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Common Core and Better Law in European Family Law

Katharina Boele-Woelki (ed)



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This volume contains twenty-three contributions delivered at the CEFL's second international conference which took place in Utrecht in December 2004. The interventions written by both experienced family experts as well as young researchers cover those fields of family law that are closely related to the activities of the CEFL: (1) divorce and maintenance between former spouses, (2) parental responsibilities, (3) informal long-term relationships and (4) the revised Brussels II Regulation. Furthermore, the opening two contributions deal not only with essential aspects of the harmonisation process of family law in Europe but also with the CEFL's working method.

www.intersentia.com

ISBN 90-5095-475-8



9 789050 954754

**COMMON CORE AND BETTER LAW
IN EUROPEAN FAMILY LAW**

EUROPEAN FAMILY LAW SERIES

Published by the Organising Committee of the
Commission on European Family Law

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COMMON CORE AND BETTER LAW IN EUROPEAN FAMILY LAW

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Hart Publishing
Salter's Boat Yard
Folly Bridge
Abingdon Road
Oxford OX1 4LB
UK
Tel: + 44 1865 24 55 33
Fax: + 44 1865 79 48 82

*Distribution for Switzerland and
Germany:*

Stämpfli Verlag AG
Hallerstrasse 7
Postfach
CH-3001 Bern
Tel. + 41 31 300 66 77
Fax: + 41 31 300 66 88

Distribution for North America:

Gaunt Inc.
Gaunt Building
3011 Gulf Drive
Holmes Beach
Florida 34217-2199
USA
Tel: + 1 941 778 5211
Fax: + 1 941 778 5252

Distribution for other countries:

Intersentia Publishers
Groenstraat 31
2640 Mortsel
Belgium
Tel: + 32 3 680 15 50
Fax: + 32 3 658 71 21

Common Core and Better Law in European Family Law
Katharina Boele-Woelki (ed.)

© 2005 Intersentia
Antwerp – Oxford
<http://www.intersentia.be>

ISBN 90-5095-475-8
D/2005/7849/49
NUR 822 and 828

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PREFACE

Exactly two years after its inaugural conference about the Perspectives for the Unification and Harmonisation of Family Law in Europe, the Commission on European Family Law (CEFL) organised its second conference which took place in Utrecht from 9th-11th of December 2004. This second CEFL conference was organised along the same lines as the first conference. Not only well-known specialists in the field of (international) family and comparative law took the floor but also young researchers were expressly invited to contribute to the conference. This volume contains the twenty-three written versions of the interventions that were presented.

The volume consists of four parts which reflect the working fields of the CEFL. The first part deals with aspects of divorce and maintenance between former spouses. The respective Principles of European Family Law, which were published in No. 7 of this series, are explained by CEFL members and assessed by outside observers. The second part – parental responsibilities – which is CEFL's second working field contains initial results of CEFL's national reports in this field as well as specific aspects such as contact arrangements, relocations orders and co-parenthood. The Principles regarding parental responsibilities are expected to be published in 2006. The third part contains contributions regarding the informal long term relationships. The CEFL will continue its activities in this field from 2006 onwards. Finally, the fourth part is dedicated to the revised Brussels II Regulation which came into force on 1st March 2005. The interrelation between this private international law instrument and substantive family law has mainly influenced CEFL's selection of its working fields. Furthermore, the two opening contributions deal not only with essential aspects regarding the harmonisation process of family law in Europe but also with the CEFL's working method.

The legal institutions, legal solutions, and norms of the various legal orders express the hierarchy of values inherent in every legal order, though in different degrees. A comparative approach requires an assessment of these values. Apparently, there is no universally accepted hierarchy of values, and thus no objective standard for the evaluation. Some degree of subjectivity in the evaluation process cannot be avoided, but does this really matter? In addition, should the harmonisation of family law in Europe only be common core-based or is the use of the better law method indispensable in order to achieve positive results that represent the highest standard of modernity? At least during the drafting process of the first set of Principles of European Family Law it became apparent that, to a certain extent, it is not obligatory to make

a choice between one thing and another. Also a combination of both methods can be applied. The title of this volume intends to express this connotation.

Also the 2nd CEFL conference was largely financed by different organisations, such as the European Commission under the Framework Programme Judicial Cooperation in Civil Matters, the Netherlands Organisation of Scientific Research (NWO), the Dutch Ministry of Justice, the Utrecht University and its Law Faculty, the Royal Dutch Academy of Science (KNAW), the Ius Commune Research School, the publishing houses Intersentia (Antwerp) and Stämpfli (Bern). The CEFL is most thankful to all these sponsors for their substantial contributions.

Katharina Boele-Woelki

Utrecht, April 2005

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TABLE OF CONTENTS

PREFACE	v
---------------	---

LIST OF AUTHORS	vii
-----------------------	-----

COMMENCEMENT OF PROCEEDINGS

BREAKING THE SHACKLES OF CULTURE AND RELIGION IN THE FIELD OF DIVORCE?

STEPHEN CRETNEY	3
1. Introduction: Religion and the Law in Times Past	3
2. Reform: A Protracted Process	4
3. An Intellectual and Legislative Revolution	5
4. Dissenting Views	6
5. Demographic Change	7
6. Yet Divorce Law Remains Controversial	7
7. Divorce Law and Pressure Groups	9
8. The Political Nature of Family Law Reform	9
9. The European Union and Democratic Legitimacy	12
10. Conclusion: The Role of Scholarship	13

THE WORKING METHOD OF THE COMMISSION ON EUROPEAN FAMILY LAW

KATHARINA BOELE-WOELKI	15
1. Introduction	15
2. Selecting the Fields Most Suitable for Harmonisation	18
3. Drafting the Questionnaire	21
4. Drawing up the National Reports	23
5. Collection and Dissemination of the Comparative Material	24
6. Drafting the Principles of European Family Law	25

6.1.	Selection of the Subjects and Some Practical Aspects	26
6.1.1.	Divorce	26
6.1.2.	Maintenance Between Former Spouses	29
6.2.	The Interrelationship Between the Principles, Comparative Overviews and Comments	30
6.3.	“Common Core” and/or “Better Law”?	31
7.	Publication of the Principles on European Family Law	37
8.	Conclusion	38

***PART ONE: DIVORCE AND MAINTENANCE BETWEEN FORMER
SPOUSES***

FUTURE DIVORCE LAW – TWO TYPES OF DIVORCE

	MARIANNE ROTH	41
1.	Introduction	41
2.	General Principles	43
2.1.	Permission of Divorce	43
2.2.	Procedure by Law and Competent Authority	44
2.3.	Types of Divorce	44
3.	Divorce by Mutual Consent	45
3.1.	Mutual Consent	45
3.1.1.	Consent as a Basis for Divorce	45
3.1.2.	No Separation Period	45
3.1.3.	Definition	46
3.1.4.	Application	47
3.2.	Reflection Period	47
3.2.1.	Rationale	47
3.2.2.	Requirements and Duration	48
3.2.3.	Summary	49
3.3.	Content and Form of the Agreement on the Consequences	49
3.3.1.	Content of the Agreement	49
3.3.2.	Writing Requirement	50
3.4.	Determination of the Consequences	50
3.4.1.	Consequences Regarding Children	50
3.4.2.	Consequences Regarding Spouses	51
4.	Divorce Without the Consent by One of the Spouses	52
4.1.	Factual Separation	52
4.1.1.	Meaning	52

4.1.2.	Comparative Overview	53
4.1.3.	Duration	54
4.2.	Exceptional Hardship to the Petitioner	55
4.3.	Determination of the Consequences	55
5.	Conclusion	56

THE UNDERLYING PRINCIPLES OF CONSENSUAL DIVORCE

ANDERS AGELL	59
1. Introduction	59
2. The Value of Harmonisation?	59
3. The Importance of a Spouse’s Wish to Terminate the Marriage	60
4. The Relationship Between a Period of Reflection and Factual Separation	62
5. The Ancillary Matters	63
6. A Request for an Agreement “in Advance”	64
7. Alternative Policies for Modern Divorce Rules	65
8. Additional Remarks	66
Annex. Principles of European Family Law Regarding Divorce	67

DIVORCE AND SPOUSAL AGREEMENTS

FRÉDÉRIQUE FERRAND	71
1. Introduction	71
2. The Admissibility of Spousal Agreements on the Consequences of Divorce	72
2.1. Contents of the Agreement	74
2.1.1. Agreement Relating to the Consequences of Divorce for the Spouses Themselves	74
2.1.2. Agreement Relating to the Consequences of Divorce for the Children	75
2.2. Date of the Agreement	76
2.3. Form Requirement	77
3. The Possible Scrutiny of Spousal Agreements by the Competent Authority	77
3.1. Should there be any Scrutiny?	77
3.2. Extent of the Scrutiny	79
4. Conclusion	81

CEFL'S MAINTENANCE PRINCIPLES: THE CONDITIONS FOR MAINTENANCE

CRISTINA GONZÁLEZ BEILFUSS	83
1. Introduction	83
2. General Questions	83
2.1. The Definition of Post Divorce Maintenance	83
2.2. One Maintenance Claim	86
2.3. The Self-Sufficiency Principle	87
3. Conditions for the Attribution of Maintenance	88
3.1. General Considerations	88
3.2. General Framework	89
3.3. Factors to be Taken into Account	91
3.3.1. The Spouse's Employment Ability, Age and Health	91
3.3.2. The Care of Children	91
3.3.3. The Division of Duties During the Marriage	92
3.3.4. The Duration of the Marriage	93
3.3.5. The Standard of Living During the Marriage	93
3.3.6. Any New Marriage and Long-Term Relationship	94
3.4. The Hardship Clause	95
3.5. Calculation and Method of Maintenance Provision	96
4. Specific Issues	98
4.1. Limitation in Time	99
4.2. Termination of the Maintenance Obligation	100

CLEAN-BREAK OR LONG-TERM PAYMENT OF MAINTENANCE

GEOFFREY SHANNON	103
1. Introduction	103
2. Clean Break	103
3. Long-Term Payment of Maintenance	106
4. Rehabilitative Maintenance	115
5. Compensatory Maintenance	116
6. Conclusion	117

MAINTENANCE AS A SEPARATE ISSUE – THE RELATIONSHIP BETWEEN MAINTENANCE AND MATRIMONIAL PROPERTY

TONE SVERDRUP	119
1. Introduction	119
2. Contribution and Loss	122
2.1. Co-ownership	122
2.2. Valuation of Non-market Contributions	124
2.3. The Equal Distribution Rule	126
2.4. Spousal Maintenance	127
2.5. Modern Marriages	128
3. The Adjustment of Behaviour During Marriage	129
4. Conclusion	132

COMMENTS ON THE PRINCIPLES OF EUROPEAN FAMILY LAW: DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES

BEA VERSCHRAEGEN	135
------------------	-----

PART TWO: PARENTAL RESPONSIBILITIES

PARENTAL RESPONSIBILITIES – CEFL’S INITIAL RESULTS

KATHARINA BOELE-WOELKI	141
1. Introduction	141
2. Selecting Parental Responsibilities as CEFL’s Second Working Field	142
3. Structure of the Questionnaire	144
4. Selected Issues Compared	145
4.1. The Concept(s) of Parental Responsibilities – Question 2	146
4.2. Protection of Children from Indebtedness Caused by the Holder(s) of Parental Responsibilities – Question 13	147
4.3. Attribution of Parental Responsibilities Affected by Divorce, Legal Separation, Annulment of the Marriage, Factual Separation – Question 16	148
4.4. Agreement upon the Attribution of Parental Responsibilities After Divorce, Legal Separation or Annulment of the Marriage – Question 17	150
4.5. Non-Married Parents and Parental Responsibilities – Question 20	152

4.6.	Rights of a Partner of a Parent Holding Parental Responsibilities – Question 27	153
4.7.	Disagreement Between the Holders of Parental Responsibilities – Question 38	157
4.8.	The Right of the Child to Have Contact with... – Question 44	158
4.9.	Delegating the Exercise of Parental Responsibilities – Question 49	160
4.10.	Regaining Parental Responsibilities After Having Been Discharged from Them – Question 54	162
4.11.	Hearing of the Child in Disputes Relating to Parental Responsibilities – Question 59	164
5.	Preliminary Conclusions	167

CONTACT ARRANGEMENTS: UNIFICATION ON THE BASIS OF EUROPEAN PRINCIPLES?

	VELINA TODOROVA	169
1.	Introduction	169
2.	The Approach of the Convention	171
2.1.	Unification on the Basis of Common Principles	171
2.2.	‘Good Practices’	171
2.3.	Areas Outside the Principles	172
3.	The Definition of Contact	173
4.	What Is ‘Contact’ According to Bulgarian Family Law?	175
5.	Contact Following Divorce	176
6.	Who Determines this Contact?	179
7.	Professional Support for Agreements/ Dispute Resolution	180
8.	Who Has the Right to Contact?	183
8.1.	Forms of Contact	184
8.2.	Contact With ‘Other’ Persons	185
9.	Enforcement of Contact Orders	186
10.	Conclusion	191

MOBILITY AND THE POST-DIVORCE FAMILY: RESOLUTION OF RELOCATION DISPUTES IN THE U.S.

	THERESA GLENNON	193
1.	Introduction	193
2.	U.S. Child Custody Law	195

2.1.	Legal Parentage	195
2.2.	Legal Standards Applicable to Custody Disputes	196
3.	Post-Divorce Relocation Disputes	198
3.1.	Competing Visions of the Post-Divorce Family	199
3.2.	Sources of Relocation Law	202
3.3.	Specific Relocation Doctrine	203
3.4.	Modification of Custody Doctrine	207
3.5.	Joint Custody	208
3.6.	Are Parties Bound by a Prior Agreement not to Relocate?	209
4.	Constitutional Concerns in Relocation Debates	210
5.	Broad Judicial Discretion	213
6.	Conclusion	215

THE *COPARENTALITÉ* IN FRENCH LAW

LAURE TALARICO	217
1. Introduction	217
2. The Strengthening of <i>Coparentalité</i>	219
2.1. The Suppression of All Distinctions Based on the Family Situation	219
2.2. Promoting Parental Agreements as a Guarantee for the Non-Conflicting Exercise of Parental Authority	220
3. The <i>Coparentalité</i> Consecrated as a Right of the Child to <i>Biparental</i> Relations	221
3.1. The Effectiveness of <i>Coparentalité</i> Ensured by the Legal Recognition of Shared Residence	221
3.2. The Strengthening of Parental Responsibilities	222

DECIDING ON SOLE OR JOINT CUSTODY RIGHTS IN THE CHILD'S BEST INTEREST

ROSA MARTINS	225
1. Introduction	225
2. The Joint Exercise of Parental Care During Marriage or Cohabitation Between Unmarried Parents	226
2.1. The Rule of the Joint Exercise of Parental Care During Marriage or Cohabitation Between Unmarried Parents	226
2.2. The Meaning of the Joint Exercise of Parental Care	228

2.3.	The New Form of Exercising Parental Care after a Family Breakdown	229
3.	The Evolution of the Portuguese Legal System Regarding Custody Matters	230
3.1.	The 1966 Civil Code	230
3.2.	The 1977 Reform of the Civil Code	232
3.3.	Law 84/95 of 31 st August and the Introduction of Joint Custody	233
3.4.	Law 59/99 of 30 th June and the Preference for Joint Custody	234
4.	Sole or Joint Custody?	234
4.1.	The Preference for Joint Custody	235
4.2.	The Legal Meaning of Joint Custody	235
4.3.	To a Certain Extent there is no Perfect Model to Be Applied in all Cases of Family Breakdown	236
4.4.	The Intervention of Social/Psychological Counselling or Mediation Services	238
5.	Conclusion	238

PART THREE: INFORMAL LONG-TERM RELATIONSHIPS

FINANCIAL COMPENSATION UPON THE ENDING OF INFORMAL RELATIONSHIPS – A COMPARISON OF DIFFERENT APPROACHES TO ENSURE THE PROTECTION OF THE WEAKER PARTY

	SABINE AESCHLIMANN	243
1.	Introduction	243
2.	The Purpose and Aim of this Paper	244
3.	Legal Orders Without a Statutory Regime	245
3.1.	The Present Situation in Switzerland	245
3.2.	Protection Granted by the Courts	245
3.3.	Deficiencies Caused by the Absence of Statutory Rules	247
4.	A Registration System for Unmarried Cohabitation	249
4.1.	The Expanding of Registration Systems	249
4.2.	Experiences with the “Contracting-in” Approach	249
5.	Unified Approach	250
5.1.	The Situation in New Zealand: The Relationship itself as the Starting Point for Financial Consequences	250

5.2.	The Scope of the Statutory Rules with Regard to Unmarried Couples	251
5.2.1.	Limitation by the Statutory Definition of “de facto – Partnership”	251
5.2.2.	Limitation by the Requirement of a Minimum Duration ..	252
5.3.	Extent of Financial Consequences	252
5.4.	Experiences and Criticism	253
5.5.	Proposal for a Future Modification	254
6.	Conclusion	255

GENERAL LESSONS FOR EUROPE BASED ON A COMPARISON OF THE LEGAL STATUS OF NON-MARITAL COHABITANTS IN THE NETHERLANDS AND GERMANY

	WENDY M. SCHRAMA	257
1.	Introduction	257
2.	Legal Implications of Sociological Research on Informal Lifestyles	258
2.1.	What is Non-Marital Cohabitation?	258
2.2.	Prevention and Control of Conflicts when a Relationship Breaks Down	261
2.2.1.	High Separation Rate	261
2.2.2.	The Special Nature of Love-Based Relations	263
2.2.3.	Alternative Solutions?	264
2.2.4.	Case Law	267
2.3.	Protection of the Financially Vulnerable Partner	269
2.4.	Protection of Children	272
2.5.	Conclusions	273
3.	Constitutional Dimension	274
4.	Lifestyles as a Means to Order Relations in Society	277
5.	Concluding Remarks	280

THE LEGAL STATUS OF COHABITANTS – REQUIREMENTS FOR LEGAL RECOGNITION

	JENS M. SCHERPE	283
1.	Introduction: Why Cohabitation Needs to be Regulated	283
2.	The Two Basic Models	284
2.1.	Formal Cohabitation	285
2.2.	Informal Cohabitation	287

3.	A Three-Step Approach to Regulate Cohabitation	288
3.1.	The First Situation: Basic Informal Cohabitation	289
3.2.	The Second Situation: Children Involved	290
3.3.	The Third Situation: More Rights and Duties	291
3.4.	Summing Up: Steps to Regulate Cohabitation	292
4.	What Is “Cohabitation” Anyway?	293

LEGISLATION ON INFORMAL COHABITATION IN NORWAY

	JOHN ASLAND	295
1.	Introduction	295
2.	Legal Definition of Cohabitation	296
3.	Proposals Regarding Private Law	298
4.	Proposals Regarding Public Law	300
5.	What Is the Present Status of the Implementation?	301
6.	Critical Comments on Some Proposals Regarding Private Law	302
6.1.	Adoption	302
6.2.	Right of Inheritance	303

THE SPANISH RELATIONSHIPS LEGISLATION

	LEONOR BUENO MEDINA	305
1.	Introduction	305
2.	Status According to the State	306
2.1.	Dissolution of the Partnership	307
2.2.	Compensations	308
2.2.1.	Unjust Enrichment	308
2.2.2.	Article 97 Civil Code	309
3.	The Autonomous Community Laws	309
3.1.	The Legal Economic Structure	309
3.2.	Financial Provisions	310
3.2.1.	Financial Compensation	310
3.2.2.	Income Support	310
4.	The Common Residence	311
5.	Parenting	311
6.	Conclusion	311

UNMARRIED PARTNERSHIPS IN HUNGARY

ORSOLYA SZEIBERT ERDÖS	313
1. The History of the Regulation on Unmarried Partners in Hungary	
Since the 1940s	313
1.1. The Legal Position of Cohabitation up to 1977	313
1.2. The Legal Regulation of the Unmarried Partnership from	
1977 Onwards	316
1.2.1. The Amendment of the Civil Code in 1977	316
1.2.2. The Amendment of the Civil Code in 1996	316
2. The Effective Regulation Concerning Unmarried Partners	319
2.1. The Rights of Unmarried Partners under the Civil Code	319
2.1.1. The “Community Property” of Unmarried Partners	319
2.1.2. The Unmarried Partner’s Right of Inheritance	320
2.2. The Rights of Unmarried Partners According to the	
Family Act	320
2.2.1. Parental Responsibilities	320
2.2.2. Rights which cannot be Claimed by an Unmarried	
Partner	321
2.2.3. Other Legal Rules Guaranteeing Rights for Unmarried	
Partners	322
3. The Judicial Practice Concerning the Legal Status of Unmarried	
Partners	323
3.1. The Definition of Unmarried Partnership and the	
Examination of Its Existence	323
3.1.1. Definition	323
3.1.2. What is an Unmarried Partnership According to	
Judicial Practice?	324
3.2. The Connection Between the Matrimonial Property of	
Spouses and the Community Property of Unmarried Partners ...	327
3.3. Arranging the Unmarried Partners’ Financial Issues	328
3.4. The Obligation of Unmarried Partners to Maintain Each	
Other During Cohabitation	329
4. The Regulation of the Unmarried Partnership – De Lege Ferenda	331
5. Conclusion	332

NEUTRALITY: THE DEATH OR THE REVIVAL OF THE TRADITIONAL FAMILY?

CAROLINE SÖRGJERD	335
1. Introduction	335
1.1. The Family Concept	335
1.2. The Purpose and Scope of this Article	336
2. Relevant Legislation and Terminology	336
2.1. The Personal and Material Scope of the Cohabitees Act of 2003 ..	336
2.2. The Registered Partnership Act	338
3. Legal Development and Ideological Aspects	339
3.1. Regulating Cohabitee Relationships	339
3.1.1. Legislative History	340
3.1.2. The Neutrality Theory	342
3.1.3. Forcing Rules on Unmarried Couples?	344
3.1.4. What Kind of Regulation do Cohabitees Prefer?	345
3.2. Regulating Same-Sex Partnerships	346
3.2.1. Legislative History	346
3.2.2. The Legislator Creating Public Opinion	348
3.2.3. Possible Explanations for the Low Figures on Partnership Registration	349
4. Concluding Remarks	351

PART FOUR: THE REVISED BRUSSELS II REGULATION

HABITUAL RESIDENCE CONSIDERED AS A EUROPEAN HARMONIZATION FACTOR IN FAMILY LAW (REGARDING THE “BRUSSELS II-BIS” REGULATION)

ANNE RICHEZ-PONS	355
1. Introduction	355
2. The Function of Habitual Residence in the “Brussels II- <i>bis</i> ” Regulation	356
2.1. Habitual Residence, Expression of a Material and Geographical Proximity	357
2.2. Habitual Residence as a Mark of Belonging to a Social Background	358
3. The Determination of Habitual Residence under the Brussels II- <i>bis</i> Regulation	359
4. Conclusion	360

**THE IMPACT OF SUBSEQUENTLY CHANGED FACTS ON THE
EXEQUATUR PROCEDURE UNDER BRUSSELS IIBIS**

CLAUDIA RAMSER	361
1. Introduction	361
2. Jurisdiction for Modification	363
3. Enforcement	364
3.1. Enforcement Without a Declaration of Enforceability	364
3.1.1. Judgments Relating to Rights of Access	365
3.1.2. Judgments on the Return of the Child	367
3.2. The Exequatur Procedure	368
4. Conclusion	370

COMMENCEMENT OF PROCEEDINGS

BREAKING THE SHACKLES OF CULTURE AND RELIGION IN THE FIELD OF DIVORCE?

STEPHEN CRETNEY

1. INTRODUCTION: RELIGION AND THE LAW IN TIMES PAST

A hundred years ago, throughout Europe, the state took a close legislative interest in marriage. And legislation reflected a common understanding about the essential nature of that institution: a permanent relationship between one man and one woman, in principle dissoluble only by death. In some countries the definition of marriage, and even the jurisdiction to deal with its incidents, was left to the Church; but even in states whose legal systems embodied enlightenment ideas of the separation of powers the law continued to reflect traditional Christian teaching about the nature of marriage. True, there were differences, often reflecting political and constitutional history in the 15th and 16th century Reformation, especially between those states which (influenced by Roman Catholic teaching about the sacramental view of marriage as reflecting the union between Christ and his Church) denied absolutely the possibility of dissolution of a marriage validly formed, and others (sometimes influenced by the preference of most of the churches of the Protestant Reformation for a contractual rather than a sacramental view of marriage) which were prepared to accept the possibility of divorce in certain restrictively prescribed circumstances. Religion certainly played an important part; but the view that marriage should in principle be indissoluble was not necessarily explicitly founded on religious dogma: this view could be based simply on utilitarian notions of the function of social institutions. The stability of the family unit was seen as the basis of stability in society; and this could best be promoted by insisting that marriage, the basis of the family, should remain intact. The happiness of the individual was properly to be sacrificed to the greater and more general good. Whatever the intellectual justification, throughout Europe those who had been joined in marriage (whether in the name of God or in the name of the Republic) would find great difficulty in casting off that legal status. Even if they did succeed in doing so they would probably be subject to social and even legal sanctions and discrimination.

2. REFORM: A PROTRACTED PROCESS

These laws caused much hardship, but achieving reform was not easy. In England, for example, judicial divorce founded solely on proof of adultery was introduced into the law in 1857. Serious and organised agitation for divorce to be made available on grounds other than adultery – cruelty, for example, and desertion – began in the early years of the twentieth century, but the struggle for reform was long and bitter: it took eighty years for the offences considered sufficient to justify dissolution of the marriage bond to be extended by the Matrimonial Causes Act 1937. But of course – as became all too clear with the long separations and other stresses associated with the Second World War – an ‘offence’ based law did not provide any remedy in cases where husband and wife had been separated for many years and there was no realistic possibility of their ever coming together again. Once again there was pressure for reform. But there was no change in the ground for divorce until 1969: the Divorce Reform Act of that year purported to make the fact that the marriage had irretrievably broken down the sole ground for divorce. The Church of England which had for long vigorously opposed reform played a significant part in bringing this change about: a Committee appointed by the Archbishop of Canterbury, whilst still speaking out strongly against ‘making divorce easier’ and vigorously repudiating any notion that marriage should be capable of being terminated by the agreement of the parties, none the less accepted the possibility that a marriage ‘beyond all probability of existing again in fact’ might, after appropriate inquiry and consideration of the interests of society as well as of those immediately affected, properly be ended in law. This was a crucial factor in gathering a sufficient consensus to achieve reform in England. And the wind of change blew across Europe. Thirty years later (as the detailed research published by the Centre for European Family Law¹ demonstrates) although there remain considerable differences in the detail of the law in the twenty-two states studied, all of them (including Ireland, Italy and Spain, three countries in which the influence of Roman Catholic teaching has traditionally been powerful) now allow divorce, and in many cases divorce is based on the parties’ agreement or on the ground that the marriage has irretrievably broken down. Whatever the differences of detail between the different member states of the European Union, the notion of marriage as a legally indissoluble union seems to be dead beyond recall. And the divorce statistics certainly support the view that divorce law meets a need even if it can be said (as some do say) that in part the law has itself played a part in creating the demand. Increasingly, it seems, divorce is no longer a ‘big deal’ but merely a routine feature of everyday life. Even those whose function in society must be to some extent to serve as exemplars of good citizenship (such as the members of the United Kingdom’s Royal Family,

¹ K. BOELE-WOELKI/B. BRAAT/I. SUMNER (eds), *European Family Law in Action: Volume I, Grounds for Divorce*, Intersentia, Antwerp Oxford and New York, 2003.

including the heir to the throne) have been consumers of this particular product, made available to them by the legal system.

3. AN INTELLECTUAL AND LEGISLATIVE REVOLUTION

For many years, the main – and highly controversial – issue seemed to be whether or not the legal existence of a marriage should be terminated; but today the emphasis has shifted. Governments have increasingly come to accept that the *juristic* question of whether a marriage can be legally terminated is no longer *the* central issue of policy – or even *a* central issue of policy. Instead, attention has shifted to the *social and economic* aspects of relationships – the provision of educational and welfare support for families (whether based on marriage or not) and for children, the financial consequences of family breakdown, and so on. The whole of the divorce process is to be considered, not merely the question of the basis upon which marriage can be legally terminated. The aim (it is said²) must be to ensure that the process of giving legal recognition to the factual reality that the husband-wife relationship has ended should cause the ‘minimum of distress to the parties and to the children’ and that the legal system ensures that issues arising from the ending of the relationship are ‘dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances.’ Because of this, the *ground* for divorce no longer has the prominence it once had.

Other social and legal developments affecting family relationships have also tended to divert attention from the subject of the ground for divorce and to make concentration on that issue to the exclusion of other legal aspects of family life seem rather outdated. In particular, the massive increase in the phenomenon of long-term cohabitation outside marriage (accompanied by a corresponding reduction in the number of marriages, by an increased readiness to allow those who so wish to regulate the legal consequences of such a relationship by formally registered civil partnership, and by the widespread and frank social recognition not only that such relationships exist but that discrimination against the partners is unacceptable) has called into question traditional assumptions about the centrality of the traditional concept of marriage as a fundamental legal institution. The pace of change in recent years has indeed been remarkable: before World War II marriage might not always be a life-long union but it was certainly a union between a man and a woman. Indeed, as recently as the 1960s in England, adult men who had sexual relations with one another in private were still

² The language is that used in the English Family Law Act 1996, s. 1: see further below.

liable to be sent to prison for doing so. But in 2004 Parliament has, by a very large majority – 387 to 74 in the House of Commons – legislated³ to give same-sex partners, by registration, virtually all the legal rights and duties of married couples. It would be difficult to find a more striking example of how notions of ‘family life’ and the role of the law in relation to it *can* change over a comparatively short period of time. The United Kingdom’s Civil Partnership Act still denies same-sex couples the right to acquire the formal status of a ‘married couple’; and there must be more than a suspicion that the Government’s decision to bring forward the Civil Partnership Bill was influenced, in part at least, by a desire to avoid the intense and emotional conflicts which would certainly have been provoked by any suggestion that ‘marriage’ could be other than a relationship between man and woman. It remains to be seen when and if other states will follow the example of the Netherlands and allow couples of the same sex the right to marry – a matter of urgent debate in the United States following the decision of the Massachusetts Supreme Judicial Court in November 2003 that a law which allows same sex couples the right to register their relationship but denies them the possibility of marriage violates constitutional guarantees of equality before the law.

4. DISSENTING VIEWS

So there has unquestionably been an intellectual and legislative revolution in the Western world. But this has not been universally welcomed. The Vatican, for example, continues to assert that the natural moral law (binding – so it is claimed – not only Christians but ‘all persons committed to promoting and defending the common good of society’⁴) requires recognition of certain essential attributes distinguishing marriage from other relationships. In particular, it is said that marriage is necessarily a relationship between a man and a woman and that this relationship is dissoluble only by death. And it is perhaps unwise to underestimate the tenacity of what we may call ‘traditional values’. For example, although Irish law now accepts judicial divorce, the divorce law is significantly more restrictive than in most other jurisdictions, and, less than ten years ago, only a very small majority of the electorate voted to accept it. Even more strikingly, in the United States, it appears that in November 2004 more voters – in excess of 20% of the total – named ‘moral values’ as the issue which was of most importance to them (rather than such issues as the state of the economy, healthcare, education, terrorism, not to mention policy towards Iraq) in casting their votes in the Presidential election; and the voters in all eleven of the States in which the question

³ By the Civil Partnerships Act 2004.

⁴ *Congregation for the Doctrine of the Faith: Considerations Regarding Proposals to give Legal Recognition to Unions between Homosexual Persons*, 3 June 2003, para. 2.

was put before them firmly rejected the acceptability of a same-sex marriage law such as that to be found in The Netherlands. ‘Social conservatism’ certainly seems to be alive and well in the United States. And in Europe there are those in public life who are prepared to express opposition to the liberalising tendencies which I have described: notoriously, the fact that Signor Rocco Buttiglione (nominated for the Justice portfolio in the European Commission) adhered to the teaching of the Catholic Church and also had views about the position of women in society which many would regard as outdated, prompted a constitutional crisis in November of this year – a crisis only resolved by Signor Buttiglione’s readiness to accept the role of an innocent victim of anti-Christian prejudice, sacrificed for upholding moral values.

5. DEMOGRAPHIC CHANGE

So far I have assumed that the ‘religious’ shackles and the cultural attitudes which may reflect them are those of Western Christendom. But what of the demographic changes which have occurred since World War II? In the United Kingdom, some 8% of the population now describe themselves as belonging to an ethnic minority group; and the mother tongue of 9% of all schoolchildren is a language other than English. Since 1981 the United Kingdom has been a country of net immigration, and each year there are some 18,000 immigrants from Pakistan, the great majority of whom will be Muslims. Demographic changes in some other member States of the European Union are similar: in the Netherlands it appears that some 10% the population are of non-Western origin; and some 4% of the population claim to be Muslims. The teaching of Islam about marriage and the family is detailed and comprehensive; but in the past there seems to have been little reference to this in discussions of family law and policy.

6. YET DIVORCE LAW REMAINS CONTROVERSIAL

Whatever the impact of religious and cultural pluralism in some parts of the European Union, Christianity remains significant: the great majority of UK residents who answered a census question about religious affiliation – nearly 72% – described themselves as ‘Christian’. The next largest group were the one and a half million Muslims, 3% of the total. Only 8% said they had no religion.⁵ But of course that does not mean that religious doctrine continues to be a decisive factor in influencing attitudes to marriage and the family. I have already referred to the fact that countries where membership of the Roman Catholic Church is widespread have none the less come

⁵ These figures, from the 2001 census, have only a limited utility, not least because the question was not obligatory: see *Social Trends 2003*, Table 13.24.

to accept a divorce law not easily compatible with the church's teaching. And in England there is other evidence which may suggest a sharp fall in the proportion of the population who see marriage as a religious rite: in England marriage can, at the choice of the parties, be contracted either with a religious rite or in a strictly secular form, and until well after the end of World War II the great majority of marriages were church' marriages. But by the beginning of the 1990s civil marriage became the majority option; and today religious ceremonies constitute only a third of the total.⁶ Perhaps this suggests that in England at any rate marriage is increasingly viewed as an entirely civil matter.

You may conclude that, whatever the extent and nature of religious commitment amongst the population, the evidence suggest that organised religion has ceased to be an effective 'shackle' to reforming measures. Of course, religious and other ideological values may often be a factor influencing the scope of reform which can be achieved: is divorce to be a judicial or administrative process, is divorce by the mere consent of the parties to be permitted, should it be necessary to resolve issues about finance and the upbringing of children before the parties are freed from the legal status of husband and wife? These may be regarded as matters of detail, but the differences may reflect significant differences in the cultural attitudes of groups in the different countries. In any event the greatly diminished influence of religion and other ideological factors does not mean that divorce law has ceased to be acutely controversial. I believe the contrary to be true: what has happened is rather that the *emphasis* has changed. True, the *ground* for divorce no longer has the prominence it once had, but in its place there is concern with the *whole divorce process*: with how the legal system treats all the incidents and consequences of the breakdown. Perhaps there is no dispute that the marriage is over. Perhaps there is no dispute that husband or wife or both should marry again. But there may well be disagreement about such matters as the respective financial contributions to be made to the newly created family units, and about the extent to which the divorcing parents are to continue to play a parental role in the upbringing of the couple's children. And this has an important consequence for any proposal to harmonise (and therefore necessarily to change) the law: so long as divorce law was seen largely as a matter of defining or redefining the legal basis on which the status of marriage could be terminated, debate could be (and to a large extent was) confined within a comparatively narrow and perhaps even legalistic basis. But now the legal system has to deal with providing 'justice' in what may be a highly emotional range of issues. And the traditional schematic division of the codifier or scholar – distinguishing the ground for divorce from its consequences in terms of maintenance, from matrimonial property regimes, and from the law governing the

⁶ *Population Trends 2004*, No 115, Figure 1 and Table 1.

discharge of the parties' parental responsibilities – may not appeal to those who as 'consumers' seek an increasing role in decisions on legislative reform.

7. DIVORCE LAW AND PRESSURE GROUPS

'Divorce' by definition marks the *legal* dissolution of an emotional and a sexual relationship (and of course in many cases, the failure of such a relationship). Hence, almost inevitably, those concerned feel far more strongly about the law – or at least what they perceive the law to be – than would be the case with other areas of the law. And then there is the fact that so many people now have first hand experience of the divorce law – far more than have such experience of the any other kind of civil litigation. Many of them do not find that experience edifying: emotions easily become engaged and complaints of systemic injustice are readily made. What may in reality be anger and hurt about the break down of the relationship can easily find the legal system and the legal process a convenient focus for these strong emotions. And there is another factor which I believe exacerbates the matter: this is the emergence of 'pressure groups' whose success is largely dependent on their providing some form of emotional release for these, often overwhelming, emotions. Of course, pressure groups have historically⁷ played an important part in divorce law reform. But in recent years their character, techniques, and effectiveness have changed dramatically. Not only is there the increased power of the media; there is the growth of the realisation that press and television are constantly searching for 'news' (or, as some would prefer to say, 'sensation') especially if this can be related to a person widely accepted as a 'celebrity'.

8. THE POLITICAL NATURE OF FAMILY LAW REFORM

The last few years of the history of English family law provide an unhappy but salutary example both of the growing significance of pressure groups in the reform process and of the difficulty of securing a rational approach to law reform in this area. Less than ten years after the Divorce Reform Act 1969 had introduced 'breakdown' divorce, organisations (notably the *Campaign for Justice in Divorce*) claiming to speak for divorced men and the new legal families which 'no fault' divorce allowed them to create began to complain of the injustice of a law which required them to support financially the woman who (they said) had in truth been responsible for the breakdown

⁷ See S. CRETNEY, *Family Law in the Twentieth Century: A History* (2003), Chapter 6.

of the marriage. In 1984 Parliament sought to remove any substance in these complaints; but it was not conspicuously successful in stilling discontent. Indeed, it had become clear that the 1969 'irretrievable breakdown' divorce law had, by providing that breakdown was only to be inferred from the proof of certain facts – not only a period of separation but also adultery and unreasonable behaviour – by no means expunged the question of 'fault' from the law. Wounding allegations were still made: but under 'breakdown' divorce the courts and the legal system often seemed to conspire to prevent the 'innocent' party from refuting these complaints. Since the marriage had clearly broken down, what (it was asked) was the point in long, detailed and painful forensic investigation? Sooner or later (it was said) there would be a 'separation' divorce, so why not face up to that now, and allow the divorce to be granted based on, say, 'behaviour'? To do so would surely be in the interests of the husband and the wife, and their children. So 'fault' had been effectively excluded from the judicial decision about whether or not the marriage should be dissolved. But it was less easy to exclude 'fault' from decisions about the financial consequences and about the arrangements to be made for the upbringing of the children.

There was a prolonged and thorough investigation. In the end, the Government promoted legislation. This retained the principle that divorce be based solely on the fact that the marriage had irretrievably broken down, but would have changed the way in which that breakdown was to be established. No longer would adultery or behaviour (or even separation) be relevant: instead, a statement claiming that the marriage had broken down would be filed, and then after a period of time – intended to be used 'for reflection and consideration' – the marriage would be automatically dissolved. But so simple a scheme would be tantamount to allowing divorce by repudiation; something which no government committed to upholding the institution of marriage (which indeed the draft legislation in terms asserted) would wish to promote. So complex provisions were grafted onto this structure: for example, from the simple truth that many people did not understand all the implications of divorce and would welcome information about the divorce process and its consequences there eventually emerged provisions preventing anyone starting the divorce process until he or she had attended an official 'information meeting' at which it was intended they should be confronted with the painful practical realities of working out what life after divorce would be like in financial and other terms; and they would be given the opportunity to meet a marriage guidance counsellor and have advice on reconciliation. If they persisted in seeking divorce, there was to be a strong preference for reference to mediation rather than court-room litigation to resolve questions relating to the children and to finance. And eventually it was decided that no divorce should be finalised unless and until those matters had been resolved. It was all done with the best of intentions; but the result was that what had started as a logical and straightforward rationalisation of 'breakdown' divorce was set to become a hugely complex and

expensive bureaucratic procedure – expensive not only in financial terms but in terms of the emotional demands placed on those involved.

In part these complex changes in the original basically simple draft were made because of the opportunity which the British law-making process gives to those concerned to promote a particular interest: for example, there were groups concerned to emphasise the contribution that social work and other disciplines could have, not least in protecting the interests of the children of divorcing parents; there were groups specifically urging the claims of the children of divorcing parents to have their point of view put forward in all the decision taking processes; there were groups, concerned by the incidence of domestic violence especially against women, who wanted special provision to accord further legal protection in any reform of the divorce law. And there were also groups, especially those from the evangelical wing of protestant Christianity, who (whilst accepting that marriage might in some circumstances be dissolved) were opposed to anything which could be seen as undermining the status of marriage as a union in principle life-long, and who wanted to emphasise the ‘responsibilities’ of married couples. In the end, the Government decided to abandon the reform proposals, and English substantive law governing the ground for divorce remains as enacted in 1969 with all its evident faults.

The underlying complaint remains that the ‘divorce law’ is unjust; but the grievance seems no longer to be about the ground for divorce as such. Rather, complaints are made about the divorce courts’ approach to questions of the upbringing of children, and specifically on the supposed failure of the ‘divorce law’ to recognise the contribution which a child’s father can make to the child’s upbringing. It is easy enough for lawyers to say that such matters are determined by one criterion: what would best serve the interests of those children?⁸ But the application of that principle can be difficult: courts often conclude that the mother can best provide the daily care the children need. This itself caused resentment and bitterness in some cases, and that resentment and bitterness not surprisingly increased if the mother then seemed to find it difficult to complying with the stipulations the court had imposed in an attempt to ensure that the father kept a real link with his children.

Strong feelings were transmuted into highly effective protests organised by a new kind of self-help pressure group, notably *Fathers 4 Justice*. This group uses tactics in some way similar to those adopted a century ago by women campaigning for the vote – the

⁸ The governing English statute provides that the child’s welfare shall be the paramount consideration, ie superior to all other considerations: Children Act 1989, s. 1. Note that the Charter of Fundamental Rights of the European Union requires only that the child’s best interests ‘be a primary consideration’: see Article 24 (2) and below.

so-called 'suffragettes'; and civil disobedience is an important part of the strategy. For example, one of their members dressed in a 'spider-man' suit climbed a 50 metre high crane thereby effectively stopping traffic from using one of the main bridges over the River Thames, for seven days causing 40 mile tail-backs and bringing large parts of London to a standstill. In May the ritual of Prime Minister's Questions in the House of Commons was rudely interrupted by demonstrators pelting him from the Public Gallery with condoms containing pink flour. Worse was to come: a little while later, in spite of 'increased security', men somehow gained access to the chamber of the House of Commons itself where they proceeded to make their dissatisfaction with what Bob Geldof described as the 'secret, outdated, defunct family law system' very clear. Most dramatically perhaps a demonstrator gained access to Buckingham Palace (the Sovereign's residence). There have also been attacks on the courts and the judges and others who staff them. This is of course all very shocking to 'informed public opinion'; but, as one commentator noted,⁹ the authorities and the media seemed to have been 'galvanised' by such publicity stunts. It is quite certain that any attempt to change the divorce law would attract a huge amount of interest and controversy.

I believe that the history of the divorce law and its reform in 20th century England demonstrates the intensely political nature of the process: there may no longer be such divergences of opinion about the need for divorce and the objectives which it should serve; but there do remain many different perspectives and sometimes sharply conflicting interests. Above all, there are the injured feelings of those involved: what is presented as a complaint about contact with children may be in reality a complaint about the rupture of a relationship. But the complaints may prevent changes being made which informed opinion would regard as desirable. That is part of the price we pay for parliamentary democracy.

9. THE EUROPEAN UNION AND DEMOCRATIC LEGITIMACY

I have drawn my examples almost exclusively from my own country; and it may well be that the English style of legislation (with its insistence on precise, particular, and specific language rather than statement of general principle) gives excessive opportunity for pressure groups concerned to achieve or at least ventilate the case for their cherished objectives. But it is clear that the European Union will take decisions about aspects of family law with cross border implications;¹⁰ and the specific issue of ongoing

⁹ PAUL RUBERT, in a letter to *The Times*, 12 November 2004.

¹⁰ *Provisional Text of the Constitutional Treaty for the European Union* as presented to the United Kingdom Parliament, July 2004 (Cm. 6289) Article III-170.

contact between parent and child is directly addressed by Article 24 of the *Charter of Fundamental Rights* to which the Union – the declared objectives of which include protection of the rights of the child – is to accede. It may be that the legislative procedures of the Union have a lower apparent public involvement than those of the United Kingdom; but it would be necessary to exercise caution to avoid the risk that the law will be seen to lack democratic legitimacy. As Professor Pintens put it in 2002 any *unification of law*...established in back rooms without sufficient participation of the European Parliament and perhaps even of national parliaments, lacks democratic legitimacy.¹¹ We need to remember that a major complaint made by *Fathers 4 Justice* (and by its predecessors) is that ‘no one will listen’ to their point of view; and it would certainly be dangerous not to give an opportunity for these differences to be expressed. It is true that the Charter of Fundamental Rights¹² seems to address the issue currently brought to public notice: it specifically provides that every child is to have the right to maintain on a regular basis a personal relationship and direct contact with his or her parents, unless that is contrary to the child’s interests. But the point is that any reform of the divorce law would certainly be used as the basis for questioning whether the reform would, in practice, mark a move to satisfying the claims of men who believe they are being denied such contact or of women who believe that allowing such contact will expose them to the risk of domestic violence – a consideration which has been especially influential in England in recent years.

10. CONCLUSION: THE ROLE OF SCHOLARSHIP

The stated objective of the *Commission on European Family Law* is to create a set of principles to establish the most suitable means of harmonisation of family and succession law in Europe.¹³ It is said that ‘the comparative research-based drafting of common principles is not a political but an academic matter’.¹⁴ You may think that what I have been saying casts doubt on the validity of that statement. I disagree.

I *do* believe that any legislation dealing with family relationships is likely to be controversial, and that the political process would necessarily involve much discussion and amendment. But that is not an objection to the Commission’s work. On the contrary: it is an important part of the case for dispassionate study; and the production of texts

¹¹ See ‘Europeanisation of Family Law’ in K. BOELE-WOELKI/B. BRAAT/I. SUMNER (eds), *European Family Law in Action: Volume I, Grounds for Divorce*, Intersentia, Antwerp Oxford and New York 2003, p. 3-28.

¹² Article 24, ‘Rights of the Child’.

¹³ K. BOELE-WOELKI/B. BRAAT/I. SUMNER (eds), *European Family Law in Action: Volume I, Grounds for Divorce*, Intersentia, Antwerp Oxford and New York 2003, p. vi.

¹⁴ *ibid.*

for discussion and debate; and it would certainly also be immensely valuable to have an authoritative statement of the practical advantages of harmonisation contrasted with the manifest disadvantages of the existing wide variety of law within the Union. That is truly a matter for scholarship.

I can summarise the essential message of this paper in a sentence: it is that the ‘shackles’ restricting our freedom in relation to divorce law and its reform are no longer primarily those of religion and culture; they are those of the psychology of individuals and of groups. Because of this it seems probable that change will not come quickly: as Professor Boele-Woelki says, the complexity of family law and the great number of jurisdictions involved necessarily mean that today’s family and comparative law specialists will need to ‘work for many years on the harmonisation and probable unification of family law in Europe’.¹⁵ But prediction – and especially prediction about public attitudes – is a dangerous business: attitudes do sometimes change unexpectedly and very rapidly – as, for example, in relation to legal recognition of same-sex relationships – and then to quote Professor Pintens¹⁶ again, ‘what is still a dream today, becomes reality tomorrow.’ It is important to be prepared; and in that preparation the work of the Commission on European Family Law is vitally important.

¹⁵ *op.cit.*, p. vi.

¹⁶ ‘Europeanisation of Family Law’ in K. BOELE-WOELKI/B. BRAAT/I. SUMNER (eds), *European Family Law in Action: Volume I, Grounds for Divorce*, Intersentia, Antwerp Oxford and New York 2003, p. 3-32.

THE WORKING METHOD OF THE COMMISSION ON EUROPEAN FAMILY LAW

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*Comparison is an operation in which specific 'objects'
... are set against each other so that their similarities
and differences can be determined, and the causes of
these can be traced. The comparative method ... is the
road which leads to these discoveries. Its 'role' consists
of putting the comparative process in order to arrange
all the steps and procedures in a rational way.
Its 'goal' is to create new knowledge.¹*

1. INTRODUCTION

It has been frequently argued that the most satisfactory piece of comparative law research is the one that employs teamwork.² To date the research by the Commission on European Family Law has been carried out by a team of specialists in the field of comparative family law from twenty-two different jurisdictions. Right from the outset an agreement has been reached that CEFL's main objective is the creation of a set of Principles of European Family Law that are thought to be the most suitable for the harmonisation of family law in Europe. Three years after its establishment the first set of Principles in the field of divorce and maintenance between former spouses was

* I am greatly indebted to the Law Faculty of Uppsala University where I was able to prepare this contribution under optimal working conditions. In particular, I am very grateful to my dear friend and colleague Professor MAARIT JÄNTERÄ-JAREBORG for all her care and stimulating discussions. In addition, I would like to thank Dr. BENTE BRAAT, secretary of the CEFL, for always being there when I call for assistance.

¹ D. KOKKINI-IATRIDOU, "Some Methodological Aspects of Comparative Law", *NILR* 1986, p. 155.

² D. KOKKINI-IATRIDOU, *ibid.*, note 1, p. 148 and A.E. ÖRÜCÜ, "Symbiosis Between Comparative Law and Theory of Law, Limitations of Legal Methodology", *Mededelingen van het Juridisch Instituut no. 16*, Erasmus University, Rotterdam 1982, p. 17.

published³ and presented at this conference. Both the involvement of many researchers and thus many jurisdictions in the CEFL project and the complexity of the research field require clear guidelines⁴ regarding the following overall question: How can we achieve our final goal as effectively as possible whereby generally accepted rules regarding how comparative research should be carried out are to be taken into account? Apparently, throughout the last three years this question has been frequently and passionately discussed among CEFL's members,⁵ in particular between my colleagues in the Organising Committee.⁶ Crystal clear cookery books with uncomplicated recipes that provide information on how to organise and conduct European research which – as in the case of the CEFL – is based on a scientific initiative and which is considered to be a purely academic matter do not exist. Nonetheless, for the CEFL it would have been a waste of time to reinvent the wheel. Several other groups and commissions working in the field of the harmonisation of private law in Europe already started their activities many years ago. Obviously, we studied their working methods and learned from their experiences.⁷ At this preparatory stage, in particular, we decided not to copy a specific working method applied by one or two of these sister commissions. However, their working methods functioned as an excellent tool of inspiration which we gladly used in establishing our own working method. When comparing the working methods of the different groups and commissions working in the field of the harmonisation of private law in Europe it will not come as a surprise that both similarities and differences can be distilled.⁸ In this respect it is worth noting,

³ K. BOELE-WOELKI, *et al*, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, European Family Law Series No. 7, Intersentia-Antwerp 2004.

⁴ According to K. ZWIEGERT/H. KÖTZ, *Introduction to Comparative Law*, Clarendon Press-Oxford 1998, p. 33, a detailed method cannot be laid down in advance; all one can do is to take a method as a hypothesis and to test its usefulness and practicability against the results of actually working therewith. Even today it would be extremely doubtful whether one could come up with a logical and self-contained methodology of comparative law which had any pretensions of being perfect.

⁵ See in general I. SCHWENZER, "Methodological Aspects of Harmonisation of Family Law", in: K. BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, EFL series No. 4, Intersentia-Antwerp 2003, pp. 143-158 and in particular M. ANTOKOLSKAIA, "The 'Better Law' Approach and the Harmonisation of Family Law", *ibidem*, pp. 159-182.

⁶ See on the structure of the CEFL which consists of the Organising Committee (seven members) and the Expert Group (at present 26 members): K. BOELE-WOELKI, *et al*, *ibid.*, note 3, p. V.

⁷ W. PINTENS, "Die Commission on European Family Law, Hintergründe, Gründung, Arbeitsmethode und erste Ergebnisse", *ZEuP* 2004, pp. 555-556; W. PINTENS, "Die Rolle der Wissenschaft bei der Europäisierung des Familienrechts", *Festschrift für Erik Jayme*, Sellier European Law Publishers 2004, pp. 1339-1352.

⁸ See for a comparison of the different groups and commissions: E.H. HONDIUS, "Towards a European Ius Commune: The Current Situation in Other Fields of Private Law", *ibid.*, note 5, p. 118-119; M. ANTOKOLSKAIA, *ibid.*, note 5, pp. 163-165. See also R. ZIMMERMANN, "Die 'Principles of European Contract Law', Teil III", *ZEuP* 2003, p. 707; H. KOZIOL, "Die 'Principles of European Tort Law', der 'European Group on Tort Law'", *ZEuP* 2004, p. 234-259.

however, that the use of the comparative method⁹ should not be confused with the ‘methods and techniques’ which are used in the comparative process. As Kokkini-Iatridou rightly reminds us, these are only ‘means’ which may be very different, in order for the goal of the comparative method to be achieved.¹⁰

This contribution aims to explain CEFL’s working method.¹¹ What precisely has been achieved? How was the comparative research-based drafting of the Principles carried out? Which decisions were taken and upon which considerations are certain choices based? How many steps or stages are to be distinguished?

In short, six steps are to be distinguished: The *first step* is to select the fields of family law most suitable for harmonisation. The *second step* is to draft a questionnaire that embodies the functional approach. The *third step* is to draw up national reports which not only take the law in the books into account, but also the law in practice. The *fourth step* is to collect and to disseminate the comparative material. In addition to the country-by-country reports which are accessible on CEFL’s website an integrated and printed version laid out according to the numbers of the questions has been published. This integrated version provides a rapid overview and a straightforward simultaneous comparison of the different solutions within the national systems. The *fifth step* is to draft the Principles of European Family Law. Proposals are made by the seven members of the Organising Committee which were discussed with the authors of the national reports (the Expert Group). At this stage a decision had to be made between either the ‘common core’ or the ‘better law’ approach. The *sixth and final step* is to publish the Principles which consist of three parts: firstly, the provisions, secondly, the comparative overviews which refer to the national reports and, thirdly, the comments which elucidate the provisions.

⁹ D. KOKKINI-IATRIDOU, *ibid.*, note 1, p. 156: ‘The comparative method does not vary either according to the legal discipline or the branches of law to which it is applied. There is no separate comparative method for international or municipal law, or for public or private law.’

¹⁰ D. KOKKINI-IATRIDOU, *ibid.*, note 1, p. 156. According to the Italian comparatist G. GORLA (*idem*, note 50) ‘every type of comparative problem ... has essentially its own methods, devices or techniques resulting from its degree of difficulty, ...’.

¹¹ Detailed explanations as to the content of the Principles are provided by M. ROTH, “Future Divorce Law – Two Types of Divorce”, this publication, pp. 41-57; F. FERRAND, “Agreements on Divorce and Maintenance”, this publication, pp. 71-82; C. GONZÁLEZ BEILFUSS, “CEFL’s Maintenance Principles: The Conditions for Maintenance”, this publication, pp. 83-101; G. SHANNON, “Clean-break or Long-Term Payment of Maintenance”, this publication, pp. 103-117; T. SVERDRUP, “Maintenance as a Separate Issue – Relationship Between Maintenance and Matrimonial Property”, this publication, pp. 119-134.

2. SELECTING THE FIELDS MOST SUITABLE FOR HARMONISATION

CEFL's activities are intended to produce results that may be used for specific practical purposes. First and foremost, the Principles are addressed towards national legislators which are considering whether to modernise their national family law. Eventually, they can function as a source of inspiration for both the European¹² and international legislator. The choice of the most suitable field of family law in order to contribute to the harmonisation of law in Europe has not so far revealed any problems regarding the methodological requirement that it is only possible to compare what is in fact comparable. Instantly, at its inaugural meeting, CEFL's Organising Committee reached an agreement – although it was the subject of extensive discussion – that the first working field would be divorce and spousal maintenance. General investigations into divorce law and the law regarding maintenance between former spouses readily unveiled the fact that the famous *tertium comparationis*, which depends on the presence of common elements, was not at all a matter of concern.¹³ Other aspects, however, caused real difficulties. Why should we begin in the field of divorce by including only one of the many divorce consequences? Why not embark on matrimonial property law given the fact that in many jurisdictions the spouses are free to agree on their property relationship?¹⁴ However, after long deliberations CEFL's Organising Committee rejected the idea of commencing its activities in the field of matrimonial property law. The reasons for this were manifold. First of all, in the various European

¹² To date, it is generally accepted that the European Union has no competence under the EC Treaty to unify or harmonise substantive family and succession law. See W. PINTENS, "Europeanisation of Family Law", *ibid.*, note 5, p. 22; W. PINTENS, "Familienrecht und Personenstand – Perspektiven einer Europäisierung", *StAZ* 2004, p. 355 and M. JÄNTERÄ-JAREBORG, "Unification of International Family Law in Europe – A Critical Perspective", *ibid.*, note 5, p. 195. However, Article 65 of the EC Treaty speaks of measures in the field of judicial cooperation in civil matters *having cross-border implications*. Due to the fact that no time indication is provided regarding the required cross-border implications the following view can be taken. Each internal relationship which is only connected to one national jurisdiction can – hypothetically – become a cross-border relationship. In order to guarantee the free movement of persons in Europe the EU Commission should take appropriate steps to avoid a loss of legal position, which, for instance, can arise with a change of residence if the connecting factor is not immutable, but where the applicable law is based on the habitual residence in question. See N. DETHLOFF, "Arguments for the Unification and Harmonisation of Family Law in Europe", *ibid.*, note 5, p. 37-64 and N. DETHLOFF, "Europäische Vereinheitlichung des Familienrechts", *AcP* 2004 pp. 544-568. According to this broad interpretation of Article 61 EC Treaty the European Union even could take measures in order to harmonise or unify the substantive family law in Europe. See K. BOELE-WOELKI, "De competentie van de Europese Unie in familiezaken", *FJR* 2004, p. 289.

¹³ If Malta would have been represented in the CEFL the comparability would have been problematic due to the fact that Malta is the only European jurisdiction not to permit divorce.

¹⁴ M. ANTOKOLSKAIA, "Would the harmonisation of family law in Europe enlarge the gap between the law in the books and the law in action? A discussion of four historical examples of radical family law reform", *FamPra.ch* 2002, p. 261.

countries three main categories of default systems exist: the community of property, the deferred community of property and the participation system.¹⁵ Comparative research has demonstrated that the differences between these systems are nearly unbridgeable.¹⁶ Consequently, only a few – two or three – models for different matrimonial property regimes can be offered from among which a national legislator can choose.¹⁷ Recommending alternative systems, which could operate in addition to national systems, is, however, not considered to belong to CEFL's main objective,¹⁸ though recently the idea of an optional European system of matrimonial property has revived, this time from the perspective of private international law in particular.¹⁹ Another argument in favour of CEFL's decision not to start its activities in the field of matrimonial property law lies in the complexity and technicality of this particular field of law. Besides, there exist strong relationships with patrimonial and contract law exist and, moreover, with property law and succession law, fields of law which to date are generally regarded as being indifferent to any form of harmonisation. The choice of divorce and spousal maintenance was primarily based upon the growing convergence of divorce laws in Europe²⁰ and, in support of this development, the entry into force of the Brussels II Regulation.²¹ In view of the latter, it has been unmistakably

¹⁵ W. PINTENS, *ibid.*, note 5, pp. 9-12.

¹⁶ B. BRAAT, "Indépendance et interdépendance patrimoniales des époux dans le régime légal des droits néerlandais, français et suisse", EFL series No. 6, Stämpfli – Bern, 2004.

¹⁷ K. BOELE-WOELKI, "Divorce in Europe: Unification of Private International Law and Harmonisation of Substantive Law", in: H.F.G. LEMAIRE (ed.), *Liber amicorum Ingrid. S. Joppe*, Kluwer-Deventer 2002, p. 27. For proposals see among others A. VERBEKE, "Proeve van internationaal huwelijksrecht", in: S.C.J.J. KORTMANN *et al* (eds), *Yin-Yang: Martin Jan Alexander van Mourik Bundel*, Kluwer-Deventer 2000, p. 391.

¹⁸ W. PINTENS, *ibid.*, note 7, p. 557.

¹⁹ Papers delivered by D. MARTINY, "A New Matrimonial Property Regime for Europe", and by G. STEENHOFF, "A Matrimonial Property System for the European Union?" at the UK-German Judicial Family Law Conference, Cardiff 8-11 September 2004. See also C. WERWIGK-HERTNECK/F. MAUCH, "Auf dem Weg zu einem Europäischen Familiengesetzbuch", *FamRZ* 2004, p. 574-580.

²⁰ W. PINTENS, "Rechtsvereinheitlichung und Rechtsangleichung im Familienrecht. Eine Rolle für die Europäische Union?", *ZEuP* 1998, p. 670 and the conclusion by D. MARTINY, "Ehescheidung und nachehelicher Unterhalt in Europa", *EJCL* (<http://www.ejcl.org>) 2004 issue 8(3): "Trotz erheblicher Abweichungen kann man den europäischen Trend mit dem Motto 'einfacher, schneller und effektiver' zusammenfassen." See also the magnificent work that was completed in 2002 by a group of eminent Nordic scholars who carried out a comparative study on Danish, Finnish, Norwegian, Icelandic and Swedish law on marriage (which includes divorce) in order to discuss the need for reform and to investigate the possibilities for harmonisation: A. AGELL, *Nordisk äktenskapsrätt, En jämförande studie av dansk, finsk, isländsk, norsk och svensk rät med diskussion av reformbehov och harmoniseringsmöjligheter*, Nord-Copenhagen 2003.

²¹ Council Regulation (EC) No. 1347/2000 on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses (which entered into force on 1st March 2001). The Brussels IIbis Regulation replaces the Brussels II Regulation as of 1st March 2005. See Council Regulation (EC) No. 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000, Official Journal 2003 L 338/1, 23. 12. 2003.

demonstrated that in the long run the European unification of the rules on jurisdiction, recognition and enforcement of judgments in divorce matters and, in addition, the planned unification of the conflict of law rules on divorce²² makes it necessary to harmonise the substantive divorce laws in Europe.²³ Not only the Brussels II Regulation but, in particular, the broadening of its scope by the Brussels IIbis Regulation supports CEFL's choice for the second working field, being parental responsibilities. Besides, there are significant and natural links between, on the one hand, the question of divorce and its consequences and, on the other, between the question of parental responsibilities and the financial consequences of divorce. Extensive work has already been carried out in this field²⁴ by the Council of Europe in its White Paper on Parental Responsibility and Parentage of January 2002,²⁵ as well as by the Hague Conference on Private International Law in preparing its Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.²⁶ An overlap with the comparative research already carried out is unavoidable; however, it is advisable not to leave the matters untouched simply because somebody else is busy in that field. CEFL's comparative research based drafting of Principles will turn out to be a different kind of exercise. In any case, a solid comparative insight into the subject will be provided.²⁷ Finally, the third working field was already selected in March 2003. At the end of 2005 the CEFL will embark on the new forms of cohabitation which includes all kinds of formal (e.g. registered partnerships and civil unions) and informal forms of cohabitations except marriage. Although this third working field is to date quite controversial and therefore somewhat complicated,²⁸ one might argue that the subject of cohabitation is not hemmed in by defined positions; it is still open and free. It could be a good opportunity – and obviously a challenge – to find a European model, at least for non-marital cohabitation which is currently considered to be one of the hottest

²² See the recently published Green Paper on applicable law and jurisdiction in divorce matters, Brussels, 14.3.2005 COM(2005)82 final. See R. WAGNER, "Überlegungen zur Vereinheitlichung des Internationalen Privatrechts in Ehesachen in der Europäischen Union", *FamRZ* 2003, p. 803.

²³ M. JÄNTERÄ-JAREBORG, *ibid.*, note 5, pp. 194-216.

²⁴ A similar comparative study as that in the field of Scandinavian divorce law (note 20) has recently been completed in the field of parental responsibilities, see S. DANIELSEN, *Nordisk børneret II, Forældreansvar, Et sammenlignende studie af dansk, finsk, islandsk, norsk og svensk ret med drøftelser af harmoniseringsmuligheder og reformbehov* (Nordic child law II, Parental responsibility, A comparative study of Danish, Finnish, Icelandic, Norwegian and Swedish law with discussions on harmonisation and the need for reform), Nord-Copenhagen 2003:14.

²⁵ See <http://www.coe.int>.

²⁶ See <http://www.hcch.net>.

²⁷ See K. BOELE-WOELKI, "Parental Responsibilities – CEFL's Initial Results", this publication, pp. 141-168.

²⁸ For an overview see K. BOELE-WOELKI/A. FUCHS, *Legal Recognition of Same-Sex Couples in Europe*, European Family Law series No. 1, Intersentia-Antwerp 2003 and C. GONZÁLEZ BEILFUSS, *Parejas de hecho y matrimonios del mismo sexo en la Unión Europea*, Marcial Pons – Madrid/Barcelona 2004.

issues in the field of comparative family law.²⁹ Above and beyond this, two workshops at the second CEFL conference on informal relationships emphasize the need to consider these concepts without delay. We will contribute to the overall discussion with a European view based on comparative research.

Regarding CEFL's choices with respect to the fields of family law that are thought to be the most suitable for drafting common Principles of European Family Law the following conclusion can be drawn. To date, choices have been made in favour of limited and precisely delineated fields of law. The first and second working fields are interlinked and cover issues which are regulated in all jurisdictions and which, in particular, have often been modernised in the last few decades. In addition, the EU instruments for cross-border relationships in these matters have played a decisive role. Also the first and third working fields are interconnected if, with regard to the latter, the break-up of a relationship which in fact causes the most complicated problems will be included. Hence, a systematic approach that covers all aspects of family law has hitherto not been pursued by the CEFL and it is rather doubtful whether this approach will be altered in the near future.

3. DRAFTING THE QUESTIONNAIRE

After determining the working fields the following step has to be taken. This second step consists of drafting a questionnaire. Generally, a questionnaire is deemed to provide an overview of the similarities and differences between the solutions applied in the different jurisdictions. Setting up and compiling a questionnaire has to cover the legal systems of not only different jurisdictions but which also adhere to different legal families, i.e. the so-called Romanic law family, the Germanic, the Common law and the Scandinavian systems. Therefore the questions are to be formulated as independently of national legal systems as possible. The drafting of questionnaires is very common and international organisations,³⁰ research groups³¹ as well as individual researchers frequently make use of this technique. Apparently, it requires an essential knowledge of the substantive law in different jurisdictions in order to take all kinds

²⁹ See J. SCHERPE/N. YASSARI (eds), *Rechtsstellung nichtehelicher Lebensgemeinschaften – Legal Status of Cohabitants*, Max-Planck-Institut Hamburg, J.C.B. Mohr-Tübingen, 2005.

³⁰ The questionnaires in preparation for the Hague Conventions on Private International Law are published together with the national reports, the discussions and the explanatory report in the *Actes et Documents*. In addition, they are available at the Hague Conference's website, see: <http://www.hcch.net>.

³¹ The European Group on Tort Law, for instance, also started its activities with the drafting of questionnaires regarding the most important issues of tort law. The questionnaires contain both conceptual questions as well as questions regarding concrete factual patterns, see H. KOZIOL, *ibid.*, note 8, p. 235.

of situations and problems into account. In applying the basic methodological principle in comparative research the questionnaires embody the functional approach. Zweigert/Kötz expressed the meaning of functionality very succinctly: “In law the only things which are comparable are those which fulfil the same function.”³² The drafters of the CEFL questionnaires thus posed the questions in purely functional terms without any reference to the concepts of a specific legal system, thus asking what is the underlying problem that a certain legal provision aims to redress.³³ Ignoring the principle of the functional or problem-oriented approach could have resulted in the risk that not all systems would have been covered. Consequently, a great deal of attention has been devoted to drafting both questionnaires which contain 105 questions on the subject of divorce and maintenance between former spouses³⁴ and 62 questions regarding parental responsibilities. After a first draft proposal prepared by one of the members of the Organising Committee, it took the Committee, on each occasion, more than two long days to confer, agree and finalise both questionnaires. The questions must, of necessity, be pertinent.³⁵ They are deemed to reveal a certain knowledge and understanding of the subject matter as it exists in the national jurisdictions and not as it should be according to some ideal standard. They are addressed to family law experts and are to be answered according to their national law. If an agreement has been reached on the content of a questionnaire – if it is therefore final, has been published on the CEFL’s website and sent to the experts – any changes and the addition of new questions should be avoided so as not to confuse the whole process. Careful drafting is therefore considered to be essential for the entire road. At this stage, a significant difference between a research team operating in more than twenty jurisdictions and an individual researcher becomes evident. The latter can easily adjust his/her questionnaire any time.

Finally, in our opinion the instant electronic publication of CEFL’s questionnaire on its website is valuable at least in two respects: Firstly, the necessary progress of CEFL’s activities, which, to date, have been significantly funded under EC research programmes, is highlighted. Secondly, all researchers who, for instance, would like to carry out similar research into jurisdictions not represented in the CEFL may make use of the questionnaire. At least one gains an impression as to how a questionnaire can be drafted.

³² K. ZWIEGERT/H. KÖTZ, *ibid.*, note 4, p. 34.

³³ I. SCHWENZER, “Methodological Aspects of Harmonisation of Family Law”, *ibid.*, note 4, pp. 146-148.

³⁴ Accessible on CEFL’s website under Working Field 1 and in K. BOELE-WOELKI/B. BRAAT/I. SUMNER, *European Family Law in Action*, Volume I: *Grounds for Divorce*, Volume II: *Maintenance Between Former Spouses*, European Family Law Series Nos. 2 and 3, Intersentia-Antwerp 2003, pp. XIII-XXIII.

³⁵ Every questionnaire starts with an introduction to the historical background and a look into the future.

4. DRAWING UP THE NATIONAL REPORTS

In contrast to several other groups and commissions CEFL's Organising Committee has deliberately chosen to involve experienced family law specialists in order to answer the questionnaires according to their own national laws. Along with the detailed questionnaires these experts have been asked to establish the national reports in accordance with some detailed instructions, most of which are of a technical nature.³⁶

The most important instruction concerns the request to take the law in action into account. Palmer³⁷ recently correctly noted that each legal system may prescribe its list of official sources, but this list, which is only designed to bind judges and courts internally, does not necessarily bind a comparatist. The practical importance of the law as it appears in action also holds true in the field of family law.³⁸ We wanted to discover not only what practitioners are actually doing with the legal rules, but how far it is possible for the expert to establish the law in action as opposed to the law in the books. Here, we have to acknowledge that there are limits, though, theoretically, there are no stumbling blocks to the pursuit for information about the legal rules, and only the practical constraints, imposed by a sense of relevance, available time and limited resources, will apply.³⁹

Answering a questionnaire is a demanding task.⁴⁰ It requires knowledge about the relevant statutes, case law and academic discussions. This knowledge needs to be presented according to the generally accepted academic standards and needs to be submitted within a seven-month period.⁴¹ In particular, the time constraints and the

³⁶ Exclude private international law questions; Be as precise as possible in answering the questions; Preferably refer to provisions in statutes and case law if and when necessary; Avoid lengthy discussions in legal doctrine; Refer not only to the law in the books but also to the law in action; Follow the questionnaire and include the questions in your report; Answer each question separately; Avoid cross-references; Follow the attached guidelines as to how to cite articles, books and case law; Include the relevant provisions in an annex and provide a translation if available (preferably in English, German or French); Limit your report to a maximum of 50 (regarding the first reports on divorce and maintenance between former spouses) and 30 (regarding the second reports on parental responsibilities) pages (print size 10, with 1.5 line spacing) respectively; Ensure – if possible – the linguistic revision of your report if English is not your mother tongue.

³⁷ V.V. PALMER, "From Leretholi to Lando: Some Examples of Comparative Law Methodology", *Global Jurist Frontiers* 2004, p. 27 also published in *De Tous Horizons, Mélanges Xavier Blanc-Jouvan*, Société de Législation Comparée, 2004, pp. 129-157.

³⁸ Demonstrated by I. SCHWENZER, *ibid.*, note 5, pp. 144-146.

³⁹ V.V. PALMER, *ibid.*, note 37, p. 27.

⁴⁰ Many experts chose to make use of co-authors. These co-authors, however, do not belong to the CEFL Expert Group. See on the structure of the CEFL, K. BOELE-WOELKI *et al*, *ibid.*, note 3, pp. V-VII.

⁴¹ The period for the first report lasted from 22 January 2002 until 16 September 2002, the period for the second report from 5 April 2004 until 15 November 2004.

fact that most of the authors are not writing in their mother tongue⁴² should not be underestimated. Reference is to be made to the sources of law. A simple “Yes” or “No” will not take us any further. We need to know why an answer is in the affirmative or negative. For that reason, a few draft reports were returned to the authors with a request to provide the necessary information and references. In addition, one should also keep in mind that a national report is written for those who, in principle, are not familiar with the particular jurisdiction. Sometimes, supplementary explanations concerning, for instance, typical institutions⁴³ or recent phenomena⁴⁴ must be included in order to avoid cryptically drafted answers which can only be understood by insiders, that is lawyers from the same jurisdiction. In short, compiling a national report calls for a great deal of sensitivity towards the addressee who generally has a different legal background. At any rate, regarding CEFL’s national reports the standard has been set. The experiences gained in drawing up the first reports and their comparisons are definitely of great value for the forthcoming reports.

Finally, it should be mentioned that the members of the Organising Committee also drafted national reports in order to gain a better insight into the subject-matter and to experience the difficulties involved in answering the questionnaire which, in their opinion, contained the most pertinent questions.

5. COLLECTION AND DISSEMINATION OF THE COMPARATIVE MATERIAL

The fourth step in CEFL’s working method is purely technical. However, this step is to be considered as being of tremendous importance. Two ways of dissemination have been chosen. First, the electronic publication of all national reports together with the relevant legal provisions on CEFL’s website. The collected national reports provide a unique insight into various European family laws and modern trends. They are based on the law as it stood in 2002 with regard to divorce and maintenance between former spouses⁴⁵ and on the law as it stood in 2004 with regard to parental responsibilities. Electronic publication is simple, quick and cheap, however it requires, like printed

⁴² CEFL’s working language is English.

⁴³ The *prestation compensatoire*, for instance, which combines elements of matrimonial property law and maintenance law is a typical institution in French law, which needs to be explained in detail, see F. FERRAND, “French report”, Q 62 in: K. BOELE-WOELKI/B. BRAAT/I. SUMNER, *ibid.*, note 34, pp. 91-92

⁴⁴ The Dutch *lightning divorce*, for instance, belongs to this category. See K. BOELE-WOELKI/O. CHEREDNYCHENKO/L. COENRAAD/, “Dutch Report”, Q 7, in: K. BOELE-WOELKI/B. BRAAT/I. SUMNER, *ibid.*, note 34, pp. 124-126.

⁴⁵ See for references to already existing comparative studies in the field of divorce and maintenance, D. MARTINY, *ibid.*, note 20, in particular notes 4-8.

publications, editing and, of course, linguistic revision. We have learnt that this is a time-consuming and costly activity. However, electronic publishing has several advantages: the national reports can be completed with the relevant legal provisions which, in some cases, are rather lengthy. The direct accessibility of the legal provisions facilitates an easy check of the primary sources in the given jurisdiction. In addition, the national reports are accessible worldwide and we have noticed that this opportunity has been frequently used.⁴⁶ The third advantage of electronic publication lies in the possibility of easily updating the national reports. The very recent revision of divorce law in France, for instance, which came into force on 1st January 2005⁴⁷ or the new Spanish bill on divorce law⁴⁸ are not included in the respective national reports presently accessible on CEFL's website. Thus far, the updating of the comparative material has not been a matter of primary concern. In the long run, however, we have to seriously consider how to organise the updating of the comparative information. Its value will otherwise diminish or even become lost.⁴⁹ In addition to the country-by-country reports which altogether extend to more than a 1000 pages, two integrated and printed versions laid out according to the numbers of the questions thereby followed.⁵⁰ These integrated versions provide a quick overview and a straightforward simultaneous comparison of the different solutions within the national systems.⁵¹ They form the very foundation for the next step to be taken, the drafting of the Principles of European Family Law.

6. DRAFTING THE PRINCIPLES OF EUROPEAN FAMILY LAW

The drafting of the Principles of European Family Law (PEFL) was the most exciting step to be taken. How did we achieve the final result? Which steps were taken in

⁴⁶ A "Google search" using the terms divorce and maintenance in combination with the jurisdiction on which one is seeking information immediately leads to the CEFL national reports.

⁴⁷ F. FERRAND, "Aktuelles zum Familienrecht in Frankreich", *FamRZ* 2004, pp. 1423-1425; C. DADOMO, "The Current Reform of French Law of Divorce", *IFL* 2004, pp. 218-225.

⁴⁸ Anteproyecto de Ley por el se modifica el Código Civil en materia de separación y divorcio.

⁴⁹ Obviously extra time and money are needed to realise this plan.

⁵⁰ K. BOELE-WOELKI/B. BRAAT/I. SUMNER, *ibid.*, note 34.

⁵¹ The Scottish legislature already has used CEFL's work as a source for arguing for the amendment of the current law on divorce. On the 7th February 2005, the Family Law (Scotland) Bill Grounds for Divorce was submitted to the Scottish Parliament which would, inter alia, amend the grounds for divorce in Scotland so as to reduce the current five year separation period to two and the two year separation period to one. Furthermore desertion would also be removed as a ground for divorce. The Bill also aims to amend the law regarding maintenance, parental responsibilities and parental rights, as well as cohabitation. It therefore provides yet further support to the choice of the CEFL to work on these three topics first. The relevant Scottish Parliament Information Centre Briefing which is compiled for the benefit of the Members of the Parliament frequently refers to the CEFL national reports on the grounds for divorce. See <http://www.scottish.parliament.uk/business/research/briefings-05/sb05-22.pdf>.

between? How did we divide the preparatory work? On what considerations did we base our final choices? Which approaches are to be distinguished? This bundle of questions cannot be answered instantaneously. They need to be categorised. I will first focus on the more practical aspects, then I will touch upon the close connection between Principles, comparative overviews and comments and, finally, I will comment on or, more accurately, make an attempt to explain how and when a choice between the “common core” approach and the “better law” approach was made. All the explanations given will in fact refer to the Principles regarding divorce and spousal maintenance.

6.1. SELECTION OF THE SUBJECTS AND SOME PRACTICAL ASPECTS

The 105 questions making up the first questionnaire only led to the formulation of twenty Principles in total, most of which, however, consist of more than one paragraph. The total number of paragraphs reveals that we dealt with approximately 35 aspects. Apparently, a choice was made regarding the aspects of divorce and spousal maintenance, which, in our view, should be dealt with, and, moreover, could be laid down in a Principle. The whole drafting process consists of a systematic analysis of the similarities and differences, of dividing solutions into different categories and, finally, of discussing the pros and cons regarding the proposals made, both within the Organising Committee and the Expert Group. Unanimity on all aspects of the final version could evidently not be reached. However, there was broad agreement on the basic elements of the first set of Principles. Besides, dissenting opinions are not mentioned in the comments.⁵² Right from the outset the Organising Committee rejected the use of a voting system.

6.1.1. *Divorce*

We started in the field of divorce⁵³ and initially – even before we had received the national reports – we identified the following subjects. First of all, we raised the question whether domestic law should permit divorce and whether there should be any defences to divorce. Secondly, we thought that we should deal with the grounds for divorce. On what basis should a divorce be granted? Should we only opt for a non-fault-based divorce? Should we choose a sole ground or multiple grounds for divorce based on mutual consent, irretrievable breakdown and separation as grounds for divorce?

⁵² Only with regard to two aspects do the Comments to the Principles disclose the fact that lengthy discussions had taken place, see Preamble, Comment 1 and Principle 1:8, Comment 3. Detailed minutes were taken of both meetings with the Expert Group in March 2003 and March 2004 which, however, are for internal use only.

⁵³ It turned out to be impossible to deal with both subjects at the same time.

Thirdly, we asked whether divorce should be a judicial and/or an administrative process. Fourthly, the question of a specific time-limit for divorce was raised as well as whether there should be a period of reflection. In addition to these subjects we questioned whether one could obtain a divorce without an agreement or a decision on the consequences (a so-called package-deal). Furthermore, we considered state responsibilities in the divorce process (legal aid) and even the notion of mediation. In retrospect this first list of subjects was indisputably to be considered as both traditional with regard to, for instance, the grounds of divorce as well as being too ambitious if we think of the divorce process, legal aid and mediation. However, we only became aware of this at a much later stage. After we had received the national reports we instantly narrowed our ambitions to some extent. We decided that all members of the Organising Committee⁵⁴ should make a comparison of the national reports, draft a Principle and explain why the proposed rule should be adopted with regard to one of the following subjects:

1. Should the law permit divorce by consent?
2. Should divorce by consent be an autonomous ground or should it be a subform of divorce based on irretrievable breakdown?
3. Should the marriage be of a certain duration?
4. Should a period of separation be required before filing the divorce papers?
5. Which procedure is required (appearance in court, conciliation, information, mediation)?
6. Do the spouses need to reach an agreement (or should it be left open) on all the consequences of the divorce or can the competent authority determine those consequences (subjects, before divorce, during divorce)?
7. Should the competent authority scrutinise the agreement?
8. What is meant by ‘consent’?

The subjects upon which each of us, at the outset, had to distil the similarities and differences in the twenty-two jurisdictions at that moment in time still did not completely mirror the final version of the Principles.⁵⁵ However, the drafting stage

⁵⁴ Who, precisely, has prepared which subject is not considered to be relevant.

⁵⁵ The ten Divorce Principles are contained in three Chapters. The first Chapter sets out the General Principles: Permission of Divorce (Principle 1:1), Procedure by Law and Competent Authority (Principle 1:2), and Types of Divorce (Principle 1:3). The second Chapter contains the Principles regarding Divorce by Mutual Consent: Mutual Consent (Principle 1:4), Reflection Period (Principle 1:5), Content and Form of the Agreement (Principle 1:6) and Determination of the Consequences (Principle 1:7). The third Chapter deals with Divorce without the Consent of one of the Spouses and contains three Principles: Factual Separation (Principle 1:8), Exceptional Hardship to the Petitioner (Principle 1:9) and Determination of the Consequences (Principle 1:10). See also this publication, pp. 66-69.

was finally reached and during several meetings⁵⁶ we intensively argued and evidently compromised on the proposals which we eventually adopted. It turned out to be difficult – we never had the illusion that it would be an easy task – to derive a single set of Principles from as many as twenty-two legal systems, which to some extent differ greatly.⁵⁷ When we finally presented the first draft of the Divorce Principles to the Expert Group in March 2003 we received three different kinds of comments: firstly, minor corrections regarding the content of the comparative overviews;⁵⁸ secondly, complete agreement as to the overall structure of the Principles consisting of provisions, comparative overviews and comments and, thirdly and most importantly, support as well as criticism regarding the content of the Principles.⁵⁹ The discussions were intense and many arguments in favour of a less traditional approach were very convincing.⁶⁰ Consequently, the Organising Committee reconsidered the Divorce Principles and made some major changes. The present Divorce Principles no longer speak of grounds for divorce. Instead we opted for two types of divorce, being: divorce by mutual consent and divorce without the consent of one of the spouses. In the latter case a factual separation between the spouses is required. As a result, the irretrievable breakdown of the marriage as a ground for divorce was no longer sustained.⁶¹ Moreover, we completely departed from the original structure of our questionnaire where a distinction was made between sole and multiple grounds for divorce systems. From a non-participant's perspective this observation is probably less striking than for those who were responsible for drafting both the questionnaire and the Principles. After a second "reading" of the revised Divorce Principles at the next meeting with the Expert Group in March 2004, which in contrast to the first draft were by then completed with comparative overviews and comments with regard to all the Principles, minor changes were made. Also these lengthy discussions were extremely fruitful and led to an improvement in and a better understanding and clarification of the Divorce Principles, in particular concerning the comparative overviews and the comments. Additional arguments were put forward in support of the choices that were made. For

⁵⁶ Information on the meetings is provided in the Preface of the PEFL book, see K. BOELE-WOELKI *et al*, *ibid.*, note 3, pp. VII-VIII.

⁵⁷ D. MARTINY, "Divorce and Maintenance Between Former Spouses – Initial Results of the Commission on European Family Law", *ibid.*, note 5, pp. 529-550 and D. MARTINY, "Ehescheidung und nachehelicher Unterhalt in Europa", *ibid.*, note 20.

⁵⁸ Regarding several jurisdictions additional information and clarification were provided.

⁵⁹ Nigel Lowe succinctly expressed the overall impression of the Organising Committee after the first two-days meeting with the entire Expert Group with the meaningful expression: "We survived!"

⁶⁰ See Principle 1:8 Comment 3, *ibid.*, note 3, p. 53: "The members of the Expert Group critically assessed the first draft of the Divorce Principles which contained the irretrievable breakdown of the marriage as a basis for divorce. Factual separation alone should be considered sufficient upon which to base divorce since irretrievable breakdown is a meaningless additional hurdle."

⁶¹ W. PINTENS, *ibid.*, note 7, p. 560: "Hier hat die progressivere Lösung mancher nordischer Rechtssysteme sich als zukunftsweisend durchgesetzt."

the sake of clarity the number of Principles (twelve) was reduced to ten by merging some rules, thus creating more paragraphs in several Principles.

6.1.2. *Maintenance Between Former Spouses*

While reconsidering the Divorce Part, we started at the same time, namely in April 2003, to draft the second part of the PEFL in the field of maintenance between former spouses. Within the Organising Committee we followed the same procedure consisting of the preparation of comparative overviews, proposals for Principles and explanatory comments. This time, however, (and this is my very personal opinion) much more attention was paid to the comparative overviews. The subjects initially selected are almost identical to the subjects which were dealt with in the final version of the Maintenance Principles.⁶² We instantly agreed on the necessity to write an introduction to the question of whether maintenance should be a separate issue as well as whether we should distinguish between the types of maintenance claims. Regarding the subjects to be dealt with in a Principle we selected the following issues:

1. Individual self-sufficiency
2. General conditions for maintenance
3. Obligation and means of third parties
4. Special conditions for maintenance (list of criteria)
5. Hardship clause
6. Method of calculating maintenance⁶³
7. Method of payment (periodical payments, payment in kind, lump sum)
8. Priority of maintenance claims
9. Limitation and ending of the maintenance obligation
10. Limited time-period
11. Maintenance agreement
12. Scrutiny of the agreement.

In contrast to the preparation of the Divorce Principles by five persons, on this occasion, the preparation of the maintenance issues could – due to the enlargement

⁶² The ten Principles regarding Maintenance Between Former Spouses (Part 2) are contained in three Chapters. The first Chapter sets out two General Principles: Relationship Between Maintenance and Divorce (Principle 2:1) and Self Sufficiency (Principle 2:2). The second Chapter contains the Conditions for the Attribution of Maintenance: Conditions for Maintenance (Principle 2:3), Determining Claims for Maintenance (Principle 2:4), Method of Maintenance Provision (Principle 2:5) and Exceptional Hardship to the Debtor Spouse (Principle 2:6). The third Chapter covers Specific Issues: Multiplicity of Maintenance Claims (Principle 2:7), Limitation in Time (Principle 2:8), Termination of the Maintenance Obligation (Principle 2:9) and Maintenance Agreement (Principle 2:10).

⁶³ We never intended, however, to draft a detailed calculation system. The conditions for maintenance could only be established in general terms.

of the Organising Committee – be distributed among seven members. For that reason also, we already met in October 2003 in order to discuss and draft each Principle one by one. In addition, all comparative overviews were checked and the comments were assessed, altered and finalised. In March 2004, at the second meeting of the Expert Group, we received the same kinds of comments as with regard to the Divorce Principles. Once more we experienced that the exchange of ideas and the reciprocal criticisms were of great value. We took all the remarks and proposals into account as far as possible, adjusted the Maintenance Principles accordingly and sent the second draft to all the members of the Expert Group. Due to financial reasons and time constraints it was not possible to organise a second “reading” in the form of a face-to-face discussion. Meanwhile, however, in May 2004 the Organising Committee had decided that a joint publication of both sets of Principles was to be preferred. Different arguments were finally decisively in favour of this decision.⁶⁴ The written comments and remarks by the experts were taken into account as far as possible and on that note the Maintenance Principles could be finalized.

6.2. THE INTERRELATIONSHIP BETWEEN THE PRINCIPLES, COMPARATIVE OVERVIEWS AND COMMENTS

The PEFL consist of three parts: the Principles themselves in the form of provisions, the comparative overviews and the comments. These three parts belong together. One part cannot be read without the other two parts. Both the comparative overviews and the comments are part and parcel of the Principles as a whole.⁶⁵ This approach has been adopted by many groups and commissions and is inspired by the American Restatements.⁶⁶ The comparative overviews extensively refer to the national reports.⁶⁷ An effort is made to expose the variations in the underlying rules themselves and to make explicit comparisons between the jurisdictions. The fact that the comparisons are de-

⁶⁴ Firstly, if we would only have published the Divorce Principles and could have discussed the revised draft of the Maintenance Principles at our next Expert Group meeting, which was planned to take place in Uppsala in December 2005, the latter would not have been published before the beginning of 2006. In our view, this would have been too late. Secondly, if we only had published the Divorce Principles which had been reduced to ten Principles, the academic world would have considered this to be a somewhat meagre result. Thirdly, we needed to duly inform the participants at the second CEFL Conference, which took place in December 2004, where both sets of Principles played a central role. Finally, a more pragmatic reason was that, also from the publisher’s perspective, a joint publication was considered to be more attractive.

⁶⁵ See on the nature of the Principles: K. BOELE-WOELKI *et al*, *ibid.*, note 3, p. 3.

⁶⁶ See in the field of contract law: E. IORIATTI, “A Methodological Approach for a European Restatement of Contract Law”, *Global Jurist Topics*, 2003 Volume 3 Issue 3, Article 4.

⁶⁷ Both parts of the PEFL contain 1076 footnotes in total.

monstrated renders the Principles attractive to legislators who are considering whether their national family law should be modernised.⁶⁸ Every provision adopted by the CEFL in most cases represents a choice for a single rule from among the options presented by the different systems. Together with the comments they reveal and explain why a particular Principle was selected and drafted. They provide a guide to the policy considerations behind the choices. They are in a sense the dominant features of the drafters, suggesting which is “the best”, the more “functional” or the more “efficient” rule. At least we tried to discover the origins of a Principle. It must be acknowledged, however, that part of the whole comparative thought process, in particular the evaluation of the offered solutions, is concealed in unreported deliberations and side-issues. We were trying to seek as much transparency as possible, while intuition was obviously avoided. Taking the interrelationship between the three parts of the Principles into account implies that the text of a Principle should not be used without having consulted the respective comparative overview and comment in order to comprehend its specific meaning.

6.3. “COMMON CORE” AND/OR “BETTER LAW”?

The legal institutions, legal solutions, and norms of the various legal orders express the hierarchy of values inherent in every legal order, though in different degrees. In the final drafting of the Principles an assessment of these values (an evaluation) has to take place. Apparently, there is no universally accepted hierarchy of values, and thus no objective standard for the evaluation. Some degree of subjectivity in the evaluation process cannot be avoided, but does this really matter?⁶⁹ At CEFL’s inaugural conference in December 2002 extensive discussions took place concerning the most effective method for harmonising family law in Europe.⁷⁰ Should the harmonisation only be common core-based or is the use of the better law method indispensable in order to achieve positive results that represent the highest standard of modernity?⁷¹ During the PEFL drafting process it became apparent that, to a certain extent, it is not obligatory to make a choice between one thing and another. Also a combination of both methods has been applied.

After comparing the national solutions several approaches were taken. If it was possible to elaborate a common core for a significant majority of the legal systems, we could have followed this solution. However, should we take it for granted that this common

⁶⁸ Spanish colleagues, for instance, have already been asked to provide a comparative overview of the divorce laws in Europe in order to inform the Ministry of Justice as to whether the recent divorce bill (note 47) would be in agreement with the European developments.

⁶⁹ D. KOKKINI-IATRIDOU, *ibid.*, note 1, p. 191.

⁷⁰ I. SCHWENZER, *ibid.*, note 5, pp. 143-158 and M. ANTOKOLSKAIA, *ibid.*, note 5, pp. 159-182.

⁷¹ M. ANTOKOLSKAIA, *ibid.*, note 5, pp. 180-182.

core reflects the best solution? Certainly not. We would have been accused of short-sightedness if we had not evaluated the common solutions. Hence, the comparative process does not consist of a simple adding up or deletion of the answers given in the national systems. In some cases this evaluation led us to the final conclusion that the common core should be followed – in these cases the common core thus reflects the best solution; in other cases, however, we deviated from the common core and choose the better law approach instead. In those areas where it is not possible to derive general applied solutions, the decision as to which solution should prevail (the better law) is obviously also to be based on an evaluation. In addition, in both cases where, on the one hand, it is possible to indicate a common core and, on the other, it is impossible to do so, we came to the conclusion that certain questions should not be dealt with in the CEFL Principles and that they should therefore be left to national law. This applies, for instance, to all procedural issues and notions such as children or long-term relationships.⁷² Regarding the different subjects which were selected upon the basis of the comparative material, the following five different approaches are to be differentiated:

1. The common core was found and selected as the best solution.⁷³
2. The common core was found, but a better solution was selected.⁷⁴
3. The common core was found, but the solution was left to national law.
4. No common core was found and the best solution was selected.
5. No common core was found and the solution was left to national law.

All five approaches invoke the necessity of justifying the choices that were made. Nonetheless, both the second and fourth approaches which reflect the best or better law method definitely require more arguments based on certain values than in the case of the other three approaches. During the whole drafting process we were aware of the fact that evaluating solutions and taking positions can never be made without any subjectivity. Despite this awareness it is necessary to reveal the kind of criteria which are considered to be decisive for the choices that were made.⁷⁵ To that end, the Principles are preceded by a Preamble which includes both generally acknowledged considerations and commonly felt desires. In addition, some specific considerations (e.g. consensual divorce should be favoured) were a reason for the adopted choices and preferences. Also practical evidence and the immediate sense of appropriateness⁷⁶

⁷² The qualification of certain issues as belonging to procedural law, which is outside the scope of the Principles, was not always an easy task however.

⁷³ The common core and the selected solution are thus identical.

⁷⁴ The common core and the selected (better) solution can be compared.

⁷⁵ According to K. ZWIEGERT/H. KÖTZ, *ibid.*, note 4, p. 47, the comparatist must be explicit as to the solutions s/he favours.

⁷⁶ K. ZWIEGERT/H. KÖTZ, *ibid.*, note 4, p. 33 consider these criteria as often the only ultimate ones when it comes to determining which of the various solutions is the best.

played a role. The respective evaluation criteria are laid down in the comments of each Principle.

In both tables below an attempt is made to disclose which approach was chosen with regard to which aspect.

Table 1: Principles Regarding Divorce

Principles	1. Common core was found and selected as the best solution	2. Common core was found, but a better solution was selected	3. Common core was found, but the solution was left to national law	4. No common core was found and the best solution was selected	5. No common core was found and the solution was left to national law
P 1:1(1)	– Permission of divorce				
P 1:1(2)		– No minimum duration of marriage			
P 1:2(1)	– Legal process				
P 1:2(2)			– Competent authority – Moment of dissolution of the marriage		
P 1:3				– Two types of divorce	
P 1:4(1)	– Mutual consent	– No separation period required			
P 1:4(2)				– No agreement on the consequences required	
P1:4(3)	– Forms of consent				– Expression of acceptance of consent
P 1:5		– Reflection period required			
P 1:6(1)				– Content of the divorce agreement	– Binding nature of the agreement – Motions of parental responsibility, children, child maintenance and the division or reallocation of property
P 1:6(2)				– Written form	

Principles	1. Common core was found and selected as the best solution	2. Common core was found, but a better solution was selected	3. Common core was found, but the solution was left to national law	4. No common core was found and the best solution was selected	5. No common core was found and the solution was left to national law
P 1:7(1)	– Determination of the consequences regarding children				
P 1:7(2)	– Full scrutiny of agreements regarding children – Restricted scrutiny of agreements regarding spouses				
P 1:7 (3)					– Determination of the economic consequences for the spouses
P 1:8	– Period of separation – Meaning of separation	– Only separation required			
P 1:9	– Exceptional hardship				
P 1:10(1)	– Determination of the consequences regarding children				
P 1:10(2)					– Determination of the economic consequences for the spouses

Table 2: Principles Regarding Maintenance Between Former Spouses

Principles	1. Common core was found and selected as the best solution	2. Common core was found, but a better solution was selected	3. Common core was found, but the solution was left to national law	4. No common core was found and the best solution was selected	5. No common core was found and the solution was left to national law
P 2:1	– Single maintenance regime				
P 2:2	– Self-sufficiency				
P 2:3	– Need and ability	– Retention of a certain amount by the debtor		– Income and assets to be taken into account	– Standardisation of maintenance calculation
P 2:4	– Spouses' age, health and employment ability – Care of children – Division of duties during the marriage – New marriage of the debtor spouse			– Standard of living during the marriage – New long-term relationship of the debtor spouse	– Notion of children – Relevance of premarital cohabitation – Modification of a maintenance order

Principles	1. Common core was found and selected as the best solution	2. Common core was found, but a better solution was selected	3. Common core was found, but the solution was left to national law	4. No common core was found and the best solution was selected	5. No common core was found and the solution was left to national law
P 2:5	– Advanced, monetary, periodical and lump-sum payments	– Lump-sum payment at the request of one of the spouses			
P 2:6	– Exceptional hardship – No list of limited factors				
P 2:7	– Priority of the claim by children of the debtor spouse – Same ranking of the divorced spouse and new spouse				– Relationship between claims of the divorced spouse and other relatives
P 2:8	– Maintenance for a limited period of time				
P 2:9 (1)	– Termination in the case of marriage or long-term relationship of the creditor spouse	– Equation of formal and informal relationships	– Ex-lege termination or upon request		– Notion of long-term relationship
P 2:9(2)	– No revival of the maintenance claim				
P 2:9(3)	– Automatic termination in the case of the death of the debtor spouse				
P 2:10 (1)	– Freedom of agreement – Content of the agreement and renouncement				– Moment of the agreement – Consequences renouncing the agreement
P 2:10(2)	– Form of the agreement				
P 2:10(3)	– Scrutinising the validity of the agreement		– Notion of validity of the agreement		– Scrutiny and interpretation of the agreement – Moment of scrutiny – Modification of the maintenance agreement

Summing up the different subjects listed under the different approaches should be handled with care⁷⁷ and the interpretation of both tables requires a great deal of reticence. For instance, in the Principles regarding Divorce the requirement of a separation period only in the case of a non-consensual divorce⁷⁸ (second approach) is of much greater relevance than the determination of the economic consequences for the spouses which should be left to national law⁷⁹ (fifth approach). Another example which is taken from the list under the second approach of the Principles regarding Maintenance Between Former Spouses demonstrates that the possibility for either spouse to request a lump-sum payment⁸⁰ is probably less difficult to introduce into national systems than the proposed equal treatment of a formal and informal relationship of the debtor spouse which leads to the termination of the maintenance obligation.⁸¹ Many more examples that illustrate the difference in relevance and importance can be given. Yet again, simply adding together the listed subjects under each approach and a comparison of the figures does not reveal very much. A detailed analysis is therefore indispensable. However, both tables at least show that with regard to many aspects a common core was found and that this common core is considered to be the best solution. Convergence in both fields of law has been proven.

Finally, the question should be raised whether the CEFL has already paid attention to the changes which the Principles would bring to the national laws they are designed to replace. Was it possible to specify how much each law had contributed? In addition, how far would each law be affected? The general absence of these kinds of investigations and explanations can be justified by a lack of time. An exception was made, however, with regard to the one-year separation period which Principle 1:8 determines in the case of a non-consensual divorce due to the fact that the irretrievable breakdown of the marriage has been discarded.⁸² Generally, it should be mentioned, however, that during our discussions an argument in favour or against a certain solution was regularly supported by conclusions such as: “This would never be accepted in my jurisdiction” or “This is in accordance with the solution adopted in my country.” Sometimes, it was difficult to distance oneself from one’s own legal background and to find a balance between, on the one hand, feeling responsible for or representing national solutions and, on the other, thinking from a European perspective. In the end the latter

⁷⁷ With respect to Principle 1:6(1), for instance, four different notions are listed under the fifth approach.

⁷⁸ Principle 1:8.

⁷⁹ Principle 1:7(3).

⁸⁰ Principle 2:5.

⁸¹ Principle 2:9(1).

⁸² Principle 1:8 Comment 2-4, in PEFL book, *ibid.*, note 3, p. 53.

prevailed.⁸³ Hence, regarding the “implementation issue” I would be inclined to suggest that obviously not only CEFL members are able to investigate whether the proposed Principles are acceptable in the(ir) national system(s) in Europe. In order to obtain a probably more objective assessment, in particular, outside observers should embark on this venture. Finally, on a more global scale, a comparison between the PEFL and the Principles of the Law of Family Dissolution which were established by the American Law Institute in 2002⁸⁴ should be pursued.⁸⁵

7. PUBLICATION OF THE PRINCIPLES ON EUROPEAN FAMILY LAW

The last step is the publication of CEFL’s final results in the field of divorce and spousal maintenance. It has already been emphasised that the (first) Principles of European Family Law book(s) can be consulted as a guide for reference in the covered fields. However, due to the comprehensive comparative overviews they should always be read in conjunction with the national reports. We would not have been able to establish the PEFL book without the two integrated versions of the national reports. All three publications belong together⁸⁶ and as a package deal they represent the first step towards a European Restatement of Family Law.⁸⁷ One could even go one step further. The CEFL Principles do not only restate the family laws in Europe but contribute to the coming into existence of a factual European family law.⁸⁸

A final remark concerns the languages used. The three languages in which the Principles have been drafted at the same time are equally authentic. The Dutch, Spanish and Swedish translations were added at a later stage. This choice is based on the language skills of the members of CEFL’s Organising Committee. Translations in other languages are most welcome and will be published on CEFL’s website. However, one

⁸³ W. PINTENS, *ibid.*, note 7, p. 560: “Es zeigt, dass es den Experten gelungen ist, Abstand von ihren eigenen Rechtssystemen zu gewinnen und dass die Verwurzelung des Familienrechts in der Kultur und die Angst vor Kulturverlust sich in Grenzen halten.”

⁸⁴ Principles of the Law of Family Dissolution: Analysis and Recommendations, American Law Institute, 2002.

⁸⁵ T. GLENNON, “An American Perspective on the Debate over the Harmonisation or Unification of Family Law in Europe, Book Review of Perspectives on the Unification and Harmonisation of Family Law in Europe”, *Family Law Quarterly* 2004, p. 209

⁸⁶ They thus provide more than only a good comparative law survey, see in this sense M. ANTOKOLSKAIA, *ibid.*, note 5, p. 182

⁸⁷ K. BOELE-WOELKI, “Naar een Europees Restatement voor familierecht”, *FJR* 2004, pp. 249-256.

⁸⁸ The Common Frame of Reference (COM (2004) 651 final, 11.10.2004, http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm) aims at the improvement of the legislation and the coherence of the existing and future EC law in the area of contract law. See D. STAUDENMAYER, “The Way Forward in European Contract Law”, *ERPL* 2005, pp. 95-104.

should always take into account that without consulting the relevant comparative overviews, the comments and even the national reports – which are all drafted in English – misunderstandings are likely to occur.

8. CONCLUSION

In the foregoing an attempt was made to explain the working method of the self-appointed Commission on European Family Law which has no ties with any government and does not professionally belong to any interest group. Generally speaking, there is a sliding scale of methods and the best approach will always be adapted along the lines of the specific purposes of the research, the subjective abilities of the research team and, last but not least, the affordability of the costs.⁸⁹ Zweigert & Kötz remind us that even today the right method must largely be discovered by gradual trial and error.⁹⁰ Did we nevertheless choose the right method or at least the right direction? The time has come to obtain a critical assessment from outside observers concerning CEFL's results to date.⁹¹ When carrying out such an assessment one should bear in mind that we tried to find a balance between delving into the subject in depth, demonstrating the comparisons, having sufficient room for discussion between the experts, explaining why a certain Principle has been adopted and finalising the first set of Principles within a reasonable period of time.

⁸⁹ V.V. PALMER, *ibid.*, note 37, p. 29.

⁹⁰ K. ZWIEGERT/H. KÖTZ, *ibid.*, note 4, p. 33.

⁹¹ A. AGELL, "The Underlying Principles of Consensual Divorce", this publication, pp. 59-66.

**PART ONE: DIVORCE AND MAINTENANCE
BETWEEN FORMER SPOUSES**

FUTURE DIVORCE LAW – TWO TYPES OF DIVORCE

MARIANNE ROTH

1. INTRODUCTION

Today, divorce is recognised all over Europe and the numbers of divorces are consistently high. However, the question on what basis a divorce should be granted is answered quite differently in the various national laws. There are two basic systems: the monistic jurisdictions recognise only one ground for divorce usually based on an irretrievable breakdown of the marriage,¹ whereas the pluralistic jurisdictions provide a variety of grounds for divorce,² sometimes still including the fault of one of the parties.³ Other forms of divorce are based on mutual consent, irretrievable breakdown or an extended separation period. Often these divorce grounds are combined with an additional element that must be fulfilled, such as an agreement on the consequences of divorce.⁴

Despite all the differences between the various national legal systems, one may recognise common tendencies in the divorce laws of Europe: The judicial scrutiny of the dissolution of a marriage is losing its persuasiveness, while the respect for the privacy of the parties is gaining ground.⁵ Often, the competent authority will not inquire into whether, for instance, an irretrievable breakdown of the marriage has really taken place. Similarly, the new French law permits the judge – upon joint application of the spouses – to grant a divorce based on fault without explicitly stating the indivi-

¹ These are THE CZECH REPUBLIC, ENGLAND AND WALES, GERMANY, HUNGARY, IRELAND, ITALY, THE NETHERLANDS, POLAND, RUSSIA, SCOTLAND and SPAIN.

² Namely AUSTRIA, BELGIUM, BULGARIA, DENMARK, FRANCE, GREECE, LUXEMBOURG, NORWAY, PORTUGAL and SWITZERLAND.

³ This is the case in AUSTRIA, BELGIUM, DENMARK, FRANCE, LUXEMBOURG, NORWAY and PORTUGAL.

⁴ On the various grounds for divorce see D. MARTINY, “Divorce and Maintenance Between Former Spouses – Initial Results of the Commission on European Family Law”, in: K. BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, EFL-Series No. 4, Antwerp, Oxford, New York: Intersentia, 2003, pp. 531-543; D. MARTINY, “Ehescheidung und nachehelicher Unterhalt in Europa”, *European Journal of Comparative Law (EJCL)*, 2004, p. 3, <http://www.ejcl.org/83/art83-3.html>.

⁵ See F. FERRAND, “Agreements on Divorce and Maintenance”, this publication, pp. 71-82.

dual matrimonial offences.⁶ In these cases, the law departs from the general assumption that if two adults declare that their marriage should be dissolved this should be accepted without further investigation. Thus it is that mutual consent as basis for divorce is of growing importance, whereas the principle of fault is losing importance.⁷

Recognising this convergence of laws, but also recognising that the free movement of persons is still hindered by the many remaining differences,⁸ the Commission on European Family Law created ten Principles of European Family Law Regarding Divorce.⁹ These Principles are based on twenty-two national reports from the old and some of the new EU member states – including THE CZECH REPUBLIC, HUNGARY, POLAND – as well as from BULGARIA, NORWAY, RUSSIA and SWITZERLAND.¹⁰

The ten Divorce Principles form part 1 of the Principles of European Family Law and are contained in three chapters: the first chapter comprises the General Principles, namely Principles 1:1 – 1:3, setting out the basic framework for divorce, the second chapter contains the Principles regarding Divorce by Mutual Consent - these are Principles 1:4 – 1:7, and the third chapter deals with Divorce without the Consent of one of the Spouses; the respective Principles are 1:8 – 1:10. This structure already reflects the decision of the Commission on European Family Law that the Principles only recognise two types of divorce: divorce by mutual consent and divorce without the consent of one of the spouses.

⁶ Art. 245(1) French Civil Code; <http://www.legifrance.gouv.fr>; see F. FERRAND, “Aktuelles zum Familienrecht in Frankreich”, *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2004, pp. 1423-1425.

⁷ See D. MARTINY, “Divorce and Maintenance Between Former Spouses – Initial Results of the Commission on European Family Law”, in: K. BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, EFL-Series No. 4, Antwerp, Oxford, New York: Intersentia, 2003, pp. 531-543; D. MARTINY, “Ehescheidung und nachehelicher Unterhalt in Europa”, *European Journal of Comparative Law (EJCL)*, 2004, p. 3, <http://www.ejcl.org/83/art83-3.html>.

⁸ See the Preamble of the Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses. See also N. DETHLOFF, “Arguments for the Harmonisation and Unification of Family Law in Europe”, in: K. BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, EFL-Series No. 4, Antwerp, Oxford, New York: Intersentia, 2003, pp. 37-64 who clearly illustrates that people cannot rely on the continuity of their family relationships when changing their residence to another state.

⁹ K. BOELE-WOELKI/F. FERRAND/C. GONZALES BEILFUSS/M. JÄNTERÄ-JAREBORG/N. LOWE/D. MARTINY/W. PINTENS, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, EFL-Series No. 7, Antwerp, Oxford: Intersentia, 2004.

¹⁰ See Commission on European Family Law (CEFL), <http://www2.law.uu.nl/priv/cefl>. For a printed and integrated version of the national reports laid out according to the question numbers of the questionnaire see K. BOELE-WOELKI/B. BRAAT/I. SUMNER (eds.), *European Family Law in Action*, Vol. I: *Grounds for Divorce*, EFL-Series No. 2, Antwerp, Oxford, New York: Intersentia, 2003.

In the following I will keep the structure of the Divorce Principles and shortly present the ideas expressed in the General Principles, before I will discuss the two types of divorce provided in the Principles of European Family Law.

2. GENERAL PRINCIPLES

2.1. PERMISSION OF DIVORCE

Principle 1:1 para. 1 explicitly states that the law should permit divorce and thereby reflects the current position of all jurisdictions surveyed. Some national laws even recognise a “right to divorce”.¹¹ However, by recommending states to permit divorce Principle 1:1 para. 1 goes beyond the rulings of the European Court of Human Rights which has held that the European Human Rights Convention does not grant a “right to divorce”;¹² and indeed, there is still one European jurisdiction not to permit divorce, namely Malta.¹³

Principle 1:1 para. 2 sets out that no duration of the marriage should be required. An independent requirement of a minimum period of marriage is not the common core in the legal systems surveyed¹⁴ and does not protect the weaker party. His or her protection must be achieved by other means, namely by a reflection period after the commencement of proceedings and appropriate provisions with regard to the consequences of divorce. Thus it was felt justified that no duration of the marriage should be required.¹⁵ The lack of a minimum duration requirement is also intended to foster

¹¹ See, e.g., the new French divorce reform which entered into force on 01.01.2005: Loi no. 2004-439 du 26.05.2004 relative au divorce, J.O. no. 122 du 27.05.2004 page 9319; <http://www.legifrance.gouv.fr/>; F. FERRAND, “Agreements on Divorce and Maintenance”, this publication, pp. 71-82.

¹² *Johnson v Ireland* (1986) 9 EHRR 203; but see *F v Switzerland* (1989) 10 EHRR 411: no arbitrary bars against remarriage.

¹³ Art. 33 of the Maltese Marriage Act, however, recognises foreign divorce decisions for all legal purposes in Malta, if the decision has been rendered by a competent court of the country in which either of the parties is domiciled or of which either of the parties is a citizen. K. BOELE-WOELKI et al., supra note 9, pp. 17, 19.

¹⁴ Only ENGLAND AND WALES and IRELAND have independent requirements of a minimum duration of marriage before a divorce can be sought. For ENGLAND AND WALES see s. 3(1) Matrimonial Causes Act and N. LOWE, English Report, Q 13, supra note 10; for IRELAND see section 5(1)(a) Irish Divorce Act and G. SHANNON, Irish Report, Q 13, supra note 10. However, one has to concede that in over two thirds of the jurisdictions surveyed divorce by consent can only be obtained following a period of separation which has the effect of imposing a requirement of a minimum duration of marriage; K. BOELE-WOELKI et al., supra note 9, pp. 18-19.

¹⁵ Moreover, in jurisdictions such as FINLAND and SWEDEN which no longer recognise the annulment of a marriage, it would be going too far to impose a minimum length of the marriage; K. BOELE-WOELKI et al., supra note 9, p. 19.

the *dédramatisation* of divorce and in particular to favour consensual divorce above unilateral divorce.

2.2. PROCEDURE BY LAW AND COMPETENT AUTHORITY

Principle 1:2 comprises two paragraphs which must be read together:

- “(1) The divorce procedure should be determined by law.
- (2) Divorce should be granted by the competent authority which can either be a judicial or an administrative body.”

Principle 1:2 emphasises that divorce is a secular matter which is governed by a legal process. This reflects the position in all twenty-two jurisdictions surveyed.¹⁶ However, the choice whether there should be a judicial or an administrative process is left to national law. While in most jurisdictions a divorce may only be granted via a judicial process,¹⁷ there are also some jurisdictions which under certain circumstances provide for an administrative process.¹⁸ The Principles’ restraint concerning the determination of the competent authority makes sense, since in general the Principles do not deal with questions of procedure.

2.3. TYPES OF DIVORCE

Principle 1:3 states what is already obvious from the structure of the Principles that there are only two types of divorce: divorce by mutual consent and divorce without consent of one of the spouses. This reduction of divorce categories is based on the realisation that the more divorce is recognised the more it becomes superfluous to list the innumerable situations where a dissolution of the marriage is regarded justified. Other circumstances, such as separation or an agreement as to the consequences, are

¹⁶ K. BOELE-WOELKI et al., supra note 9, pp. 20, 23.

¹⁷ In fourteen of the twenty-two jurisdictions surveyed not only is there a judicial process for divorce, but the parties are also required to attend a court hearing. The only jurisdictions in which the court can grant a divorce based on the papers alone are ENGLAND AND WALES, FINLAND and SWEDEN. It should, however, be acknowledged that even in jurisdictions that insist on a court process to obtain a divorce, that process may often be quasi-administrative in practice, namely, where a judge effectively rubber-stamps a consensual agreement; K. BOELE-WOELKI et al., supra note 9, p. 23.

¹⁸ This is the case in DENMARK, NORWAY, PORTUGAL, RUSSIA and since the 2001 Act Opening Marriage to Same Sex-Couples also in THE NETHERLANDS; there it is possible to obtain a so-called lightning divorce by converting a marriage into a registered partnership; K. BOELE-WOELKI et al., supra note 9, pp. 22 f.

either a question of the conditions for divorce or its consequences and do not justify a multitude of divorce forms.¹⁹

Due to its growing importance, divorce by mutual consent is expressly recognised as the first type of divorce. Divorce without consent - based on factual separation - is the second type of divorce.

3. DIVORCE BY MUTUAL CONSENT

3.1. MUTUAL CONSENT

3.1.1. *Consent as a Basis for Divorce*

The basic Principle for divorce by mutual consent is Principle 1:4. Para. 1 sentence 1 states that divorce should be permitted simply upon the basis of the spouses' mutual consent. Arguments for the establishment of such a separate type of divorce are the growing recognition of the freedom of the spouses to terminate their marriage and the desired encouragement of the spouses to find a solution themselves as to the consequences of divorce.²⁰

Under the European Divorce Principles mutual consent is not treated as a case of irretrievable breakdown. No further investigation into the existence of a marital breakdown and the reasons for it is necessary. Public interest and other interests which may be at stake, namely those of any children, should only be relevant for the consequences of the divorce.²¹

3.1.2. *No Separation Period*

Principle 1:4 para. 1 sentence 2 states that no period of factual separation should be required before the spouses are allowed to file for a divorce. This reflects the legal situation in twelve of the twenty-two jurisdictions surveyed.²² The Principles favour consensual divorce and therefore no impediment regarding any separation period need

¹⁹ K. BOELE-WOELKI et al., supra note 9, p. 25.

²⁰ See F. FERRAND, "Agreements on Divorce and Maintenance", this publication, pp. 71-82; K. BOELE-WOELKI et al., supra note 9, pp. 27 f., 30.

²¹ K. BOELE-WOELKI et al., supra note 9, p. 30.

²² Namely in BELGIUM, BULGARIA, FINLAND, FRANCE, GREECE, HUNGARY, THE NETHERLANDS, POLAND, PORTUGAL, RUSSIA, SWEDEN and SWITZERLAND. In contrast, the remaining ten jurisdictions require a separation period of widely differing length to prevent hasty decisions and to facilitate attempts at reconciliation and mediation. K. BOELE-WOELKI et al., supra note 9, pp. 29 f.

to be established. In the view of the Commission on European Family Law a modern divorce law should not hinder spouses in their efforts to reorganise their family as long as the interests of the children and the weaker spouse are not violated.²³ Their interests, however, are sufficiently protected by a period of reflection upon the commencement of the divorce proceedings – as required under Principle 1:5 – and by appropriate provisions on the consequences of divorce (see Principles 1:6 and 1:7).²⁴

Also, one may argue against a separation period that such a requirement could easily be circumvented, if separation were possible under the same roof, as it is the practice in many jurisdictions.²⁵ So generally, there is no justification for a separation period binding spouses against their corresponding clear and free will as a prerequisite for consensual divorce.

3.1.3. Definition

Principle 1:4 para. 2 defines mutual consent: mutual consent is to be understood as an agreement between the spouses that their marriage should be dissolved. Hence, consent with respect to the divorce itself and consent with respect to the consequences thereof are two separate issues under the Principles. This means: there can be a divorce by mutual consent even if the spouses do not agree on the consequences of their divorce. In such a case the competent authority determines the consequences according to Principle 1:7.²⁶

Notwithstanding this provision, the Principles encourage parties to agree also on the consequences of divorce. If they don't reach an agreement before filing the divorce

²³ See I. SCHWENZER, "Methodological Aspects of Harmonisation of Family Law", in: K. BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, EFL-Series No. 4, Antwerp, Oxford, New York: Intersentia, 2003, pp. 157.

²⁴ K. BOELE-WOELKI et al., *supra* note 9, p. 31.

²⁵ See, e.g., M. ROTH, Austrian Report, Q 24 and 49(c); M. HRUSAKOVA, Czech Report, Q 16(c); D. MARTINY/D. SCHWAB, German Report, Q 16(c); M. MARTIN-CASALS/J. RIBOT/J. SOLE, Spanish Report, Q 16(c); N. LOWE, English Report, Q 16(c); M. MESTON, Scottish Report, Q 49(c); S. PATTI/L. ROSSI CARLEO/E. BELLISARIO, Italian Report, Q 16(c); G. SHANNON, Irish Report, Q 16(c). The national reports are available in an electronic as well as in an integrated, printed version, see *supra* note 10.

²⁶ This largely corresponds to Art. 112 Swiss Civil Code, H. HAUSHEER/S. WOLF, Swiss Report, Q 29; H. HAUSHEER in S. HOFER/D. SCHWAB/D. HENRICH (eds.), *Scheidung und nachehelicher Unterhalt im europäischen Vergleich*, Bielefeld: Giesecke, 2003, p. 295. Many other divorce laws, however, have the spouses' agreement on all or some of the consequences of divorce as a mandatory prerequisite for divorce, see, e.g. M. ROTH, Austrian Report, Q 29; W. PINTENS/E. TORFES, Belgian Report, Q 29; V. TODOROVA, Bulgarian Report, Q 29; F. FERRAND, French Report, Q 29; D. MARTINY/D. SCHWAB, German Report, Q 19; A. KOUTSOURADIS, Greek Report, Q 29; E. WEISS/O. SZEIBERT, Hungarian Report, Q 19; G. OLIVEIRA, Portuguese Report, Q 29, M. MARTIN-CASALS/J. RIBOT/J. SOLE, Spanish Report, Q 19. All national reports are available in an electronic as well as in an integrated, printed version, see *supra* note 10.

papers, a period of reflection is required under Principle 1:5, which gives them the opportunity to come also to an agreement as to the consequences.

3.1.4. *Application*

According to Principle 1:4 para. 3 the agreement may be expressed by means of a joint application of the spouses or by an application by one spouse with the acceptance of the other spouse.²⁷ A similar treatment of this second situation is justified since consent also exists albeit at a later stage of the proceedings. How this acceptance by the other spouse can be expressed is a procedural question and therefore left to the national systems. In any case, however, acceptance should be a positive act; not contesting the application for the dissolution of the marriage is not considered sufficient.²⁸

3.2. REFLECTION PERIOD

3.2.1. *Rationale*

In certain situations Principle 1:5 requires a reflection period in order to prevent hasty decisions.²⁹ This period of reflection should facilitate the spouses' agreement on the consequences of the divorce, particularly concerning child custody and the contact arrangements with regard to the children, if this is possible under national law. To achieve such an agreement also attempts at reconciliation or mediation can be undertaken during the reflection period.³⁰

²⁷ National divorce laws recognise various forms of spousal consent: besides the joint application for divorce by both parties, some jurisdictions also provide for an application by one spouse with the subsequent joining or acceptance of the other spouse; see, e.g., M. ROTH, Austrian Report, Q 23; F. FERRAND, French Report, Q 23; D. MARTINY/D. SCHWAB, German Report, Q 23; H. HAUSHEER/S. WOLF, Swiss Report, Q 23. All national reports are available in an electronic as well as in an integrated, printed version, see *supra* note 10.

²⁸ K. BOELE-WOELKI et al., *supra* note 9, p. 32.

²⁹ Of the twenty-two jurisdictions surveyed only FINLAND and SWEDEN require a reconsideration period subject to certain conditions after the divorce application, see M. SAVOLAINEN, Finnish Report, Q 4; M. JÄNTERÄ-JAREBORG, Swedish Report, Q 4, 14. However, also the three-month period in BELGIUM and FRANCE which must have passed after the first and before the second renewed application for a divorce by consent, may be regarded as a reflection period, see W. PINTENS/E. TORFS, Belgian Report, Q 28; F. FERRAND, French Report, Q 28. All national reports are available in an electronic as well as in an integrated, printed version, see *supra* note 10.

³⁰ K. BOELE-WOELKI et al., *supra* note 9, p. 35.

3.2.2. *Requirements and Duration*

The necessity and length of the reflection period depends on three criteria: the existence of children under the age of sixteen years,³¹ an agreement between the spouses on all the consequences of the divorce, and a factual separation of at least six months.

Principle 1:5 para. 1 deals with the situation that the spouses have younger children:

“If, at the commencement of the divorce proceedings, the spouses have children under the age of sixteen years and they have agreed upon all the consequences of the divorce as defined by Principle 1:6, a three-month period of reflection shall be required. If they have not agreed upon all the consequences, then a six-month period shall be required.”

Principle 1:5 para. 2 concerns spouses who do not have younger children:

“If, at the commencement of the divorce proceedings, the spouses have no children under the age of sixteen years and they have agreed upon all the consequences of the divorce as defined by Principle 1:6(d) and (e), no period of reflection shall be required. If they have not agreed upon all the consequences, a three-month period of reflection shall be required.”

Principle 1:5 para. 3, finally, acknowledges the situation that, at the commencement of the divorce proceedings, the spouses have already lived apart for six months. In this case they do not have to observe any additional period of reflection.

The Principles keep the reflection period of a relative short duration³² in order to make consensual divorce more attractive than a divorce upon the request of one of the spouses. For the same reason no period of reflection is required, if the spouses have

³¹ As to the age limit of sixteen years compare Swedish and Norwegian law: If a spouse demands divorce under section 21 or 22 of the Norwegian Marriage Act and the spouses have children of their marriage under the age of sixteen years, they must attend mediation proceedings in order to reach an agreement concerning the child-related consequences of divorce before the case is brought before the competent authority; T. SVERDRUP, Norwegian Report, Q 50. Under Chapter 5 section 1 of the Swedish Marriage Code spouses who agree that their marriage should be dissolved must first go through a reconsideration period of six months, if they have children under the age of sixteen years; M. JÄNTERÄ-JAREBORG, Swedish Report, Q 4. For the electronic as well as the printed version of the national reports see *supra* note 10.

³² The length of the reflection period of three respectively six months is modelled on Finnish and Swedish law (six-month period) as well as on Belgian and French law (three-month period), section 26 para. 2 Finnish Marriage Act, section 3 Swedish Marriage Code, Art. 231 French Civil Code, Art. 1294 para. 1 Belgian Judicial Code. See M. SAVOLAINEN, Finnish Report, Q 18; M. JÄNTERÄ-JAREBORG, Swedish Report, Q 18; W. PINTENS/E. TORFS, Belgian Report, Q 28; F. FERRAND, French Report, Q 28. For the electronic as well as the printed version of the national reports see *supra* note 10.

already been factually separated for at least six months. During the prescribed reflection period, however, the spouses do not need to live separately.³³

3.2.3. *Summary*

Summarising Principle 1:5 it may be said that a reflection period is required in two cases: firstly, if - at the moment of filing the divorce papers - the spouses have children under the age of sixteen or secondly, if the spouses have not been able to agree upon all the consequences of the divorce. In general, the reflection period is three months long; if both conditions are fulfilled, it is six months.

On the other hand, an immediate divorce – without any period of reflection – is granted, if the spouses have no children under the age of sixteen years and have agreed upon all the consequences of the divorce, or if at the commencement of the proceedings, the spouses have been factually separated for at least six months.

3.3. CONTENT AND FORM OF THE AGREEMENT ON THE CONSEQUENCES

Principle 1:6 defines the content and form of the agreement on the consequences of divorce.

3.3.1. *Content of the Agreement*

Principle 1:6 para. 1 reads:

“The consequences upon which the spouses should have reached an agreement are:

- a) their parental responsibility, where necessary, including the residence of and the contact arrangements for the children,
- b) child maintenance, where necessary,
- c) the division or reallocation of property, and
- d) spousal maintenance.”

It was the unanimous view of the Commission on European Family Law that divorce by consent should facilitate and give effect to the spouses’ agreements since the spouses show that they have agreed to take joint responsibility for the past and the future by regulating the consequences of the divorce.³⁴ The restriction “*where necessary*” was

³³ K. BOELE-WOELKI et al., *supra* note 9, pp. 34 f.

³⁴ Twelve of the twenty-two jurisdictions surveyed require or favour an agreement between the spouses on the consequences of divorce (AUSTRIA, BELGIUM, BULGARIA, DENMARK, IRELAND, FRANCE, GERMANY, GREECE, HUNGARY, PORTUGAL, SPAIN, SWITZERLAND); others at least allow the spouses to make joint

adopted with regard to the child-related consequences in lit. (a) and (b), because in many jurisdictions certain aspects of parental responsibility remain the same after divorce;³⁵ and in some jurisdictions, such as in ENGLAND AND WALES, there are limitations on an agreement regarding child maintenance.³⁶

3.3.2. *Writing Requirement*

Principle 1:6 para. 2 provides that such an agreement should be in writing. For reasons of seriousness and clarity the Principles establish the writing requirement for agreements on the consequences of divorce. Even though the majority of jurisdictions surveyed do not require any special form, as a matter of practice such agreements are usually drawn up in writing everywhere.³⁷

3.4. DETERMINATION OF THE CONSEQUENCES

3.4.1. *Consequences Regarding Children*

Principle 1:7 deals with the determination of the consequences. The first paragraph of Principle 1:7 states that the competent authority should determine the consequences for the children as mentioned in Principle 1:6(a) and (b), but that any agreement between the spouses should be taken into account insofar as it is consistent with the best interests of the child.

The determination of the consequences has to take place in all cases, even in cases where the spouses have reached a full agreement, since child matters should not exclusively be the subject of an agreement. Also, in all cases the child has the right to be heard according to Article 12 of the UN Convention on the Rights of the Child. However, the issues of when and how the child should be heard are determined by national law.

proposals (THE CZECH REPUBLIC, DENMARK, ENGLAND AND WALES, THE NETHERLANDS, RUSSIA). For details see K. BOELE-WOELKI et al., *supra* note 9, pp. 37 ff.

³⁵ This is true for all jurisdictions surveyed except for HUNGARY and SWITZERLAND. For details see the national reports on parental responsibilities, <http://www2.law.uu.nl/priv/cefl>; see also the integrated version of the national reports: K. BOELE-WOELKI/B. BRAAT/I. SUMNER (eds.), *European Family Law in Action*, Vol. III: *Parental Responsibilities*, EFL-Series No. 9, Antwerp, Oxford, New York: Intersentia, 2005.

³⁶ Spouses are not allowed to exclude the minimum maintenance required by the Child Support Act which is based on the parents' income. See K. BOELE-WOELKI et al., *supra* note 9, pp. 40 f.; N. LOWE, English Report, Q 19, available in an electronic as well as in an integrated, printed version, *supra* note 10.

³⁷ K. BOELE-WOELKI et al., *supra* note 9, pp. 42, 132.

With regard to the scrutiny of the agreements concerning the children, there is a clear common core. All systems accept full scrutiny by the competent authority. In practice, however, it will commonly only exercise its competence in exceptional cases.

In any case, the competent authority has to take into account any “admissible” agreement between the spouses; that is an agreement permitted by national law. Such permission concerns the consequences at stake, the content of the agreement and also the date when such an agreement has been made.³⁸

3.4.2. *Consequences Regarding Spouses*

The second paragraph of Principle 1:7 states that the competent authority should at least scrutinise the validity of the agreement concerning the spouses as mentioned in Principle 1:6(c) and (d).³⁹ As regards the scrutiny of the agreements concerning the spouses there is no real common core in the various national legal systems. The only common factor is that there exists a certain tendency to restrict the scrutiny in the belief that spouses are adults and that nobody can tell them what their best interests are.⁴⁰

Considering the wide variety of solutions in the various legal systems, the Principle only sets a minimum standard and prescribes scrutiny concerning the validity of the agreement. The interpretation and the content of the term validity is left to national law, which will decide whether a contract is invalid, for example for illegality, immorality, incorrect information, mistake, fraud, duress or unfair advantage.⁴¹ Further scrutiny should be decided by national law. However it should be noted that too much scrutiny would lead to an increase in conflicts between the spouses and thus could frustrate consensual divorce which, according to the Principles, should be favoured as much as possible.⁴² Also left to national law is the question of how the scrutiny has to take place, e.g. in a written or an oral procedure.

The third paragraph of Principle 1:7 states that if the spouses have not made an agreement or have reached only a partial agreement on the matters mentioned in Principle 1:6(c) and (d) – the economic consequences –, the competent authority

³⁸ K. BOELE-WOELKI et al., *supra* note 9, pp. 48, 50.

³⁹ Principle 1:7 only deals with agreements in the context of consensual divorce. The more general questions on the validity of maintenance agreements is dealt with in Principle 2:10.

⁴⁰ K. BOELE-WOELKI et al., *supra* note 9, p. 48.

⁴¹ This matter forms part of contract law which is not dealt with by the Commission on European Family Law. For the harmonisation of contract law see O. LANDO/H. BEALE, *Principles of European Contract Law*, Parts I and II, The Hague, London, Boston: Kluwer Law International and Taxation Publishers, 2000; O. LANDO/E. CLIVE/A. PROM/R. ZIMMERMANN, *Principles of European Contract Law*, Part III, The Hague, London, Boston: Kluwer Law International, 2003, pp. 227 ff., who do not deal with invalidity arising from illegality, immorality or lack of capacity because of the great variation among the legal systems.

⁴² K. BOELE-WOELKI et al., *supra* note 9, pp. 48 f.

should determine the consequences of the divorce as in a case of non-consensual divorce.

This paragraph opens the possibility for a consensual divorce even in cases where the spouses cannot agree or can only partially agree on the consequences of the divorce.⁴³ Even in such a situation preference is given to a consensual divorce. However, whether and to what extent the competent authority should determine the economic consequences for the spouses is left to national law. Also the procedural requirements for such a decision are provided by national law.⁴⁴

4. DIVORCE WITHOUT THE CONSENT BY ONE OF THE SPOUSES

4.1. FACTUAL SEPARATION

4.1.1. *Meaning*

Now we turn to the second type of divorce: divorce without the consent by one of the spouses. Principle 1:8 permits such unilateral divorce if the spouses have been factually separated for one year. This Principle provides a simple objective test: by eliminating any reference to fault or irretrievable breakdown it avoids any undesirable investigation into the state of the marriage and thus respects the personal integrity and autonomy of the spouses.

As in the overwhelming majority of the European jurisdictions surveyed the term “factual separation” in Principle 1:8 embraces the idea that marital life between the spouses must have ended. The separation should be intentional at least in the sense that one spouse believes that the marriage has broken down.⁴⁵ However, it is not necessary for the spouses to live in separate dwellings. Conversely, living in separate dwellings does not necessarily mean that marital life has ended.⁴⁶

⁴³ A similar provision exists in Switzerland: Art. 112 Swiss Civil Code, see supra note 26.

⁴⁴ K. BOELE-WOELKI et al., supra note 9, p. 50.

⁴⁵ This reflects the majority of the jurisdictions surveyed: AUSTRIA, BELGIUM, ENGLAND AND WALES, FRANCE, GERMANY, IRELAND, ITALY, PORTUGAL and SPAIN. Only in four jurisdictions it is sufficient that the separation has resulted in the marital breakdown: BULGARIA, THE CZECH REPUBLIC, DENMARK and SCOTLAND. K. BOELE-WOELKI et al., supra note 9, p. 53.

⁴⁶ This corresponds to the legal situation in all jurisdictions surveyed which base non-consensual divorce (in whole or in part) on a period of separation: AUSTRIA, BELGIUM, BULGARIA, THE CZECH REPUBLIC, ENGLAND AND WALES, FRANCE, GERMANY, GREECE, IRELAND, ITALY, THE NETHERLANDS, POLAND, PORTUGAL, RUSSIA, SCOTLAND and SPAIN. K. BOELE-WOELKI et al., supra note 9, pp. 53, 56.

4.1.2. Comparative Overview

The absence of any reference to fault is consistent with the general development in the legal systems surveyed. Many jurisdictions have completely abandoned fault. And even systems that partially hold on to fault, have often developed in the direction of non-fault divorce in practice. In any event, it has proved to be difficult to allocate fault solely to one spouse.⁴⁷

Even though the majority of jurisdictions require an irretrievable breakdown of the marriage as a prerequisite of non-consensual divorce,⁴⁸ the Commission on European Family Law abandoned this requirement, which in fact does not protect the weaker spouse and seems to be a meaningless additional hurdle. Rather, factual separation alone is considered sufficient upon which to base divorce. The respondent will always be protected by the Principle on the consequences of the divorce. It must be noted, however, that the common core in this respect is no longer followed: Principle 1:8 embraces a better law approach.⁴⁹

On the other hand, insofar as Principle 1:8 provides for a period of separation on which to base non-consensual divorce, it reflects a clear majority of jurisdictions. In fifteen out of the twenty-two jurisdictions surveyed specific provision is made for non-consensual divorce to be obtained in whole or in part on the basis of separation.⁵⁰ Only a minority of jurisdictions base non-consensual divorce solely on irretrievable breakdown without requiring any period of separation.⁵¹ In FINLAND and SWEDEN, finally, a divorce can be unilaterally requested, irrespective of any prior separation or any other ground for divorce. These two jurisdictions, however, provide for a mandatory six-

⁴⁷ K. BOELE-WOELKI et al., supra note 9, p. 55; see also W. PINTENS, “Grundgedanken und Perspektiven einer Europäisierung des Familien- und Erbrechts (Teil 1)”, *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2003, p. 334; P. WATZLAWICK/J. BEAUVIN/D. JACKSON, *Menschliche Kommunikation*, 10th ed., Bern: Hans Huber Verlag, 2000, pp. 151 ff.; P. H. NEUHAUS, “Ehescheidungsgründe aus rechtsvergleichender Sicht”, *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 1968, pp. 36 ff.

⁴⁸ Thus, the first draft of the Divorce Principles still contained the irretrievable breakdown requirement in correspondence to the common core.

⁴⁹ K. BOELE-WOELKI et al., supra note 9, pp. 51 f., 55.

⁵⁰ These are AUSTRIA, BELGIUM, THE CZECH REPUBLIC, DENMARK, ENGLAND AND WALES, FRANCE, GERMANY, GREECE, IRELAND, ITALY, NORWAY, PORTUGAL, SCOTLAND, SPAIN and SWITZERLAND. The majority of these systems require a *de facto* separation; only DENMARK, FRANCE, NORWAY and SWITZERLAND use a *de jure* separation as a ground for divorce. K. BOELE-WOELKI et al., supra note 9, pp. 51 f., 55.

⁵¹ Namely BULGARIA, HUNGARY, THE NETHERLANDS, POLAND and RUSSIA. K. BOELE-WOELKI et al., supra note 9, p. 54.

month period of reflection after the application for divorce, unless the parties have already lived apart for two years.⁵²

Although Principle 1:8 comes close to adopt the model operating in FINLAND and SWEDEN, it does not require a period of reflection. However, the one-year separation period in itself allows for a certain degree of reflection. In this way a compromise has been reached between the majority of jurisdictions and the special Scandinavian approach.⁵³

4.1.3. Duration

There is considerable variance as to the required length of factual separation among the jurisdictions surveyed, ranging from one year in DENMARK and NORWAY (after a decree on separation) to three years in AUSTRIA, GERMANY and PORTUGAL and four years in IRELAND.⁵⁴ Hence, the period of one year in Principle 1:8 would speed up non-consensual divorces – insofar as they are based on separation – in almost all the jurisdictions surveyed. As divorce has been reformed within Europe the requisite periods of separation have tended to be shortened⁵⁵ and Principle 1:8 continues this process. The intention is to provide a sufficiently lengthy period from which it can be reasonably deduced that the marriage has no future; but at the same time the period may not be too long, given that it would no longer be possible to have instant divorces on grounds of fault or reprehensible behaviour.⁵⁶

⁵² See M. SAVOLAINEN, Finnish Report, Q 4, 15, supra note 10; M. JÄNTERÄ-JAREBORG, Swedish Report, Q 4, supra note 10: in SWEDEN the six-month reflection period only applies in the case of a contested divorce or when the spouses have a child under the age of sixteen years.

⁵³ K. BOELE-WOELKI et al., supra note 9, pp. 54 f.

⁵⁴ See I. LUND-ANDERSEN/L. KRABBE, Danish Report, Q 47; T. SVERDRUP, Norwegian Report, Q 47; M. ROTH, Austrian Report, Q 44, 47; D. MARTINY/D. SCHWAB, German Report, Q 15; G. OLIVEIRA, Portugese Report, Q. 47; G. SHANNON, Irish Report, Q 14. All national reports are available in an electronic and an integrated, printed version, supra note 10.

⁵⁵ The separation period has recently been reduced to two years in France (from previously six years) and in Switzerland (from previously four years); Art. 237 French Civil Code, Art. 114 Swiss Civil Code. F. FERRAND, “Aktuelles zum Familienrecht in Frankreich”, *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2004, p. 1425; F. FERRAND, French Report, Q 47, supra note 10; H. HAUSHEER, “Verkürzung der Trennungsfrist nach Art. 114 des schweizerischen ZGB auf zwei Jahre”, *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2004, p. 1432; H. HAUSHEER/S. WOLF, Swiss Report, Q 47, supra note 10. See also D. HENRICH in S. HOFER/D. HENRICH/D. SCHWAB (eds.), *Scheidung und nachehelicher Unterhalt im europäischen Vergleich*, Bielefeld: Gieseking, 2003, pp. 421 ff.; D. MARTINY, “Ehescheidung und nachehelicher Unterhalt in Europa”, *European Journal of Comparative Law (EJCL)*, 2004, p. 7, <http://www.ejcl.org/83/art83-3.html>.

⁵⁶ In ten of the jurisdictions surveyed non-consensual divorce can be obtained on some basis other than separation, usually in relation to the behaviour (commonly violent or abusive) or insanity of one spouse. K. BOELE-WOELKI et al., supra note 9, pp. 55 f.

4.2. EXCEPTIONAL HARDSHIP TO THE PETITIONER

To safeguard against any possible injustice, Principle 1:9 permits a divorce on the basis of exceptional hardship to the petitioner.⁵⁷ It states that the competent authority may grant a divorce in cases of exceptional hardship to the petitioner even when the spouses have not been factually separated for one year.

The term exceptional hardship only comprises extreme cases of maltreatment, domestic violence or other serious offences, which render the continuation of the marriage unbearable. The proof of fault, however, is not necessary; for example the violence may be due to the other spouse's illness. What is decisive is the effect upon the petitioner.⁵⁸

4.3. DETERMINATION OF THE CONSEQUENCES

The last Principle – Principle 1:10 – finally deals with the determination of the consequences for the children and the spouses in the case of a non-consensual divorce. As in the case of consensual divorce Principle 1:10 provides only some guidelines with respect to the consequences of divorce. It does not suggest a common approach but leaves the issues largely to national law.

Principle 1:10 para. 1 reads:

“Where necessary, the competent authority should determine: (a) parental responsibility, including residence and contact arrangements for the children, and (b) child maintenance. Any admissible agreement of the spouses should be taken into account insofar as it is consistent with the best interests of the child”.

Para. 2 deals with the consequences regarding the spouses:

“On or after granting the divorce the competent authority determines the economic consequences for the spouses taking into account any admissible agreement made between them”.

⁵⁷ Of the jurisdictions surveyed only GERMANY provides such an explicit exceptional hardship clause, see § 1565 para. 2 German Civil Code; D. MARTINY/D. SCHWAB, German Report, Q 12. However, many systems that base divorce on irretrievable breakdown or separation also have a ground for an immediate divorce which may be considered as an implied hardship clause; see S. PATTI/L. ROSSI CARLEO/E. BELLISARIO, Italian Report, Q 4, 11 and 14; N. LOWE, English Report, Q 11; T. SVERDRUP, Norwegian Report, Q 4; M. MARTIN-CASALS/J. RIBOT/J. SOLÉ, Spanish Report, Q 3, 4, 12 and 14. The national reports are available in an electronic as well as in an integrated, printed version, see *supra* note 10.

⁵⁸ K. BOELE-WOELKI et al., *supra* note 9, p. 58.

The general statement that the competent authority determines the consequences recognises the great diversity of national solutions in the same way as Principles 1:6 and 1:7 for consensual divorces.

5. CONCLUSION

This overview of the ten European Divorce Principles leads me to the following conclusion. In a number of cases the Principles are adopting the common core found in the national legal systems surveyed. This is primarily true for the General Principles, namely for the permission of divorce (Principle 1:1 para. 1) and the prescribed legal process (Principle 1:2 para. 1), but also to some extent for the Principles regarding Divorce by Mutual Consent. While the significance (Principle 1:4 para. 1) and forms of mutual consent (Principle 1:4 para. 3) correspond to the common core, a better solution was selected for the requirements of consensual divorce: in contrast to most national laws the European Divorce Principles do not require a certain period of separation or non cohabitation before filing the divorce papers (Principle 1:4 para. 1) nor do they make an agreement on the consequences of divorce a pre-condition of divorce (Principle 1:4 para. 2). Nevertheless, they do take account of the necessity to prevent hasty decisions and to facilitate agreements on the child-related and economic consequences of divorce by requiring a period of reflection after the commencement of the proceedings (Principle 1:5).

Also in other cases the European Divorce Principles clearly follow a better law approach.⁵⁹ Above all, this is done with regard to Divorce without the Consent of one of the Spouses which is granted upon expiry of a one year period of separation without any further requirements (Principle 1:8). Many systems are reluctant to permit unilateral divorce; those which recognise such a ground for divorce, however, demand additional requirements such as an extended period of factual separation, irretrievable breakdown or at least a reflection period after applying for divorce.

Nevertheless, the European Divorce Principles reflect common tendencies in the various national laws and societies in Europe: party autonomy and the protection of privacy are gaining importance with regard to the dissolution of a marriage, but also – to some extent – with regard to the consequences of divorce.⁶⁰ Today, the dispute resulting from a marital breakdown mainly concerns its consequences: the spouses'

⁵⁹ For details see M. ANTOKOLSKAIA, "The Better Law Approach and the Harmonisation of Family Law", in: K. BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, EFL-Series No. 4, Antwerp, Oxford, New York: Intersentia, 2003, pp. 159-182; K. BOELE-WOELKI, "The Working Method of the Commission on European Family Law", this publication, pp. 15-38.

⁶⁰ See F. FERRAND, "Agreements on Divorce and Maintenance", this publication, pp. 71-82.

property rights and maintenance obligations as well as their rights and duties concerning children.⁶¹ In these matters, parties are increasingly taking resort to mediation or similar forms of alternative dispute resolution, in order to reach an out of court settlement.⁶²

Taking account of these developments the present Divorce Principles aim at a *dédramatisation* of divorce without neglecting the interests of the children and the weaker spouse. Hence, the Principles clearly favour consensual divorce above unilateral divorce. In case of unilateral divorce they provide a simple objective test – the expiry of a one-year period of factual separation – and thereby avoid an undesirable investigation into the state of the marriage. As to the consequences of divorce, the Principles encourage the spouses to come to an amicable agreement. Such an agreement, however, is not a prerequisite for the divorce. Rather, where this is necessary, the competent authority decides on all child-related and the economic consequences of the divorce.

In concluding it may thus be said that under the Principles of European Family Law regarding Divorce both types of divorce provide easy and public access to the dissolution of marriage assuring at the same time the necessary protection of the children and the weaker spouse.

⁶¹ D. MARTINY, “Divorce and Maintenance Between Former Spouses – Initial Results of the Commission on European Family Law”, in: K. BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, EFL-Series No. 4, Antwerp, Oxford, New York: Intersentia, 2003, pp. 531, 543; D. MARTINY, “Ehescheidung und nachehelicher Unterhalt in Europa”, *European Journal of Comparative Law (EJCL)*, 2004, p. 2, <http://www.ejcl.org/83/art83-3.html>.

⁶² Which of course is subject to a certain judicial scrutiny; the consequences concerning children are finally scrutinized or decided by the competent authority in all examined jurisdictions. K. BOELE-WOELKI et al., *supra* note 9, pp. 44 ff., 61 f.

THE UNDERLYING PRINCIPLES OF CONSENSUAL DIVORCE

ANDERS AGELL

1. INTRODUCTION

The “Principles of European Family Law regarding Divorce and Maintenance Between Former Spouses” have been construed in a very careful manner by “the Commission on European Family Law”. The underlying comparative work on the law in 22 European countries is impressive. This paper on “consensual divorce” has been written in order to fit in between the previous and the succeeding papers on other subthemes dealing with divorce and its consequences. The following considerations are to some degree based on my own ideas of three different stages for construing legal rules with rationality as a general guideline for achieving good results. Such an approach is desirable for legal scholarship, although valuations are unavoidable in legal matters.

As a first stage the question is what *legal policy*, including values and aims, should be chosen as a starting point. The identification of *concepts* for the realisation of the aims can be seen as the second stage. The *construction of the rules* as such, their prerequisites and consequences, constitute the third stage.

However, it is another question how the rules will function practically. Could they possibly also lead to other consequences than fulfilling of the legal policy underlying the legislation? What impact will the rules probably have on the behaviour of people? What is the need for exceptions or flexibility in order to avoid undesired results in individual cases? Those questions should not be forgotten. They can be dealt with in connection with the different stages of rationality or as an independent, general matter, influencing the preliminary conclusions of the different stages.

2. THE VALUE OF HARMONISATION?

How important is the harmonisation of the conditions for divorce in Europe? A sharing of joint values and concepts in our part of the world seems to be a good thing. On the other hand, some national differences in the conditions for divorce do not

create any great practical problems. A divorce can take place only once in each marriage. Whether the change of civil status occurs in one country or another is of less importance provided that the conditions are more or less similar.

As an object for harmonisation the rules on so-called ancillary matters (custody of and maintenance for children, division of property, alimony and the division of pension rights) are more important than the equalisation of the conditions for divorce. Great differences in the rules on ancillary matters can imply an accidental result based on the spouses' nationality or domicile. A more or less accidental outcome can also depend on the choice of applicable rules according to private international law.

Although divorce takes place only once, the solutions for ancillary matters have long-lasting effects. They normally remain the same if the former spouses later move from one country to another although the solutions would have been different, if the ancillary matters had not been dealt with prior to the change of domicile.

In some countries the modernisation of the divorce conditions might be desirable also in order to stimulate the frequency of marriage! The marriage rate has declined and unmarried cohabitation is now widespread. If the legislators believe that marriage is a good thing, then the conclusion of marriages should not be counteracted by rigorous divorce conditions which might refrain some people from marrying at all. Fairly liberal divorce rules can also bring to an end the misuse of divorce grounds such as adultery or desertion as fictions in order to obtain a quick divorce. Such a stance within the law decreases respect for the legal system.

3. THE IMPORTANCE OF A SPOUSE'S WISH TO TERMINATE THE MARRIAGE

Although Principles 1:4 – 1:7¹ on divorce by consent is the prescribed theme of this paper, I must necessarily also touch upon the principles for divorce without consent. Otherwise the analysis would be too superficial. This approach includes some basic issues which will undoubtedly emerge at every attempt to harmonise European divorce laws.

Principle 1:3 gives the general starting point for the proposed Principles: "The law should permit divorce by mutual consent and divorce without consent of one of the spouses." This is the strategy of harmonisation on the basis of a "European common

¹ See for the text of the Divorce Principles the Annex at the end of this contribution.

core” of the existing domestic laws in different countries. Such a strategy might be more realistic than the search for “the better law” or the “best law”. The mentioned alternatives are well known and exist in one way or another all over Europe as perhaps the two main, modern alternatives for the dissolution of a marriage.

It is nevertheless problematic how the two chosen divorce grounds are connected and how they could be looked upon in different respects. It is not all that easy to *carry through* the starting points in the construction of the necessary legal rules with respect to any common core approach. An alternative might be to combine the starting point of a common core for the basic solutions with more open considerations as far as the carrying through of the starting points is concerned. As said above, it does not matter very much if some differences remain between the divorce conditions in different European countries.

Thus, Principle 1:3 mentions two grounds for divorce, that is either divorce based *on* mutual consent by the spouses or divorce *without* the consent of one of the spouses. The latter ground could be reformulated as divorce on application by one spouse alone. The reformulation indicates that divorce could be based on either mutual consent *or* an application by one spouse alone. However, such a statement, which is an interpretation of Principle 1:3, does not provide any understanding of the underlying intention.

The legal-technical difficulty created by the wording of Principle 1:3 seems to be connected to the existence of two alternatives for divorce without the consent of both spouses. In addition to factual separation (Principle 1:8) also exceptional hardship to the petitioner (Principle 1:9) is a ground for divorce, and for good reasons according to my mind.

An alternative way of summarizing the grounds for divorce (Principle 1:3) could be: “The law should permit divorce by mutual consent of the spouses. Divorce should also be granted by an application by one spouse alone after a period of factual separation or in case of exceptional hardship to the petitioner.”

For many countries these Principles express a more modern approach than the attitude that a permanent breakdown of the marriage should represent the legal policy underlying different statutory rules even when consent is mentioned as a condition for divorce (cf. i.e. English law). It seems questionable whether such a legal technique really combines what I mention as the three stages of rationality in a satisfactory way. Of course valid French law with its very different divorce alternatives, sometimes commented upon as divorce “à la carte”, offers a much more complicated picture. Even the abolition of different “faults” as grounds for divorce seems to be a good idea.

As far as legal policy is concerned, it is an important step for the modernisation of divorce laws to leave the question of when a marriage can be terminated to the spouses themselves.² Such a starting point does not exclude periods of reconsideration, requests for separation etc. for avoiding overhasty divorces.

Principle 1:4 on mutual consent also includes cases when one spouse alone makes the petition and the other consents in a response to the court.

In a way Principle 1:8 is based on the still more liberal approach, that the *unilateral* wish of one spouse alone is a ground for divorce, although a period of reflection should always be applied when the other spouse has not given his or her consent. However, the philosophy underlying the proposed Principles does not build upon the distinction whether both spouses or only one spouse want to terminate the marriage as being decisive in the way that I have indicated here. The necessity of factual separation is seen as the decisive element when both spouses have not given their consent to divorce.

4. THE RELATIONSHIP BETWEEN A PERIOD OF REFLECTION AND FACTUAL SEPARATION

There are, as the Principles have been construed, links between divorce based on mutual consent and on factual separation. In my following considerations I leave aside exceptional hardship as a special case. However, what I am going to say on the so-called ancillary matters, the consequences of divorce, is equally valid for divorce based on exceptional hardship as for divorce after factual separation.

Principle 1:4 on divorce by mutual consent contains the additional statement: “No period of factual separation should be requested.” However, Principle 1:5 (1) and (2) requires the application of a reflection period in some situations. Point (1) refers to the existence of children, even when the spouses have concluded an agreement on all ancillary matters. But even if the spouses do not have any children, a three-month period of reflection shall be required if the spouses have not agreed upon all the consequences of divorce, point (2).

² As a member of a working party at a comparative colloquium on divorce and its consequences I have myself been proposing that there should be, as far as legal policy is concerned, only one ground for divorce, that is the wish of a spouse to terminate the marriage. That recommendation, however, was the result of an effort to find the best possible solution, not to apply a “common core approach”. See A. AGELL, “Grounds and Procedures for Divorce”, in L. WEITZMAN/M. MACLEAN (eds.), *The Economic Consequences of Divorce. The International Perspective*, Oxford, Clarendon 1992, pp. 53-65.

It is of decisive importance that an agreement on ancillary matters makes a reflection period unnecessary according to Principle 1:5 only if the agreement has been concluded before “the commencement of the divorce proceedings”. In any case, however, no period of reflection is required if, at the commencement of the divorce proceedings, “the spouses have been factually separated for six months”, Principle 1:5 (3). Thus, in all respects the decisive, additional condition for divorce by mutual consent of the spouses has to be established not later than at the commencement of the divorce proceedings.

Factual separation according to Principle 1:5 (3) plays another role than the possibility for one spouse alone to obtain divorce after a factual separation of one year. However, the statement in Principle 1:4 (1) that “no period of factual separation should be required” for divorce by mutual consent does not seem to be quite true. According to Principle 1:5 (3) factual separation can also be of importance for divorce by mutual consent, since the request for a previous agreement on ancillary matters is no longer upheld as a condition for a divorce by mutual consent.

I will add one more observation on the rather complicated relationship between Principle 1:4, divorce by mutual consent, and Principle 1:8, divorce based on factual separation. What I have said so far could provide arguments for rewriting the Principles, implying that a divorce can always be granted after a factual separation of six months when both spouses consent to divorce *or* after a separation of 12 months if only one of the spouses consents. Such a rewriting, however, would also make other alterations necessary. For today my considerations might first of all represent an intellectual exercise. The final assessment must be based on a more complete analysis of the proposed rules.

5. THE ANCILLARY MATTERS

Irrespective of the grounds for divorce, the ancillary matters have to be resolved. For divorce by the consent of both spouses those issues are mentioned in Principle 1:6, which covers agreements concerning children as well as agreements on the division of property and on maintenance/alimony to be paid after divorce by one ex-spouse to the other. Exactly the same issues also emerge in the case of divorce based on factual separation or exceptional hardship. Technically, however, Principle 1:6 is construed primarily for divorce based on mutual consent.

According to both Principle 1:7 and Principle 1:10 the court has to control the contents of an agreement between the spouses whether the ground for divorce is mutual consent or factual separation respectively.

One question here is whether the slight differences, which are indicated by the wording in Principles 1:7 and 1:10, are indeed necessary. Could not the two rules be put together in one single rule? This might be possible although the starting point for Principle 1:10 is that an agreement has not been concluded and that the court should decide on the ancillary matters. However, even if the spouses do not mutually want to have the marriage dissolved, it is a good thing if they can agree on the ancillary matters.

6. A REQUEST FOR AN AGREEMENT “IN ADVANCE”

The Principles for divorce by mutual consent are based on a wish to *promote agreements* between the spouses on the ancillary matters *before* the commencement of divorce proceedings. This aim has been promoted so strongly that an agreement, concluded later, no longer provides a right to divorce based on mutual consent.

The reflection period in Principle 1:5 constitutes perhaps the most interesting part of the proposal, but also the greatest question mark for both legal policy and legal technique.

The ancillary matters are listed in Principle 1:6 point (1) under (a)-(c). Please observe the different, well known items.

If an agreement on ancillary matters has not been concluded before the commencement of the divorce proceedings, a period of reflection of either 3 or 6 months will apply. But even *if* an agreement *has* been concluded before the commencement of the divorce proceedings, a reflection period will nevertheless be necessary, when there are children of the family (see Principle 1:5 point 1).

The compulsory period of reflection when there are children is understandable as such in the interest of avoiding overhasty divorces. In that situation Principle 1:5 does offer a changed perspective with respect to the foregoing arguments for basing divorce on the mutual consent of the spouses. In the first comment on Principle 1:4 on divorce by mutual consent, it is said that only the wishes of the spouses, and neither public interest in general nor the interest of any children, should prevent the freedom of the spouses to terminate their marriage. The interest of the children is said to be relevant only for the *consequences* of the dissolution of the marriage.

However, the statement of the aims of the rules, to give the spouses themselves complete freedom to decide on the termination of their marriage, is in fact not totally

upheld. The interest of the children *is* taken into account, but in a very limited way. I do not criticize this solution. On the contrary, a question to be discussed is whether the interest of the children is given sufficient weight as far as the conditions for divorce are concerned.

Let us consider the request for an agreement “in advance” as an issue of legal policy. The underlying purpose is, above all, to stimulate the spouses to solve the ancillary matters by themselves. One question to be raised is whether this aim of legal policy might be contradictory to another, traditional purpose of the divorce conditions. The rules should not stimulate overhasty divorces, if family stability is considered as a value of its own.

However, a request for an agreement in advance might force the spouses to consider the alternatives very carefully and to draw the conclusion that it would be better to continue their marriage. From that point of view Principle 1:5 might not only stimulate agreements, but also counteract overhasty divorces. The objective of facilitating attempts at reconciliation or mediation is in fact also emphasized in the comments on the Principle. It is a crucial and important issue whether Principle 1:5 could stimulate agreements for divorce, and thereby also divorce as such, more than it stimulates reconsideration on the part of the spouses concerning the value of their marriage, especially with respect to the children.

Principle 1:5 is technically somewhat complicated. One difficulty is whether the spouses should be allowed to withdraw their first petition based on mutual consent, and to come back with a new, similar application when they have reached an agreement which was concluded after the first petition based on mutual consent. The answer is left open in the comments. It is said to be an issue of national, procedural law whether the spouses can commence new proceedings for divorce on mutual consent with reference to the agreement that was concluded too late for the first application. With all respect for the learned legal scholars behind that argument, I consider this way of avoiding an answer through a reference to the law of procedure somewhat formalistic. Irrespective of the use of different labels in order to divide the law into different parts, the admissibility of using the agreement for a new petition could have considerable practical importance and should be considered when the rules are construed.

7. ALTERNATIVE POLICIES FOR MODERN DIVORCE RULES

The decisive question of legal policy with respect to Principle 1:5 is of a more general character. The question is what possible alternatives there are for avoiding overhasty divorces as well as for facilitating agreements between the spouses on ancillary matters.

First, one solution, which is quite different to Principle 1:5, would be to apply a compulsory consideration period for divorce as such based on mutual consent, especially when there are children, but without any request for an agreement at all. If the spouses cannot themselves resolve the ancillary matters, the court has to do so when the divorce decree has been granted. That solution presupposes, of course, that there is a possibility for interim measures until final solutions to the ancillary matters have been found.

Second, there is also a solution somewhere in between. The granting of a rapid divorce by mutual consent could presuppose agreements on the ancillary matters but with acceptance also of agreements concluded *after* the commencement of the divorce proceedings. This solution roughly corresponds to the ideas underlying the 1996 English act on divorce, an act, however, that seems to have been too complicated and has been thrown overboard without being finally introduced in the English legal system.

For my part I have not been totally convinced of the advantages of Principle 1:5 in its proposed form compared to possible alternatives. Two final observations could be added. A reflection period of either 3 or 6 months is comparatively short. The distinction between 3 months and 6 months is rather slight and difficult to understand.

8. ADDITIONAL REMARKS

Finally, two additional points of view could be stressed although they fall outside my direct commitment.

First, it is a very important issue to what extent a court should control the contents of an agreement as it is stated in Principle 1:7 for mutual consent and, for that matter, in Principle 1:10 for divorce after separation. The issue is connected not only to the requests for binding agreements in different parts of family law, but also to the possibilities for a spouse to have an agreement revised at some time in the future.

Second, in connection with the discussions on divorce the importance of family counselling should at least be mentioned. It is a good thing when spouses seek family counselling as soon as they face serious problems in their married life, and when the necessary resources for family counselling are available.

ANNEX. PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE

PREAMBLE

Recognising that, notwithstanding the existing diversities of national family law systems, there is nevertheless a growing convergence of laws;

Recognising that the free movement of persons within Europe is hindered by the remaining differences;

Desiring to contribute to the harmonisation of family law in Europe and to facilitate further the free movement of persons within Europe;

Desiring to balance the interests of spouses and society and to support actual gender equality, taking into account the best interests of children,

The Commission on European Family Law recommends the following Principles:

PART I: DIVORCE

CHAPTER I: GENERAL PRINCIPLES

PRINCIPLE 1:1 PERMISSION OF DIVORCE

- (1) The law should permit divorce.
- (2) No duration of the marriage should be required.

PRINCIPLE 1:2 PROCEDURE BY LAW AND COMPETENT AUTHORITY

- (1) The divorce procedure should be determined by law.
- (2) Divorce should be granted by the competent authority which can either be a judicial or an administrative body.

PRINCIPLE 1:3 TYPES OF DIVORCE

The law should permit both divorce by mutual consent and divorce without consent of one of the spouses.

CHAPTER II: DIVORCE BY MUTUAL CONSENT

PRINCIPLE 1:4 MUTUAL CONSENT

- (1) Divorce should be permitted upon the basis of the spouses' mutual consent. No period of factual separation should be required.
- (2) Mutual consent is to be understood as an agreement between the spouses that their marriage should be dissolved.
- (3) This agreement may be expressed either by a joint application of the spouses or by an application by one spouse with the acceptance of the other spouse.

PRINCIPLE 1:5 REFLECTION PERIOD

(1) If, at the commencement of the divorce proceedings, the spouses have children under the age of sixteen years and they have agreed upon all the consequences of the divorce as defined by Principle 1:6, a three-month period of reflection shall be required. If they have not agreed upon all the consequences, then a six-month period shall be required.

(2) If, at the commencement of the divorce proceedings, the spouses have no children under the age of sixteen years and they have agreed upon all the consequences of the divorce as defined by Principle 1:6(d) and (e), no period of reflection shall be required. If they have not agreed upon all the consequences, a three-month period of reflection shall be required.

(3) No period of reflection shall be required, if, at the commencement of the divorce proceedings, the spouses have been factually separated for six months.

PRINCIPLE 1:6 CONTENT AND FORM OF THE AGREEMENT

(1) The consequences upon which the spouses should have reached an agreement are:

- (a) their parental responsibility, where necessary, including the residence of and the contact arrangements for the children,
- (b) child maintenance, where necessary,
- (c) the division or reallocation of property, and
- (d) spousal maintenance.

(2) *Such an agreement should be in writing.*

PRINCIPLE 1:7 DETERMINATION OF THE CONSEQUENCES

(1) In all cases the competent authority should determine the consequences for the children as mentioned in Principle 1:6(a) and (b), but any admissible agreement of the spouses should be taken into account insofar as it is consistent with the best interests of the child.

(2) The competent authority should at least scrutinise the validity of the agreement on the matters mentioned in Principle 1:6(c) and (d).

(3) If the spouses have not made an agreement or reached only a partial agreement on the matters mentioned in Principle 1:6(c) and (d), the competent authority may determine these consequences.

CHAPTER III: DIVORCE WITHOUT THE CONSENT OF ONE OF THE SPOUSES

PRINCIPLE 1:8 FACTUAL SEPARATION

The divorce should be permitted without consent of one of the spouses if they have been factually separated for one year.

PRINCIPLE 1:9 EXCEPTIONAL HARDSHIP TO THE PETITIONER

In cases of exceptional hardship to the petitioner the competent authority may grant a divorce where the spouses have not been factually separated for one year.

PRINCIPLE 1:10 DETERMINATION OF THE CONSEQUENCES

(1) Where necessary, the competent authority should determine:

- (a) parental responsibility, including residence and contact arrangements for the children, and
- (b) child maintenance.

Any admissible agreement of the spouses should be taken into account insofar as it is consistent with the best interests of the child.

(2) On or after granting the divorce the competent authority may determine the economic consequences for the spouses taking into account any admissible agreement made between them.

DIVORCE AND SPOUSAL AGREEMENTS

FRÉDÉRIQUE FERRAND

1. INTRODUCTION

Divorce is becoming an increasingly common “accident of life” which should therefore be dedramatised (“*dédramatisé*”). More and more countries recognize a real “right to divorce”¹ (see, for example, the new French divorce reform of 26 May 2004 which will come into force on 1st January 2005 and which now states that a divorce may be granted at the request of one spouse if there is a case of “*altération définitive du lien conjugal*”² – a definitive deterioration of the marital bond, which requires a factual separation of at least two years³). More importance is given to spousal consent, to the couple’s contractual freedom, and therefore to their agreements as to the consequences of the divorce. Some scholars insist upon the fact that not only divorce, but also more generally speaking marriage itself is increasingly subject to this contractual freedom of the spouses.⁴ Sometimes, the new evolution is even defined as a “privatization” of divorce⁵ which is established by two phenomena: on the one hand, more respect is shown to the spouses’ private life (they do not always have to explain the reasons why they want to divorce; objective situations are increasingly required by national law which sometimes does not even require the spouses to mention the reasons for their

¹ See PH. MALAURIE/H. FULCHIRON, *La famille*, Paris, Defrénois, 2004, n° 420 (“*du droit de divorcer au droit au divorce?*”).

² See Article 237 new Code civil (“*Le divorce peut être demandé par l’un des époux lorsque le lien conjugal est définitivement altéré*”). Any hardship clause has now disappeared in French Law, this is the reason why French scholars acknowledge the existence of a real right to divorce.

³ See Article 238 new Code civil (“*L’altération définitive du lien conjugal résulte de la cessation de la communauté de vie entre les époux, lorsqu’ils vivent séparés depuis deux ans lors de l’assignation en divorce*”).

⁴ See e.g. H. FULCHIRON, “Les métamorphoses des cas de divorce”, *Répertoire Defrénois* 2004 n° 37 999 p. 1103 and especially p. 1121; comp. M.-Th. MEULDERS-KLEIN, “La problématique du divorce dans les législations d’Europe occidentale”, *RIDC* 1989, p. 7; Le démariage consensuel, *RTDCiv.* 1995, p. 559. See also ECHR, 18 December 1986, *Johnston v./ Ireland*, Serie A n°112.

⁵ See H. FULCHIRON, *ibid.* See also PH. MALAURIE/H. FULCHIRON, *La famille*, *op. cit.*, n°440 who stress the words “*libéralisation, délégalisation, contractualisation*”; F. DEKEUWER-DESFOSSEZ, “Divorce et contrat”, in *La contractualisation de la famille*, Paris, Economica, 2001, p. 67.

separation⁶), on the other hand, there is a generalised recognition of spousal agreements on divorce and divorce consequences. This is what the Commission on European Family Law (CEFL) has chosen, proposing only two types of divorce: divorce by mutual consent of both spouses, and divorce after a separation of one year, which can be defined as an objective divorce based on the acknowledgement that the marriage has failed. The CEFL Principles also acknowledge the importance of the spouses' individual desire in the conviction that an agreement accepted by both spouses will be more easily and spontaneously enforced than a court order based only on the judge's opinion. Agreements are deemed to contribute to bringing peace into spousal relationships and to prevent conflicts.

In four provisions the CEFL Principles on Divorce and Spousal Maintenance after Divorce deal with spousal agreements: Principles 1:6 and 1:7 relating to a divorce jointly requested by both spouses, Principle 1:10 relating to a divorce without the consent of one spouse, and Principle 2:10 which relates to agreements on maintenance between the spouses after divorce. Two problems must to be dealt with: first, the admissibility of such spousal agreements on the consequences of the divorce (2) and, secondly, if this question is positively answered, as the CEFL Principles do, the issue of a possible scrutiny of the spousal agreement by a competent authority (3).

2. THE ADMISSIBILITY OF SPOUSAL AGREEMENTS ON THE CONSEQUENCES OF DIVORCE

Similar to certain national laws, the CEFL Divorce Principles distinguish between divorce by mutual consent, and a divorce which is requested by only one spouse while considering the possibility or even the necessity of spousal agreements on the consequences of the divorce. This distinction is a logical one since the philosophy of both these types of divorce is not the same: one is based on the principle of the spouses' common desire to divorce, while the second type can lead to a divorce being imposed on one spouse by the other.

⁶ K. BOELE-WOELKI, *et al*, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, European Family Law Series No. 7, Intersentia-Antwerp 2004, p. 14: "The law departs from the general assumption that if two adults declare that their marriage should be dissolved this should be accepted without further investigation. The idea that the privacy of the parties should be respected is also gaining ground."

For **divorce by mutual consent**, the general assertion of the validity of spousal agreements on the consequences of divorce is contained in Principle 1:6 which states that

- “1. *The consequences upon which the spouses should have reached an agreement are*
 - (a) *their parental responsibility, where necessary, including the residence of the child and the contact arrangements for the children,*
 - (b) *child maintenance, where necessary,*
 - (c) *the division or reallocation of property, and*
 - (d) *spousal maintenance.*
2. *Such an agreement should be in writing.*”

This means that a spousal agreement is not only allowed, but even desirable. Spouses who make a joint petition should in principle agree on all the divorce consequences both for themselves and for their children. This corresponds, for example, to the French system which requires of the spouses filing a joint divorce petition (*divorce sur requête conjointe*) that they should present an arrangement including all the consequences of the divorce, an arrangement which is subject to the scrutiny of the family judge.⁷ The comparative overview of the CEFL Principles shows that in the case of divorce by mutual consent⁸ twelve⁹ of the twenty-two jurisdictions surveyed require or favour an agreement between the spouses on the consequences of the divorce. A real divorce by mutual consent should for these jurisdictions encompass a full agreement on the divorce and on (almost) all of its consequences. This is part of the spouses' responsibility, namely that they should take joint responsibility for the past and the future by regulating the consequences of the divorce. The German § 630 para. 1 n°3 Code of Civil Procedure (ZPO) states, for example, where the “*einverständliche Scheidung*” (divorce by mutual consent) is concerned that the petition of the spouses must contain a common declaration by the spouses either concerning the fact that the spouses have agreed to maintain common parental responsibilities so that a judicial decision is not necessary, or in case a judicial order is required, a common petition by the spouses with regard to parental responsibilities. The spouses shall also agree upon child maintenance and upon the matrimonial home. See also Principle 1:5 on the Reflection period, which shortens (1:5 (1)) or even suppresses (1:5 (2)) this period if the spouses have agreed on all the consequences of the divorce.

⁷ See Article 250-2 new C. civil. See also Article 232 C. civil which is applicable until 1 January 2005 and which stated that the family judge can reject the agreement if it is not consistent with the children's interests or with the interests of one spouse. In the new provision, the family judge, when rejecting the agreement, invites the spouses to present a new agreement within six months.

⁸ Or even in other cases of divorce, for example in a divorce based on irretrievable breakdown, some national law provisions require a spousal agreement on the consequences of divorce: GERMANY, HUNGARY, IRELAND and SPAIN.

⁹ AUSTRIA, BELGIUM, BULGARIA, DENMARK, IRELAND to some extent, FRANCE, GERMANY, GREECE, HUNGARY, PORTUGAL, SPAIN and SWITZERLAND.

Nevertheless, and contrary to French law for example, the CEFL Principles accept that a divorce decree can be issued even if the spouses have not made an agreement or reached only a partial agreement on the matters mentioned in Principle 1:6.¹⁰ In such a case the competent authority will determine the consequences that have not been agreed upon by the spouses. The reason for such a liberal solution is that the Principles aim to make divorce easier if both spouses agree to the divorce but cannot reach complete agreement as to its consequences. A lack of agreement as to the consequences of the divorce or merely a partial agreement, should not be an obstacle to the granting of the divorce, even though one can wonder whether a really consensual divorce should not encompass consent as to its consequences.

Furthermore, Principle 1:10 gives priority to spousal agreements in the case of a **divorce based on separation of at least one year**. Indeed, it states that “*any admissible agreement of the spouses should be taken into account insofar as it is consistent with the best interests of the child*”.

To determine the validity of such agreements on the consequences of the divorce, three criteria must be taken into consideration: the contents of the agreement (2.1), its date (2.2) and its form (2.3).

2.1. CONTENTS OF THE AGREEMENT

The consequences of the divorce related to the spouses themselves are given more latitude than those relating to the children, whose interests should be protected even against a common desire of both parents. This is the reason why the CEFL Principles make a distinction between these two kinds of consequences of divorce.

2.1.1. *Agreement Relating to the Consequences of Divorce for the Spouses Themselves*

In the case of **divorce by mutual consent** the Principles expect the spouses to agree not only on the divorce but also – if possible – on all the divorce consequences which are listed in Principle 1:6. The consequences relating to the spouses mentioned in this provision are the division or reallocation of property and spousal maintenance after divorce. These are financial matters upon which the spouses can decide almost completely freely.

¹⁰ This solution has been chosen with regard to the comparative analysis which does not show a strong tendency in Europe in favour of the necessity of a spousal agreement dealing with the main consequences of divorce.

In the case of a **divorce without the consent of one spouse** the Principles state that the competent authority may determine the economic consequences for the spouses “*taking into account any admissible agreement made between them*”.¹¹ This means that the spouses are not obliged to present an agreement as to the consequences of the divorce; but if they do so, this agreement is favoured and will be taken into consideration.

In both these types of divorce the CEFL Principles make a distinction between the consequences of divorce for the spouses and the consequences for the children. The child must be protected against a possible common decision of the parents which would not be in his/her best interests. Such a distinction is usual in national law provisions.

2.1.2. *Agreement Relating to the Consequences of Divorce for the Children*

When the spouses want to obtain a **divorce by mutual consent**, they should agree not only on the consequences for themselves, but also for the children: parental responsibilities (“*where necessary*” because under some national law systems parental responsibilities are not affected by a divorce at all), including the child’s residence and the contact arrangements, and child maintenance (again “*where necessary*”).¹² But in this respect the parents do not have complete contractual freedom. The competent authority shall determine all these consequences of divorce for the children. It will take into account a possible spousal agreement, but only if it is consistent with the child’s best interests. As we will see later, this means a genuine control of this concept by the competent authority in order to prevent erroneous or misguided parental decisions.

In the case of a **divorce without the consent of one spouse** the competent authority shall determine, where necessary, the issues relating to the children. If the parents are able to reach an agreement on these issues, it will be taken into consideration subject to the same conditions as for a divorce by mutual consent (consistency with the child’s best interests).

These solutions show that the CEFL Principles are not opposed to such spousal agreements that can facilitate the enforcement of the measures relating to the consequences of divorce. But, where children are concerned, the competent authority (the court or administrative body, depending on national law) should examine the child’s interests before accepting any spousal arrangement.

¹¹ Principle 1:10 § 2.

¹² Principle 1:6 § 1.

2.2. DATE OF THE AGREEMENT

The CEFL Principles do not deal directly with the issue of the date on which the agreement was made. This is nevertheless an important question which has been discussed at length within the Organizing Committee. A previous version of the Principle dealing with maintenance agreements stated that *“the competent authority may scrutinise a maintenance agreement to safeguard the interests of children and, having regard to the foregoing Principles, the interests of the creditor and the debtor spouse. In carrying out this scrutiny, the competent authority should have regard to all the circumstances and in particular to when the agreement was made.”*

In the last version of the Principles this reference to when the agreement was made has disappeared. Why is this so? It is in order to bring into line the Principles dealing with divorce (that did not mention the date of the agreement) and the Principle on maintenance agreements between the spouses. Nevertheless, and even if many jurisdictions surveyed favour the spouses’ freedom to decide consensually on the divorce consequences, an agreement entered into many years in advance can be very dangerous for a “weaker” spouse who, for example, renounces his/her future right to maintenance. The national reports do sometimes mention the case of a pregnant woman accepting that she will renounce certain rights in order to get married.¹³ Some countries therefore require that the agreement must have been made during the marriage and not prior thereto (e.g. The Netherlands¹⁴) or even like France (case law) or Poland¹⁵ only during the divorce proceedings themselves.¹⁶ The CEFL Principles do not provide any precise direction in this regard. They merely mention a possible scrutiny of the validity of the agreement by the competent authority; the scope of the scrutiny will therefore depend on national law.

¹³ See e.g. two very important German decisions by the Constitutional Court (*Bundesverfassungsgericht*), BVerfG, 6 February 2001, *NJW* 2001, p. 957; 29 March 2001, *NJW* 2001, p. 2248: the court shall not accept a matrimonial contract which has only been signed because of an important disparity between the negotiation position of the parties (e.g. pregnancy) and which leads to particularly unilateral contractual obligations. See L. BERGSCHNEIDER, “Eheverträge und Scheidungsvereinbarungen”, *FamRZ* 2004, p. 1757.

¹⁴ See Article 1:558 Dutch Civil Code.

¹⁵ See MĄCZYŃSKI/SOKOŁOWSKI, Polish Report, Q 102 in K. BOELE-WOELKI/B. BRAAT/I. SUMNER, *European Family Law in Action*, Volume II: *Maintenance Between Former Spouses*, European Family Law Series No. 3, Intersentia-Antwerp 2003.

¹⁶ Cass. civ. 2, 21.03.1988, *Bull. Civ.* I, no. 74.

2.3. FORM REQUIREMENT

The CEFL Principles favour spousal agreements. The easiest way to do this would have been to avoid any form requirement for such agreements. They could then have been, for example, made orally before the competent authority which would have recorded and confirmed them. However, some other concerns must be addressed: the contents of the agreement must be clearly proved and without any possible dispute. This is why Principles 1:6 § 2 and 2:10 § 2 require that the agreement should be in writing, even if many jurisdictions surveyed do not require any special form.¹⁷ Many national reports state that no form is legally required but that, in practice, it is usual that the spousal agreement is entered into through a notary public, a lawyer or is at least in writing. A written document will facilitate the proof of the spousal arrangements. This is the reason why the CEFL Principles finally opted for the written form.¹⁸ A written document also facilitates a possible scrutiny of the spousal agreements by the competent authority.

3. THE POSSIBLE SCRUTINY OF SPOUSAL AGREEMENTS BY THE COMPETENT AUTHORITY

Two issues arise with respect to scrutinizing the spousal agreement on the consequences of divorce: first, whether there should be a scrutiny at all, or whether contractual freedom should in any case prevail (3.1); secondly, if indeed any scrutiny is possible, what extent should it should have (3.2)?

3.1. SHOULD THERE BE ANY SCRUTINY?

With respect to the issue of the possibility of scrutinizing the spousal agreement, national laws have opted for differing solutions. But in almost all systems a distinction is made between the divorce consequences for the children and those for the spouses, since the consequences and the interests involved are quite different.

Most legal systems give a competent authority the power to scrutinize the **agreements concerning the children**. Not only the legality but also the merits of the agreement

¹⁷ See Principle 2:10, commentary “Form of the agreement”.

¹⁸ In some countries a written agreement is only required when it concerns real property, see e.g. French law, Article 1097 French New Code of Civil Procedure.

are checked with regard to the child's best interests.¹⁹ In some systems like in Germany²⁰ or in England and Wales, the spouses can only make some proposals²¹ but are not allowed to agree on parental responsibilities. In Germany, the § 1697a BGB states that the court shall, in principle, while deciding on parental responsibilities, take into account the facts and possibilities, the interests of all parties and – as the most important criterion – the child's interest (*das Wohl des Kindes*). The court will make use of its full competence to decide on these issues. In other systems like Belgium, the Netherlands or Sweden, the competent authority exercises a limited review of the parental agreement. According to the new French Law of 4th March 2002 concerning parental responsibilities, the parents can apply to the family court to obtain the *homologation* (judicial confirmation) of the agreement in which they have organized parental responsibilities after their separation and have fixed the amount of child maintenance.²² The family judge will confirm the agreement unless it does not “sufficiently protect the child's interest or if the parents' agreement was not freely provided”.²³

With regard to the **divorce consequences related to the spouses**, the systems vary a great deal. Apart from a few systems (Catalonia, Sweden) where the agreement is not scrutinized at all,²⁴ there are two main streams: one analyzing the agreement as a contractual matter excluding full scrutiny and allowing only the control of legality or validity, and one stressing the spouses' interests and controlling whether the agreement sufficiently protects the interests of each spouse, or is not unfair. Again, some legal systems distinguish between these matters (division of property, maintenance etc.).

The CEFL Principles allow a certain scrutiny of both kinds of divorce consequences dealt with in a spousal agreement: consequences for the children and consequences for the spouses. But the extent of the scrutiny is not the same in both cases.

¹⁹ For many examples in the national laws, see Principle 1:7, Commentary p. 33, Consequences for the children.

²⁰ See Article 1630 § 1 German Civil Procedure Code.

²¹ For the German rules, see §§ 1671 ff BGB and especially § 1697a BGB which states that the court shall, in principle, while deciding on parental responsibilities (*elterliche Sorge*), take into account the facts and possibilities, the interests of all parties and as the most important criterion the child's interest (*Wohl des Kindes*). As in French law, the German provisions do not distinguish between divorce and factual separation of the parents. The same rules apply in both cases.

²² Article 373-2-7 C. civil.

²³ Article 373-2-7 § 2 C. civil: “Le juge homologue la convention sauf s'il constate qu'elle ne préserve pas suffisamment l'intérêt de l'enfant ou que le consentement des parents n'a pas été donné librement.”

²⁴ Like in Catalonia or Sweden, see Article 78 Catalanian Family Code; for Sweden see JÄNTERÄ-JAREBORG, Swedish Report, Q 20 in K. BOELE-WOELKI/B. BRAAT/I. SUMNER, *European Family Law in Action*, Volume I: *Grounds for Divorce*, European Family Law Series No. 2, Intersentia-Antwerp 2003.

3.2. EXTENT OF THE SCRUTINY

It is almost impossible to report on whether a scrutiny of the spousal agreement is allowed without dealing at the same time with the extent of this scrutiny. As stated above, the scrutiny of the agreement is possible both for the agreements concerning the children and for those relating to the divorce consequences for the spouses. The difference between these two kinds of issues is therefore not whether or not any scrutiny is possible, but the extent of the possible control.

The CEFL Principles reflect the idea that the protection of children must be ensured even against a possible spousal arrangement which is not consistent with the child's best interests. Therefore Principle 1:7 (for divorce by mutual consent) and Principle 1:10 (for divorce without the consent of one spouse) both state that the competent authority shall itself determine the **consequences of the divorce for the children**: parental responsibilities, the child's residence, contact arrangements, and child maintenance. The court or the administrative body decides itself, but should take any parental agreement into account subject to two conditions:

- 1) first, whether this agreement is valid, and
- 2) second, whether it is consistent with the child's best interests.

The power to decide remains in the hands of the competent authority, and the parents only have a right to make proposals based on their agreement.

The basis of the CEFL solutions is that in issues relating to children, the competent authority shall mostly make an order *ex officio* in case the divorce proceedings require a decision on the exercise of parental responsibilities and child maintenance, which is not always the case in certain national legal systems.

With regard to the **divorce consequences for the spouses**, the CEFL Principles are more liberal because they deal with the rights of adults who are deemed to be able to defend their own interests (but is this really always the case?). In the case of a divorce by mutual consent, the competent authority shall "*at least scrutinize the validity of the agreement.*"²⁵ One could ask what "*at least*" actually means in this context. These two short words refer in fact to national law, and mean that a minimum scrutiny of the validity of the agreement must take place, but that national law may provide a broader scrutiny which could even encompass a control of the merits of the agreement e.g. with regard to the interests of each spouse, the fairness or reasonableness of the agreement,

²⁵ Principle 1:7 § 2 for the issues of division or reallocation of property and spousal maintenance.

or even with regard to the State's interests²⁶ when a spouse totally renounces his/her maintenance claim. This wording thus takes into account the different extent of the scrutiny which is admissible in the European jurisdictions surveyed. The Principles do not aim to impose a strict and uniform solution for all European countries, but rather to try to take into consideration the peculiarities of each national system while laying down a minimum level of scrutiny in the interest of legality and possibly of fairness. Even legal systems which for a long time accepted the broad contractual freedom of the spouses including before marriage (such as Germany with *Eheverträge*) have recently set some limits for reasons of good morals (*Sittenwidrigkeit*, § 138 BGB), fairness and good faith (§ 242 BGB, *Treu und Glauben*).²⁷ The German *Bundesgerichtshof* (BGH, 11 February 2004) now requires from the lower court that it should first ascertain whether the spousal contract is valid with regard to § 138 BGB (good morals); if not, the lower court shall apply the legal rules on the consequences of divorce. If the spousal agreement is valid, the lower court shall scrutinize whether the contract is consistent with § 242 BGB (*Treu und Glauben*, control of possible abuse, *Missbrauch*).

After having looked at the newest CEFL Principles on the subject of Divorce and Spousal Maintenance, I would like to conclude with the following thoughts.

²⁶ See e.g. GERMANY and RUSSIA: a renouncement of maintenance by one spouse should not lead to a future lack of means on the part of this spouse and to costs (social benefits) at the expense of society, see MARTINY/SCHWAB, German Report, Q 103; ANTOKOLSKAIA, Russian Report, Q 103.

²⁷ See BGH, 12. Zivilsenat, 12 February 2004, website www.bundesgerichtshof.de. The German Constitutional Court (*Bundesverfassungsgericht*) has had a real influence on this evolution in the case law since it delivered an important decision on the possible control of the contents of such spousal contracts (*Eheverträge*). The *Bundesgerichtshof* (BGH, 11 February 2004, *NJW* 2004, p. 930) now requires from the inferior court that it should first check whether the spousal contract is valid with regard to § 138 BGB (good morals); if not, the inferior court shall apply the legal rules on divorce consequences. If the spousal agreement is valid, the lower court shall scrutinize whether the contract is consistent with § 242 BGB (*Treu und Glauben*, controlling any possible abuse, *Missbrauch*), see J. BREDHAUER, "Der Ehevertrag in der Praxis", *NJW* 2004, p. 3072; L. BERGSCHNEIDER, "Eheverträge und Scheidungsvereinbarungen", *FamRZ* 2004, p. 1757. Nevertheless, the German Court of Justice (*Bundesgerichtshof*) admits that it is not possible to answer generally the question of the validity of such spousal agreements in the case of a possible divorce (see *FamRZ* 2004, p. 604: "Nach Auffassung des Senats lässt sich nicht allgemein und für alle denkbaren Fälle abschließend beantworten, unter welchen Voraussetzungen eine Vereinbarung, durch welche die Ehegatten ihre unterhaltsrechtlichen Verhältnisse oder ihre Vermögensangelegenheiten für den Scheidungsfall abweichend von den gesetzlichen Vorschriften regeln, unwirksam ist (§ 138 BGB) oder die Berufung auf alle oder einzelne vertragliche Regelungen unzulässig macht (§ 242 BGB)").

4. CONCLUSION

The large-scale admissibility of spousal agreements on the consequences of divorce is part of the modern tendency²⁸ to promote settlement in all judicial disputes (see the Recommendation of the Council of Europe reference R (98)1 on Family Mediation,²⁹ Report of the European Commission for the Efficiency of Justice – CEPEJ – “Advancing legal and judicial approaches to mediation in civil, family and commercial matters” 2004, Green Paper of the European Commission on Alternative Dispute Resolutions³⁰...). The basic principle of mediation is self-determination between the parties, requiring flexibility concerning the mediation process which should enable the parties to control the outcome of the mediation.³¹ Especially in family law, where contacts between family members should be maintained after divorce, mediation and spousal agreements can be the best way to guarantee the effective enforcement of the divorce order which should rely on such agreements or at least take them into account. Nevertheless, limits must of course be set: safeguard clauses must protect the children and the weakest spouse. This is a question of fairness and of higher values that cannot be totally left to spousal contractual freedom and consent, even if the modern tendency seems to insist upon the right of the spouses not only to obtain a divorce, but also to decide almost freely on the divorce consequences and on their right to privacy. Personally, I think that the admissibility of any scrutiny of spousal agreements in the context of divorce is not a procedural question but a decisive material issue. I also think – but this is a big issue! – that the CEFL Principles should not be afraid of dealing to a certain extent with procedural law, because it is now a myth to maintain that procedural law cannot and should not be harmonized. The various EC Regulations and

²⁸ See for the most recent example in national law the French Divorce Reform Law Act of 26 May 2004 (Article 255 new Code civil, which allows the family judge to propose a mediation measure to the spouses (if the spouses agree, the judge will appoint a mediator) or even to issue an injunction on the spouses to compel them to see a family mediator who shall inform them about the matter and the development, and progress of the mediation); see also A. BÉNABENT, “La réforme du divorce article par article”, Paris, Defrénois 2004, n°74. Comp. Report of the CEPEJ *Advancing legal and judicial approaches to mediation in civil, family and commercial matters*, Strasbourg, May 2004, p. 3 (“Mediation should be in principle voluntary for the parties. In order to encourage parties to enter into mediation process national authorities could carefully consider the possibility of automatic assignment of certain cases to mediation, referral discretion of a judge, cost sanctions for the party which wouldn’t participate in good faith or which would refuse to participate unless good cause be shown. However, a right of the parties to opt out of mediation should be guaranteed to a reasonable extent”).

²⁹ See also Recommendation of the Council of Europe Rec. (2002) 10 on mediation in civil matters.

³⁰ See the Green Paper on alternative dispute resolution in civil and commercial matters COM (2002)196 final.

³¹ See the Report of the CEPEJ *Advancing legal and judicial approaches to mediation in civil, family and commercial matters*, Strasbourg, May 2004.

Directives³² that have already been issued during the last four years demonstrate, on the contrary, that procedural law is increasingly becoming an essential way of achieving material rights and freedoms. This does not necessarily mean total, across the board unification, but rather the rationalisation of the solutions and, where necessary, the power to ensure the free movement of persons, and thus, a certain degree of harmonisation.

³² See e.g. the new EC Regulations on jurisdiction, recognition and enforcement of judicial decisions (Brussels I of 22 December 2000 and Brussels IIa of 23 November 2003), the EC Regulation on cooperation between courts of the Member States in the taking of evidence n° 1206/2001 of 28 May 2001, EC Regulation n°1348/2000 of 29 May 2000 on the service of judicial and extrajudicial documents in civil or commercial matters, EC Directive n° 2003/8 of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid, and EC Regulation n°805/2004 of 21 April 2004 establishing a European Payment Order for uncontested claims.

CEFL'S MAINTENANCE PRINCIPLES: THE CONDITIONS FOR MAINTENANCE

CRISTINA GONZÁLEZ BEILFUSS

1. INTRODUCTION

The main purpose of this paper is to present, explain and discuss the Principles on Maintenance Between Former Spouses developed by the Commission on European Family Law. Particular attention will be paid to the conditions for maintenance which are dealt with in Chapter II of the Maintenance Principles (Conditions for maintenance). In order to provide a more comprehensive examination of CEFL's maintenance principles Chapters I (General principles) and III (Specific issues) will as well be taken into account. This paper will however not deal with Principle 2:10 (Maintenance Agreement). Agreements are dealt with extensively in Frederique Ferrand's contribution.¹

2. GENERAL QUESTIONS

2.1. THE DEFINITION OF POST DIVORCE MAINTENANCE

What is CEFL's concept of maintenance between former spouses? The Principles as such do not define or describe what is meant by post-divorce maintenance. In the Introduction to the Maintenance Principles it is however stated that the term maintenance embraces "all kinds of monetary payments by one party to the other for the purpose of support".² This would include payments which are not primarily or exclusively for the purpose of support such as the French *prestation compensatoire* or

¹ This publication pp. 71-82.

² K. BOELE-WOELKI et al., *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, European Family Law Series No. 7 Intersentia-Antwerp 2004, p. 71. Hereinafter cited as Principles.

the Spanish *prestación compensatoria*.³ It allows as well to deal with Common law systems which do not distinguish between maintenance between former spouses and the settlement of property after divorce.⁴ The fact that there is no proper concept of post divorce spousal maintenance in a given legal system does therefore not render the principles irrelevant as long as this system knows of some kind of support obligation between divorced spouses. In order to adapt to CEFL's principles it is moreover not necessary to adopt its terminology .

CEFL's approach is in line with other international approaches. The Hague Convention on the law applicable to maintenance obligations which was concluded on the 2nd October 1973 refers, in its article 8, to maintenance between divorced spouses. CEFL's terminology is as well consistent with case law by the European Court of Justice as regards the interpretation of the 1968 Brussels Convention on the recognition and enforcement of judgments in civil and commercial matters.⁵

There are a number of reasons for looking at this latter instrument more closely. It should first be noted that the Brussels Convention rules are applicable, either through the Brussels Convention itself, through its successor the Brussels I regulation⁶ or by virtue of the so called parallel Lugano Convention,⁷ in 28 European jurisdictions including the 25 EC Member States⁸ as well as Iceland, Norway and Switzerland.⁹ It was therefore important to keep in line with the Brussels I concept of maintenance if one wanted to remain inside a common framework of reference which has already acquired legitimacy in Europe. This matter may seem of little importance now that the EC has only entered the realm of family law,¹⁰ a view to other areas in which there

³ See MARTIN CASALS/RIBOT/SOLÉ, Spanish National Report, Q 61 and FERRAND, French National Report, Q 61. The National reports upon which CEFL based its work are available on CEFL's web site (<http://www2.law.uu.nl/priv/cefl/>). There is as well an integrated version of the National Reports. See K. BOELE-WOELKI/B. BRAAT/I. SUMNER, *European Family Law in Action, Volume II: Maintenance Between Former Spouses*, European Family Law Series No. 3 Intersentia-Antwerp, 2003. I have cited from Vol II. Reference is made to the National Reports.

⁴ See D. MARTINY, "Ehescheidung und nachehelicher Unterhalt in Europa", *EJCL*, vol. 8.3 October 2004, p. 21

⁵ See D. MARTINY, "Ehescheidung..." , *supra*, p. 11.

⁶ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Official Journal L 012, 16/01/2001 pp. 1-23.

⁷ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters – done at Lugano on 16 September 1988, Official Journal L 319 , 25/11/1988 pp. 9-33.

⁸ The Regulation is not binding on Denmark which does not participate in the measures taken under Title IV of the EC Treaty. The applicable rules are however those of the Brussels Convention.

⁹ These are the Non-EC Member States of the Lugano Convention.

¹⁰ N. LOWE, "The growing influence of the European Union on International Family Law- a view from the boundary", *Current Legal Problems*, 2003; P. MCELEAVY, " The Brussels II Regulation: how the European Community has moved into family law", *ICLQ*, 2002, (883-908); C. GONZALEZ BEILFUSS,

has been more activity such as contract law shows however that a common framework of reference or a uniform terminology is an important theoretical and practical matter in European Private Law.¹¹

Another important reason for referring to the Brussels Convention rules is that this instrument was and is obliged to treat maintenance as a distinct question from matrimonial property. The former falls within the instrument's scope of application whereas the latter issue is excluded by virtue of art. 1.2 Brussels Convention/Brussels Regulation/Lugano Convention. The ECJ has therefore been forced to work out criteria in order to differentiate both areas.

The situation is to a certain extent parallel to that faced by CEFL. Although CEFL intends to cover different fields of family law it had to start somewhere. It decided to begin its works on harmonization with divorce and one of the most important effects of divorce, post divorce spousal maintenance, and has not dealt with matrimonial property so far. Criteria in order to distinguish one and the other matter are therefore important.

The criteria used by the ECJ in its case-law, especially in the Van Den Boogaard decision,¹² coincide with important elements of the Maintenance Principles. The ECJ has established that "if a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount the decision will be concerned with maintenance".¹³ As seen before, the support function of maintenance is an essential element in the terminology used by CEFL. Principle 2:3, which will be dealt with in more detail below, clearly establishes that maintenance after divorce should be dependent upon the creditor spouse having insufficient resources to meet his or her needs and the debtor spouse's ability to satisfy those needs. There is therefore no discrepancy between the "concept" of maintenance of the *acquis communautaire* and the Maintenance Principles developed by CEFL.

"Relaciones e interacciones entre derecho comunitario, derecho internacional privado y derecho de familia europeo en la construcción de un espacio judicial común", *Anuario español de Derecho internacional privado*, 2004, *forthcoming*.

¹¹ Communication from the Commission to the European Parliament and the Council, A more coherent European contract law – an action plan. COM (2003) 68 final

¹² Judgment of the Court of 27 February 1997, Antonius van den Boogaard v. Paula Laumen, Case C-220/95.

¹³ Van Den Boogaard, at p. 22.

2.2. ONE MAINTENANCE CLAIM

Chapter I of the Maintenance Principles (General Principles) includes two principles. Principle 2:1 establishes that maintenance between former spouses should be subject to the same rules regardless of the type of divorce whereas Principle 2:2 contains the so called self-sufficiency principle.

Principle 2:1 reflects the common core of European law. The national reports drawn by CEFL experts showed that while in the past maintenance was only granted to the innocent spouse the withdrawal of fault as a ground for divorce has meant that the majority of jurisdictions do not build upon a link between fault and maintenance anymore. There are exceptions to this trend. The Austrian Marriage Act establishes, for example, fault-based maintenance claims which imply that the guilty spouse has to pay maintenance to the innocent spouse whereas if both are equally to blame for the break down of the marriage neither party is entitled to maintenance. A matrimonial law reform which took place in 1999 did however introduce the possibility of granting maintenance to the guilty spouse if it is unreasonable to expect him or her to support him or herself due to present or past child care.¹⁴ Even in these more traditional systems fault is therefore losing its predominant role.

While fault is on the decline one can as well say that having more than one post divorce spousal maintenance regime depending on the grounds for divorce is a minority position in European Private Law. Portuguese law, for example, only establishes one maintenance claim regardless of the type of divorce.¹⁵ The same is true of Norway¹⁶ and Denmark,¹⁷ although these jurisdictions are as well so called pluralistic jurisdictions where several forms of divorce exist. In those jurisdictions where there is only one type of divorce there is as well only one post divorce spousal maintenance regime.

Principle 2:1 therefore imposed itself quite easily both on CEFL's Organizing Committee and the Expert Group. It is a result of the common core method and reflects the position of the existing law. There was however one point at the Expert Meeting which took place in Frankfurt (Oder)¹⁸ where a number of experts pleaded for distinguishing between maintenance claims based on solidarity and maintenance obligations seeking to compensate marriage-related detriments. If this suggestion had been followed it would have meant giving up the idea of having only one maintenance regime. This did however not happen. The reasons will be explained below.

¹⁴ See ROTH, Austrian Report Q 62.

¹⁵ See DE OLIVEIRA, Portuguese Report Q 62.

¹⁶ See SVERDRUP, Norwegian Report, Q 62.

¹⁷ See LUND-ANDERSEN, Danish Report Q 62.

¹⁸ The meeting took place in March 2004.

2.3. THE SELF-SUFFICIENCY PRINCIPLE

Principle 2:2 establishes the so called self-sufficiency principle according to which each spouse should provide for his or her own support after divorce. Although the self-sufficiency principle is not always spoken out in the written law the comparative overview of the national reports drafted by CEFL's experts showed that in nearly all the systems surveyed there is an underlying assumption that a divorced spouse who can be reasonably expected to seek gainful employment is to support him or herself.¹⁹

The drafting of Principle 2:2 was however not without discussion. Some experts felt that this was a too harsh principle which does not take into account the realities of life. It should however be stressed that the language used in Principle 2:2 leaves room for a lot of flexibility. Principle 2:2 refers right at the beginning to its exceptions which, as will be seen below, certainly allow to take into account marriage related detriments and solidarity considerations. This is actually self-evident: if there were not to be exceptions to the self-sufficiency principle it would actually become pointless to develop any principles on post divorce maintenance because there would be no room for such maintenance obligations.

It should as well be taken into account that whether and how self sufficiency works in practice is dependent on a variety of socio-economic factors which widely differ from one jurisdiction to the other. Dieter Martiny already pointed out in his initial comments on the works of CEFL on the maintenance principles that maintenance between former spouses plays a different role depending on whether there is access to sources of support other than maintenance.²⁰ If these sources are available the self sufficiency principle is easier to implement than if they are lacking.

Whether a divorced spouse can be reasonably expected to support him or herself moreover depends on a variety of socio-economic factors. Culture and tradition play a certain role. In some countries a "good" mother is expected to stay at home, whether in others a woman is expected to pursue a gainful employment, even if she is raising small children. An equal share of family work between men and women is more frequent in some countries than in others. It is however probably even more decisive whether child care and family work are conceived as a purely private matter or as an issue concerning society and in which society is willing to invest resources. In the latter case child care facilities will probably be more developed and better subsidized. The

¹⁹ Principle 2:2, Comment, p. 78.

²⁰ D. MARTINY, "Divorce and Maintenance between Former Spouses- Initial Results of the Commission on European Family Law" in K. BOELE-WOELKI (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, European Family Law Series No. 4, Intersentia-Antwerp, 2003, p. 543.

situation of the labour market is as well a dominant factor. The impact of labour policies seeking to facilitate the conciliation of gainful employment with family life certainly has as well an impact on this area of the law.

It has therefore to be acknowledged that a woman who can be reasonably expected to support herself in State A may not be able to do so in State B. The fact that there are differences in the implementation of the self-sufficiency principle from one jurisdiction to the other does however not affect the validity of the principle as such. It merely reflects differences in social development which are outside the Principles' scope.

Although the language used in the principles is gender-neutral CEFL was evidently aware that gender issues are of paramount importance in maintenance law. Supporting gender equality is actually a fundamental issue not only in the context of the maintenance principles but generally throughout CEFL's work. This is clearly reflected in the Preamble. The Maintenance Principles provide a framework in which the national legislator can decidedly promote gender equality. There is however room for different approaches, something which is sensible if one bears in mind the differences referred to above.

3. CONDITIONS FOR THE ATTRIBUTION OF MAINTENANCE

3.1. GENERAL CONSIDERATIONS

Originally fault-based maintenance was a compensation paid by the guilty spouse to the innocent spouse. Once divorce is not dependent on any fault the *rationale* for post divorce spousal maintenance is less clear. Justification can be found in either post-divorce solidarity or in compensation for marriage related detriments. The main purpose of post divorce maintenance can as well be to provide for a rehabilitative transitional period.²¹

In most legal systems the abovementioned justifications coexist and intermingle. It should therefore not be surprising that the Principles on European Maintenance Law do not follow any clear cut line, but provide a general framework allowing to pursue any of the abovementioned goals both independently and simultaneously. As already mentioned before, this position was not reached easily since there were quite a number

²¹ D. MARTINY, "Divorce and Maintenance...", *supra*, p. 545.

of experts who wished to further develop one or the other approach. This track was however in the end not followed.

In order to understand why it is important to understand the nature of CEFL's work. CEFL's purpose is not to draft model laws but to establish Principles which provide a common framework fit to be adopted by all European legislators. This aim has two fundamental consequences. It is first important to keep the right balance between the common core and the better law method. It is not the purpose of CEFL to spell out an ideal set of Principles but to work out the Common Core of European Private law in a given area resorting to the better law method basically if no common core can be found or if there are compelling reasons for departing from the common core. This is actually explained in the General Introduction of the Principles.²²

It is in the second place important to acknowledge that a too casuistic approach would not be consistent with the purpose of providing a basic structure which leaves considerable room for the national legislator. Unifying maintenance law is neither feasible nor probably desirable, especially bearing in mind the fundamental cultural and socio economic differences which were referred to before.

3.2. GENERAL FRAMEWORK

The general framework for granting post divorce maintenance is established in Principles 2:3 and 2:4. Principle 2:3 provides that maintenance should be dependent on each spouse's income and assets. This is a common feature in all the jurisdictions surveyed which has as well been taken up by the ECJ in order to characterize maintenance and differentiate it from matrimonial property.²³

The Principles as such do not contain any further specification. The Comments, which are always to be read together with the Principles, do however clarify that in determining one spouse's needs and the other spouse's ability to pay, account should be taken of each spouse's income and assets and that both concepts are to be construed broadly. The concept of need is as well a broad concept referring to any reasonable living expenses. Reasonable living expenses are likely to vary depending both on the standard of living of the couple and the economic development of the jurisdiction at stake.

²² Principles, General Introduction, p. 2.

²³ *Supra*.

Beyond this basic common ground which makes maintenance dependent on needs on the side of the creditor spouse and ability to pay on the side of the debtor spouse, there are however many differences in approach in the different jurisdictions.

In some systems the determination of the maintenance claim is basically left to the court's discretion. Ten jurisdictions actually follow this approach. These are Czech Republic, Denmark, England and Wales, Finland, Hungary, Ireland, Italy, the Netherlands, Scotland and Switzerland.²⁴

In other systems the claimant has to satisfy the court not only of the general conditions (need and ability to pay) but also of certain supplementary conditions laid down by the law. This is actually the case in Germany where the needs of one party and the ability to pay of the other party only form the general basis of the claim and the creditor spouse has to fulfil one of the conditions of § 1570-1576 of the German Civil Code. Each of these provisions provides an independent basis for maintenance.²⁵

Finally it is to be noted that some other jurisdictions such as for example Norway requires as a basis of the claim marriage related detriments,²⁶ whereas in French and Spanish law the basic idea is to compensate any economic imbalance between the parties caused by divorce.²⁷

CEFL decided not to follow any of these approaches. No national system offered a model for the formulation of the maintenance principles because CEFL's basic approach is to formulate Family law principles from a genuinely European perspective rather than from a national point of view.²⁸ The basic conditions of need and ability to pay are therefore supplemented in the Maintenance Principles with a non exhaustive list of factors which the competent authority has to consider before determining the claim. The factors mentioned in Principle 2:4 are the most common factors in the jurisdictions surveyed; any other factor which seems pertinent can however as well be taken into consideration. Principle 2:4 merely establishes that these factors have to be taken into account; it does not further specify the weight which should be given to one or the other factor.

The framework is therefore quite flexible. It would not be incompatible with the Maintenance Principles to introduce in national law a hierarchy between the factors or to list up new factors.

²⁴ Principle 2:3, Comparative overview, p. 79.

²⁵ Principle 2:3, Comparative overview, p. 80

²⁶ Principle 2:3, Comparative overview, p. 80

²⁷ Principle 2:3, Comparative overview, p.80.

²⁸ Principles, General Introduction, p.3.

3.3. FACTORS TO BE TAKEN INTO ACCOUNT

3.3.1. *The Spouse's Employment Ability, Age and Health*

Although there is no hierarchy between the factors listed in Principle 2:4 it was nevertheless inevitable that these factors appear in a certain order which to a certain extent reflects the weight attached to each of them by the drafters.

The first factor mentioned relates to the spouse's age, health and employment ability. The creditor spouse's personal conditions play a role in determining the maintenance claim in all jurisdictions surveyed. Depending on how maintenance law is structured these factors influence the exercise of the court's discretion in determining the maintenance claim; in other systems each of these factors is a separate ground for maintenance provided that the general conditions (need and ability to pay) are met. In the context of the Maintenance Principle's structure the creditor spouse's personal conditions have to be taken into account in the overall assessment of the claim.

The majority of jurisdictions²⁹ do not require that there is any link between the marriage and lack of self-sufficiency on the side of the creditor-spouse. A divorced spouse suffering from an incapacitating illness is entitled to receive maintenance even if the illness is totally unrelated to the marriage as such. This is as well the position of the Maintenance Principles. Although it can certainly be held that such a position reflects the assumption that there is a post-divorce solidarity between the spouses and that this in itself lacks a clear justification, it reflects the common core. CEFL did not feel that it is at this stage possible to depart from it, especially bearing in mind that the European principles of maintenance law also address jurisdictions in which post-divorce maintenance may be the only or the predominant source of support.

3.3.2. *The Care of Children*

In all jurisdictions the care of children is a predominant factor. Sometimes this factor is privileged in the written law;³⁰ but even if this is not the case, child care has an impact on the employment ability which is in practice acknowledged everywhere.³¹ In perhaps the majority of the cases the entitled spouse is a wife who has spent a large part of her life raising children as opposed to building up a professional career giving her economic independence, or a spouse who cannot be expected to pursue full gainful employment because of future child care.

²⁹ The exception would be Swedish law. See Principle 2:4, Comparative overview, p. 88.

³⁰ E.g. Austria. Principle 2:4, Comparative overview, p. 88.

³¹ Principle 2:4, Comparative overview, p. 88.

Both types of situations are addressed by the Principle. As the Comments stress, reference to child care in Principle 2:4 includes both past and future child care. In the former case the attention is focussed on the past and maintenance seeks to compensate the spouse who has in whole or in part refrained from gainful employment in order to take care of the children in so far as this has affected the ability of that spouse to support herself in the future. Principle 2:4 as well refers to future child care taking into account that the raising of children may prevent or hinder the primary carer from pursuing gainful employment.

Principle 2:4 does not specify whether or not the children have to be common children. This matter is therefore left to national law. It does further not specify that past child care has to have taken place while the parties were married. The national legislator might therefore decide to include past child care outside marriage, during a previous cohabitation.

3.3.3. *The Division of Duties During the Marriage*

Although in practice it often appears in connection to the previously analysed factor, the division of duties during the marriage, that is the fact that the spouses agreed that one of them was going to take over the major part of the family and house work, thus enabling the other to pursue his career more fully, is a factor which plays a major role in maintenance law in almost all jurisdictions surveyed.

From a gender perspective the division of duties can be regarded as one of the cornerstones of maintenance law. A traditional division of functions in the family may have reduced the wife's earning capacity substantially thereby creating a need. It is as well likely that a traditional marriage had a positive impact on the husband's career prospects increasing his earning capacity and ability to pay.

It can be assumed that the division of duties is an important element everywhere. The English Matrimonial Causes Act 1973, for example, directs the court to have regard to a certain number of circumstances when determining a maintenance claim. Each party's contribution to the family, including looking after and caring for the family, is to be taken into account.³² The division of duties between the spouses is the first criterion mentioned in art. 125 § 2 of the Swiss Code of Civil Law.³³ In Swedish law there is a strong rule that divorce terminates economic ties between the parties. Maintenance can however be granted if it is necessary in order to enable one spouse to obtain education or find gainful employment. This provision basically addresses the

³² LOWE, English Report, Q. 64.

³³ HAUSHEER/WOLF, Swiss Report, Q 64.

case in which there has been a traditional division of duties during the marriage and the wife is not immediately able to support herself.³⁴

3.3.4. *The Duration of the Marriage*

Principle 2:4 mentions as well the duration of the marriage. In many legal systems a short marriage hardly justifies a marriage claim unless there are for example common children, whereas a long marriage more often justifies post divorce solidarity. In practice this factor will often appear together with a lack of employment ability or poor age and health conditions on the side of the creditor spouse.

There is no explicit reference in the Principles to a previous cohabitation of the parties. This issue is however dealt with in the Comments, where it is stated that the fact that the Principles as such do not take into consideration premarital cohabitation does not hinder the national legislator to do so. The non exhaustive nature of the list of factors was already referred to before. It should as well be recalled that CEFL has not dealt with unmarried cohabitation so far.

3.3.5. *The Standard of Living During the Marriage*

There is as well a reference to the standard of living during the marriage as one of the factors to be taken into account. As regards this factor the jurisdictions surveyed differ importantly. The Comparative overview establishes three groups of national systems. Whereas in jurisdictions such as Belgium, France and Switzerland the standard of living enjoyed during the marriage is one of the most important factors which has to be taken into account, in other systems like in Germany, England and Wales and The Netherlands it plays a certain role, but is just one element among others. In still other systems (Norway, Sweden, Finland and some East European countries like Russia, Czech Republic, Bulgaria) the standard of living plays no role whatsoever and is neither taken into account in order to assess the needs on the side of the creditor spouse nor the ability to pay on the side of the debtor spouse.³⁵

It was not without discussion that the standard of living was finally included among the factors listed in principle 2:4. The main reason for doing so was an acknowledgment that the standard of living plays a role in the majority of systems. The standard of living is moreover only one among other factors in a non exhaustive list. The Comments show some scepticism as regards this factor by explicitly stating that “it must

³⁴ JÄNTERÄ-JAREBORG, Swedish Report, Q 64.

³⁵ Principle 2:4, Comparative overview, pp. 89-90.

be admitted however that it is often unrealistic to maintain the same standard of living after separation”.³⁶

3.3.6. *Any New Marriage and Long-Term Relationship*

Principle 2:4 finally refers to any new marriage or long-term relationship. This actually refers to a new relationship of the debtor spouse since Principle 2:9 establishes that the maintenance obligation terminates if the creditor spouse remarries or enters a new long term relationship.

Many jurisdictions take into account that a new relationship has an impact on the debtor spouse’s ability to pay. Even if only the debtor spouse’s income and assets are taken into account in order to determine his or her ability to pay, a new marriage or long term relationship with a third party indirectly influences the debtor spouse’s costs. It therefore has an impact on the debtor spouse’s ability to pay, which might either increase or decrease. The first will be the case if the new spouse or partner significantly contributes to the common living expenses, the latter will be the case if, on the contrary, the new higher living expenses are predominantly held by the debtor spouse.

Both situations are addressed in Principle 2:4. This Principle has moreover to be seen in connection with Principle 2:7 dealing with the situation of multiplicity of maintenance claims. Principle 2:7 does not establish, strictly speaking, priority rules between different maintenance claims because CEFL’s maintenance principles do not deal with maintenance in general. It was however considered necessary to establish some guidelines as regards the relationship of post-divorce maintenance claims with other maintenance claims.

According to Principle 2:7 a maintenance claim of a minor child of the debtor spouse should be given priority over a maintenance claim of a divorced spouse. This reflects the common core of European Private law in this area.

There is more diversity as regards the relationship between a claim of a former spouse and the claim of a new spouse. In many systems maintenance law assumes the same ranking for both claims either through a formal provision in maintenance law (e.g. Austria, Belgium, Switzerland, Czech Republic) or by considering that the new claim diminishes the debtor spouse’s ability to pay (e.g. Spain, the Netherlands). In other countries the maintenance claim by the new spouse is given preference (Sweden, England and Wales), whereas in Germany the divorced spouse takes precedence. In

³⁶ Principle 2:4, Comments, p. 94.

still other systems the situation is unclear.³⁷ In view of this diversity it was not considered possible to draft a Principle which establishes that the maintenance claim of a former spouse is to rank equally to the maintenance claim of a new spouse. Principle 2:7 only establishes that the obligation *vis-à-vis* the new spouse has to be taken into account when determining the debtor spouse's ability to pay. The Comments to Principle 2:7 however show a lot of sympathy for equal ranking.³⁸

Principle 2:7 only refers to a new marriage of the debtor spouse. The Comments clarify that spouse includes the partner in a registered partnership where he or she has an equal ranking with a spouse under national law.³⁹ The decisive factor is therefore first whether national law creates maintenance obligations between registered partners and second whether these obligations rank equally to those towards a spouse. There is no reference to unmarried cohabitation or long-term relationships in the context of Principle 2:7 simply because informal relationships do not give rise to maintenance obligations under most national laws and there can therefore not be any concurring maintenance claims if the debtor spouse enters such a relationship. Long-term relationships have to be taken into account under Principle 2:4, in so far as they influence the debtor spouse's ability to pay.

3.4. THE HARDSHIP CLAUSE

Principle 2:6 establishes that in cases of exceptional hardship to the debtor spouse the competent authority may deny, limit or terminate maintenance because of the creditor spouse's conduct. The so-called hardship clause exists in most of the systems surveyed. As was mentioned before originally the guilty creditor spouse was not entitled to maintenance. This basic idea is still present in for example the law of Austria where a needy spouse of unworthy conduct only receives a limited amount of maintenance.⁴⁰ According to Article 2016 .1 of the Portuguese Civil Code only the innocent or less guilty spouse is entitled to maintenance.⁴¹

A reproachable conduct on the side of the creditor spouse plays however as well a role in non-fault divorce systems. Such would be the case of Poland where, according to art. 60 of the Polish Family and Guardianship Code maintenance can be denied if the creditor spouse is the sole guilty spouse.⁴² Most of the systems however operate a

³⁷ Principle 2:7, Comparative overview, pp. 106-107.

³⁸ Principle 2:7, Comment, p. 110. "Therefore the divorced spouse's claim... should rank equally."

³⁹ Principle 2:4, Comment, p. 94.

⁴⁰ ROTH, Austrian Report, Q100.

⁴¹ DE OLIVEIRA, Portuguese Report Q. 100.

⁴² MĄCZYŃSKI/SOKOŁOWSKI, Polish Report, Q 100.

general hardship clause which is strictly interpreted in practice and allows denying, limiting or terminating maintenance. In the Netherlands a judge can take into account misconduct on the side of the creditor spouse which took place either before or after the divorce was granted. In practice this faculty is however only used in very extreme cases in which the creditor spouse had for example attempted to murder the debtor spouse or had seriously damaged the debtor spouse's honour and reputation.⁴³ In English law misconduct on the side of the creditor spouse is as well considered by the courts, case-law however shows that only extreme forms of misbehaviour such as inciting others to murder the debtor spouse or misuse of family funds are taken into account.⁴⁴

Some systems have established a more specific hardship clause. Article 1444 of the Civil Code of Greece allows to deny maintenance if the creditor spouse has deliberately caused his or her poverty. The German Civil Code establishes a so called negative hardship clause in § 1579 according to which maintenance can be denied, reduced or limited in time if it would be grossly unfair to claim. The grounds are listed in Statute.

Fault does not play any role in the Divorce and Maintenance Principles proposed by CEFL. It was however considered necessary to retain a general hardship clause. The Principles as such do not further establish what is meant by exceptional hardship. The wording suggests and the Comments clarify that "not every form of misconduct ... can be taken into account" and that only extreme cases of mistreatment, domestic violence or financial misconduct ... are meant. This can have occurred during the marriage or after divorce.⁴⁵

3.5. CALCULATION AND METHOD OF MAINTENANCE PROVISION

In practice three issues play a decisive role: the calculation of maintenance, the retention of a certain amount by the debtor and the method of maintenance provision. There are considerable divergences as regards the method of calculation of maintenance. In some countries like in Germany, The Netherlands and Sweden there exists standardised maintenance calculation with tables and guidelines which are used by the courts.

⁴³ BOELE/CHEREDNYCHENKO/COENRAAD, Dutch Report, Q 65.

⁴⁴ LOWE, English Report, Q 100.

⁴⁵ Principle 2:6, Comment, p. 103

In other countries standardisation is less developed but the courts nevertheless fix maintenance according to certain percentages of the debtor spouse's income or of the income of the debtor or both spouses. In Norway administrative authorities usually grant one third of the debtor spouse's income in cases in which the debtor spouse has an average income and the creditor spouse has no income at all.⁴⁶ Austrian authorities usually grant 33% of the debtor spouse's net income if the creditor spouse has no income and 40% of the common income less his or her own income if the creditor spouse has an own income.⁴⁷

Finally the comparative overview showed that in still other systems calculation is left to the competent authority's discretion. In Spain for example the courts tend to establish a fixed amount after assessing to economic possibilities of the debtor spouse.⁴⁸

CEFL finally decided not to draft a principle on this matter. The basic reason for doing so is that operational issues such as this are very often not dealt with in Statute. These kind of matters which relate to the court's working methods are especially difficult to harmonize. There are moreover too many connections with other areas of the law such as Tax and Social Security law, which cannot be properly taken into account in the framework of the Principles.

Another issue which was left open, on grounds of the same considerations, was the retention of a certain amount by the debtor.

Principle 2:5 deals with the method of maintenance provision. The first paragraph provides that as a rule maintenance is to be paid at regular intervals and in advance. Although in all systems monthly payments are the most usual method of payment, this is only due to the time period in which income is collected. It seemed therefore sensible to leave some room for different periodicities and not to establish a rigid rule in a matter which is only of subordinate importance. In practice monthly payments will however be the most common method of payment.

The fact that it is further specified that maintenance is to be paid in advance reflects the common core of European law. Since the question of arrears is one of the most important issues in practice it seemed worthwhile to be very clear in the Principles.

The second Paragraph of Principle 2:5 establishes that the competent authority may order a lump sum payment upon request of either or both spouses taking into account

⁴⁶ SVERDRUP, Norwegian Report, Q 70.

⁴⁷ ROTH, Austrian Report, Q 70.

⁴⁸ MARTIN CASALS/RIBOT/SOLE, Spanish Report, Q 70.

the circumstances of the case. Lump sum payments, either as a complement or as a substitute of periodical payments are possible in most of the national systems. They are the rule in France as regards *prestation compensatoire*,⁴⁹ but in most systems they are in the court's discretion. In Belgium, for instance, periodical payments can be replaced by a lump sum payment according to art 301 (5) of the Belgian Civil Code. A lump sum payment is as well contemplated under section 70(2) of the Austrian Marriage Act or under section 13 of the Irish Family Law (Divorce) Act 1996.

In many systems the parties have to request a lump sum payment, that is, the court cannot decree it on its own motion. There are differences as regards who can request a lump sum payment. In most of the systems it is possible if it is requested by both parties. Such would be the case in Italy under article 5 § 8 of the Italian Divorce Law or in Czech Law.⁵⁰ In other jurisdictions only the maintenance creditor can request it. This is the rule under section 70(2) of the Austrian Marriage Act. According to some national laws a lump sum payment can be requested by either party. Such would be the position under article 85 (2) of the Family Code of Catalonia.

Principle 2:5 reflects the common core of European law by providing that courts may order a lump sum payment if it seems reasonable in view of the circumstances of the case. Either or both parties can request it but it is ultimately for the courts to decide. If both parties request a lump sum payment this will equate to an agreement on the matter to which article 2:10 is applicable.

According to CEFL's maintenance principles the creditor spouse and the debtor spouse are equally entitled to request a lump sum payment. This rule is justified in the Comments on Principle 2:5 as follows. "Not only the circumstances and wishes of the creditor spouse merit respect but also those of the debtor spouse who by requesting a lump-sum payment may wish to put an end to the relationship with his or her former spouse".⁵¹

4. SPECIFIC ISSUES

Chapter III of the Maintenance Principles deals with some specific issues. Some of these have already been referred to. Such is the case of Principle 2:7 on multiplicity of maintenance claims. For the sake of comprehensiveness it seems however necessary to refer to Principles 2:8 (Limitation in time) and 2:9 (Termination of the maintenance

⁴⁹ FERRAND, French Report, Q 75.

⁵⁰ HRUSAKOVA, Czech Report, Q 75

⁵¹ Principle 2:5, Comment, p. 99.

obligation). As mentioned before this paper will not deal with the maintenance agreement.

4.1. LIMITATION IN TIME

According to Principle 2:8 post divorce maintenance is as a rule limited in time, although it is by view of exception possible to grant maintenance without time limit. Eight of the jurisdictions surveyed establish time limits for maintenance obligations. These time limits differ widely. Three years would be the normal duration under the law of the Czech Republic, Bulgaria or Norway, whereas in Sweden the maximum is generally four years and Poland establishes a duration of five years. Other jurisdictions provide more generous time limits of ten (Denmark) or twelve years (The Netherlands). It is however very often provided that in view of the financial situation of the creditor spouse, additional periods can be established by the competent authority.⁵²

A similar result can be attained using a different approach. According to the German Federal Supreme Court a lifelong maintenance is the rule, provided that the conditions for granting maintenance continue to exist. This means that maintenance will be granted for a limited time period until the creditor spouse is able to support him or herself.⁵³ Also in Belgium maintenance is generally granted for life. The court may however impose a limitation if it comes to the conclusion that the creditor spouse will regain self sufficiency after a certain time period.⁵⁴

In establishing that this is a matter for the courts to decide Principle 2:8 reflects the common core. The court has to establish the duration of maintenance. If there are exceptional circumstances maintenance can however last for life. Among these the Comments mention old age or illness on the part of the creditor spouse or a very long marriage.⁵⁵ If the court initially granted maintenance for a limited time period and the conditions for maintenance still prevail after expiry of this time period nothing in the Principles prevents from granting additional maintenance. It should as well be recalled that the parties can agree to limit maintenance in time.

⁵² Principle 2:8, Comparative Overview, pp. 113-114.

⁵³ MARTINY/SCHWAB, German Report, Q 68.

⁵⁴ PINTENS/TORFS, Belgium Report, Q 68.

⁵⁵ Principle 2:8, Comment, p 115.

4.2. TERMINATION OF THE MAINTENANCE OBLIGATION

Principle 2:9 deals with the termination of the maintenance obligation and establishes that it ceases if either the creditor or the debtor spouse dies or if the creditor spouse remarries or establishes a long term relationship. In this latter case the maintenance obligation does not revive if the new marriage or long-term relationship ends.

The first rule mentioned was not particularly difficult to draft. In relatively few jurisdictions the maintenance obligation devolves upon the debtor's estate and heirs. This would be the case in Spanish law both under the Civil Code regime according to Article 152.5 and in Catalan law (Article 271.1 Catalanian Family Code) or French law (Articles 276.2, 275.1 and 284 Code Civil). In most of the systems, however, the obligation does not pass to the heirs and therefore extinguishes upon the debtor spouse's death.⁵⁶

The situation was more difficult as regards the second rule mentioned. There was a lot of discussion as regards this matter at the Expert Meeting of Frankfurt/Oder. Some experts strongly argued against such a rule, especially in those cases in which maintenance is conceived as a compensation for marriage related detriments.

The rule was however upheld, basically for two reasons. First, because as mentioned before, CEFL decided against a special maintenance regime with marriage related detriments as a justification. And secondly, because it felt that departure from the common core is difficult to justify and reconcile with CEFL's purpose and methodology.

According to the majority of jurisdictions a new marriage (or registered partnership in the jurisdictions where this institution exists) of the creditor spouse automatically terminates the debtor spouse's obligation. A long-term relationship of the creditor spouse as well terminates the maintenance obligation in most jurisdictions, although this will in many cases not occur automatically, but on request of the debtor spouse.⁵⁷

In view of the increasing numbers of cohabitation CEFL decided to treat marriage and informal long-term relationships alike.⁵⁸ Both terminate the maintenance obligation. Neither the Principles nor the Comment define what is meant by a long-term relationship. This matter is left to national law. It is therefore for the national legislator to

⁵⁶ Principle 2:9, Comparative overview, pp. 121-122

⁵⁷ Principle 2:9, Comparative overview, p. 122.

⁵⁸ Principle 2:9, Comment, p. 123.

decide whether this equates to cohabitation or other forms of relationship (*e.g.* living apart together) are as well included. It is as well for the national legislator to decide whether a new marriage or long-term relationship of the creditor spouse causes the obligation to terminate automatically or termination has to be decreed by the competent authority after a procedure in which room is made for an assessment of the circumstances of the case.

Finally Principle 2:9 establishes that the maintenance obligation does not revive if the creditor spouse's marriage or long-term relationship fails. This rule reflects the common core of European law on the matter.⁵⁹

⁵⁹ Principle 2:9, Comment, p. 123.

CLEAN-BREAK OR LONG-TERM PAYMENT OF MAINTENANCE

GEOFFREY SHANNON

1. INTRODUCTION

This paper critically evaluates the options for the provision of maintenance after divorce and considers the bases on which post-divorce maintenance can be paid. The payment of maintenance between former spouses should have as its overarching objective facilitating an ordered and smooth transition from dependence to economic independence and self-sufficiency. Both the 'clean break' and long term payment of maintenance options will be examined. Other options will also be considered.

In considering the payment of maintenance, if any, between former spouses, it is necessary to look at the function of maintenance payments and to determine what the payments are designed to achieve. An examination of the options for the payment of maintenance after divorce is the useful starting point in determining the rationale underpinning the provision of maintenance after divorce.

2. CLEAN BREAK

The 'clean break' option historically involved an abandonment by the wife of her right to maintenance for which, in return, the husband would transfer a capital asset. With the shift away from a fault-based philosophy in matrimonial litigation, the clean break option emerged as a legitimate aim in fixing spousal support obligations. The aim of the fault-based system which had rewarded the innocent spouse and punished the guilty spouse was no longer relevant to no-fault divorce. Further, the general trend towards equality of the sexes and the aim of self-sufficiency became the new ideal. The clean break principle gathered momentum in the United States in the 1970's and 1980's where it was characterised by an order for the sale of the assets and the division of the proceeds of such assets between the spouses. A number of commentators held that the old law had converted:

“... a host of physically and mentally competent young women into an army of alimony drones who neither toil nor spin and become a drain on society and a menace to themselves”.¹

The clean break option is perhaps the most superficially attractive option in that it facilitates finality. Once the parties are divorced and their assets reordered, they cannot be subject to a claim by the other person. It facilitates a final settlement with no continuing financial obligations. After all, why should a former spouse maintain a former spouse? The suggestion that spousal support obligations should continue indefinitely despite the divorce decree seems indefensible. That said, it should be stated that the ‘clean break’ option does not apply to the maintenance obligations which a parent has towards his or her child. Indeed, the principle of self-sufficiency underpinning the ‘clean break’ order can only be realised where such an order is harmonious with the best interests of any children of the parties.

What then are the main advantages of operating a clean break regime? Many advantages can be advanced for operating a clean break jurisdiction in divorce proceedings. It has the advantages of being “simple, clear and final”² and equates well with our notions of equality. The clean break approach enables the parties to establish a new life unencumbered by the former marriage. Thorpe L.J. in *Mawson v Mawson*³ held that it provided the ex-spouses with “peace of mind”. He stated:

“In the end I would only observe that peace of mind will be the benefit for [the wife in the case] and her former husband when the financial dependency between the parents is brought to termination”.

Another major advantage of the ‘clean break’ order is that it makes the ex-spouses self-sufficient. The clean break approach also equates well with the desire for finality and certainty in litigation. Keane C.J., a former Irish Chief Justice, states this view in the following terms:

“[C]ertainty and finality can be as important in [family law] as in other areas of the law”.⁴

A number of disadvantages have, however, been identified in using the clean break principle as a general aim for all maintenance. Commentators have rejected the

¹ S.H. HOFSTADTER and S.R. LEVITTAN, “Alimony – A Reformulation” (1967) 7 *Journal of Family Law* 51.

² D. BYRNE, Former Irish Attorney General, Foreword in G. Shannon *The Divorce Act in Practice* (Dublin: Round Hall, 1999) p. viii.

³ [1994] 2 FLR 985; [1995] Fam Law 9.

⁴ Unreported, Supreme Court, 14 October 2002. See also *F v F* (Judicial Separation). [1995] 2 IR 354.

practicability of a 'clean break' solution and argue that the rhetoric has outstripped the reality. Women assume the major responsibility for domestic life and child rearing and suffer the major economic disadvantages. It is therefore of paramount importance that wife support be kept on the public agenda until women are no longer disadvantaged by marriage itself. Weitzman held that the clean break approach often caused the family home to be sold, leading to the 'feminisation of poverty'.⁵ Eekelaar and Maclean noted that there is a general movement into poverty by separated spouses with children.⁶ It is not divorce *per se* but the existence of child care responsibilities which has a significant economic impact on a couple's financial circumstances. The emerging picture from the aforementioned research was that the majority of separated or divorced women worked in sex-segregated, low-paid, insecure employment with limited sick-pay and pension entitlements and carried the twin burdens of the direct and opportunity costs of child care. This caused concern and prompted a former Irish Attorney General to comment:

"It could be said that [the clean break option] is in fact only useful for couples who have assets which may be sold and divided, for those couples where both parties are economically active outside the home, for those couples who are on an equal footing in terms of bargaining power and-in particular-for those couples who do not have children".⁷

A 'settling up' or 'clean break' approach can only address events up to the time of the separation or divorce. The financial problems are, however, much longer-lived for divorced women. Further, the major argument against the clean break approach is that it fails to compensate the homemaker and caregiver for the economic disadvantages which have resulted for her and will continue beyond the separation of the spouses, particularly but not exclusively for the custodial parent of dependent children. As previously stated, no 'clean break' is possible or fair where children are involved since their need for ongoing support will curtail the already impaired earning capacity of the custodial spouse and therefore her capacity for self-support. A former Irish Attorney General summarised the position in the following terms:

"It has been shown [that the clean break approach] impact[s] with particular unfairness on marriages where the women entered the marriage in the expectation that her contribution to the family enterprise would be made within the home, and that in return, she could expect life-long material support from her husband".⁸

⁵ WEITZMAN, "Alimony: Its Premature Demise and Recent Resurgence in the U.S." in WEITZMAN and M. MACLEAN, *The Economic Consequences of Divorce* (1992).

⁶ J. EEKELAAR and M. MACLEAN, *Maintenance after Divorce* (Clarendon Press, Oxford, 1984).

⁷ D. BYRNE, Former Irish Attorney General, Foreword in G. SHANNON, *The Divorce Act in Practice* (Dublin: Round Hall, 1999) pp. viii-ix.

⁸ *Ibid* at p. ix.

It should also be stated that, as Thorpe LJ noted, “the State has an interest in preventing individuals from avoiding their financial responsibilities and thereby casting an unnecessary burden on the Welfare State”.⁹ This is not to say that the clean break option should not be one of the options for the court to choose from. The long term payment of maintenance, while addressing some of the foregoing concerns, can also result in injustice.

3. LONG-TERM PAYMENT OF MAINTENANCE

Ireland is a very good example of a divorce jurisdiction that allows for the long term payment of maintenance. The model of divorce introduced in Ireland is the ‘no clean break’ option which continues the old common law tradition of a life-long spousal support obligation. A ‘clean break’ option is precluded in both the Family Law (Divorce) Act, 1996¹⁰ and Article 41.3.2° of the Irish Constitution. The new Article 41.3.2° was incorporated into the Constitution on June 17, 1996 upon the Fifteenth Amendment to the Constitution Bill being signed by the President of Ireland. This Article provides that a court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that:

- i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
- ii. there is no reasonable prospect of a reconciliation between the spouses,
- iii. such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and,
- iv. any further conditions prescribed by law are complied with”.

The provisions of Article 41.3.2° were brought into force by the Family Law (Divorce) Act, 1996 which became law on February 27, 1997.

David Byrne, former Attorney General, explained the political context for the absence of a ‘clean break’ in Irish divorce law in the following manner:

“The Irish people ascribe a very high value to the institution of marriage. It emerged very clearly during the pre-referendum debate that the electorate had a strong concern for the position of the financially-weaker party to the marriage. I think it is fair to say that generally

⁹ THORPE LJ, “The English System of Ancillary Relief” in P. BAILEY-HARRIS (ed), *Dividing the Assets on Family Breakdown* (Jordans, 1998) p. 7.

¹⁰ No. 33 of 1996.

the Irish people, although in favour of the introduction of divorce, did not regard divorce as being an easy solution to the problem of marital breakdown. They did not see it as being a neat, clean or pain-free process and recognise that it will have enduring consequences ... The Irish electorate ultimately chose by a tiny majority to opt for the introduction of divorce in this jurisdiction. The realistic response to the demand for the introduction of divorce was, I believe, tempered by a very real concern on the part of the electorate for the position of women and children in divorce.

It is this compassionate consideration for the vulnerable parties to divorce that, in my view, led the Oireachtas to conclude that once-off final settlements in the area of divorce would not be acceptable to the Irish people and therefore should not, for now, be an option”.¹¹

It should be noted that only 50.28 per cent of the Irish electorate opted for the introduction of divorce in Ireland.

The statutory liability of spouses in Ireland to maintain one another therefore continues following a divorce. Financial obligations to a former spouse will continue even if the other spouse remarries and is liable for the support of a new spouse and dependent children. In summary, liability to maintain a former spouse only terminates when the maintenance debtor dies or the claimant spouse remarries. The liability may even survive death by means of a secured maintenance order where the order is made under the Family Law (Maintenance of Spouses and Children) Act, 1976.¹² Following the granting of a divorce decree “a reference to a spouse includes a reference to a person who is a party to a marriage that has been dissolved under [the Divorce] Act”¹³ for the purposes of the rights and remedies available to them under the Divorce Act.

On the granting of a decree of divorce in Ireland, or at any time thereafter, the court may, on the application by either spouse, make one or more maintenance orders to either spouse and to a dependent member of the family. Section 2(1) of the Divorce Act defines a ‘dependent member’ as any child under the age of 18 years (or 23, if in full-time education). It is significant that, whereas section 5(1)(c) of the Divorce Act alludes to ‘dependent members of the family’, Article 41.3.2° of the Irish Constitution refers to ‘any children of either or both’ of the spouses.

In the case of *R.C. v C.C.*,¹⁴ Barron J held that the latter interpretation prevails:

¹¹ D. BYRNE, Former Irish Attorney General, Foreword in G. SHANNON, *The Divorce Act in Practice* (Dublin: Round Hall, 1999), pp. viii-ix.

¹² No. 11 of 1976.

¹³ Section 2(2)(c) of the Family Law (Divorce) Act, 1996.

¹⁴ [1997] 1 ILRM 401.

“Since the jurisdiction invoked is that contained in the Constitution and not that amplified by the Act, it is necessary for the court to consider the position of the children. While I do not purport to determine that non-dependent children should necessarily have provision made for them, I am satisfied that in the particular circumstances of the present case it is proper that certainly the two daughters of the marriage should have provision made for them in the interests of the family as a whole.”

The reference to ‘any children’ in Article 41.3.2° of the Irish Constitution is clearly capable of a much wider interpretation than that of ‘any dependent member of the family’ as set out in the Divorce Act, where the term is defined as any person under the age of 18 years or, if over 18 but below 23, is in full-time education. There are no such limitations on the interpretation of ‘child’ in the provision contained in the Irish Constitution. It is therefore possible for a divorcing parent in Ireland to be ordered to continue maintenance payments in respect of an adult child where he or she no longer wishes to do so, in order that the court might be satisfied that proper provision exists or will be made for the ‘children’ of the marriage.

An Irish court is obliged to provide such maintenance as is proper in the circumstances. The court has a wide discretion in determining what is ‘proper’ maintenance in the overall circumstances of any given case. This discretion is exercisable within a framework of criteria as well as the constitutional and statutory requirement that proper provision be made for the spouses and dependent children of the marriage. Section 20 of the Divorce Act sets out those individual factors which must be taken into account by the court before deciding to make any maintenance order. These include, *inter alia*, the following twelve factors:

- income and general financial resources,
- financial needs,
- standard of living,
- age of spouses and length of cohabitation,
- physical or mental disability,
- past and future contributions,
- marital responsibilities,
- statutory income and benefits,
- conduct,
- accommodation needs,
- loss of future benefits,
- rights of other parties.

In summary, the total financial resources of the parties are to be assessed against their financial and other responsibilities to one another and to their dependent children. Since there is no provision for a ‘clean break’ settlement between the spouses, it is

arguable that there should be no difference in the relevant factors in assessing maintenance whether the spouses are still living together or separated pursuant to a divorce decree.

Since maintenance is always reviewable under Irish divorce law, the assessment of earning capacity is limited to the current and reasonably foreseeable future. In particular, section 22 of the Divorce Act permits orders to be suspended, discharged, reviewed or varied on the application of, *inter alia*, a spouse if the court considers it proper to do so in light of ‘any change of circumstance’ or ‘any new evidence’. The effect of section 22 is to permit the variation of previously granted ancillary orders in perpetuity.

Section 13(1)(c) of the Irish Divorce Act empowers the court to order either spouse to make a lump sum payment to the other spouse under the terms as specified in the order for the benefit of the recipient spouse, or a dependent member of the family. Since the decision in *L.B. v H.B.*,¹⁵ the Irish courts have been more favourably disposed to awarding lump sum maintenance. In *J.D. v D.D.*¹⁶ the question arose “whether it is open to the court to endeavour to create a situation of finality, what is commonly called a ‘clean break’, by making a sizeable lump sum order in favour of the wife and making no order for periodic maintenance”. The case involved the ending of a 30-year long marriage, where there were considerable financial resources available for distribution. McGuinness J. held that no ‘clean break’ provision could be made when financially reordering a broken marriage.

The learned judge referred to the Family Law (Maintenance of Spouses and Children) Act, 1976 and the fact that since its enactment it has not been possible to make an order which purports to cut off the right of a spouse to apply for maintenance. Notwithstanding the payment of a large sum annuity, both spouses would retain the right to apply to vary the maintenance order. McGuinness J. stated the position in the following terms:

“Just as the payment of a large capital sum for an annuity could not prevent the wife, in certain circumstances, from applying for further maintenance in the future, so also it could not prevent the husband, if he fell on hard times, from applying for maintenance to be paid to him by the wife, thus reducing her annuity income”.¹⁷

¹⁵ [1980] ILRM 257.

¹⁶ [1997] 3 IR 64 at 89.

¹⁷ *Ibid* at 88.

McGuinness J. considered whether, in ample resources cases,¹⁸ it should be the policy of the court to try to provide a situation of certainty and finality on the irretrievable breakdown of a marriage. She noted that the Oireachtas had legislated to permit repeated applications to court concerning ancillary relief so that finality could not be achieved and continued:

“It appears to me that by the subsequent enactment of the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996, the Oireachtas has made it clear that a “clean break” situation is not to be sought and that, if anything, financial finality is virtually to be prevented ... The court, in making virtually any order in regard to finance and property on the breakdown of a marriage, is faced with the situation where finality is not and never can be achieved. This also appears to mean that no agreement on property between the parties can be completely final, since such finality would be contrary to the policy and provisions of the legislation. The statutory policy is, therefore, totally opposed to the concept of the ‘clean break’.”¹⁹

Having decided that a ‘clean break’ was not possible, McGuinness J. proceeded to consider “what level of maintenance should be payable and, more particularly, at what level should a lump sum payable to a wife be set in the context of a relatively wealthy family.”²⁰

The learned judge then considered the statutory guidelines provided but stressed their role as guidelines only which were subject to the overall discretion of the court. McGuinness J. stated:

“Even given these guidelines however, the court still has a wide area of discretion particularly in cases where there are considerable financial assets.”

On the purpose of maintenance in such cases, McGuinness J. posed the question:

“Should the court seek simply to provide for the actual day to day needs of the dependent spouse or should it endeavour to divide the family assets in a more equal way by the operation of a lump sum and/or property adjustment order? In such a division of the family assets, should the “stay at home” wife be treated differently from the wife who works outside the home?”²¹

¹⁸ 7a The phrase used by the Irish Supreme Court to refer to ‘big money’ cases in *T v T* unreported, Supreme Court, 14 December 2002.

¹⁹ *Ibid* at 89.

²⁰ *Ibid* at 90.

²¹ *Ibid* at 91.

Following a consideration of the approach of the English courts in ample resources cases and allowing for the fact that consideration of a ‘clean break’ is not a permissible criterion in Ireland, the learned judge stated:

“From the English case law, I would deduce the principle that in the case where there are considerable family assets the court is not limited to providing for the dependent spouses actual immediate needs through a periodic maintenance order, but may endeavour, through the making of a lump sum order, to ensure that the applicant will continue into the future to enjoy the lifestyle to which she was accustomed.”²²

In assessing the amount of lump sum maintenance payable to the applicant wife, the court took into account the fact that the wife was a ‘stay at home’ wife who had played an equal albeit non-income producing role in the marriage to be a very relevant consideration:

“This has been a lengthy marriage. The wife has given up any real hope of a career. The husband was the sole earner of income during the marriage but the level of matrimonial expenditure was such as to enable him to accumulate considerable assets. It cannot be said that the wife was extravagant in any way during the years of the marriage. She cared for the home and brought up the children and the husband accepted and approved the traditional distinction of roles between financial provider and homemaker. On a practical level this marriage was a lengthy partnership of complementary roles and it seems to me that it should result in a reasonably equal division of the accumulated assets. I will therefore order the payment of a lump sum by way of maintenance of £200,000 by the husband to the wife in addition to his financing of the wife’s residence.”²³

The lump sum order was granted in addition to a periodical maintenance order of £20,000 per annum. The award of maintenance was made in the context of judicial separation proceedings but in her analysis of the principles applicable McGuinness J. referred to the breakdown of the marriage and made no distinction between maintenance payable under the Family Law (Maintenance of Spouses and Children) Act, 1976 and the Divorce Act.

The issue of whether or not a ‘clean break’ or a full and final settlement is facilitated by Irish divorce law was considered by the Irish Supreme Court in 2002 in *T v T*.²⁴ In that case, the Supreme Court upheld a decision of the Irish High Court in which Lavan J. awarded the respondent a lump sum of £5million (€ 6.35million), in three

²² *Ibid* at 93.

²³ *Ibid* at 95.

²⁴ Unreported, Supreme Court, 14 October 2004.

instalments, together with maintenance of £800 a month for the youngest dependent child of the marriage.

The parties had been married for 22 years. There were three children from the marriage. The parties had ‘separated’ at the time of the divorce. The applicant husband was involved in another relationship and there was one child from that relationship. He argued that cognisance should be taken of the fact that 80% of his assets had been acquired after the date of separation and that he now had additional responsibilities and dependents to consider.

In making his award in the High Court, Lavan J. stated that he did not see the making of a lump-sum payment as introducing the ‘clean break’ concept into Irish law. In his view, it was making provision for the financial security of the respondent. On appeal to the Supreme Court, the court upheld the decision of the High Court on the clean break issue.

The Supreme Court held that the totality of the issues outlined in the Irish Divorce Act must be taken into account and applied in every case in order to determine what is ‘proper provision’ in any individual case. By virtue of section 5(1)(c) of the Divorce Act, the court must be satisfied that such provision as the court considers proper, having regard to the circumstances, exists or will be made for the spouses and any dependent member of the family. In *T v T*, the Supreme Court held that, in certain cases, in particular ample resources cases, the appropriate manner of making proper provision may be by the payment of a very large lump sum by one spouse to the other.

The Supreme Court in *T v T*, by a majority of 4 to 1, held that the absence of a ‘clean break’ principle in Irish divorce law did not prevent the payment of a lump-sum order as part of the proper provision for a spouse, even where no order for periodic payments by way of maintenance has been made. Denham J. stated the position in the following terms:

“A “clean break” principle may be found in the law as to financial orders relating to divorce in other jurisdictions. However, such provision is not part of the Irish constitution or legislation. There is no provision providing for a single payment to a spouse to meet all financial obligations. Rather the fundamental principle is one of “proper provision”. However, the absence of a “clean break” principle does not exclude a lump sum order. The principles of certainty apply to family law as to other areas of the law. Certainty is important in all litigation. Certainty and consistency are at the core of the legal system. However, the concepts of certainty and consistency are subject to the necessity of fairness. Consequently, each case must be considered on its own facts, in the light of the principles set out in the law, so as to achieve a just result. Thus while the underlying constitutional principle is one

of making proper provision for the spouses and children, this is to be administered with justice to achieve fairness”.

The former Chief Justice, Keane C.J. held that he did not believe that the Oireachtas intended that the courts should exclude the possibility of achieving certainty and finality when financially reordering the assets upon divorce, or of avoiding further litigation between ex-spouses. He stated:

“I do not believe that the Oireachtas, in declining to adopt the “clean break” approach to the extent favoured in England, intended that the court should be obliged to abandon any possibility of achieving certainty and finality and of encouraging the avoidance of further litigation between the parties ... I am satisfied that, while the Irish legislation is careful to avoid going as far as the English legislation in adopting the “clean break” approach, not least because of the constitutional constraints, it is not correct to say that the legislation goes so far as virtually to prevent financial finality. On no view could such an outcome be regarded as desirable and I am satisfied that it is most emphatically not mandated by the legislation under consideration.”

Considering the approach of the High Court in making a lump-sum payment without any provision for a periodic payments order, Keane C.J. stated:

“The approach of the trial judge appears to have been to have effected a ‘clean break’ between the parties in financial terms insofar as that is permissible having regard to the constitutional and legal provisions; and, given the desirability of avoiding future litigation between spouses whose marriages have irretrievably broken down, I have no doubt that this was the correct approach for him to have adopted.”

Fennelly J. adopts a similar approach. He stated his view at page 12 of his judgment:

“I am in full agreement with the Chief Justice, for the reasons he gives, that the absence of a specific statutory machinery for the making of “clean break” provision should not preclude the court from seeking to do so in appropriate cases. In the present case, where the amplitude of resources make it possible, the desire of the parties for financial finality should not be frustrated. The Act expressly empowers the court to make orders at any time after the divorce but that fact does not preclude the court from taking note of a provision already made in the form of a lump sum intended to facilitate a clean break.”

The current Chief Justice, Murray C.J., also acknowledges the concepts of certainty and finality as desirable ones in that he states at page 17 of his judgment:

“I also agree that when making proper provision for the spouses a court may in the appropriate circumstances seek to achieve certainty and finality in the continuing obligations of the divorced spouses to one another. This is not to say that legal finality can be

achieved in all cases and any provision made may be subject to review pursuant to section 22 of the 1996 Act where that provision applies. However, the objective of seeking to achieve certainty and stability in the obligations between the parties is a desirable one where the circumstances of the case permit.”

While it is unlikely that the respondent wife would be successful in a future application for periodic maintenance, the suggestion in the *T v T* Supreme Court judgment “that it would not be possible” to provide for periodic maintenance rests very uneasily with section 13(1) of the Irish Divorce Act: This section provides:

“13. (1) On granting a decree of divorce or at any time thereafter, the court, on application to it in that behalf by either of the spouses concerned or by a person on behalf of a dependent member of the family, may during the lifetime of the other spouse, or, as the case may be, the spouse concerned, make one or more of the following orders, that is to say—
(a) a periodical payments order....”

The decision in *T v T* does not impact on the ability to vary or discharge maintenance orders following a divorce decree. As previously stated, any maintenance order made on divorce may be varied pursuant to the provisions of section 22 of the Irish Divorce Act, with the exception of a lump-sum payment which is not being paid in instalments. The class of person who may make an application under section 22 includes, in the case of the re-marriage of either of the spouses, the new spouse. Before varying any maintenance order under section 22, the court must have regard to any change of circumstances which may have occurred, or any new evidence which there may be. In addition to varying or discharging any maintenance order previously made, the court may suspend the operation of an existing order for a period of time.

The decision of the Irish Supreme Court in *T v T* marked a significant departure from previous judicial interpretation of the Irish maintenance legislation, a departure that has facilitated a ‘clean break’ in certain ‘ample resources’ cases insofar as that is permitted by the Constitution and the Divorce Act. In particular, the lump sum provisions of the Family Law (Divorce) Act, 1996 have been used with greater frequency to achieve a ‘clean break’ where the parties seeking a divorce have ‘ample resources’. The fear now is that *T v T* has effectively lead to the creation of a two-tier system of divorce in Ireland between those who are able to achieve a ‘clean break’ and those who will have to resign themselves to the possibility of repeated applications to court for maintenance, so that finality can never be achieved. See also the recent decision of the Irish Supreme Court in *W.A. v. M.A.*, unreported, Supreme Court, HARDIMAN J., December 9, 2004.

Notwithstanding the decision of the Supreme Court in *T v T*, clean break divorce/maintenance is an impossibility in Ireland save in respect of those parties with

ample resources. The absence of the clean break option produces unjust and inequitable results. An order for periodical payments made under the Irish Divorce Act means that although the union of the parties is no longer recognised the ongoing obligation to maintain a former spouse results in an undeniable link remaining between the parties. This obligation to maintain a former spouse after the granting of a decree of divorce arises under legislation that effectively mirrors the pre-existing provisions governing maintenance granted following a decree of judicial separation. Thus, while the marriage is deemed to be no longer in existence, no corresponding alteration has been made to the Irish law governing the ancillary relief of maintenance.

The Irish legislature's failure to provide for a 'clean break' option in appropriate cases following divorce is a shortfall in Irish family law. In fact, the radical change introduced in Irish law by the Divorce Act should have been preceded by a debate on the nature of the obligations owed to a former spouse. However, the legislature not only failed to provide a rationale underpinning grants of maintenance where spouses can be declared legally free of each other and capable of remarriage, but it has also failed to do so since the introduction of the first Irish legislation governing maintenance in 1976.²⁵

4. REHABILITATIVE MAINTENANCE

It is clear that both the 'clean break' and long term payment of maintenance options represent an inadequate basis for maintenance after divorce. Further options for the provision of maintenance after divorce should therefore be considered. One such option is to allow for 'rehabilitative maintenance'. This would essentially involve the appropriate division of the marital assets with maintenance being paid on a short-term basis to the former dependent spouse. This system would afford a short-term cushion for the dependent spouse thereby allowing him/her time to establish him/herself in the working environment. This option amounts in some ways to a 'clean break with a cushion'. Clearly, the period in which the maintenance would be payable would vary with the facts of each individual case. The rehabilitative maintenance model was advocated by the Scottish Law Commission²⁶ and now forms part of the Family Law (Scotland) Act, 1985.

The concept of 'rehabilitative maintenance' as a formula for division and survival has been subject to criticism. This approach often fails to compensate for the losses

²⁵ See the Family Law (Maintenance of Spouses and Children) Act, 1976, which transferred the duty to pay maintenance from a common law duty to a statutory foothold.

²⁶ *Report on Ailment and Financial Provision*, No. 67 of 1981.

suffered by women. For example, frequently spouses who have been dependent for all their married life will suffer in the workplace and most likely fail to ever realise their full earning capacity because of their long-term absence from the workplace. A rehabilitation approach is based on providing limited support to allow the dependent spouse to become self-sufficient but as pointed out by Eekelaar and Maclean²⁷ this is essentially another manifestation of the ‘needs’ approach.

5. COMPENSATORY MAINTENANCE

A further option for the provision of maintenance after divorce is a compensation model. This is perhaps the most desirable option in that it provides a rationale that is both fair and workable. It allows for a spouse to be compensated for the losses and sacrifices made by him/her in favour of the other spouse during the course of the marriage. The formulation of maintenance amounts in this case would not be an arbitrary procedure but rather would be founded upon actual events and spousal behaviour during the marriage. Maclean, Weitzman and Eekelaar recommend a ‘compensatory’ role for spousal maintenance arguing that if women are expected to put their earning capacities on hold while they care for children during marriage, then it is only fair to recognise and compensate them for the impairment and dependency which that creates. The compensation model sees marriage as a partnership and there has been a renewed interest in maintenance for wives as the legal mechanism that balances the inequalities of divorce and honours the partnership ideals of the marriage contract. The Californian Appeal Court in *Re Marriage of Brantner* graphically articulated this aim:²⁸

“A woman is not a breeding cow to be nurtured during her years of fecundity, then conveniently converted into cheap steaks when past her prime ... [T]he husband simply has to face up to the fact that his support responsibilities are going to be of extended duration-perhaps for life. This has nothing to do with feminism, sexism, male chauvinism or any other trendy, social ideology. It is ordinary common sense, basic decency and simple justice.”

Support for the compensation model is to be found in Ireland in the judgment of McGuinness J. in *J.D. v D.D.*²⁹ wherein, as previously stated, the learned judge held that the notion of a clean break was not an option available to her in adjudicating on family law cases.

²⁷ See *Maintenance after Divorce* (Clarendon Press, Oxford, 1984).

²⁸ 67 Cal. App. 3d 41b at 419-420 (1977).

²⁹ [1997] IR 64.

6. CONCLUSION

The payment of maintenance between former spouses should have as its objective facilitating an ordered and smooth transition from dependence to economic independence and self-sufficiency. It is clear that both the ‘clean break’ and long term payment of maintenance options represent an inadequate basis for maintenance after divorce. While ‘the goals of self-determination and clean break are often expounded as indicators of good divorce law’,³⁰ the reality is that financial certainty on divorce may not be either fair or workable. A broader approach is therefore recommended. Such an approach should cater for all the options discussed in this paper for the payment of maintenance after divorce and give courts the discretion to select which option is best in the circumstances.

³⁰ S. CONNEELY, “The Family Law (Divorce) Act 1996: Some Observations”, *Irish Law Times*, [1997] 78 at 81.

MAINTENANCE AS A SEPARATE ISSUE – THE RELATIONSHIP BETWEEN MAINTENANCE AND MATRIMONIAL PROPERTY

TONE SVERDRUP

1. INTRODUCTION

In England and Wales, and also in Ireland, there are no formal distinctions between property division and maintenance – they are dealt with in the same claim. In the majority of European countries, however, marital property is allocated according to fixed rules, regardless of whether or not maintenance is granted to the ex-spouse. Thus maintenance is dealt with as a separate issue – the only interface between maintenance and property settlements being of a practical nature: Property settlements influence the need for maintenance and the creditor's ability to pay.¹ Likewise, in the CEFL principles, maintenance is dealt with as a separate issue.² This is the common core; and the CEFL has not yet embarked on the matrimonial property rules.

In all countries, however, these two economic consequences interact on a general level. The purpose of this paper is to examine some of these interactions in the light of the recent changes in family life and legal policy.

The CEFL principles on maintenance have self-sufficiency as their starting point: Principle 2:2 states that each “spouse should provide for his or her own support after divorce”.³ This articulates the de facto legal position in more or less all the jurisdictions surveyed. However, the *frequency* of the granting of maintenance varies considerably

¹ D. MARTINY, Divorce and Maintenance between Former Spouses – Initial Results of the Commission on European Family Law, in K. BOELE-WOELKI, (ed.) *Perspectives for the Unification and Harmonisation of Family Law in Europe*, EFL Series, No. 4, Intersentia, Antwerp (2003), p. 544.

² K. BOELE-WOELKI, F. FERRAND, C. GONZÁLEZ BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY, W. PINTENS, *Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses*, EFL Series, No. 7, Intersentia, Antwerp, (2004).

³ K. BOELE-WOELKI, F. FERRAND, C. GONZÁLEZ BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY, W. PINTENS, *Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses*, EFL Series, No. 7, Intersentia, Antwerp (2004), p. 77.

– from countries in Eastern Europe and Scandinavia where maintenance is the exception, to Germany, Austria, Switzerland etc., where it is quite common. The overall trend, however, seems to be a decline in the granting of maintenance, and a shift from permanent to short-term awards.

Both marital property rules and maintenance rules are aimed at allocating (or unscrambling) the property of the spouses upon divorce, as well as providing for the future financial needs of the spouses. The main purpose of the marital property rules is of course distributive, but the rules also have a supportive function in providing for future financial needs. The division of property is sometimes the only way of guaranteeing the previous standard of living after divorce. And vice versa – even though the main purpose of maintenance is supportive, it also has an allocative function: In countries where no formal splitting of pensions takes place, pension rights are, for example, indirectly divided through the granting of long-term maintenance – not always equally – but still divided.

A number of legal scholars have claimed that the principle of self-sufficiency does not take adequate account of the fact that the earning capacity of the majority of wives has been permanently reduced owing to childcare and working patterns during marriage. They have argued for a rethink as regards the “premature abandonment” of maintenance, and for the granting of maintenance as compensation for these losses.⁴ However, there is little to suggest that the clock can be turned back in this respect. Therefore, one important question is how this decline in maintenance affects the relationship between matrimonial property and maintenance.

As lifelong maintenance becomes more infrequent, the distributive function of maintenance decreases accordingly. Pension rights are part of the assets that have been acquired during the marriage, and could in this respect be compared to other forms of savings, such as bank deposits. Against this background many are of the opinion that pension rights acquired during the existence of marriage should be divided upon divorce. Today, pension rights are subject to division in several European countries – e.g. Germany, Switzerland, and the Netherlands and to some extent also in England and Wales. Generally there seems to be an increasing tendency to split pensions in European countries. Pension-splitting is, however, a much debated question, and it could be argued that pension rights are so closely linked to the individual that no division should take place.

⁴ See among others L.J. WEITZMAN, “Alimony: Its Premature Demise and Recent Resurgence in the United States”, in L.J. WEITZMAN/M. MACLEAN, *Economic Consequences of Divorce*, Clarendon Press Oxford (1992) and M.A. GLENDON, *The Transformation of Family Law*, The University of Chicago Press (1989), pp. 233-238.

Of another nature and far more controversial is the question whether an increment in *spousal earning capacity* during marriage should be regarded as property subject to division upon divorce. Future earning capacity, education etc. (“human capital” or “career assets”) are not treated as property in the European jurisdictions – traditionally, spousal claims as regards future earnings are made under the rubric of maintenance, as is normally the case in United States as well.⁵

Traditionally, both marital property rules and maintenance rules have been justified in broader terms such as “solidarity”, “community”, “equal treatment”, “marital partnership” etc. As long as most families consisted of only one breadwinner and divorce rarely occurred, one could live with such broad justifications: Both spouses were presumed to have made a balanced effort in this community of living. In the case of divorce, the housewife was obviously in need of support, and – as the normal situation was lifelong marriage – the former husband was expected to take responsibility for that support.

When an economic settlement after divorce is justified in such broad and vague terms, it is not always clear where the essence of the argument really lies. Is the settlement in accordance with the principle “from each according to his abilities, to each according to his needs”, or the result of the concept of a balance between contributions and returns? In society at large, these two principles of justice (evening out the needs and balancing the contributions) are often contradictory: Persons who contribute the most – for example, in the form of taxes – have, as a rule, relatively few unsatisfied needs and receive little in return – for example from social security.⁶

In marriage, however, these two principles of justice can be combined more easily. The reason why one of the spouses (usually the wife) has a greater need for money is that she cares for the children and does the housework, and not that her ability to contribute is small. She has made a non-financial contribution, and this is the very reason for her need for financial support from her husband. Therefore, the basic conflict between the two principles is often hidden within marriage. But the conflict still exists, and comes more to the surface in modern marriages.

As the number of divorces increased dramatically in the 1970s, it was no longer self-evident that there should be solidarity between spouses that lasted longer than the marriage. When at the same time women started to take up paid work on a larger scale, they were, in many countries, expected to be self-sufficient and to support themselves

⁵ American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002), pp. 694-695.

⁶ T. ECKHOFF, *Justice. Its Determinants in Social Interaction*, Rotterdam University Press, 1974, p. 225.

after divorce, even though they had not done so during marriage. In this situation there is a need for more explicit and precise justifications for why marriage should have economic consequences after divorce.

2. CONTRIBUTION AND LOSS

Today, the trend in legal policy is to replace the broader terms of solidarity, community etc. by more explicit justifications, such as compensation for contributions made and for losses suffered during marriage. The fundamental justification for the division of *marital property* is now more closely linked to the contributions (financial and non-financial) of the spouses than to the broader concepts of solidarity or community. This conception of justice is linked to *retributive justice* – there should be an overall balance between contributions and returns.

2.1. CO-OWNERSHIP

One of the first examples occurred in England and Wales in the 1960s and 1970s. The question was whether a wife's indirect contribution in the form of payment for household expenses or childcare should give her a beneficial interest (co-ownership) in the family home formally owned by the husband. The broad doctrine that acknowledged an indirect contribution within the framework of a remedial constructive trust was, however, not adopted in English law, contrary to other common law jurisdictions, like Canada and Australia.⁷ But once a spouse or cohabitee has established some beneficial interest by making a direct contribution (by way of a deposit, mortgage liability or by paying off a loan), the *quantification* of that interest is determined by the whole range of conduct during the relationship – including *indirect* contributions by way of, for example, a contribution to household expenses.⁸ Conceptually the quantification of the beneficial interest is founded on inferred intention. Thus, in theory, the contribution in itself is not decisive, only its significance for the parties' common understanding concerning the ownership of the property. In reality, however, as long as the threshold condition is satisfied, indirect contributions seem to be of great importance in determining property rights in English law both with regard to unmarried cohabitation and in relation to the spouses' creditors.

In Norway, the Supreme Court completed this journey in 1975 and acknowledged an indirect contribution in the form of childcare and housework, and no distinction

⁷ S.M. CRETNEY/J.M.MASSON/R. BAILEY-HARRIS, *Principles of Family Law*, 7. ed. (2002), pp. 112-123.

⁸ S.M. CRETNEY/J.M.MASSON/R. BAILEY-HARRIS, *Principles of Family Law*, 7. ed. (2002), pp. 122- 131.

was made between entitlement and quantification. In the so-called ‘Housewife case’ the Supreme Court ruled that a wife who stays at home and cares for young children could become the co-owner of the house purchased during the marriage by her husband with his income.⁹ This method of acquisition departs sharply from the traditional methods of acquiring ownership, as the justification is not linked to a “common intention” requirement. The rule developed in Supreme Court case law,¹⁰ and it has now been laid down in the new Marriage Act of 1991 with regard to housework and childcare.¹¹ Co-ownership is established on the basis of what the parties have contributed to the acquisition of the property. A wife’s indirect contributions, in the form of childcare and housekeeping chores, and/or the payment of household expenditure, are normally sufficient to constitute her as the co-owner of a house bought by the husband with his income during the marriage. This rule applies not only to the family home, but also to other items of property for common personal use, e.g. a holiday chalet, a car or a boat, and will apply unless the spouses have expressly agreed who is to be considered the owner.¹² A similar course of legal development, departing from the property law concept of acquisition, was in progress in the lower courts of Denmark and Sweden. The higher courts of these countries, however, halted its development. In Scandinavia spouses have separate property during marriage, but an equal division takes place upon divorce (deferred community property). As property is divided equally upon divorce, this acknowledgement of an indirect contribution is of greatest significance in relation to the spouses’ *creditors* and in *unmarried cohabitation*.¹³

It is not surprising that the law developed in this way in the 1960s and 1970s. Partly this was, of course, due to the increasing number of divorces, but it was also connected

⁹ *Norwegian Supreme Court Reports* 1975, p. 220. The house in question was acquired during the existence of the marriage and was formally owned by the husband (it was registered in his name).

¹⁰ *Norwegian Supreme Court Reports* 1966, p. 876, 1975, p. 220, 1977 p. 553, 1979, p. 1463. In these first cases, the spouses had deferred community property, so that property would be evenly divided, regardless of ownership. When disputes did arise, they were due to the rules governing the right of allotment in kind: the person who owned the particular item was allowed to keep it after divorce in return for a compensatory payment to the other spouse based on the value of the property. Up to the 1970s, this payment was – in practice – well below the market value, so that the reality of ownership was also indirectly economically significant upon the termination of the marriage.

¹¹ Marriage Act of 1999, Section 31, third paragraph.

¹² The same principle is also applied judicially to *unmarried cohabitation*; see *Norwegian Supreme Court Reports* 1978, p. 1352 and 1984, p. 497. The Supreme Court has also determined that *creditors* must respect co-ownership rights of this nature; cf. *Norwegian Supreme Court Reports* 1978, p. 871. A new principle was thus established with respect to obtaining property rights in Norway, cf. T. SVERDRUP, *Stiftelse av sameie i ekteskap og ugift samliv* (Co-ownership in Marriage and in Unmarried Cohabitation), Oslo 1997, p. 125ff.

¹³ If the spouses have agreed to have a separate property regime, this rule relating to the acquisition of property applies as well, as long as the spouses have not agreed as to who is to be deemed the owner of the particular items of property. *Norwegian Supreme Court Reports* 1980, p. 1430 and 1982 p. 1269.

with the increasing number of women going out to work: As long as it was considered to be the natural order of things for the woman to remain at home looking after the children when she married, it seemed unnatural to say that she accounted for a part of the husband's income. But when there is *a realistic alternative*, a judicial solution by which only the one who has directly contributed achieves owner status appears as a random manifestation of the division of labour which the spouses have chosen.

Furthermore, it is not fortuitous that *the courts* and *not the legislators* were responsible for this legal development. It came about by the solution of individual cases in which real people took part. The reality, the truth and the complexity of the relationship, then, appear differently and more clearly than in the case of general discussions on the principles on which legislation is based. Such documents must necessarily be based on simpler and more ideological ideas, *e.g.*, on principles such as independence and self-sufficiency for married women. Such principles are important, but they often do not extend to the heart of such relationships. There is every indication that this area of family law is one where the courts have a law-making role that can hardly be completely supplanted by the legislator. The conflict embraces a complex collection of norms and values, which only become apparent in specific cases.

2.2. VALUATION OF NON-MARKET CONTRIBUTIONS

It is understandable that this legal development took place in separate property regimes, where property rights have some significance. In community-property countries, *e.g.* Italy, Spain and countries in Eastern Europe, co-ownership in property acquired during marriage is embedded in the marital property regimes. But in these countries as well, the valuation of non-market work is significant in *legal policy* – *e.g.* whether a certain allocation of property, or the granting of maintenance, should be viewed as an entitlement or as a charitable transfer to a needy spouse.

It is worth noting that the Norwegian Supreme Court justified co-ownership from the point of view of *economic* reasoning. In the so-called 'Housewife Case', the husband, in addition to performing the work from which he derived his income, had built a large part of the house himself in his spare time. The judge who led the voting in the Supreme Court stated that it was the wife's housework and her caring for three small children "that has enabled the husband to devote so much work to building". The travaux préparatoires of the new Marriage Act of 1991 state likewise that the housewife's co-ownership is based on "economic realities" and emphasise that no transfer of property occurs by declaring that the wife is a co-owner. The same text also states that: "co-ownership is based on the contribution from each of the spouses that

lies behind the acquisition.”¹⁴ The basic principle of the new regulations with respect to the acquisition of rights to property is that the spouses both contribute to the economic results. The fundamental thinking appears to be that if they had performed an equal share of the work outside and inside the home, the husband would have had to reduce his working hours and thus would have earned less. On the other hand, the housewife would have had more time for paid employment and thus (normally) she would have made a direct contribution to the acquisition.

A number of people have pointed out that the courts are reluctant to put a market price on housework, and part of this fear is due to the fact that there is a conviction that its value must be so low. The idea that the value of non-market contributions in marriage is lower than the value of financial contributions is shared by the American Law Institute’s Principles of the Law of Family Dissolution. The Institute’s reasoning goes as follows:¹⁵

“Much of the spousal earnings during marriage are consumed, and only the surplus remaining is available for division at divorce. For domestic labors to contribute to that surplus, they must not only enhance the financial capacity of the other spouse or the value of marital property but do so by an amount that exceeds the consumption attributable to the spouse performing those labors. For domestic labors to contribute equally to that surplus would require, further, that this excess enhancement equal the excess of the higher-earning spouse’s income over that spouse’s consumption. Neither data nor intuition support such inferences.”

I agree that the consumption attributable to the spouse performing domestic labour must be taken into account when valuing the housewife’s indirect contribution. But her consumption *is already taken into account* in the valuation of her contribution outlined above: Let us suppose that the wife takes care of small children below compulsory school age as well as household chores. The husband is engaged in paid work and earns 40,000 euros per year (taxes deducted). From his income he pays the household expenses and the mortgage repayments on the house (the latter constitute the “surplus” subject to division on divorce). The husband would have to reduce his working hours by one half, and consequently halve his income, if he were to take responsibility for his half share of the domestic work and child care, as the children are below school age and thus need round the clock care. We must presuppose that the children should have just as much contact with their parents in the comparative situation. Given this premise, the wife has made half of his earnings possible, i.e. 20,000 euros per year. But the total of this sum cannot be regarded as her yearly investments in the house – of course. Part of this enabled income amounting to 20,000 euros must

¹⁴ NOU (Official Norwegian Report) 1987: 30 pp. 70-71.

¹⁵ American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002), p. 735.

also be deemed to have been spent on covering consumption expenses. In our case it is reasonable to assume that the wife has contributed to half of the total consumption expenses and half of the total investment in the house. In other words: she has contributed on an equal footing to the surplus subject to division on divorce, as well as to the household expenses (consumption). The spousal contribution of domestic labour confers an equal financial benefit in this case. However, if the children had been of compulsory school age, and the wife still worked full time at home, she would have enabled less than half his earnings, and contributed less than half. Some would argue that the same holds true for cases where the husband has a high salary and invests in property far above average, see below.

The housewife's opportunities for earnings of her own in the hypothetical comparative situation of equal sharing of domestic labour are part of the prerequisite (and the justification) for recognising domestic labour as an indirect contribution that can lead to co-ownership. The thinking is that the chosen division of labour shall not in itself entail that the housewife acquires ownership of less than she would otherwise have had: where an equal distribution of effort between the spouses both inside and outside the home would have given her a right of co-ownership, a skewed distribution should not lead to a different result. As occupational work gradually became a realistic alternative for many married women, housework appeared precisely as the main reason why the housewife could not herself invest – it was no longer gender or “the natural order of things” that amounted to the only obstacles. As mentioned above, the idea that an arbitrary and unjust advantage arises where the right of ownership is determined by who happens to go out to work and who happens to be at home, is most likely if it is *realistic* to imagine an alternative.

2.3. THE EQUAL DISTRIBUTION RULE

This principle of establishing co-ownership on the basis of what the parties contribute to the acquisition of property is in accordance with one of the normative patterns that seems to prevail in marriage and unmarried cohabitation: A rationale of reciprocity might exist, which means that there should be an overall balance between service and counterservice – one should obtain a proportionate return. But usually there is no proportionality between a single service and a counterservice. The contributions are not reciprocally conditional – the two are not linked together with a “shall”, even though sometimes with a “should”. Therefore it is, in my view, not problematic to

justify an *equal distribution rule* with reference to the parties' contribution, and at the same time to reject its rebuttal with evidence of unequal contribution.¹⁶

The idea of a balance between contributions and returns is present on a more general level in many European countries, as the majority of countries exclude the value of gifts, inheritance and premarital assets from the property which is subject to division. In Southern and Eastern Europe this has long been the case (community property), as well as in Germany (*Zugewinnngemeinschaft*) and in Norway since 1991. One can even trace such tendencies in English law in recent cases.¹⁷ In Denmark, Sweden and Finland all assets are still subject to division, but similar limitations are discussed in these countries as well.¹⁸

Traditionally, marital property rules have been explained both in the community that exists between spouses, in the labour of both parties and in the need for support. The only common feature of the assets not subject to division (i.e. property that a spouse owned before the marriage or acquires later by means of an inheritance or a gift) is that the other spouse is not presumed to have made a contribution to the acquisition of those assets. In other words: in cases where the assets subject to division are limited to assets created during marriage, *contributions* appears to be the essence of the justification.

2.4. SPOUSAL MAINTENANCE

When we turn to *spousal maintenance*, we find a similar development. Dieter Martiny identifies four different justifications for spousal maintenance after divorce. In addition to support during the *transitional* period, he mentions *sanction*, *solidarity* and *compensation for losses* suffered during marriage.¹⁹ As fault-based divorce is no longer the rule, maintenance as a sanction is not particularly relevant; and as lifelong marriage is declining, solidarity is more a justification in theory than in practice. Today, *compensation for losses relating to marriage* seems to be the most plausible justification both for long-term maintenance and for short-term maintenance: This compensation is also linked to retributive justice on a more general level.

¹⁶ The American Law Institute is of another opinion; cf. *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002), p. 735.

¹⁷ Notably *White v. White* [2001] 1 A.C. p. 596.

¹⁸ A. AGELL, *Nordisk äktenskapsrätt*, Nord 2003:2, Copenhagen 2003, pp. 404-412.

¹⁹ D. MARTINY, "Divorce and Maintenance between Former Spouses – Initial Results of the Commission on European Family Law", in K. BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, EFL Series, No. 4, Intersentia, Antwerp (2003), pp. 545-546.

Arguments with regard to compensation for losses due to marriage are of course much more persuasive when they are linked to and are justified by the contributions made during the marriage. At least, in families with a single breadwinner and a full-time homemaker, it is obvious that losses sustained and contributions made during the marriage are *two sides of the same coin*. Surpluses accumulated during marriage (as well as future income and pensions) can be regarded as the fruits of the division of labour in marriage. The wife's childcare has enabled the husband to pursue his own career and to earn more money (and consequently to obtain higher pension rights) outside the family. The "coin" is the household work and childcare, which from one side constitute an indirect contribution to the breadwinner's acquisitions and from the other side an obstacle to the housewife engaging in paid employment, which results in a loss of income. Losses and gains are two sides of the same coin, and they both relate to the past as well as to the future. As regards maintenance, it is the future income that has to be compensated, and as regards property, assets in the form of pensions and earning capacity are also related to the future.

2.5. MODERN MARRIAGES

Today, however, the division of labour is less clear – a wife can work part-time or full-time outside the home, and take care of the children part-time. It is not obvious that her housework and her care of the children enable the husband to devote his time to earning money and to a professional career. One could argue that because the husband would often have earned just as much even if he had performed "his" share of the care duties, therefore the wife cannot be said to have facilitated any of his earnings, and therefore has not contributed indirectly in any substantial way. When it is accepted (and often expected) that mothers work full-time outside the home, and childcare centres are available, it is understandable that such questions are raised.

However, a chain of causation still exists during marriage: As mentioned above, it must be presupposed that the children should have just as much contact with their parents in the hypothetical, comparative situation. In the same way it must be presupposed that the person working outside the home should have just as much spare time and the same living standards as a person in a hypothetical, comparative situation.²⁰ Given these facts, a husband would have *had to reduce his working hours* if his wife had not performed some of "his" share of the childcare and housework. From this point of view, the wife has caused (made possible) part of his earnings, and if these additional earnings result in investments or greater pension benefits, she has indirectly contributed thereto.

²⁰ This is expressly stated in RG 1990 p. 858 (Norwegian High Court judgment): "same quality of life".

The same holds true for the losses suffered during marriage: It is arguable whether the husband's full-time work can be said to have "caused" her to work only part-time when a childcare centre is available. But given the same premises as mentioned, the answer is yes.

Even though losses and gains are two sides of the same coin, they do not always extend equally far. In the *quantification* there may be differences according to whether one sees things from the gain side or the loss side. For example: the sharing of pensions is subject to political and legal debate as regards the criteria for compensation. Should the wife's loss of pension benefits due to the fact that she has spent more time on household chores and care than the husband be compensated? Or should they split the increase in the husband's pension that is a result of the wife enabling him to devote more time to his occupational work? Apart from a small percentage of high-income families, however, these two methods of calculation lead to more or less the same result. In this hypothetical assessment we must take it as established that she could have had a more lucrative career development if the roles had been reversed. It is only in those cases in which the housewife's alternative income, given these conditions, would have been markedly lower than the husband's that there is a difference of any significance.

However, in those cases in which the person who goes out to work (most often the husband) has a very high income, one can normally exclude the possibility that the wife would have earned just as much. The husband could then argue that more than half of his salary is related to his personal abilities, and not to his wife's childcare and the chosen division of labour.²¹ On the other hand, it may be claimed that the person working at home has freed time for the person who goes out to work to earn high as well as low pay. In cases where the husband has a very high salary the spouses have chosen a more efficient division of labour during the marriage, and the question of who shall be ascribed this efficiency gain cannot be solved on the basis of simple causal considerations. In such cases there is no "correct" answer to this question of causation.

3. THE ADJUSTMENT OF BEHAVIOUR DURING MARRIAGE

In my opinion, however, it is an erroneous *question to ask*. It is not sufficient to measure contributions and losses when dealing with the economic consequences of

²¹ A similar argumentation is put forward in the politico-legal debates on the division of future income, see among others A.M. PARKMAN, *No-Fault Divorce: What Went Wrong?*, Boulder-San Francisco-Oxford 1992, pp. 39-42 and pp. 143-144.

divorce. Such measurements obscure part of the truth: the changing of one's way of life that takes place in most marriages even where there are two breadwinners in the family. Instead one could ask whether the parties had a sufficient reason to modify their behaviour during the marriage in the way they did, and whether this modification ought to have consequences for the division of assets and income. Equal sharing and maintenance may, as mentioned, be justified in the community of living that existed between the spouses. This justification has, however, little persuasive force as long as it is not specified in concrete terms. The question is what elements or distinctive features of this community make it reasonable for the spouses to exchange benefits after their relationship is over.

Most spouses adjust their work patterns to their total earning capacity and their total expenditure – they form a consumption unit. Spouses, especially women, adjust their level of income during marriage to the fact that there is another income earner in the household. As a consequence, it is difficult for them to find full-time employment in order to support themselves after divorce. And as regards the earning of pension rights, many women have missed the boat. The universal trend towards state pensions determined by the amount of the individual's lifetime earnings makes it impossible for many women to compensate for the "lost years" working part-time by working full-time later in life.²²

The phenomenon of modifying behaviour is often linked to the subordinate role of women, inasmuch as they often put the male career first and foremost. One could ask whether this modification of behaviour on the part of the parties is a (transitional) *gender issue* that will disappear when equality between men and women is achieved. In my opinion it is *not only* a gender issue, but also a more permanent feature of family life – which occurs irrespective of gender.

A fundamental adaptation lies solely in the fact that most spouses and cohabitants must be content with *one* dwelling; it is in the nature of family life that both parties live in one family home. If both have previously owned a house, one of them is in most cases obliged to sell his or her house if they are to live together. If only one of them owned a house, the other is in most cases prevented from future investments (savings) in a house. Whether or not the parties are independent of each other, the majority can afford only one house. In unmarried cohabitation this often leads to the fact that the non-owning party is left without property even after a lengthy relationship. In marriage the situation is better in those cases in which the mortgage is paid off during the

²² This is pointed out by Margareta Brattström in her book, M. BRATTSTRÖM, *Makars pensionsrättigheter* (Spouses' Pension Rights) , Iustus Forlag, Uppsala (2004), English Summary pp. 326-330.

marriage, for such assets are divided equally, irrespective of the ownership of the dwelling.

However, if the dwelling has been paid off at the start of the marriage, this adjustment of behaviour can lead to unfortunate results in the countries where only the assets acquired during the marriage are divided. Owing to the increase in both wealth and the frequency of remarriage, it is not uncommon for one spouse to bring a house, a holiday chalet etc. into the marriage, whereas the other brings little property. If such basic investments are already available to the family, *it is natural for the spouses to apply most of their disposable income to current expenses during marriage*. The party without property will benefit from the other party's investments during the marriage, but will be hard hit when nothing is saved for equal distribution when the spouses part company. In order that one party shall not come out of the marriage empty-handed, the said party must *put aside part of his or her income during the marriage* in case of a possible breach. But how many persons will do such a thing in practice? The prerequisite for property rules in the countries where only the assets acquired during the marriage are divided seems to be that the spouses should model themselves on the "Economic Man" model.²³ Spouses, however, live in a community of life one of the consequences of which is that they form *a consumption unit*. (Taken to extremes, the property regime where only assets created during the marriage are divided would require that if one party wants roast beef for dinner, the other must insist on fish and chips, and that if one wants a holiday abroad, the other must stay at home.) The parties adjust their level of consumption to the fact that basic investments, like a family home, are already available. The spouses arrange their lives according to the total amount of investments available, their total earning capacity and expenditure. This accommodation of economic behaviour has little to do with dependence and the lack of equality between men and women.²⁴

These more permanent features of family life seem to be deeply rooted in many marriages, and come more clearly to the surface when we go beyond the broad justi-

²³ T. SVERDRUP, "Marriage and Cohabitation: Community of Life or Community of Work?", *Working Papers in Woman's Law* No. 51, Department of Public and International Law University of Oslo (1999).

²⁴ It has however something to do with dependence: Even if a spouse were to think like Economic Man and wish to save some of his or her income in order to have something to share in the event of the dissolution of the marriage, it would be of no help if the said spouse has no income. Nor has anyone who stays at home with the children without an income any theoretical possibility of saving. In deferred community regimes (i.e. separate property during marriage) a housewife has normally no legal right to decide that her husband shall put aside some of his income so that there will be something to share equally in the event of a termination of the marriage, and even in community regimes this is probably a right more in theory than in practice.

fications for the economic settlements after divorce, and start to measure contributions and losses in family life.

4. CONCLUSION

When paid employment is a realistic alternative for the wife working in the home, the right of ownership only to the direct contributor appears as a *random* manifestation of the division of labour which the spouses have chosen. This makes it plausible to consider both the full-time and part-time housewife as having made possible parts of the husband's income, and thus contributed indirectly to his acquisitions. Co-ownership during marriage as well as an equal division rule upon divorce can be justified in this way. But when one window is opened, another is closed: The same realistic expectancy of paid employment for women cuts off the possibility of long-term maintenance after divorce.

The household work and childcare constitute an indirect contribution to the breadwinner's acquisitions and, from the other side, an obstacle to the housewife taking up paid work, which results in a loss of income. Gains and losses are two sides of the same coin, but apparently a division of property provides dignity (entitlement rule) while maintenance is demeaning (charity rule). Sometimes one gets the impression that one has to choose between them. Due to the fact that they are two sides of the same coin, there is, however, no reason to conceal one side at the expense of the other – simultaneous gains and losses constitute a powerful justification for transfers between the spouses. But this acknowledgment also leads to the fact that it is difficult first to argue for an equal division of the assets on the basis of the contribution side, only then to demand a further portion of the assets created with reference to the loss side. This may sound like argumentation in which the same factor is ascribed weight twice.

Additional compensation could, however, take place because the division of labour has resulted in a gain and loss *in the future*: There is however political and legal disagreement especially on whether spousal earning capacity (or an increment of the earning capacity during the marriage) should be regarded as property subject to division upon divorce. The crux of the argument for division seems to be that because both parents out of consideration for their children are not able to fully pursue a career, the choice of one of the spouses to partly give up a career should not be at the peril of that said spouse alone. Career assets are, however, regarded by many as being too closely linked to individual autonomy, and therefore not suitable for division. Moreover, the division of property is final and there are great difficulties in valuing career assets. Maintenance, on the other hand, is more flexible because of the possibility of terminating the award, but, on the other hand, not in accordance with the self-sufficiency principle. Future gains and future losses are also two sides of the same

coin. Thus, it is problematic to claim a division of career assets and, at the same time, to claim rehabilitative maintenance. As regards any gain and loss in the future, “property” and “maintenance” are two different labels for the same phenomenon: the spouses’ adjustment of work patterns to each other during the marriage that have effects after the termination of the marriage. One can therefore imagine a new form of benefit upon the dissolution of marriage under a new name, which cannot be characterised as either “property division” or “maintenance”. Such a rehabilitative measure need not carry with it the traditional legal and political understanding that lies embedded in these two concepts. This new benefit may be tailor-made to address the particular problems that arise when future gains and losses are to be compensated.

The spouse’s adjustment of behaviour that takes place in most marriages with regard to savings, investments, consumption, work patterns and career planning, leads to inadequate results in economic settlements based on the thinking that there should be a balance between contributions and returns, i.e. that only assets acquired *during the marriage* by means other than gifts and inheritance are divided. Family law should take into account that spouses adjust their careers to the fact that they have children and that there are two breadwinners in the family. They adjust their economy according to the total amount of income, investments and expenditure. When only assets acquired during the marriage are subject to division, it mirrors a rationale of contribution which obscures part of the truth: The spouses adjust lifestyles, work patterns, investments and consumption to each other in accordance with the rationale of need. This implies, among other things, that one spouse, usually the wife, adjusts her (or his) level of income to the fact that there is another income earner in the household. The adjustments that have taken place with respect to work patterns, investments and consumption during a marriage are also *a reflection of the starting position* of each spouse with respect to property, education, etc.: A spouse who has no pension rights (or no professional qualifications) before marriage is more likely to acquire such assets during marriage than the other spouse who has such assets. Should these assets be subject to an equal division, while the other spouse’s assets remain undivided due to the fact that they were acquired before marriage? The adjustments that have taken place are also a reflection of the starting position of the *other* spouse – as they form an investment and consumption unit. A spouse adjusts the level of consumption to the fact that basic investments in a house, a car, etc. are already available to the family. When nothing is saved during the marriage, there is nothing to divide upon the termination of that marriage.

Until now one flexible remedy has been maintenance. In the future we will have to rely more on other remedies, as one would expect maintenance to become increasingly infrequent in Europe within the coming decades. The distributive function of maintenance will, of course, disappear as well, leading to unfortunate results, especially in those countries where pension rights acquired during marriage are not divided equally.

Fixed rules for the division of assets harmonise best – for procedural economic reasons – with today’s high divorce figures in the Western world, but are unfortunately in conflict with the more fundamental basic features of the community of life described above, in which individual adjustment is the keyword. A court with discretionary power to divide property upon the termination of marriage, as is the case in England and Wales, could more easily take all of these factors into consideration. And similarly in France and Spain (*prestation compensatoire*). In other countries it might be necessary to rely more on reallocative powers and more flexible rules than has been the case until now.

A fundamental question is to what extent it *ought to be* the task of family law to even out and correct inequalities that are due to the spouses’ adaptation during their marriage. Some will maintain that this adjustment is something which spouses undertake at their own risk, so that it falls outside the area of responsibility of marital legislation to compensate for this in the case of divorce.

In my view, marital legislation should – at any rate to some degree – seek to even out the inequalities in work experience, investments, education etc. which are a consequence of living in a community of life. But then this cannot only apply to measures for restoring the reduced capacities in the economic sphere, it must also apply to other qualities that are not adequately developed (or that have been stunted) as a consequence of adaptation during marriage. I am thinking first and foremost of the reduced capacity for care-giving and contact with the children, which may be a consequence of the fact that the spouse (usually the husband) has taken on the major part of the career-promoting work outside the home, overtime work etc. Around 90% of children live with their mothers after divorce, also in those countries where the great majority of married women are in paid employment. In child custody cases the decision must of course comply with what is in the best interest of the child, but this does not prevent one from conceiving “rehabilitative” measures that make it possible for the husband to take over daily care in the long run, or possibly to strengthen the bonds between the father and child without daily care being taken over. I cannot see any great difference between such measures and the rehabilitative measures (short-term maintenance etc.) in the economic field. They are both measures that aim at restoring the reduced capacities due to the adjustment of behaviour that takes place during the existence of marriage and cohabitation. Family law should acknowledge this adaptation and try to find more adequate means to assist in these situations as well.

COMMENTS ON THE PRINCIPLES OF EUROPEAN FAMILY LAW: DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES

BEA VERSCHRAEGEN

Comparative law primarily provides a basis for academic and legislative projects, including the harmonisation of law. Usually, comparative work is highly underestimated. It is a widespread misunderstanding that collecting information on foreign law constitutes comparative law. Indeed, the collection of data is part of what comparative lawyers must do. In this context, it is needless to repeat which working method has been adopted by the Commission on European Family Law.

Instead, it must be underlined, that the goal to be achieved and the addressees of the principles adopted by the Commission on European Family Law are of the utmost importance. The least one can say is that the principles can be regarded as a frame for possible legislative projects of national and/or European legislators. Taking this as a starting point, the first impression is a positive one. This has a great deal to do with the topic itself: family law!

Comparative lawyers must carefully focus on the countries they want to compare. Only some countries will serve as leading examples, due inter alia to their historical, cultural, legal, political and economic background. In practice, comparative lawyers face obstacles of different nature, such as lack of experts, language barriers, time schedules etc. This is pure reality. The Commission on European Family Law is no exception to this.

When undertaking a comparative analysis, the question to be asked is what is to be compared? “Law in the books” or also “law in action”? Family law in the strict sense of the term or also neighbouring fields of law, such as procedural law, labour and social law, tax law etc? Obviously, the Commission on European Family Law is mainly concerned about family law in the strict sense of the term but makes an attempt to

include the “law in action”. In my view, the restriction to family law ought to be reconsidered.

The Commission on European Family Law also made a clear choice by opting for specific issues of substantive family law. Though “divorce”, “maintenance between spouses” and “parental responsibilities” are crucial areas of family law, they are, at the same time, very broad issues. This leads to the result that the principles must necessarily remain on a general level.

Some principles refer to the so-called “common core”, others focus on a “better law”, obviously in areas where a common core cannot be established. Upon analysis, therefore, the “common core” remains extremely limited. This is not at all surprising. It may then be a wise decision of the Commission on European Family Law to suggest alternatives and/or, as the case may be, to refer to national law. By and large, the choice for a “better law” and the reference made to national law demonstrate the limits of the harmonisation of family law.

When developing rules of better law, creativity becomes an important factor. Clearly, better law rules must, in some way, be applicable; they should also reflect what is feasible and needed in a society. Just taking into account the 25 member states of the European Union, it is evident that we are dealing with countries that differ in important aspects. Their demography is different, their socio-economic level differs, the nature and percentage of minorities differs etc. Just to name one example, the discussions on the EU-directive on family reunification indicated the standards of the member states and their notion of family and family issues. The European Commission stressed how important the reunification of families is, for the society at large and for the well-being of the persons concerned. But, due to strong pressure from Germany and Austria, the final version of the directive is disappointing to say the least.¹ If attempts to harmonise the law aim to be successful, one needs to deal with the specific societal and legal rules of each of the countries. One needs to know how these societies will most probably change within the next few generations, if the goal is to improve the law.

It further seems important to deal with the functioning of family law. Principles of family law may prove to be extremely interesting from an academic point of view; they may, however, be useless for practitioners. A discussion of the principles reflecting a “common core” and/or “better law” with practitioners from each of the EU-member

¹ See e.g. B. VERSCHRAEGEN, “Familienzusammenführung in Europa. Zur Bekämpfung von Schnecken, Wühlmäusen und allzu ungestümen Wucherern”, in STELZER u.a. (Eds.), *FS Öhlinger* (2004), pp. 603-617.

states therefore becomes of overall importance. Admittedly, this would delay the work of the Commission on European Family Law considerably and it would, of course, also imply higher costs. At the end of the day, maybe only few principles would remain on the list.

To close these general remarks, the work accomplished by the Commission on European Family Law deserves a positive assessment. Enormous energy has been invested in the development of the principles. However, co-operation with practitioners would have been highly desirable.

Some more specific examples are to be advanced in order to demonstrate the contradictory strategy of the legislators, resulting in difficulties on the level of the harmonisation of the law. On the one hand, deregulation seems important, party autonomy is underlined, alternative dispute resolution is favoured, self-determination and self-sufficiency have become guiding values, on the other hand, legislators develop a real “*furor codificandi*”. For example, rules for cohabitantes who may wish to organise their life without any restriction by legal rules are introduced in order to protect the weaker party, which necessarily limits party autonomy. Alternative dispute resolution is favoured, but, at the same time leading case law, which to some extent allows for the predictability of court decisions, will, in due course, disappear. In this context, it is accepted (and necessary) that procedural rules are not applied (e.g. the right to be heard, the independence of judges, fair trial etc.), which reduces the legal protection guaranteed by the European Convention on Human Rights.²

The Commission on European Family Law suggests rules on divorce and some consequences of divorce. Obviously, grounds for divorce differ from country to country. They all show that marriage as a civil status cannot be abandoned that easily, but practice also proves that people who want “their” divorce can have it. Different “types” of divorce will not change this. However, from a comparative point of view the discussion has moved from the grounds for divorce to the consequences of divorce. There is a tension between the concept of marriage as a life-long commitment and the relative easiness with which a divorce can be obtained. This is not a plea for difficult divorces as a matter of principle, but perhaps, the concept of marriage (and of the family) ought to be reconsidered. There is also a basic tension between marriage and divorce on the one hand and the consequences of divorce on the other. It is claimed, that a “no guilt model” should result in “no sanctions” upon divorce. Divorcees ought, therefore, to achieve a mutual agreement. Who, then, should check the agreement as to whether

² E.g. B. VERSCHRAEGEN, “Mediation: Sinnige Mode oder moderner Unsinn?”, in: Schriftenreihe der Österreichischen Juristenkommission (Eds.), *Entstaatlichung Gefahr für den Rechtsstaat?*, Wien 2002, pp. 166-174.

the interests are balanced? Should judicial control be limited to hard cases, such as error, duress etc.? Comparative analysis also shows that so-called “clean break models” tend to find other ways in order to realise “justice” (e.g. new property, escape clauses etc).³ Any compensation model must answer the question what is to be compensated? The work invested in the marriage during that marriage or also frustrated legitimate expectations (on the basis of a “lifelong commitment)?

To summarise, every law reform and also new principles of family law face a basic problem. That is to say: what is the intention of the reform or the model law? New rules based on already existing (differing) philosophies on what the family is all about, or an approach, which departs from “traditional concepts” to which – in fact – also rules on “life-long partnerships” and “same-sex marriage” belong, and “only” deals with the responsibility of certain groups of persons, most probably also “compensation” for (longterm) investment in personal relationships and the frustration of legitimate expectations? Everybody’s answer is most probably the following: justice, and not more than that. And it is up to (family) lawyers to deal with this basic need of the members of each society.

³ See e.g. B. VERSCHRAEGEN, *Divorce*, in: International Encyclopaedia of Comparative Law, GLENDON (ed), Vol. IV Persons and Family (2004), pp. 1-157.

PART TWO: PARENTAL RESPONSIBILITIES

PARENTAL RESPONSIBILITIES – CEFL’S INITIAL RESULTS

KATHARINA BOELE-WOELKI*

1. INTRODUCTION

In January 2004 the Organising Committee of the Commission on European Family Law drafted a detailed questionnaire with 62 questions on parental responsibilities.¹ At the beginning of April 2004 twenty-two family law experts in Europe were asked to draft a national report. An integrated version of all the reports has been published in the European Family Law Series.² On the basis of this integrated version it will be possible to distil the differences and similarities between the national concepts and solutions. Finally, based upon a thorough analysis of the comparative material Principles of European Family Law regarding Parental Responsibilities will be drafted. The selection of the subjects to be dealt with was made at the Organising Committee’s meeting in February 2005. Subsequently, two drafting sessions of the Organising Committee are planned to take place in April and September 2005 before the draft Principles regarding Parental Responsibilities will be discussed with the Expert Group in December 2005. The final version is expected to be published in 2006.

This is the 2nd initial results report with regard to CEFL’s activities. At CEFL’s inaugural conference in December 2002 DIETER MARTINY presented the first report regarding divorce and maintenance between former spouses.³ In contrast to his excellent and comprehensive comparative overview which he was able to provide after having had

* This contribution is dedicated to NIGEL LOWE, a member of CEFL’s Organising Committee, who is one of the most prominent experts in the field of child law in Europe. Originally, he was supposed to write this contribution. To our great regret, he was not able to do so. Therefore, I have prepared this paper in his place.

¹ Accessible at CEFL’s website, see <http://www2.law.uu.nl/priv/cefl> under Working field 2.

² See K. BOELE-WOELKI/B. BRAAT/I. SUMNER (eds.), *European Family Law in Action, Volume III: Parental Responsibilities*, European Family Law Series No. 9, Intersentia-Antwerp 2005. All national reports, together with the relevant provisions, are also accessible at CEFL’s website.

³ D. MARTINY, “Divorce and Maintenance Between Former Spouses – Initial Results of the Commission on European Family Law”, in: K. BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, EFL series No. 4, Intersentia – Antwerp 2003, pp. 529-550.

a very short time for preparation, this contribution is restricted to only a few aspects of parental responsibilities.⁴

I will first focus on the selection of our second working field and its position within the European and international setting. After having explained the structure of CEFL's questionnaire selected issues regarding parental responsibilities will be compared. In order merely to provide a preliminary overview of the national reports, at least *one* specific question from *each* part of the questionnaire has been selected.⁵

2. SELECTING PARENTAL RESPONSIBILITIES AS CEFL'S SECOND WORKING FIELD

For many decades important international organisations have been engaged in the field of family law, in particular in the field of parental responsibilities, in order to improve the legal position of the child. Under the auspices of the United Nations,⁶ the Hague Conference on Private International Law⁷ and the Council of Europe⁸ different international conventions have been drafted. Many European countries are bound by these conventions, most of which deal with cross-border relationships. In addition to the international unification of the law relating to the protection of children including all civil matters concerning the attribution, exercise, delegation, restriction or termination of parental responsibilities the European Union has unified the rules concerning jurisdiction and the recognition and enforcement of judgments on parental responsibilities. From 1st March 2005 these matters are governed by Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental

⁴ The national reports have been submitted by 15 November 2004.

⁵ Reservations are made regarding possible errors with regard to the solutions that were found, categorised and compared. More time is needed in order to analyse the answers contained in the national reports more thoroughly than I was able to do at this stage.

⁶ Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms; Convention of 20 November 1989 on the Rights of the Child, see <http://www.untreaty.un.org>.

⁷ Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors; Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, see <http://www.hcch.net>.

⁸ Convention of 20 May 1980 on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children; Convention of 25 January 1996 on the Exercise of Children's Rights; Convention of 15 May 2003 on Contact Concerning Children, see <http://www.coe.int>.

responsibility (Brussels *Iibis*).⁹ This Regulation¹⁰ repealed and replaced Council Regulation (EC) No. 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (Brussels II), which was in force from 1st March 2001 until 28 February 2005. Not only the Brussels II Regulation but, in particular, the widening of its scope by the Brussels *Iibis* Regulation supports CEFL’s choice for the second working field, being parental responsibilities.¹¹ Besides, there are significant and natural links between, on the one hand, the question of divorce and its consequences and, on the other, between the question of parental responsibilities and the financial consequences of divorce. In addition to legally binding instruments (conventions and regulations) the Council of Europe drafted Principles Concerning the Establishment and Legal Consequences of Parentage on 15 January 2002 (White Paper).¹² The drafters noted that ‘with the legal and social changes which have occurred at the national and international level, in particular, as regards human rights and the protection of the rights of the child, as well as the newly available medical techniques, there is an increased need for the member States of the Council of Europe to update their laws in order to clarify and reinforce the legal status of the child.’ For the CEFL the White Paper contains interesting perspectives and choices that will be used as a frame of reference. Already at this stage it can be noted that, to a certain extent, the content of the CEFL’s Principles regarding Parental Responsibilities will probably be quite similar to the Council of Europe Principles regarding the legal consequences of parentage (Principles 18-25). However, with respect to the presentation of the choices that, on the one hand, have already been made by the Council of Europe and, on the other, will be made by the CEFL, considerable differences will exist because the White Paper does not delve into the origins of its Principles. It makes no explicit comparisons between the European jurisdictions; neither does it expose the variations in the underlying rules themselves nor reveal and explain systematically why a particular Principle was selected and drafted. In contrast, comparative overviews and explana-

⁹ The Brussels *Iibis* Regulation replaces the Brussels II Regulation (EC) No. 1347/2000. See Council Regulation (EC) No. 2201/2003 of 27 November 2003, Official Journal 2003 L 338/1, 23. 12. 2003. See D. COESTER-WALTJEN, “Die Berücksichtigung der Kindesinteressen in der neuen EU-Verordnung “Brüssel Iia”, *FamRZ* 2005, pp. 241-248.

¹⁰ Adopted on 27 November 2003.

¹¹ See the Practice Guide for the application of the new Brussels Regulation drawn up by the Commission Services in consultation with the European Judicial Network in Civil and Commercial Matters: http://europa.eu.int/comm/justice_home/ejn/parental_resp/parental_resp_ec_vdm_en.pdf. According to the introduction by its drafters the Practice Guide seeks to give guidance to parties, judges, lawyers, notaries and central authorities. It also provides advice to Member States as to how best to ensure its implementation. Furthermore, the Practice Guide is not legally binding, and does not prejudice any opinion delivered by the European Court of Justice, or any decision issued by national courts, concerning the interpretation of the Brussels *Iibis* Regulation.

¹² See <http://www.coe.int>.

tions as to why a certain rule has been chosen is one of the main characteristics of the CEFL's Principles.¹³

The brief overview of the international and European setting among which CEFL's second set of Principles will be drafted reveals that extensive but not exhaustive comparative research in the field of parental responsibilities has been undertaken. In addition, all instruments evidently consider the best interests of the child to be of primary significance. In the CEFL's drafting process this generally accepted principle will also be applied as the leading principle.

3. STRUCTURE OF THE QUESTIONNAIRE

The questionnaire consists of eight parts and contains 62 questions. Part A (Questions 1-6) deals with the legal sources of parental responsibilities, the concept's legal development and – if any – recent proposals in the national systems. In addition, one of the questions inquires whether the national concepts of parental responsibilities encompass the definition of the Council of Europe which has been established in Principle 18 of its White Paper.¹⁴ This definition has been chosen as a working definition. Part B (Questions 7-14) contains detailed questions on the contents of parental responsibilities whereby a distinction is made between three categories: married parents, unmarried parents and other persons. The same distinction is made in Part C (Questions 14-34) which deals with the attribution of parental responsibilities. The most important questions in this part are: How and by whom can parental responsibilities be obtained and are the holders of parental responsibilities free to agree on the attribution of their rights and duties? Part D (Questions 35-42) on the exercise of parental responsibilities differentiates between, first, the interests of the child, secondly, joint parental responsibilities and, thirdly, sole parental responsibilities. Part E (Questions 43-48) deals with contact which, in particular, becomes relevant after the relationship between the holders of parental responsibilities has broken up. Does the child have a right to contact with – most importantly – the other parent regardless of

¹³ See K. BOELE-WOELKI, "The Working Method of the Commission on European Family Law", this publication, pp. 15-38.

¹⁴ Principle 18: Parental responsibilities are a collection of duties and powers, which aim at ensuring the moral and material welfare of children, in particular:

- Care and protection
- Maintenance of personal relationships
- Provision of education
- Legal representation
- Determination of residence and
- Administration of property.

whether he/she is (not) the holder of parental responsibilities? Is there a duty to have contact? Can the competent authority limit this right or duty? Part F (Questions 49-50) covers questions on the voluntary delegation of the exercise of parental responsibilities and the following Part G (Questions 51-54) with its non-voluntary discharge. Under what circumstances and upon whose request should the competent authority discharge the holder(s) of his/her (their) parental responsibilities? Finally, in Part H (Questions 55-62) some procedural issues are dealt with, such as which authority is competent to decide on disputes concerning parental responsibilities, what alternative dispute-solving mechanisms are available, how can court orders be enforced and what is the position concerning the legal representation of the child and its hearing by the competent authority in matters concerning him/herself?

Also CEFL’s second questionnaire¹⁵ is comprehensive and to a certain extent complex. Many questions are interconnected with others and many questions have been posed in order to obtain background information regarding specific issues. In any case, – as far as I can see at this stage – all kinds of situations and problems have been taken into account and in doing so the drafters have followed the functional approach in order to cover all family law systems. Again, it was a demanding task for the experts to answer the questions in detail.

4. SELECTED ISSUES COMPARED

For the comparison of the following aspects of parental responsibilities, 22 national reports could be compared. Eleven questions have been selected, whereby from each part of the questionnaire at least one question has been chosen. The questions regarding the attribution of parental responsibilities are somewhat overrepresented. From Part C of the questionnaire four questions have been selected because this part contains nearly one-third of all the questions.¹⁶

¹⁵ The first questionnaire deals with divorce and maintenance between former spouses. See CEFL’s website under Working Field 1.

¹⁶ Reference is made to the national reports (see notes 1 and 2) by citing the author’s name, the jurisdiction concerned and the question number where the specific answer is provided.

4.1. THE CONCEPT(S) OF PARENTAL RESPONSIBILITIES – QUESTION 2

The answers to Question 2¹⁷ on the concept(s) of parental responsibilities readily reveal that there is a common core. In all jurisdictions the concept of parental responsibilities encompasses the following aspects: care and protection, maintenance of the personal relationship, the provision of education, legal representation, the determination of the child's residence and the administration of the child's property. With regard to education it is expressly stated in the NORWEGIAN Children Act that a child of 15 years or older may take all decisions concerning his or her education without the consent of his or her parents.¹⁸ With regard to the administration of the child's property parental responsibilities does not include rights of succession to the child's property according to the law of ENGLAND AND WALES¹⁹ and in NORWAY a child of 15 years or older may dispose of any income which he or she has earned through work or received as gifts or through inheritance if the donor or testator has expressly declared that the gift or inheritance shall be at the free disposal of the child.²⁰ This collection of rights and duties, which aims to ensure the moral and material welfare of children, is entirely in accordance with Principle 18 of the Council of Europe's White Paper of 15 January 2002 on principles concerning the establishment and legal consequences of parentage. In some jurisdictions certain aspects of parental responsibilities such as care and protection, the maintenance of personal relationships or the provision of education are explicitly regulated in the national constitution (BULGARIA,²¹ GERMANY,²² ITALY,²³ RUSSIA,²⁴ SPAIN²⁵). The meaning of the right and duty to legally represent the child refers not only to the position of the holder(s) of parental responsibilities in legal proceedings – whereby apparently in disputes between them and the child the latter cannot be represented by the holder(s) of parental responsibilities – but generally includes representation with regard to legal transactions. Generally, this legal representation lasts until the age of majority.

¹⁷ Q 2: Explain whether your national concept or concepts encompass:

- (a) Care and protection;
- (b) Maintenance of personal relationships;
- (c) Provision of education;
- (d) Legal representation;
- (e) Determination of residence;
- (f) Administration of property.

¹⁸ See SVERDRUP/LØDRUP, Norwegian Report, Q 2.

¹⁹ See LOWE, English Report, Q 2.

²⁰ See SVERDRUP/LØDRUP, Norwegian Report, Q 2.

²¹ See TODOROVA, Bulgarian Report, Q 2.

²² See DETHLOFF/MARTINY, German Report, Q 2.

²³ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 2.

²⁴ See ANTOKOLSKAIA, Russian Report, Q 2.

²⁵ See GONZÁLEZ BEILFUS, Spanish Report, Q 2.

4.2. PROTECTION OF CHILDREN FROM INDEBTEDNESS CAUSED BY THE HOLDER(S) OF PARENTAL RESPONSIBILITIES – QUESTION 13

Due to the fact that the holder(s) of parental responsibilities has/have the right and duty to administer the property of the child, the question arises as to how the child can be protected from indebtedness.²⁶ In this respect a distinction can be made between, on the one hand, jurisdictions with only general rules (BULGARIA,²⁷ DENMARK,²⁸ ENGLAND AND WALES,²⁹ FINLAND,³⁰ GERMANY,³¹ HUNGARY,³² IRELAND,³³ POLAND,³⁴ RUSSIA³⁵), and, on the other, jurisdictions with special rules which restrict the rights of the holder(s) of parental responsibilities and impose certain obligations on them in order to prevent indebtedness (AUSTRIA,³⁶ BELGIUM,³⁷ CZECH REPUBLIC,³⁸ FRANCE,³⁹ GERMANY,⁴⁰ GREECE,⁴¹ ITALY,⁴² LITHUANIA,⁴³ THE NETHERLANDS,⁴⁴ NORWAY,⁴⁵ PORTUGAL,⁴⁶ SPAIN,⁴⁷ SWEDEN,⁴⁸ SWITZERLAND⁴⁹). The general approach, however, is similar in many systems: Firstly, for certain transactions, an authorization or permission by the competent authority is required and, secondly, the holder(s) of parental responsibilities may be held liable for poor administration and the loss resulting therefrom. Although the law aims to protect children from any indebtedness caused by the holder(s) of parental responsibilities, it has been explicitly reported by the SWEDISH

²⁶ Q 13: Are there special rules protecting children from indebtedness caused by the holder(s) of parental responsibilities?

²⁷ See TODOROVA, Bulgarian Report, Q 13.

²⁸ See LUND-ANDERSEN/ JEPPESEN DE BOER, Danish Report, Q 13.

²⁹ See LOWE, English Report, Q 13.

³⁰ See KURKI-SUONIO, Finnish Report, Q 13.

³¹ See DETHLOFF/MARTINY, German Report, Q 13.

³² See WEISS/SZEIBERT, Hungarian Report, Q 13.

³³ See SHANNON, Irish Report, Q 13.

³⁴ See MĄCZYŃSKI/MĄCZYŃSKA, Polish Report, Q 13.

³⁵ See ANTOKOLSKAIA, Russian Report, Q 13.

³⁶ See ROTH, Austrian Report, Q 13.

³⁷ See PINTENS/PIGNOLET, Belgian Report, Q 13.

³⁸ See HRUSAKOVÁ, Czech Report, Q 13.

³⁹ See FERRAND, French Report, Q 13.

⁴⁰ See DETHLOFF/MARTINY, German Report, Q 13.

⁴¹ See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 13.

⁴² See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 13.

⁴³ See MIKELENAS, Lithuanian Report, Q 13.

⁴⁴ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 13.

⁴⁵ See SVERDRUP/LØDRUP, Norwegian Report, Q 13.

⁴⁶ See DE OLIVEIRA, Portuguese Report, Q 13.

⁴⁷ See GONZÁLEZ BEILFUSS, Spanish Report, Q 13.

⁴⁸ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 13.

⁴⁹ See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 13.

experts⁵⁰ that there are still many indebted children due to inappropriate actions taken by the parents. In many cases in SWEDEN, the child's debt refers to motor vehicles that the parents have registered in the child's name, e.g., unpaid parking tickets. Furthermore, a significant proportion (about 50 percent) of children's debts originates from the parents' transactions using the child's capital, e.g., investment in stocks and shares but leaving the resulting taxes unpaid. This problem has only recently received the attention of the SWEDISH legislator. Since October 2004, an authority called the Enforcement Service now has a duty to report to the competent authority (the Chief Guardian) every time a person under the age of 18 years is registered as having unpaid fees, etc. The competent authority should then take certain measures, as required by the particular situation, to secure the interests of the child. This entails convincing the parents to take responsibility for debts that are not those of the child. The competent authority can also appoint a guardian *ad litem* to initiate court proceedings to have the debts removed or declared invalid.

4.3. ATTRIBUTION OF PARENTAL RESPONSIBILITIES AFFECTED BY DIVORCE, LEGAL SEPARATION, ANNULMENT OF THE MARRIAGE, FACTUAL SEPARATION – QUESTION 16

Does the break up of the relationship between the holders of parental responsibilities have any influence on the attribution of PR?⁵¹ Around less than 25 years ago the general answer to this change of personal circumstances was in the affirmative. In particular, in the case of divorce, parental responsibilities were generally attributed to one of the parents. A court decision on parental responsibilities was compulsory in the event of a divorce. Joint parental responsibilities was the exception.⁵² This has considerably changed, however. In the great majority of systems neither a divorce, nor a legal separation – insofar as this is known (which is not the case in AUSTRIA,⁵³ BULGARIA,⁵⁴

⁵⁰ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 13.

⁵¹ Q 16: How, if at all, is the attribution of parental responsibilities affected by:

- (a) Divorce;
- (b) Legal separation;
- (c) Annulment of the marriage;
- (d) Factual separation.

⁵² See K. KURKI-SUONIO, "Joint Custody as an Interpretation of the Best Interest of the Child in Critical and Comparative Perspective", *International Journal of Law, Policy and the Family*, 2000, pp. 183-205.

⁵³ See ROTH, Austrian Report, Q 16.

⁵⁴ See TODOROVA, Bulgarian Report, Q 16.

CZECH REPUBLIC,⁵⁵ FINLAND,⁵⁶ GERMANY,⁵⁷ GREECE,⁵⁸ HUNGARY,⁵⁹ RUSSIA,⁶⁰ SWEDEN⁶¹) – nor the annulment of a marriage⁶² (a concept which is not known in SWEDEN) or a factual separation change the position of the holders of parental responsibilities. Only in HUNGARY⁶³ and SWITZERLAND⁶⁴ in the case of a divorce or an annulment of the marriage will sole parental responsibilities be attributed by a court order to the parent with whom the child is residing unless the parents request that their joint parental responsibilities should continue. In all other jurisdictions a distinction is no longer made between an informal (factual separation)⁶⁵ and a formal separation (intervention by a competent authority).⁶⁶ The attribution of parental responsibilities is a consequence of parenthood and not of civil status, not even in the case of cohabitation. In practice, however, the post-divorce problems shift from the issue of attribution of parental responsibilities to the issue of, in particular, the determination of the child’s residence after divorce and the issue of the participation of the parent, who does not reside with the child, in the upbringing of that child. The almost eighty-year old RUSSIAN experience, where joint parental responsibilities after divorce is always the case, clearly illustrates this development. In all other systems the exercise of parental responsibilities after the separation of the parents has become a major issue. Under the umbrella of the continuation of joint parental responsibilities after divorce, which in fact does not describe reality but is a legal construction; issues regarding contact with the child; maintenance and upbringing, must generally be clarified between the parents.⁶⁷ If the child’s permanent residence is with one of the parents, GERMAN law, for instance, explicitly stipulates that the parents’ mutual consent is no longer generally required, as is otherwise the case with joint parental responsibilities, but only in

⁵⁵ See HRUSAKOVÁ, Czech Report, Q 16.

⁵⁶ See KURKI-SUONIO, Finnish Report, Q 16.

⁵⁷ See DETHLOFF/MARTINY, German Report, Q 16.

⁵⁸ See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 16.

⁵⁹ See WEISS/SZEIBERT, Hungarian Report, Q 16.

⁶⁰ See ANTOKOLSKAIA, Russian Report, Q 16.

⁶¹ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 16.

⁶² If the annulment of the marriage should lead to a redetermination of paternity, the parental responsibilities will be affected according to the law in NORWAY. As an annulment of a marriage seldom occurs, the legal situation with regard to the redetermination of paternity is not clear. See SVERDRUP/LØDRUP, Norwegian Report, Q 16.

⁶³ See WEISS/SZEIBERT, Hungarian Report, Q 16.

⁶⁴ See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 16.

⁶⁵ In SWITZERLAND sole parental responsibilities may be attributed to one of the parents if the cohabitation of the parents comes to an end. See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 16.

⁶⁶ See also Principle 22 of the Council of Europe’s White Paper: ‘Dissolution or annulment of marriage, separation of parents or termination of the cohabitation should not as such affect the right of a parent to exercise parental responsibilities. The competent authority may, however, rule on the exercise of parental responsibilities taking into account the best interests of the child.’

⁶⁷ See ANTOKOLSKAIA, Russian Report, Q 16.

matters the regulation of which is significant for the child. In matters relating to everyday life, the decisions are made solely by the parent with whom the child habitually resides, the habitual residence resulting either from the consent of the other parent or from a court decision.⁶⁸ Does the separation of the holders of parental responsibilities justify changing the attribution of PR? The following question deals with this issue.

4.4. AGREEMENT UPON THE ATTRIBUTION OF PARENTAL RESPONSIBILITIES AFTER DIVORCE, LEGAL SEPARATION OR ANNULMENT OF THE MARRIAGE – QUESTION 17

To what extent, if at all, are the parents free to agree upon the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage?⁶⁹ The answers to this question differ greatly. According to the concept in BELGIUM,⁷⁰ ENGLAND AND WALES,⁷¹ FRANCE,⁷² THE NETHERLANDS,⁷³ RUSSIA⁷⁴ and SPAIN parental responsibility is an institution created in the interest of the child. It is part of the status of the person; consequently, the applicable rules are matters of public order. Parental responsibility is not disposable. The parents are not allowed to make an agreement specifically on the attribution of parental responsibilities. In these systems they can only agree on the modalities of exercising of parental responsibilities. A few DUTCH courts, for instance, have not accepted an agreement between the parents according to which sole parental responsibilities was attributed to the parent with whom the child was residing merely because the other parent has moved to another country. Residence in another country does not prevent the parent from having contact with the child via email or phone and to take decisions on the upbringing of the child together with

⁶⁸ See DETHLOFF/MARTINY, German Report, Q 16. The term “matters relating to everyday life” refers to frequently occurring situations requiring a decision by the parents, but whose effects on the child’s development can be modified without a great deal of difficulty (e.g. § 1687 I 3 German Civil Code). In contrast, any decisions regarding matters which have an effect on the child’s development that can either not be modified, or be modified only with difficulty, are of “considerable importance” for the child.

⁶⁹ This is the wording of Q 17.

⁷⁰ See PINTENS/PIGNOLET, Belgian Report, Q 17.

⁷¹ See LOWE, English Report, Q 17.

⁷² See FERRAND, French Report, Q 17.

⁷³ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 17.

⁷⁴ See GONZÁLEZ BEILFUSS, Spanish Report, Q 17.

the other parent.⁷⁵ In contrast, in many systems (AUSTRIA,⁷⁶ CZECH REPUBLIC,⁷⁷ DENMARK,⁷⁸ FINLAND,⁷⁹ GERMANY,⁸⁰ GREECE,⁸¹ HUNGARY,⁸² ITALY,⁸³ LITHUANIA,⁸⁴ NORWAY,⁸⁵ POLAND,⁸⁶ PORTUGAL,⁸⁷ SWEDEN,⁸⁸ SWITZERLAND⁸⁹) the parents can agree to terminate joint parental responsibilities and to attribute sole parental responsibilities to one of them. Under IRISH law⁹⁰ parties are not free to agree upon the attribution of parental responsibilities after annulment of the marriage. They are, however, free to agree upon the attribution of parental responsibilities after legal separation and divorce. In the case of a divorce by mutual consent an agreement on the attribution of parental responsibilities is required in BULGARIA⁹¹ and GREECE.⁹² In the great majority of jurisdictions the agreements on the attribution of parental responsibilities are subject to scrutiny by a competent authority in order to protect the child’s interests. Only in DENMARK, GERMANY and NORWAY is there no such scrutiny. In DENMARK⁹³ and NORWAY⁹⁴ it is sufficient that the agreement is registered and the GERMAN courts are generally bound by the parents’ will as expressed in the application and the consent.⁹⁵

⁷⁵ See Rb Haarlem 2 July 2002, No. 83728/2002, see also Hof Den Bosch 15 April 2004, LJN- No. AO7714. In contrast the Rb Amsterdam 19 June 2002 nr. 225833/01.4053 F (unpublished) attributed the right relating to sole parental responsibilities to the mother following the agreement of the parents.

⁷⁶ See ROTH, Austrian Report, Q 17.

⁷⁷ See HRUSAKOVÁ, Czech Report, Q 17.

⁷⁸ See LUND-ANDERSEN/ JEPPESEN DE BOER, Danish Report, Q 17.

⁷⁹ See KURKI-SUONIO, Finnish Report, Q 17.

⁸⁰ See DETHLOFF/MARTINY, German Report, Q 17.

⁸¹ See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 17.

⁸² See WEISS/SZEIBERT, Hungarian Report, Q 17.

⁸³ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 17.

⁸⁴ See MIKELENAS, Lithuanian Report, Q 17.

⁸⁵ See SVERDRUP/LØDRUP, Norwegian Report, Q 17.

⁸⁶ See MĄCZYŃSKI/MĄCZYŃSKA, Polish Report, Q 17.

⁸⁷ See DE OLIVEIRA, Portuguese Report, Q 17.

⁸⁸ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 17.

⁸⁹ See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 17.

⁹⁰ See SHANNON, Irish Report, Q 17.

⁹¹ See TODOROVA, Bulgarian Report, Q 17.

⁹² See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 17.

⁹³ See LUND-ANDERSEN/ JEPPESEN DE BOER, Danish Report, Q 17.

⁹⁴ See SVERDRUP/LØDRUP, Norwegian Report, Q 17.

⁹⁵ See DETHLOFF/MARTINY, German Report, Q 17. The only exception to this is when the child has attained its 15th birthday and objects to the sought-after attribution of sole parental responsibilities, or if the attribution of the said responsibilities would endanger the welfare of the child (§ 1697 a German Civil Code). Any objection by the child does not mean that the court must in all cases be guided by the child’s will; if the court decides that granting sole parental responsibilities constitutes the best solution, resistance on the part of the child notwithstanding, it will nevertheless grant the application.

4.5. NON-MARRIED PARENTS AND PARENTAL RESPONSIBILITIES – QUESTION 20

Who has parental responsibilities when the parents are not married?⁹⁶ It is generally accepted that a difference should no longer be made between children who are born within a marriage and children who are born within another relationship. Consequently, the parents' mutual relationship is of no influence on their ability to obtain parental responsibilities. Only their legal relationship with the child is relevant.⁹⁷ In all jurisdictions – except in FRANCE and ITALY – the birthmother has parental responsibilities over her child by operation of law unless she lacks the capacity for parental responsibilities at the time she gives birth. Under FRENCH⁹⁸ and ITALIAN⁹⁹ law the unmarried mother has to recognise her child or the court must determine her maternity. In some jurisdictions the father can acquire parental responsibilities either on the basis of recognition or the determination of paternity (BELGIUM,¹⁰⁰ BULGARIA,¹⁰¹ CZECH REPUBLIC,¹⁰² FRANCE,¹⁰³ GREECE,¹⁰⁴ HUNGARY,¹⁰⁵ ITALY,¹⁰⁶ LITHUANIA,¹⁰⁷ POLAND,¹⁰⁸ RUSSIA,¹⁰⁹ SPAIN¹¹⁰). If the child does not live with either parent, the one who first recognized the child has the right to exercise parental responsibilities under ITALIAN law, unless the judge determines differently in the interests of the child.¹¹¹ In seven systems joint parental responsibilities can only be acquired upon the basis of the registration of an agreement according to which both parents have joint parental

⁹⁶ This is the wording of Q 20.

⁹⁷ In this respect Principle 19 of the Council of Europe's White Paper states:

1. Parental responsibilities should in principle belong jointly to both parents.
2. In cases where only one parent has parental responsibilities by the operation of law, the other parent should have an opportunity to acquire parental responsibilities, unless it is against the best interests of the child. Lack of consent or opposition by the parent having parental responsibilities should not as such be an obstacle for such acquisition.

⁹⁸ See FERRAND, French Report, Q 20.

⁹⁹ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 20.

¹⁰⁰ See PINTENS/PIGNOLET, Belgian Report, Q 20.

¹⁰¹ See TODOROVA, Bulgarian Report, Q 20.

¹⁰² See HRUSAKOVÁ, Czech Report, Q 20.

¹⁰³ See FERRAND, French Report, Q 20.

¹⁰⁴ See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 20.

¹⁰⁵ See WEISS/SZEIBERT, Hungarian Report, Q 20. In addition, the father should live together with the mother.

¹⁰⁶ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 20.

¹⁰⁷ See MIKELENAS, Lithuanian Report, Q 20.

¹⁰⁸ See MĄCZYŃSKI/MĄCZYŃSKA, Polish Report, Q 20.

¹⁰⁹ See ANTOKOLSKAIA, Russian Report, Q 20.

¹¹⁰ See GONZÁLEZ BEILFUSS, Spanish Report, Q 20.

¹¹¹ Art. 317*bis* of the Italian Civil Code.

responsibilities (AUSTRIA,¹¹² DENMARK,¹¹³ GERMANY,¹¹⁴ THE NETHERLANDS,¹¹⁵ PORTUGAL,¹¹⁶ SWEDEN,¹¹⁷ SWITZERLAND¹¹⁸). In particular, in THE NETHERLANDS¹¹⁹ it is highly disputed whether or not a father should automatically acquire parental responsibilities solely upon his legally established fatherhood. If no legal relationship is established before or after the birth of the child with respect to the (biological) father, the mother has sole parental responsibilities.

4.6. RIGHTS OF A PARTNER OF A PARENT HOLDING PARENTAL RESPONSIBILITIES – QUESTION 27

What are the rights of a partner of a parent who holds parental responsibilities? Under which conditions can s/he acquire PR?¹²⁰ The answers to these questions differ considerably. In order to give an overview of the answers provided it is necessary to make a distinction between three different relationships (marriage, another kind of formalised relationship, cohabitation) in which the partner may live with the parent who has parental responsibilities. In addition, it does make a difference whether the child is of a previous relationship, or is born into this relationship. If the partner is married to the parent with parental responsibilities in the majority of systems the partner may obtain parental responsibilities if s/he adopts the child (step-parent adoption) (AUSTRIA,¹²¹ BELGIUM,¹²² BULGARIA,¹²³ DENMARK,¹²⁴ FINLAND,¹²⁵ FRANCE,¹²⁶ GERMANY,¹²⁷

¹¹² See ROTH, Austrian Report, Q 20.

¹¹³ See LUND-ANDERSEN/ JEPPESEN DE BOER, Danish Report, Q 20.

¹¹⁴ See DETHLOFF/MARTINY, German Report, Q 20.

¹¹⁵ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 20.

¹¹⁶ See DE OLIVEIRA, Portuguese Report, Q 20.

¹¹⁷ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 20.

¹¹⁸ See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 20.

¹¹⁹ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 20.

¹²⁰ Q 27: Under what conditions, if at all, can the partner of a parent holding parental responsibilities obtain parental responsibilities, when, he/she is:

(a) Married to that parent;

(b) Living with that parent in a formalised relationship (registered partnership, civil union, *pacte civil de solidarité*...);

(c) or living with that parent in a non-formalised relationship?

¹²¹ See ROTH, Austrian Report, Q 27.

¹²² See PINTENS/PIGNOLET, Belgian Report, Q 27.

¹²³ See TODOROVA, Bulgarian Report, Q 27.

¹²⁴ See LUND-ANDERSEN/JEPPESEN DE BOER, Danish Report, Q 27.

¹²⁵ See KURKI-SUONIO, Finnish Report, Q 27.

¹²⁶ See FERRAND, French Report, Q 27. An *adoption plénaire* requires that the other parent has been fully discharged of parental responsibilities, never had parental responsibilities or died. Article 345 (1) Code Civil. An *adoption simple* is always possible.

¹²⁷ See DETHLOFF/MARTINY, German Report, Q 27.

GREECE,¹²⁸ HUNGARY,¹²⁹ IRELAND,¹³⁰ ITALY,¹³¹ LITHUANIA,¹³² THE NETHERLANDS,¹³³ POLAND,¹³⁴ PORTUGAL,¹³⁵ RUSSIA,¹³⁶ SPAIN,¹³⁷ SWEDEN¹³⁸) or – in the case of a male spouse – recognises the child if it does not already have a father (BULGARIA,¹³⁹ DENMARK,¹⁴⁰ FINLAND,¹⁴¹ LITHUANIA,¹⁴² THE NETHERLANDS,¹⁴³ NORWAY¹⁴⁴). The establishment of a legal relationship between the partner of the parent and his/her child always requires, first of all, the agreement of the spouse or registered partner respectively and, secondly, the consent of the other parent. In addition, the spouse or registered partner must be of a different sex than the parent, except in GERMANY (from the 1st of January 2005),¹⁴⁵ THE NETHERLANDS,¹⁴⁶ some SPANISH provinces¹⁴⁷ and SWEDEN,¹⁴⁸ where same-sex adoption is possible. Whereas in AUSTRIA,¹⁴⁹ the CZECH REPUBLIC¹⁵⁰ and SWITZERLAND¹⁵¹ the step-parent cannot obtain any parental responsibilities, under DUTCH law the spouse or registered partner of a parent obtains parental responsibilities by *operation of law* for a child born into their relationship if the child has no other legal parent.¹⁵² This is the only jurisdiction where this possibility exists whereby, in addition, the

¹²⁸ See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 27.

¹²⁹ See WEISS/SZEIBERT, Hungarian Report, Q 27.

¹³⁰ See SHANNON, Irish Report Q 27. The natural parent must also adopt his or her own child even though he or she has parental responsibilities in respect of the child. There is no mechanism within the existing adoption code whereby the natural parents can continue a legal parenting regime, and, at the same time, allow the custodial parent to adopt the child with his or her partner. The Irish Adoption Board has called for a change in the legislation to facilitate a new spouse of a natural parent obtaining joint guardianship rights with the mother, while at the same time facilitating the continuation of any factual relationship of the non-custodial natural parent with the child.

¹³¹ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 27. The adoption does not break the ties between the adopted minor and its family of origin, but confers the *status* of an adopted child on the minor and attributes full parental responsibilities.

¹³² See MIKELENAS, Lithuanian Report, Q 27.

¹³³ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 27.

¹³⁴ See MĄCZYŃSKI/MĄCZYŃSKA, Polish Report, Q 27.

¹³⁵ See DE OLIVEIRA, Portuguese Report, Q 27.

¹³⁶ See ANTOKOLSKAIA, Russian Report, Q 27.

¹³⁷ See GONZÁLEZ BEILFUSS, Spanish Report, Q 27.

¹³⁸ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 27.

¹³⁹ See TODOROVA, Bulgarian Report, Q 27.

¹⁴⁰ See LUND-ANDERSEN/JEPPESEN DE BOER, Danish Report, Q 27.

¹⁴¹ See KURKI-SUONIO, Finnish Report, Q 27.

¹⁴² See MIKELENAS, Lithuanian Report, Q 27.

¹⁴³ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 27.

¹⁴⁴ See SVERDRUP/LØDRUP, Norwegian Report, Q 27.

¹⁴⁵ See DETHLOFF/MARTINY, German Report, Q 27.

¹⁴⁶ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 27.

¹⁴⁷ See GONZÁLEZ BEILFUSS, Spanish Report, Q 27.

¹⁴⁸ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 27.

¹⁴⁹ See ROTH, Austrian Report, Q 27.

¹⁵⁰ See HRUSAKOVÁ, Czech Report, Q 27.

¹⁵¹ See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 27.

¹⁵² See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 27.

gender of the spouses or registered partners is irrelevant. A middle course is followed in GERMANY¹⁵³ where the spouse¹⁵⁴ and the registered partner of a parent with sole parental responsibilities is entitled to participate in the decision-making concerning matters relating to the child’s everyday life – the so-called “limited parental responsibilities” (*kleines Sorgerecht*) – and, where s/he has a “right of representation in emergency situations” (*Notvertretungsrecht*), in the event of imminent danger.¹⁵⁵ In ENGLAND AND WALES¹⁵⁶ step-parents (whether married to the parent or not) have no parental responsibilities automatically, but they can acquire such responsibilities principally upon being granted a residence order (which is an order determining the person with whom the child is to live). In ENGLAND AND WALES the position of the step-parent will change when the Adoption and Children Act 2002 comes fully into force since that Act amends the Children Act 1989 to permit a step-parent who is married (i.e. cohabitation is insufficient) to the child’s parent who has parental responsibilities to obtain responsibility either by agreement or by a court order. When the Civil Partnerships Act 2004 comes into force the registered partner of a parent with parental responsibilities will be in the same position as a heterosexual step-parent who is married to a parent with parental responsibilities. In other jurisdictions where also, in addition to marriage, another formalised form of relationship has been introduced, the position of the (registered) partner is less strong. In DENMARK,¹⁵⁷ for instance, the partner cannot obtain rights relating to parental responsibilities. The situation is similar in BELGIUM¹⁵⁸ and FRANCE.¹⁵⁹ Only in exceptional cases after the intervention of the competent authority upon the request by the parent(s) or the Public Prosecutor may the partner acquire parental responsibilities. In AUSTRIA¹⁶⁰ the partner can only obtain parental responsibilities upon the death of the parent holding parental responsibilities.

Finally, if the partner is living with the parent in a non-formalised relationship, his/her possibilities to obtain parental responsibilities are limited. In some jurisdictions adoption is possible (LITHUANIA,¹⁶¹ THE NETHERLANDS,¹⁶² PORTUGAL,¹⁶³ RUSSIA¹⁶⁴) or

¹⁵³ See DETHLOFF/MARTINY, German Report, Q 27.

¹⁵⁴ To a certain extent the step-parent has limited rights relating to parental responsibilities in SWITZERLAND. See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 27.

¹⁵⁵ § 1687 b I and II German Civil Code and § 9 Registered Partnership Act.

¹⁵⁶ See LOWE, English Report, Q 27.

¹⁵⁷ See LUND-ANDERSEN/JEPPESEN DE BOER, Danish Report, Q 27.

¹⁵⁸ See PINTENS/PIGNOLET, Belgian Report, Q 27.

¹⁵⁹ See FERRAND, French Report, Q 27.

¹⁶⁰ See ROTH, Austrian Report, Q 27.

¹⁶¹ See MIKELENAS, Lithuanian Report, Q 27.

¹⁶² See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 27.

¹⁶³ See DE OLIVEIRA, Portuguese Report, Q 27.

¹⁶⁴ See ANTOKOLSKAIA, Russian Report, Q 27.

the recognition of the child is required (BULGARIA,¹⁶⁵ LITHUANIA,¹⁶⁶ THE NETHERLANDS¹⁶⁷). In GERMANY and THE NETHERLANDS the non-marital step-parent has gained the right to acquire parental responsibilities under specific conditions. According to GERMAN law,¹⁶⁸ together with the parent holding sole parental responsibilities, s/he can make a declaration of joint responsibility for a child if both are the biological parents, whereas under DUTCH law¹⁶⁹ they may file an application for joint parental responsibilities with the court. The court will only grant the application if the parent's partner has a close personal relationship with the child. Furthermore, if legal family ties exist between the child and another parent, the application will only be granted if, prior to the application, the parent and the other person have jointly cared for the child for at least a continuous one-year period and the parent who makes the application has been vested with sole parental responsibilities for at least a continuous three-year period. The application will be rejected if, also in the light of the interests of the other parent, there is a well-founded fear that the best interests of the child would be neglected if this were granted. Also according to the law of ENGLAND AND WALES¹⁷⁰ the individual living with a parent in a non-formalised relationship can acquire parental responsibilities by obtaining a residence order. With regard to POLISH law¹⁷¹ it has been reported that the fact of having an informal relationship with the child's parent is not a prerequisite to be granted parental responsibilities. Consequently, any person can obviously obtain parental responsibilities, a special relationship with the parent not being required. It is questionable whether this approach is to be preferred. In contrast to the DUTCH and GERMAN approach, which legally protects the non-marital partner of the parent, in many of the other jurisdictions (CZECH REPUBLIC,¹⁷² DENMARK,¹⁷³ GREECE,¹⁷⁴ HUNGARY,¹⁷⁵ IRELAND,¹⁷⁶ ITALY,¹⁷⁷ RUSSIA,¹⁷⁸ SWEDEN,¹⁷⁹ SWITZERLAND¹⁸⁰) the partner cannot obtain rights relating to parental responsibilities or can only do so in exceptional cases (BELGIUM,¹⁸¹ FRANCE¹⁸²).

¹⁶⁵ See TODOROVA, Bulgarian Report, Q 27.

¹⁶⁶ See MIKELENAS, Lithuanian Report, Q 27.

¹⁶⁷ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 27.

¹⁶⁸ § 1626 a I No. 1 German Civil Code.

¹⁶⁹ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 27.

¹⁷⁰ See LOWE, English Report, Q 27.

¹⁷¹ See MĄCZYŃSKI/MĄCZYŃSKA, Polish Report, Q 27.

¹⁷² See HRUSAKOVÁ, Czech Report, Q 27.

¹⁷³ See LUND-ANDERSEN/JEPPESEN DE BOER, Danish Report, Q 27.

¹⁷⁴ See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 27.

¹⁷⁵ See WEISS/SZEIBERT, Hungarian Report, Q 27.

¹⁷⁶ See SHANNON, Irish Report, Q 27.

¹⁷⁷ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 27.

¹⁷⁸ See ANTOKOLSKAIA, Russian Report, Q 27.

¹⁷⁹ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 27.

¹⁸⁰ See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 27.

¹⁸¹ See PINTENS/PIGNOLET, Belgian Report, Q 27.

¹⁸² See FERRAND, French Report, Q 27.

4.7. DISAGREEMENT BETWEEN THE HOLDERS OF PARENTAL RESPONSIBILITIES – QUESTION 38

If the holders of parental responsibilities are unable to agree on specific issues relating to parental responsibilities, the question arises whether they can apply to a competent authority to resolve their dispute.¹⁸³ Only in the DANISH¹⁸⁴ and NORWEGIAN¹⁸⁵ legal systems is the intervention of the competent authority limited to disputes relating to contact. If the parents holding joint parental responsibilities do not agree on an issue in NORWAY, there is no public authority to which they can apply to resolve the dispute as long as they live together. In contrast, according to the laws of nearly all jurisdictions the intervention of a competent authority is provided for all kinds of disagreements, although, in general, unimportant disputes regarding the issues of daily routine fall outside the scope of legal regulation and should be resolved by the parents themselves (FRANCE,¹⁸⁶ GERMANY,¹⁸⁷ ITALY,¹⁸⁸ RUSSIA,¹⁸⁹ SWITZERLAND¹⁹⁰). It should be avoided that parents offload their responsibilities onto a competent authority. Different mechanisms for resolving disputes can be distinguished: The competent authority can try to conciliate the parents (FRANCE,¹⁹¹ SWEDEN¹⁹²), it can solve the problem itself in the interest of the child and leave the joint exercise of parental responsibilities to both parents (AUSTRIA,¹⁹³ BELGIUM,¹⁹⁴ CZECH REPUBLIC,¹⁹⁵ DENMARK,¹⁹⁶ ENGLAND AND WALES,¹⁹⁷ FINLAND,¹⁹⁸ FRANCE,¹⁹⁹ GREECE,²⁰⁰ HUNGARY,²⁰¹ ITALY,²⁰² LITHUANIA,²⁰³ THE

¹⁸³ Q 38: If holders of parental responsibilities cannot agree on an issue, can they apply to a competent authority to resolve their dispute? If applicable, specify whether this authority’s competence is limited to certain issues e.g. residence or contact.

¹⁸⁴ See LUND-ANDERSEN/JEPPESEN DE BOER, Danish Report, Q 38.

¹⁸⁵ See SVERDRUP/LØDRUP, Norwegian Report, Q 38.

¹⁸⁶ See FERRAND, French Report, Q 38.

¹⁸⁷ See DETHLOFF/MARTINY, German Report, Q 38.

¹⁸⁸ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 38.

¹⁸⁹ See ANTOKOLSKAIA, Russian Report, Q 38.

¹⁹⁰ See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 38.

¹⁹¹ See FERRAND, French Report, Q 38.

¹⁹² See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 38.

¹⁹³ See ROTH, Austrian Report, Q 38.

¹⁹⁴ See PINTENS/PIGNOLET, Belgian Report, Q 38.

¹⁹⁵ See HRUSAKOVÁ, Czech Report, Q 38.

¹⁹⁶ See LUND-ANDERSEN/JEPPESEN DE BOER, Danish Report, Q 38.

¹⁹⁷ See LOWE, English Report, Q 38.

¹⁹⁸ See KURKI-SUONIO, Finnish Report, Q 38.

¹⁹⁹ See FERRAND, French Report, Q 38.

²⁰⁰ See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 38.

²⁰¹ See WEISS/SZEIBERT, Hungarian Report, Q 38.

²⁰² See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 38.

²⁰³ See MIKELENAS, Lithuanian Report, Q 38

NETHERLANDS,²⁰⁴ POLAND,²⁰⁵ PORTUGAL,²⁰⁶ SPAIN²⁰⁷), it can authorise one of the parents to act alone with regard to one or more specific decisions (BELGIUM,²⁰⁸ GERMANY,²⁰⁹ ITALY,²¹⁰ SPAIN²¹¹), it can attribute sole parental responsibilities to one of the parents (GERMANY,²¹² SWEDEN²¹³), it can charge one of the parents with the exclusive exercise of parental authority (BELGIUM²¹⁴), it can determine with whom the child lives (ENGLAND AND WALES²¹⁵), it can determine what visiting or other contact arrangements there should be (ENGLAND AND WALES,²¹⁶ SWITZERLAND²¹⁷), or it can give instructions as to how the dispute should be resolved (RUSSIA²¹⁸).

4.8. THE RIGHT OF THE CHILD TO HAVE CONTACT WITH... – QUESTION 44

The question whether a child has a right to have contact with the other parent or a person other than the holder of parental responsibilities with whom it resides should be distinguished from the right of the other parent or person to have contact with the child.²¹⁹ From the child's perspective all contact arrangements with other persons should be in full compliance with the best interests of the child. This is a generally accepted principle. According to DANISH law²²⁰ also the consent of the parent with whom the child is living is required. Whether or not the other parent with whom the child is not residing holds parental responsibilities is generally of no relevance according to many systems. The right to have contact is attributed to both the child

²⁰⁴ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 38.

²⁰⁵ See MĄCZYŃSKI/MĄCZYŃSKA, Polish Report, Q 38.

²⁰⁶ See DE OLIVEIRA, Portuguese Report, Q 38.

²⁰⁷ See GONZÁLEZ BEILFUSS, Spanish Report, Q 38.

²⁰⁸ See PINTENS/PIGNOLET, Belgian Report, Q 38.

²⁰⁹ See DETHLOFF/MARTINY, German Report, Q 38.

²¹⁰ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 38.

²¹¹ See GONZÁLEZ BEILFUSS, Spanish Report, Q 38.

²¹² See DETHLOFF/MARTINY, German Report, Q 38.

²¹³ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 38.

²¹⁴ See PINTENS/PIGNOLET, Belgian Report, Q 38.

²¹⁵ See LOWE, English Report, Q 38.

²¹⁶ See LOWE, English Report, Q 38.

²¹⁷ See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 38.

²¹⁸ See ANTOKOLSKAIA, Russian Report, Q 38.

²¹⁹ Q 44: To what extent, if at all, does the child have a right of contact with:

(a) A parent holding parental responsibilities but not living with the child;

(b) A parent not holding parental responsibilities;

(c) Persons other than parents (e.g. grandparents, step-parents, siblings etc...)?

²²⁰ See LUND-ANDERSEN/JEPPESEN DE BOER, Danish Report, Q 44.

and the other parent (AUSTRIA,²²¹ BELGIUM,²²² DENMARK,²²³ THE NETHERLANDS,²²⁵ NORWAY,²²⁶ POLAND,²²⁷ PORTUGAL,²²⁸ SPAIN,²²⁹ SWITZERLAND²³⁰) whereas, in contrast, in the CZECH REPUBLIC,²³¹ FINLAND,²³² GREECE,²³³ HUNGARY,²³⁴ IRELAND,²³⁵ RUSSIA²³⁶ and SWEDEN²³⁷ only the child has the right to have contact. In FRANCE²³⁸ the parent who has been discharged from parental responsibilities has no right of contact with the child. A different approach is taken in ENGLAND AND WALES.²³⁹ Traditionally, ENGLISH law has tended to eschew developing Family Law in terms of rights and still has a tendency to think and develop in terms of remedies. The general approach is that denying contact between a child and a parent is regarded as a very serious issue. It is thus necessary to establish why in the child’s interests some form of contact should not be granted. In this respect it has been reported that in practice it might be easier to persuade a court to deny contact to an unmarried father particularly when he does not have parental responsibilities.

Persons other than parents generally include close relatives such as grandparents and siblings and persons with whom the child maintains an affectionate or close relationship (AUSTRIA,²⁴⁰ BELGIUM,²⁴¹ FRANCE,²⁴² GERMANY,²⁴³ ITALY,²⁴⁴ NORWAY,²⁴⁵ SWITZERLAND²⁴⁶) or who have acted *in loco parentis* in respect of the relevant child, (IRELAND²⁴⁷) relatives with whom it is enriching for the child’s development to have

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- ²²¹ See ROTH, Austrian Report, Q 44.
 - ²²² See PINTENS/PIGNOLET, Belgian Report, Q 44.
 - ²²³ See LUND-ANDERSEN/JEPPESEN DE BOER, Danish Report, Q 44.
 - ²²⁴ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 44.
 - ²²⁵ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 44.
 - ²²⁶ See SVERDRUP/LØDRUP, Norwegian Report, Q 44.
 - ²²⁷ See MĄCZYŃSKI/MĄCZYŃSKA, Polish Report, Q 44.
 - ²²⁸ See DE OLIVEIRA, Portuguese Report, Q 44.
 - ²²⁹ See GONZÁLEZ BEILFUS, Spanish Report, Q 44.
 - ²³⁰ See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 44.
 - ²³¹ See HRUSAKOVÁ, Czech Report, Q 44.
 - ²³² See KURKI-SUONIO, Finnish Report, Q 44.
 - ²³³ See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 44.
 - ²³⁴ See WEISS/SZEIBERT, Hungarian Report, Q 44.
 - ²³⁵ See SHANNON, Irish Report, Q 44.
 - ²³⁶ See ANTOKOLSKAIA, Russian Report, Q 44.
 - ²³⁷ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 44.
 - ²³⁸ See FERRAND, French Report, Q 44.
 - ²³⁹ See LOWE, English Report, Q 44.
 - ²⁴⁰ See ROTH, Austrian Report, Q 44.
 - ²⁴¹ See PINTENS/PIGNOLET, Belgian Report, Q 44.
 - ²⁴² See FERRAND, French Report, Q 44.
 - ²⁴³ See DETHLOFF/MARTINY, German Report, Q 44.
 - ²⁴⁴ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 44.
 - ²⁴⁵ See SVERDRUP/LØDRUP, Norwegian Report, Q 44.
 - ²⁴⁶ See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 44.
 - ²⁴⁷ See SHANNON, Irish Report, Q 44.

contact (SWEDEN²⁴⁸), or where family life exists in the sense of Article 8 ECHR (THE NETHERLANDS²⁴⁹). Thus, for instance, also the biological father who meets these requirements can have a right to have contact with the child and *vice versa*. In contrast to all other jurisdictions, POLISH law²⁵⁰ does not regulate the relations between a child and its more distant relatives.

4.9. DELEGATING THE EXERCISE OF PARENTAL RESPONSIBILITIES – QUESTION 49

The question whether and to what extent the holder(s) of parental responsibilities may delegate the exercise of these responsibilities should be understood in the sense that the holders of parental responsibilities themselves have the freedom to transfer the exercise of parental responsibilities for whatever reason.²⁵¹ In this sense the delegation of parental responsibilities is voluntary and different from the discharge of parental responsibilities. In principle, the attribution of parental responsibilities and the exercise of such responsibilities belong together. The holder(s) of parental responsibilities are obliged to exercise parental responsibilities.²⁵² The rights and duties are strictly personal and generally they cannot be transferred to other persons as a whole (AUSTRIA,²⁵³ BELGIUM,²⁵⁴ BULGARIA,²⁵⁵ CZECH REPUBLIC,²⁵⁶ DENMARK,²⁵⁷ ENGLAND AND WALES,²⁵⁸ FINLAND,²⁵⁹ FRANCE,²⁶⁰ GERMANY,²⁶¹ GREECE,²⁶² HUNGARY,²⁶³ IRELAND,²⁶⁴

²⁴⁸ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 44.

²⁴⁹ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 44.

²⁵⁰ See MĄCZYŃSKI/MĄCZYŃSKA, Polish Report, Q 44.

²⁵¹ Q 49: To what extent, if at all, may the holder(s) of parental responsibilities delegate its exercise?

²⁵² See also Principle 20 of the Council of Europe's White Paper:

'1. Parents having parental responsibilities should have an equal right to exercise such responsibilities and whenever possible they should exercise them together unless the best interests of the child otherwise requires.

2. Subject to the best interests of the child, parental responsibilities may be exercised by one parent alone or the exercise may be divided between the two parents according to the decision of the competent authority or on the basis of an agreement concluded between them.

3. In cases determined by law a person other than a parent may, upon a decision by a competent authority, exercise some or all parental responsibilities in addition to or instead of parents.'

²⁵³ See ROTH, Austrian Report, Q 49.

²⁵⁴ See PINTENS/PIGNOLET, Belgian Report, Q 49.

²⁵⁵ See TODOROVA, Bulgarian Report, Q 49.

²⁵⁶ See HRUSAKOVÁ, Czech Report, Q 49.

²⁵⁷ See LUND-ANDERSEN/JEPPESEN DE BOER, Danish Report, Q 49.

²⁵⁸ See LOWE, English Report, Q 49.

²⁵⁹ See KURKI-SUONIO, Finnish Report, Q 49.

²⁶⁰ See FERRAND, French Report, Q 49.

²⁶¹ See DETHLOFF/MARTINY, German Report, Q 49.

²⁶² See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 49.

²⁶³ See WEISS/SZEIBERT, Hungarian Report, Q 49.

²⁶⁴ See SHANNON, Irish Report, Q 49.

ITALY,²⁶⁵ LITHUANIA,²⁶⁶ THE NETHERLANDS,²⁶⁷ NORWAY,²⁶⁸ POLAND,²⁶⁹ PORTUGAL,²⁷⁰ RUSSIA,²⁷¹ SPAIN,²⁷² SWEDEN,²⁷³ SWITZERLAND²⁷⁴). However, this does not exclude the possibility to delegate certain aspects of the exercise of parental responsibilities to others. This is necessarily the case when, for instance, the child attends school, is partly and/or temporarily being cared for by relatives or neighbours or goes to a summer camp (ENGLAND AND WALES,²⁷⁵ GERMANY,²⁷⁶ GREECE,²⁷⁷ RUSSIA²⁷⁸). In this respect, the holder(s) of parental responsibilities are delegating its exercise more or less every day. If the holder(s) of parental responsibilities are not able to exercise their rights and duties due to specific circumstances, such as illness or other reasons of incapability, it is possible to transfer the exercise of parental responsibilities entirely or in part to a third person, a (foster) family or an institution. In most systems a decision by a competent authority is required (specifically mentioned in the reports of AUSTRIA,²⁷⁹ BELGIUM,²⁸⁰ DENMARK,²⁸¹ ENGLAND AND WALES,²⁸² FINLAND,²⁸³ FRANCE,²⁸⁴ HUNGARY,²⁸⁵ ITALY,²⁸⁶ LITHUANIA,²⁸⁷ THE NETHERLANDS,²⁸⁸ SPAIN,²⁸⁹ SWEDEN²⁹⁰).

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- ²⁶⁵ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 49.
²⁶⁶ See MIKELENAS, Lithuanian Report, Q 49.
²⁶⁷ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 49.
²⁶⁸ See SVERDRUP/LØDRUP, Norwegian Report, Q 49.
²⁶⁹ See MĄCZYŃSKI/MĄCZYŃSKA, Polish Report, Q 49.
²⁷⁰ See DE OLIVEIRA, Portuguese Report, Q 49.
²⁷¹ See ANTOKOLSKAIA, Russian Report, Q 49.
²⁷² See GONZÁLEZ BEILFUSS, Spanish Report, Q 49.
²⁷³ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 49.
²⁷⁴ See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 49.
²⁷⁵ See LOWE, English Report, Q 49.
²⁷⁶ See DETHLOFF/MARTINY, German Report, Q 49.
²⁷⁷ See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 49.
²⁷⁸ See ANTOKOLSKAIA, Russian Report, Q 49.
²⁷⁹ See ROTH, Austrian Report, Q 49.
²⁸⁰ See PINTENS/PIGNOLET, Belgian Report, Q 49.
²⁸¹ See LUND-ANDERSEN/JEPPESEN DE BOER, Danish Report, Q 49.
²⁸² See LOWE, English Report, Q 49.
²⁸³ See KURKI-SUONIO, Finnish Report, Q 49.
²⁸⁴ See FERRAND, French Report, Q 49.
²⁸⁵ See WEISS/SZEIBERT, Hungarian Report, Q 49.
²⁸⁶ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 49.
²⁸⁷ See MIKELENAS, Lithuanian Report, Q 49.
²⁸⁸ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 49.
²⁸⁹ See GONZÁLEZ BEILFUSS, Spanish Report, Q 49.
²⁹⁰ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 49.

4.10. REGAINING PARENTAL RESPONSIBILITIES AFTER HAVING BEEN DISCHARGED FROM THEM – QUESTION 54

It has been mentioned in several reports that the restoration of rights and duties pertaining to parental responsibilities is a rather exceptional event (CZECH REPUBLIC,²⁹¹ ENGLAND AND WALES,²⁹² RUSSIA²⁹³); however, in almost all jurisdictions it is possible that previous holder(s) of parental responsibilities who have been discharged of their rights and duties may regain their status as holder(s) of parental responsibilities.²⁹⁴ In contrast, according to the law in GREECE²⁹⁵ and LITHUANIA²⁹⁶ the regaining of parental responsibilities is not possible if parental responsibilities have been entirely restricted.²⁹⁷ The same result, however due to a completely different approach, is pursued in DENMARK,²⁹⁸ where regaining parental responsibilities is not possible because the holder(s) of parental responsibilities cannot be discharged from these responsibilities. Those systems, however, that allow the regaining of parental responsibilities after having been discharged from them require, first of all, that an essential change of circumstances has taken place so that the need for care and substitute placement no longer apply (AUSTRIA,²⁹⁹ BELGIUM,³⁰⁰ BULGARIA,³⁰¹ CZECH REPUBLIC,³⁰² FINLAND,³⁰³ FRANCE,³⁰⁴ GREECE (in the case of a restricted discharge),³⁰⁵ HUNGARY,³⁰⁶ IRELAND,³⁰⁷ ITALY,³⁰⁸ LITHUANIA (in the case of a restricted discharge),³⁰⁹ THE NETHERLANDS,³¹⁰

²⁹¹ See HRUSAKOVÁ, Czech Report, Q 54.

²⁹² See LOWE, English Report, Q 54.

²⁹³ See ANTOKOLSKAIA, Russian Report, Q 54.

²⁹⁴ Q 54: To what extent, if at all, can the previous holder(s) of parental responsibilities, who has been discharged of his/her parental responsibilities, regain them?

²⁹⁵ See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 54.

²⁹⁶ See MIKELENAS, Lithuanian Report, Q 54.

²⁹⁷ Article 3.180 C.C.

²⁹⁸ See LUND-ANDERSEN/JEPPESEN DE BOER, Danish Report, Q 54.

²⁹⁹ See ROTH, Austrian Report, Q 54.

³⁰⁰ See PINTENS/PIGNOLET, Belgian Report, Q 54.

³⁰¹ See TODOROVA, Bulgarian Report, Q 54.

³⁰² See HRUSAKOVÁ, Czech Report, Q 54.

³⁰³ See KURKI-SUONIO, Finnish Report, Q 54.

³⁰⁴ See FERRAND, French Report, Q 54.

³⁰⁵ See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 54.

³⁰⁶ See WEISS/SZEIBERT, Hungarian Report, Q 54.

³⁰⁷ See SHANNON, Irish Report, Q 54.

³⁰⁸ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 54.

³⁰⁹ See MIKELENAS, Lithuanian Report, Q 54.

³¹⁰ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 54.

NORWAY,³¹¹ POLAND,³¹² PORTUGAL,³¹³ RUSSIA,³¹⁴ SPAIN,³¹⁵ SWEDEN,³¹⁶ SWITZERLAND³¹⁷). All the reasons that justified discharging the holder(s) of parental responsibilities must no longer be applicable. In order to regain parental responsibilities an order by the competent authority is required. This order may be requested by either the discharged holder of parental responsibilities (BELGIUM,³¹⁸ BULGARIA,³¹⁹ ITALY,³²⁰ SWEDEN³²¹), the Public Prosecutor (BELGIUM,³²² HUNGARY,³²³ PORTUGAL³²⁴) or the Social Welfare Committee (SWEDEN³²⁵), both parents (FINLAND,³²⁶ FRANCE,³²⁷ SWEDEN³²⁸) or either parent (FRANCE,³²⁹ HUNGARY,³³⁰ THE NETHERLANDS,³³¹ PORTUGAL,³³² RUSSIA,³³³ SWEDEN³³⁴) or the child itself (HUNGARY³³⁵). In this respect a great variety of solutions exist. In BELGIUM,³³⁶ FRANCE,³³⁷ PORTUGAL³³⁸ and SWITZERLAND³³⁹ the request may only be made to the competent authority at least one year after the judgement ordering the discharge has become irrevocable. In NORWAY³⁴⁰ regaining of parental responsibilities is also possible if the parents have made an agreement to this effect. In all cases – and this is of paramount and evident importance – the decision to restore the discharged holder(s) of parental responsibilities with their original status must be taken in accordance with the interests of the child.

³¹¹ See SVERDRUP/LØDRUP, Norwegian Report, Q 54.

³¹² See MĄCZYŃSKI/MĄCZYŃSKA, Polish Report, Q 54.

³¹³ See DE OLIVEIRA, Portuguese Report, Q 54.

³¹⁴ See ANTOKOLSKAIA, Russian Report, Q 54.

³¹⁵ See GONZÁLEZ BEILFUSS, Spanish Report, Q 54.

³¹⁶ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 54.

³¹⁷ See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 54.

³¹⁸ See PINTENS/PIGNOLET, Belgian Report, Q 54.

³¹⁹ See TODOROVA, Bulgarian Report, Q 54.

³²⁰ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 54.

³²¹ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 54.

³²² See PINTENS/PIGNOLET, Belgian Report, Q 54.

³²³ See WEISS/SZEIBERT, Hungarian Report, Q 54.

³²⁴ See DE OLIVEIRA, Portuguese Report, Q 54.

³²⁵ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 54.

³²⁶ See KURKI-SUONIO, Finnish Report, Q 54.

³²⁷ See FERRAND, French Report, Q 54.

³²⁸ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 54.

³²⁹ See FERRAND, French Report, Q 54.

³³⁰ See WEISS/SZEIBERT, Hungarian Report, Q 54.

³³¹ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 54.

³³² See DE OLIVEIRA, Portuguese Report, Q 54.

³³³ See ANTOKOLSKAIA, Russian Report, Q 54.

³³⁴ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 54.

³³⁵ See WEISS/SZEIBERT, Hungarian Report, Q 54.

³³⁶ See PINTENS/PIGNOLET, Belgian Report, Q 54.

³³⁷ See FERRAND, French Report, Q 54.

³³⁸ See DE OLIVEIRA, Portuguese Report, Q 54.

³³⁹ See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 54.

³⁴⁰ See SVERDRUP/LØDRUP, Norwegian Report, Q 54.

4.1.1. HEARING OF THE CHILD IN DISPUTES RELATING TO PARENTAL RESPONSIBILITIES – QUESTION 59

My final question concerns the hearing of the child in disputes concerning parental responsibilities. To what extent are children heard when the competent authority decides upon parental responsibilities?³⁴¹ According to Article 12 of the UN Convention on the Rights of the Child a child who is capable of forming his or her own views shall have the right to express those views freely in all matters affecting him/herself, the views of the child being given due weight in accordance with the age and maturity of that child. For this purpose, the child shall, in particular, be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. This fundamental right has been adopted in all jurisdictions: the child has the right to be heard.³⁴² The child's hearing does not oblige the competent authority to take into account or to follow the child's wishes. However, according to court practice in FRANCE³⁴³ the court must specify in its decision whether or not the feelings expressed by the child during the hearing have been taken into account. Under the ENGLISH Children Act 1989, it is mandatory for the court to have regard to "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)". The court can either ask an officer of the Children and Family Court and Advisory Service or interview the child in private. The latter is in any event a matter entirely at the judge's discretion.³⁴⁴ In those systems where the child must be heard it must have reached a certain age (7 years in NORWAY,³⁴⁵ 10 years in BULGARIA³⁴⁶ and RUSSIA,³⁴⁷ 12 years in BELGIUM,³⁴⁸

³⁴¹ Q 59: To what extent, if at all, are children heard when a competent authority decides upon parental responsibilities, the child's residence or contact, e.g., upon a dispute, when scrutinizing an agreement, when appointing or discharging holder(s) of parental responsibilities, upon enforcement of a decision or agreement?

³⁴² See also the Council of Europe's White Paper, Principle 21: "When exercising parental rights and responsibilities the child should have a right to express his or her views and due weight should be given to the views expressed by the child according to his or her age and maturity." And Principle 25(2) in the case of a decision of the competent authority concerning the attribution, the deprivation or the exercise of PR: "When the competent authority takes a decision relating to parental responsibilities due weight should be given to the views expressed by the child according to the age and maturity of the child."

³⁴³ See FERRAND, French Report, Q 59.

³⁴⁴ See LOWE, English Report, Q 59.

³⁴⁵ See SVERDRUP/LØDRUP, Norwegian Report, Q 59.

³⁴⁶ See TODOROVA, Bulgarian Report, Q 59 and Q 62.

³⁴⁷ See ANTOKOLSKAIA, Russian Report, Q 62.

³⁴⁸ See PINTENS/PIGNOLET, Belgian Report, Q 59 and Q 62.

DENMARK,³⁴⁹ FINLAND,³⁵⁰ HUNGARY,³⁵¹ THE NETHERLANDS,³⁵² SPAIN,³⁵³ SWEDEN³⁵⁴ or 14 years in AUSTRIA,³⁵⁵ GERMANY³⁵⁶ and HUNGARY³⁵⁷). If it has not reached the specific age, however, it may still be heard if it is sufficiently mature (AUSTRIA,³⁵⁸ BULGARIA,³⁵⁹ DENMARK,³⁶⁰ FINLAND,³⁶¹ GERMANY³⁶² HUNGARY,³⁶³ THE NETHERLANDS,³⁶⁴ NORWAY³⁶⁵). In other systems, the law does not establish an age at which a minor should be heard. If the child is able to express his/her views, it has the right to be heard irrespective of its age (CZECH REPUBLIC³⁶⁶ ENGLAND AND WALES,³⁶⁷ FRANCE,³⁶⁸ GREECE,³⁶⁹ IRELAND,³⁷⁰ ITALY,³⁷¹ LITHUANIA,³⁷² POLAND,³⁷³ PORTUGAL,³⁷⁴ RUSSIA,³⁷⁵ SWEDEN,³⁷⁶ SWITZERLAND³⁷⁷). Therefore, whether or not the child is heard in a dispute concerning parental responsibilities depends on its maturity, which must be assessed individually. Whether children are actually heard in parental responsibilities disputes depends on the law in practice which in some systems largely deviate from the written law. In the light

³⁴⁹ See LUND-ANDERSEN/JEPPESEN DE BOER, Danish Report, Q 59.

³⁵⁰ See KURKI-SUONIO, Finnish Report, Q 59.

³⁵¹ See WEISS/SZEIBERT, Hungarian Report, Q 62.

³⁵² See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 59 and Q 62.

³⁵³ See GONZÁLEZ BEILFUSS, Spanish Report, Q 59 and Q 62.

³⁵⁴ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 59. Enforcement may not be ordered contrary to the wishes of a child who has reached the age of twelve years except where the county administrative court considers enforcement necessary with regard to the best interests of the child. The same applies also in respect of a younger child who has attained such a degree of maturity that his or her wishes should be taken into account.

³⁵⁵ See ROTH, Austrian Report, Q 62.

³⁵⁶ See DETHLOFF/MARTINY, German Report, Q 59.

³⁵⁷ See WEISS/SZEIBERT, Hungarian Report, Q 59 and Q 62.

³⁵⁸ See ROTH, Austrian Report Q 59 and Q 62.

³⁵⁹ See TODOROVA, Bulgarian Report, Q 59 and Q 62..

³⁶⁰ See LUND-ANDERSEN/JEPPESEN DE BOER, Danish Report, Q 59 and Q 62..

³⁶¹ See KURKI-SUONIO, Finnish Report, Q 59 and Q 62.

³⁶² See DETHLOFF/MARTINY, German Report, Q 62. There is, however, contradictory case law about which age it is best to hear children. Some courts argue that the child is to be heard at the age of three. Other courts and authors propose the age of four or of five years. Above this age limit there seems to be consensus that a hearing generally must take place.

³⁶³ See WEISS/SZEIBERT, Hungarian Report, Q 59 and Q 62.

³⁶⁴ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 59 and Q 62.

³⁶⁵ See SVERDRUP/LØDRUP, Norwegian Report, Q 62.

³⁶⁶ See HRUSAKOVÁ, Czech Report, Q 62.

³⁶⁷ See LOWE, English Report, Q 59 and Q 62.

³⁶⁸ See FERRAND, French Report, Q 59 and Q 62.

³⁶⁹ See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 59 and Q 62.

³⁷⁰ See SHANNON, Irish Report, Q 59 and Q 62.

³⁷¹ See PATTI/ROSSI CARLEO/BELLISARIO, Italian Report, Q 59 and Q 62.

³⁷² See MIKELENAS, Lithuanian Report, Q 59 and Q 62.

³⁷³ See MĄCZYŃSKI/MĄCZYŃSKA, Polish Report, Q 59 and Q 62.

³⁷⁴ See DE OLIVEIRA, Portuguese Report, Q 59 and Q 62.

³⁷⁵ See ANTOKOLSKAIA, Russian Report, Q 59 and Q 62.

³⁷⁶ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 59 and Q 62.

³⁷⁷ See HAUSHEER/ACHERMANN/WOLF, Swiss Report, Q 59 and Q 62.

of the negative impact of court hearings upon children, the overriding preference of IRISH judges has been to exclude children from legal proceedings. While a child may apply to be present at a hearing, the court may exclude such child if, having regard to his or her age and the nature of the proceedings, it feels that it would not be in the child's interest to allow him or her to be present.³⁷⁸ With regard to the question as to whether the child has attained a sufficient degree of maturity it is interesting to note, for example, that, according to the GREEK Supreme Court,³⁷⁹ the courts do not need to justify explicitly the omission to hear the child. When no hearing of the child has taken place it is assumed that the courts have judged that the child was not sufficiently mature in order to form an opinion on the issue in question. This reasoning has been rightly criticised by the legal literature in GREECE. In addition, in a few reports it has been mentioned that despite the general obligation to hear the mature child or a child older than a certain age, in practice the courts do not hear the child, and not only because it is considered that the hearing would probably be harmful to the child (BELGIUM³⁸⁰). In GERMANY,³⁸¹ for instance, research has shown that, in fact, less than half of the children were heard personally in child protection proceedings and even a quarter of those aged between 14 and 17 were not heard. The SPANISH Supreme Court³⁸² has held that in the case of discharging parental responsibilities children do not necessarily have to be heard even if they are older than twelve years of age. Also in THE NETHERLANDS³⁸³ and SWEDEN³⁸⁴ children are not always heard to the extent which is desirable. Finally, it is striking that children are not heard in the particular case when the parents have reached a mutual agreement with regard to – most frequently – the exercise of parental responsibilities (CZECH REPUBLIC,³⁸⁵ DENMARK,³⁸⁶ FINLAND,³⁸⁷ HUNGARY,³⁸⁸ THE NETHERLANDS³⁸⁹). In these cases the competent authorities apparently assume that the parents have already taken the views and wishes of the child into consideration. It is questionable whether this has actually always occurred.

³⁷⁸ See SHANNON, Irish Report, Q 59.

³⁷⁹ See KOUTSOURADIS/ZERVOGIANNI, Greek Report, Q 59.

³⁸⁰ See PINTENS/PIGNOLET, Belgian Report, Q 59.

³⁸¹ See DETHLOFF/MARTINY, German Report, Q 59.

³⁸² See GONZÁLEZ BEILFUSS, Spanish Report, Q 59.

³⁸³ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 59. Specific figures are, however, not available.

³⁸⁴ See JÄNTERÄ-JAREBORG/SINGER/SÖRGJERD, Swedish Report, Q 59.

³⁸⁵ See HRUSAKOVÁ, Czech Report, Q 59.

³⁸⁶ See LUND-ANDERSEN/JEPPESEN DE BOER, Danish Report, Q 59.

³⁸⁷ See KURKI-SUONIO, Finnish Report, Q 59.

³⁸⁸ See WEISS/SZEIBERT, Hungarian Report, Q 59.

³⁸⁹ See BOELE-WOELKI/SCHRAMA/VONK, Dutch Report, Q 59.

5. PRELIMINARY CONCLUSIONS

At the beginning of this contribution it has been emphasized that this work-in-progress report only allows some general conclusions which are to be considered of a preliminary nature due to the fact that no more than only one sixth of all questions have been dealt with. In any case, when drafting the Principles on Parental Responsibilities all answers to the 62 questions will be compared. At this stage, based on a brief comparison of the national reports with regard to eleven questions, the following conclusions can be drawn:

- (1) Parental responsibilities encompasses the same rights and duties in all systems compared.
- (2) The kind of relationship between the parents, whether formal or informal, has – to a certain extent – become less important with regard to the right to obtain and exercise parental responsibilities. Instead, the legal relationship between a person and a child is generally decisive.
- (3) The holder(s) of parental responsibilities occupy a strong position. In some systems an agreement to terminate joint parental responsibilities is not allowed, whereas in other systems only by an order of the competent authority can sole parental responsibilities be attributed to one of the parents. However, to a certain extent the (joint) delegation of the exercise of parental responsibilities is possible. In addition, the discharged holder(s) of parental responsibilities can regain their position.
- (4) With regard to contact arrangements between the child and parents and other persons the best interest of the child prevails.
- (5) The position of the partner of the parent holding parental responsibilities is different in the jurisdictions compared. In most jurisdictions step-parent adoption is still required in order to attribute parental responsibilities to the parent’s partner, whereas a trend has probably been set by the DUTCH solution, where the partner acquires parental responsibilities by operation of law over a child born into their marriage or registered partnership if the child has no other parent.
- (6) The generally accepted principle of hearing the child in parental responsibilities disputes is frequently not applied. It is questionable whether this development is desirable. In addition, the age limits should be the subject of discussion.

Finally, the general conclusion can be drawn that, with regard to the great majority of aspects compared, common solutions could be found. At this point, I am inclined to predict that also with regard to the other questions the practical results will often be very similar. This presumption of similarity (*praesumptio similitudinis*) is a generally

accepted working rule in comparative law. It also applies to parental responsibilities which, as part of family law, no longer belong to those topics which are “heavily impressed by moral views and values.”³⁹⁰

³⁹⁰ In this sense K. ZWIEGERT & H. KÖTZ, *Introduction to Comparative Law*, Clarendon Press-Oxford, 1998, p. 40.

CONTACT ARRANGEMENTS: UNIFICATION ON THE BASIS OF EUROPEAN PRINCIPLES?

The Council of Europe Convention on Contact Concerning Children

VELINA TODOROVA

1. INTRODUCTION

Academic discussions on the “desirability and feasibility”¹ of the harmonisation of Family law in Europe have already been taking place for many years. At the same time, the social dynamics and particularly “the continuing internationalisation of family relationships within unified Europe”² call for their reflection in European Family Law.

There is increased attention to the diversity of rights within the *free movement family rights*³ that appears in the international legal instruments and legal research. Among them, the contact arrangements have gained more importance from 1980 onwards. This conflict area of family relations is becoming additionally complex due to the free movement of persons, the international abduction of children and cross-border custody and contact. Therefore international law is gradually widening its regulation led by the understanding that it should be able to provide an effective legal framework based on certain standards.⁴

¹ See D. MARTINY, “Is Unification of Family law Feasible or even Desirable?” In: A. HARTKAMP *et al.* (eds), *Towards a European Civil Code*, Ars Aequi Libri, Nijmegen, 1998, p. 155.

² *Explanatory Report to the CE Convention on contact concerning children*. CDCJ (2001) 23 Add. I, § 1, page 14.

³ See C. MCGLYNN, “The Europeanisation of family law”, *Child and Family Law Quarterly*, Vol. 13, No. 1, 2001, page 36.

⁴ See *Transfrontier Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. Final Report drawn up by W. DUNCAN, Deputy Secretary General. July 2002, page 10.

The standardization of rules in the area of contact runs along three main channels. First, the unification of the rules on conflicts of law for members of the Hague Conference on private international law. The Hague Convention on the Civil Aspects of International Child Abduction (1980) and the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (1996) need to be mentioned in this respect. Second, at the level of the European Union the efforts to unify the rules of conflict jurisdiction in matrimonial matters so as to simplify the formalities for rapid and automatic recognition and enforcement of judgements⁵ have materialised in the European Commission's Council Regulation No. 2201/2003⁶ (Revised Brussels II Regulation). Third, public international law treaties also create uniform rules providing a basis for the harmonisation of national substantive legislation. The United Nations Convention on the Rights of the Child (CRC) and the European Convention on Human Rights and Fundamental Freedoms (ECHR) with its case law are highly influential in introducing the perspective of human rights among the other more procedural instruments.

Against this impressive body of international treaties, another international treaty has recently been adopted – the Council of Europe Convention on Contact Concerning Children (2003).⁷ This Convention reflects the critical voices which had been raised against the insufficient effectiveness of the international regulation of conflicts of law in contact arrangements and calls for the unification of national substantive family law. National law, which regulates the substance of contact, has been criticised for remaining almost untouched by the process of unification, thus undermining international law.⁸

This chapter will analyse some provisions of the Contact Convention in the light of questions which may arise as a result of the adoption of its principles by the national legal systems. To what extent does the legal system need to be prepared to respond to these principles? What is the significance of political and cultural constraints? I will

⁵ See C. HAMILTON/A. PERRY, *Family Law in Europe*, Second Edition, 2002, p. 177-9.

⁶ Council Regulation No. 2201/2003 of the European Commission concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility. It has repealed Regulation (EC) No. 1347/2000 ('Brussels II').

⁷ Hereafter, the Convention or Contact Convention. The Convention has not yet come into force, as the three required CE Member State ratifications have not been obtained. It has been signed by 14 member states, but so far there have only been two ratifications.

⁸ See *Transfrontier Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. Final Report drawn up by W. DUNCAN, Deputy Secretary General, July 2002, page 5. See also D. MARTINY, "Is Unification of Family law Feasible or even Desirable?", *ibid.*, p. 156.

seek answers to these questions by studying the family law of Bulgaria – a country whose accession to the European Union is expected in 2007.

2. THE APPROACH OF THE CONVENTION

2.1. UNIFICATION ON THE BASIS OF COMMON PRINCIPLES

As an instrument of public international law, the Convention invites the member states to carry out the necessary changes to their internal law: “*each state-party undertakes to ensure the conformity of its law with the principles of this Convention and takes measures for that purpose*”.⁹ The Convention substantiates that some level of uniformity of the national laws is needed which should support the operation of international instruments dealing with abduction, custody and the habitual residence of children.¹⁰ As a means for achieving this goal it suggests the adoption of common principles which contain not only procedural rules, but also domestic substantive laws.¹¹ These principles should not be restricted to cross-border contacts,¹² but should cover the whole range of issues to be applied to contact orders, to fix appropriate safeguards and guarantees to ensure the proper exercise of contact and the immediate return of children at the end of the period of contact”.¹³ As the Convention says: “*Such principles will not only assist judicial authorities, at a national level, to follow certain standards but will also ensure that any foreign decisions to be implemented by other State Parties to this Convention have been based on similar reliable standards*”.¹⁴ It is expected that the contact arrangements of each jurisdiction, which are based on uniform substantive law, will be more effectively implemented through private international law instruments.

2.2. ‘GOOD PRACTICES’

Irrespective of the fact that the formal reason for the adoption of the Convention is to facilitate international contacts, one can expect an additional effect from its coming

⁹ Explanatory Report (ER), § 36.

¹⁰ ER, § 10.

¹¹ Article 1/a in relation to Article 3 of the Convention and ER § 11.

¹² Preamble to the Convention, § 12: “...need to promote the adoption of common principles in states on contact concerning children, in particular in order to facilitate the application of international instruments in this field.”

¹³ See: Preamble to the Convention, § 12 and §13, Explanatory Report, § 16 and § 17.

¹⁴ ER, §17.

into force. If it offers a 'better law',¹⁵ the unification can also contribute to improving of the effectiveness of the law in regulating domestic contacts. Is this the implicit objective of the Convention? One can presume so, as the authors of the Convention admit that the principles are not theoretical constructions, but rather originate from the well established practices and innovative legislation in the countries of Europe.¹⁶ Good practices, as the Explanatory Report shows, very often stem from the case law under the ECHR¹⁷ or from some recent changes in national legislation.¹⁸ Therefore one can assume that good practices actually constitute the 'better law', which is offered as a model in the unification of national substantive law.

2.3. AREAS OUTSIDE THE PRINCIPLES

The Convention abstains from offering common unifying principles in some areas, thereby refraining from imposing the 'better law'. They are categorised in several groups:

- The child and its status under the law, the legal capacity of the child and the legal meaning of the child's consent with regard to contact. It is up to national law to determine the age at which the Convention will no longer apply to the child, in other words when a young person ceases to be a child.
- The principles for determining the child's parent.
- Family relations: the extent of personal relations within which contact with the child will be arranged.

Obviously, the authors of the Convention have considered these matters to be sensitive in relation to national traditions and culture or concerning socio-economic and political aspects. Therefore they have left them to be determined by the national authorities. One can assume, however, that this approach will not jeopardise the projected unification. On the one hand, the areas left for national discretion are not of vital importance for the regulation of contact. On the other hand, the influence of other important conventions is apparent in these areas. The CRC, for instance, exerts a significant impact with regard to determining both the capacity of the child to be able to be involved in certain legal procedures and with reference to the principle of the best interests of the child. The European Convention on the Exercise of Children's

¹⁵ See M. ANTOKOLSKAIA, "The 'better law' approach and the harmonisation of family law", in: K. BOELE-WOELKI, ed., *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, 2003, p.162.

¹⁶ ER, § 11: "The generally accepted principles of GP applied currently by the majority of States".

¹⁷ ER, § 9.

¹⁸ For instance, the expansion of the circle of people entitled to contact, agreements between spouses etc. (ER, §9, 29, 35).

Rights also lays down common standards for the participation of the child in certain procedures. The ECHR and its case law have already established standards with regard to the recognition of parentage, the rights with respect to personal and family life within the child's close family circle etc. Therefore, it can be expected that in these areas the legislation and practice in national substantive law are already based on common principles and are sufficiently foreseeable.

3. THE DEFINITION OF CONTACT

In addition to principles, the Convention proposes new definitions of contact. Its aim is to improve the regulation by prioritising the perspective of human rights rather than making it technically possible to adopt foreign legal solutions. Until its adoption, two terms were used: "access" and "contact". "Human rights" conventions use the term "contact", while "access" is more frequently used in the conventions of the Hague Conference and in the regulations of the European Commission. The Revised Brussels II Regulation proposes, for example, the following definition of the term: "the 'rights of access' shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time" (art. 2/10). The Regulation does not have the objective of changing legal concepts; it rather aims to determine the applicable jurisdiction in the case of conflict. Therefore, it merely reflects some established definitions¹⁹ and mirrors the situation in national legal systems. However, against the backdrop of the CRC and the case law under the ECHR, this definition seems to be already outdated. It is obvious that the term "access" associates contact with the rights of the parents or the adults and rather assigns to the child the role of an "object" which can merely be taken from place to place. There is no clear-cut authority that contact is also a right belonging to the child.

The new Convention of the Council of Europe has assumed quite a different approach. It offers precise and convincing reasons for the adoption of a single term: "contact", as well as a new concept of contact. According to its simplified and clear definition (Article 2/à), 'contact' means a physical or an indirect relationship, a stay for a limited length of time, and communication between the child and another "appropriate" person,²⁰ with whom he/she does not habitually reside. So, contact is a subjective right to a relationship between the child and other persons, without them being necessarily

¹⁹ For instance, the Hague Convention on the Civil Aspects of International Child Abduction: "'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence" – Article 5 (b).

²⁰ See ER, § 7.

his/her parents. A prerequisite for this right to contact to arise is that the child does not habitually reside with the person with whom it will have contact.

This definition provides a new concept of contact. The Convention suggests a new perspective by not directly referring to divorce or separation. Historically and logically, the need to regulate contact will arise as a consequence of a divorce/separation between the parents. Usually, contact is arranged for the parent with whom the child will not permanently reside.²¹ With its neutral definition, however, the Contact Convention departs from the field of family separation and divorce and even from family law as such. It thereby generalises the situations where there is a need for contact by referring to an interrupted relationship between the child and another person – a parent or another close person.

What are the advantages of this approach?

1. An opportunity is provided for national legislations to go beyond the regulation of separation/divorce. Thus, contact can be arranged as an individual, subjective right belonging to the affected parties, as the issue considers the particular needs of the persons rather than the consequences of divorce, which, presumably, only affects the parents. Introducing the notion of human rights in the field of family relations is very much in line with the case law of the ECHR and this will lead to the liberalisation of family law. The Convention even raises the issue of the right of the child to consent to the contact.²²
2. The term ‘contact’ makes it easier to accept human rights terminology, in contrast to the term “access”, which rather reflects the rights of parents or adults and the consequences of divorce. This change in terminology mirrors the change in the legal status of the child: “...children are no longer regarded as packages or pieces of property to be moved about.”²³
3. Contact can be considered to be a legal option for any person within the circle of the extended family or friends. Thus, the regulation can reflect all situations of change in one’s personal life and is not only limited to divorce/separation between parents. As the Convention states: “*the Convention is concerned with situations relating to the right of contact and lays down specific solutions to them*”.²⁴ The child, as an independent legal subject, enters into relations with different people for different reasons. Therefore the child needs and has an interest in maintaining contact with persons other than its parents. A loss of contact, for various reasons,

²¹ See *Transfrontier Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, *ibid.*, p. 8.

²² See ER, § 15, vi.

²³ M. Freeman, “Disputing Children”, in: J. EEKELAAR *et al.* (eds) *Cross Currents. Family Law and Policy in US and England*, Oxford University Press, 2000, p. 456.

²⁴ ER, § 16.

may give rise to the need to guarantee such contact if it is in the interest of the child.

The definition of contact therefore remains neutral with regard to the reasons which necessitate that such contact should be guaranteed. It is not closely related to divorce, but to all possible scenarios which can result in the child being separated from a parent or other related persons. And this is not only limited to private law; it also extends to public law. At this point we are already referring not to rights, but to the interests of the child, as they determine the circle of persons with whom contact has to be arranged and maintained.

4. WHAT IS ‘CONTACT’ ACCORDING TO BULGARIAN FAMILY LAW?

The Bulgarian legislation uses the term “personal relations between parents and children”, but legal practice also uses the term “contact”.²⁵ The term “access”, with the connotations discussed above, is not familiar to the law. Until very recently, contact with respect to children was a subject which was expressly regulated by family law in the context of the dissolution of a marriage or separation between parents. With the adoption of the Child Protection Act (CPA) in 2000, this monopoly was broken. The CPA obliges the foster parents, with whom the child is placed, to assist in the maintenance of personal relations between the biological parents and the child. Such personal relations will be determined by the court if this is in the interest of the child.²⁶

The concept of the right to personal contact has undergone certain developments. It was initially regulated by the first secular act on marriage and divorce in Bulgaria – the Marriage Ordinance Act from 1945. The law stated that the non-custodial parent “*is entitled to maintain appropriate personal relations with them (the children)*”.²⁷ In 1949 the law departed from this “rights” language to a more neutral wording. This is still preserved: the court will order “*measures regarding personal relations between children and parents*”.²⁸ Specific “rights” terminology occasionally appears in some

²⁵ See decision 10 052/12.11.2002 of the Supreme Administrative Court (SAC).

²⁶ Article 33 (1) The foster family shall provide information about the child to his or her parents and shall assist them in their personal relations with the child. Where such relations are in the interest of the child, the regional court shall determine their regime.

(2) The decision under para. 1 may be appealed, pursuant to the order laid down in the Code of Civil Procedure, by the parents, the child, the prosecutor, the municipal social assistance service or the foster family.

²⁷ Article 45, § 2.

²⁸ See Article 54 of the Act on the Persons and the Family (1949), Article 29 of the Family Code (1968) and Article 106 of the Family Code (1985).

court orders: “*contact is the right of the child* to communicate with the other parent... and it satisfies the child’s need to communicate with both parents”.²⁹ Irrespective of the lack of an explicitly articulated right, however, the right to contact is seen as a subjective right of the parent which constitutes part of parental rights and duties.³⁰ On the other hand, the child has an indisputable interest in the contact. However, it is difficult to discuss the child’s personal right to contact, given the lack of any explicit rights relating to children in relation to parents, except for the right to be supported.

In the context of such a regulation, the implementation of the Contact Convention would give rise to significant changes in family law and beyond. Thus, for instance, the legal situation of the child in family law will have to be reconsidered along the lines of a clear articulation of subjective rights. This is a very significant change for certain legislations which still prefer not to use the language of individual rights in family law, not so much for cultural reasons, but for socio-economic considerations. The accession of Bulgaria to the Convention would in this sense be a serious step towards the modernisation of private law in general.

5. CONTACT FOLLOWING DIVORCE

Contact between the parents and the child is usually arranged in the context of divorce/separation. That is why, in spite of the Convention dealing with contact as an individual subjective right, the context of divorce will remain important as this is the most common situation where contact will have to be considered. In this case, contact usually forms part of the consequences of divorce and its arrangement depends on the approach taken by each legislator to the issue of custody. The greater the possibility for the parents to reach an agreement in this situation, the more impact it will have on the eventual contact.

In general, three types of regimes are applied by the legislations of European states to regulate post-divorce arrangements: joint custody, sole custody and shared custody. A different philosophy rests behind each of these regimes with regard to family autonomy, personal rights and the degree of state intervention in family life. Some of the main objectives and principles in joint custody and shared custody are: 1) to increase and encourage parental responsibility for the raising and the upbringing of children and settling disputes by way of agreement. Therefore, a new terminology was adopted: responsibilities rather than rights and obligations, residence instead of custody etc.;

²⁹ Case 3717-1979-II Civil Division.

³⁰ In this sense, a parent deprived of his/her parental rights does not have an autonomous subjective right to contact.

2) the intervention of the state will only take place if and when required or in the case of a conflict which damages the interests of children; 3) there will be joint and shared custody when the relationship between marriage and parentage is interrupted – if the marriage is terminated, parenthood nevertheless continues and parents have equal responsibilities towards their children; 4) joint and shared custody are more effective – the parties know their interests and they are usually more predisposed to fulfil their own agreements.

The subject of family relations in Bulgaria is still regulated by the Family Code enacted by the former communist state in 1985. In general, its principles, such as gender equality including the attribution of paternity, the equality of children born outside wedlock and consensual divorce, were modern concepts for those times. From today's perspective, however, this law already seems fairly outdated. It does not reflect the profound changes in the families and the personal lifestyles of Bulgarians which have occurred during the last 20 years.³¹ It still values the institution of marriage and the stability of the couple more than personal autonomy and personal rights. These values justify, for example, the retained high degree of state interference in personal relationships. The court plays an active role in deciding on a divorce and its consequences. Within the framework of the procedure for a divorce due to the irretrievable breakdown of the marriage, when the court pronounces *ex officio* on the matter of marital fault, it also determines custody and contact issues *ex officio*.³² It will choose one of the parents to exercise parental rights after the divorce, and it is with that person that the child will reside. When the matter refers to third persons – such as grandparents,

³¹ The latest statistical and sociological surveys show that the marital behaviour of Bulgarians is changing, although the tendencies in this respect are not as strong as in Western societies. According to the last census (2001), the number of marriages had decreased (by 3000 as compared to a 2000), the number of children born out of marital relations had increased (42% of all deliveries), the average marital age of women had increased – 23.8 years as well as the age for having a first child – 25.1 years. These data are confirmed by the conclusions of a sociological survey carried out in 2002 by the Alpha-Research Agency. According to the research, 21% of younger people consider marriage unnecessary, the percentage of people marrying under the age of 30 is dropping, which reflects the tendencies of Western European countries – for Bulgaria this percentage is 30%, whereas for Great Britain it is 25%, for Greece it is 22%, while, for Denmark it is 12%. The tolerance for unmarried cohabitation has increased: only 11.5% of young people aged between 18 and 30 years condemn this way of life. As for the Survey by ASSA M (May, 2004), every second couple in Bulgaria live out of marriage, every second child was born out of wedlock in 2003.

³² Article 99/1,2 of the Family Code: 'Each of the spouses is entitled to seek a divorce where the marriage has seriously and irrevocably broken down.(2) Together with the decision allowing the divorce the court determines *ex officio* who is responsible for the breakdown of the marriage unless it has been caused by objective reasons which cannot be attributed to the fault of one or both spouses.' According to the statistics of the Ministry of Justice, these divorces amount to just over a half of the total number of divorces in the last 5 years. More on divorce law in Bulgaria in: K. BOELE-WOELKI *et al.* (eds). *European Family Law in Action. Vol. I: Grounds for Divorce*, Intersentia, 2003.

again a decision is required from the court in order to establish the contact regime.³³ Outside private law, the child's contact with its biological parents in the case of placement with a foster family will also be settled by a court decision.³⁴

The only option for attaining an agreement on contact between the parents is in the case of a divorce by mutual consent or when the parties do not raise the issue of fault for the marriage breakdown.³⁵ The parents submit their agreement to the court. The court reviews this agreement from the perspective of the interests of the child without being able to influence its content. If approved, the agreement becomes a part of the divorce decision and settles both the custody and contact issues.

The law seems much more liberal with regard to cohabiting parents who separate. In this case the law presumes that the parents have reached an agreement with regard to custody/contact issues. The Family Code stipulates that: "*Where the parents do not live together and are unable to reach an agreement as to with whom the children will reside, the dispute will be resolved by the regional court at the place of the children's residence, after the court has heard any child who is ten years of age or older.*"³⁶ This rule could be applied in various situations – in a factual separation within a marriage or when an unmarried couple separate. However, if an agreement is reached, there is no requirement that it should be confirmed or registered by the court or any other authority. This means that such an agreement will not be enforceable and will therefore be excluded from the Convention's scope of application. Even where there is general consent between the parents, in order to rely on the enforceability of their agreement, they have to address the court as if there is a dispute between them.

This is another example of the law not respecting personal autonomy, but also not respecting factual relationships. Family Law values the institution of marriage above everything else, which is reflected in the regulation of divorce. The relations between the spouses within the marriage, however, even when domestic violence is at issue, remain outside the ambit of legal intervention. Any intervention is mainly directed towards preserving the marriage, not to protect the individual rights of spouses and children. This can be no doubt be attributed to tradition and national culture and it

³³ Article 70(2): The grandfather and grandmother are entitled to personal relations with their minor grandchildren. Where there are obstacles to maintaining personal relations, the regional court at the place of the grandchildren's residence, at the request of the grandfather or the grandmother, will determine measures for personal relations with the grandchildren, except where this is not in the interest of the children.

³⁴ Article 33/2 of the Child Protection Act.

³⁵ Articles 99/3 and 101 of the Family Code.

³⁶ Article 71/2.

can be raised as a point against the harmonisation of family law. Is this appropriate in the European context of today?

It becomes obvious that such a situation is not acceptable to Bulgarian when we refer to a sociological survey from 1999 that was carried out in connection with a Draft Family Code that was subject to Parliamentary discussion.³⁷ The respondents expressed positive views towards the simplification of the divorce procedure, which, at present, is not very attainable, particularly for people with low incomes. The determination of fault within the divorce procedure is thought to be the most undesirable aspect of the whole procedure. At the same time a significant proportion of the respondents believed that a divorce is still considered to be something of a stigma or a failure on the part of the spouses.

That is why the possible ratification of the Convention would call for an entire reconsideration of the principles and values underlying divorce and custody arrangements. It can be expected that the liberalisation of divorce will result in increasing the autonomy of spouses in post-divorce arrangements, including contact. Together with this, the legislature should regulate the protection of rights arising from factual rather than legal relationships. This would reflect the change in family patterns and values which Bulgarian society is now facing – low marriage rates, decreasing birth rates and increasing cohabitation outside marriage.³⁸

Regrettably, these social changes have not yet become the subject of public debate. Mainly left-wing sociologists and politicians have occasionally addressed the lack of family policies in the light of negative demographic tendencies. It is not clear, however, where some issues of family life like fault-based divorce, family dispute resolution, etc. actually stand on their agenda. As far as factual relationships are concerned, these social commentators tend to consider them in relation to persons with a lower education profile and low incomes which tend to make marriage a somewhat unattractive proposition. The main values in their policies concern the promotion of families with children based on increased financial benefits for families with children.³⁹

6. WHO DETERMINES THIS CONTACT?

According to the definition of the Convention: “*contact order is a decision of a judicial authority ... including an agreement ... which has been confirmed by a competent judicial*

³⁷ Public opinion on the Draft Family Code, November 1999: <http://www1.parliament.bg/nciom>.

³⁸ See note 35.

³⁹ See the quoted Survey of ASSA M and Sega of 3 May 2004.

*authority or which has been formally drawn up or registered as an authentic instrument and is enforceable.*⁴⁰ The concept of a contact order raises questions in two directions. First, what is the source of such contact arrangements, public or private, the court or the parents, and, second, how will the enforcement of contact orders be guaranteed? The court is the first possible source of a contact order which is enforceable.

The Convention establishes as a major principle the need for “*state parties to encourage, by means they consider appropriate, parents and other persons having family ties with the child to reach amicable agreements concerning contact*”.⁴¹ This suggests, as an obvious approach, the withdrawal of the state within reasonable parameters, from the private sphere. Such an agreement will be justified: when it is in the interest of all the affected parties to determine the terms of the contact for themselves, when it provides a better opportunity to determine the necessary details, especially concerning a future change of circumstances, and when it is good practice to do so – in many cases contact with a child results from private agreements rather than a judicial decision.⁴²

However, for the Convention to be applicable to such agreements, they will have to acquire the same legal force, as a judicial decision with regard to their enforceability. The agreement may become enforceable in two ways: when it is approved by the court or when it has the quality of a so-called authentic instrument. As the Convention states, “*such a document is not based on a decision of a judicial authority but has been established or registered under the control of a public authority.*”⁴³ The officialisation of the private agreement is a guarantee of its enforceability, especially with regard to cross-border contacts.

7. PROFESSIONAL SUPPORT FOR AGREEMENTS/ DISPUTE RESOLUTION

The wide possibility which the Convention leaves for reaching an agreement on contact raises the question of how the parents or other persons could be assisted in attaining such an agreement and who will provide that assistance. Here we are referring not only to the law, but also to family and social policies. Where the political attention and the economic resources devoted to these issues are insufficient, politicians usually refer to culture and traditions.

⁴⁰ Article 2/b and ER, §§ 26-28.

⁴¹ Articles 7/b, 8; ER § 63.

⁴² ER, §§ 27, 63.

⁴³ ER, § 2.

The Convention states on this issue that both parents should be informed of the importance (for their child and for both of them) of establishing and maintaining regular contact with their child.⁴⁴ This is an obligation not only of the legal authorities, but also of other professions – mediators and social workers.⁴⁵ The Convention also suggests that it is important to promote agreements between the parties by means of encouraging the use of family mediation according to the provisions of Recommendation (98) 1 by the Committee of Ministers. Family mediation and other similar methods such as conciliation, counselling, and family counselling have a similar objective.⁴⁶ It is to exclude or reduce legal procedures by assisting the parents in reaching an agreement between themselves.

It is still difficult to fulfil these recommendations in Bulgaria. Mediation in family disputes is at an embryonic stage. The divorce court is burdened with having to assume the role of a “conciliator” between the spouses, a role which, at the initial stage of the proceedings, it is not equipped to fulfil. As laid down in Article 259, §1 of the Civil Procedure Code: “*Proceedings in applications for divorce begin with a conciliatory session, in which the spouses are obliged to appear in person.*” The conciliatory measures comprise of summoning the parties before the court, when the court will explain to them the consequences of the divorce and will invite them to agree to continue their marriage: “*The conciliatory hearing is held in closed session. The court shall hear the views of the parties, require explanations for the reasons on the basis of which the action for divorce is founded, and explain to them the unfavourable consequences of divorce in general and concerning the children and it will invite them to reconcile their difference.*”⁴⁷ Therefore, if they are willing to reach an agreement the disputing parents may only rely on private, but not public resources – namely their lawyers or family members or friends.

The first Law on Mediation was passed by Parliament in December 2004 after continued opposition and lengthy debates. The minutes of the debates suggest a lack of understanding with respect to the substance and the objectives of mediation. The majority of MPs generally reject the need for its introduction, referring to the lack of social practice and no general need for mediation due to the legal procedures which should be sufficient for disputing parties. The main argument is that this law is not obligatory according to EU law, so it does not have to be adopted. Here is a good illustration with regard to the intensity of the parliamentary debate on the Draft Act: “... *this law is dangerous, I would say, because under this Act the so-called mediation or*

⁴⁴ Article 7/a.

⁴⁵ ER, § 60.

⁴⁶ See § 61 of the Explanatory Report.

⁴⁷ Article 259, §2 of the Civil Procedure Code.

*whatever creates the danger the courts will de facto be burdened with the judiciary function of the state... My excuses for the castigating words, but, for me, this piece of legislation shames the law!*⁴⁸

This situation reflects the previous attitude towards both the legislation and the social services in the area of family relations in Bulgaria. What I mean is that if there is any regulation of public intervention in private relations, it only concerns the contracting and dissolution of the marriage. As far as relations between the couple are concerned, they are irrelevant to the law. As I have said before, the law values the couple as an institution, as a collective, rather than the individuals themselves. The quality of family relations and life are left to the spouses. This may be well illustrated not only by the lacking legislation on domestic violence, but also by the lack of support for dispute resolution. There is still no professional discussion also with regard to the interests of children and the need to intervene in private disputes by offering support for reconciliation. Also, there are no specialists who are prepared to look at the problem and to regulate the necessary services, such as family counselling, mediation, etc. Matrimonial proceedings are reserved for the legal professions, which are not prepared to implement modern methods of reconciliation. This is probably, the reason for the lack of political interest in the issue.

The argument concerning the absence of social practice and the public's unfamiliarity with the institution of mediation is interesting, but can quite easily be imagined. The legal history of Bulgaria to a large extent deprives any meaning to the question of which comes first: law or social relations. This is particularly evident in the current negotiations on Bulgaria's accession to the EU. There is no law in the area of the family, but there are numerous examples of social engineering via the law in this domain in the country. For instance, it was the Child Protection Act of 2000 which "introduced" numerous 'social relations and even professions' such as social work concerning children and families, foster care, specialised authorities, public intervention to place a child in care etc. The implementation of the Law seems to have been quite successful; it has been very much welcomed by the public and the professionals concerned.⁴⁹ As far as mediation is concerned, however, the very fact that there is public discontent with matrimonial law may be presumed to be reason for the introduction of a similar service.

⁴⁸ Minutes of the discussions on the Draft Act on Mediation (No. 402-01-9 of 16.02.2004), L. KORNEZOV.

⁴⁹ Reports on these issues can be found at www.sacp.government.bg or www.mlsp.government.bg

8. WHO HAS THE RIGHT TO CONTACT?

Notwithstanding the fact that the definition of contact is neutral with regard to the subjects of contact, the principles incorporated in Articles 4 and 5 of the Convention do identify them clearly. First and foremost, they are the child and its parents. As Article 4 states: “*A child and his or her parents shall have the right to obtain and maintain regular contact with each other.*” By ‘parents’, the Convention means those persons who have parental responsibility for the child or those who are “*legally recognised as parents.*”⁵⁰ Unlike the case law of the ECHR, this Convention does not adopt as a general principle that the factual family relationships justify the right to contact. Which persons will be recognised as parents, is an issue which is left to the discretion of the national legislator.

The Convention adopts as a principle the fact that, although it is a subjective right, the contact may be limited. However, the only criterion for its restriction has to be the interests of the child. The member states have a margin of appreciation in determining those cases where the restriction or exclusion of contact is necessary in the best interests of the child.⁵¹ The Explanatory report (§39) provides two examples. First, certain actions by the parent or his/her behaviour may provide grounds for restricting his/her right to contact with the child as they are against the child’s best interests. Contact should not be arranged, for instance, in cases of parental abuse or in cases of domestic violence.⁵² A lack of interest on the part of the parent in question could also justify contact being denied. Therefore, it can be said that the Convention adopts the view that biological kinship does not directly and automatically create a right to contact. If personal relations have never been established, the law may not create such relations.⁵³ Or, worded differently, the influence of the law in family and personal relations is rather limited. The law may point to other regulations, but it cannot replace and substitute them. The reverse example is somewhat different: the law may defend a factual, but not a legal relationship, when it is clear that such a relationship exists and has to be supported in the interests of those persons concerned. Second, the fact that the child consistently rejects any form of contact may also justify its restriction.

Bulgarian family law does not lay down specific grounds for denying or restricting contact with a parent. It is left to the court’s discretion to assess the interests of the

⁵⁰ ER, §§ 34 and 39.

⁵¹ Article 4/2.

⁵² See also ER §§ 41 and 44.

⁵³ For more on this issue see J. EEKELAAR, “Contact and Adoption Reform,” and J. HERRING, “Connecting Contact: Contact in the Private Law Context”, and A. BAINHAM, “Contact as Right and Obligation”, all in: A. BAINHAM *et al.* (eds) *Children and Their Families. Contact, Rights and Welfare*, Hart, 2003.

child in each individual case. The interests of the child are not only crucial in arranging the contact, but also in justifying its rejection: “... *the interests of the child have priority over those of his/her parents*”, and where these interests so require, contact will generally not be arranged.⁵⁴ For example, contact was excluded in a case where the father was in prison and suffered from a nervous disorder; contact was also excluded in a case where the father had abandoned the pregnant mother and had not seen the child for 10 years. Furthermore, contact is excluded where the behaviour of the parent jeopardises the child’s personal integrity, upbringing or health. During the 1950s and 1960s the courts ruled both in favour of contact with both parents as they were deemed “*necessary for strengthening the relations between themselves, and the nourishment of the love and respect required*”,⁵⁵ and for the need not to arrange contact between the child and its parent where the personality and the conduct of the parent could harm the child.⁵⁶

The Bulgarian courts have recently been authorised to intervene in family relations with regard to the placement of a child in care. The Child Protection Act stipulates: “*The placement of a child with a family of relatives or friends, as well as with a foster family or a specialised institution shall be done by the court. Until the court delivers such a ruling, the social assistance directorate where the child resides shall provide for temporary placement by means of an administrative order.*”⁵⁷ To date, practice has shown that the courts are very reluctant to deny parental rights when children are placed in care.

8.1. FORMS OF CONTACT

The need to restrict contact in some cases in order to protect the best interests of the child leads to the recognition that contact can take various forms, and it does not necessarily have to be in person. The various forms of contact also reflect the variety of family situations where contact has to be regulated.⁵⁸ The Convention admits that the most frequent and suitable form of contact is direct contact, which means personal ‘face to face’ contact.

Bulgarian law does not specify the various forms of contact, but case law has recognised a wide range of forms, for example personal, through letters and postcards, and by phone. After the adoption of the Child Protection Act, contact under the supervision of a social worker was made possible although the law did not actually say anything

⁵⁴ L. NENOVA, *Family Law of the Republic of Bulgaria*, Sofia, 1994, p. 641.

⁵⁵ See Decisions 2021 of the Supreme Court of 1960 and Decision 3314 of 1959.

⁵⁶ See Decision 189 of the Supreme Court of 1959: case 758-1973 Second Civil Division.

⁵⁷ Article 26/1.

⁵⁸ Article 2 of the Contact Convention.

about this issue. This form of contact, however, requires a specialist service resource, as the Convention states – “... *trained people, appropriate premises*.”⁵⁹ In Bulgaria, this aspect is still largely undeveloped.

8.2. CONTACT WITH ‘OTHER’ PERSONS

Unlike contact with the parents, the Convention clarifies that factual relations with persons who have family ties with the child may justify contact. The key concept here is ‘family ties’ – “*a contact may be established between the child and persons other than his or her parents having family ties with the child*.”⁶⁰ The term ‘family ties’ is recognised by the Convention as ties, which are based not only on a relationship recognised by law (grandparents or siblings), but also on a *de facto* family relationship.⁶¹ In contrast to parents, however, contact between the child and these persons is not a subjective right, but only a legal option which is conditional. Contact may only be arranged if this is in the best interests of the child: “*A child and persons other than parents, having family ties with the child, do not have a right to obtain and maintain contact but may only have a right to request contact subject to the best interest of the child*.”⁶² The contribution of the ECHR case law is obvious for the development of this concept. Irrespective of the fact that the state parties to the Convention have been left with the discretion to determine who these persons are, these states are bound by the case law under the ECHR, which actually narrows the scope of this discretion.

The concept of a factual tie, which provides the legal ground for contact with the child, is completely unknown under Bulgarian law. As stated above, legal consequences have only been attached to legally established relations, not to factual ones. The Bulgarian Family Code of 1985 only recognises a right to personal contact between the child and its grandparents: “*The grandparents are entitled to personal relations with their minor underage grandchildren. Where there are obstacles to maintaining personal relations, the regional court at the grandchildren’s place of residence, at the request of the grandparents, will decide on measures concerning personal relations between them, except where this is not in the interest of the grandchildren in question*.”⁶³ Interestingly, this provision has a much more modern implication than the regulation of contact between parents and children. Not only does the law not hesitate in recognising the right of contact as a subjective right belonging to grandparents, but provides for that right in general,

⁵⁹ ER § 44.

⁶⁰ Article 5/1 of the Contact Convention.

⁶¹ Article 2/d of the Contact Convention.

⁶² Explanatory Report, § 49, page 27.

⁶³ Article 70/2 of the Family Code.

without making it conditional upon a particular situation, such as, for instance, divorce.⁶⁴

In fact, the maintenance of close ties between grandparents and grandchildren is a tradition and a social norm in Bulgarian society and this is reflected in the law. The members of the wider family still retain their role in supporting parents in the upbringing of children, which is often facilitated by the fact that they share the same household or live nearby. The recognition of this rule in judicial practice dates back to the 1950s. At that time the Supreme Court stated that “...*the ascendants of the child, whose mother had passed away, have a right to personal relations with the child... and the recognition of that right does not restrict the parental rights of the father...; the person responsible for the deterioration in the relations between the child’s relatives has no relevance to the right to maintain personal relations with this child.*”⁶⁵ However, any ruling concerning contact with the grandparents is a matter of assessing the interests of the child. For instance, contact will be refused if this creates tension with the parents.⁶⁶

The right to contact between siblings is not subject to any special regulation. The only explicit regulation concerns the placement of a child with a foster family. In that context, Article 19 of the Ordinance on Foster Families requires brothers and sisters to be jointly placed with a foster family. Despite the lack of any legal regulation, judicial practice has adopted the joint placement of sibling children with the custodial parent as a basic principle in post-divorce arrangements. The separation of sibling children can only be ordered as an exception. The Supreme Court also accepts that when the exercise of parental rights is required after a divorce, the contact arrangements shall be determined between the two parents in such a way that siblings will have contact between themselves.⁶⁷

9. ENFORCEMENT OF CONTACT ORDERS

The last issue which I will look at is the execution of the court’s decision on contact. The Convention obliges the member states: “... *to take all appropriate measures to ensure that contact orders are carried into effect.*”⁶⁸ Stating that states parties are free to choose the implementation measures necessary in order to give effect to contact orders, the Convention stipulates that the “*non-enforcement of judicial decisions concerning parental*

⁶⁴ See also L. NENOVA, *Family Law*, Sofi-R 1995, p. 455.

⁶⁵ Supreme Court Decision 1029/1956 of the Second Civil Division and Decision 47 of 1957.

⁶⁶ L. NENOVA, *Divorce and Children*, Sofi-R 1995, p. 83.

⁶⁷ Supreme Court, decision 1601-1972, Second Civil Division, 535-1979, Second Civil Division

⁶⁸ Article 9 of the Contact Convention.

*rights and responsibilities, including contact, may constitute a violation of the right to respect for family life as provided by Article 8 of the ECHR.”*⁶⁹

Two of the guarantees for the enforcement of contact have an obligatory character – these are supervised contact⁷⁰ and the recognition of custody/contact orders in advance⁷¹ when a cross-border contact order has to be enforced. In addition, states are free to choose various guarantees, even outside those stated in the Convention.⁷² However, these guarantees have to be of two types, as Article 10/1 stipulates: guarantees with regard to the effecting of contact itself, and guarantees referring to the fulfilment of the decisions on parental rights – custody. They are designed to ensure “that the child is returned at the end of a period of contact or to prevent improper removal”.⁷³ The guarantees can be envisioned when the contact decision is delivered, as well as at any other time, including when the contact decision is amended.

The guarantees for effecting the contact decision can be as follows:

- Supervised contact,
- The obligation of a person – either the person with whom the child is usually living or the person seeking contact⁷⁴ – to provide for the child’s travel and accommodation expenses and, as may be appropriate, the expenses of any other person accompanying the child,
- A sum of money in the form of a security to be deposited by the person with whom the child is usually living to ensure that the person seeking contact is not prevented from having such contact,
- A fine to be imposed against the person with whom the child is usually living if this person refuses to comply with the contact order.

The Convention offers an even longer list of guarantees which are relevant to the execution of the decision on custody. For the large part, they refer to cross-border contact, but some are also applicable to domestic contact:

- The surrender of a passport or identification documents,
- Financial guarantees,
- Charges against property,
- Undertakings or stipulations to the court,

⁶⁹ Explanatory Report, § 68, page 32.

⁷⁰ Article 4/3.

⁷¹ Article 14//1/b.

⁷² Article 10/2/a.

⁷³ Explanatory Report, §75.

⁷⁴ See Explanatory Report, § 77, page 34.

- The obligation of the person having contact to present himself or herself and the child regularly before a competent body, such as a juvenile welfare authority or a police station, in the place where the contact is to be exercised.

Of the example guarantees provided, it can be seen that, in order to improve the effectiveness of contact orders, the narrow scope of family law is exceeded, whereby, for the regulation of family relations the use of a rich inventory of legal instruments is used from all branches of the law: civil, financial, administrative and criminal.

However, these ideas are somewhat strange to the Bulgarian legislator. The law neither provides for an enforcement mechanism nor for an enforcement authority to ensure the enforcement of the contact order/agreement.⁷⁵ Additional administrative restrictions have recently been imposed on the right to free movement in order to guarantee contact. This is probably the reason why the enforcement of contact orders has become a minefield of serious conflict between parents. This is illustrated by the bulky archive of legal proceedings concerning the enforcement of contact orders, the leading decision dating back to 1962, and also by the fact that the first case brought against Bulgaria under the ECHR is for the non-fulfilment of a contact order.⁷⁶ Only one of the example contact guarantees provided for in the Convention is possible under Bulgarian law: fining the parent who refuses to cooperate with a contact order. In fact, the only effective guarantee is the threat that, in the case of the non-performance of the decision by the parent with whom the child resides, the other parent is entitled to request a revision of the custody order.⁷⁷

Where there is no voluntary implementation of the contact order the enforcement of the order or of the agreement is possible through a Judge-Executive, who will organise the “factual transfer of the child”.⁷⁸ The participation of that particular judge, however, is not always effective due to the sensitive nature of the issue. That is why the Supreme Court has underlined the fact that a child is not a commodity simply to be transferred from a one place to another, so convincing the parent to observe the order is much more important and efficient. If this does not work the Judge-Executive can request assistance from the Guardianship authority, the police or the Child Protection Department,⁷⁹ but only when other means have proved to be ineffective or “the interests of the child require immediate enforcement”. The Supreme Court

⁷⁵ L. NENOVA, *Family Law*, Sofi-R 1995, p. 652.

⁷⁶ See V. TODOROVA, “The Decision on Communication No. 27496/95 before the Commission on Human Rights in Strasbourg – MM v. Bulgaria and the questions raised for the Bulgarian family law”, *Human Rights*, Vol. 1/1999, Appendix – pp. 28-29.

⁷⁷ Article 106, § 5 of the Family Code.

⁷⁸ See Supreme Court Procedural Rules – 4/1962, op. cit. p. 328-9.

⁷⁹ After the coming into effect of the Child Protection Act, Article 21.

has stated that consideration has to be given to “the specific circumstances, the age, the affiliation and the condition of the child, as well as any psychological stress.”

The Civil Procedure Code provides for the possibility to fine a parent who impedes enforcement (articles 421 and 422). That parent is also criminally liable⁸⁰ and risks either a restriction or deprivation of parental rights or an amendment to the custody and contact arrangements in favour of the other parent. Obstructing the enforcement of a court order is considered as a change of circumstances that justifies an amendment to the custody and contact arrangements.

Enforcement may be refused in exceptional circumstances – “*for reasons such as an unreasonable delay in enforcing the contact order, the inability to perform due to a change of circumstances or when this is in the best interests of the child.*”⁸¹ In such cases the order may be revised. Revising the measure is recommendable especially when the child refuses to cooperate in the enforcement of the decision. Thus, for instance, a definite refusal to fulfil the contact order of an “*older child who has not reached the age of majority constitutes a ground for its revision.*”⁸²

For the purpose of preventing conflicts between parents, the courts have always emphasised that additional obligations arise for the custodial parent: to observe correct contact with the other parent, not to manipulate the attitude of children towards that other parent and not to damage his/her reputation.⁸³ Another issue which was given special attention by the Supreme Court was the terms and conditions under which contact would be maintained. The Courts have been instructed to provide a sufficiently detailed description of the terms/conditions so as to avoid conflicts and disputes between the parents.

Where there is a failure to enforce the contact order for reasons such as undue delay, an inability to perform due to a change of circumstances or when this is in the best interests of the child, the order may be revised. In all cases, however, the claim can only be successfully enforced if the change of circumstances definitely affects the interests of the child, i.e. a change of circumstances does not automatically necessitate a change to the predetermined measures, but requires a balanced assessment from the perspect-

⁸⁰ Article 270 of the Penal Code.

⁸¹ See Supreme Court Procedural Rules 4/6 1962, op. cit. p. 328-9.

⁸² Supreme Court Decision -473-1980-Second Civil Division.

⁸³ Supreme Court Procedural Rules 1/1974. Current judicial practice also emphasizes the obligation of the custodial parent to ensure contact with the other parent (case 2416-1981- Second Civil Division), including positively motivating over the child (cases 313-1982-Second Civil Division, 1713-1982-Second Civil Division).

ive of the situation of the child.⁸⁴ There are two extensive arguments for revising such measures which are related to the behaviour of the child itself: a change is envisaged when the child does not cooperate for the purpose of enforcing the decision. This also applies when the custodial parent expressly impedes the contact between the child and the other parent or instils the child with a hostile attitude. As far as the first hypothesis is concerned, any possible change is aimed at limiting contact, both in terms of regularity and duration, or, indeed, the contact may even be terminated altogether. In the second hypothesis, an amendment to the measures can be made, i.e. changing the custodial parent. Thus, for instance, a definite refusal to cooperate with the contact order on the part of an “older child not having reached the age of majority” constitutes a ground for revision.⁸⁵ However, where there is proof that such an attitude has been instilled by the other parent, through manipulating the child, it will not constitute a ground for the revision of the measures.⁸⁶ The courts have established that the manipulation of the child by one parent against the other constitutes a ground for the revision of the measures in favour of the other parent.⁸⁷ The conduct of the parent cooperating with the contact order is also important: if he/she does not arouse fear in the child, no grounds exist for revising the measures.⁸⁸

Cross-border contacts between parents and children have only become relevant for Bulgaria in recent years. The enforcement of the traditional family law legislation in the new situation of the free movement of persons, following the ratification of three major conventions in 2003, seems to be generating certain problems for the Bulgarian authorities.⁸⁹

These cross-border contacts and a few headline-making child abduction cases have brought to light the problems surrounding contact arrangements between parents and children. As a first response, the Act on Bulgarian Identification Documents introduced a prohibition on a child leaving the country without the consent of both parents. Usually, the parent with contact rights will object to the child leaving the country because of a violation of his/her right to contact the child. In such a case the police

⁸⁴ See cases: 1571-71, 721-1974, 80-1978, 2929-1982, 1287-1983, 809-1983 of the Second Civil Division of the Supreme Court, etc. op. cit., p. 342-3.

⁸⁵ Case -473-1980-Second Civil Division.

⁸⁶ Case-2774-1980-Second Civil Division.

⁸⁷ Case 2130-71-Second Civil Division, Supreme Court Procedural Rules 1-1974, case 2464-71-Second Civil Division, case 1248-1982-Second Civil Division, case 261-1984-Second Civil Division.

⁸⁸ Case-1212-1980-Second Civil Division.

⁸⁹ In 2003 Bulgaria ratified the Hague Convention on the Civil Aspects of International Child Abduction (1980), the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (1996) and the European Convention on Recognition and Enforcement of Decisions, concerning Custody of Children and on Restoration of Custody of Children (1980).

will act to stop the child leaving the country, thus also imposing restrictions on the free movement of the custodial parent. A series of cases have been instigated in the Supreme Administrative Court against such actions by the police.⁹⁰ It transpired that the new possibility to restrict passports challenged the established interpretation of the concept of „custody” which includes the right of the parent to determine the child’s residence. A decision by the Supreme Court of Cassation⁹¹ stated that when the custodial parent wants to move abroad together with the child, the previous custody decision should not be reconsidered, but rather guarantees should be provided for arranging cross-border contact with the other parent. However, the court did not lay down any particular guarantees, such as those contained in the Convention, and there is no other decision on this aspect that I know of. I would assume that the first issue to be resolved in such cases would be the financial capacity of the parents to provide for the child’s foreign travelling expenses so that contact is maintained.

Until now, the case law has adopted a different stance. The parent’s “veto” concerning the child’s departure from the country is interpreted as a dispute between the parents with regard to exercising parental rights, which can be resolved by the court. This is based on Article 72 of the Family Code: *“Parental rights and obligations are exercised by both parents jointly and separately. Where there is disagreement between them, the dispute will be resolved by the regional court after hearing the parents, and, where necessary, also the child. The decision may be appealed according to the general rules.”* The court decision will usually allow the child to move with the custodial parent, thus rejecting the other parent’s objection. However, this again raises the problem of guaranteeing the right to contact between the child and the parent remaining in Bulgaria. The legislation and the case law should provide answers in this respect in harmony with the Council of Europe Convention.

10. CONCLUSION

The Council of Europe Convention on Contact Concerning Children with its innovative concepts and principles not only aims to promote a certain level of harmony between national substantive laws, but also requires a particular degree of modernity as a prerequisite for this harmonization. In the case of Bulgaria, the possible ratification of the Convention would require profound changes to the existing family law and beyond. It will need a clear articulation of the subjective rights of the child within the family and an entire reconsideration of the principles and values underlying divorce and custody arrangements, including support for disputing parents. The law

⁹⁰ Decisions: 17488/1999, 9794/2001, 4903/2001, 2739/2002, 9575/2002, 6474/2002.

⁹¹ Decision 460 – 18.06.1999/ case 344/99 – Second Civil Division of the Supreme Court of Cassation.

should also conceptualise and regulate factual relationships, thus reflecting the changes in family patterns and values that Bulgarian society now faces – low marriage rates, decreasing birth rates and increasing non-marital cohabitation. One can expect that the process of harmonising European Family Law – regardless of how desirable this may be – will be the driving force for the Bulgarian legislator to respond to the changes in modern lifestyles and values.

MOBILITY AND THE POST-DIVORCE FAMILY: RESOLUTION OF RELOCATION DISPUTES IN THE U.S.

THERESA GLENNON

1. INTRODUCTION

Justice Long of the New Jersey Supreme Court captured the dilemma facing courts when custodial parents wish to move away from their children's other, non-custodial, parents:

"Ideally, after a divorce, parents cooperate and remain in close proximity to each other to provide access and succor to their children. But that ideal is not always the reality. In our global economy, relocation for employment purposes is common. On a personal level, people remarry and move away. Noncustodial parents may relocate to pursue other interests regardless of the strength of the bond they have developed with their children. Custodial parents may do so only with the consent of the former spouse. Otherwise, a court application is required.

... If the removal is denied, the custodial parent may be embittered by the assault on his or her autonomy. If it is granted, the noncustodial parent may live with the abiding belief that his or her connection to the child has been lost forever."¹

Relocation disputes have been called "the most contentious and fastest growing custody litigation" in the U.S.² When custodial parents want to move away, courts face a stark choice between the desire of non-custodial parents to live near their children and the liberty of custodial parents. These disputes pit culturally embedded values regarding the ideal "family life" against the cultural norm of individualism, expressed as freedom of mobility and the "right" of custodial parents to make important decisions about their lives. The discord inevitable in relocation disputes has resulted in a body of law across the states that is complex, varied, and subject to change. The

¹ Baures v. Lewis, 770 A.2d 214, 217 (2001).

² Leslie Eaton, "More parents going to court when ex-spouse wants to move kids," *New York Times News Service*, August 8, 2004.

disparate legal standards adopted by U.S. states and their varied application to specific factual situations reflect these different beliefs regarding which values best serve the children whose lives are most deeply affected by their decisions.

The United States is an extremely mobile society. Each year, more than five percent of the population moves outside their home county, usually moving 160 kilometers or more.³ When custodial parents wish to join this annual migration, they often encounter resistance from non-custodial parents. Despite the longstanding concern over the issue of relocation, the legal standards used remain, as Judge Beck noted in 1990, “distressingly disparate.”⁴

Family law is largely governed by state, not federal, law, so any examination of custody relocation disputes requires surveying the various state approaches. These approaches to custody relocation disputes may be described as falling into three categories: 1) states that place the burden on the moving parent to demonstrate that the move either provides a “real advantage” or serves the “best interests” of the involved children; 2) states that place the burden on the nonmoving parent to demonstrate either that the move is not in children’s best interests or is detrimental to them; and 3) states that apply a “best interests of the child” standard without placing the burden on either parent.⁵ Within these broad categories, however, there are two types of doctrine being applied by courts. Many states have developed legal doctrine that is specific to relocation disputes, while others use the legal doctrine regarding modification of custody.⁶ All of the legal standards, however, provide judges with broad discretion. The conflicting legal standards and broad judicial discretion have led to inconsistent and unpredictable outcomes for families. While all courts claim to focus on the best interests of the child, judicial decision making is informed by differing beliefs about which values best serve children’s needs. These conflicting views are visible as well in

³ U.S. CENSUS BUREAU, *Geographical Mobility: 2002 to 2003, Current Population Reports*, Table A (March 2004). Divorced and separated persons moved outside their home county at a slightly higher rate, 6.6 percent. *Id.* at Table B.

⁴ Gruber v. Gruber, 583 A.2d 434, 437 (Pa. Super. 1990).

⁵ See, e.g., Roberts v. Roberts, 64 P.3d 327 (Id. 2003) (burden of proof on relocating parent to show move in best interests of child); Hollandsworth v. Arkansas, 109 S.W. 653 (Ark. 2003) (presumption favoring relocating custodial parent); Bodne v. Bodne, 588 S.E.2d 728 (Ga. 2003) (adopting neutral best interests test). Others have also described the various approaches as falling along a continuum, with those states that place a heavy burden of proof on the noncustodial parent falling on one end of the continuum, and those states that place a heavy burden of proof falling on the other end. AMERICAN LAW INSTITUTE, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, §2.17 cmt.d at 375-76 [hereinafter *ALI Principles*]; JANET M. BOWERMASTER, “Sympathizing with Solomon: Choosing Between Parents in a Mobile Society,” 31 *U. Louisville J. Fam. L.* 791, 799 (1992).

⁶ Compare Baures v. Lewis, 770 A.2d 214 (N.J. 2001) (use of special relocation doctrine) to In re Marriage of Thielges, 623 N.W.2d 232 (Iowa App. 2004) (use of modification of custody doctrine).

the social science literature on the developmental and relationship needs of children involved in relocation disputes.

Societal shifts in custodial arrangements present further challenges. Until the 1980's, few parents shared custody, and even now, there are no reliable statistics on the percentage of divorced and separated couples that share legal and/or physical custody.⁷ Where both parents participate relatively equally in their children's lives, it may be difficult to identify the primary custodial parent or determine the effect of living far away from one parent. In relocation disputes, courts are often asked to choose between two dedicated, involved parents.

2. U.S. CHILD CUSTODY LAW

Relocation battles generally occur after the initial custody determination.⁸ Custody is divided into two forms: legal custody and physical custody.⁹ Legal custody gives one or both parents the right to make all major decisions for the children, including decisions concerning school, medical treatment, and place of residence. Physical custody involves the right to reside with the child and have care and control over the child. Physical custody, too, can vest solely in one parent or be shared by both parents. A parent who does not receive either form of custody is usually still entitled to visit the child.

2.1. LEGAL PARENTAGE

Generally speaking, custody is only given to those recognized as "legal parents." Individuals with no recognized legal basis for custody cannot prevent relocation by a "legal" parent. Traditional grounds for legal parentage are marriage, adoption and biological parenthood, and legal parentage is rarely disputed by divorcing couples.¹⁰ Questions of legal parentage more often affect gay and lesbian couples. In some states, second parent adoptions provide legal recognition of parentage in both members of same-sex couples.¹¹

⁷ IRA MARK ELLMAN, ET AL., *Family Law: Cases, Text, Problems* 600, 604 (Newark, NJ, LexisNexis, 4th Ed. 2004).

⁸ They may, however, occur during initial custody determinations. *See, e.g.,* Moeller-Prokosch v. Prokosch, 99 P.3d 531 (Alaska 2004).

⁹ *Id.* at 600.

¹⁰ *ALI Principles*, *supra* note 5, §2.03 cmt. a, at 110.

¹¹ *See, e.g.,* In re Adoption of R.B.F., 803 A.2d 1195 (Pa. 2002).

The recent recognition of same-sex marriages in Massachusetts and civil unions in Vermont has created an alternative route for gay and lesbian couples to create legally recognized parent/child relationships.¹² However, these bases for parentage may not be recognized by other states. For example, a Virginia judge recently refused to recognize the legal parentage of a lesbian mother whose claim to parentage was based on a civil union in Vermont.¹³

Some gay and lesbian parents have been entitled to seek custody or visitation with children through the judicially-created status of *in loco parentis*, one who stands in the place of a parent. In Pennsylvania, when an individual develops a parent/child relationship with the consent of the legal parent, the individual is eligible for *in loco parentis* status and entitled to seek custody or visitation with the child.¹⁴ However, the parent granted *in loco parentis* status is unlikely to obtain primary custody of the child.

Lack of legal recognition for some parent-child relationships prevents many who have functioned as parents from even raising a challenge to the legally recognized parent's decision to relocate. These relocation disputes are largely invisible to the legal system.

2.2. LEGAL STANDARDS APPLICABLE TO CUSTODY DISPUTES

Child custody disputes between two legally recognized parents are governed by the "best interests of the child" standard.¹⁵ This standard permits a judicial decision-maker to consider all aspects of a child's family life. While the precise factors courts consider vary state by state, most courts consider the quality of the child's relationship with each parent, what arrangement will best promote continuity and stability in the child's life, the child's wishes, and the child's adjustment to home, school and community.¹⁶ This broad grant of judicial discretion has, however, come under extensive criticism. Critics believe it encourages the parties to litigate issues that would be better resolved between the parents and gives judges and other involved professionals the opportunity to base their decisions on their own values and beliefs about childrearing. It also places family relationships under a microscope at a time of great stress and transition.¹⁷

¹² Vt. St. t. 15, §1204; KATHY A. GRAHAM, "Same-Sex Unions and Conflicts of Law: When 'I Do' May be Interpreted as 'No, You Didn't,'" 3 *Whittier J. Child & Fam. Advoc.* 231 (2004).

¹³ JONATHAN FINER, "Custody case puts civil union on trial: states' differing laws complicate same-sex couple's fight over child," *Washington Post* at A03 (August 7, 2004).

¹⁴ T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001).

¹⁵ ELLMAN, ET AL., *supra* note 7, at 564.

¹⁶ See, e.g., 23 Pa. Cons. Stat. §5301 et seq.

¹⁷ *ALI Principles*, *supra* note 5, §2.02, rptr's notes cmt. a, at 100-104 (collecting articles on the best interests standard).

The “best interests” test has been modified in various ways in many states. One important modification relates to joint custody. In most states joint custody is an authorized option and public policy favors continuing contact with both parents.¹⁸ Joint custody does not mean, however, that a child’s time is evenly split between the two parents’ homes.¹⁹ In most states, courts will identify a primary physical residence for the child. Unfortunately, the United States does not maintain statistics on post-separation or post-divorce custodial arrangements. While one study found that one-half or more of divorced couples have joint *legal* custody of their children,²⁰ other studies indicate that many fewer have joint physical custody.²¹

Joint custody is not the only issue, however. State statutes deal with a number of other issues: they may require compelling reasons to separate siblings; favor the parent more likely to promote contact between the child and the other parent; or disfavor parents who have committed acts of domestic violence.²² In most states, sexual behavior is relevant only where it adversely affects the child, although gay and lesbian parents report continued disadvantages in custody decision-making.²³ Courts are also prohibited from discriminating on the basis of race or religion in their custody determinations, although broad judicial discretion may permit courts to consider these factors in more subtle ways.²⁴

More recently, many jurisdictions have devised ways to encourage parents to cooperate in developing custody and visitation plans.²⁵ Private decision-making is now the norm; it is estimated that only a tiny percentage of custody disputes are decided by courts.²⁶

¹⁸ *Id.*, §2.08, rptr’s notes cmt. a, at 211 (although some states, such as Oregon and Vermont, limit joint custody to situations in which both parents agree to this arrangement).

¹⁹ *Id.*, §2.08, rptr’s notes cmt. j, at 230-31.

²⁰ JUDITH A. SELTZER, “Father by Law: Effects of Joint Legal Custody on Nonresident Fathers’ Involvement with Children,” 35 *Demography* 135, 139-40 (1998) (based on data collected 1992-1994).

²¹ ELLMAN, ET AL., *supra* note 7, at 604 (1992 study of families in California most comprehensive study of joint custody to date and found approximately 20% of divorced couples had joint physical custody, and of those, almost half became de facto sole physical custody after three years); JOAN B. KELLY, “The Determination of Child Custody,” 4 *Future Child*, 121, 125 (1994) (estimating 12-24% of parents have de facto joint custody post-divorce).

²² See, e.g., 23 Pa. Cons. Stat. §5303; *Wiskoski v. Wiskoski*, 629 A.2d 996, 998 (Pa. Super. Ct. 1993).

²³ ELLMAN, ET AL., *supra* note 7, at 577-580.

²⁴ *Id.* at 583-84, 588-90.

²⁵ LUCY S. MCGOUGH, “Starting Over: The Heuristics of Family Relocation Decision Making,” 77 *St. John’s L. Rev.* 291 (2003).

²⁶ In one California study, only 2% of parents had the custodial arrangements determined by a court. ROBERT H. MNOOKIN & ELEANOR MACCOBY, “Facing the Dilemmas of Child Custody,” 10 *Va. J. Soc. Pol’y & L.* 54, 60 (2002).

Some states have developed parent education and mediation programs to assist parents in developing these “parenting plans.”²⁷

The American Law Institute, in its *Principles of the Law of Family Dissolution*, also emphasizes private decision making.²⁸ Parents are encouraged to develop a joint parenting plan, and courts should accept such parental agreements if the agreement was knowing and voluntary and not harmful to the child.²⁹ When the parents cannot agree, courts consider competing plans and must approximate “the proportion of time each parent spent performing caretaking functions for the child prior to the parents’ separation.”³⁰ The ALI standard is intended to rein in judicial discretion and is based on the assumption that “the division of past caretaking functions correlates well with other factors associated with the child’s best interests.”³¹ It turns the court away from expert testimony on the quality of the parent-child relationship, which tends to focus on the weaknesses of each parent, and towards more concrete facts about prior caretaking arrangements. This approach emphasizes private decision-making, either through agreed-upon parenting plans, or by focusing on the allocation of caretaking the parents chose prior to the dissolution. To date, this approach has been adopted only in the state of West Virginia.³²

Within the U.S., there are a wide array of custodial situations and legal terminology used to describe those situations. This chapter uses the term “custodial parent” to refer to a parent who either has sole custody or a clear majority of residential time with a child. “Non-custodial parent” refers to a parent who either has visitation rights or a clear minority of residential time. Where the sharing of time is relatively equal, the parents are described as having “joint” or “shared” custody.

3. POST-DIVORCE RELOCATION DISPUTES

Given the tremendous mobility of U.S. society, many post-dissolution families experience relocation, and relocations appear to be equally divided between custodial

²⁷ JOAN B. KELLY, “Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice,” 10 *Va. J. Soc. Pol’y & L.* 129 (2002).

²⁸ *ALI Principles*, *supra* note 5, at §2.05.

²⁹ *Id.* at §2.06.

³⁰ *Id.* at §2.08(1). This standard is modified by the requirement to consider, when necessary, ensuring that each parent has some continuing contact with the child, accommodating the child’s preferences, keeping siblings together, protecting children from harm, taking into account prior agreements, and avoiding arrangements that are impractical due to factors such as distance or the parents’ ability to cooperate. *Id.* at §2.08(1) (a) – (h).

³¹ *Id.* at §2.08, rpt’rs cmt. b, at 180.

³² W.Va. Code Ann. §48-11-206.

parents and non-custodial parents.³³ Few of these relocations come before state courts. No legal remedy is available to prevent non-custodial parents from moving away.³⁴ Families may also find other solutions to the relocation dilemma, such as moving both parents. Virtual visitation is the newest way to keep families connected over long distances.³⁵ Parents with little income may lack the resources to contest a relocation.

Thus, relocation disputes in the U.S. states' judicial systems concern a much smaller number of relocations, and all concern relocations by custodial parents. Since mothers are still usually the custodial parents, this typically means that a non-custodial father seeks to prevent relocation by a custodial mother.³⁶ The gendered nature of these disputes has not escaped notice. These disputes have become a central part of the gender wars. A number of fathers' rights groups have made increasing fathers' custodial access and ending relocation by custodial parents a major priority.³⁷ They have taken their case to the public media, and state legislatures and courthouses. They argue that courts permit mothers to steal children away from fathers through limited custodial access and relocation. Custodial mothers have found support from women's rights organizations that tackle a wide range of issues affecting women.³⁸

3.1. COMPETING VISIONS OF THE POST-DIVORCE FAMILY

Legislative and judicial decision making regarding relocation disputes highlight competing visions of the post-divorce family.

Under one vision, the ideal post-divorce family is simply "a larger, interconnected 'binuclear family.' This binuclear family consists of one household headed by the custodial parent and another household headed by the non-custodial parent, with the

³³ There are no large population studies available on the percentages of custodial and noncustodial parents who relocate. However, in a recent study of college students, the researchers found that approximately 25% of the students whose parents were divorced had relocated with their mothers, while another 25% had remained with their mothers while their fathers relocated, indicating that these moves are roughly equal. SANFORD BRAVER, ET AL., "Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations," 17 *J. Fam. Psychol.* 206, 212 (Table 1)(2003).

³⁴ BOWERMASTER, *supra* note 5, at 839-40. Noncustodial parents are not required to visit with their children either. *Id.*

³⁵ See, e.g., KIMBERLY R. SHEFTS, "Virtual Visitation: The Next Generation of Options for Parent-Child Communications," 36 *Fam. L.Q.* 303 (2002).

³⁶ BRAVER, ET AL., *supra* note 33, at 206 n. 1 (citing findings that 85% of custodial parents are mothers).

³⁷ See, e.g., Children's Rights Council, www.gocrc.com; Parents and Children for Equality, www.pacegroup.org; and Father's Rights Inc., www.fathersrightsinc.com.

³⁸ See, e.g., National Organization for Women, www.now.org, Women's Law Project; www.womenslaw-project.org.

child being part of both.”³⁹ This vision idealizes not only the child’s ready access to both parents, but other benefits that derive from remaining at “home.” These benefits may include grandparents, extended family and friends, and familiar schools, playgrounds, religious institutions, and community activities.⁴⁰ The post-divorce family is just like the pre-divorce family, except the parents now live in two different homes.

In this view, the custodial parent who wishes to relocate disturbs the favorable status quo. Distance and travel are difficult burdens, making relationships “impossible” to maintain.⁴¹ The ideal post-divorce family situation can be maintained only if the custodial parent remains in place.

This view gains support from social science literature that concludes close relationships and frequent contact with both parents is important for children.⁴² A recent and influential article, based on a study of college students, concluded that students whose divorced parents remained close to each other fared better on several important measures than students whose divorced parents lived at a distance, no matter who had relocated.⁴³ This article, which has already had an important effect on the public discourse and judicial views, has been criticized for methodological weaknesses and overstatement of its findings.⁴⁴

This article’s influence is reflected in a recent Colorado case.⁴⁵ The trial court brought the article into the courtroom and distributed it to the parties. The trial court denied the mother’s request to move and “stated that it had adopted ‘substantially the same rationale’ as that presented in the study which the court had provided to the parties. That study concluded that, when all other things are equal, a move generally harms the long-term relationship between the child and the parent left behind, and the harmed relationship, in turn, impairs the child.”⁴⁶ The trial court refused to let the custodial mother put on evidence from the expert witness, who was prepared to testify regarding limitations of the study, such as concerns about bias in its selection of subjects, a weak statistical basis for its conclusions, and its admission that its findings are

³⁹ Bodne v. Bodne, 588 S.E.2d 728, 730 (Ga. 2003)(Sears, J., concurring).

⁴⁰ See, e.g., Fohey v. Knickerbocker, 130 S.W.3d 730 (Mo. App. 2004).

⁴¹ See, e.g., Curole v. Curole, 828 So.2d 1094 (La. 2002).

⁴² RICHARD WARSHAK, “Social Science and Children’s Best Interests in Relocation Cases: Burgess Revisited,” 34 *Fam. L.Q.* 83 (2000).

⁴³ BRAVER, ET AL., *supra* note 33.

⁴⁴ “Judith Wallerstein Comments on Sanford Braver’s ‘Relocation of Children After Divorce and Children’s Best Interests: New Evidence and Legal Considerations,’” at <http://www.thelizlibrary.org/~liz/liz/braver-wallerstein.html>.

⁴⁵ Ciesluk v. Ciesluk, 100 P.3d 527, 531 (Colo. App. 2004)(describing trial court’s discussion in court of social science article).

⁴⁶ Ciesluk v. Ciesluk, 100 P.3d at 531.

correlational rather than causative.⁴⁷ The trial court's reliance on this one study was upheld on appeal.

In contrast is a "realist" vision of life in flux, adaptation to change as normal, and the value of individualism. Under this view, the family is irretrievably different than it was prior to the divorce, and this change must be acknowledged. As the New York Court of Appeals stated,

"Like Humpty Dumpty, a family, once broken by divorce, cannot be put back together in precisely the same way. The relationship between the parents and the children is necessarily different after a divorce and, accordingly, it may be unrealistic in some cases to try to preserve the noncustodial parent's accustomed close involvement in the children's everyday life at the expense of the custodial parent's efforts to start a new life or to form a new family unit."⁴⁸

In this view, a child's emotional stability depends not on geography, but on the depth of the child's relationship with each parent, and especially to the custodial parent.⁴⁹ The child's primary family is the custodial family.⁵⁰ Parenting from a distance through travel and technology to stay in touch is viewed optimistically.⁵¹ In addition, the custodial parents' interests and concerns are accorded much greater respect. Change is viewed as a normal part of the divorce process. Employment, education or relational opportunities for the relocating parent are valued, not denigrated.⁵²

Those that adopt this view of the post-divorce family often cite research conducted by Dr. Judith Wallerstein and some of her associates. Dr. Wallerstein is the main author of a well-publicized twenty-five year study of 131 middle-class families.⁵³ Dr. Wallerstein concludes that the psychological well-being of children is most affected by the well-being of the custodial family with which they reside.⁵⁴ In addition, she concludes that children's psychological health, although affected by the quality of their

⁴⁷ BRAVER, ET AL., *supra* note 33, Table 1, at 214 (no statistically significant differences between adult children whose divorced parents did not move and those who moved away with their custodial mothers with regard to personal/emotional adjustment, hostility, platonic and romantic relationship choices, substance abuse, worry about college expenses, and general life satisfaction).

⁴⁸ *Tropea v. Tropea*, 665 N.E.2d 145 (1996).

⁴⁹ *See, e.g., Baures v. Lewis*, 770 A.2d 214, 223 (2001).

⁵⁰ *See, e.g., Rosenthal v. Maney*, 745 N.E.2d 350 (Mass. App. 2001).

⁵¹ SARAH L. GOTTFRIED, "Virtual Visitation: The New Wave of Communication Between Children and Non-Custodial Parents in Relocation Cases," 9 *Cardozo Women's L.J.* 567 (2003).

⁵² *See, e.g., Watt v. Watt*, 971 P.2d 608 (1999).

⁵³ JUDITH S. WALLERSTEIN, ET AL., *The Unexpected Legacy of Divorce: A 25 Year Landmark Study* (New York, Hyperion, 2000).

⁵⁴ JUDITH S. WALLERSTEIN & TONY J. TANKE, "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce," 30 *Fam. L.Q.* 305, 311, 318 (1996).

relationship with non-custodial parents, is not strongly affected by the amount of time spent with the non-custodial parent.⁵⁵ Her work has also been subjected to criticism.⁵⁶

State legislatures and courts are torn between these two competing visions, and they often turn to this disputed social science literature to justify the position they select. Some family law scholars have warned that empirical studies regarding divorce and custody issues are too readily adopted and promoted by advocates, judges, and other commentators seeking to establish their vision, without careful scrutiny of the limitations most of these studies have.⁵⁷

While the fathers' rights advocacy groups contend that women are always allowed to move, the picture is much more complex. There is a marked "lack of uniformity and much fluidity" in state approaches to relocation.⁵⁸ Courts use varied legal standards to address these cases. Under most of these standards, they have wide discretion to permit or refuse the custodial parent to relocate with the children. These two visions of the post-divorce family are in active competition with each other, and this competition is apparent in all aspects of judicial involvement in relocation disputes.

3.2. SOURCES OF RELOCATION LAW

Relocation disputes are decided under state law, but *what* state law to apply is not a simple matter. Given the complex and fluctuating legal landscape in this area, however, relocation law is best viewed as an ongoing conversation among state legislatures and courts, various state courts, and different levels of courts within each jurisdiction.

While many state legislatures have not enacted relocation legislation, such legislation may be passed in response to judicial decisions. For example, California passed a statute that expressed legislative approval of the California Supreme Court decision *In re Burgess*, a case viewed by many as favoring the relocating parent.⁵⁹ Colorado and Florida, on the other hand, recently passed statutes eliminating judicially adopted standards that favored relocating parents.⁶⁰

⁵⁵ *Id.* at 311, 318.

⁵⁶ See, e.g., WARSHAK, *supra* note 42.

⁵⁷ See, e.g., MARGARET BRINIG, "Empirical Work in Family Law," 2002 *U. Ill. L. Rev.* 1083.

⁵⁸ *Dupre v. Dupre*, 857 A.2d 242, 249 (R.I. 2004).

⁵⁹ 913 P.2d 473 (Cal. 1996).

⁶⁰ *Ciesluk v. Ciesluk*, 100 P.3d at 528-29 (describing legislature's rejection of the judicially created presumption favoring relocating custodial parents); *Flint v. Fortson*, 744 So. 2d 1217, 1218 (Fla. App. 4 Dist. 1999) (describing legislature's elimination of judicial presumption favoring custodial parent's relocation).

State courts that must rule on relocation disputes in the absence of specific legislation often look to other states for guidance.⁶¹ The conversation that has developed among the state courts through this process highlights the competing visions, as courts decide whether to adopt a standard that favors the relocating parent or one that disfavors relocation.⁶²

These conversations also take place vertically, among the different court levels within a jurisdiction. Reversals may demonstrate the efforts of appellate courts to impose their vision of the post-divorce family on trial judges who cling to their own, often quite different, visions.⁶³ An extreme example of this conflict is one Alaska case that has reached the Alaskan Supreme Court three times and is once again on remand.⁶⁴ States' approaches to relocation may favor the relocating parent, currently the dominant approach, the nonmoving parent, or employ a neutral best interests of the child standard.⁶⁵ Cutting across these large categories, however, are two main bodies of legal doctrine. The sources of these bodies of doctrine may be common law or statutory.⁶⁶ One main body of legal doctrine is specific to relocation, while a smaller number of states have utilized their modification of custody doctrine.⁶⁷

3.3. SPECIFIC RELOCATION DOCTRINE

In those states that have adopted doctrine specific to relocation disputes, the central question addressed by the courts is whether to permit the custodial parent to relocate.⁶⁸ Some courts that use relocation doctrine will also consider whether to modify custody in some situations.⁶⁹

⁶¹ See, e.g., *Dupre v. Dupre*, 857 A.2d at 249-51.

⁶² See, e.g., *Latimer v. Farmer*, 602 S.E.2d 32 (S.C. 2004); *Ireland v. Ireland*, 717 A.2d 676 (1998).

⁶³ See, e.g., *Rosenthal v. Maney*, 745 N.E.2d 350 (Mass. App. 2001).

⁶⁴ *Moeller-Prokosch v. Prokosch*, 99 P.3d 531 (Alaska 2004).

⁶⁵ See citations *supra* at n. 5.

⁶⁶ See, e.g., *Latimer v. Farmer*, 602 S.E.2d 32 (S.C.) (judiciary determining relevant legal standard governing relocation disputes) and *Ciesluk v. Ciesluk*, 100 P.3d at 528-29 (relying on recently passed Colorado relocation statute).

⁶⁷ Compare *Brown v. Loveman*, 680 N.W.2d 432, 437 (Mich. App. 2004) (adopts specific relocation doctrine) and *Swonder v. Swonder*, 642 N.E.2d 1376 (Ind. App. 4 Dist. 1994) (adopts modification of custody approach).

⁶⁸ See, e.g., *Curole v. Curole*, 828 So.2d 1094 (La. 2002) (interpreting Louisiana's relocation statute); *Rosenthal v. Maney*, 745 N.E.2d at 354 (distinguishing relocation doctrine from modification of custody doctrine).

⁶⁹ See, e.g., *Johns v. Cioci*, 2004 Pa. Super. 492 (affirming trial court denial of petition to relocate; reversing and remanding granting of petition to modify custody).

The most common method of analysis involves three main questions: first, whether the proposed move improves the quality of life of the child or child and parent, which often involves comparing the status quo, with both parents in the same area, to the situation of the child if the custodial parent relocates; second, determining the parental motives for seeking or opposing the relocation; and third, deciding whether reasonable visitation is available in light of the move.⁷⁰ Some states include a wider range of “best interests” factors as well.⁷¹

Those states that have adopted legal doctrine specific to relocation disputes generally place the burden of proof on the custodial parent who wishes to relocate. The parent may be required to prove that their motivation for the move is legitimate and that the move provides “real advantage” for the child or that it is in the best interests of the child.⁷²

A second approach involves burden shifting. The initial burden is on the custodial parent who wishes to relocate; once that burden is met, the burden of proof shifts to the noncustodial parent opposing the relocation. The initial burden on the custodial parent has several different formulations. One version of burden shifting places the initial burden on the custodial parent to show that the move is requested in good faith and provides the child and parent with a real advantage.⁷³ Other jurisdictions place a lesser burden on custodial parents to show that the purpose of the move is reasonable and the chosen location meets that purpose.⁷⁴ Yet others require an initial showing that there is a good faith reason for the move and that the move is not inimical to the child’s best interests.⁷⁵ Once this initial burden is met, the burden shifts to the other parent to demonstrate that the move is inimical to the child’s best interests.⁷⁶

Some states take a neutral stance towards a relocation petition. For example, in Florida, the court must consider typical relocation factors – motives, whether both parents have participated in and cooperated in visitation, whether substitute visitation is practical, and whether the move is in the best interests of the child. The governing statute

⁷⁰ Baures v. Lewis, 770 A.2d 214 (N.J. 2001).

⁷¹ C.R.S. §14-10-129(1)(a)(II).

⁷² Williams v. Pitney, 567 N.E.2d 894 (Mass. 1991)(custodial parent must show move provides “real advantage”); In re Marriage of Collingbourne, 791 N.E.2d 532 (Ill. 2003)(custodial parent must show move in best interests of child); Fohey v. Knickerbocker, 130 S.W.2d 730 (Mo. App. 2004); Vogel v. Vogel, 637 N.W.2d 611, 621 (Neb. 2002)

⁷³ See, e.g., Flynn v. Flynn, 92 P.3d 1224, 1228 (Nev. 2004).

⁷⁴ See, e.g., Ireland v. Ireland, 717 A.2d 676, 682 (Conn. 1998); In re Pfeuffer, 837 A.2d 311, 314 (N.H. 2003).

⁷⁵ Baures v. Lewis, 770 A.2d 214, 229-31 (N.J. 2001)

⁷⁶ See, e.g., Flynn v. Flynn, 92 P.3d at 1228; Ireland v. Ireland, 717 A.2d at 682; In re Pfeuffer, 837 A.2d at 314.

specifically states that “[n]o presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact and access with the secondary residential parent.”⁷⁷

In contrast, a few states and the ALI Principles place a heavy burden on parents resisting relocation. The Minnesota courts require the noncustodial parent to demonstrate that the move endangers the child or is meant to frustrate the noncustodial parent’s relationship with the child.⁷⁸ Tennessee’s statute permits parents with a majority of the custodial time to move as long as they have a “reasonable purpose” and the move does not create a “specific and serious harm” to the child.⁷⁹

Under the ALI Principles, parents who intend to move must provide notice and propose a modified parenting plan designed to maintain the same proportion of custodial responsibility between the two parents. Where this is impossible, however, the Principles favor the right of parents with a “clear majority” of custodial responsibility to relocate as long as they demonstrate that they have a “valid purpose” for relocation. Valid purposes include to move close to family, to protect a family member from harm, health reasons, employment or educational opportunities, to join a spouse or domestic partner, or to improve the family’s quality of life.⁸⁰ The court will conduct a best interests test only if: (1) the primary custodial parent does not establish a valid purpose for relocation; or (2) the parents share custodial responsibility relatively equally. In both situations, the court should determine the allocation of custodial responsibility in the child’s best interests, and neither parent bears the burden of proof.⁸¹

The description of the burden of proof obscures a more important issue: courts’ formulations of children’s best interests, which reflect the competing visions described earlier. For example, Massachusetts law requires the custodial parent who desires to move to show a “good, sincere” reason for the move and a “real advantage” resulting from the move, which apparently favors the non-custodial parent. This standard, however, actually favors the custodial parent, because the Massachusetts Supreme Judicial Court has emphasized that the child’s interests are “so interwoven with the

⁷⁷ Florida Stat. §61.13(2)(d).

⁷⁸ Silbaugh v. Silbaugh, 543 N.W.2d 639, 641 (Minn. 1996).

⁷⁹ Tenn. Code Ann. §36-6-108(d).

⁸⁰ ALI Principles, *supra* note 5, at §2.17.

⁸¹ *Id.* at §2.17(4)(c).

wellbeing of the custodial parent, the determination of the child's best interest requires that the interest of the custodial parent be taken into account.⁸²

A number of other states have adopted a similar perspective on the primacy of the child/custodial parent relationship.⁸³ Many of these courts have emphasized that the child indirectly benefits from the improvement of the general quality of life for the custodial parent.⁸⁴ For example, the Supreme Court of Illinois upheld a trial court's decision to relocate from Illinois to Massachusetts with her son in order to marry a man who lived in Massachusetts. The Court found that the mother's move, which would enable her to remarry, greatly improve her economic situation, and work part-time, would indirectly benefit her son as well.⁸⁵ The Illinois Supreme Court emphasized that courts must consider whether the move will enhance the "quality of life for *both* the custodial parent *and* the children."⁸⁶ It noted that if courts were to consider only direct benefits, approval of relocations would be rare, and ordered courts to consider the best interests of the child in light of the other members of their household, and "most particularly the custodial parent."⁸⁷

Other states, however, have focused much more on the disruption the move would cause to the child's relationship with the non-custodial parent. For example, the New Hampshire Supreme Court uses the burden shifting approach. After the custodial parent meets the initial burden of showing that the relocation is for a legitimate purpose and is reasonable in light of that purpose, the burden shifts to the non-custodial parent to prove that relocation is not in the child's best interests.⁸⁸ This approach would appear to favor the relocating custodial parent. However, the New Hampshire Supreme Court upheld a denial of a custodial mother's petition to relocate to South Carolina despite her inability to obtain employment in her field, horse training, in New Hampshire. The trial court focused on the extent to which the move would interfere with the son's close relationship with his father. The court appointed guardian ad litem had stated that the move would "destroy the close and fun loving relationship that [he] enjoys with [the father]."⁸⁹ The New Hampshire Supreme Court upheld the trial court's decision, finding that its focus on the child's relationship with

⁸² Yannas v. Frondistou-Yannas, 481 N.E.2d 1153 (Mass. 1985) (*quoting* Cooper v. Cooper, 491 A.2d 606 (1984)).

⁸³ See, e.g., Ireland v. Ireland, 717 A.2d 676, 684-85 (Conn. 1998);

⁸⁴ In re Marriage of Collingbourne, 791 N.E.2d 532, 544 (Ill. 2003).

⁸⁵ *Id.* at 549-50.

⁸⁶ *Id.* at 547.

⁸⁷ *Id.*

⁸⁸ In the Matter of Pfeuffer, 837 A.2d 311, 314 (N.H. 2003).

⁸⁹ *Id.* at 315.

the father was within the court's discretion. The opinion does not address the serious economic concerns raised by the mother or the effect of those concerns on the child.⁹⁰

The varied legal standards and differing judicial decisions highlight states' ambivalence towards relocation disputes, towards competing visions of the post-divorce family. This ambivalence is further emphasized by the Proposed Model Relocation Act developed by The American Academy of Matrimonial Lawyers, an influential professional association. The Model Relocation Act focuses on the child's best interests. Significantly, however, the Members of the Academy could not reach any consensus about which parent should bear the burden of proof to demonstrate whether the move was in the child's best interests, instead offering states all three possible alternatives from which to choose.⁹¹

3.4. MODIFICATION OF CUSTODY DOCTRINE

Although most states utilize specific relocation standards, a smaller number of states consider relocation disputes within the legal framework for modification of custody. In some situations, the court may be using custody modification doctrine in response to a petition for modification of custody by the non-custodial parent. This approach focuses the court on a different question. Rather than asking whether the custodial parent may relocate, the court must decide whether the child should move with the custodial parent or whether custody should be modified and transferred to the non-custodial parent in light of the proposed move. While this is a different question, and it may be important to assessing judicial use of power, it may not appear that different to a custodial parent who would not be willing to move if it meant losing custody of her children.⁹²

Under the modification approach, the court must first consider whether the relocation constitutes a substantial or material change in circumstance. If so, courts have considered whether a change in custody will either prevent harm to the child or promote the welfare of the child. A more "strict" approach to custody modification generally favors relocating custodial parents, since it establishes a high threshold that the noncustodial parent must meet in order to obtain custody of the child.

In a few states, noncustodial parents bear a heavy burden to demonstrate that the court should give the nonmoving parent custody in light of the proposed relocation. For

⁹⁰ *Id.*

⁹¹ AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, "Proposed Relocation Act," 15 *J. Am. Acad. Matrimonial Law* 1 (1998).

⁹² *See, e.g., Sullivan v. Knick*, 568 S.E.2d 430 (Va. Ct. App. 2002)(mother testified would not relocate if needed to remain in order to retain custody).

example, Indiana will only modify if substantially changed circumstances render the original custody order “unreasonable.”⁹³ In Oklahoma, the parent seeking modification must show “a permanent, substantial, and material change of circumstances which directly and adversely affects a child in such a material way that as a result the child would be substantially better off if custody were changed to the other parent . . .”⁹⁴ Other states have specified what distance or type of move will constitute a substantial change in circumstances. For example, Iowa considers any move of 150 miles or more a substantial change in circumstances, while Maine considers any move out of the state to be a substantial change in circumstances.⁹⁵ For other states, the decisions regarding whether a proposed relocation constitutes a substantial change of circumstances is fact-specific.⁹⁶

It is more common for the burden of proof on the non-custodial parent to be light – a preponderance of the evidence that a change of custody is in the child’s best interests.⁹⁷ Finally, some states apply a neutral best interests of the child standard to its determination whether to shift custody to the non-custodial parent.⁹⁸ In these states, the court’s focus is on an evenhanded evaluation of the best interests of the child. In most states, courts employing the modification of custody approach to relocation disputes retain significant discretion, which permits widely varying outcomes to relatively similar cases.

3.5. JOINT CUSTODY

In the context of truly shared parenting, where the parents share time relatively equally, courts are extremely reluctant to permit one parent to relocate away from another parent who shares custody. In many of these cases, courts have modified custody and

⁹³ Ind. Code §31-17-2-23.

⁹⁴ *Kaiser v. Kaiser*, 23 P.3d 278, 286 (Okla. 2001). Oklahoma also has a statute that gives a custodial parent a presumptive right to move absent prejudice to the rights or welfare of the child. 10 O.S. 1991 §19.

⁹⁵ Iowa Code §598.21(8A); *Rowland v. Kingman*, 629 A.2d 613 (Me. 1993)(move out of state by parent with shared custody is a substantial change in circumstances; custody should then be determined in accordance with best interests of child).

⁹⁶ See, e.g., *Swonder v. Swonder*, 642 N.E.2d 1376 (Ind. Ct. App. 1994); *Hughes v. Gentry*, 443 S.E.2d 448, 451 (“whenever the evidence suggests . . . that the relocation of the custodial parent may not be in the child’s best interests, the relocation of the custodial parent constitutes a material change in circumstances”); *deBeaumont v. Goodrich*, 644 A.2d 843, 847 (Vt. 1994)(relocation without more is not per se a substantial change of circumstances).

⁹⁷ See, e.g., *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000); *Latimer v. Farmer*, 602 S.E.2d 32, 35 (S.C. 2004).

⁹⁸ See, e.g., *Bodne v. Bodne*, 588 S.E.2d 728 (Ga. 2003); *Braun v. Headley*, 750 A.2d 624 (Md. App. 2000); *Rowland v. Kingman*, 629 A.2d at 615-16.

given full custody to the nonmoving parent rather than letting the other parent move with the child. In some states, the law clearly distinguishes between situations of shared parenting and parents with a clear majority of the custodial time.

For example, New Jersey's approach to relocation generally favors the relocating custodial parent.⁹⁹ However, the New Jersey appellate court has rejected the application of this approach to relocation when the parents are de facto joint physical custodians.¹⁰⁰ In *O'Connor*, the mother was the primary residential custodian immediately following the divorce. However, over time, the father's role in the child's life had increased until their roles were relatively equal. The court found that the situation of shared parenting was an exception to the settled relocation doctrine. In that circumstance, the court treated the relocation petition as a motion for a change in custody, to be decided under the state's modification of custody standard, the best interests of the child.¹⁰¹ Other states that have addressed shared parenting situations have also treated these as requests for modifications of custody.¹⁰²

Tennessee, which creates a presumptive right for custodial parents to move for reasonable purposes unless the move presents a specific and serious harm to the child, treats shared parenting situations differently. In shared parenting situations, the court should use no presumption for or against permitting the move in determining the best interests of the child.¹⁰³

3.6. ARE PARTIES BOUND BY A PRIOR AGREEMENT NOT TO RELOCATE?

Another dilemma that courts have faced is what to do with provisions in a Marital Dissolution Agreement that specifically state that the primary custodial parent promises to not relocate for the duration of the minority of the involved children, or state that if the custodial parent chooses to move, custody will automatically switch to the non-custodial parent. In general, courts have not been willing to enforce these provisions, although in some cases they have considered them as one factor in their analysis of the best interests of the children. These courts have refused to permit the parents to make a decision at the time of dissolution that prevents the court from

⁹⁹ Baures v. Lewis, 770 A.2d 214 (2001)(relocating custodial parent need only show that move is proposed in good faith and would not be inimical to the child's interest).

¹⁰⁰ O'Connor v. O'Connor, 793 A.2d 810 (N.J. Super. 2002).

¹⁰¹ *Id.* at 821.

¹⁰² McGuiness v. McGuiness, 970 P.2d 1074 (Nev. 1998); Jaramillo v. Jaramillo, 823 P.2d 299 (N.M. 1991); Hoover v. Hoover, 764 A.2d 1192, 1194 (Vt. 2000).

¹⁰³ Tenn. Code Ann. §36-6-108(c).

determining whether relocation is in the child's best interests at a later date.¹⁰⁴ Another state has decided that a non-relocation clause in a dissolution agreement will shift the burden of proof from the non-custodial parent who opposes relocation to the custodial parent who seeks to move.¹⁰⁵ In this court's view, the non-relocation clause establishes an important feature of the current custodial status, and the burden should be placed on the relocating parent who wishes to change the agreed-upon arrangement.

Mississippi has completely rejected provisions in custody agreements that prevent relocation or require a shift in custody if the custodial parent chooses to relocate, finding that is "particular folly to decree in advance . . . that it will be in [children's] best interest to remain in a given community until they become adults. This is simply something that no individual and certainly no court can know."¹⁰⁶ Therefore, it directed courts to reject any child custody agreements presented to the court for approval which mandate that children be raised in a specific community.¹⁰⁷

4. CONSTITUTIONAL CONCERNS IN RELOCATION DEBATES

Judicial power in family law cases is limited by individual rights based in the U.S. Constitution. A number of litigants and commentators have raised constitutional concerns about judicial involvement in relocation disputes. Under relocation specific approaches, courts often simply deny a custodial parent permission to move. In conducting their analysis, courts compare the current situation, with both parents living close to each other, to the situation where the custodial parent and child have moved a distance away. Needless to say, when these two situations are compared, courts are reluctant to permit the custodial parent to move.

Custodial parents have claimed that restrictions on moving with their children inhibit their constitutional right to travel. This claim is based on U.S. Supreme Court decisions that established a constitutional right under the Fourteenth Amendment to travel

¹⁰⁴ See, e.g., *Helton v. Helton*, 2004 WL 63478, at *6 (Tenn.Ct.App.) (prior prohibitions on relocation, whether in a marital dissolution agreement or by judicial decree, are subject to modification, and courts remain at liberty to lift such prohibitions); *Scott v. Scott*, 578 S.E.2d 876 (Ga. 2003) (provisions that require automatic change in custody upon relocation violate public policy unless provide for a determination of the best interests of the child); *Williams v. Pitney*, 567 N.E.2d (Mass. 1991) (where best interest of child requires, court may disregard provisions of agreement with regard to relocation).

¹⁰⁵ *Latimer v. Farmer*, 602 S.E.2d 32 (S.C. 2004).

¹⁰⁶ *Bell v. Bell*, 572 So.2d 841, 845 (Miss. 1990); see also *In re Marriage of Thielges*, 623 N.W.2d 232, 237 (Iowa Ct. App. 2000).

¹⁰⁷ *Id.* at 845-46.

among the states.¹⁰⁸ Custodial parents point out that a denial of relocation petitions can work serious hardship on them. They may be forced to forego significantly better employment, education opportunities or remarriage. Several cases highlight the hardship of a denial. For example, a mother who sought to move her daughter from Missouri to Texas, about a six hour drive, was stuck in a dead end, low paying security guard position. The job opportunity in Texas with the U.S. Federal Bureau of Investigation would soon double her salary, provide important health benefits, and provide extensive advancement opportunities.¹⁰⁹ In another case, a woman had remarried a person who lived in a neighboring state, a marriage which allowed her to quit her current fulltime job and take a position that paid more and required fewer hours.¹¹⁰ A second remarriage case involved the new husband's mandatory transfer by the Air Force to a different state; his refusal to the transfer was not an option.¹¹¹ In some cases, a court's refusal to permit custodial parents to move prevents the parent's new spouse from living near the new spouse's children from a prior relationship, children whose interests are not in front of the deciding court.¹¹²

To date, no state has found that parents have an absolute right under the Constitution to move with their children. At its strongest, the right to travel has been interpreted to mean that custodial parents can be prevented from moving with their children only if the move is harmful to their children. Those few states that adopt this view place a heavy burden on the resisting parent to demonstrate that the move is harmful to the children. They believe that the right to change a child's residence is not only an important part of the constitutional right to travel, but it is also required by custodial parents' rights to make decisions for their children.

For example, in *Watts v. Watts*, the Wyoming Supreme Court found that the "right of travel enjoyed by a citizen carries with it the right of a custodial parent to have the children move with that parent."¹¹³ The court ruled that custody would only be transferred when "clear evidence before the court demonstrates another substantial and material change of circumstance and establishes the detrimental effect of the move upon the children."¹¹⁴ Those courts that recognize the right to travel in this context have generally found that the burden lies on the nonmoving parent to demonstrate that the move is detrimental to the child's best interests.¹¹⁵ To these courts, the

¹⁰⁸ *Shapiro v. Thompson*, 89 S.Ct. 1322, 1328-29 (1969); *Saenz v. Roe*, 526 U.S. 489 (1999).

¹⁰⁹ *Fohey v. Knickerbocker*, 130 S.W.2d 730 (Mo. App. 2004).

¹¹⁰ *In re Marriage of Robison*, 53 P.3d 1279 (Mont. 2002).

¹¹¹ *Vogel v. Vogel*, 637 N.W.2d 611 (Neb. 2002).

¹¹² *See, e.g., Sullivan v. Knick*, 568 S.E.2d 430 (Va. App. 2002).

¹¹³ *Watt v. Watt*, 971 P.2d 608, 615-16 (Wyo. 1999).

¹¹⁴ *Id.* at 616.

¹¹⁵ *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991); *Marriage of Cole*, 729 P. 2d 1276 (Mont. 1986); *Holder v. Polanski*, 544 A.2d 852 (N.J. 1988).

custodial parent's right to travel is an important liberty interest in choosing where to live, work, and raise children, a right that is fully protected for married parents.

Many more courts, however, have held that the parent's right to travel must bow to the child's best interests. They find that the state has a compelling interest in determining the child's best interests post-divorce. Therefore, the parent's right to travel must be weighed against the best interests of the children involved.¹¹⁶ This approach provides very limited deference to the custodial parent's right to travel. The New Mexico Supreme Court rejected placing the burden of proof that relocation is in the child's best interests on relocating parents as a violation of their right to travel.¹¹⁷ Instead, the court determined that non-custodial parents must carry the burden of proof in opposing relocation, while in joint custodial arrangements the parents are on equal footing and the court's decision should be based on children's best interests.¹¹⁸ The Montana court placed the burden on the parent opposing the move to show that a relocation restriction was in the child's best interests.¹¹⁹ In many other cases, however, the claim of a right to travel is summarily dismissed, and court find that it is parents' custodial status, not their liberty to travel, that is at stake in these disputes.¹²⁰

The constitutional right to travel is implicated in the modification of custody approach as well. Some courts have ordered that custody be changed to the non-custodial parent if the custodial parent moves, without deciding whether the child would be better off with the non-custodial parent if the custodial parent still goes ahead and relocates. This can be viewed as a form of custody blackmail, as the court orders the change in custody on the assumption that the custodial parent will not move without the child. According to one study, this works about two-thirds of the time.¹²¹ Several state supreme courts have rejected this custody blackmail, arguing that it violates the custodial parent's right to travel and undermines the best interests of the child.¹²² These state supreme courts require judges to compare the child's situation with the custodial parent in the new location to the situation with the non-custodial parent in that

¹¹⁶ *La Chapelle v. Mitten*, 607 N.W.2d 151, 163 (Minn. App. 2000); *Weiland v. Ruppel*, 75 P.3d 176 (Idaho 2003) (right to travel "only limited by desire of the parent to retain her status as the custodial parent and that in all custody proceedings a parent may be forced to forgo some rights consistent with the best interests of the child").

¹¹⁷ *Jaramillo v. Jaramillo*, 823 P.2d 299, 305 (N.M. 1991)

¹¹⁸ *Id.* at 308-309.

¹¹⁹ *In re Marriage of Cole*, 729 P.2d 1276 (Mont. 2002) (any interference with this fundamental right must be made cautiously, and may only be made in furtherance of the best interests of the child").

¹²⁰ *Clark v. Atkins*, 489 N.E.2d 90 (Ind. Ct. App. 1986); *Maeda v. Maeda*, 794 P.2d 268 (Haw. 1990).

¹²¹ BRAVER, ET AL., *supra* note 33, at 208.

¹²² *See, e.g., Taylor v. Taylor*, 849 S.W.2d 319 (Tenn. 1993).

parent's current location, not to the current, idealized situation with both parents in the same location.¹²³

Given the importance of the constitutional right at stake and the widely disparate legal standards currently in use, the parameters of the constitutional right to travel in the context of relocation disputes requires further thought and development by American courts.¹²⁴

Other important constitutional rights may be at stake as well. Under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, parents have a protected liberty interest in the care and control of their children.¹²⁵ In many cases, both parents continue to have a liberty interest in a continuing relationship with their children. Because divorcing parents share this liberty interest, when they come into conflict with each other, court intervention is viewed as authorized by the state's *parens patriae* power.¹²⁶ The liberty interests of parents also require further thought and development.

Finally, it is not clear whether children have any constitutional rights at stake in these decisions. To date, the Supreme Court has largely avoided consideration of children's rights in the context of family relationships, permitting states to make decisions instead on the basis of the state's *parens patriae* power, limited only by the parents' liberty interests.¹²⁷ However, if a court permits a custodial parent to remove a child to a remote location that makes the child's relationship with the non-custodial parent impossible to maintain, or refuses to permit a child to remain with a custodial parent without determining whether a custodial change is in the child's best interests, the child's relational rights are arguably deeply affected.

5. BROAD JUDICIAL DISCRETION

Relocation disputes are most appropriately characterized by their broad judicial discretion, not the precise legal standard or burden of proof adopted by courts. Under most states' legal standards, courts have substantial discretion to determine the best interests of the children involved in relocation disputes. It is in the application of this

¹²³ See, e.g., *Moeller-Prokosch v. Prokosch*, 99 P.3d 531 (Alaska 2004).

¹²⁴ ARTHUR LAFRANCE, "Child Custody and Relocation: A Constitutional Perspective," 34 *U. Louisville J. Fam. L.* 1 (1995-96); CHARLES P. KINDREGAN, JR., "Family Interests in Competition: Relocation and Visitation," 36 *Suffolk U.L. Rev.* 31, 46-50 (2002).

¹²⁵ *Troxel v. Granville*, 530 U.S. 57 (2000).

¹²⁶ See, e.g., *In re Parentage of R.F.R.*, 93 P.3d 951 (Wash. App. Div. 2004).

¹²⁷ *Troxel v. Granville*, 530 U.S. at 86-91 (Stevens, J., dissenting) (arguing that children have constitutionally protected relationship issues at stake in determinations of their best interests).

discretion that the choices of competing visions of the post-divorce family are most apparent.

The most widely publicized example of this broad discretion and the room it leaves for judges to express differing visions of the post-divorce family is the California Supreme Court's recent relocation decision, *In re Lamusga*.¹²⁸ Susan LaMusga and her ex-husband had joint legal custody of their two sons, and Susan had primary physical custody. For five years, they lived five miles apart, and both had remarried. After five years, the mother sought permission to relocate to Cleveland, Ohio, quite a long distance away. Her new husband had a better job offer there, allowing the family an improved economic status, and Susan had close family ties in Cleveland.

California had led the way in developing a legal standard that favored the relocating parent. In a groundbreaking 1996 case, *In re Burgess*, it gave the custodial parent "the right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child."¹²⁹ In order to force a change in custody in relocation cases, the non-custodial parent must show that "as a result of relocation with [the custodial] parent, the child will suffer detriment rendering it 'essential or expedient for the welfare of the child that there be a change.'"¹³⁰ The favorable nature of this legal standard was strengthened by the great weight given to continuity in children's relationships with their custodial parents. California's approach was regarded as especially friendly to relocating custodial parents.

However, in *LaMusga*, the California Supreme Court denied the mother's petition to relocate, placing primary importance on improving the rocky relationship between the non-custodial father and his sons over stability in their custodial and emotional ties with their mother. The court ordered a change in custody to the father if the mother moved, without deciding whether the father's home was in the children's best interests. This was a clear change in direction, as earlier California decisions had consistently favored continuation of the custodial relationship over changing custody to protect the non-custodial parent's relationship.

There are two interpretations of the court's surprising decision in *LaMusga*. Under one view, the decision is limited to its specific facts. Notably, the divorced parents experienced numerous conflicts, and the assigned expert had found that the mother contributed to the children's alienation from their father by telling them about the

¹²⁸ 88 P.3d 81 (Cal. 2004).

¹²⁹ Cal. Fam. Code §7501.

¹³⁰ *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996).

parents' disputes and indulging their negative emotions about their father.¹³¹ Clearly, throughout U.S. case law, judges are reluctant to let parents who interfere with the child's relationship with the other parent move away.

The dissenting justice in *LaMusga*, however, viewed this decision as marking an important turn in the state's jurisprudence away from a presumptive right of the custodial parent to relocate towards an increased emphasis on detriment to the child's relationship with the non-custodial parent.¹³² Notably, the California Supreme Court upheld the change in custody order even though the lower court did not determine whether the children were better off living with the father if the mother relocated to Cleveland without them. While the language of the legal standard remains unchanged, *LaMusga* emphasizes that courts in California have broad discretion to emphasize the effect of relocation on the child's relationship with the non-custodial parent over stability in their custodial relationships.

The importance of judicial discretion in this area cannot be overstated. Families who enter the court system with relocation disputes cannot predict the outcome of their case, nor can they expect that the trial court's decision will necessarily be upheld by appellate courts. Factually similar cases are decided quite differently. In many cases, the outcome is determined by the judge's vision of the post-divorce family.

6. CONCLUSION

State approaches to relocation disputes are complex and conflicting. They may be described as heading in several different directions at the same time. While courts in this area generally describe themselves as seeking to determine the best interests of the child, they evidence deep conflicts about how to determine those interests in the post-divorce family. The "ideal" vision of the post-divorce family remains deeply contested. This sharp disagreement is reflected in the social science literature many courts turn to for guidance. Most courts recognize, that children's interests are not the only ones at stake, but that their decisions will have profound and long-lasting effects on parents' lives. Broad discretion within the legal doctrine in most states leaves the resolution of these deeply conflicting values to individual judges. While individual circumstances do vary, the current uncertainty and lack of consistency litigants face appears to be due more to these unresolved value conflicts than to these individual variations. It is difficult to imagine that the best interests of children are well-served by this legal disarray.

¹³¹ *Id.* at 101.

¹³² *Id.* at 103.

THE *COPARENTALITÉ* IN FRENCH LAW

LAURE TALARICO

1. INTRODUCTION

The European legislations have turned to a dominant model: that of the joint exercise of parental authority. This general tendency is organised through different methods according to each State. Nevertheless, we can observe some reticence to widen this model to cases of partnership breakdown; indeed, in this case, mothers are often awarded parental authority.¹ France is in keeping with this general movement. For thirty years, all the reforms which intervened in the subject tended to consecrate the principle of *coparentalité*. The evolution began with the law of 4th of June, 1970 substituting parental authority for the *patria potestas* inherited from the Napoleonic code. The change of terminology, besides its symbolic force, reveals a new concept of the function of parenthood. While the term “power” (*potestas*) implied a sovereign power, the term authority more accurately contains the idea of a “rightfunction” which has, as its aim, the interest of the child. As for the term “parental”, it reinforced the equality of the father and the mother in the exercise of these rightfunctions, putting an end to the often denounced paternal tyranny.

Subsequently, the French legislator has strengthened parental equality. The road towards *coparentalité* progressed in successive stages: automatic in the married family, the joint exercise of parental authority became the rule after divorce. The family out of wedlock was subject to the same evolution: at first, subordinate to a joint statement of the father and the mother or to a decision of the judge, the joint exercise became semi-automatic in 1993. The evolution was completed by the reform of 4th March, 2002, which evidences the spontaneous harmonization of European legislations.

The international instruments consecrating the rights of the child widely inspired the reform. First of all, the International Convention on the Rights of the Child of 20th of November, 1989, which recognizes in its Article 7-1 the right of the child to be raised by both its parents and which provides, in its Articles 18-1, for the principle according

¹ F. GRANET, “Séparations des couples et autorité parentale dans les législations européennes”, *AJfam.* 2002, n° 4, p. 138.

to which both parents have a common responsibility to raise the child and to ensure its development. Besides, Article 9-3 and 10-2 of the aforesaid convention, and Article 24 of the Charter of fundamental rights of the European Union recognize, for the child whose parents do not live together, the right to maintain personal relations with both of them on a regular basis.

The weight of social reality added to the influence of supranational law. Indeed, the married and united family no longer constitutes the “normal” model. The huge increase in births outside wedlock, but also the increase in separations, and the underlying question of the place of the father led the legislator to adapt the law to the evolution being experienced by society. The plurality of familial situations invites us to admit that family law has become “a recognition of the principle and no longer a recognition of the model family”.² At least, if the model remains, it is henceforth based on the vertical relationship of parents–child, and no longer on the horizontal relationship between parents. The exercise of parental authority has been removed from the parents’ choice of lifestyle. The *coparentalité* consecrated by the law of 2002 rests “simply on the relation between the child and his parents”.³ It is the idea that parents are “parents” for ever, whatever the hazards of life. The second idea is that there is no difference between children, whatever the circumstances of their births may be. The child needs its two parents, whether it is born within or outside wedlock. Such is the interest of the child. Moreover, it is by considering the interest of the child that the legislator was persuaded to consecrate the shared residence of the child after the breakdown of the family, which marks the originality of the French law.

So, the *coparentalité* appears as a double notion: it is aimed not only at the equality of parents in the exercise of their function, but also at the right of the child to have relations with both its parents. On the one hand, when the *coparentalité* relates to the equality between the father and the mother, its promotion does not lead to any dispute. On the other hand, when we refer to the interest of the child, promoting this interest does give rise to discussion. The objective of our comment is not to wonder whether it is always in the best interest of the child to be raised by both its parents. Let us reiterate that it is the interest of the child which justified the exclusive exercise of parental authority some years ago.

Having said that, we will first envisage the *coparentalité* strengthened by the generalization of the joint exercise of parental authority; Secondly, we will consider the *coparentalité* as a right of the child to have relations with both its parents.

² S. ROYAL, ministre de la famille, Sénat, séance du 21 novembre 2001.

³ H. FULCHIRON, *L'autorité parentale renouvelée*, Defrénois 2002, art. 37580.

2. THE STRENGTHENING OF *COPARENTALITÉ*

The reform of 2002 looked at the parental link from the side of the child. By considering that the child needs to be raised by both its parents, the legislator neutralized the consequences of the matrimonial situation of the parents. The legislator also favoured a consensual exercise of parental authority.

2.1. THE SUPPRESSION OF ALL DISTINCTIONS BASED ON THE FAMILY SITUATION

The generalization of the joint exercise of parental authority means the abolition in the statutes of distinctions according to the quality of the filiation of the child, at least as regards its effects. Since filiation is established towards both parents, the joint exercise thereof is automatic. There is no need to resort to the courts or to show a specific will by means of a joint statement. Article 372 of the French civil code provides that: “the father and mother will exercise common parental authority”. Such is the principle that the quality of the spouses’ or partners’ characters will make no difference. The terminology is moreover revealing; indeed, we only refer to the “parents” qualities.

Nevertheless, the precondition, of the establishment of filiation means that the divisibility of the family link in filiation outside marriage should be taken into account. This consideration has led the legislator to recognise the joint exercise of parental authority in a family out of wedlock and the double acknowledgment of the child’s filiation by its father and mother within one year of its birth. A late acknowledgment or a judicially established filiation leads to the presumption of a lack of interest in the child. In these situations, the parent who first acknowledges the child will be vested with the exclusive exercise of parental authority. It should be noted that before the law of 4th of March 2002, the exclusive exercise of parental authority was vested in the mother. Doing away with this maternal domination in the out of wedlock family recognises the equality between the father and the mother. As the exclusive exercise of parental authority is now the exception, the joint exercise thereof can always be granted by a joint statement of the parents or by a decision of the judge.

Moreover, the automatic aspect of the joint exercise of parental authority in the out of wedlock family is strengthened by the fact that the condition of a community of life between the parents at the time of the joint acknowledgement or of the second acknowledgement has now been dispensed with. The legislator even shows a will to separate the exercise of parental authority from the sentimental lives of the parents.

Only the acknowledgement testifies to the commitment of the parents to care for the child and to ensure its education.

The generalization of the joint exercise of parental authority also implies the deletion of the distinction between a united family and a disunited one. Article 373-2 of the civil code provides that the separation of the parents does not affect the rules for allocating the exercise of parental authority. The term “separation” is neutral and encompasses divorce, legal separation, de facto separation and the end of a partnership. This neutrality promotes a common set of rules regarding separation. So the *coparentalité* does not stop with the ending of the matrimonial relationship: the parental couple survive the conjugal couple. The rights and the duties of the parents are exclusively bound to the parents’ quality, which does not disappear because of the separation.

If the joint exercise of parental authority remains the dominant principle even after separation, its modalities should be modified if and when necessary. To favour the consensual exercise of parental authority, the legislator has favoured agreements between the parents.

2.2. PROMOTING PARENTAL AGREEMENTS AS A GUARANTEE FOR THE NON-CONFLICTING EXERCISE OF PARENTAL AUTHORITY

The endurance of the parents as a parental couple seems to be better ensured by the search for consensus than by forcing them to live up to their responsibilities. In such a case the parents can submit, for the ratification of the judge, an agreement which regulates the exercise of parental authority and determines the contribution towards the maintenance and the education of the child.⁴ This preference for parental agreements illustrates the phenomenon of the “contractualisation” of family law. But “contractualisation” does not mean privatization. Indeed, the judge can always refuse to ratify the agreement if it does not sufficiently protect the interests of the child.

The interests of the child is the leitmotiv in this respect. It is the essence of the second aspect of the *coparentalité*: the right of the child to maintain relations with both its parents.

⁴ Code civil, article 373-2-7

3. THE *COPARENTALITÉ* CONSECRATED AS A RIGHT OF THE CHILD TO *BIPARENTAL* RELATIONS

To ensure the right of the child to the preservation of relations with both its parents, the legislator has given effect to shared residence after separation. Moreover, it is the responsibility of the parents to ensure the preservation of this link.⁵

3.1. THE EFFECTIVENESS OF *COPARENTALITÉ* ENSURED BY THE LEGAL RECOGNITION OF SHARED RESIDENCE

Until the reform of the 4th of March 2002, it was compulsory for the judge to determine the usual residence of the child at the home of one of its parents. Even when the joint exercise of parental authority was granted, the parent with whom the child lived, the mother in the majority of cases, was considered by third parties to be the “main” parent and the authorized interlocutor; the other parent was somewhat pushed into the background. In practice, however, the judges of the lower courts had already implemented the concept of shared residence, under the guise of an increased right of access and custody.

With the new law, the judge is now legally authorized to determine the residence of the child to be, alternatively, each parent’s places of residence. Presented as the model allowing for the effectiveness of *coparentalité*, shared residence has not been established as a principle. The judge does have an alternative and can determine the residence of the child to be the home of one parent only. Conceived as a right of the child, the shared residence has to be in accordance with the child’s interests. A Court of Appeal⁶ thereby decided to terminate the shared residence order due to the disinterest of the father and his “strict conception of education”.

As it is a right of the child and not of the parents, the judge can thus refuse shared residence even when the parents have agreed thereon it. A contrario, the judge can also impose it on a short-term basis against the will of the parents. A Court of Appeal⁷ thereby granted shared residence on approval, in spite of the opposition of the mother. It considered that the short distance between the parental homes and the equal

⁵ F. VAUVILLÉ, *Du principe de coparentalité*, Petites affiches 2002, n° 209.

⁶ CA Nîmes, 3 July 2002, *AJ fam.* 2002, p. 339.

⁷ CA Bastia, 23 December 2003, *AJ fam.* 2004, p. 100.

emotional and material living conditions, offered by each parent to the child meant that an alternating residence was in the interest of the child. For some judges, residence on approval is a means of reassurance in order to calm the conflict for the benefit of the children. Alternating residence is thus the purpose to be achieved. Its legal consecration has an educational value for both the parents and the judge. From the point of view of the child, an alternating residence has a therapeutic value, in the sense that the child will not have to choose between its parents: “living alternately with each, (the child will live) with both”.⁸

If an alternating residence gives concrete expression to the right of the child to *biparental* relations, its effectiveness is strongly dependent on the parents respecting their duties.

3.2. THE STRENGTHENING OF PARENTAL RESPONSIBILITIES

The promotion of the joint exercise of parental authority has as its purpose to impose responsibilities on the parents. The *coparentalité* aims to equal the father and the mother in the education of their child, but it also goes beyond this. Indeed, the parents have the duty to maintain links with their child. This duty implies a dual respect: respect for the child and respect for the other parent.

To guarantee respect for the child, the law allows the judge to take any measures which allow the continuance and the effectiveness of *biparental* relations. Over and above this general power given to the judge, the law also encompasses particular measures. Indeed, it offers the judge the possibility to insert a provision in the passport of the child to the effect that it is prohibited for the child to leave French territory without the authorization of both parents. This measure obviously tends to deter the international abduction of children.

Besides, every parent has a duty to respect “the links of the child with the other parent”. This obligation has no direct sanction. Nevertheless, it remains important. Indeed, when the judge rules on the exercise of parental authority, he has to take the following into account: “the capacity of each of the parents, not only to assume his/her duties, but also to respect the rights of the other parent”.⁹ The courts already tended to favour

⁸ H. FULCHIRON, *Autorité parentale et parents désunis*, Ed. CNRS, 1985, p. 134, n° 135.

⁹ Code civil, article 373-2-11, 3°.

“the parent who does not denigrate the other parent in the eyes of the child”.¹⁰ The spirit of mutual respect established by the legislator is illustrated by the provision¹¹ relating to the change of residence of one of the parents. Indeed, when one parent moving out changes the exercise of parental authority, the law will impose a duty for that parent to maintain contact with the other parent in due course. In the case of disagreement, the latter can then resort to the judge “who will decide according to the interests of the child”.¹²

Coparentalité therefore appears as a guarantee of the equality of the father and the mother and of the perpetuity of the links of the child with each of them. Let us hope that the intensification of the principle of the joint exercise of parental authority, as introduced by the new law, will persuade parents to demonstrate that they are worthy of the confidence with the legislator has demonstrated in them. If the endurance of the parents as a parental couple and the consensual exercise of parental authority after separation appears to be a myth, it is up to practice to demonstrate the opposite. The legislator has provided parents with the means to make use of *coparentalité*: it belongs to them and they should make it successful. This would be in the interest of the child.

¹⁰ A. GOUTTENOIRE, “Commentaire des dispositions relatives à l’autorité parentale”, *AJ fam.* 2002, p. 124.

¹¹ Code civil, article 373-2 para. 3.

¹² Ibidem.

DECIDING ON SOLE OR JOINT CUSTODY RIGHTS IN THE CHILD'S BEST INTEREST

ROSA MARTINS

1. INTRODUCTION

According to Portuguese law, during a marriage and in some cases of cohabitation between unmarried parents, parental care belongs to both the father and the mother. In order to jointly exercise all the rights, powers and duties included under parental care in their child's interest, both parents must agree on several issues related to the person and the assets of their child. Whenever there is a divorce or a separation between spouses or the ending of a relationship between unmarried parents, a new question arises: how to reorganise the exercise of parental care. Since the father and the mother no longer have a life in common, their situation does not allow them to agree on a frequent and daily basis about all those issues which are of paramount importance in their child's life.

Therefore, it is necessary to find a new form for the exercise of parental care, so that the parents, in the interests of their child, continue to perform their role of protecting their child and promoting his/her physical, moral and social development. Traditionally Portuguese law resolved this question by attributing custody to only one of the parents (sole custody). The question, in both litigious and consensual situations, was to decide, in the child's best interests, which parent would be granted custody of the child. This model, however, proved inadequate in terms of protecting and promoting the best interests of the child, particularly with regard to the right to grow up while maintaining contact with both parents.

Since 1999, Portuguese law has preferred the joint custody model, which permits both parents to exercise parental care together after a divorce or separation just as they did during their marriage or life in common. This new legal preference seems to be more in harmony with the vision of the child as a person and a holder of fundamental rights, namely the right to freely develop one's personality, and it is also more in harmony

with the consideration of his/her best interests in the protection and promotion of his /her fundamental rights.

In fact, there are now two possible models that the exercise of parental care may take after the family breakdown: sole custody or joint custody. The problem that is now being faced is of knowing which of the custodial models is in the best interest of the child. The solution to this question requires consideration not only of legal criteria but also of psychological and sociological matters, amongst other things.

In addition, the choice of how to exercise parental care after divorce or separation now has to take into account the wishes of the child, who must actively participate in the decision-making process. This choice as well as all the other questions related to this new exercise of parental care (such as visitation rights in the case of sole custody, and parental disagreement concerning issues like safety, education, religious upbringing, medical treatment, the administration of the child's assets, etc.) must focus on the child's right to freely develop his/her personality and should not be in the interest of the parents nor should it aim to protect their rights.

2. THE JOINT EXERCISE OF PARENTAL CARE DURING MARRIAGE OR COHABITATION BETWEEN UNMARRIED PARENTS

2.1. THE RULE OF THE JOINT EXERCISE OF PARENTAL CARE DURING MARRIAGE OR COHABITATION BETWEEN UNMARRIED PARENTS

According to Article 1901, No. 1 of the Portuguese Civil Code, when parents are married to each other and their child is born within wedlock, parental care¹ belongs

¹ The expression that is used even today in the Portuguese Civil Code to regulate the relationship between parents and their minor children (and consequently the expression that is normally used by legal literature and jurisprudence) is '*parental power*'. This term seems to derive from a conception of this legal institution as an *arbitrary power* exercised uniquely and exclusively by the father over the person and property of his children. In the light of modern social and legal values this expression is thus inadequate. In the context of the 1977 Civil Code Reform, the need for new legal terminology to describe the relationship between parents and their minor children was discussed in the sessions of the Civil Code Review Committee. However, the Committee was unable to find another term that could reasonably replace the traditional one. The purpose of the above-mentioned Reform was to adapt civil law concerning family relations to the new constitutional principles of Family Law, established by the 1976 Constitution of the Portuguese Republic. Taking into consideration the experiences of Italy, France, the United Kingdom and Germany, where the traditional terms were gradually replaced by others which are more in accordance with

to both spouses: the father and the mother. That is to say, the father and the mother are not only holders of parental responsibility, but they also exercise it jointly on an equal basis. This design of parental care, as regards both the question of who is entitled to hold it and who exercises the complex of the rights, powers and duties involved, seems to best translate the constitutional principle of equality between spouses (Article 36, No. 3 of the Portuguese Constitution and Article 1671 of the Portuguese Civil Code).²

Article 36, No. 3 of the Portuguese Constitution states that both spouses have equal rights in everything that concerns their child's support and education. This legal precept is usually interpreted as consecrating the general principle of equality between the spouses, which covers all aspects of their relationship with each other and, as parents, with their children.

When parents are not married to each other but parenthood has been established with regard to both of them, parental responsibility belongs to both the father and the mother if they are living together and have declared before a Registry Office official their wish to exercise parental responsibility jointly (Article 1911, No. 3 of the Portuguese Civil Code).³ Thus, as regards the exercise of parental care, Portuguese Civil law establishes that, as a general rule, it shall be exercised jointly or bilaterally, without any specific division of functions between the mother and the father.⁴

Recommendation No. R (84)4 on Parental Responsibilities, adopted by the Committee of Ministers of the Council of Europe, the Convention on the Rights of the Child and the European Convention on the Exercise of the Rights of the Child, some authors have suggested that the time is ripe for replacing the term 'parental power' with the expression 'parental responsibilities'. There are, however, some criticisms of this proposal. As Irène Théry points out, "parents do not only have responsibilities, but also a 'duty to demand' in relation to their child. To devalue this duty would weaken the bond of parenthood" (IRÈNE THÉRY, *Couple, filiation et parenté d'aujourd'hui*, Paris, Éditions Odile Jacob, 1998, p. 190). Thus (and with reference to the democratic model of the family in which the relationship between parents and children is based upon affection and mutual respect, and where it is necessary to take account of the autonomy of the child as a developing human being, without neglecting the need to provide guidance and supervision in his/her education and training, in the context of an interactive and dialectic relationship in which the child has the status of a partner) the expression 'parental care' would seem to be the most appropriate.

² On the constitutional principle of equality between the spouses and the implications of this for the regulation of parental care, see FRANCISCO PEREIRA COELHO/GUILHERME DE OLIVEIRA, *Curso de Direito da Família*, vol. I, 3rd ed., Centro de Direito da Família da Universidade de Coimbra, Coimbra, Coimbra Editora, 2003, pp. 170-171.

³ This solution adopted by Portuguese Civil Law derives, on the one hand, from the constitutional principle that "the parents [father and mother] have the right and the duty to educate and support their children" (Article 36, No. 5 of the Portuguese Constitution) and, on the other, from the constitutional principle of non-discrimination of children born out of wedlock (Article 36, No. 4 of the Portuguese Constitution).

⁴ Cf. PIRES DE LIMA/ANTUNES VARELA, *Código Civil Anotado*, vol. V, Coimbra, Coimbra Editora, 1995, p. 389.

2.2. THE MEANING OF THE JOINT EXERCISE OF PARENTAL CARE

The joint exercise of the cluster of rights, powers and duties included under parental care, in the interest of the child, means that both parents must agree upon all the possible matters related to the person and the property of their child on a frequent and daily basis. Therefore, we can say that parental agreement⁵ is the main feature of the joint exercise of parental care. It is thus a question of *exercising together, with agreement*, all the rights, powers and duties relating to the person and the property of their children, and not *exercising them in a competitive way*.⁶ Indeed, in accordance with Article 1901, No. 2 of the Civil Code, it is through a series of successive agreements (that is, successive declarations of will on the part of both parents in agreement or by one parent with the consent of the other) relative to different acts that the daily exercise of parental care is manifested.

It is also important to explain that, as regards “acts of normal importance” relating to the person or the property of the child, these may be undertaken by either parent, and the law will presume that it is with the consent of the other (Article 1902, No. 1 of the Portuguese Civil Code).⁷ However, this presumption does not apply to other categories of acts for which the law requires the express consent of both parents (for instance, representing the child in court proceedings) and “acts of particular importance” (Article 1902, No. 1 of the Portuguese Civil Code).

The difficulty here is knowing how to interpret “acts of normal importance” and “acts of particular importance”, since the law does not define either category. This question becomes more complex in the light of Article 1901, No. 2 of the Civil Code, which establishes that, if there has not been parental agreement regarding “acts of particular importance”, then either parent may apply to have the matter settled in court. In accordance with this legal precept, the court will first attempt to encourage the parents

⁵ Parental agreement on the exercise of parental care is not, however, discretionary, but is fundamentally connected to the pursuit of the child’s interest. For this idea see FRANCESCO RUSCELLO, *La potestà dei genitori, Rapporti personali* (artt. 315-319), Milan, Giuffrè editore, 1996, p. 140, MICHELE SESTA, *La filiazione*, estratto da “Il Diritto di Famiglia” del Trattato di Diritto Civile (diretto da Mario Bessone), vol. VI, tomo III, Turin, G. Giappichelli Editore, 1999, p. 231.

⁶ For this idea see GÉRARD CORNU, *Droit Civil, La Famille*, 7th ed., Paris, Montchrestien, 1999, p. 169, JACQUELINE RUBELLIN-DEVICHI, *Droit de la famille 2001/2002*, Paris, Éditions Dalloz, 2001, p. 692.

⁷ This presumption has a practical purpose: to avoid the problems caused by the bilateral exercise of parental care, which may effectively paralyse the daily life of the child. Cf. JOSÉ LUIS LACRUZ BERDEJO; FRANCISCO DE ASÍS SANCHO REBULLIDA; AGUSTÍN LUNA SERRANO *et al.*, *Elementos de Derecho Civil IV, Derecho de Familia*, p. 574, FRANCESCO RUSCELLO, *op. cit.*, pp. 144-145, FRANÇOIS TERRE/DOMINIQUE FENOUILLET, *Droit Civil, Les personnes, La famille, Les incapacités*, 6th ed., Paris, Éditions Dalloz, 1996, p. 876, GÉRARD CORNU, *op. cit.*, p. 169, JEAN CARBONNIER, *Droit Civil, 2, La famille, l’enfant, le couple*, 21st ed., Paris, PUF, 2002, p. 104.

to reach an agreement on the matter. If this fails, then the judge will decide the matter in the interests of the child, after having heard the child's opinion, if she/he is fourteen years of age or older. Only if there are powerful circumstances mitigating against this procedure it will not take place.

The concepts of "acts of normal importance" and "acts of particular importance" are open concepts,⁸ to be defined by jurisprudence or legal doctrine on a case by case basis.

Legal doctrine has put forward some criteria which may be used in these cases. Thus, in order to determine the *normal importance* of the act, attention should be given to the frequency with which it occurs in the daily life of the child, its relationship to all other acts normally undertaken, whether or not this act represents a marked break with prior practice, and whether it might influence the child's future in some decisive way.⁹ As for what should be understood by an *act of particular importance*, this would seem to argue in favour of a restricted interpretation of the concept,¹⁰ as proposed by Italian legal authors. Indeed, the only interpretation that properly conforms to the principle of the exercise of parental care through successive agreement with the minimal intervention of the State in the family is one which refers only to those acts that relate to the education and instruction of the child or that will seriously compromise the child's material and spiritual interests (in short, his/her future).

2.3. THE NEW FORM OF EXERCISING PARENTAL CARE AFTER A FAMILY BREAKDOWN

Whenever there is a family breakdown as a result of a divorce, a judicial separation of persons and the property of the spouses, a declaration of nullity or the annulment of a marriage, or a *de facto* separation of spouses or the ending of the relationship between unmarried parents although both parents remain holders of parental care, a new question arises: how to rearrange the exercise of parental care.

In fact, since the father and the mother no longer have a life in common, their situation does not permit them to agree on a daily basis about all those issues related to their child's person and property, especially about those major decisions concerning their

⁸ Cf. JACQUELINE RUBELLIN-DEVICHI, *op. cit.*, p. 693, CLAUDE LIENHARD, *Les nouveaux droits du père...après la loi du 4 mars 2002 réformant l'autorité parentale*, Paris, Éditions Dalloz, 2002, p. 30.

⁹ Cf. MARIA DE FÁTIMA ABRANTES DUARTE, *O Poder Paternal – Contributo para o Estudo do seu Actual Regime*, Lisboa, AAFDL, 1994, p. 161, FRANÇOIS TERRÉ/DOMINIQUE FENOUILLET, *op. cit.*, p. 877, CLAUDE LIENHARD, *op. cit.*, p. 30.

¹⁰ Cf. MICHELE SESTA, *op. cit.*, p. 233. In a similar way see MARIA CLARA SOTTOMAYOR, *Exercício do poder paternal (relativamente à pessoa do filho após o divórcio ou a separação de pessoas e bens)*, 2nd ed., Porto, Publicações Universidade Católica, 2003, pp. 505-506.

child's life (such as education, religious upbringing, medical treatment, administration of property, etc.) as they did when they were living together.

There are two main solutions for this problem; that is to say, there are two possible models for the new form of parental care after the breakdown of the family: sole custody or joint custody.¹¹

The main question is knowing which of these models is the most appropriate for the proper protection and promotion of the child's best interests (that is to say, his/ her fundamental rights, such as the right to freely develop one's personality and especially the right to grow up while maintaining a close relationship with both parents).¹² Therefore the discussion about sole or joint custody rights has to focus not on the parents' rights (the mother's or the father's rights) but on the child's rights.¹³

3. THE EVOLUTION OF THE PORTUGUESE LEGAL SYSTEM REGARDING CUSTODY MATTERS

3.1. THE 1966 CIVIL CODE

The 1966 Civil Code (like the 1867 Civil Code) did not establish a concrete solution as to how "parental power" was to be exercised after divorce, judicial separation, declaration of nullity or annulment of the marriage. This question was not expressly regulated by law, and in fact the Civil Code only mentioned that, in such situations, both parents would retain parental power and that it should be exercised by parental

¹¹ *Sole custody* is understood to be the exercise of the complex of rights, powers and duties involved in parental care exclusively by the parent that lives with the child; in other words, as it this parent alone who provides the daily care of the child, then only she/he may decide about questions of major importance related to the life of the child, with the other parent having only visitation rights and the power to control the education and living conditions of the child. *Joint custody* is understood as the exercise of the complex of rights, powers and duties involved in parental care by both parents together in conditions very similar to those which applied during their marriage or their life in common. Cf. ARMANDO LEANDRO, "Poder paternal: natureza, conteúdo, exercício e limitações. Algumas reflexões de prática judiciária", in: *Temas de Direito da Família*, Coimbra. Almedina, 1986, pp. 154-155, MARIA CLARA SOTTOMAYOR, *op. cit.*, pp. 61-63 and pp. 406-410, GÉRARD CORNU, *op. cit.*, pp. 648-849.

¹² Cf. VIRGINIA ZAMBRANO, "Interesse del minore ed affidamento congiunto. Esperienze europee a confronto.", *Diritto di famiglia e delle persone*, vol. XXIX, 2000, p. 1383.

¹³ Claiming the need for cultural change in family law practice so that children's rights can be taken more seriously, see NIGEL LOWE, "Children's participation in the family justice system – translating principles into practice", *Child and Family Law Quarterly*, vol. 33, No. 2, 2001, p. 155. In a similar way claiming a genesis of the concept of the 'good' post-separation child see FELICITY KANGANAS/ ALISON DIDUCK, "Incomplete citizens: Changing Images of Post-Separation Children", *The Modern Law Review*, vol. 67, No. 6, 2004, pp. 959 et seq.

agreement or, if that were not possible, by a court's decision. In that case, the court would award custody of the child to the mother and would maintain the rules concerning the exercise of parental responsibility during the marriage. Therefore, the regime of the exercise of "parental power" was not affected by the breakdown of the family.

In fact, both parents were entitled to hold "parental power" over their minor children. However, the law established some differences between the entitlement to parental power and the exercise thereof. The exercise of the powers that made up parental power was shared unequally between the father and the mother. According to the patriarchal, hierarchical and unequal conception of the family that inspired the legislator, the father was considered by law to be the "head of the family", and only he had the power to determine the residence of the child, to represent him/her, to administer his/her property and to decide on the child's education and professional instruction. The mother had the right to be heard and to participate in all matters concerning the child's interests: she therefore only had a 'consultative function'.¹⁴

In this way, the law created a division between custody and the exercise of parental power, as mothers usually obtained physical custody of the child while fathers retained all the abovementioned powers. Thus, the mother performed the principal role as regards the day to day upbringing of the child, but the father still had the traditional power to oversee the child's education and professional training, to represent the child in court and to administer his/her assets. This dissociation was criticised by most legal authors for not corresponding to the child's best interest. In fact, the father's intervention could produce a great deal of instability in the child's life.¹⁵

These authors argued that the mother, who generally obtained custody, was the parent who best knew the child's personality and needs, by virtue of the fact that she lived with him/her on a daily basis; consequently she was the parent who was in the best position to fulfil these needs. Therefore, it was argued, mothers should not only have custody of the child but also the exclusive right to exercise parental power over him/her.¹⁶

¹⁴ Cf. JORGE MIRANDA, "O poder paternal no Código de 1867 e no novo Código Civil: breve confronto", *Informação Social*, vol. II, n.º 8, 1967, pp. 79 et seq. and MOITINHO DE ALMEIDA, "O poder paternal no direito moderno: introdução", *Scientia Iuridica*, XVII, 1968, pp. 38-46.

¹⁵ Cf. MOITINHO DE ALMEIDA, "O poder paternal no direito moderno", *Jurídica*, XV, no. 107, 1969, p. 86.

¹⁶ Cf. MOITINHO DE ALMEIDA, "O poder paternal no direito moderno", *Jurídica*, XV, no. 107, 1969, p. 89.

3.2. THE 1977 REFORM OF THE CIVIL CODE

In 1977, the Reform of the Civil Code established a different rule, that of sole custody. The legislator decided to award custody to only one of the parents in cases of a divorce, a judicial separation of persons and property of the spouses, a declaration of nullity or the annulment of the marriage, or a *de facto* separation of spouses. There was now an almost total overlap between custody and the exercise of parental care.¹⁷ In fact, custody belonged exclusively to one of the parents, and all the other powers and duties included in the concept of parental care remained unilaterally and exclusively exercised by the custodial parent.¹⁸ The non-custodial parent was awarded visitation rights and the right to control the education and living conditions of his/her child.

The essential aim of the establishment of sole custody as a rule was to avoid conflicts between parents over the life, education and representation of the child and the administration of his/her property caused by the interference of the non-residential parent, thereby preventing instability in the child's life. In fact, in 1977 the legislator was operating on the principle that since the parents had been unable to agree about aspects of their life together while they were married or cohabiting, then they would be unable to agree about questions concerning the upbringing of their child following the divorce or separation.¹⁹ According to this line of thought, sole custody was the solution that best accomplished the purpose of serving the child's best interests. The problem that was now faced, in both litigious and consensual situations, was that of determining which parent should be awarded custody in the child's best interest. However, this model proved inadequate²⁰ in terms of protecting and promoting the best interests of the child, in particular with regard to the right to grow up while maintaining contact with both parents.²¹ This right seems to be grounded in the constitutional principle of the inseparability of children from their parents (Article 36, No. 6 of the Portuguese Constitution), which establishes the child's right not to be separated from his/her parents, save in exceptional circumstances (such as when the parents do not fulfil their fundamental duties towards their child) – in other words,

¹⁷ Cf. MARIA DE FÁTIMA ABRANTES DUARTE, *op. cit.*, p. 172, MARIA CLARA SOTTOMAYOR, *Exercício do poder paternal (relativamente à pessoa do filho após o divórcio ou a separação de pessoas e bens)*, 2nd ed., Porto, Publicações Universidade Católica, 2003, pp. 61-62.

¹⁸ Cf. MARIA CLARA SOTTOMAYOR, *op. cit.*, p. 59.

¹⁹ Cf. MOITINHO DE ALMEIDA, "Efeitos da filiação", in: *Reforma do Código Civil*, Lisbon, Ordem dos Advogados, 1981, p. 158, MARIA DE FÁTIMA ABRANTES DUARTE, *op. cit.*, pp. 178-179, MARIA CLARA SOTTOMAYOR, "The introduction and Impact of Joint Custody in Portugal", *International Journal of Law, Policy and the Family*, vol. 13, No 3, 1999, pp. 249-250, MARIA CLARA SOTTOMAYOR, *Exercício do poder paternal (relativamente à pessoa do filho após o divórcio ou a separação de pessoas e bens)*, 2nd ed., Porto, Publicações Universidade Católica, 2003, pp. 62-63.

²⁰ Cf. HUGUES FULCHIRON, "Les relations parents-enfants dans le nouveau droit français de l'autorité parentale (loi n.º 87-570 du 22 juillet 1987)", *Revue de Droit Familial*, 3, 1988, pp. 404-405.

²¹ *Ibid.*

the right of the child to grow up while maintaining a close relationship with both parents.²² This right is also established in the Convention on the Rights of the Child, as adopted by the United Nations General Assembly on 20th November 1989,²³ where in its Article 9 No.1 and in its Article 18 it is stated that “states shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.” Continued and frequent contact with both parents promotes a closer relationship between them and the child, which is essential to the emotional and psychological development of the child whose parents have experienced a separation.²⁴

3.3. LAW 84/95 OF 31ST AUGUST AND THE INTRODUCTION OF JOINT CUSTODY

This perspective on the child's interest was introduced into the Civil Code in 1995 by law 84/95 of 31st August. This law brought about two main changes to the regulation of parental responsibility after divorce. Firstly, it determined that the best interest of the child in cases of a family breakdown also consisted of maintaining a close relationship with both parents, especially with the non-residential parent. Secondly, it introduced the possibility of an agreement between the parents stipulating joint custody or that some matters related to their child's person or property could be decided jointly by both parents.

Although it introduced the possibility of the joint exercise of parental responsibility after divorce, this law did not change the rule of sole custody. Joint custody was seen as an exceptional solution for those exceptional cases in which parents were able to separate their own conflict as ex-spouses from their roles as parents and who were able to respect and trust each other, to collaborate with each other in their child's education when both had a close relationship with their child.

²² On this subject, but with regard to Italian law, see MASSIMO DOGLIOTTI, “L'interesse dei figli nella separazione (a proposito di una ricerca interdisciplinare)”, *Diritto di Famiglia e delle Persone*, XIX, 1990, p. 221.

²³ This Convention was approved and ratified by Portugal in the Resolution of the Assembly of the Republic, No. 20/90, and the Order from the President of the Republic, No. 49/90, both published in the *Diário da República* No. 211/90, Series I, 1st Supplement, on 12th September 1990.

²⁴ On this see ANNAMARIA DEEL' ANTONIO, “Criteri per l'affidamento dei figli nelle separazione giudiziali”, *Diritto di Famiglia e delle Persone*, XIX, 1990, p.233, MICHELE GIROUX, “Le partage des responsabilités parentales après une rupture: rôle et limites du droit”, in: PETER LØDRUP and EVA MODVAR (eds) *Family life and human rights*, Oslo, Gyldendal Norsk Forlag, 2004, pp. 251-252.

3.4. LAW 59/99 OF 30TH JUNE AND THE PREFERENCE FOR JOINT CUSTODY

In 1999, a bill was placed before Parliament that proposed the establishment of the principle of joint custody as a rule. According to this, the new form to be taken by the exercise of parental care after divorce would be joint custody, unless the parents did not agree to that possibility.

The final version of the law (law 59/99 of 30th June) was, however, less innovative than the bill. In fact, this law does not establish joint custody as a rule. Joint custody depends on an agreement between the father and the mother in this respect. If both parents do not agree to the joint exercise of parental responsibility, then the right of custody and the exercise of all other rights and duties related to the child's person and property will be awarded to only one of the parents as sole custody.

Although Portuguese law does not stipulate joint custody as a rule in cases of divorce, etc., one can say with certainty that joint custody is given preference.²⁵ In fact, the first possibility that the law presents to the parents when they are deciding on custody rights is joint custody. Only if they do not reach an agreement in this respect can the court award sole custody to either the mother or the father.

4. SOLE OR JOINT CUSTODY?

Portuguese law has demonstrated its preference for joint custody without imposing it. However, it does not choose between the two mentioned custody models. It does not impose a single model for the regulation of parental responsibility following a family breakdown.

The problem that is now faced is that of knowing which of the custodial models (sole or joint custody) is in the best interests of the child. The solution to this question requires a consideration not only of legal criteria, but also of psychological, sociological and other factors.

²⁵ See also PAULO GUERRA, "Mediação Familiar e o Tribunal", *Infância e Juventude*, no. 4, 2004, pp. 46-47. For a different opinion, see MARIA CLARA SOTTOMAYOR, *Exercício do poder paternal (relativamente à pessoa do filho após o divórcio ou a separação de pessoas e bens)*, 2nd ed., Porto, Publicações Universidade Católica, 2003, p. 481 and ff., especially, p. 483.

4.1. THE PREFERENCE FOR JOINT CUSTODY

Some psychological and sociological studies point out that divorce and other situations of family breakdown, especially when children are involved, are never easy.²⁶ However, these studies also claim that divorces can either be successful or not so. A divorce can be considered successful when, from the perspective of the children, they do not feel themselves to be part of the conflict between their parents.²⁷ In a so-called successful divorce, parents demonstrate that they are able to solve their own conflicts without involving their children. In this way, they show their children that their relationship as parents continues and survives the family breakdown and that the parental community still exists.²⁸ This will permit the children to overcome some of the psychological and even social problems related to their parents' separation.

In fact, divorce or other situations of family breakdown are less traumatic for children when parents are not in disagreement over the children, when they agree to share parental responsibility after divorce and to promote continued and frequent contact with both parents.

Joint custody makes possible the continued contact of the child with both parents in order to establish a close relationship with both of them and it permits the child to experience the different personalities of his/her parents and their different views.

4.2. THE LEGAL MEANING OF JOINT CUSTODY

Joint custody permits both parents to exercise parental care together after divorce just as they did during their marriage. In fact, both the father and the mother continue not only to hold parental responsibility but also to exercise it on an equal basis. Both exercise the cluster of rights and duties that the legal system confers on them. Thus, they are expected, in the interest of their child, to take care of all aspects relating to the person and property of the child, such as maintenance, health, safety, education, the legal representation and administration of the child's property (Article 1878, No. 1 of the Portuguese Civil Code).

²⁶ E.g. MARIA DA CONCEIÇÃO TABORDA SIMÕES/MARIA DO ROSÁRIO SOUSA ATAÍDE, "Conflito parental e regulação do exercício do poder paternal: da perspectiva jurídica à intervenção psicológica", *Psychologica*, 26, 2001, J. S. WALLERSTEIN/T. J. TANKE, "To move or not to move: psychological and legal considerations in the relocation of children following divorce", *Family Law Quarterly*, 30, 2, 1996, E. M. HETHERINGTON; M. STANLEY-HAGAN/E. R. ANDERSON, "Marital transitions: a child perspective", *American Psychologist*, 44, 1989.

²⁷ Cf. MARIA DA CONCEIÇÃO TABORDA SIMÕES/MARIA DO ROSÁRIO SOUSA ATAÍDE, *op. cit.*, p. 241.

²⁸ Cf. HUGUES FULCHIRON, *op. cit.*, p. 405, MARIA ROSA GRIMALDI, "Affidamento congiunto e alternato della prole tra psicologia e diritto", *Diritto di Famiglia e delle Persone*, XVII, 1989, p. 307.

The joint exercise of parental responsibility after divorce, however, cannot involve a daily agreement about all these matters. An adaptation of this regime is needed.²⁹ In fact, parents only have to exercise parental responsibility jointly in relation to those matters of major importance concerning their child's life. Joint custody means that the major decisions affecting the child's life have to be taken by both parents. All other acts (the so-called acts of normal importance related to the daily care of the child) can only be exercised by the parent with whom the child is living.

If parents are unable to agree on matters of particular importance then either parent may apply to the courts to solve the problem (Article 1901, No. 2, *in fine* of the Portuguese Civil Code).³⁰

It follows from this that, in an abstract way, the joint custody model presents itself as the model that the law should prefer. In fact, such a legal preference is more in harmony with the consideration of the child's best interests³¹ and with the protection and promotion of his/her fundamental rights, particularly the child's fundamental right not to be separated from his/her parents as established in the Portuguese Constitution. It also promotes his/her right to freely develop one's personality, especially the right to grow up in close contact with both parents.

4.3. TO A CERTAIN EXTENT THERE IS NO PERFECT MODEL TO BE APPLIED IN ALL CASES OF FAMILY BREAKDOWN

As regards the choice of the custodial model, legislators should take into consideration that the legal model should be sufficiently flexible to permit its application to all social and family situations, including those that are more suited to the joint custody model and those that are not and will never be (such as situations where there has been domestic violence or the sexual abuse of the child).³²

Although joint custody appears to be the preferable model in an abstract way, the fact remains that there are no perfect solutions to apply to all cases of regulating the regime

²⁹ Cf. MARIA CLARA SOTTOMAYOR, *Exercício do poder paternal (relativamente à pessoa do filho após o divórcio ou a separação de pessoas e bens)*, 2nd ed., Porto, Publicações Universidade Católica, 2003, p. 496 et seq.

³⁰ *Supra* p. 5.

³¹ KIRSTI KURKI-SUONIO, "Joint custody as an interpretation of the best interests of the child in a critical and comparative perspective", *International Journal of Law, Policy and the Family*, 14, 2000, pp. 184, 187. This author also states that the preference of joint custody as the custodial model is linked to the principle of a minimum intervention of the State in family matters.

³² For this idea see MICHELE GIROUX, *op. cit.*, p. 262.

for exercising parental responsibility after divorce or in other situations of family breakdown. The choice as to which model should apply always focuses on the child's best interests as the decisive criterion, not only in an abstract way by the legislator, but also in concrete circumstances by the court.

In fact, Portuguese law has felt the need to protect and promote the child's best interests in cases of regulating the new regime of the exercise of parental responsibility after divorce, the legal separation of the spouses, and a declaration of nullity or the annulment of a marriage, and in a *de facto* separation between spouses, because of their particular consequences for the child. According to Portuguese law, it is the child's best interests that are promoted in the custodial processes. These are the criteria that will guide the judge's decision as to whether or not to ratify the parents' agreement about the new form that the exercise of parental responsibility will take or to reach his own decision as to which custodial model he should choose in the event that the parents are unable to agree upon the matter.

The law does not define the abovementioned concept, nor does it offer any specific criteria for its definition. The child's best interest is therefore an open concept. Despite the difficulty that most legal authors have in defining this concept, it is particularly expressive and acquires specific shades of meaning when referring to the special circumstances of a particular child.³³ The child's best interests is therefore a cultural notion, dependent upon the system of values in force at a given time in a specific society, concerning the person of the child, his/her material and emotional needs, and the conditions necessary for his/her development. Thus, the notion can only be specified with reference to those values and by means of a systematic interdisciplinary study of the child's real-life situation.

Today, the child is considered to be a person, a holder of fundamental rights, who acquires progressive autonomy as he/she grows in maturity. One of the recognized fundamental rights of the child is the right to freely express his/her opinions and to have these opinions taken into account in all the issues related to his/her life, that is to say the right to take part in all the decisions that can affect his/her future. One such decision is precisely the regulation of the exercise of paternal responsibility after a family breakdown.

Therefore the choice of a new way of exercising parental care after divorce has to actively involve the child in the decision-making process.³⁴ This choice, as well as all

³³ Cf. MASSIMO DOGLIOTTI, *op. cit.*, p. 221.

³⁴ JAN PRYOR, "Adolescent attitudes toward living arrangements after divorce", *Child and Family Law Quarterly*, vol. 13, No. 2, 2001, pp. 197 et seq., Nigel Lowe, *op. cit.*, pp. 137 et seq.

the questions related to this new exercise of parental care, must focus on the child's best interests, especially on his/her right to freely develop his/her personality, and not on the rights or interests of parents.

However, how can we achieve this objective when the parents are in conflict?

4.4. THE INTERVENTION OF SOCIAL/PSYCHOLOGICAL COUNSELLING OR MEDIATION SERVICES

After a divorce or any other kind of family breakdown, the persons involved generally experience a painful and sometimes traumatic situation characterised by a high level of conflict.³⁵ The relationship between the ex-spouses is sometimes a hostile one. In fact, the parents usually concentrate on themselves and forget their children's interests and rights. This parental conflict seriously compromises any possibility of deciding about their child's best interests, that is to say, of promoting the psychological, emotional, material and social conditions which are essential for the free development of the child's personality.³⁶

This obstacle is not, however, decisive. With the help of social or psychological counselling or mediation services it is possible to make conflicting parents understand the difference between their own problems as ex-spouses and their role as parents.³⁷ It is possible to establish a communicative and cooperative relationship between the parents that will permit them to come to some kind of agreement about the issues regarding their child's life, that is to say, about the issue of the joint exercise of parental responsibility.

5. CONCLUSION

According to what has been previously said, the law should demonstrate its preference for the joint custody model, as this model seems to be the one that best serves the interests of the child in the abstract, considering the child as a person in his/her own right, distinct from the persons of the parents, as a holder of a right to freely develop his/her personality. This last right acquires a special concrete definition in cases of parental separation: the right of the child to grow up while maintaining frequent and

³⁵ Cf. MARIA DA CONCEIÇÃO TABORDA SIMÕES/MARIA DO ROSÁRIO SOUSA ATAÍDE, *op. cit.*, p. 235.

³⁶ Cf. MARIA DA CONCEIÇÃO TABORDA SIMÕES/MARIA DO ROSÁRIO SOUSA ATAÍDE, *op. cit.*, pp. 235-236.

³⁷ Cf. CONCEIÇÃO TABORDA SIMÕES/MARIA DO ROSÁRIO SOUSA ATAÍDE, *op. cit.*, p. 239.

continued contact with both parents and consequently a close relationship with both of them.

The concrete realisation of the interests of each child involved in a paternal responsibility process involves not only the formulation of legal decisions and the application of legal criteria and rules, but goes beyond this. We have to recognise the limits of the law.³⁸ The solution to this problem necessarily involves the resolution of non-legal conflicts,³⁹ for only in this way will the effective resolution of a legal conflict become viable.⁴⁰

Furthermore, the State should promote all the material conditions for the parents to reach an agreement⁴¹ in order to be able to exercise parental responsibility jointly. This may involve encouraging the use of social or psychological counselling or mediation services in order to help the parents to distinguish their own problems as ex-spouses from their role as the parents of a child, thereby helping them to communicate and cooperate on all matters related to their child's life.

However, this model should not be imposed. In fact, joint custody is not feasible in all circumstances. In some cases it is not possible to pretend that parents can act jointly because their relationship reveals a high level of conflict. In those cases the best interests of the child requires the application of the other model: sole custody.

The choice of model for the exercise of parental responsibility after a family breakdown must take account of all the circumstances of the concrete situation and aim to serve the best interests of the particular child involved. The best choice can only be made on a case by case basis (that is to say, with a face to face encounter with the child), since there are as many different interests as there are children.

³⁸ On this idea see MARIA DA CONCEIÇÃO TABORDA SIMÕES/MARIA DO ROSÁRIO SOUSA ATAÍDE, *op. cit.*, p. 239, MICHELE GIROUX, *op. cit.*, p. 259.

³⁹ These conflicts usually underlie the legal conflict that is brought to court.

⁴⁰ Cf. ANTÓNIO FARINHA/CONCEIÇÃO LAVADINHO, *Mediação Familiar e Responsabilidades Parentais*, Coimbra, Almedina, pp. 36-37.

⁴¹ On this see MICHELE GIROUX, *op. cit.*, pp. 259- 263.

PART THREE: INFORMAL LONG-TERM RELATIONSHIPS

FINANCIAL COMPENSATION UPON THE ENDING OF INFORMAL RELATIONSHIPS – A COMPARISON OF DIFFERENT APPROACHES TO ENSURE THE PROTECTION OF THE WEAKER PARTY

SABINE AESCHLIMANN

1. INTRODUCTION

The socio-demographic data which mark today's society in industrial Western countries are well known: the divorce rate is rising and, simultaneously, there is a general decrease in the number of marriages. As a consequence thereof, developments such as a growing number of children born out of wedlock, a growing number of different family forms like single-parent families or stepfamilies can be noticed. In addition, unmarried cohabitation is continually increasing and in some countries is so well developed that it is regarded as an alternative to marriage.¹

Family law – as a reflection and at the same time as part of the developments occurring within society – could not ignore these trends and has undergone profound changes during the past 40 years. The developments within family law have been, with minor time delays, surprisingly uniform² and the phrase “uniform law through evolution” has been coined.³ Beyond the fundamental reforms a certain common tendency, which can be circumscribed as a move away “from status towards contract and relations”

¹ I. SCHWENZER, ‘The Evolution of Family Law’, *European Journal of Law Reform* 3 (2001), p. 200.

² For a comparative law overview compare, for example, A. BÜCHLER, ‘Das Scheidungsverfahren in rechtsvergleichender Sicht’, in: R. VETTERLI (Ed.), *Auf dem Weg zum Familiengericht*, Bern 2004, p. 19 et seq.; Switzerland and Austria are seen as latecomers, compare I. SCHWENZER, ‘The Evolution of Family Law’, *European Journal of Law Reform*, 3 (2001), p. 199.

³ Compare already G. LUTHER, ‘Einheitsrecht durch Evolution im Eherecht und im Recht der eheähnlichen Gesellschaft’, 45 *RebelsZ*, 1981, p. 253.

can be identified.⁴ In general, family law provisions have become less oriented towards status and focus on how people actually live rather than on the external formal character of the relationship.

With this background in mind, it is not surprising that unmarried cohabitation between both homosexual and heterosexual couples has increasingly become the object of legal regulations in recent years.

2. THE PURPOSE AND AIM OF THIS PAPER

The following analysis concentrates on one difficulty surrounding informal partnerships: The approach of different legal systems in granting financial compensation and ensuring the protection of weaker parties at the end of the relationship will be investigated more closely. The response of different jurisdictions in dealing with this issue has varied. Essentially three approaches have developed over the years and can be distinguished today: Some legal systems do not have any statutory provisions concerning informal relationships at all; others have enacted a special registration system and require the entry of the partnership in a public register before granting financial compensation and, finally, some legal orders have introduced statutory regulations which take the individual circumstances of the relationship as the starting point for legal consequences.

To illustrate the differences between and the difficulties involved in these three approaches the focus will be on the contrasting situation under Swiss, Scandinavian, French and New Zealand law. However, the scope of this paper only allows an examination of the questions surrounding what is called “the core” financial issues, namely the division of property, maintenance and pension rights. Other relevant financial questions – such as, for example, the rights of succession – cannot be discussed. For the purpose of this paper, it is assumed that the partners have not concluded a private agreement on the financial consequences at the end of their relationship.

⁴ Compare already I. SCHWENZER, *Vom Status zur Realbeziehung*, Baden-Baden, 1987.

3. LEGAL ORDERS WITHOUT A STATUTORY REGIME

3.1. THE PRESENT SITUATION IN SWITZERLAND

The situation in Switzerland⁵ will be used to illustrate how the issue of financial compensation is dealt with in a legal system without the statutory recognition of unmarried cohabitation.⁶

In 1990 about ten percent of the Swiss population were already living in unmarried partnerships; since then the number has increased.⁷ Despite this, the legislator has not considered legal regulations concerning this group of persons to be necessary until now.⁸ As marriage is nowadays still the only form of cohabitation for which statutory regulations exist, a considerable part of the Swiss population fall between a “gap” in written rules. This explains the criticism expressed by scholars that the current Swiss family law is, to a certain extent, failing its objective.⁹ Considering the situation for the growing number of unmarried couples this reproach seems to be justified.

3.2. PROTECTION GRANTED BY THE COURTS

The absence of any statutory regime in Switzerland delegates to the Courts the entire responsibility to grant any appropriate financial compensation at the end of a relationship. Three main solutions have been discussed in this context: Either to deny any financial compensation, to apply the law of marriage and divorce by analogy, or to apply rules from other areas of the law. Up until the 1970s unmarried cohabitation

⁵ A similar situation, however, can be found in many other European countries particularly for heterosexual unmarried couples. For example, in Austria, England & Wales, Germany, Greece, Ireland, Italy, Norway, Portugal, Scotland, Spain – compare for an overview C. HAMILTON/A. PERRY (Eds.), *Family law in Europe*, London, 2002, at p. 30, 156, 322, 357, 396, 433, 517, 540, 581, 616. In contrast to the situation for heterosexual couples, the number of statutory provisions concerning same-sex couples has exploded in the last 30 years, compare R. WINTMUTE/M. ANDENÆS (Eds.), *Legal Recognition of Same Sex Partnerships – A Study of National, European and International Law*, Oxford/Portland Oregon 2001.

⁶ With regard to same-sex couples an Act introducing a registration system has been drafted. The Act is expected to enter into force in 2006; see also footnote 26 below.

⁷ Bundesamt für Statistik, *Statistisches Jahrbuch der Schweiz 2003*, Zürich, 2003, p. 42.

⁸ In 1997, the Swiss Parliament refused, for the last time, to introduce statutory provisions concerning unmarried partners, compare I. SCHWENZER, *Praxiskommentar Scheidungsrecht*, Basel/Geneva/Munich, 2000, p. 11.

⁹ A. BÜCHLER, ‘Familienrecht der Zukunft’, in: R. VETTERLI (Ed.), *Auf dem Weg zum Familiengericht*, Bern, 2004, p. 49.

was considered to be immoral and illegal in Switzerland.¹⁰ Accordingly, the Federal Supreme Court emphasised in its earlier case law that “partners in such a relationship (...) do not enjoy legal protection”.¹¹ This position, however, is mainly considered to be old-fashioned today.¹² In a later decision the Federal Supreme Court acknowledged that denying any legal protection to unmarried partners would be a “failure of the legal system” with respect to a common way of living.¹³ Nevertheless, there would appear to be a rather broad agreement in Switzerland that the equal treatment of married and unmarried couples is excluded and that the law of marriage and divorce cannot be applied by analogy to unmarried cohabitation.¹⁴ The Federal Supreme Court therefore follows a differentiated approach today and applies, where protection is necessary, legal rules from other areas of the law. With regard to financial compensation upon the ending of a relationship, the Court accepted that, under certain conditions, principles of company law relating to partnerships may apply – not in general – but only with regard to individual financial assets commonly acquired during the relationship.¹⁵

In its case law the Federal Supreme Court refers to unmarried cohabitation as a “living community between two people of different sex”.¹⁶ This old-fashioned definition – which is still authoritative today – implicitly excludes same-sex partnerships. Fortunately the definition is not decisive for the applicability of the principles of company law;

¹⁰ Up to 1995 unmarried cohabitation was – according to the law of some Swiss Cantons – even prohibited and punishable. Compare A. BÜCHLER, ‘Vermögensrechtliche Probleme in der Nichtehelichen Lebensgemeinschaft’, in: A. RUMO-JUNGO/P. PICHONNAZ (Eds.), *Familienvermögensrecht*, Bern, 2003, p. 62.

¹¹ BGE 97 I 389 at p. 407. It was argued that people who do not marry do not wish to be protected by the law.

¹² I. SCHWANDER, ‘Sollen eheähnliche und andere familiäre Gemeinschaften in der Schweiz gesetzlich geregelt werden?’ *Allgemeine Juristische Praxis (AJP)* 1994, p. 926 et seq. – who already argued that statutory rules concerning unmarried couples should be established in Switzerland; see also A. RUMO-JUNGO/P. LIATOWITSCH, ‘Nichteheliche Lebensgemeinschaft: Vermögens- und kinsrechtliche Belange’, *Die Praxis des Familienrechts (FamPra.ch)* 2004, p. 900.

¹³ BGE 108 II 204 at p. 207.

¹⁴ BGE 108 II 204 at p. 206; C. HEGNAUER/P. BREITSCHMID, *Schweizerisches Eherecht*, Bern, 2000, marg. No. 2.27; R. DUSSY, *Ausgleichsansprüche für Vermögensinvestitionen nach Auflösung von Lebensbeziehungen nach deutschem und schweizerischem Recht*, Diss., Basel 1994, p. 46 et seq.; H. HAUSHEER/TH. GEISER/E. KOBEL, *Das Eherecht des schweizerischen Zivilgesetzbuches*, 2. Ed., Bern, 2002, marg. No. 03.29; This view is sustained by arguments such as that unmarried partners have precisely decided not to be subject to marriage law and, further, that the diversity of possible forms of unmarried cohabitation would not fit under a unified solution; different: B. PULVER, *Unverheiratete Paare, Aktuelle Rechtslage und Reformvorschläge*, Diss., Basel, 2000, p. 16.

¹⁵ A. BÜCHLER, ‘Vermögensrechtliche Probleme in der Nichtehelichen Lebensgemeinschaft’, in: A. RUMO-JUNGO/P. PICHONNAZ (Eds.), *Familienvermögensrecht*, Bern, 2003, p. 80.

¹⁶ BGE 109 II 15 et seq.

homosexual and heterosexual couples would therefore be treated equally in this context.¹⁷

The applicability of company law principles rather requires that partners pursue a “common purpose with joint forces or means”.¹⁸ This implies that partners must have a will to be legally bound. Whether such a will exists – and as a result company law rules apply – must be examined individually for each financial asset in question. A common ‘household purse’, common acquisitions or a common business, to which both partners have contributed with financial or other means, may be indications in favour of the existence of a company. If the court is satisfied that company law can be applied, the equal sharing of earnings and losses will result, regardless of the type and scope of the contribution which each partner has made during the partnership.¹⁹

3.3. DEFICIENCIES CAUSED BY THE ABSENCE OF STATUTORY RULES

The approach of applying company law appears at first glance to offer a just and tolerably clear way of tackling the property disputes of unmarried couples with regard to individual financial assets commonly acquired during the partnership. Since earnings and losses arising from these assets are shared equally, regardless of the type and scope of the contributions which each party has made during the partnership, the Swiss approach even allows for a certain compensation of unpaid housework.

Nevertheless, the extent of the protection which company law principles are able to grant may only be sufficient for short-term relationships with a minimum of mutual interdependence. Particularly in more complex – typically long-term – relationships, the fact that company law was originally not intended to be applied to unmarried couples can no longer be hidden.

Difficulties start where one partner accumulates significant private assets for his or her private purposes. Under the current system equal sharing can be avoided if, for a particular asset, no connection to a common purpose can be established.²⁰ In

¹⁷ H. HAUSHEER/TH. GEISER/E. KOBEL, *Das Eherecht des schweizerischen Zivilgesetzbuches*, 2. Ed., Bern, 2002, marg. No. 03.03; A. BÜCHLER, ‘Vermögensrechtliche Probleme in der Nichteelichen Lebensgemeinschaft’, in: A. RUMO-JUNGO/P. PICHONNAZ (Eds.), *Familienvermögensrecht*, Bern, 2003, p. 66.

¹⁸ Art. 520 OR.

¹⁹ Art. 533 Abs. 1 OR.

²⁰ A. BÜCHLER, ‘Vermögensrechtliche Probleme in der Nichteelichen Lebensgemeinschaft’, in: A. RUMO-JUNGO/P. PICHONNAZ (Eds.), *Familienvermögensrecht*, Bern 2003, p. 81.

addition, company law does not provide a legal basis for the compensation of contributions which one partner has made to an asset that belongs – according to the law of possession – to the other party. In this situation, the principles of unjust enrichment may be the last resort.

The problems become even worse when the particularities of family law disputes appear and future aspects come into play. If one party suffers partnership-related disadvantages which indicate mutual obligations exceeding the relationship, company law rules, which relate to past events, rather than the future, deny appropriate protection for weaker parties.²¹

An example should illustrate this difficulty: In a long-term informal relationship that operated according to the classical division of functions – the woman cared for the children and did the unpaid housework, while the man earned the money – there is no legal basis to compensate the woman for the fact that her career has been put on hold during the upbringing of the children.²² The principles of company law neither provide a legal basis for ongoing maintenance obligations between partners, nor for the division of pension rights. Although a private agreement concerning ongoing maintenance is possible and recommended, particularly when children are born,²³ a private contract on the division of pension rights is not a solution: it would not be legally enforceable, because the assets lie in the hands of a third party.²⁴

This leads to the conclusion that at least where partnership-related disadvantages occur – and this may regularly happen when children are born – reforms introducing statutory regulations are indeed necessary.

²¹ A. BÜCHLER, 'Vermögensrechtliche Probleme in der Nichtehelichen Lebensgemeinschaft', in: A. RUMO-JUNGO/P. PICHONNAZ (Eds.), *Familienvermögensrecht*, Bern, 2003, p. 84 et seq.; already I. SCHWANDER, 'Sollen eheähnliche und andere familiäre Gemeinschaften in der Schweiz gesetzlich geregelt werden?', *Allgemeine Juristische Praxis (AJP)* 1994, 925; similar also E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, 2. Ed., Vienna, 2001, p. 47 et seq.

²² The same situation exists, for example, in Austria, compare E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, 2. Ed., Vienna, 2001, p. 43; Germany, compare H. GRZIWOTZ, *Nichteheliche Lebensgemeinschaft*, 3. Ed., Munich, 1999, p. 393 et seq., p. 432 et seq.; as well as in many other European countries, see also footnote 5 above.

²³ P. PICHONNAZ, 'Conventions et couples concubins', *Die Praxis des Familienrechts (FamPra.ch)* 2002, p. 678; E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, 2. Ed., Vienna, 2001, p. 26.

²⁴ A. BÜCHLER, 'Vermögensrechtliche Probleme in der Nichtehelichen Lebensgemeinschaft', in: A. RUMO-JUNGO/P. PICHONNAZ (Eds.), *Familienvermögensrecht*, Bern, 2003, p. 72; for Germany compare H. GRZIWOTZ, *Nichteheliche Lebensgemeinschaft*, 3. Ed., Munich, 1999, p. 432.

4. A REGISTRATION SYSTEM FOR UNMARRIED COHABITATION

4.1. THE EXPANDING OF REGISTRATION SYSTEMS

As mentioned, many – particularly European – jurisdictions have responded to the increasing number of people living in unmarried partnerships with the introduction of a “contracting-in system.”²⁵ The extent of the legal protection depends upon entering the relationship in a public register. Although the precise consequences of registering a partnership may vary from country to country, in general a registered partnership attracts many of the same consequences as marriage.²⁶

With a few exceptions, registration is only open to same-sex couples. A well known exception exists in France, where a “Pacte Civil de Solidarité” (in short: “PACS”) can be concluded between two adult individuals of different sexes or of the same sex.²⁷ Registration is also open to heterosexual as well as homosexual couples in the Netherlands, Belgium and parts of Spain.²⁸

4.2. EXPERIENCES WITH THE “CONTRACTING-IN” APPROACH

Nevertheless, the problem associated with a registration system is that it only caters for some of the people affected: Data reported from Scandinavia shows that only a minority of same-sex partners actually make use of the possibility to register their partnership.²⁹ In Sweden, for example, between five and ten percent – i.e. at least 450,000 people – of the total population of almost nine million are estimated to be

²⁵ For example: Denmark (1989), Norway (1993), Sweden (1994), Iceland (1996), the Netherlands (1997), Belgium (1998), Spain (Catalonia 1998, Aragon 1999), Germany (2001), Finland (2002).

²⁶ An Act to enable same-sex couples to register their partnership has also been drafted in Switzerland. With regard to financial compensation the deficiencies of the current system could be eliminated to a large extent. The Act contains a legal basis for maintenance obligations (Art. 36) as well as for the division of pension rights (Art. 35). For a detailed discussion of the financial provisions in the Swiss Act compare PH. GREMPER, ‘Vermögensrechtliche Wirkungen der eingetragenen Partnerschaft’, *Die Praxis des Familienrechts (FamPra.ch)* 2004, p. 475 et seq.

²⁷ Art. 515-1 Code Civil.

²⁸ Compare W. PINTENS, ‘Partnerschaft im belgischen und niederländischen Recht’, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2000, p. 69 et seq.; see for the difficulties resulting in the Netherlands from the possibility to convert a marriage into a registered partnership and vice versa, I. SUMNER, ‘Dissolution of Registered Partnerships: Excursion in Conversion’, *International Family Law* 2004, p. 231.

²⁹ M. JÄNTERÄ-JAREBORG, ‘The Experiences with Registered Partnerships in Scandinavia’, *Die Praxis des Familienrechts (FamPra.ch)* 2004, p. 577 et seq.

homosexual.³⁰ Despite this, at the end of last year only a total of 3,440 persons had entered their partnership in the register. Similar data was reported from other Scandinavian countries.³¹ The majority of unregistered partnerships are subject to a system that is often similar to the situation in Switzerland, with only sporadic statutory regulations and no legal basis to compensate partnership-related disadvantages.³² A registration system does therefore not prevent discussion about the necessity of further protection for weaker partners.

In addition, considering the trend of recent family law reforms to change the focus from the legal “status” to the substance of the relationship itself, a registration system once again giving priority to the legal status over and above the true nature of the relationship may be misguided.

5. UNIFIED APPROACH

5.1. THE SITUATION IN NEW ZEALAND: THE RELATIONSHIP ITSELF AS THE STARTING POINT FOR FINANCIAL CONSEQUENCES

Some Anglo-American countries, particularly New Zealand, have developed – with regard to financial consequences at the end of a relationship – a different, rather progressive “contracting-out” approach.³³ In 2002, New Zealand renamed the existing Matrimonial Property Act as the Property Relationship Act.³⁴ At the same time new statutory rules were introduced, which take the criteria of the individual relationship as the starting point for any financial consequences. Regardless of the legal status, the new law generally provides for an equal share of the relationship property at the end

³⁰ M. JÄNTERÄ-JAREBORG, ‘The Experiences with Registered Partnerships in Scandinavia’, *Die Praxis des Familienrechts (FamPra.ch)* 2004, p. 587.

³¹ For example, from Denmark: of the total number of about 5 million inhabitants, it is assumed that approximately five per cent of the population are purely homosexual (250,000 persons). From the 1st of January 1990 to the 1st of January 1998, only a total of 4,337 persons (around 2,168 partnerships) had registered their partnerships, compare: I. LUND-ANDERSEN, ‘The Danish Registered Partnership Act, 1989’, in: R. WINTEMUTE/M. ANDENÆS (Eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford/Portland Oregon, 2001, p. 419.

³² In Sweden, for example, the Cohabitees (Joint Home) Act which, according to the Unisex Act, also applies to non-registered homosexual couples provides for an equal share of the value of the home and household goods. There is, however, no legal duty to maintain a cohabitee, compare C. HAMILTON/C. PERRY (Eds.), *Family Law in Europe*, Bath, 2002, 656.

³³ The New Zealand provision is modelled on s 4 of the New South Wales Property Relationships Act, 1984. See for a comparison of the situation in Australia and New Zealand I. KENNEDY, ‘The Legal Position of Cohabitees in Australia and New Zealand’, *International Family Law*, 2004, 238.

³⁴ Property (Relationship) Amendment Act 2001, which entered into force on 1 February 2002.

of a partnership.³⁵ The adoption of this system has allowed the distinctions between married, unmarried, homosexual and heterosexual couples to be abolished to a large extent.³⁶

5.2. THE SCOPE OF THE STATUTORY RULES WITH REGARD TO UNMARRIED COUPLES

In contrast to married couples, the scope of the “equal-sharing rule” is, with regard to informal relationships, limited by the statutory definition of a “de facto” relationship, as well as a time element:

5.2.1. *Limitation by the Statutory Definition of “De Facto – Partnership”*

According to the definition in the Act, three hallmarks are characteristic of a “de facto” partnership: The relationship must, firstly, be between two persons aged 18 years or older; secondly, the partners must not be married to each other but, thirdly, they must live together as a couple.³⁷ In applying this definition, the court is invited to make an overall assessment of the individual relationship and to take into account a non-exclusive list of nine circumstances which is set out in the Act and contains criteria such as “the degree of mutual commitment to shared living” or the “duration of the relationship.”³⁸

This definition implicitly excludes several categories of associations between people from the scope of the Act:³⁹ a mother living with a child, or siblings living together are just as unlikely to be considered as “de facto” partners as boyfriend/girlfriend relationships where the parties live independent lives and do not cohabit.⁴⁰ On the other

³⁵ Section 11 (1) Property Relationship Act 1976.

³⁶ For a description of the unsatisfactory situation prior to the introduction of the new legislation, see B. ATKIN, ‘The Challenge of Unmarried Cohabitation – The New Zealand Response’, *Family Law Quarterly* 37 (2003), p. 305 et seq.

³⁷ S. 2D (1) Property Relationship Act 1976.

³⁸ Additional criteria laid down in s. 2D (2) Property Relationship Act 1976 are: the nature and extent of the common residence; whether or not a sexual relationship exists; the degree of financial dependence or interdependence and any arrangements for financial support between the parties; the ownership, use and acquisition of property; the care and support of children; the performance of household duties; the reputation and public aspects of the relationship. None of the criteria are determinative. For a detailed discussion of the individual elements compare B. ATKIN/W. PARKER, *Relationship Property in New Zealand*, Wellington, 2001, p. 34 et seq.

³⁹ P. GERAGHTY (Ed.), *Family Law in New Zealand*, 11th ed., Wellington, 2003, marg no. 7.309, at p. 1288.

⁴⁰ More than two people, living in a quasi-polygamous association, are not treated as a whole group, but may be treated as pairs, compare B. ATKIN, ‘The Challenge of Unmarried Cohabitation’, *Family Law Quarterly* 37 (2003), p. 313.

hand, the definition includes same-sex couples. Under the Act, they receive the same treatment as heterosexual pairs.

5.2.2. *Limitation by the Requirement of a Minimum Duration*

As a further limitation the rules relating to property division only apply to unmarried couples if the partnership has lasted for at least three years.⁴¹ Two important exceptions exist, however, to the requirement of a minimum duration: If there is a child of the relationship,⁴² or if one partner has made a substantial contribution to the relationship,⁴³ financial compensation may be granted to unmarried partners regardless of the duration of their partnership.

5.3. EXTENT OF FINANCIAL CONSEQUENCES

If an informal relationship fulfils the requirements laid down in the Act, the same financial consequences result as for married couples:

Relationship property – which includes pension rights acquired during the partnership – has to be equally shared, unless there are “extraordinary circumstances that make equal sharing (...) repugnant to justice.”⁴⁴ Notwithstanding this, the new regulations give judges the power to grant to weaker parties – typically the parent who cares for young children – additional compensation for an economic disparity. It must be shown that both the income and the living standards of one party are likely to be significantly higher than those of the other party. In addition, the disparity must be linked to the division of functions during the period of cohabitation. If the disparity can be explained by other reasons, no adjustment can be made.⁴⁵

⁴¹ S. 4 (5) Property Relationship Act 1976. Partners in short-term relationships that have lasted for less than three years may resort to the rules of common law and equity as they existed prior to the passing of the new regulations. In this context it is notheworthy that referring to the law of equity means having to lodge a claim directly in the (more expensive) High Court, whereas the Family Court has no jurisdiction in these cases, compare B. ATKIN, ‘The Challenge of Unmarried Cohabitation’, *Family Law Quarterly* 37 (2003), p. 310.

⁴² According to s. 2 of the Property Relationship Act 1976, the expression “child of the relationship” includes stepchildren, children of the wider family and foster children.

⁴³ S. 14 A (2) (a) (ii), s. 85 (3) (a) (ii) Property Relationship Act, 1976.

⁴⁴ S. 13 (1) Property Relationship Act 1976. In its jurisdiction the Court of Appeal has consistently emphasised that this is a stringent test not easily satisfied, see, for example, *Martin v. Martin* [1979] 1 NZLR 97; *Wilson v. Wilson* [1991] 1 NZLR 687. This approach seems to continue under the new rules, see, for example, *Malamanche v. Malmanche* [2002] 2 NZLR 838.

⁴⁵ S. 15 Property Relationship Act 1976. The award is discretionary; the Court can look at the situation as a whole and determine whether compensation is merited. The new powers of the courts have been criticised because of the degree of uncertainty they introduce into the scheme, compare B. ATKIN, ‘The Rights of Married and Unmarried Couples in New Zealand – Radical New Laws on Property and Succession’, *Child and Family Law Quarterly* 15 (2003), p. 182.

In addition, the 2001 amendments also extended the liability of providing ongoing maintenance to former partners of de facto relationships.⁴⁶ As for divorced couples the maintenance liability expires after a period of time that is reasonable in all the circumstances.⁴⁷

It is noteworthy that in addition to the statutory provisions for property division and maintenance, the reforms place unmarried and married partners on much the same footing as in some other important areas of the law, particularly in the law of succession or the area of family protection.

All of these changes, however, are subject to the same three-year minimum duration rule that applies to the division of property.

5.4. EXPERIENCES AND CRITICISM

The law reform process to introduce the new legislation in New Zealand was exceptionally long and the opinions on treating marriage and de facto relationships the same were particularly controversial.⁴⁸ Despite the doubts of opponents, the new regime has proved to be less controversial than some predicted and in the first 12 months only a modest number of cases have been litigated.⁴⁹

Nevertheless, the new rules have also been the object of some criticism. One reproach concerns the lack of precision of the statutory definition.⁵⁰ In borderline cases, the Courts have a broad discretion in deciding whether an association between people is a “de facto relationship” within the meaning of the Act. Another major reproach is associated with the requirement that unmarried partnerships must in general have lasted for three years before financial consequences can result. On the one hand, this requirement makes it necessary to determine precisely its beginning and end, which may not always be obvious.⁵¹ On the other hand, taking a temporal element as the

⁴⁶ S. 64 Family Proceedings Act 1980.

⁴⁷ S. 64 A Family Proceedings Act 1980.

⁴⁸ The first Working Group was established by the Ministry of Justice in 1988. Until the new regulations entered into force in February 2002, 14 years had passed. For a description of the legislative history, B. ATKIN/W. PARKER, *Relationship Property in New Zealand*, Wellington, 2001, p. 2; B. ATKIN, ‘Reforming Property Division in New Zealand’, *European Journal of Law Reform*, 3 (2001), p. 353.

⁴⁹ B. ATKIN, ‘The Rights of Married and Unmarried Couples in New Zealand – Radical New Laws on Property and Succession’, *Child and Family Law Quarterly*, 15 (2003), p. 176.

⁵⁰ P. GERAGHTY (ed.), *Family Law in New Zealand*, 11th ed., Wellington, 2003, marg. No. 7.201 at p. 1255.

⁵¹ P. GERAGHTY (ed.), *Family Law in New Zealand*, 11th ed., Wellington, 2003, marg. No. N 7.309 at p. 1288.

primary starting point for financial consequences has been criticised for introducing a requirement that does not truly reflect the substance of a relationship, but creates, once more, a kind of a legal status for unmarried partners.⁵² It has therefore been argued that “the New Zealand reforms have in fact gone back to the old legal core of relationships, minus the formal trappings.”⁵³

5.5. PROPOSAL FOR A FUTURE MODIFICATION

In fact, requiring a minimum duration of the partnership as the primary starting point for legal consequences fails to acknowledge, to a certain extent, that, above all, mutual responsibilities and rights should relate to the way people live rather than to a particular duration of their partnership.

The criticism expressed in New Zealand therefore induces a search for other criteria as the basis for establishing financial consequences at the end of an informal relationship. The investigation of the Swiss approach illustrates that, particularly where partnership-related disadvantages occur, legal consequences are necessary. This leads to a suggestion for a future modification of the current legislation in New Zealand: Some of the difficulties inherent in the current solution may be avoided by replacing the “three-year requirement” with the existence of “partnership-related disadvantages.” If such disadvantages appear in a relationship, financial compensation would automatically result, subject to the same conditions as currently apply, namely, regardless of the legal status or sex of the partners. This solution would allow, to a wider extent than the current provisions, focusing on the individual circumstances of a relationship. The way in which the partners lived would become the major basis for financial compensation. The proposal may even allow any definition of “de facto partnership” to be abolished, since financial compensation may be necessary in all associations between people in which partnership-related disadvantages occur. On the other hand, it may be necessary to consolidate the situations in which partnership-related disadvantages are to be assumed. Such circumstances would in particular have to include the existence of children and a partnership which has existed for many years.⁵⁴

⁵² B. ATKIN, ‘The Rights of Married and Unmarried Couples in New Zealand – Radical New Laws on Property and Succession’, *Child and Family Law Quarterly*, 15 (2003), p. 179; B. ATKIN, ‘The Challenge of Unmarried Cohabitation’, *Family Law Quarterly* 37 (2003), p. 323.

⁵³ B. ATKIN, ‘The Rights of Married and Unmarried Couples in New Zealand – Radical New Laws on Property and Succession’, *Child and Family Law Quarterly*, 15 (2003), p. 178.

⁵⁴ Similarly it has been proposed to allow divorce without court proceedings in cases in which partnership-related disadvantages can in general be excluded, compare I. SCHWENZER, ‘Registerscheidung’, in: P. GOTTWALD/E. JAYME/D. SCHWAB (Eds.), *Festschrift für Dieter Henrich zum 70. Geburtstag*, Bielefeld, 2000, p. 541.

6. CONCLUSION

As an overall conclusion it can be held that, considering the three approaches discussed here, many reasons advocate a unified approach as is currently practised in New Zealand:

Above all, there is the social change, as evidenced by an increasing number of people living in unmarried partnerships, that intensifies the pressure for reform in those jurisdictions without a statutory recognition of unmarried cohabitation.

In addition, only a unified approach is able automatically to cover all the people affected and to provide them with a mechanism which ensures appropriate protection for weaker parties. The unified solution is furthermore the only one of the three approaches that acknowledges that the problems which the law needs to resolve with regard to financial compensation are the same, regardless of whether the partners were formally married, registered or merely lived together on an informal basis.

From a broader context, two other reasons can be advanced for a unified solution: A system that focuses on the circumstances of the individual relationship rather than on its external formal character corresponds with the trend – mentioned at the beginning – that underlies most of the fundamental family law reforms of recent years. Furthermore, the unified approach is compatible with a changed understanding of the role of family law: Whereas in earlier years, family law was legitimised by the aim of protecting marriage and sanctioning its dissolution, today its role is described as being “to grant fair financial compensation and protect weaker partners.”⁵⁵

I mentioned at the beginning that in family law we sometimes speak of a “unified law through evolution”. It is interesting to note in this context that prior to the introduction of the unified solution, New Zealand law followed an approach that was similar to the current situation in Switzerland and trust law was applied to unmarried cohabitation. This caused similar difficulties to those currently being experienced in Switzerland.⁵⁶ Subsequently, during the extensive legislative process in New Zealand, the introduction of a registration system was discussed but finally “skipped” with the argument that only a minority of the people affected could be reached.⁵⁷

⁵⁵ A. BÜCHLER, ‘Das Familienrecht der Zukunft’, in: R. Vetterli (Ed.), *Auf dem Weg zum Familiengericht*, Bern, 2004, p. 48 et seq.

⁵⁶ B. ATKIN, ‘Reforming Property Division in New Zealand’, *European Journal of Law Reform* 3 (2001), p. 351 et seq.

⁵⁷ Law Commission, *Recognising Same-Sex Relationships Study Paper*, Wellington, 1999.

| Sabine Aeschlimann

This leads to my closing wish, which is that family law will evolve in the same direction as the New Zealand solution, and that in the future a unified approach will find its way from Down Under to this side of the world.

GENERAL LESSONS FOR EUROPE BASED ON A COMPARISON OF THE LEGAL STATUS OF NON-MARITAL COHABITANTS IN THE NETHERLANDS AND GERMANY

WENDY M. SCHRAMA

1. INTRODUCTION

Non-marital cohabitation is a social phenomenon which increasingly confronts European legal systems with rather urgent and complex questions. This relatively new social development not only affects family law, but also has far-reaching consequences in many other legal areas, like inheritance law, tax law, social security and pension law. In order to deal with the questions raised by non-marital cohabitation, different legal models have been developed in the various European countries, of which a majority also include regulations for same-sex couples. The registered partnership legislation in the Scandinavian countries and The Netherlands, the introduction of *Eingetragene Lebenspartnerschaft* in German law, the French PaCS, the Belgian Act on Statutory Cohabitation, the Property (Relationships) Act (1984) (New South Wales) and the Property (Relationships) Act 1976 (New Zealand) are just a number of different models illustrating the growing need for legislation in this area of the law.

From this perspective, it is not surprising to see that the Commission on European Family Law is planning to dedicate their third working field to informal lifestyles. In view of the harmonisation of family law in Europe, it is interesting to compare the Dutch and the German legal systems, since this generates a number of general ideas. These ideas relate in the first place to understanding what non-marital cohabitation actually is. In this respect it is necessary to take a closer look at sociological and demographical research regarding informal lifestyles. Section 2 will in particular focus on the legal implications of the sociological dimension of non-marital cohabitation. Secondly, the different approaches of the Dutch and German jurisdictions with respect to changes in society relating to lifestyles will be analysed in the context of constitutional differences between both systems (section 3). The third general lesson is related to the value of lifestyles as a means to regulate not only the internal relations between

partners, but also the relation to the State. From this point of view, it also deals with the ways in which the Dutch and German legal systems have responded to social changes with respect to non-marital cohabitation (section 4). After deliberating on these general lessons, this paper will end with some concluding remarks (section 5).

2. LEGAL IMPLICATIONS OF SOCIOLOGICAL RESEARCH ON INFORMAL LIFESTYLES

2.1. WHAT IS NON-MARITAL COHABITATION?

Currently, there are an estimated 1.4 million non-marital cohabitants in The Netherlands¹ and 4.2 million in Germany.² An important problem which has to be tackled in any examination of the legal position of non-marital cohabitants is the question of what non-marital cohabitation is. Since there is, unlike marriage, no system to register the beginning or the end of non-marital cohabitation, a clear definition thereof is lacking in both countries. A formal approach does not therefore offer any help. It would be possible to adopt one of the definitions used in the Dutch or German legislation.³ However, looking at a legal definition only provides a halfway solution, since social facts and human behaviour partially determine what is important for the law; not only the law itself.

Just one example to illustrate this. Imagine that empirical research shows that 95 per cent of non-marital couples live together for just one year before getting married. This would confront a legal system with rather different questions and priorities compared to a situation in which non-marital cohabitation would turn out to be a long-lasting lifestyle with a high birth rate. What are the implications of sociological research⁴ for the legal systems in The Netherlands and Germany?⁵

¹ STATISTICS NETHERLANDS, <http://www.cbs.nl/en/figures/statline/index.htm>. Data from 2003.

² H. ENGSTLER & S. MENNING, *Families in Germany – Facts and Figures*, 2004, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, Berlin, p. 10. Data from 2000.

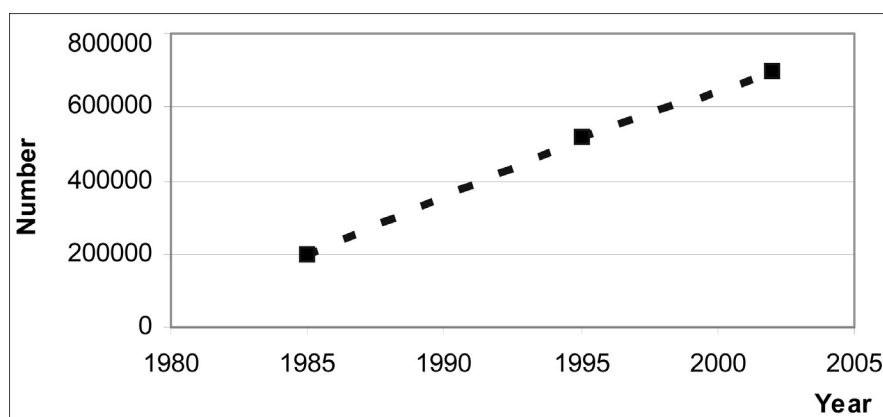
³ In The Netherlands there are at least fifteen different legal terms referring to the situation in which couples live together without being married, for example in tax law ('tax partnership'), social security ('joint household'), rent law ('durable joint household') and private law ('life-companion' and 'living together as husband and wife'). In Germany the term *eheähnliche Gemeinschaft* (social security law) and 'durable joint household' (tenancy law) are the most important terms. See W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 128-212.

⁴ See W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 9-97 for a much more elaborated presentation of sociological and demographical data.

⁵ However, lawyers should be careful with the use of empirical data, since, as a non-specialist, one encounters several difficulties. First, what are the relevant sources of sociological research? Secondly, the interpretation of those sources is rather complex, in particular when there is no consensus among

First of all, figures 1 and 2 show a rapid increase in the number of non-marital cohabitants over the last few decades in both The Netherlands and Germany. Cohabitation has obtained a secure position. One in six cohabiting couples consists of non-marital cohabitants in The Netherlands versus one in ten in Germany.

Figure 1. The number of non-marital relationships in The Netherlands

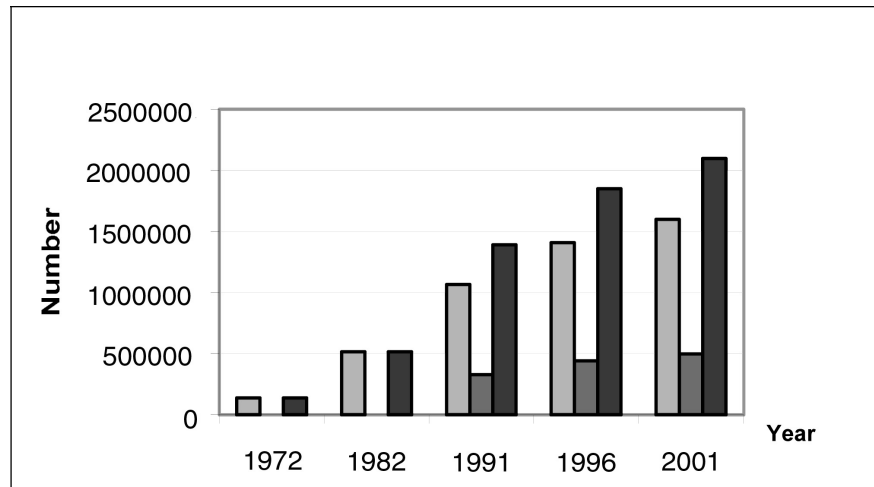


Source: Statistics Netherlands

sociologists themselves. Thirdly, the results of research carried out in different countries (like in this case The Netherlands and Germany) are often not comparable, since research differs, for example, on cohorts, ages, periods, calculating methods and definitions. Finally, there are hardly any comparative analyses between different countries by sociologists on this subject. See, however, K. KIERNAN, *The State of European Unions: An Analysis of Partnership Formation and Dissolution*, in: M. MACURA & G. BEETS (eds.), *Dynamics of fertility and partnership in Europe, Insights and lessons from comparative research*, Volume I, United Nations, New York and Geneva, 2002, p. 57-76 and K. KIERNAN, *The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe*, *IJLPP* 2001, p. 1-21.

A frequently appearing example which demonstrates the risk of the use of demographic data in other disciplines is the reference in legal publications to the decline in marriage rates, which is interpreted as a sign of the diminished status of marriage. However, such an interpretation may oversimplify reality, since a decline in marriage rates can also be the result of a changing population structure. If, for instance, the average age of the population increases, this could be a relevant factor in explaining a decrease in marriage rates.

Figure 2. The number of non-marital relationships in Germany⁶



Secondly, empirical data show that non-marital cohabitation as such does not exist. A distinction has to be drawn between (at least) three categories:⁷

1. Pre-marital cohabitation: young people who live together only for a limited period of time (mostly between 0-5 years). A large minority of these cohabitants eventually separate, the remainder will eventually marry. This is the largest group of cohabitants in both countries.
2. Post-marital cohabitation: One or both partners were previously married or lived in a long-term non-marital relationship. There are no specific data on the proportion of post-marital cohabitants who convert their relationship into a marriage. In Germany 33 per cent of all non-marital cohabitants are post-marital; there are no reliable data for The Netherlands.⁸
3. Long-term non-marital cohabitation, which the partners consider to be an enduring alternative to marriage or registered partnership. Only very few cohabitants live together for a long period.

Each category has its own characteristics, but the existing sociological research does not yet provide a sufficient insight into the exact differences between the groups. However, lawyers and the legislature should be well aware of this diversity, since each of the categories has its own legal problems. The relevance of this classification is related

⁶ Figure from W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 14.

⁷ See also W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 95-97.

⁸ Of the unmarried couples with children 28 per cent consist of post-marital relationships.

to general policy concerns and to the legislative question of whether the position of non-marital cohabitants has to be reformed in certain aspects.⁹

In the next sections the sociological characteristics will be analysed in the perspective of the legal position of non-marital cohabitants. First, section 2.2.1 focuses on the relatively high separation rate of non-marital relationships. The legal implications thereof are numerous. In the first place, it is interesting to investigate the problems which might occur upon the breakdown of a non-marital relationship. This is particularly interesting since, according to Dutch and German law, there is no specific regulation which is applicable with respect to the financial and property relations between non-marital partners (sections 2.2.2-2.2.4). However, in addition to the general problems relating to a relationship breaking down, there are even more serious consequences in the case of an unequal division of labour and care and the upbringing of children during the relationship. For that reason the sociological data with respect to the division of labour division and the upbringing of children will be discussed in section 2.3. Research confirms the general assumption that women are often still economically vulnerable and in this context it is important to examine the resulting legal complications. Thirdly, the high separation rate is relevant in the perspective of the presence of children in non-marital relationships, as it requires a minimum level of legal protection for this group. In this context the current legal status of non-marital cohabitation will be evaluated in section 2.4. Finally, some general conclusions will be formulated (section 2.5).

2.2. PREVENTION AND CONTROL OF CONFLICTS WHEN A RELATIONSHIP BREAKS DOWN

2.2.1. *High Separation Rate*

The separation rate between non-marital couples is higher than between married couples, especially in the case of pre-marital cohabitants.¹⁰ Most breakdowns take place within 8 years after the start of the cohabitation; in this period the differences with respect to the divorce rate are remarkable in both countries.¹¹ In The Netherlands there were an estimated 70,000 separations (from a total number of 700,000 relationships)

⁹ This classification could also be useful in determining which cohabitation period could be used in a specific provision in order to legally qualify as a cohabiting couple.

¹⁰ Since there is – unlike for divorce – no system to register separation between non-married couples, these figures represent estimations based on cohort-based studies.

¹¹ W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 26-31, p. 68-72 and p. 89-90.

versus 35,000 divorces (from a total number of more than 1.7 million marriages) in 2000.

The implications of these sociological findings for the law are far-reaching, since the fact that a large number of separations take places invariably leads to the question whether the legal position of partners upon the breakdown of the relationship gives rise to certain problems. This issue is relevant to all three types of non-marital cohabitation, although pre-marital relationships are most likely to end in separation. Sociological research does not reveal the specific separation percentages in post-marital and long-term cohabitation and therefore it is difficult to quantify the number of these couples experiencing a breakdown. Nevertheless, one would expect that the stability of these relationships is no higher than that of marriage, which means that the risk of separation is still substantial. Furthermore, the nature and effects of the problems caused by a separation might vary for the different categories. The separation of a long-term non-marital cohabitation might be expected to lead to more, and to more intense problems compared to short-term cohabitation, since the effect on the financial and property relations between the partners in a long-term relationship can be expected to be more profound, especially when there are children involved.

In order to create a better understanding of the legal implications of the high separation rate, it is necessary to go into some detail concerning the current legal situation. As stated before, separation raises the question whether the legal position of non-marital couples results in specific problems. In The Netherlands and in Germany, no legal regulations exist specifically aimed at the financial and property aspects of the relationship between non-marital cohabitants. General contract and property law apply, which results in a number of problems, due to the fact that the relations between cohabiting partners deviate from other types of relations in certain respects.¹²

The special nature of love-based relationships and the resulting problems for the application of general property and contract law will be examined in 2.2.2. Subsequently, attention will be paid to alternative solutions to overcome these problems. In this context the significance of marriage law, company law and cohabitation contracts will be analysed in section 2.2.3. The way in which the courts deal with claims arising out of conflicts between former cohabitants will be dealt with in 2.2.4.

¹² The same special nature gives rise to problems when one of the parties dies. The problems of the surviving cohabitant are even more urgent, since non-marital partners have hardly been recognised in Dutch and German inheritance law. See: W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 474-490.

2.2.2. *The Special Nature of Love-Based Relations*

The relationship between non-marital partners is characterised by a special nature, due to a number of factors. First, the relations between partners are characterised by the fact that the personal love-relationship between the partners determines the financial behaviour of the partners.¹³ Contract law and property law are based on the general presumption that each party acts in his/her own interest. Consequently, there is hardly any room to take the special nature of love-based relations into account. The *quid pro quo* principle underlying general contract and property law functions well between two persons who do not know each other and who act primarily on a commercial or financial basis, but this rule is hardly relevant to non-marital love-relationships. This also implies that coincidence plays a substantial role. During the relationship it is usually irrelevant to the partners who pays what, who owns what and who contributes what to the other partner.

The second special element of the relationship between cohabiting partners is the fact that the partners are home-sharers. This brings about certain complicating factors as well. It is for example more difficult to establish property claims with respect to moveable goods. Besides, after separation there is only one home, but – due to housing shortages in both countries – two persons (and possibly children) who might want to continue living there.

Thirdly, due to the emotional nature of the relationship, it is more difficult to resolve conflicts upon the breakdown of the relationship. This typical nature of a love-based relationship is not limited to non-marital cohabitation, but also manifests itself in other relationships like marriage or a registered partnership. In this sense, marriage and non-marital cohabitation are both species of the genus love-relationships. To a certain extent even relations between cohabiting relatives (brothers, sisters, etc.) share some of these typical characteristics.

With respect to marriage¹⁴ Book 1 of the Dutch Civil Code and Book 4 of the German Civil Code provide a clear system of coherent provisions regarding the financial and property consequences of the relationship between the spouses and between spouses and third parties. In these rules the special nature of love-based relationships is taken into account. For non-marital cohabitation there is no such regulation.

¹³ This applies to all types of cohabitation, but the extent to which these factors manifest themselves might differ. W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 368-371.

¹⁴ Also with respect to the registered partnership and *eingetragene Lebenspartnerschaft* there are clear provisions.

2.2.3. *Alternative Solutions?*

In both Dutch¹⁵ and German¹⁶ legal literature, attempts have been made to overcome the problems resulting from the difficult position of non-marital cohabitation in private law. From this point of view, both marriage law and company law could be relevant. Next to this, the question arises whether cohabitation contracts may contribute to a solution for the difficult application of general civil law.

In both The Netherlands and Germany, the prevailing view is that it is not possible to apply marriage law in the context of non-marital cohabitation. Application on the basis of an assumed analogy between marriage and non-marital cohabitation is generally observed to be impossible, regardless of whether a couple have minor children.¹⁷ Although the level of similarity required for an analogy might be met, the most important bottleneck is that marriage law mostly consists of provisions which are so closely connected with marital status that it is not possible to apply them outside marriage.¹⁸ In a case brought before a Dutch court at the end of the 1970s the question rose whether matrimonial property law could actually be applied by reason of analogy to property relations between non-married couples. Although the district court judge did apply the marriage provisions,¹⁹ this line of reasoning has generally been disapproved.²⁰

¹⁵ In The Netherlands little attention has been paid to the significance of informal lifestyles in the last decade. See, however, for example, C. FORDER, *Het informele huwelijk: de verbondenheid tussen mens, goed en schuld*, Deventer: Kluwer and A. VERBEKE, *Naar een billijk relatie-vermogensrecht*, TPR 2001, p. 373-401. Both primarily concern private law aspects of the relations between partners.

¹⁶ Apart from the numerous publications in journals and the *Kommentare*, there are a number of general books on non-marital cohabitation, like, for example: D. BURHOFF, *Handbuch der nichtehelichen Lebensgemeinschaft*, Herne/Berlin: Verlag für die Rechts- und Anwaltspraxis 1998; H. GRZIWOTZ, *Nichteheliche Lebensgemeinschaft*, München: Verlag C.H. Beck 1999; R. HAUSMANN & G. HOHLOCH (eds.), *Das Recht der nichtehelichen Lebensgemeinschaft*, Handbuch, Berlin: Erich Schmidt Verlag 2004. In contrast to The Netherlands the legal position of non-marital cohabitants has also been examined in public law.

¹⁷ W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 272-282 and p. 346-357.

¹⁸ In The Netherlands it has been argued that Art. 1:131 (1) DCC concerning the onus of proof with respect to the property claims of spouses concerning moveable goods could be applied to conflicts between unmarried partners. See: W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 278-280.

¹⁹ Rb. Groningen (District Court) 5 November 1976, NJ 1977, 407.

²⁰ HR 8 October 1982, NJ 1984, 2 annotated by CJHB. Also in the legal doctrine of that time the decision was heavily criticised.

Various other solutions have been suggested, like the application of the provisions of company law concerning partnerships ('*maatschap*' and '*Innen-)*gesellschaft')²¹ and the qualification of cohabitation as a comprehensive *contract sui generis*.²² Both solutions have proved not to be successful.

Another means to deal with the financial and property law aspects of non-marital cohabitation is a cohabitation contract. In The Netherlands, approximately 50 per cent of unmarried couples have concluded a cohabitation contract (*samenlevingscontract*).²³ In my opinion, this relatively high rate has to be explained in the light of conditions in other areas of law which require a cohabitation contract to be signed by a notary, in order to obtain certain financial advantages. In order to qualify as a cohabiting partner for some provisions of inheritance law, a cohabitation contract signed by a notary is required.²⁴ A partner's pension will usually also be paid on the basis of a contract between the partners and signed by a notary.²⁵

In Germany, the number of non-marital cohabitants who have concluded a cohabitation contract (*Partnerschaftsvertrag*) seems to be considerably lower than in The Netherlands.²⁶ According to a study carried out at the end of the 1990s, only a small number of non-marital cohabitants had concluded a contract which was signed by a notary. Mostly, if there is any contract at all, this concerns an oral agreement between the partners, with a rather limited range of issues dealt with.²⁷

Sociological research seems to suggest that in both countries partners are usually not aware of the important legal differences between marriage and cohabitation, in particular with respect to the private law effects of relations between the partners.²⁸

²¹ W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 416-424. The application of the provisions has been rejected by the Dutch Supreme Court: HR 8 July 1985, NJ 1986, 358. The German BGH has also rejected the general application of company law provisions in the GCC: BGH FamRZ 1980, 664.

²² W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 382-384.

²³ STATISTICS NETHERLANDS: A. DE GRAAF, *Helft samenwoners heeft samenlevingscontract*, *Webmagazine* 22 maart 2004.

²⁴ Art. 4:82 DCC.

²⁵ In practice a number of models for this type of contract have been developed with a varying degree of economic commitment: M.J.A. VAN MOURIK, *Modellen voor de Rechtspraak*, Leids model I-V, Kluwer Losbladige.

²⁶ Bundesministerium für Jugend, Familie und Gesundheit, *Nichteheliche Lebensgemeinschaften in der BRD*, p. 87 seems to indicate that in 1985 approximately 20 per cent of non-marital couples had concluded a cohabitation contract.

²⁷ L.A. VASKOVICS & M. RUPP & B. HOFMANN, *Lebensverläufe in der Moderne: Nichteheliche Lebensgemeinschaften, Eine soziologische Längsschnittstudie*, Opladen: Leske + Budrich 1997, p. 139.

²⁸ W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 375 and p. 378.

This implies that cohabiting partners often do not realise that there is no specific legal regulation to determine their relationship.²⁹

A cohabitation contract can be helpful to prevent and solve conflicts between the partners upon the breakdown of the relationship, since it provides some insight into the intentions of the parties. However, the use of cohabitation contracts may introduce new problems.³⁰ Due to the nature of everyday life, the relationship between the partners is dynamic. This is in particular relevant when children are born during the relationship, since this might have a large impact on the earning capacity of, mostly, women (see section 2.3). The partners will probably not have foreseen these changes and the contract may contain provisions which are not supposed to regulate the changed situation. Imagine, for example, a couple where both partners have full-time employment, who then agree that no compensation is payable upon the breakdown of the relationship. After five years a child is born and the woman reduces the time spent on paid work. The question then arises whether the parties intended to include this new situation in their contract. Although the partners are free to adapt the contract to the new conditions, in practice very few couples appear to do so.

A second limitation of cohabitation contracts is that it is not possible to solve a number of problems. It is difficult to agree to a just and practical compensation mechanism for contributions to the partner's property or the partner's career, since most systems would require good bookkeeping, which is difficult in practice. Although not related to the specific problems of separation, it is important to note that the legal position of unmarried cohabitants in inheritance law cannot be easily improved by a contract (or will), since many provisions in inheritance law are of a mandatory nature. Furthermore, the partners cannot attribute jurisdiction to the family law section of the courts,³¹ they cannot opt for a petition procedure instead of a summons procedure and they cannot attribute competence to the court to make provisional court orders with respect to the use of the home and furniture, maintenance, child-related issues, etc. (see also section 2.4).³²

²⁹ This supports the idea that in The Netherlands the desire to regulate mutual financial and property relations is not a decisive determinant to conclude a contract, but that the economic advantage of qualifying as cohabitants in other fields of law is such a determinant.

³⁰ It is difficult to assess the practical importance of this problem. In both countries there is little case law in which cohabitation contracts play a role. See however Rb. Middelburg, sector kanton, 15 May 2002, LJNAE 3258.

³¹ In The Netherlands divorce cases are subject to a petition procedure whereas problems arising from the breakdown of a non-marital cohabitation are subject to a summons procedure. The first type of procedure is characterised by an informal, more oral nature than the latter, which obviously has advantages.

³² See, for example, Arts. 822 and 827 Dutch Code of Civil Procedure.

In conclusion, using the freedom of contract by agreeing to a cohabitation contract can certainly contribute to conflict prevention and conflict settlement upon the breakdown of a relationship. However, it is not the ultimate remedy to mitigate the problems resulting from the general application of contract and property law to the relations between cohabitants. The most important limitation is that a substantial number of couples have no cohabitation contract at all. Secondly, contracts are usually not adjusted to changed factual circumstances and, finally, a number of issues cannot be solved by means of a contract.

2.2.4. Case Law

So far the conclusion is that, although attempts have been made to deal more adequately with financial and property conflicts between former partners, there are no real solutions in contract and property law or in marriage law. In both countries there is a substantial body of case law in which financial and property aspects between former unmarried partners are the central issues.³³ Empirical findings contain no data on the number of disputes between partners upon the breakdown of the relationship and the way in which these disputes are settled. Presuming that only a very limited proportion of the couples experiencing a conflict apply to the court for a solution, the number of discordant separations is potentially considerable.

A number of issues frequently appear in the case law. In The Netherlands property relations are a regular source of disputes.³⁴ In The Netherlands there are also numerous decisions concerning the question of who is allowed to continue to live in the rented house after separation.³⁵ The courts in both countries often have to deal with compensation claims for contributions by one partner towards the other partner's house or company.³⁶

³³ Outside this scope there is a body of case law as well, for example with respect to the principle of equality (see section 3) and to the interpretation of legal definitions of non-marital cohabitation in all fields of law.

³⁴ HR 8 October 1982, NJ 1984, 2 (regarding property rights over a dog); HR 16 January 1987, NJ 1987, 912 annotated by E.A.A. Luijten (with respect to a bank deposit); HR 26 May 1989, NJ 1990, 23 annotated by E.A.A. Luijten (with respect to a capital gain partially realised by a successful joint company on the basis of a implicit contract of co-ownership) HR 17 December 2004, LJN: AR3636, <http://www.rechtspraak.nl> (with respect to conflicts arising out of property distribution with respect to a house owned by both partners). See further W.M. SCHRAMA, *Vermogensrecht voor ongehuwden samenlevers*, Deventer: Kluwer 2000, p. 63-65. In Germany there appears to be more emphasis on the compensation issue.

³⁵ W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 270-271.

³⁶ W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 445-455 with respect to Dutch case law and p. 459-464 regarding German law.

Not all potential problems result in case law. There are hardly any decisions in The Netherlands³⁷ and Germany with respect to maintenance between (former) partners, probably because it is obvious that maintenance claims will not be successful. This also appears to be true with respect to monetary claims for compensation for contributions made to the household or towards the care and upbringing of children.

The outcome of procedures is unpredictable. Similar claims lead to different results, depending on the court and the lawyers involved and on the way in which the claim is substantiated. The lack of any clear, specific legal provisions for non-marital cohabitation is a contributing factor, since the rather difficult application of property and contract law is likely to be interpreted in different ways by the courts. Sometimes the decisions are clearly unjust, in particular in cases where the courts do not recognise the social function of non-marital cohabitation.³⁸ A problem is that judges or lawyers sometimes deal with a conflict between former partners without taking into account the special cohabitation context in which it has arisen. Secondly, also in civil procedural law the special nature of non-marital cohabitation is overlooked. For married couples procedural law offers a special regime, in which there is room to do justice to the special nature of the relationship between the parties. In The Netherlands and in Germany, divorces are dealt with by special family law divisions, instead of the general civil law divisions.

In my opinion it should be considered how introducing family law legislation for non-marital cohabitants could contribute to a solution. Furthermore, changes should be made in civil procedural law. It is important that the family law divisions of the courts have the necessary authority to deal with these conflicts, not only because these courts have the necessary expertise and skills in handling family conflicts, but also because

³⁷ HR 9 January 1987, *NJ* 1987 annotated by E.A.A. Luijten held that non-marital cohabitation as such does not infer a maintenance duty. In the case before Rb. Leeuwarden 31 January 1985, *NJ* 1985, 728 it was argued that maintenance had to be paid on the basis of an implied contract. The court decided, however, that the fact that both partners had their own financial household did not support the existence of such a contract. The BGH has not yet provided an explicit ruling on whether a post-cohabitation maintenance duty exists, but it is generally presumed that the court would deny this. There is one limited exception in § 1615 I BGB with respect to the mother who has a right to be maintained by the father during a period of at least six weeks after the birth of their child.

³⁸ In The Netherlands the courts sometimes refuse to award compensation for contributions with respect to the purchase or reconstruction of a house owned by the other partner (see section 2.3). However, the courts solve certain other problems in a flexible way which does justice to the nature of non-marital cohabitation, for example with respect to the application of the provisions regarding co-tenancies. In Germany the distinction between contributions which justify compensation and those which do not regularly results, in my opinion, in artificial categories. Even large investments may, depending on the court's interpretation of the partners' intention, not be compensated (see section 2.3).

it would be better if the rules of procedure would leave sufficient room to take the special love-based nature of the relationship between the litigants into consideration.

2.3. PROTECTION OF THE FINANCIALLY VULNERABLE PARTNER

A further implication of sociological research is that the law should provide a sufficient level of protection for financially vulnerable partners. Despite substantial changes over the last few decades, women in The Netherlands and Germany are still an economically vulnerable group, especially when they have children (see also section 2.4). This is most relevant for post-marital and long-term cohabitation, since in most cases the female partner's economic position in a pre-marital relationship has not yet been influenced by the relationship.

In The Netherlands, the participation of women in the workforce has increased considerably over the last twenty years, but this rise is mostly the result of the growing importance of part-time work.³⁹ Women will generally continue to work after the birth of a child,⁴⁰ but the one and a half income family still prevails. In 1992 some 26 per cent of working couples with minor children consisted of this kind of family, whereas in 2003 this had increased to 47 per cent.⁴¹ The proportion of families with minor children in which only one partner is responsible for the income was 34 per cent in 2003; this was 57 per cent in 1992.⁴²

The labour force participation of women with children in West and East Germany differs considerably. Before reunification in 1989, 90 per cent of mothers went out to work in East Germany, most of them full-time. After reunification, the employment rate of women – with or without children – stabilised at 75 per cent in the 1990s. Only working women with children under the age of six years participated less (61 per cent) in the labour force in 2000.⁴³ Since 1991 the proportion of full-time working mothers

³⁹ STATISTICS NETHERLANDS and A.C. LIEFBROER & P.A. DYKSTRA, *Levenslopen in verandering, Een studie naar ontwikkelingen in de levenslopen van Nederlanders geboren tussen 1900 en 1970*, Sdu Uitgevers, Den Haag 2000 p. 149-151.

⁴⁰ W. PORTEGIJS & A. BOELEN & L. OLSTHOORN, *Emancipatiemonitor 2004*, Centraal Bureau voor de Statistiek en Sociaal en Cultureel Planbureau, Den Haag 2004, p. 100 indicates that 10 per cent of working women who had a child in 2003 left the labour market.

⁴¹ STATISTICS NETHERLANDS.

⁴² W. PORTEGIJS & A. BOELEN & L. OLSTHOORN, *Emancipatiemonitor 2004*, Centraal Bureau voor de Statistiek en Sociaal en Cultureel Planbureau, Den Haag 2004, p. 70.

⁴³ H. ENGSTLER & S. MENNING, *Families in Germany – Facts and Figures*, 2004, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, Berlin 2004, p. 32.

has declined, mostly because of an increase in the proportion of mothers not working at all.

In West Germany the employment rate for women is to a great extent dependent on the presence of children. Some 85 per cent of women without children in the household are employed in comparison with 63 per cent of women with children in the household. The increasing labour force participation of mothers during the last thirty years is largely the result of an increase in part-time work.

Both in The Netherlands and in Germany women spend more time taking care of the children and the household than their male partners.⁴⁴ In both countries the income of women is considerably lower than that of men.⁴⁵

The economic vulnerability of women is not only caused by the differences in the income position of both partners during the relationship, but also by long-term negative effects on the earning capacity of these women. Besides, the division of care and paid work also results in differences in future pension rights and social welfare benefits. These effects last for the rest of their lives.

At the moment, there is hardly any legal protection at all for this vulnerable group in Dutch and German law. Private law encompasses three ways in which a 'household partner' can be compensated for losses suffered as a result of the relationship: 1. Participation in property which is present at the end of the relationship; 2. A right to be maintained after the breakdown of the relationship; 3. Monetary compensation for contributions during the relationship. For married couples all three mechanisms apply on the basis of marriage law, but for unmarried couples there is no legal right to any form of compensation whatsoever. An unmarried partner has, according to Dutch and German law, no right to be maintained, not even if his/her need is directly connected to the division of tasks during the relationship.⁴⁶ Next to this, the vulnerable partner will generally not participate in the assets which the other partner has acquired during the relationship, regardless of whether he/she has (in)directly contributed to the purchase of these goods.

⁴⁴ W. PORTEGIJS & A. BOELEN & L. OLSTHOORN, *Emancipatiemonitor 2004*, Centraal Bureau voor de Statistiek en Sociaal en Cultureel Planbureau, Den Haag 2004, p. 93-95.

⁴⁵ W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 34-38 and p. 74-78. In The Netherlands only 41 per cent of women (regardless of whether they have children) were economically independent in 2001: W. PORTEGIJS & A. BOELEN & L. OLSTHOORN, *Emancipatiemonitor 2004*, Centraal Bureau voor de Statistiek en Sociaal en Cultureel Planbureau, Den Haag 2004, p. 70.

⁴⁶ In The Netherlands one could argue that a maintenance duty can be derived from an implicit contract between the partners, but in practice this solution generates many problems and is not used. See: W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 434-438.

Finally, no monetary compensation has to be paid for contributions like child care and housekeeping, even though the other partner has considerably profited therefrom.

In The Netherlands no general compensation rule has been developed by the courts. The case law of the lower courts is inconsistent and results in different outcomes. There are no claims put forward on the basis of child care; most claims are based on financial investments in real estate owned by the other partner,⁴⁷ or on non-financial investment in the other partner's business.⁴⁸

In Germany the general principle on this point of law is the *Nichtausgleichung*, which means that the relations between the partners will not give rise to compensation claims after separation, not even when one of the partners has made substantial contributions, financially or otherwise, to the joint household or the upbringing of the children. The financial and property relations are determined at the end of the relationship and will not be subsequently changed.

There is just one, rather limited exception to this principle with respect to contributions intended to create a joint property interest, which in the perception of the partners belongs to them together, even after separation. For this category, monetary compensation might be appropriate. A problem is how to determine whether the partners intended to create a joint property interest. Substantial contributions by one partner to the property of the other partner might, depending on the circumstances,

⁴⁷ HR 26 May 1989, *NJ* 1990, 23 annotated by E.A.A. Luijten (a woman claimed 45,000 euro in compensation on the basis of an implicit contract to share the value of the property. The HR determined that the Court of Appeal had applied an incorrect test); Hof Den Haag 5 January 1977, *NJ* 1977, 569 (financial contributions by a male partner towards the house of the female partner, compensation claim rejected); Rb. Breda 28 June 1977 (unpublished) (concerning a contribution of 4,100 euro by the woman to the man in order to purchase a houseboat. The claim on the basis of unjust enrichment was rejected); Rb. Assen 8 March 1983 and 7 February 1984, *NJ* 1987, 427 (the male partner had invested financially with respect to the purchase of a house; the court granted compensation, but only the exact amount invested and not the increase in the value of the house); Rb. Alkmaar 11 July 1974, *NJ* 1975, 54 and Hof Amsterdam, 7 May 1975, *NJ* 1976, 110 (a claim for 3,200 euro on the basis of contributions by the male partner by reconstructing the house of the female partner was granted on the basis of unjust enrichment). See also HR 17 December 2004, *LJNAR* 3636 (concerning compensation with respect to financial contributions related to the purchase of a house) and *VZNGR* Rb. Rotterdam 14 December 2004, *NJ Feitenrechtspraak* 2005, 130 (with respect to a house).

⁴⁸ Rb. Assen 8 March 1983 and 7 February 1984, *NJ* 1987, 427 (the court granted one fifth of the profit of the company to the male partner for his contributions); Rb. Arnhem 7 March 1991, *RN* 1991, no. 5, no. 195 (the female partner claimed the liquidation of the partnership. If the male partner does not succeed in proving that no partnership exists, the court will divide the assets of the partnership according to each partner's contributions); Rb. Zwolle 2 June 1993, *PRG* 1993, 3954 (the female partner claimed 220,000 euro because of contributions to the companies which were owned by the male partner on the basis of unjust enrichment. The court tried to reconcile the parties, there was no judgement with respect to the merits of the case).

imply the will to create a joint property interest.⁴⁹ The BGH in this respect sticks to a standard of a minimum contribution of about 20,000 euro.⁵⁰ Depending on the factual circumstances, compensation can be awarded with respect to the purchase of land and the subsequent construction of a house thereon, for which the partner invested with the title has provided the money while the other partner has contributed considerably by means of working⁵¹ and with respect to the reconstruction of the house.⁵²

For all other investments, whether financially or by working in the household, taking care of the children or the long-term nursing of a sick partner, no compensation has to be paid after a breakdown.⁵³ These are presumed to be performed in the interest of the relationship.⁵⁴ Drawing a line between both categories is rather difficult, since it is to some extent arbitrary whether an intention to create a joint property interest is to be inferred from the facts. Therefore, the legal position of non-marital cohabitants is not clear in this respect. In addition, sometimes the results are, in my opinion, unfair, since this approach does not correctly take into account the special love-based nature of the relationship. It leaves the partner who has made substantial contributions empty-handed.

In conclusion, mechanisms to adjust the economic asymmetry between cohabiting partners are currently lacking. Other approaches to give more protection to unmarried partners who have invested in the relationship seem to a large extent be unsuccessful in both countries (see section 2.2).

2.4. PROTECTION OF CHILDREN

Closely connected to the previous problem is the presence of children in non-marital relationships. An increasing number of children live with non-marital, cohabiting

⁴⁹ BGH *FamRZ* 1992, 408-409; BGH *FamRZ* 1993, 939-941.

⁵⁰ BGH *NJW* 1985, 1841.

⁵¹ Granted: BGH *FamRZ* 1985, 1232. Monetary compensation for the work of the male partner in constructing two houses on the basis of § 733 (2) BGB. Denied: BGH *FamRZ* 1993, 939-941: No intention to create a joint property interest, since the wife who owned the land and the house had paid all the financial costs while the construction work by the man was not substantial.

⁵² Granted: KG *FamRZ* 1983, 271-273 (With respect to a same-sex couple). See also BGH *FamRZ* 1982, 1065-1066 (With respect to 190,000 DM). Denied: BGH *FamRZ* 1983, 1213-1214 (The male partner claimed to have invested 73,000 DM in the reconstruction of the house owned by the female partner. The claim was rejected, because the contribution was made in the interest of the non-marital cohabitation); OLG München *FamRZ* 1988, 58.

⁵³ BGH *FamRZ* 1983, 349 (Financial contributions in a short-term cohabitation); BGH *NJW* 1997, 3371-3372 (Cohabitation of 15 years, the man had contributed 94,000 DM to the wife so that she could pay her debts, which she had incurred in the construction of a house); BGH *FamRZ* 1996, 1141-1142 (The contributions of one partner towards old-age benefits did not have to be compensated).

⁵⁴ BGH *NJW* 1980, 1520-1521; OLG Frankfurt *FamRZ* 1981, 253; OLG München *FamRZ* 1980, 239-240.

parents in The Netherlands and Germany. An estimated 30 per cent of non-marital cohabitants in both countries have children in their households, which is a substantial number.⁵⁵ This includes children from previous relationships. In The Netherlands 28 per cent of non-marital relationships with children are post-marital and in Germany 54 per cent. It would be interesting to analyse the specific characteristics of those relationships; currently it is not clear what the influence of a new relationship is on the division of tasks, to which extent partners have children together and how they deal with their financial relations. Another aspect is that a growing number of people have children before they marry. Undoubtedly, this also results in a growing number of couples with children separating before marrying. Although the cohabitation may not have lasted for very long, the effects of having children together are lifelong. From a legal point of view, this requires special attention.

It is important, also from the perspective of the high separation rate, to prevent conflicts between the parents on financial and property issues. If separation is inevitable, there should be a regime in which the stability of the family will be promoted as much as possible. Legislation which would allow a court to order an occupational right with respect to the house and furniture for a limited period, as well as the introduction of a conflict settlement procedure in which children may be heard, could make the transition into a single-parent family somewhat easier. Of course, clear regulations on property and financial aspects are also very important from this perspective, as is the protection of the financially weaker partner.

From a procedural point of view, all problems resulting from the breakdown of the relationship should be dealt with together in one case by one and the same judge, who is preferably experienced in family law matters and issues relating to children. At the moment, both in The Netherlands and in Germany, financial and property claims between the partners will be brought before the civil law division of the court, whereas matters with respect to children (maintenance, parental responsibilities, contact) will be dealt with by the family law division.

2.5. CONCLUSIONS

The most important general lesson in the context of the harmonisation of European family law is that knowledge of the sociological dimension of lifestyles is a prerequisite for understanding the meaning of non-marital cohabitation for the law. In order to assess whether or not legal reforms in and outside family law are desirable, it is abso-

⁵⁵ H. ENGSTLER & S. MENNING, *Families in Germany – Facts and Figures*, 2004, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, Berlin 2004, p. 11. Data from 2000.

lutely necessary to take this dimension into account. Unfortunately, this occurs far too rarely at the moment.

With respect to informal lifestyles, it is, even from a sociological point of view, not easy to answer the question of what non-marital cohabitation exactly is. Nevertheless, it is clear that there are different types of non-marital cohabitation, each type having its own characteristics. One could imagine that pre-marital cohabitation gives rise to relatively few and less serious problems, whereas long-term cohabitation – a relatively small group out of the total number of non-marital cohabitants – could justify further-reaching state intervention.

In the context of the high separation rate for non-married couples a clear set of provisions regarding financial and property relations is worth considering, in particular since conflicts of this nature may occur in all three types of cohabitation. A suitable procedure to settle conflicts between cohabitants is a step forward for all types of cohabitation.

The unequal division of paid employment and care for children between men and women, combined with the increasing number of children growing up with non-marital couples, is a substantial source of problems with a profound impact on the lives and future of the partners and children involved.

It is not only the protection of economically weaker partners which is important, but also the best interests of children living with non-married partners. The law should offer them a sufficient level of protection, which could be a good reason to limit the personal autonomy of the partners. Furthermore, clear rules regarding property and financial conflicts are also important from this point of view, as are proceedings before a family court in which children may be heard and in which all relevant matters may be decided upon in one and the same procedure.

3. CONSTITUTIONAL DIMENSION

The social developments regarding non-marital cohabitation turn out to be generally comparable in The Netherlands and in Germany.⁵⁶ Both legal systems face the same social reality, but the differences in judicial reactions in both countries are profound. Dutch law may be characterised as being open to these social changes and is pragmatically interacting with social reality, whereas the German approach is one of denial, or

⁵⁶ W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 91.

sometimes even trying to turn back the clock by using the law as a means to reverse certain social changes (see also section 4).

It is difficult to provide a correct explanation of this difference in attitudes, but it is clear that the constitutional dimension of family law plays an important role. Article 6 (1) of the German Basic Law gives special State protection to marriage and the family. The Dutch constitution does not have such a provision.⁵⁷ The impact of Article 6 (1) Basic Law is extensive. Not only does it control the political and academic debate on lifestyles, but it also determines whether the legislature has the power to legislate for non-marital couples. The political and legal debates have been and, to a certain extent, still are polarised. Terms like '*Krise der Ehe*' and 'decay of the family' are frequently used. From this point of view, one should not be surprised that the social changes, including non-marital cohabitation, were seen as undesirable developments, which could negatively affect the status of marriage.

Outside the political and legislative arena, this fundamental principle also leaves its trademark in the case law, since married couples regularly complain about a violation of Article 6 (1). Thus they try to obtain the same rights with respect to specific regulations as unmarried partners. As a result, the influence of Article 6 (1) covers all fields of law, from tax law to inheritance law and employee benefits.⁵⁸

Although both the Dutch and the German courts⁵⁹ are under a duty to determine whether the equality principle has been violated, the existence of Art. 6 I Basic Law implies that the German courts use a different test. Whether distinctions between married and unmarried persons amount to discrimination is a question which depends on the interpretation of Art. 6 (1) Basic Law. The special status of marriage may be a justification for certain distinctions between married and unmarried couples. Differentiations with respect to social benefits,⁶⁰ tax law⁶¹ and civil law⁶² have been scrutinised by the courts in the light of the special status of marriage. Therefore, Article 6 (1) controls both the tendency of unmarried couples to try to assimilate certain

⁵⁷ The Dutch constitutional system does not allow the courts to test the constitutionality of legal provisions, but provisions of the European Convention on Human Rights and the International Covenant on Civil and Political Rights are applicable.

⁵⁸ W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 287-298 and p. 597-619.

⁵⁹ Art. 3 (1) Basic Law.

⁶⁰ BSG 24 March 1988, *FamRZ* 1988, 1261-1267 (*Arbeitslosenhilfe*); BVerwG 5 July 1985, *NJW* 1986, 738-740 (with respect to a *Wohnberechtigungsbcheinigung*); BVerfG 17 November 1992, *FamRZ* 1993, 164-169 (*Arbeitslosenhilfe*).

⁶¹ BVerfG 3 November 1982, *NJW* 1983, 271-274 (income tax); BVerfG 1 June 1983, *NJW* 1984, 114 (inheritance tax); BFH 27 October 1989, *NJW* 1990, 734-736 (income tax); BVerfG 15 November 1989, *FamRZ* 1990, 727-729 (inheritance tax).

⁶² BVerfG 6 April 1990, *FamRZ* 1990, 729-730 (concerning a gift).

aspects of their status with the position of married couples and the tendency of married couples to try to obtain the same legal position as unmarried couples.

In The Netherlands, the debate on family forms has not been polarised. There is no fear that the status of marriage will be affected by non-marital cohabitation. The legislature is simply trying to solve practical problems in a pragmatic way. As in many respects it is difficult to differentiate between both lifestyles, a gradual assimilation of both statuses has taken place. The recognition of non-marital couples is generally well balanced, since legal recognition brings about both advantages *and* disadvantages for unmarried couples and recognises the different social functions of non-marital cohabitation.

Next to this neutrality, an important incentive for the process of reform is the desire of the legislature to meet the requirements of the principle of equality. Generally speaking, the legislature has, in dealing with reforms in a specific field of law, stressed the similarities between non-marital cohabitation and marriage rather than looking at the differences (see also section 4).

The principle of equality is also a mechanism used by unmarried couples in the case law to obtain rights which are equal to those of married couples. The Dutch courts have held on several occasions that the principle of equality has been violated in various fields of law by the different treatment of married and unmarried couples. There is no justification for different treatment to be found in constitutional provisions attaching special protection for some family forms. As a result, the legal position of unmarried couples has been improved considerably.⁶³ Married couples sometimes invoke the equality principle as well, for instance with respect to differences in tax law.⁶⁴ Usually these claims are not successful.

The general lesson to be learnt from the comparison between the Dutch and German approach to non-marital cohabitation is that family law does not operate in isolation. Although this is not very surprising, it is nevertheless important to bear in mind the constitutional aspects when trying to harmonise family law with respect to informal lifestyles. This dimension might have far-reaching consequences for the way in which changes in society are dealt with.

⁶³ HR 21 March 1986, *NJ* 1986, 585 (discrimination with respect to parental responsibilities), CRvB 13 November 1986, *AB* 1987, 456 (certain unjustified differences with respect to the compensation of costs for military employees), HR 23 September 1988, *NJ* 1989, 740 (provisions on the choice of a child's surname were in breach of the equality principle, since they were limited to married parents without good reason).

⁶⁴ HR 27 September 1989, *NJ* 1990, 449 annotated by E.A. ALKEMA and HR 15 December 1999, *BNB* 2000, 57. In both cases the claim was rejected.

4. LIFESTYLES AS A MEANS TO ORDER RELATIONS IN SOCIETY

Marriage finds its basis in family law. Family law prescribes how a marriage has to be concluded, what the rights and duties of spouses are, how a marriage may end and whether maintenance has to be paid. It is also in the field of family law that the connection between marriage and children is established. However, marriage is also valuable for other areas of the law. In inheritance law, marriage was for a long time the one and only recognised lifestyle; important rights and duties are attached to marital status. Outside private law, lifestyles play an important role as well. Entitlement to social benefits may depend on whether the applicant is married to a partner who has sufficient means to maintain both of them. In tax law and criminal law, being married makes a difference. In other words, marriage is an instrument not only to regulate the relationship between the spouses and between the spouses and the children, but also the relation between spouses and the State.

The system in which marriage is the one and only means to regulate relations has for a long time been in conformity with social reality, but now social developments show a shift towards informal lifestyles. This brings about fundamental issues, which do not only relate to family law, but to the law in general.

There are different methods for reforming the law. In the first method, a bottom-up approach, the legislature prefers to solve problems in isolated areas of the law. For instance, if financial motives compel the state to recognise unmarried couples, tax law itself will be changed, without affecting other areas of the law in which lifestyles are relevant. This method is likely to result in problems, since the legislation will be changed, but probably without a fundamental discussion on the meaning of lifestyles for the law as a coherent, interacting system of rules. This might result not only in a different appreciation of the social functions of non-marital cohabitation in distinct fields of law, but also in the use of divergent legal terminology and various criteria in order to be considered a cohabitant.

The second method means working from the top down and starts within family law itself. Once non-marital cohabitation is regulated within family law, it is legally defined and institutionalised. Then it can be useful as a legal tool in private and public law. Changing family law therefore has far-reaching implications and should not be introduced without a fundamental debate on the meaning of lifestyles for the law.

In both The Netherlands and in Germany the first method has been used, but with rather different outcomes.⁶⁵ In The Netherlands, the law has in many respects acknowledged the shift in society from formal to informal relationships. This development started as early as the 1970s. The recognition of non-marital cohabitation has taken place in many respects: cohabitation as a ground to terminate post-marital maintenance after a divorce (1971), the position of a co-tenant has been regulated in tenancy law (1979), the position in inheritance tax law (1981), with respect to judicial protection on behalf of adults (1982), in income tax (1984), in social security law (1987)⁶⁶ and with respect to compensation for losses suffered as result of the death of a breadwinner (1992). Even though this does not imply complete equality in all fields of law, the legislature picked up social signals quite quickly. The recognition is not dependent on whether this is financially advantageous for the state; the effects are given regardless of the positive or negative consequences. The process of gradually equating both statuses started decades ago and is still continuing. Over the last fifteen years, the legal position of non-marital cohabitants has in many of these regulations been fully equated with the position of married couples. This implies that non-marital cohabitation is recognised as an economic and financial unit between partners, as a love-relationship and as a relation between home-sharers. However, there are two main problems.

First of all, there are three fields of law in which the significance of non-marital cohabitation has not been acknowledged: in family law with respect to the financial and property law aspects of the relationship, in inheritance law and in criminal (procedural) law. The application of general property and contract law results in unpredictable and sometimes unjust outcomes (see section 2.2.4). Furthermore, there is no appropriate procedure for settling property and financial conflicts between the partners and there is a low level of protection for vulnerable partners and children (see section 2.3 and 2.4). Another important area in which the legislature has not yet demonstrated an intention to undertake substantial improvements to the legal status of unmarried cohabitants is inheritance law. Recently Book 4 of the Dutch Civil Code regarding inheritance law was reformulated, but although the position of a cohabiting partner has been improved somewhat, the legal position of a spouse has been improved even more. The differences between both lifestyles are still remarkable. Finally, in the field of criminal law and criminal procedural law non-marital cohabitation has not yet appeared in the Dutch Criminal Code and Criminal Procedure Code. Although

⁶⁵ Although there is a very clear notion concerning the significance of non-marital cohabitation in Germany, there has been no institutionalisation of non-marital cohabitation, which makes it necessary to use separate definitions and terminology in isolated fields of the law.

⁶⁶ This, to a certain extent, was actually a codification of rules developed in case law.

this field of law is one in which one traditionally attaches a great deal of weight to legal certainty and predictability, the time has come to adapt to the new social reality.⁶⁷

The second shortcoming of the current Dutch approach is that the reform of the legal system has taken place in a rather haphazard way, without a clear idea on the meaning of cohabitation and its position in relation to other lifestyles. There are, for instance, more than fifteen statutory definitions of cohabitation. Whether a couple qualify as cohabitants, thus depends on the relevant provision. The result is ad hoc piecemeal law, which results in legal uncertainty and sometimes even unjustified outcomes.⁶⁸

In Germany, there is a large gap between social and legal reality, between social and legal norms, since the law has hardly been adapted to the increasing diversity of living arrangements. Non-marital cohabitation has not been given the recognition and position it deserves; the result is the unjustified ignoring of social facts. The prevailing reason for regulating non-marital cohabitation is to safeguard marriage by attaching financial disadvantages to non-marital cohabitation.⁶⁹ Recently the first small positive signal has been given by the codification of case law with respect to the right of an unmarried cohabitant to take over a tenancy contract in the case of the death of his/her partner.⁷⁰ It is striking to see that the legal status of relatives is in many areas better than that of unmarried cohabitants.⁷¹ Unmarried cohabitants regularly claim to fall within the scope of provisions regulating the position of relatives, but this is not very

⁶⁷ W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 151-152.

⁶⁸ W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 224-225 and p. 513-516. One example of an unjust result concerns non-marital cohabitation as a ground for the termination of a post-marital maintenance right (Art. 1:160 DCC). If a non-marital relationship subsequently breaks down, a maintenance right does not revive, even though the former non-marital partner has – unlike a married partner – no duty to support a partner who is not self-sufficient. See W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 546-547.

⁶⁹ For example, with respect to social security law the legislature had already recognised non-marital cohabitation before 1960 in order to prevent a violation of Article 6 (1) Basic Law. See also § 122 *Bundessozialhilfegesetz* and §§ 193 (2), 194 *Sozialgesetzbuch III* concerning *Arbeitslosenhilfe*.

⁷⁰ § 563 (4) BGB which uses a broader definition extending to all persons who have lived in a joint household with the tenant.

⁷¹ A relative has a right to the so-called *Dreifßigste* (§ 1969 BGB, concerning the right of a relative to be supported under certain conditions by the estate during 30 days after the death of the other relative), cohabiting relatives are not subject to the negative aspects of sharing a household in social security law as non-marital couples are, in inheritance tax special favourable provisions apply, *Familienzuschlag* is only granted to relatives, social benefits with respect to housing (*Wohnungsbaugesetz* and *Wohnungsgeldgesetz*) are limited to relatives. *Familienprivileg* (tort law) and *Familienhilfe* are also limited to relatives.

often successful.⁷² The consequence of the German approach is a low level of protection for cohabitants, not only in family law, but also in, for instance, social security law, tax law and inheritance law.

In conclusion, from the perspective of the harmonisation of family law, one should be aware of the close connection between family law and other areas of the law. Reform of legislation, in particular in the field of family law, should be carefully considered on the basis of a fundamental debate concerning the meaning of lifestyles for the law, since a decision (not) to institutionalise non-marital cohabitation has important effects for the law in many fields. In The Netherlands reform is necessary, in Germany reform is inevitable in order to deal with non-marital cohabitation in a consistent and fair way which does justice to social reality.

5. CONCLUDING REMARKS

Non-marital cohabitation is a social phenomenon which confronts legislatures and courts all over Europe with interesting legal questions. In many jurisdictions legislation specifically aimed at informal lifestyles has already been enacted, but these vary considerably. From this perspective it is interesting to see whether European principles for informal lifestyles will contribute to a more uniform approach. If we wish to change our legal system from one primarily based on formal relationships to one in which informal relationships are also relevant, it is important to keep three general lessons in mind.

First of all, it is important to investigate the sociological and demographical dimensions of non-marital cohabitation in Europe. Without this knowledge it is virtually impossible to deal properly with reforms in the law. On the basis of this research it becomes clear what legal questions have to be raised and which problems are most urgent. I expect that the distinction between pre-marital, post-marital and long-term cohabitation is not only relevant to The Netherlands and Germany, but that this classification also exists in other European countries. All three groups have their own

⁷² Just to give some examples: § 205 RVO concerning *Familienhilfe* for 'Angehörige who live in a 'häusliche Gemeinschaft' with the insured person and who is/are partially or completely maintained by him/her cannot be extended to non-marital cohabitants: see BSG *FamRZ* 1991, 58-60. With respect to the application of the *Familienprivileg* for *Familienangehörige* to non-marital partners there exists no consensus in the case law and legal literature. Granted by: AG München *FamRZ* 1982, 65; OLG Köln *FamRZ* 1991, 1293-1294; LG Saarbrücken *VersR* 1995, 158-159; LG Potsdam, *FamRZ* 1997, 878-879. Rejected by: OLG Schleswig *VersR* 1979, 669; BGH *FamRZ* 1988, 392 annotated by Bosch; OLG Hamm *VersR* 1993, 1513; OLG Frankfurt a.M. *VersR* 1997, 561-562. § 1969 I BGB concerning the so-called *Dreißigste* has been applied to an unmarried partner by OLG Düsseldorf *FamRZ* 1983, 274-277 annotated by BOSCH.

characteristics and this may have implications for the way in which the law should be reformed. Special attention should be given to the position of economically vulnerable partners and children when a relationship breaks down.

The second general lesson – like the first – emphasizes that family law should be seen from a broad perspective. The importance of constitutional aspects for family law should not be underestimated. Art. 6 (1) of the German Basic Law demonstrates the far-reaching influence of constitutional aspects on the political and legal debate on lifestyles, which is a partial explanation for the different approaches to non-marital lifestyles in The Netherlands and Germany.

Thirdly, we should be aware of the important function of the institutionalisation of lifestyles in family law. Once a specific lifestyle has been institutionalised in family law, it will almost automatically become a distinctive criterion in other fields of law.

However urgent the desire to solve the problems experienced by non-marital cohabitants may be, their interests are best served not by overhasty measures, but by an extensive academic debate and an in-depth analysis of all the relevant dimensions.

THE LEGAL STATUS OF COHABITANTS – REQUIREMENTS FOR LEGAL RECOGNITION

JENS M. SCHERPE

1. INTRODUCTION: WHY COHABITATION NEEDS TO BE REGULATED

The traditional family structure, consisting of husband, wife and children may still be the norm in Europe. However, it can no longer claim to be the only form of family life, as there are many other forms present in modern society.

One of these so-called “new” forms of family life is cohabitation, or simply put: living together. The number of cohabiting couples is rising steadily in Europe, and so is the number of children born in such relationships.¹ Irrespective of one’s personal views on marriage and cohabitation, the fact that cohabitation does exist, and that many people cohabit for long periods of their life, cannot be ignored. Often, the protection of the weaker party in these relationships is necessary; the simplistic argument that it is “these people’s own fault if they do not marry” does not hold true in all cases, particularly – but not exclusively – if the couple have children.

As in all human relationships, conflicts may occur between the cohabitants (or between cohabitants and third parties), and frequently these problems will have to be dealt with in a court of law. Cases of this kind can be found throughout Europe. Yet, in many European countries the legal rules for cohabiting couples are far from clear. Some European countries have begun to legislate in the area of cohabitation. This article will analyze and compare the existing legislative models regarding one particularly important aspect: What should the requirement for the legal recognition of cohabitation be?

¹ In Sweden, Denmark, France and Slovenia some 40-50% of all children are born outside of marriage, cf. the respective national reports by RYRSTEDT, LUND-ANDERSEN, FERRAND and RIJAVEC/KRALJIĆ as well as the demographical survey by KREYENFELD/KONIETZKA, all in: SCHERPE/YASSARI (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften – The Legal Status of Cohabitants*, forthcoming in 2005.

This is one of the points, if not *the* decisive point for any legislation on cohabitation: If a formal legal act like a contract or registration is required, the cohabiting couple will enter into the legal regime willingly and consciously. This is what I will call *Formal Cohabitation*.

If the legal rules are to apply, e.g. after a certain period of living together, and the legal regime is forced upon the cohabitants, it may possibly be against their explicit wishes and decisions. This model I will call *Informal Cohabitation*. The conflict between the need for the protection of the weaker party on the one hand, and private autonomy on the other, is apparent. Therefore one would suspect that the regulatory level of the legal regime should be rather light if the couple did not enter into it consciously. As we will see later, surprisingly this is not always the case.

Besides countries that provide for a special regime for Formal and Informal Cohabitation there are many countries like Germany or England and Wales that have no structured approach to cohabitation, but have some applicable rules for cohabitants, created by either statute or case law. As these rules apply very selectively and follow no coherent underlying approach to cohabitation, they will be disregarded for the purposes of this paper.

The question concerning the requirements for the legal recognition of cohabitation is also relevant in order to ensure legal certainty. If a contract or an act of registration is the threshold criterion, the moment from which the legal rules are to be applied is easily recognizable and can be easily proved. This is not the case if the legal rules are to apply, e.g. if the couple live together “for a longer period”. When and how does “living together” start?

What the criteria for the legal recognition of cohabitation should be will be dealt with at the end of this paper, as it is necessary to look at the two basic models to regulate cohabitation before we can determine the legal requirements for attaching legal consequences to cohabitation.

2. THE TWO BASIC MODELS

The different solutions for the regulation of cohabitation either use a formal act as a legal starting point or simply the fact of living together (which shall remain undefined at this point), with some varieties or even mixtures around the edges. And these seem to be the only possibilities: Either having a formal act – or having none at all.

2.1. FORMAL COHABITATION

Formal Cohabitation is known in a number of countries such as France, Belgium, and the Netherlands, to name just a few. The rules attached to a formal act, be it registration with the authorities or the formal conclusion of a contract or any other formal act, and the rules for dissolution vary greatly in the different legal systems; however, this is not the place to describe them. But it can be observed that the rules in the different countries have a few things in common.

Firstly, the formal act allows the state to attach some legal consequences that go beyond the “inner” relations of the couple, namely in public law such as tax, immigration and residence permits, the right to refuse to testify in a court of law if the cohabitee is indicted and to be considered as the next of kin for the purposes of criminal law. The conclusion of a formal act that functions as proof of a sufficient commitment² could also lead to a right to the joint adoption of children and to allow stepchild adoption. Custody/(joint) parental responsibility for children living with the cohabitees could also be awarded automatically by law.³

A clear focus point in the form of a formal act, a clear date from when the legal rules are to be applied and also a clear ending point, namely the dissolution of the formal act, allows the state to decide whether it wants to attach legal consequences to the clear-cut period of cohabitation. Also, requiring a formal act lowers the danger of abuse or fraud in order to obtain social benefits, etc.

A clear focus point is also of significance when the rights and duties of third parties are touched upon. The most common example of third party involvement is the right of the surviving cohabitee to remain in the rented home and effectively to adopt the deceased’s contractual position, as allowed, for example, by the German § 563 (2) 4 BGB even without formalized cohabitation.

Of course it is true that both the state and third parties can be involved without such a formal act. One common example is to allow artificial insemination for cohabiting couples without requiring a Formal Cohabitation, as e.g. in England and Wales⁴ or

² Whether or not such a demonstration of commitment is desirable or necessary shall not be debated here.

³ Or at least a “kleines Sorgerecht” in the German sense for both joint and other children living with the cohabitees. If the relationship is considered by the cohabitees to be a stable one and is thus demonstrated by a formal act, there is little reason to withhold parental responsibility etc. from one of the cohabitees. On the other hand, it is quite debatable if this should not be the case anyway regardless of a formal act to “certify” the cohabitation relationship.

⁴ Cf. s. 28 (3) Human Fertilisation and Embryology Act 1990.

France,⁵ and in many countries even tax benefits are granted to informal cohabitants.⁶ Still, having a formal act does allow things to progress more easily as there is a clear-cut date for the commencement of cohabitation and its consequences. Further, if it is not *rights* that are conferred upon the parties but *duties*; it is much more difficult to justify imposing such duties without a formal act and thus a conscious decision for the legal regime, as we shall see in the next section on “Informal Cohabitation”.

Secondly, when there is a formal act, the legislator can choose to have far-reaching legal consequences attached to it for the cohabitantes (in their “internal” relationship), such as maintenance, inheritance on intestacy, liability for the debts of the other cohabitee etc., as it is clear that the couple have consciously entered into the legal regime offered.⁷

Lastly, another common feature of the various registration models and its main – and decisive – disadvantage needs to be pointed out: Regardless of the content of the legal rules that apply after registration or other formal act, there will always be couples that do not make use of registration or perform the required formal act. The reasons for this may be manifold, beginning with sheer ignorance and extending to informed and conscious decisions. No matter what the reasons are, the legal regime offered by the Formal Cohabitation model will not apply to those couples. Still, the problems involved in regulating cohabitation set out briefly at the beginning of this paper remain unchanged. There can and will be a need for the protection of the weaker party. There can and will be children born within these relationships and their needs have to be taken into account. So what the registration model in effect does is nothing more than to add another formal layer of family law rules. Take France as an example. Here there are rules for the *Pacte civil de solidarité* (PACS) on the one hand, and rules existing for “*concubinage*” on the other, the latter even being defined in Article 518-8 Code civil.⁸ So, in effect, there are four levels of regulation for couples in France:

1. Marriage (for opposite sex couples only)
2. PACS (= Formal Cohabitation)
3. concubinage (= Informal Cohabitation) and
4. couples with no legal “status”.

⁵ Art. L. 2141-2 Code de la santé publique (cohabitation period of two years required).

⁶ For example, in Denmark, the Netherlands and the provinces and territories of Canada, cf. the national reports by LUND-ANDERSEN, BOELE-WOELKI/SCHRAMA and HOLLAND, in: SCHERPE/YASSARI (note 1).

⁷ However, many countries have chosen to award maintenance and the right to inherit on intestacy to informal cohabitants regardless of the wishes of the cohabitantes, e.g. Croatia, Slovenia, the provinces and territories of Canada, some of the Australian states and New Zealand, cf. the national reports by HRABAR, RIJAVEC/KRALJIĆ, HOLLAND and JESSEP, in: SCHERPE/YASSARI (note 1), although in some of these countries the cohabitants can ‘opt out’ of these obligations.

⁸ The criteria are: a couple (regardless of their gender) living together in a stable relationship.

There might be reasons to add another layer of family law rules this way. But the decisive fact remains: There will always be Informal Cohabitation if the application of the rules requires a formal act. In France there are both PACS and concubinage, both formal and informal cohabitation, the latter not requiring a formal act to be established. And thus the model of Formal Cohabitation fails to provide all cohabitants with a legal framework to protect them where protection is deemed necessary.

2.2. INFORMAL COHABITATION

In what I call Informal Cohabitation there is no formal act of any kind required to establish cohabitation or, more precisely, to attach legal consequences to cohabitation. There may of course be other requirements, such as a certain period of living together or joint children living with the couple. But these are informal requirements, things that happen without any reflection on the part of the cohabitants with regard to the legal consequences. Probably the best known European example of Informal Cohabitation is to be found in Sweden. As early as 1988 the *Cohabitees (Joint Homes) Act*⁹ entered into force for opposite-sex couples, followed shortly thereafter by the equivalent for same-sex couples.¹⁰ Both acts have now been amalgamated into a single act.¹¹

Since in Informal Cohabitation the legal consequences are attached without the couple having chosen them, one would think that the legal consequences would be rather limited. However, this is not always the case, as e.g. the Slovenian¹² and New Zealand legislation shows.¹³ Here rather strict, far-reaching consequences concerning property, maintenance and inheritance on intestacy are attached if the couple have cohabited for a certain period of time. In effect, the legal consequences attached to such cohabitation are then (and are meant to be) strikingly similar to those of a marriage.

The attachment of far-reaching consequences for Informal Cohabitation seems to me to be highly problematic. The couple have not married (or the equivalent for same-sex-couples); there might or might not have been good reasons for this. But what right

⁹ Lagen (1987:232) om sambors gemensamma hem.

¹⁰ Lagen (1987:813) om homosexuella sambor. See DOPFFEL/SCHERPE, “Gleichgeschlechtliche Lebensgemeinschaften im Recht der nordischen Länder“, in: BASEDOW/HOPT/KÖTZ/DOPFFEL (eds.), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften* (2000), pp. 7-49.

¹¹ Sambolag (2003:376). Some minor amendments were made, most importantly the passage referring to living together in a relationship “resembling marriage” has been deleted. For details see the national report by RYRSTEDT, in: SCHERPE/YASSARI (note 1).

¹² Cf. the national report by RIJAVEC/KRALJIĆ, in: SCHERPE/YASSARI (note 1).

¹³ Cf. the national report by JESSEP, in: SCHERPE/YASSARI (note 1), ATKIN, *The Rights of Married and Unmarried Couples in New Zealand*, (2003) 15 Child and Family Law Quarterly 173-184 and the paper by AESCHLIMANN in this volume, pp. 243-256.

does the state have to impose duties on these cohabitants? The state must have very good reasons for doing so.

Let me give an example: Suppose the law allows for inheritance on intestacy for informal cohabitants. Now imagine a widow and a widower in their sixties, living together. They both have children from their previous marriage. It might well be the case that they want each other to inherit if one of them dies. But it is equally likely (or maybe even more so) that they would want their respective children to inherit. Why should the law in such a situation state that they will inherit on intestacy and deprive the children of their inheritance if there is no will? Or, if there is a will making the children the sole heirs, why impose upon them the burden of a reserved portion/share (German: *Pflichtteil*), that is recognised in many European countries for legal heirs, because of the cohabitation and possibly against the will of the cohabitants?

Another, presumably more controversial example: A couple live together, but do not marry. They have two children. One of the reasons why they have not married is that one (or both?) of them is afraid of possible maintenance claims. Is it desirable for the state to impose such a duty, if the couple have chosen not to enter into a particular legal regime (i.e. marriage) that provides for such claims? Still, in this case I can very well imagine a situation where the state should (and maybe even is under a duty to) award one of the cohabitants maintenance. But I can equally well imagine good reasons for not automatically awarding maintenance, particularly if there are no children and both cohabitants worked during their relationship.

Many other examples could be mentioned; what these two examples alone show is that there is no easy answer for the problems of cohabitation.

3. A THREE-STEP APPROACH TO REGULATE COHABITATION

The problem with Formal Cohabitation is precisely the formal requirement that establishes it, as some couples, either by choice or by ignorance, might not conclude the formal act and thus will fall outside the scope of the legislation. The problem with Informal Cohabitation is that it imposes on the cohabitants certain rights and duties without regard for their wishes. As the problem of Formal Cohabitation is insoluble unless one forces couples to register or sign contracts, this basically leaves Informal Cohabitation.

What I am going to suggest in the following is a “three-step approach” when thinking about regulating cohabitation, as there seem to be three different basic cohabitation

situations that require regulation. The first one is basic Informal Cohabitation, where only rules indispensable for the protection of the weaker party and for “emergency situations” should apply. The second situation is cohabitation with children; when children are involved, their interests will need to be taken into account, and the needs and interests of the cohabitants themselves will also change. The third situation is cohabitation by couples who desire a more intense legal regime for their relationship but – for whatever reason – do not wish to marry or cannot marry. Here an element of Formal Cohabitation could be added as an option. Whether or not such an element is necessary or desirable is debatable and essentially depends on what rules this will comprise.

3.1. THE FIRST SITUATION: BASIC INFORMAL COHABITATION

If we take seriously the arguments for (protection of the weaker party, children and possibly third parties) and against (freedom to choose) the two existing models for regulating cohabitation, the task is to identify the situations in which the arguments for regulating are so strong that they override the arguments against. These are the situations where the state has an interest (or even a duty) that justifies imposing duties on a party without his/her consent. Or where the rights conferred upon the cohabitants do not conflict with the rights of third parties or take precedence over them. In addition, some provisions that are helpful in emergency situations should apply.

Of course, the main situations in which the protection of the weaker party is called for are separation (leading to a division of property and in some cases a need for maintenance) and the death of one of the cohabitees (the questions here being e.g. the right to remain in the dwelling, the right to inherit on intestacy, claims against a tortfeasor who has caused the death of the cohabitee etc.). Here the needs and interests of the parties involved need to be considered very carefully. This is a difficult task and cannot fully be undertaken here. Some examples must therefore suffice to illustrate the underlying principle.

First, an example for claims against the other cohabitee upon separation: Suppose there is a relationship where one of the cohabitees has through unpaid work (household duties or otherwise) furthered the other’s career and/or has contributed to the other’s assets. Here, some kind of compensation payment, possibly even maintenance may be called for.

Then, with regard to third parties’ rights, consider the right to attend the funeral of the deceased cohabitant. This can (and most likely will) be of the utmost importance

to the surviving cohabitant. If this is not ensured, basically the relatives (the cohabitant not being one of them) of the deceased can decide who is allowed to attend the funeral, thus are able to effectively bar the cohabitant from attending. Less drastic examples are visitation rights in hospital and prison, and the right to decide on treatment in cases of medical emergencies. These situations have in common that rights should here be conferred upon cohabitants. In some situations these rights will conflict with third parties' rights (as in the funeral example), but the interest of the cohabitant is much stronger and needs to be protected. Without legal rules to achieve this, the cohabitant would be left without any right.

It can be argued that in most situations in this category it is possible to sign papers or conclude contracts etc. However, this takes us back to the reason why Formal Cohabitation is not feasible: At least some couples simply will not do so. And the need for the protection of the weaker party exists independently of concluded contracts. Also, in some areas it is impossible to have a contract, particularly if public law is touched upon.

In the area of public law it would be worthwhile, from the state's point of view, to explore in which way the state benefits from cohabitation and long-term cohabitation in particular. If marriage is seen as beneficial for a society (and rightly so), then comparable benefits might be gained through cohabitation. If the benefits for the state are comparable or even equal, then the state should not treat marriage and cohabitation differently, be it through the tax system or otherwise.¹⁴ As a corollary, a cohabiting couple should not be allowed the same social benefits as two independent persons, particularly if only one of them is entitled to these benefits because of his weak social position (welfare payments, unemployment benefits). If the weakness of the social position is compensated by the cohabitation there is good reason for the state not to want to extend the benefits to that person.

3.2. THE SECOND SITUATION: CHILDREN INVOLVED

If children are involved the situation changes; the cohabitation gains a different quality, not only in relation to the children but also between the cohabitants. New problems and dependencies arise. In principle, the same technical approach as in the first situation should be taken: Identifying the factual situations where the protection of the weaker party or weaker parties is needed. Let me give an example.

¹⁴ Cf. CLIVE, "Marriage: An Unnecessary Legal Concept?", in: Eekelaar/Katz (eds.), *Marriage and Cohabitation in Contemporary Societies* (1980), pp. 71-81 and BARLOW/JAMES, *Regulating Marriage and Cohabitation in 21st Century Britain*, (2004) 67 *Modern Law Review* 143-176.

It is undisputed that the state is generally under a duty to protect the interests of children, e.g. by giving children a maintenance claim against their parents. But what these maintenance claims often fail to take into account is the position of a single parent who raises the child, most often the mother. If the couple were not married, often the mother has no maintenance claim of her own against the father of the child.¹⁵ In reality, of course, the money in the household of the single parent is not kept separate, the mother and children “live from the same account”. If the mother is unable to work (or has to work less) because the children need to be looked after, the balance in the account will be lower. If the reasons for this are to be found in the former cohabitation relationship, there is a good reason to award maintenance claims. Under which conditions and to what extent remains to be seen. However, it seems to be much more justifiable to have maintenance claims between cohabitants where one cohabitant cares for the children of that relationship.

What this example means to show is that cohabitation with children involved is more complex and needs special attention. In the case of divorce great weight is put upon the welfare of the children, and rightly so. But is it the children’s fault if their parents have not married? Why should they be treated differently than children of married couples? And not only the children need protection, but particularly the cohabitant taking care of them is in a weak position. Why should this cohabitant be treated differently from a spouse?¹⁶

As mentioned earlier, parental responsibility and connected issues are important in everyday family life and there is an apparent need to regulate irrespective of the marital status (or non-status) of the parents. In several countries parental responsibility is given to the mother and father regardless of their marital status, in some others it is not. Irrespective, cohabitation often establishes social parenthood even if there is no legal parenthood (or no parental responsibility under the law). For everyday family life this social parenthood is of importance and should be reflected in the law.

3.3. THE THIRD SITUATION: MORE RIGHTS AND DUTIES

Above (2.1 and 2.2) I have been speaking of the two different models for cohabitation. These are legal models. But there is a vast number of possible *social* models of cohabitation. As argued before, the situations in which the weaker party needs to be

¹⁵ Or just a rather limited one, cf. the German § 1615I BGB.

¹⁶ While this is not a problem area restricted to cohabiting couples and similar problems arise for situations where children are born outside marriage, a (longer) cohabitation period might merit other solutions.

protected and the state is bound to intervene have to be identified and should be regulated, particularly when there are children involved. This will provide the basic legal rules for cohabitation and will fulfil the state's duty to take care of the weaker party.

However, some cohabiting couples might wish for a closer legal relationship for their chosen social model of cohabitation. As stated before, while it is possible to draw up contracts for many situations, for some areas it is not, especially when it comes to matters of public law and third parties' rights. Consider again the example of the widow and widower. They might or might not want the other to inherit. But if they do and the law does not provide a special provision in this respect, then they depend on drafting their wills accordingly and make each other the testamentary heirs. But this will not change the fact that the inheritance will inevitably be burdened with a large reserved portion/share (German: *Pflichtteil*) for the legal heirs (if this is the practice in that legal system). This might be a situation where a differentiated legal treatment might be desirable. Another example is residence permits for foreign nationals. It is doubtful whether the state would or should give residence permits because of Informal Cohabitation. Here a more formal act, a clear focus point might be called for. The same holds true for other benefits granted by the state as well as some duties for the cohabitants as stated above.

Therefore maybe an extended set of rules should be considered, one that does require a formal act. This would allow cohabitants who feel the need for a closer legal relationship to opt into this existing set of rules.

While this may be said to create another layer of family law rules and has all the flaws of the Formal Cohabitation model as set out above, there are good reasons, particularly seen from the public law angle, to attach some consequences only to a formal act in order to have a clear focus point and thus legal certainty. What the extent of those rules should be and whether the cohabitants need to opt into the rules as a whole or just into some of them is a different matter and needs a detailed discussion in which the relation to marriage in particular must be debated. Yet I do not think it is true that this necessarily creates an alternative or a threat to marriage. Whether it does, depends entirely on the design of the rules.

3.4. SUMMING UP: STEPS TO REGULATE COHABITATION

1. There is no alternative to beginning with the Informal Cohabitation approach when seeking to regulate cohabitation. But as the rules will then apply regardless of the will

of the cohabitants the full gamut of rights and duties can only be justified in situations where the state is bound to interfere because of a need to protect the weaker party or third parties.

2. Where children live with the cohabitants, the needs change and therefore this special situation needs to be taken into account.

3. Finally, it can be justified to require a formal act, a conscious decision by the cohabitants for some legal consequences to apply. These are situations where Informal Cohabitation is just not sufficient or is not a sufficiently certain focus point. Here an ‘opt-in’ set of rules could be provided by the law.

4. Whether the parties should be allowed to opt out of some or all the legal rules depends on the content of those rules. If the consequences of cohabitation are far-reaching, the possibility to opt out has some merit and has been introduced in New Zealand and Tasmania.¹⁷ Still, opting out can (and most likely will) deprive one of the parties of the protection for which the rules were intended to provide, so this option needs to be considered carefully; on the other hand, the rules should not be mandatory to a larger degree than those for marriage.

4. WHAT IS “COHABITATION” ANYWAY?

What this article has so far intentionally failed to address is the question of what “cohabitation” actually is. How the law defines and treats cohabitants greatly depends on whether one adopts the Formal or Informal Cohabitation approach. Having asserted the Informal Cohabitation as a starting point, some of the questions have already been answered, mainly that a formal act of some kind should not be required to establish cohabitation.

However, this makes defining cohabitation more difficult, if not impossible, given the many possible forms of cohabitation. Therefore it would be unwise to have a narrow definition.

Most existing laws on cohabitation require a defined (e.g. Portugal: two years; New Zealand and Croatia: three years) or undefined (e.g. Slovenia, Sweden, France for the case of concubinage: “longer” or “long-term”) period of time of living together. Requiring a fixed period of time creates problems if the defined period has not been

¹⁷ Cf. AESCHLIMANN in this volume (pp. 243-256) and the national report by JESSEP, in: SCHERPE/YASSARI (note 1).

reached; nonetheless, the need for the protection of the weaker party might also manifest itself if the couples have lived together for a shorter period than stipulated. Therefore it appears more sensible to allow room for some discretion and to use a term like “a long-term period” in any definition.

Also, the requirement of “living together” will need to be looked at more closely and, again, it should not be interpreted narrowly. Consider the couple who work in different cities and/or each have their own apartment or house. Should this automatically preclude them from being cohabitants? What if they see and stay with each other every weekend (or more often) and they spend all their vacations together (so-called “living apart together”)? What if they have joint children?¹⁸ It seems obvious that a flexible approach is needed to allow for appropriate solutions for all cohabitation situations.

Finally, also some questions with regard to proof remain open. What is adequate proof of “living together”? But this cannot and should not be regulated in detail.¹⁹ The price to be paid would be the loss of flexibility that regulating cohabitation requires.

¹⁸ The existence of joint children in New Zealand and Croatia establishes “cohabitation” if the couple live or have lived together for the purposes of the legal rules to be applied or at least an assumption that the couple cohabit; for the reasons set out in 3.2 above this seems to be a reasonable approach.

¹⁹ Nevertheless, some Acts like the De Facto Relationships Act 1984 of New South Wales in sec. 4 (2) specify some criteria that may be relevant, but that all circumstances should be taken into account. Thus, there might still be cohabitation despite the absence of these criteria – or there may be no cohabitation although all the criteria are fulfilled. The use of this provision therefore seems doubtful. Tasmania (Relationships Act 2003, sec. 5 (3)) and New Zealand (Property (Relationships) Act 1976, sec. 2D (2)) have similar provisions; in Canada *Molodowich v. Pentinnen*, (1980) 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), serves a comparable purpose, as does e.g. *Kimber v. Kimber*, [2000] 1 FLR 232 in the United Kingdom.

LEGISLATION ON INFORMAL COHABITATION IN NORWAY

JOHN ASLAND

1. INTRODUCTION

Informal long-term relationships may include various groups of relationships; from same-sex, and different-sex cohabitation to siblings or students sharing a house or flat. Informal relationships are distinct from formal relationships such as marriage and a registered partnership. In my paper I will focus on what we may call informal cohabitation, where the partners are a couple and not only mere friends (or family members).

In Norway, there is no act that regulates the legal consequences of informal cohabitation, as the Marriage Act does for civil marriages and the Act on Registered Partnerships for Homosexual Couples does for registered partnerships. However, informal cohabitation has been recognised in several fields of law. The regulations are very fragmentary, and one has to study several acts and regulations to obtain an overview of the consequences of informal cohabitation. The Act relating to the Joint Residence and Household when a Household Community Ceases to Exist, of 4 July 1991 No. 45, seems to be the only act that specifically regulates informal cohabitation. This act not only applies to cohabitants who share bed and board, but also to other people who share a house or flat.

To systemise the maze of rules and regulations in the field of informal cohabitation, a committee of experts was appointed by the government in 1996. The committee's mandate was to provide a statement on the problems concerning rights and obligations for informal cohabitants. Informal cohabitants in this context were defined as persons living in stable marriage-like relationships. Furthermore, the mandate of the committee was to take a stand on the question of equal status between informal cohabitants and married couples, and to propose concrete amendments to adjust our legal system to such equalisation. The committee published its report in 1999 (NOU 1999:25). The

report included various drafts for amendments to the existing legislation, and it was meant to be a first step towards an act on informal cohabitation.¹

The report was limited to heterosexual relationships. Most of the proposed amendments were related to couples who had children together, a situation that only occurred in heterosexual relationships at that time.

The purpose of my paper is to present, analyse and criticise the proposals of the committee and the likely outcome of the proposed amendments to our legislation. The proposals will to some extent protect partners in informal long-term relationships, but the aim of the new legislation, to give informal cohabitants a status equal to that of married couples, may just as well lead to the opposite of protection – decreased freedom and legal rights, not only to cohabitants but also to married spouses.

2. LEGAL DEFINITION OF COHABITATION

Among other things, the committee has proposed a legal definition of informal cohabitation. Today, there are several definitions of informal cohabitants and informal cohabitation. Some definitions refer to a marriage-like relationship; other definitions emphasize the permanence of the relationship (they have a time-limit, e.g. it must have lasted for at least two years) or whether the parties have common children. What we in common language call cohabitation is a heterogeneous group of relationships spanning from short-term relationships to lifelong relationships involving children. The various couples will have various needs for legal rights and obligations motivated by their civil status. The committee focused on marriage-like relationships. The characteristics of a marriage-like relationship are: a) that it includes common children or b) that it has lasted for a certain period of time.

The committee thoroughly discussed the criteria for cohabitation that may be given a status equal to marriage.² The main criterion is that the cohabitation is stable and marriage-like. To establish whether or not the cohabitation is stable and marriage-like, the committee looked at several typical characteristics of marriage: At first there must be no impediments to marriage, i.e. neither of the cohabitants must be married (to somebody else), there can only be two cohabitants at the same time, the cohabitants are not supposed to be close relatives and, finally, they must normally have reached the age of 18 – the age for marriage.

¹ Research on informal cohabitants and their family relations was an important basis for the committee's work.

² NOU 1999: 25 p. 123 et seq.

Furthermore, the parties are assumed to share a household, to live together and to have some degree of mixed expenditure. If the parties are temporarily separated because of education or work, they may still be recognised as cohabitants in relation to legal issues where cohabitation is a criterion for legal rights or obligations.

The committee saw it as essential that the criteria for establishing a legal definition of cohabitation were functional and practical concerning legal technique. In addition to the criteria mentioned above, a stable and marriage-like relationship is recognised when either: a) the parties have children together and live together and/or b) the relationship and cohabitation has lasted for a certain period of time.

The committee suggests that cohabitants who have common children will always be recognised as living in a stable and marriage-like relationship. Consequently the permanence of the cohabitation is only an issue where there are no common children involved. Having thoroughly taken into account various aspects and considerations, the committee concluded that a particular cohabitation, in order to activate legal rights and obligations, must have lasted for at least two years.

Two years was the most frequently used time-limit in the legislation at that time, e.g. the Act relating to the Joint Residence and Household when a Household Community Ceases to Exist. But there was also another important consideration that was emphasised: The probability of a cohabitation coming to an end during the first two years is fourteen times greater than during the first two years of marriage, whereas the probability of a breakdown after four years of cohabitation is only four times higher than after four years of marriage. Accordingly, cohabitation only becomes more stable and marriage-like after two years.³

The two-year condition was not supposed to be an absolute condition in all provisions giving equal status to marriage and cohabitation. The permanence of the relationship is not an issue when it comes to domestic violence and the right to refuse to testify against the other party in criminal proceedings.

The committee did not recommend the establishment of an official register of cohabitations. They found that a register, both optional and mandatory, involved so many difficulties that the disadvantages exceeded the advantages.⁴

³ NOU 1999: 25 p. 125 and p. 277 et seq.

⁴ NOU 1999:25 p. 24.

3. PROPOSALS REGARDING PRIVATE LAW

Regarding private law, the committee was of the opinion that the parties' individual freedom and the freedom of contact should be the guidelines for the regulation. It is an independent choice taken by the parties not to enter into a marriage. To a large extent, cohabitants can arrange their private lives and economy through contracts. The committee did not wish to recommend an equal status for informal cohabitation and marriage in general.

However, some provisions and regulations were proposed in favour of the weaker party in the relationship, and in order to secure the welfare of children living within these families.

The committee did not recommend the concept of a marital property regime being imposed on informal cohabitants. There is a distinction between marital property and separate property in Norwegian marital law. Marital property in the Norwegian sense of the term means property which, upon the termination of a marriage, will as a rule be shared equally, whereas separate property will remain in the hands of the owner. During the marriage, marital property and separate property do not differ to any great extent. Marital property does not mean that the spouses have joint decision-making power regarding the property; neither does it mean that the spouses are jointly liable for any debts regarding the property.

Restrictions on the right to legal disposal, i.e. sale, mortgage, rental etc., of property such as real estate (the couple's residence) and ordinary household goods are laid down in the Marriage Act. Similar provisions for informal cohabitants are proposed by the committee. The same applies to the obligation to provide information regarding financial matters to the other party upon request, as codified in the Marriage Act section 39.

The Marriage Act section 31, third paragraph, states that "In assessing who has acquired items of property that have been used by the spouses jointly and personally, such as a joint residence or ordinary household goods, due consideration shall be given to the work of a spouse in the home." This principle, often referred to as "housewife co-ownership", also applies to informal cohabitants, but the committee wishes to codify it in relation to informal cohabitation.

Married couples who own marital property will divide the marital property equally after deductions have been made for debts. These provisions do not apply to informal cohabitants, and neither does the committee propose that they should do so. A right

to compensation in cases of unjustified enrichment is occasionally provided in the case-law. This praxis will now be codified.

Provisions on rights to individual items of property at the time of the division are already provided in the Act relating to the Joint Residence and Household when a Household Community Ceases to Exist. No amendments to these provisions are proposed.

Provisions on maintenance after cohabitation has ceased to exist are not proposed. The main rule in the present Marriage Act is that maintenance is not granted; cf. the Marriage Act section 79.

It is not proposed that the remaining cohabitant shall be a legal heir of the deceased cohabitant. However, it is proposed that the cohabitants may bequeath more to the other cohabitant by will than is currently the case without violating the statutory forced share of the children.

The right to “uskifte” is proposed by the committee to apply to informal cohabitants who have been living together for more than five years, or who have children together.

“Uskifte” is a decedent’s estate which is not transmitted to the heirs because a surviving spouse has exercised his right to take over the marital property undivided. The surviving spouse has the right to enjoy the “uskifte” so long as he/she lives or until he/she remarries. In the committee’s proposal this right will lapse if the widowed cohabitant enters into a marriage or a new cohabitation lasting for more than two years (or involving children). The “uskifte” in the committee’s proposal does not include the entire estate. It is restricted to the joint residence of the spouses and the ordinary household goods.

Parental questions are also issues which have been discussed by the committee. Firstly, the establishment of paternity has been discussed. The *pater est* rule applies when a child is born within wedlock. This rule says that the man to whom the mother is married at the time of the child's birth shall be regarded as the father of the child.⁵ The committee does not recommend the application of the *pater est* rule to informal cohabitants. The committee’s proposal on this issue is that the paternity (and maternity) of the child is established through a written declaration by both parents, in which they declare themselves to be the parents of the child and declare that they are cohabitants.

⁵ Act No. 7 of 8 April 1981 relating to Children and Parents (The Children Act) section 3.

Secondly, artificial insemination has been discussed. This option was already available to informal cohabitants, provided that they live in a marriage-like relationship. The majority of the committee were in favour of the present status of the regulations.⁶

Thirdly, the question of adoption was raised. The majority of the committee proposed an amendment to the Adoption Act giving informal cohabitants living in a marriage-like relationship the right to apply for adoption, provided the cohabitation had lasted for a certain period of time (3 – 5 years).⁷

4. PROPOSALS REGARDING PUBLIC LAW

In relation to certain fields of public law, such as social security, social welfare and taxes, the committee proposes to go further than in the field of private law by giving equal rights to informal cohabitants. Contract is seldom an option in order to achieve equal rights in these fields of law. Equal rights and obligations have already been imposed in several provisions of our Social Security Act.⁸ The main rule of equal status if the cohabitants have children together, have previously had children together or have previously been married applies to most of the provisions in the act. However, some provisions provide equal rights and obligations after a shorter period of time. Social welfare is a supplement to social insurance and the payments are based on the discretionary power of the welfare officer. Yet the committee recommends that the starting point for the evaluation should be that informal cohabitants and married couples are treated equally.

The Norwegian tax system is based on individual taxation. Nevertheless, there are some provisions that may discriminate against informal cohabitants. The committee suggests that cohabitants who have children together or who have been living together for at least two years are treated equally with married couples.

Inheritance tax and document duty and capital gains tax when transferring real estate between the parties are imposed on informal cohabitants and not on married spouses. These discriminatory differences should be abolished according to the committee's proposals.

In addition, informal cohabitants are already provided with equal rights in procedural issues like the right to appeal against a judgement in the absence of a deceased person

⁶ Today, this is regulated in Act No. 100 of 5 December 2003 relating to the Application of Biotechnology in Human Medicine, etc.

⁷ Act of 28 February 1986 No. 8 relating to adoption.

⁸ Act No. 19 of 28 February 1997 on National Insurance.

and the right to refuse to testify against the other party. Informal cohabitants and married spouses are also equally protected against domestic violence.

The question of who is considered to be the next of kin in the case of an accident, death or illness of one partner, is solved in the same way for married couples and informal cohabitants in some provisions and differently in other provisions. The committee has proposed more uniform regulations on this issue.

5. WHAT IS THE PRESENT STATUS OF THE IMPLEMENTATION?

Some of the proposed amendments were supposed to be implemented in the Act relating to the Joint Residence and Household when a Household Community Ceases to Exist, of 4 July 1991 No. 45. The proposed amendments to this act have not yet been enacted.

As mentioned above, the National Insurance Act had already been adjusted to provide equal status for cohabitants in several provisions. Nevertheless, the committee's proposed amendments from 1999 have not yet been implemented as we enter 2005. Neither has the Act relating to Social Services been amended.⁹ There has been only one amendment to the Taxation Act as a result of the committee's proposals. Section 2-16 of the Taxation Act gives equal status with married spouses to cohabitants who have equal status to married spouses in the National Insurance Act section 1-5 (cohabitants who have children together, have previously had children together or have previously been married or registered partners).¹⁰ These cohabitants are also exempted from inheritance tax due to an amendment in the Act relating to Inheritance Duty and Duty on certain Gifts, under section 4. Document duty and capital gains tax, when transferring real estate between the parties, are still imposed on informal cohabitants despite the committee's proposals.

The proposals of the committee have still not had any significant influence on private law. Restrictions on the right to the legal disposal of property such as real estate and ordinary household goods are not yet imposed. Neither has an obligation been imposed to provide information regarding financial matters to the other party upon request as proposed by the committee.

⁹ Act No. 81 of 13 December 1991 relating to Social Services.

¹⁰ Act No. 14 of 26 March 1999 on Taxation.

The proposal to allow the cohabitants to bequeath more to the other cohabitant by will than is currently the case without violating the statutory forced share of the children has not been taken up by the legislature. Neither has the proposed right to “uskifte”, i.e. to retain the joint residence of the spouses and the ordinary household goods for as long as the surviving partner lives, been taken up by the legislature.

The paternity issues discussed by the committee have not lead to any amendments to the legislation. However, something might be stirring in the wake of the discussion on registered partners’ right to adopt children. There is a heated debate going on in Norway about registered partners’ right to adopt children. Many politicians are not aware of the fact that informal cohabitants do not have a right to adopt children together. If the Adoptions Act is amended in order to allow registered partners to adopt children,¹¹ it is likely that this will also affect the right to adopt children for informal cohabitants.

However, the government has sent a report to the Storting,¹² where it embraces most of the committee’s proposals.¹³ Among other things, the government is in favour of giving surviving cohabitants the right to “uskifte” and a statutory share of the estate without having to draft a testament to that effect. The proposed legal definition of informal cohabitation is not supported by the government even though most of the comments from the consultative round were in favour of such a definition. The following debate in the Norwegian Parliament also demonstrated a positive attitude towards the recommendations of the committee, although the legal reforms have still not been implemented into our legislation.

6. CRITICAL COMMENTS ON SOME PROPOSALS REGARDING PRIVATE LAW

There are two issues from the committee’s proposals that I would like to comment upon and point out some problems and challenges.

6.1. ADOPTION

The discussion of this issue has in my view put the question upside down. As I see it, it is not a question of a right to have children, but a question of what parents a child

¹¹ Registered partners may adopt the other partner’s biological children.

¹² The Stortinget is the Norwegian Parliament.

¹³ St.meld. nr. 29 (2002 – 2003) Om familien – forpliktende samliv og foreldreskap.

is ideally is supposed to have. The question is under which circumstances society is entitled to assist people in having children. Which qualifications shall be required when society leaves the responsibilities for bringing up a child to someone other than the child's biological parents? The situation is completely different from the situation where the authorities take a child away from its biological parents, even though the best interest of the child is a guideline in both situations.

Based on the best interests of the child, I do not think that it is wise to allow informal cohabitants to adopt children. The Adoptions Act does not provide a right to adoption; the applicants must have the qualifications and prospects of giving the child a safe and harmonious childhood. It is evident that informal cohabitation is statistically less stable than marriage. I do not think that it is an unreasonable condition that the parents should demonstrate their commitments to each other and their children by entering into a marriage.

Today, single persons may adopt children under very strict conditions. This is used as an argument for allowing informal cohabitants and registered partners to adopt children as well. In my opinion it was a mistake to allow single persons to adopt, and I do not think that a mistake can justify further mistakes.

6.2. RIGHT OF INHERITANCE

The proposal to allow the cohabitants to bequeath more to the other cohabitant by will than is currently the case without violating the statutory forced share of the children, and the proposed right to "uskifte" are both ideas which I could support. However, these proposals cannot be implied without several amendments to our present law.

To allow the cohabitants to bequeath more to each other by will without violating the statutory forced share of the children is the least of the challenges. The forced share is two-thirds of the decedent's estate, but this is maximised to NOK 1,000,000 for each child. The forced share has previously been attacked by the increasing rights of the surviving spouse, and the surviving spouse have always won.

To implement a right to "uskifte" will be a much greater challenge. Even though the right is limited to the joint residence and ordinary household goods, this would lead to a massive change in the balance between the surviving cohabitant and the deceased cohabitant's family. Most people in Norway own their habitual residence. This is often the main asset. Thus a right for the surviving cohabitant to keep the joint residence is by and large the same as keeping all the assets.

Another problem is a more fundamental one. The right to “uskifte” lies at the heart of matrimonial rights in Norwegian marital law. The right is closely intertwined with the concept of marital property. Married spouses who have separate property are not entitled to “uskifte”. If they are to be entitled to “uskifte”, there has to be either a marriage settlement or consent from the heirs of the deceased cohabitant. If cohabitants are given the right to “uskifte”, we will have the peculiar situation where cohabitants have an unconditional right to keep the decedent’s estate undivided whereas some married spouses must either have entered into an agreement with the heirs or the other spouse in order to achieve such a right. To attain some kind of balance, I think it would be better if cohabitants also had to enter into an agreement or to draft a testament in order to transfer such a right. An alternative would be to give all married spouses an unconditional right to “uskifte”.

In the committee’s drafts there is also a proposed regulation of the cessation of the right to keep the estate undivided. Today, the right ceases if the widow(er) remarries. According to the committee’s proposal, the right will cease after two years of a new cohabitation. This is of course a natural consequence of giving cohabitants the right to keep the estate undivided. But an unfortunate side-effect of such a provision is that the thousands of widows and widowers who today live in informal cohabitation will have to distribute the property to the heirs of the deceased spouse. In order to minimise this negative effect, the new regulations should not be given retroactive effect.

Another problem is the situation where the deceased leaves both a married spouse and a cohabitant. This is possible if the spouses have parted without a legal separation. In such a case they are still married and are still legal heirs to each other. Sometimes these spouses may live in marriage-like relationships with other partners, and there may be children involved. If the committee’s proposed legal definition of informal cohabitation passes through Parliament, there will be no conflict, because the cohabitation suffers from an impediment to marriage. If this definition is not adopted, and the definition relating to “uskifte” does not say anything about cohabitation where one of the cohabitants is married, there will be a problem. Who is then entitled to “uskifte”? Is it the widow, the surviving cohabitant, or both? In this situation we can see some of the absurd situations that may occur when formal polygamy is prohibited whereas informal polygamy forms part of the legal order. But that is another discussion.

THE SPANISH RELATIONSHIPS LEGISLATION

LEONOR BUENO MEDINA

1. INTRODUCTION

The Spanish Informal Relationships legislation is based on the system of distribution of competences between the national authorities and the autonomous communities which has been established by the Spanish Constitution. The autonomous communities have legislative and executive autonomy with their own parliament and regional government and their powers are different for every community; these powers are contained in the so-called “autonomy statute”.

On the one hand, although the Spanish legislator has recognized special effects in determined issues in relation to Informal Relationships, it has not adopted any Act in order to regulate the whole question. On the other hand, eleven of the seventeen autonomous communities which make up the Spanish State have regulated these Informal Relationships.

We can now distinguish two types of autonomous communities: the autonomous communities without a specific regulation on Informal Relationships (any disputes, within this framework, are considered with regard to the case law of the Supreme Court), and the autonomous communities with a regulation thereon. Within this second group we can draw another distinction according to the different levels of powers: the autonomous communities with a wide range of powers to legislate in civil matters (composed of Catalonia, Aragon, Navarre, the Basque Country and the Balearic Islands) and those without any power in civil matters (composed of Valencia, Madrid, the Principado de Asturias, the Canary Extremadura and Andalucía).

We can notice that all the autonomous communities of the second group have regulated Informal Relationships with reference to constitutional articles: the social, economic and legal protection of the family (Article. 39); the dignity of the person and the free development of personality (Article. 10.2); and the equality and non-discrimination principle (Article. 14). In addition, this regulation is based on the principles of equality, personal determination and judicial security.

In general, the partners will only complain when their relationship breaks down. But any agreement concluded between the parties, either at the beginning or during the relationship, will always be the first applicable rule. In this case, the informal relationship being based on the principle of personal *self-determination*, the couple are entitled to regulate their own cohabitation. However, the cohabitants do not always regulate the specific aspects of their relationship; therefore the Courts necessarily have to analyze, on a case by case basis, in order to discover the most appropriate solution when applying of the general rules. At the same time, the principle of *judicial security* has led the regional legislators to establish a regulation in order to determine the requirements and the effects of informal relationships.

This study will analyse the major judicial and legislative solutions in order to protect partners and to avoid unjust enrichment. These solutions are generally found by means of financial compensation which is aimed at guaranteeing freedom and equality between the cohabitants and particularly at protecting the weaker party. Indeed, each of the partners is allowed to terminate the cohabitation unilaterally which can have consequences for the very important principles of freedom and equality.

After having presented the general framework of the Informal Relationships Regulation in Spain, I will firstly look at the regulation at the national level, and secondly the regulation at the regional level.

2. STATUS ACCORDING TO THE STATE

The Spanish Constitution does not include any concept of the family. Nevertheless, the Constitutional Court¹ affirmed, in 1992, that marriage and the family were two different things and that the constitutional concept of the family was not only based on marriage. Thus, the Constitutional Court stated that Article 39 of the Spanish Constitution protected all forms of the family. Couples are characterised as a “family” and they are constitutionally protected under Article 39.2 of the Spanish Constitution.

The Spanish Government has not adopted any Act to regulate unmarried couples and no customary law exists in this respect. Consequently, the Spanish Courts have to decide according to the General Principles of Law. The Spanish legal system has provided unmarried couples with legal effects by applying the constitutional principle of equality, as well as other legal texts such as the Adoption Law or the Urban Leasing Law. But we have to bear in mind that the recognition of certain benefits does not mean the recognition of a marital status.

¹ STC 222/1992, 11th December 1992.

As I have already mentioned and, in spite of the constitutional protection, there is a gap in the regulation of unmarried couples which appears when the partners separate. In this case, we have to refer to the principles formulated by the Supreme Court:

- The first criterion will be *the enforcement of the agreement concluded between the parties* referring to the effects during and at the moment of the dissolution of the relationship.
- *In the absence of such an agreement*, the rules on marriage are automatically inapplicable, so Judges can decide according to the General Principles of Law and with reference to other legal instruments which regulate civil society or the community property.
- At the same time and independently of the liquidation of the patrimony of the parties, the Supreme Court has accepted the *right to claim* any economic damages which result from the breakdown of the informal relationship.

2.1. DISSOLUTION OF THE PARTNERSHIP

As I have already mentioned, marriage and de facto relationships are two different legal situations. The first consequence of this is the non-application by analogy of the rules governing matrimonial property laid down by law. At this moment in time, unmarried couples do not have any economic property regime. The regulation of their relationship will be inferred from the intention of the parties as laid down by formal agreements or by their actions, the *facta concludentia*. The autonomy of the parties is the principal rule for regulating relationships within informal partnerships. The limits to these agreements are the general limits established for contractual relations (Article 1255 CC).

The autonomy of the cohabitants enables them to regulate their relationship according to the economic property regime. When unmarried couples were considered to be involved in immoral and illegal relationships, the patrimonial agreements between the partners were considered null and void because they were against public order and good morals.

Nowadays, the contracts regulating patrimonial terms between an unmarried couple are indeed enforceable. As the Recommendation of the European Council, 7 March 1988, indicates, this kind of contract between two people who live together and who have regulated their patrimonial relations cannot be considered null and void simply because such a contract was concluded in these circumstances.

2.2. COMPENSATIONS

However, independently from the liquidation of property, one of the unmarried partners can demand compensation when the cohabitation ends and an unfair situation is the result. In this case, the Spanish Court enforces the general principle of protecting the cohabitant who has been placed in a disadvantageous position by the *de facto* relationship.² As the Supreme Court has stated, this principle is deduced from constitutional rules (Article 10 of the Spanish Constitution: the principle of the dignity of the person; Article 14: equality principle; Article 39: the principle of the protection of the family); from the rules of Private Law and from the decisions of the Supreme and Constitutional Courts. In these situations the pertinent rule is the protection of the weaker party. In these cases the purpose is to compensate or indemnify the party who has suffered damage or a detrimental decline of his/her economic situation as a consequence of the breakdown of the relationship, so as to avoid any injustice. Nevertheless, the Courts have concluded that it is necessary to examine every situation on a case by case basis, applying in each case the more appropriate rule in order to find a just solution.

In general, the solutions used have been the application of unjust enrichment and the financial compensation which is applicable to marriage (Article 97 of the Civil Code).

2.2.1. *Unjust enrichment*

Unjust enrichment is based on the general principle which prohibits any enrichment which is not justified and creates an obligation of restitution or reparation. When cohabitation has resulted in a situation of patrimonial unfairness between both cohabitants, the affected cohabitant can claim economic compensation. Unjust enrichment is principally applied when one of the cohabitants has dedicated his or her time to the home, the common children or the other cohabitant or when one of the cohabitants has worked for the other party. The main problem of this legal instrument is that it requires the absence of a valid cause which justifies the enrichment so that it is necessary to examine the particular circumstances on a case by case basis.

2.2.2. *Article 97 Civil Code*

Article 97 of the Civil Code establishes economic compensation for the spouse who has suffered damage in the case of separation or divorce. The scope of this article is

² The decision of the Supreme Court of 10th March 1998 (RJ1998, 1272) recognized the application of a new principle: the principle of protecting the cohabitant who has been placed in a disadvantageous position by the factual situation

to avoid an unjust material crisis and to restore the economic equilibrium after the breakdown of the marriage in relation to the standard of living that the parties enjoyed within the marriage. It is necessary to compare the economic situation of each party both before and after the breakdown. According to the most recent decisions of 27 March 2001 and 5 July 2001, the Supreme Court³ considers this article to be applicable by analogy based on the following argument: Some effects of the dissolution of an unmarried relationship by unilateral decision are similar to the breakdown of a marriage. The argument in favour of the application of this article in the case of a breakdown of an unmarried relationship is that this compensation depends on the objective existence of an economic disadvantage and not on the breakdown of the marriage as such.

3. THE AUTONOMOUS COMMUNITY LAWS

Some Autonomous Communities have regulated this issue and only five of them, which have powers to legislate in civil matters, have developed an authentic private law regime. Catalonia, Catalan Act 10/1998, 15 July, concerning stable couples' relationships; Aragon, the Aragon Act 6/1999, 26 March, concerning unmarried stable couples; Navarre, the Navarre Act 6/2000, 3 July, concerning legal equality for stable couples; the Balearic Islands and the Basque country. These Autonomous Communities, subject to their competence in civil matters, have regulated the property of the couple during the cohabitation and at the moment of the dissolution. In general, the legal rules of the autonomous communities allow the partners to regulate, through an agreement, their personal and patrimonial relations.

3.1. THE LEGAL ECONOMIC STRUCTURE

When there is no agreement or when such an agreement considered null and void, the regime within the laws is applicable on a subsidiary basis and the economic position of the cohabiting couple is as follows:

- *Concerning the patrimonial effects of cohabitation:* The absolute separation of the patrimonial property between the cohabitants, each partner retaining the property and the administration of the assets they had before the cohabitation commenced and the assets they acquired during the cohabitation.
- *Concerning the common expenses and the mutual obligations to support:* The contribution of both parties to the maintenance of the home and the common

³ RJ 2001, 4770.

expenses generated by the cohabitation will be proportional to their respective revenues.

- *Concerning the liability for debts owed to third parties:* The cohabitants are jointly liable to creditors for any domestic expenses.

3.2. FINANCIAL PROVISIONS

These Acts establish some rights in the case of a breakdown with the aim being to avoid unjust enrichment. These rights are:

1. The right to claim financial compensation, and
2. The right to claim income support.

3.2.1. *Financial Compensation*

When the cohabitation has caused a situation of patrimonial unfairness between both cohabitants that implies unjust enrichment, economic compensation can be claimed by the affected cohabitant:

- a. When the cohabitant has contributed economically or with his/her work to the acquisition, conservation or improvement of any of the common or private goods of the stable unmarried couple
- b. When the cohabitant without financial reward or without sufficient financial reward, has dedicated his/her time to the home or the common children or the other cohabitant, or has worked for him/her.

The cohabitant is entitled to claim economic support in the indicated cases when the other partner has benefited from unjust enrichment.

3.2.2. *Income Support*

An income can be claimed by one of the cohabitants who has cared for the common children and when this has made it difficult for him/her to engage in paid employment. The aim of this right is to cover the needs of one of the cohabitants when his/her earning capacity has been diminished during or after cohabitation. This income will come to an end when the care of the children ceases for any reason, or when they reach the age of majority or become emancipated. Any claim to these rights must be made within one year of the breakdown of the relationship and such a claim will be calculated with respect to the duration of the cohabitation. Both rights are compatible and the maximum duration is three years.

4. THE COMMON RESIDENCE

The rules concerning the common residence of the marriage have been considered by the Supreme Court to be also enforceable in the case of unmarried couples. The Supreme Court has stated that this is another case when the effects of the breakdown of an unmarried relationship and of a marriage are similar and the judges should therefore apply the rules concerning the breakdown of a marriage. The Urban Leasing Law considers unmarried couples and couples within a marriage to be equal. Only the Catalan Act has regulated this issue in a fragmentary way. If no such agreement has been made by the parties, the articles of the Civil Code will be applied.

5. PARENTING

Cohabitation and marriage are two completely different situations but the Spanish Constitution, in Article 39.2, establishes the principle of equality of treatment for the children of married or unmarried couples. With respect to children, the autonomous communities' laws establish the same regulation for the children of unmarried couples and for those of married couples (Articles 90 to 94 CC).

6. CONCLUSION

The Spanish Supreme Court has stated that couples within a marriage and *de facto* couples are two different realities and it has solved the problems relating to unmarried couples on a case by case basis. With regard to the characteristics of this latter relationship, and more especially relating to its termination, the unmarried partnership can generate unjust situations. In such cases, the Judges have applied, firstly, the principle of unjust enrichment, and, then, the rules pertaining to marriage in the case of a breakdown. The regulations of the Autonomous Communities are broadly similar. They have regulated an authentic private law regime recognising a status inspired by marriage, although not equivalent thereto. The regulations specify the requirements or elements for determining the position of unmarried couples with respect to the principle of judicial security. However, these rules cannot be applied in the situation of some *de facto* couples, for instance when one of the cohabitants is a minor. The autonomous communities have established the principle of personal self-determination with general limits. Concerning the effects of the dissolution of an unmarried relationship, we have to highlight that the autonomous communities have followed the rules implemented by the Supreme Court, and have awarded financial compensation based on unjust enrichment. All these rules produce a new legal income.

Leonor Bueno Medina

Finally, we have to mention that the Spanish Government has presented a draft bill on marriage between same-sex couples (1 October 2004) in order to make marriage available to such couples.

UNMARRIED PARTNERSHIPS IN HUNGARY

ORSOLYA SZEIBERT ERDÖS

1. THE HISTORY OF THE REGULATION ON UNMARRIED PARTNERS IN HUNGARY SINCE THE 1940s

Neither our Civil Code nor our Family Act – which were historically the first and comprehensive codes on these issues – provided any regulations regarding unmarried partnership¹ at the time of their enactment in 1952 and 1959,² respectively. The first regulation of this form of community life came in 1977.

1.1. THE LEGAL POSITION OF COHABITATION UP TO 1977

A book which was published in 1963, on the tenth anniversary of the Family Act's entry into force and which analyses and describes in great detail certain theoretical and practical family law issues (family law is an independent branch of the law), made a very clear assertion concerning the proper place of cohabitation: those relationships between the two genders that are not legally recognised as a marriage do not belong to the legal order of the family.³ This analysis of unmarried partnership effectively shows that the contemporary – and we should carefully add not only the contemporary – doctrine and case law are largely ineffective when it comes to regulating cohabitation's proper legal position.⁴

¹ The Hungarian name for this kind of partnership is “élettársi kapcsolat”. The terms “unmarried partnership” and “cohabitation” and also “unmarried partner” and “cohabitant” are used in this text interchangeably.

² The Civil Code is Act No. IV. 1959, which entered into force in 1960, the Family Act is the Act No. IV. 1952, which entered into force in 1960.

³ ENDRE NIZSALOVSKY, *A család jogi rendjének alapjai (The basis of the family's legal order)*, 1963, p. 62.

⁴ This is reinforced by ESZTER FÁBIÁN TÓTHNÉ, referring to the fact that judicial practice resorts to both the rules of civil law and of the family law because of the Family Act's “silence condemning the cohabitation”. TÓTHNÉ FÁBIÁN ESZTER, *Az élettársi kapcsolat jellegéről és szabályozása mikéntjéről*

During the early 1960s two institutions were recognised under Hungarian law as amounting to a relationship between a man and a woman outside marriage and were therefore not part of family law: an unmarried partnership and an engagement⁵ (the latter was unambiguously quite an important family law institution in earlier times). Consequently it was primarily emphasised that cohabitation is not a marriage. The fact that a community of life is established between the parties was only subsequently recognised.

Concerning the financial consequences of cohabitation, women could claim a payment as an employee at the end of the relationship. The concept of the common assets of the parties and the fact that both of them acquired such assets was recognised both before the Civil Code and after it entered into force. Some years later this judicial practice changed: an unmarried partnership was considered to be an employment relationship and a payment could be claimed by women regardless of whether the conceptual elements of the employment relationship could be applied to the relationship and whether any increased assets were the result of the activities of both partners.⁶

It was stressed that cohabitation is a condemned institution which cannot be recognised even concerning the resulting assets when the partners have later married. This community of life could not bring about the legal consequences of a marriage and a family, but it could not be denied even in the 1960s that certain civil law consequences are attached to cohabitation – and it was this that gave rise to theoretical doubts.⁷ There was an inherent contradiction: cohabitation endangers the ideal form of matrimony by its mere existence and it is at the same time a condemned relationship, but it is clear that some rights do emanate therefrom.

Comment No. 103 by the Supreme Court's Civil Board repeatedly emphasised that cohabitation – defined as a community of life outside marriage – can not be legally equated with marriage. The following sentence in the comment goes on to state that cohabitation does not establish a family relationship and neither the consequences of matrimonial property, nor family law maintenance or inheritance law are applicable thereto.⁸

(*About the character and regulation of the unmarried partnership*), in: *Magyar Jog (Hungarian Law Journal)* 1977, 8, p. 705.

⁵ This differentiation was made by NIZSALOVSKY – *supra* n. 4. – in the first section.

⁶ *Supra* n. 4, pp. 66 and 68.

⁷ *Supra* n. 4. NIZSALOVSKY states to that the aim should be the elimination of the unmarried partnership or its formulation as a marriage.

⁸ *Court Decisions* 1973/9. 323. (*Court Decisions* – a monthly periodical published by the Hungarian Supreme Court).

Comment No. 94.⁹ by the Supreme Court's Civil Board aimed to regulate the unmarried partners' legal position in much more detail. This comment made an effort to harmonise the law and reality where men and women do live together in a community of life and subsequently terminate such cohabitation. The comment refers to this social phenomenon by admitting that there are relationships not only between spouses and blood relatives but also between heterosexual partners and such relationships have to be evaluated.¹⁰ The comment struck a balance: although it admitted that these communities of life "exist for decades in many cases" and "children are born and grow up within these frames", these relationships cannot result in a family in a legal sense because of the state's condemnation; they only amount to a "family-like social relationship". According to the comment, it can be determined that the basis of the family and family law is the eventual marriage¹¹ and although cohabitation creates a family-like relationship, only certain elements thereof require regulation.

It can be concluded from the above that the protection of unmarried partners' interests can not be complete and their regulation cannot equate to the protection offered in the case of marriage; the two legal relationships differ from each other to such an extent that the rules of matrimonial property cannot be applied by analogy to the financial relationship between unmarried partners. However, as the substantive law did not regulate the financial relations between unmarried partners, the Supreme Court was forced to make use of an analogy:¹² by regarding cohabitation as a civil law relationship, it looked for a type of contract where the property rules can be applied to the special contractual relationship between cohabitants.

Although no type of contract seemed to be suitable, as the financial claims of an unmarried partner did not fit within any existing contract, on the basis of the economic criteria of cohabitation the Supreme Court adopted the notion that "the unmarried partnership, for the most part, contains the elements of a civil law companionship". By looking at the will of unmarried partners, the Civil Board stated that the cohabitants implicitly agree that the property acquired during their cohabitation as the result of their common economic activities becomes their joint property. A special so-called "community property of cohabitants" was established and, although

⁹ It was modified by the Comment No. 369 by the Civil Board.

¹⁰ Comment No. 94 is described in detail in: *A Polgári Törvénykönyv Magyarázata 2 (Commentary on the Civil Code 2)*, 1999, pp. 1680-1682 and ÉVA CSÜRI, *A házassági vagyoni jog gyakorlati kérdései (Practical Issues of Matrimonial Property)*, 2002, p. 34.

¹¹ KÁROLY SZLADITS, *A magyar magánjog vázlata II rész (Outline of Hungarian Private Law Part II)* 1933, p. 310.

¹² A "careful analogy" – as GYULA EÖRSI writes – GYULA EÖRSI, *Összehasonlító polgári jog (Comparative Civil Law)* 1975, p. 520.

it substantially deviated from matrimonial property, its practical effects could be very similar.

1.2. THE LEGAL REGULATION OF THE UNMARRIED PARTNERSHIP FROM 1977 ONWARDS

1.2.1. *The Amendment of the Civil Code in 1977*

Act No. IV. 1977 amended certain regulations in the Civil Code so as to modernise them in order to meet the requirements of social development and within the framework of this amendment the judicial practice as laid down in the Comments was transposed to the Code. In practical terms this meant that the Civil Board's Comment No. 94 was given legislative force.¹³ The Act's explanation stressed that the special regulation of the financial relations of persons living in a common household was justified by this lifestyle's frequency and importance and that it most often occurs between unmarried partners. (Exactly the same rule is to be applied to the financial relations of any other dependants living together – excluding spouses.)

In one section the Civil Code contained both the definition of cohabitation and the rules on the partners' community property from 1977 to 1996. This community property was akin to a civil law companionship, i.e. it was not purely joint ownership.

1.2.2. *The Amendment of the Civil Code in 1996*

The amendment of the Civil Code in 1996 was the consequence of the Constitutional Court's decision in 1995¹⁴ which highlighted the differences between the two forms of communities of life. In this case, the petitioner requested the Constitutional Court to declare two statutory rules unconstitutional: according to the petitioner both the rule in the Family Act stating that only a man and a woman can enter into a marriage and the rule in the Civil Code stating that only a man and a woman can cohabit give rise to discrimination based on sexual status. Consequently, the petitioner argued, these regulations are contrary to the Constitution, both the rule guaranteeing equal rights to men and women and the rule against discrimination.

In its decision the Constitutional Court drew a sharp distinction between a marriage and cohabitation. In its explanation the Constitutional Court first dealt with marriage. It developed – by referring to the constitutional protection of marriage – what it con-

¹³ *A Polgári Törvénykönyv Magyarázata (Commentary on the Civil Code)* 1999, p. 1682.

¹⁴ Decision of the Constitutional Court No. 14/1995 (III. 13).

sidered to be the twofold purpose of a marriage: primarily, and typically, the birth of common children and their upbringing within the family and at the same time providing a framework for the spouses to support and to take care of each other. Concerning children the Constitutional Court held that although the ability to procreate and to give birth to a child is neither a conceptual element of nor a condition for the marriage, it is nevertheless the original aim of marriage, the heterosexuality of the spouses thereby being one of the terms of a marriage. This opinion was fortified by referring to the following: the tradition in Hungarian culture; common knowledge; the international human rights conventions (which guarantee rights in connection with marriage not for human beings but especially for men and women); and the fact that the equal rights of the two sexes does not mean that the natural difference between them can be ignored.

In another part of its explanation the Constitutional Court analysed whether cohabitation can be made available for same-sex partners. Before coming to this point it is worth noting how the Constitutional Court interpreted the definition and the phenomenon of unmarried partnership. In answering the question whether marriage can be made available to same-sex partners, the Constitutional Court's point of departure was the aim and the function of marriage.

However, the Constitutional Court did not deal with the real function and purpose of cohabitation at all. In its analysis it started with the differentiation which is made in the Constitution itself in that the family and marriage are both protected, while the unmarried partnership is ignored. It referred to the fact that the legal recognition of the unmarried partnership has a much shorter history than marriage. Concerning the legal status of cohabitation, the Constitutional Court was satisfied with the direct legal consequences under Hungarian law: partly the rules on marriage, but mostly the rules on dependants, are to be applied to unmarried partners. Following this not uncontroversial point of departure, the Constitutional Court examined whether cohabitation between same-sex partners could be recognised by the law.

It examined which legal rules contain rights or obligations for unmarried partners and it arrived at the conclusion that the law – within these bounds – considers a cohabitant to be just like a dependant and in these cases the differentiation between partners according to their gender violates the constitutional prohibition of discrimination, with certain exceptions. (The Constitutional Court referred to certain social security benefits concerning which no distinction can be made according to the gender of the partners who live together in a community of life.)

The aforementioned exception will apply if the law has been created with regard to either common children or to marriage with a third person. In these cases it is im-

portant to distinguish between the forms of cohabitation according to the gender of the partners. The Act on Public Health can be cited as one such exception where a differentiation has to be made concerning the gender of the partners: it makes artificial insemination available subject to certain conditions and the presumption of paternity is based on the common written request of the partners. The couple in question can be spouses and even unmarried partners, but only heterosexual unmarried partners according to the Act.

The Constitutional Court stayed the proceedings in the 1995 case discussed above so that the legislator could put an end to this unconstitutional situation and extend the definition of an unmarried partnership to cover same-sex partners. This occurred in 1996, so now even same-sex partners can legally cohabit according to the Civil Code.

The indirect evaluation of cohabitation cannot be regarded as a positive step. The fact that the Constitutional Court made cohabitation available to same-sex partners – in an indirect way – means purely, as can be clearly read in the Court’s explanation, that it took into consideration the fact that homosexuality is no longer a crime and there appeared to be a strong demand for recognising the relationship of same-sex partners. (However, it was mentioned that cohabitation is considered to be a relationship between a man and a woman as in the case of a marriage according to the general belief.) Although, the Constitutional Court tried to keep up with reality, the aforementioned clear distinction between a marriage and an unmarried partnership in general places cohabitation in a less advantageous legal position in comparison to marriage.

While analysing the institution of marriage, the Constitutional Court took as a starting point its function and traditional content – the raising of common children and the spouses supporting one another. In doing so the function of cohabitation was ignored. The starting point concerning unmarried partners is the fact that this situation is regulated by civil law as a special type of contract. The stressed aims of marriage are undoubtedly real aims but it can be questioned whether cohabitation has just the same objectives: the raising of common (or perhaps not common) children and support for each other. The provision of maintenance to each other even by cohabitants is the normal judicial practice in Hungary. The possibility of having a common child is even mentioned by the Constitutional Court itself (by denying the recognition of an unmarried same-sex partnership as far as a child is concerned).

Cohabitation is mentioned in the Constitutional Court’s explanation as a long-lasting community and obviously a certain duration is inseparable from cohabitation; in developing the definition of a marriage the Constitutional Court’s view is unambiguous: a marriage is a long-lasting institution as the raising of children and supporting

each other amounts to a lifelong commitment. Be this as it may, this situation does not reflect reality as the number of divorces is increasingly rising.

The Civil Code regulates cohabitants in two provisions:

“Unmarried partners – if there is no rule of law regulating the situation differently – are two persons who live together, without entering into a marriage, in a common household, in an emotional fellowship and in an economic partnership.”¹⁵

“Unmarried partners acquire common property in proportion to the contribution they have made in acquiring such property. If this proportion cannot be calculated, the property is considered to have been equally acquired. Any work done in the household is considered to be a contribution in acquiring this property.”¹⁶

2. THE EFFECTIVE REGULATION CONCERNING UNMARRIED PARTNERS

While describing the rights of unmarried partners, the position of married spouses will also be taken into account.

2.1. THE RIGHTS OF UNMARRIED PARTNERS UNDER THE CIVIL CODE

2.1.1. *The “Community Property” of Unmarried Partners*

The financial relations of spouses – if they have not entered into a marriage settlement which deviates from the statutory matrimonial system – are regulated in the Family Act as statutory matrimonial property. According to this system the assets which have been acquired during matrimonial life, either jointly or by either of the partners’ amount to undivided joint property, with the exception of the spouses’ own personal property. The assets which can be owned by each of them separately are listed in the Family Act and these have been supplemented by judicial practice.

The financial relations of unmarried partners are regulated in the Civil Code. In 1977 it was emphasised that this rule expressly differs from the matrimonial property of spouses. According to the main rule, unmarried partners also acquire joint ownership,

¹⁵ § 685/A of the Civil Code.

¹⁶ § 578/G(1) of the Civil Code.

but this is a somewhat intermediate position between simple joint ownership and the matrimonial property of spouses. While spouses are owners in an equal proportion in all cases, cohabitants are owners according to the proportion of their contribution in acquiring the property. Classifying any work done in the household as such a contribution has been a positive step. It is especially important as this tends to protect the weaker party.

If the parties cannot prove the actual amount of their contribution in acquiring the assets, there is a legal presumption that the property has been acquired equally. In that case the position of unmarried partners will be the same as that of spouses in relation to property.

2.1.2. The Unmarried Partner's Right of Inheritance

According to Hungarian inheritance law the spouse is the deceased's legal heir. In contrast, an unmarried partner can only inherit by will. It is worth mentioning that a spouse can be excluded from succession – under certain conditions – if it can be proved that there was no longer any matrimonial community between the spouses. The legislator considers the inheritance of the spouse to be only justified if there was not only a mere bond, but also a real matrimonial relationship.

2.2. THE RIGHTS OF UNMARRIED PARTNERS ACCORDING TO THE FAMILY ACT

2.2.1. Parental Responsibilities

There is only one very important family law issue where unmarried partners have the same rights as spouses, and this is the relationship between the parent living in an unmarried partnership and the child which has been born from this relationship, in other words the parental responsibilities of parents living in an unmarried partnership. The Family Act does not provide any special rule for this situation because, from the time when the paternal presumption is established, the rights and obligations of the parent living in cohabitation are the same as those of a married parent. The same is mostly true if the parents dissolve either their marriage or their unmarried partnership. The main difference can be the necessary intervention of the courts. The court has the power to decide on parental responsibilities if a marriage is dissolved and it can also decide ex officio. This is not the case when cohabitation ends as this is a factual as opposed to legal situation in Hungary. The court cannot intervene ex officio merely because the cohabitation comes to an end.

The Family Act does not differentiate according to the form of the community of life but according to whether the parents live together – either within a marriage or in an unmarried partnership – or, alternatively, do not live together.

The equalisation of the status of a child from a marriage and a child born out of wedlock is not wholly an achievement of the Family Act. Already Act No. XXIX. 1946, six years before the Family Act, provided a legitimate status for children born out of wedlock.¹⁷ The system within the Family Act is based on this Act, as the legal status of the child is not connected with the status of its parents: it is the same not only for children of spouses and of unmarried parents, but also for children whose parents have never lived together.

The only difference is created by the establishment of paternal presumption. While the husband will automatically be the father of the common child, based on the fact that a marriage existed – even without matrimonial life –, the unmarried partner has to take steps to establish a paternal presumption, he has to make a voluntary recognition of paternity which has certain requirements under the Family Act. This can nevertheless cause a problem, e.g. if the mother not only has an unmarried partner but also a spouse even if there is no matrimonial community between them. The unmarried partner can recognise his paternity if the paternal status is not fulfilled by anyone else.

2.2.2. *Rights which cannot be Claimed by an Unmarried Partner*

The Family Act does not guarantee additional rights for unmarried partners. It provides some rights for spouses during the marriage, but much more importantly it regulates rights which can be claimed after the ending of a relationship.

The spouse has the right to use the surname of his/her partner during the marriage and mostly thereafter. It seems to be a less important right, but it is worth mentioning for at least two reasons: firstly, in Hungary it is a tradition that wives use the name of their husbands and secondly, the number of cases dealing with the use of a surname is continuously growing. This is demonstrated by the number of cases before the European Court of Justice and even the European Court of Human Rights. The new Hungarian rules which modernised the use of surnames during the marriage entered into force in 2004.

The real problem is that an unmarried partner cannot claim maintenance if the cohabitation terminates (in contrast to the spouse living apart from his/her partner and

¹⁷ Supra n. 4, p. 255.

the divorced spouse who can claim for maintenance even if the marriage has not lasted for a long time, even if there is no child from the marriage and even when the spouse is cohabiting with another person after the divorce (subject to certain conditions)).

The use of the common dwelling is one of the most painful issues in Hungarian family law, especially in divorce law. The Family Act provides detailed rules for divorced spouses as to how they can agree on this issue and how the court can decide in the case of disagreement – a minor child has a special right to remain living in the parental home. This is not the case for cohabitants, as the cohabitant's right to use the dwelling terminates with the end of the relationship.¹⁸

2.2.3. Other Legal Rules Guaranteeing Rights for Unmarried Partners

There are more than one hundred legal sources which deal with the situation where two people – either heterosexual or same-sex partners – live together in an unmarried partnership. Here are some examples. The Act concerning Family Support in connection with maintaining the child; the Act on Public Health in connection with information about the medical treatment given not only to the spouse but also to the cohabitant; and the Act on Social Insurance and on Health Insurance. One Act should, however, be emphasised: that is the Act on Pensions in Social Insurance. According to this Act not only the widow(er), but also the unmarried partner has the right to the widow(er)'s pension either if they had lived together for one year without interruption before the death and they had a child or if they had lived together for ten years without interruption before the death. In this case the pension of the unmarried partner is the same as that of the widow(er).

These Acts – which neither belong to family law nor to civil law but to public law – have two features which are important by our subject. One is that they give the unmarried partner the same right as the spouse in some cases and the other is that they mostly do not define the concept of an unmarried partnership.

¹⁸ ÉVA CSÜRI *supra* n. 11, p. 37.

3. THE JUDICIAL PRACTICE CONCERNING THE LEGAL STATUS OF UNMARRIED PARTNERS

3.1. THE DEFINITION OF UNMARRIED PARTNERSHIP AND THE EXAMINATION OF ITS EXISTENCE

3.1.1. *Definition*

As has been mentioned, none of the legal rules containing rights and obligations for cohabitants define the concept of unmarried partnership. It justifies an analysis of the definition in the Civil Code. This definition has a great deal of importance for other reasons as well: the guaranteed rights can only be enforced if it can be established that the cohabitation really existed. As there is no registration system for unmarried partnerships in Hungary, the court's task is to decide whether or not the relationship in question had reached the level of cohabitation. Evidence therefore plays a decisive role concerning the existence, the beginning and the end of cohabitation. The lack of any registration system means that in Hungary an unmarried partnership is devoid of any form and reference can only be made to a "factual model."¹⁹

Three of the requirements of the Civil Code definition approach the issue from the positive side: living together in an emotional fellowship, living together in an economic partnership and living in a common household; the fourth element of the definition actually serves to set a demarcation line between cohabitation and marriage: living together outside marriage. This enumeration has been complemented and developed by judicial practice. There are some further elements which are investigated in every dispute: the partners' intention to live together; the appearance of belonging together towards third persons; a long-lasting relationship; and the sexual relationship between the cohabitants.

Before analysing the recent judicial practice, it is worth examining how the Hungarian legal literature defines cohabitation and which elements of this concept are stressed.

Until the Civil Code definition, an unmarried partnership was merely described as a long-lasting community of life outside marriage, the pure existence of which was explicitly condemned.²⁰ Nevertheless, even in 1959 – when the Civil Code was enacted – it had also been determined in the legal literature that cohabitation means considerably more than merely a sexual relationship; it is a community of life, "which is

¹⁹ MIGUEL MARTÍN-CASALS differentiates between the factual model and the formal model in: *Mixing-Up Models of Living Together*, Working paper p. 5. (ISFL European Regional Conference October 2003.)

²⁰ *Supra* n. 4, p. 66.

essentially identical to the matrimonial community, the essential difference being the lack of a marital bond”.²¹ At that time cohabitation was considered to be an absolutely negative social phenomenon.

Cohabitation was a wholly unregulated institution at that time and judicial practice had not yet adopted a unified stance. This can be observed in the judicial practice during the 1950s: while one decision considered the difference between the two institutions to be minimal, the Supreme Court referred at the same time to the requirement that marriage should be protected at all costs against sexual relationships outside marriage.²²

Some years later decisions can also be found which approach this issue in a more balanced way. In a judgement delivered in 1963²³ the court stated that cohabitation presumes emotional, economic community and the community of interests. It generally assumes that a sexual relationship exists, but this relationship in itself does not result in an unmarried partnership. However, a sexual relationship is not an indispensable condition for cohabitation. Similarly, it is important to investigate whether the parties have lived in the same dwelling, but the lack of this element does not prevent finding that there is, in fact, an unmarried partnership. The court stated that it would also look at whether the cohabitants support each other, manage their financial matters together, use their income together and accept responsibility for each other towards third persons.

In the late 1960s and early 1970s there were quite a few decisions dealing in detail with the conceptual elements of an unmarried partnership, so the regulation of the Civil Code in 1977 was in harmony with the judicial practice at that time.²⁴ These judgements examine several factors of cohabitation.

3.1.2. *What is an Unmarried Partnership According to Judicial Practice?*

The conceptual elements of an unmarried partnership which became crystallised in judicial practice have not essentially changed since the above-mentioned decision from 1963. Exceptionally, either for a lack of a sexual relationship or in the case of living apart, the court can state that an unmarried partnership existed during a certain period

²¹ PÁL BAJORY, *Az élettárs és az élettársi viszony a polgári ítélkezésben (Cohabitant and Cohabitation in Civil Case Law)*, in: *Magyar Jog* 1959, 7, p. 208.

²² BAJORY, *supra* n. 18, pp. 208-209 refers to the two cases with the remark that the courts declare their unfavourable decision against the unmarried partnerships, although it would be justified. In his opinion it is the task of the courts to express their view and condemn the cohabitation.

²³ The judgment of the Court of Budapest Nr. 44. Pf. 22320/1963. Published in: *supra* n. 14, p. 1682.

²⁴ *Supra* n. 14, p. 1983.

of time. Real importance is attributed by the court to three factors: the emotional fellowship, the economic partnership and whether the partners' belonging together was obvious to third persons. The emotional part of the relationship can be measured subjectively, so the other two factors carry great weight.

The Supreme Court stated in one of its decisions in 2000²⁵ that the relationship between the plaintiff and the defendant could not be qualified as cohabitation. Their relationship was close, more than that which could exist between friends, but the plaintiff lived in Germany, the defendant in Hungary and the plaintiff resided in Hungary on rare occasions and intermittently so that it could not be regarded as cohabitation according to the general belief. (The lower courts had already delivered judgements in the opposite direction when an emotional fellowship and economic partnership were not taken into consideration and the lack of a common household could not in itself mean that there was automatically no cohabitation.) However, the Supreme Court attaches a great deal of importance to the existence of an economic community which could not be proved in the case at hand as the parties had only planned to enter into a common undertaking.

The criteria for the existence of an economic community have also been developed by judicial practice. An economic community means economic co-operation and it serves as ground for cohabitation if the parties co-operate in the interest of achieving a common aim, maintaining a common way of living and using their income for this common aim.

The economic criterion plays a decisive role in many cases. In the case of a dispute one of the partners often denies that there has been any cohabitation arguing that there was no economic relationship between them. It very often occurs that the economically stronger party – which is often the defendant (see the facts below) will argue along the following lines:²⁶ they have lived together for five years in his – the defendant's – apartment and the plaintiff has regularly assisted in his business activities although there was no real cohabitation. According to the defendant there was an emotional and sexual relationship between them but no economic community, as the plaintiff's assistance was compensated in the way of gifts. The lower courts upheld these arguments and decided that there was no unmarried partnership. This view was reinforced by the argument that the assets of the undertaking were managed by the defendant.

²⁵ Judgement of the Supreme Court No. Pfv. II. 20104/2000. Published in: *Közjegyzők Közlönye* (Notaries' Gazette), 2002, 4, pp. 18-19.

²⁶ Judgement No. P. törv. II. 20854/1987. Published in: *Court Decisions* 1988. Case No. 184.

In contrast the Supreme Court emphasised the following: the details concerning the parties' relationship have to be fully investigated and it cannot be narrowed down to the management of assets. The Supreme Court concluded that the plaintiff had regularly assisted in the business without remuneration, the gifts being mostly consumer goods which were considered as necessities. Consequently the source of the plaintiff's maintenance was the income from the undertaking which resulted from both the defendant's and the plaintiff's work, so there was indeed cohabitation between the parties during the five years in question.

A similar question emerged in another case:²⁷ each of the elderly partners had his/her own income, the defendant managed her own business – where the plaintiff also assisted – and both parties disposed of their own income: the defendant benefiting from the undertaking's income and the plaintiff benefiting his pension. The lower courts held that both parties had retained their economic self-sufficiency, there was no economic co-operation and, therefore, it did not amount to cohabitation. The Supreme Court stressed that the parties had lived in an emotional fellowship and even in a common household: the defendant took care both of herself and her partner, managed the household and their relationship was obviously an unmarried partnership in the eyes of third persons as well. Besides, it was emphasised in the reasoning that although both partners disposed of their own income independently, this was in order to achieve a common aim: to contribute to their common way of living. As their common will could be determined, it was irrelevant who actually managed the assets.

This judicial standpoint increasingly appears in several decisions. In one case the court referred to the fact that the method of managing the assets cannot be decisive because it can differ according to the particular circumstances of the cohabitants;²⁸ in another case it can be read in the reasoning that concerning such economic issues it cannot be expected of unmarried partners that they should fulfil more requirements than spouses.²⁹

Of course, self-sufficiency in managing assets can be investigated and interpreted in connection with the other conceptual elements: in one case the court dismissed the action and denied any cohabitation when the parties not only managed their own

²⁷ Judgement of the Supreme Court No. Legf. Bír. Pf. V. 20816/1981. Published in: *Court Decisions* 1982. Case No. 142.

²⁸ Judgement of the Supreme Court No. Legf. Bír. Pf. II. 20528/1995. Published in: *Court Decisions* 1996. Case No. 258.

²⁹ Judgement of the Supreme Court No. Legf. Bír. Pf. II. 20759/1993. Published in: *Court Decisions* 1994. Case No. 252.

income, but their relationship was limited to common entertainment and journeys, the costs of which were met by one partner only.³⁰

3.2. THE CONNECTION BETWEEN THE MATRIMONIAL PROPERTY OF SPOUSES AND THE COMMUNITY PROPERTY OF UNMARRIED PARTNERS

Unmarried partners often enter into a marriage at a later date. The change in the partners' real community of life is not that great. Nevertheless, it is a great change in a legal sense: the unmarried partners' community of life is transposed into matrimony in a matter of seconds. As the courts should apply two sets of rules for this continuous and homogeneous community of life in case of its termination, there is a presumption in legal practice that the spouses transfer their common property acquired during cohabitation into the matrimonial property with an implicit agreement. The two communities of life create a unity so the beginning of the matrimonial community – which results in matrimonial property – is the actual beginning of their community of life.³¹ (This principle is not applied where the spouses cohabit after divorce.)³²

The question emerges whether a person can maintain a marriage and cohabitation with different partners at the same time. This is not excluded in the Hungarian system when looking at the factual model of cohabitation. In these cases it is fairly typical that the marriage is a mere bond and as it lacks the necessary matrimonial community there is no matrimonial property according to the Family Act. (If a marital bond and cohabitation co-exist, the law can provide some protection for the weaker party in any given situation.)

However, in one case the judge had to decide in a situation where the man practically had two “families”, but, “of course”, there cannot be two families in a legal sense: he lived by sharing his life between his spouse, with whom he lived together in a matrimonial community, and his cohabitant with whom he lived in a community of life in another household. He had children in both “families”. The court stated that if the matrimonial community and matrimonial property had not terminated, their existence

³⁰ Published in: *Court Decisions* 1994. Case No. 79.

³¹ ANDRÁS KÖRÖS, *Házastársi közös vagyon, közös lakás (Matrimonial Property, Common Dwelling of Spouses)*, 2002, p. 36.

This viewpoint is not condemned in the legal literature. However, in the early 1960s NIZSALOVSKY did not agree: according to him the court considered cohabitation to be an invalid marriage and did not take into consideration that there was a huge difference between cohabitation and marriage. *Supra* n. 4, p. 70.

³² As emphasised by the court in the case No. P.törv. 21154/1992. Published in: *Court Decisions* 1993. Case No. 502.

excluded the possibility of cohabitation and the establishment of joint ownership between the unmarried partners. In its reasoning the court referred to the fact that cohabitation has a presumption of living together with the intention of finality and this cannot be realised when one of the “cohabitants” still lives in a matrimonial community with someone else.³³ This “living together with the intention of finality” would create an element of cohabitation, although it is no longer an inherent element of either marriage or cohabitation.

According to the Supreme Court’s viewpoint, cohabitation was created between the parties as its conceptual elements had been realised, but the application of the Family Act – there was matrimonial property – led to the result that there was no community property between the cohabitants.³⁴

3.3. ARRANGING THE UNMARRIED PARTNERS’ FINANCIAL ISSUES

Matrimonial property and the community property of cohabitants are distinguished from each other very sharply and expressly in judicial practice. Although the principle of equity is applied in settling financial disputes, it cannot be applied with the result that there is a deviation from the main rule of matrimonial property, namely, that, upon the termination of the matrimonial property, the common property has to be divided into two equal shares between the spouses. In one case which demonstrates this,³⁵ there was a division of the common property at the end of a relatively short marriage. The husband claimed that he should be given a greater share by arguing that the costs of everyday life – on a higher level – had been met by him alone as his wife was not employed and did not even work in the household.

The lower courts allowed this claim but the Supreme Court later overturned it: the spouses owned an equal share of their common matrimonial property and their contribution in its acquisition was irrelevant. The principle of equity is only to be applied in exceptional situations and – as was stressed by the Supreme Court – matrimonial property cannot simply be dealt with as cohabitants’ community property.

Nevertheless, as the Civil Code only provides rules on financial issues relating to cohabitants on a limited basis, this regulation has been complemented to and deve-

³³ Judgement No. II. Pfv. 21375/1999. Published in: *Családi jog (Family Law Periodical)*, 2004, 3, pp. 25-26.

³⁴ Mentioned by ÉVA CSÜRI, *supra* n. 11, pp. 39-40.

³⁵ Judgement of the Supreme Court No. Legf. Bír. Pf. II. 20800/1993. Published in: *Court Decisions* 1994. Case No. 34.

loped by the courts on a case to case basis primarily by paying attention to the matrimonial community rules. So the cohabitantes' common property and their own property are distinguished just like in the case of married partners; the requirement of equity is taken into consideration by the court; it is the intention that neither of the cohabitants should be wronged³⁶ and that their financial claims should be fairly and finally settled.³⁷

Before the division of the unmarried partners' community property a balance sheet has to be drawn up – just like in the case of dividing matrimonial property – and the court has to state which assets have been acquired during their community and how they have contributed to it.

In one case³⁸ the plaintiff requested the division of the common property and had noted the proportions of each of them, but the defendant counterclaimed that the plaintiff had only lived in her flat as a tenant, contributing towards his board and lodging and helping around the house and in the defendant's business. The court declared that cohabitation had been established based on the concrete circumstances of the case and it considered that the following had to be established in a detailed way: the actual financial situation – the income from the undertaking, the pension of the plaintiff, the household costs, and the actual activity of the partners: the household chores carried out by the defendant and the work done in the undertaking by both of them. The court stated that it could only decide on the basis of express and unambiguous facts.

3.4. THE OBLIGATION OF UNMARRIED PARTNERS TO MAINTAIN EACH OTHER DURING COHABITATION

Concerning spousal maintenance, the Family Act expressly regulates only the maintenance of the spouse living apart and that of the divorced spouse, but does not contain any express rule on spousal maintenance during the marital community. Instead of this the Family Act has provisions on covering the common household costs. Concerning cohabitants, there is no possibility of maintaining the cohabitant living apart from his/her partner (if the community of life is intentionally terminated), as

³⁶ The reasoning in the judgement No. P. törv. II. 20616/1983 expressly refers to this. Published in: *Court Decisions* 1984. Case No. 225.

³⁷ The reasoning in the judgement of the Supreme Court No. Legf. Bír. Pfv. II. 23218/1995 expressly refers to this. Published in: *Court Decisions* 1997. Case No. 24.

³⁸ The reasoning in the judgement No. Eln. Tan. P. törv. 21467/1979. Published in: *Court Decisions* 1980. Case No. 245.

living together is an immanent element of the factual model and the maintenance of the ex-partner is not possible.

However, according to the court, the maintenance and taking care of each other in the course of the community of life is an element of the cohabitation which is inseparable therefrom, just like in the case of marriage. This confirms that the matrimonial community and the cohabitant's community of life are very similar. (It should be reiterated that in some cases Hungarian law only provides for spousal rights when the actual community itself is maintained.)

The basis of a case³⁹ dealing with this issue was that the partners who had cohabited for three years had entered into a contract under which one partner was wholly obliged to maintain the other, the latter being obliged to transfer the ownership of his immovable assets. During the next five years the defendant ran the household and carried out work around the house, while the plaintiff partly covered the costs of the public utilities and both of them contributed towards the costs of necessities. The lower courts stated that although they had entered into an agreement, they also lived together in cohabitation at the same time, which is available according to the law. The Supreme Court referred to the fact that the partners' relationship remained that of cohabitants and although unmarried partners can enter into a contract on maintenance, the obligor can only claim compensation upon the termination of their contractual relationship only if he/she has covered the costs of maintenance from his/her own property and the services rendered went above and beyond the sphere of activity which is inseparable from the cohabitation itself.

Similar to this was another case⁴⁰ where the partners had entered into a contract,⁴¹ under which one of the cohabitants was obliged to maintain her partner. The Supreme Court stated that although cohabitants are not obliged to maintain each other statutorily, the conceptual elements of cohabitation assume the obligation of taking care of each other. Consequently, the contractual maintenance could not apply if the value of the services rendered by the obligor did not exceed the level of activity which forms part of the cohabitation according to the general belief.

³⁹ Judgement of the Supreme Court No. Legf. Bír. Pfv. II. 22557/1999. Published in: *Court Decisions* 2002. Case No. 268.

⁴⁰ Judgement of the Supreme Court No. Legf. Bír. Pfv. II. 22066/2001. Published in: *Court Decisions* 2004. Case No. 280.

⁴¹ It was a so-called "contract to inherit", the main obligation under which is to maintain the other contractual party.

4. THE REGULATION OF THE UNMARRIED PARTNERSHIP – DE LEGE FERENDA

A new Civil Code is currently being prepared in Hungary and within the framework of this process the Concept of the new regulation and the Regulation Programme have been prepared and published.⁴² The reform has been motivated by the great changes in the field of private law resulting from the social and economic developments over the last few decades which have made new and more suitable private law regulations a matter of necessity.⁴³

During the creation of both the Concept and the Regulation Programme several viewpoints were taken into consideration, for example the legal situation in the European Union and foreign codifying experiences. Regarding the latter, the Concept emphasises that the solutions adopted by some major codifications – the ABGB, BGB and ZGB – were already taken into consideration in the current Civil Code. Emphasis has been placed on the Civil Code of the Netherlands, which “can serve as an example primarily regarding the sphere of the regulated relationships and their structure” in the course of the codification but it is not going to be a regulation model as a whole. The Concept relies on the results of the Vienna Convention, the UNIDROIT Principles and the European Contract Law Principles.

It is planned that the Code will contain five books, the second of which will contain family law regulations. (As a consequence of which family law will be regulated within the framework of civil law – albeit with special principles – and not by a separate act.) As one of the greatest changes in family law, the unmarried partnership will be removed from the contractual rules of the Civil Code and will be placed in the Family Book. The importance of this step is demonstrated by the Concept which also deals with this issue.

The Concept provides an indication of the same careful balancing which could be seen earlier in both the case law and the legal literature. According to the Concept there is a need to guarantee further rights for cohabitants, but only in a way which does not weaken the institution of marriage.⁴⁴ It means that some rights – the use of the common home and maintenance – would be granted to a cohabitant following a long-lasting relationship.

⁴² *Az Új Polgári Törvénykönyv koncepciója és tematikája (Concept and Regulation Programme of the New Civil Code)*, published in: *Hungarian Official Gazette (Magyar Közlöny)* Febr. 2003.

⁴³ *Supra* n. 38. p. 7.

⁴⁴ *Supra* n. 38, p. 14. Since the Regulation Programme was accepted and published in 2003, the proposal has been continuously discussed by experts but results of these discussions have not yet been published.

The Regulation Programme deals in detail with the regulation itself.⁴⁵ This is one of the most debated issues and although the Programme refers to the fact that the current solution which considers cohabitation to be a form of contract is no longer suitable, based on public opinion and also the number of persons cohabiting, there is still a great fear that if we extend the unmarried partner's rights, it will result in the weakening of marriage. The Programme admits that cohabitation is very similar to marriage and it arrives at a compromise: the unmarried partnership has to be regulated according to the viewpoints of family law, but it cannot result in the same regulation for cohabitation and for marriage.

According to the Programme the differences in the financial consequences of cohabitation would be retained: the rule according to which a cohabitant would acquire ownership or can claim compensation only in the proportion of his/her contribution in acquiring the assets would not be altered and the cohabitant will also not be the legal heir of his/her partner. We can expect a much more detailed regulation of the financial issues, but the Programme stresses only two aspects: maintenance and the use of the common dwelling in the interest of a minor child.

The Programme does not plan to introduce a registration system for cohabitation, the aim being to avoid the creation of "another kind" of marriage. Nevertheless, unmarried partners would get the opportunity to register their relationship although the existence of cohabitation would not depend on this registration, but it would make the proving of cohabitation easier. Cohabitation would preserve its factual character and it would be available for same-sex partners who want to maintain a relationship recognised by the state.

5. CONCLUSION

Many questions emerge while examining cohabitation and not only under Hungarian law. Several of these questions cannot be answered either by statutory law or case law. These are questions relating to legal policy. One of these questions is whether it is really the best solution to provide the same rules for cohabitation between heterosexual and same-sex partners. Although it is true that both relationships are based upon cohabiting with each other, it is nevertheless the case that heterosexual partners – at least most of them – can also enter into a marriage, while same-sex partners can not.

The analysis of why heterosexual partners do not marry is not the task of jurisprudence but of sociology, the results of which cannot be ignored by family law. The continuous

⁴⁵ Supra n. 38, pp. 50-51.

increase in the number of persons cohabiting is clearly indicated by the Hungarian statistical data: in 1990 5 percent of partner-relationships were in the form of cohabitation, in 2001 this proportion was 11 percent. According to the results of a demographic investigation a quarter of all persons who have ever lived in a partner-relationship have lived or live in an unmarried partnership. The number of persons up to 29 living in an unmarried partnership has been increasing since the 1990s.⁴⁶

A marriage and an unmarried partnership serve the same function. Even if this question does not emerge in Hungarian statutory law, judicial practice has developed the concept of the matrimonial community and the community of life of cohabitants with the same result. The next question can be that while spouses without children are considered to be a family – which is increasingly found by the European Court of Human Rights – can we also state that unmarried partners without children cannot be considered to be a family at all?

The last question can be whether the Hungarian regulation of cohabitants provides a satisfactory solution. The answer depends on the starting point: if it only concerns the status itself, our answer is “yes”, but if we take into consideration the fact that family law is moving towards a contractual situation and self-determination, then our answer should be “no”.

⁴⁶ ERZSÉBET BUKODI, *Ki, mikor, kivel (nem) házasodik?* (Who, when, with whom one should (not) marry?), 2004, pp. 122-123.

NEUTRALITY: THE DEATH OR THE REVIVAL OF THE TRADITIONAL FAMILY?

Regulating Informal Partnerships in Sweden

CAROLINE SÖRGJERD*

1. INTRODUCTION

1.1. THE FAMILY CONCEPT

What is a family? Until quite recently this question was not difficult to answer. The traditional family, consisting of a married couple and their children, was the only accepted family form. Most people today agree that also a married couple *without* children constitutes a family. In many countries in the world, a narrow definition of a family still prevails, excluding, for example, unmarried couples, even couples with children. In Sweden, however, as in several other countries, informal cohabitee relationships have gained ground and have become accepted as a family form. Recognition of informal relationships in society, in turn, has paved the way toward the recognition of same-sex relationships as a family form. It is clear that redefining the concept of the family is a controversial process, challenging traditional values, which form the very basis of Sweden's society.

1.2. THE PURPOSE AND SCOPE OF THIS ARTICLE

This article aims to describe the content of the reformed Swedish Cohabitees Act of 2003, which dates back to 1973, and the content of the Registered Partnership Act of 1994. The objective is also to analyze the legislative history behind these Acts, focusing

* Many thanks to Prof. Dr. MAARIT JÄNTERÄ-JAREBORG and Dr. ANNA SINGER for valuable comments on earlier drafts of this article.

on the ideological incentives to redefine the family concept. In this context, special emphasis will be placed on the so-called neutrality theory, which has played a decisive role in the ideological development in the field of Swedish family law, in particular as regards same-sex relationships.

A registered partnership is a *formalized* marriage-like union available to same-sex couples. Since this paper focuses on *informal* partnerships, the Registered Partnership Act will only be touched upon briefly, the Act offering a “parade example” of how legislation can be used as a means of changing attitudes in society. Firstly, the relevant legislation and terminology will be described. Thereafter, the legal development and the ideological aspects will be analyzed. Finally, some concluding remarks will be presented.

2. RELEVANT LEGISLATION AND TERMINOLOGY

In Swedish law there are two types of *formalized* unions. There is marriage, reserved for different-sex couples, and there is the registered partnership, reserved for same-sex couples. These unions provide, in principle, the same legal effects. This article focuses on *informal* partnerships. From a Swedish viewpoint, this concept includes – in a wide sense – unmarried couples *living apart*, as well as unmarried couples *living together*. This article, however, only covers couples living together, which is regulated in the Cohabitees Act of 2003.

2.1. THE PERSONAL AND MATERIAL SCOPE OF THE COHABITEES ACT OF 2003

Sweden is one of the few countries with a special Act governing informal cohabitee relationships,¹ the Cohabitees Act of 2003. The Cohabitees Act aims to grant the weaker party of a cohabitee relationship a *minimum level of economic protection*.² The Act does not intend to create a “second-class marriage”, which would compete with marriage. The scope of the Act is limited compared to marriage regulation, only providing rules on the division of the joint dwelling and household goods (acquired for the purpose of joint use) when the relationship ends. Furthermore, property acquired before the

¹ A. AGELL, “Legal Issues of the Late 1990’s, Family Forms and Legal Policies, A Comparative View from a Swedish Observer”, *Scandinavian Studies in Law* 1999, vol. 38, p. 200.

² Government Bill (prop.) 2002/03:80 Ny sambolag, p. 25.

parties moved in together,³ or property acquired through inheritance⁴ or as a gift is not covered by the Act. A cohabitee relationship does not create maintenance obligations between the parties, nor inheritance rights. Couples who wish to be covered by a more extensive regulation than the Cohabitees Act have the option of contracting a marriage or – in the case of same-sex partners – a registered partnership.

The definition of a cohabitee relationship is “*two persons living together in a relationship, on a permanent basis, sharing a household.*”⁵ The Act includes different-sex couples as well as same-sex couples.⁶ The Act does not apply to married couples, nor couples who have registered a partnership. The definition of a *relationship* presupposes a sexual relationship, or that the relationship is of such intimacy that sexual activity normally exists.⁷ The prerequisite concerning *permanence* indicates that the relationship should be durable or, at least, intended to be of some duration.⁸ As regards “*sharing a household*”, the definition presupposes that the couple has a shared economy, or at least that there is a certain degree of cooperation concerning household expenses.⁹

When the Cohabitees Act of 2003 was enacted, it was discussed whether also non-intimate relationships, such as adult siblings or parents and children living together, should be included. These relationships were, in the end, not included since the parties were not considered to be in special need of protection, requiring special legislation.¹⁰ In my opinion, this kind of reasoning can be questioned. Relationships without sexual intimacy can be lasting and include the sharing of a joint household. This often appears to be the case when, for example, adult siblings continue living together in their family home, in particular in rural areas, after the death of their parents. The members of these households are unable to obtain legal rights through marriage or partnership

³ The Act also applies to property acquired by one partner with money gained prior to the cohabitation. The Act does not apply to money deposited in bank accounts.

⁴ There is in principle no right of inheritance between cohabitees, unless there is a will. However, under special conditions cohabiting partners are entitled to a survivor's benefits. The surviving cohabitee – not the heirs of the deceased – can request the application of the Act and be granted a fixed sum, along with the right to keep more than half of the value of the dwelling and household goods, after which the estate of the deceased is to be distributed among the heirs. See: A. AGELL, “Legal Issues of the Late 1990's, Family Forms and Legal Policies, A Comparative View from a Swedish Observer”, *Scandinavian Studies in Law* 1999, vol. 38, p. 200.

⁵ See: the Cohabitees Act, Section 1 (my translation).

⁶ The Cohabitees Act entered into force on 1 July 2003, replacing the Cohabitees Joint Homes Act (1987:232) and the Act on Homosexual Cohabitees (1987:813), encompassing both Acts in the same enactment, using the gender-neutral terminology “two persons”.

⁷ Government Bill (prop.) 2003/04:80 Ny sambolag, p. 27.

⁸ Government Bill (prop.) 2003/04:80 Ny sambolag, pp. 27 f.

⁹ Government Bill (prop.) 2003/04:80 Ny sambolag, p. 28.

¹⁰ Committee Report (SOU 1999:104), Nya samboregler, pp. 271 ff. Being classified as “cohabitees” in the sense of the Cohabitees Act is relevant, *inter alia*, for the right to receive an accommodation allowance.

registration. From this perspective, their need for protective legislation might even exceed the need of couples who have the option to formalize their relationship but simply choose not to do so. The need for regulation should, in any case, not be dismissed without thorough investigation and a well-balanced consideration of the various interests.

The Cohabitees Act is of special relevance when the relationship ends, provided that the cohabitees – or one of them – request a division of property. If neither party makes such a request, each one of them retains his or her property. Such a request shall be made no later than one year after the ending of the relationship. According to the Cohabitees Act, Section 2, the point of time when the relationship ends occurs (a) when the cohabitees (or one of them) contract a marriage or a registered partnership, (b) when they separate or (c) when one of them dies. Furthermore, a cohabitee relationship ends (d) when one of the cohabitees applies to the district court for the appointment of an executor to divide the property or for the right to remain on in the joint home in spite of separation.

Finally, it should be mentioned that cohabitees who wish to keep their financial affairs separate may conclude an agreement to the effect that the Act's rules on the division of property do not apply to their relationship, or that some or all of the joint goods shall be excluded from the division of property.¹¹ On the other hand, they cannot validly agree on more extensive property rights than provided by the Act. If the cohabitees wish to regulate inheritance issues, for example, they are free to draw up a formal will.

2.2. THE REGISTERED PARTNERSHIP ACT

A registered partnership is a *formalized union* available to same-sex couples and is governed by the Registered Partnership Act of 1994. A same-sex couple has the option of either living together in an informal *cohabitee relationship*, or formalizing the relationship by concluding a *registered partnership* and thus gaining, in principle, the same legal effects as those of a marriage.

The Registered Partnership Act consists of rules on (a) partnership registration, (b) partnership dissolution and (c) the legal effects of a registered partnership. The

¹¹ See: the Cohabitees Act, Section 9. Such an agreement shall be in writing and signed by the cohabitees – or the prospective cohabitees – in order to be valid. There is, however, no registration of such contracts and they do not need to be attested. In connection with the introduction of the Act of 2003, it was clarified that the cohabitees are free to agree that some – but not all – property shall be excluded. If they wish to change the agreement, they can draw up a new agreement replacing the older one. See: Government Bill (prop.) 2002/03:80 Ny sambolag, pp. 33 ff.

partnership registration procedure is equivalent to the procedure which is applicable when contracting a civil marriage.¹² Also, the impediments to a registered partnership correspond to the impediments to a marriage.¹³ A registered partnership, like a marriage, is dissolved either by the death of one of the partners or by a court decision subject to the application of the rules on divorce.¹⁴

Whereas the Cohabitees Act is limited to covering joint dwelling and joint household goods, the Registered Partnership Act makes all property “matrimonial” in the sense of the Marriage Code.¹⁵ Upon divorce, the value of all the property (after the deduction of debts) will be divided equally between the spouses or partners, unless otherwise agreed.¹⁶ With a few exceptions, the legal effects of a registered partnership are the same as those of a marriage. Currently, the existing exceptions relate to (a) access to assisted procreation methods at public hospitals,¹⁷ (b) specific gender-related provisions¹⁸ and (c) provisions based on international treaties.¹⁹

3. LEGAL DEVELOPMENT AND IDEOLOGICAL ASPECTS

3.1. REGULATING COHABITEE RELATIONSHIPS

In Sweden, approximately 30 percent of all couples live in cohabitee relationships, compared to 20 percent ten years ago.²⁰ By the end of 2002 this figure amounted to

¹² Contrary to a marriage which can be given full legal effect either through a religious ceremony or through a civil ceremony, only a civil ceremony is available for partnership registration. Demands concerning access to a legally binding church ceremony are currently being made, mainly by Christian homosexuals. If such a reform should be considered feasible and desirable, the question arises whether religious communities can continue to solemnize marriages or whether marriage should always be conducted in a civil form. See: M. JÄNTERÄ-JAREBORG/C. SÖRGJERD, “The Experiences with Registered Partnership in Scandinavia”, *FamPra.ch* 3/2004, pp. 582, 586 and 589 ff.

¹³ See: the Registered Partnership Act, Chapter 1, Section 3.

¹⁴ See: the Registered Partnership Act, Chapter 2, Section 1.

¹⁵ Äktenskapsbalken (1987:230).

¹⁶ The system, which is the same in all the Scandinavian states, is often referred to as a “deferred community system”.

¹⁷ This is currently subject to lively debates due to a proposal to abolish the exception. See: Memorandum of the Ministry of Justice, Ds 2004:19 Föräldraskap vid assisterad befruktning för homosexuella.

¹⁸ These are provisions using the term “husband” or “wife” or defining a spouse by sex. Such provisions exist, for example, in social welfare legislation (pension rights, etc.), the purpose being to grant special benefits to a spouse who is presumed to be the weaker party in a marriage. They are few in number and of diminishing importance.

¹⁹ The rationale is that no State can of its own volition extend the scope of an existing international treaty concerning marriages or the rights of spouses to cover registered partners.

²⁰ Government Bill (prop.) 2002/03:80 Ny sambolag, p. 24.

890,343 couples.²¹ The increasing number of couples choosing not to marry has accentuated the importance of legislation, not least because of concern relating to children growing up with unmarried parents. During 2001, 91,500 children were born in Sweden. Half of these children had unmarried cohabiting parents.²²

3.1.1. *Legislative History*

The marriage frequency in Sweden has declined considerably since the 1960s. This decline is connected to changes in society and corresponding legal reforms. One important reform took place in 1917, when protective legislation concerning children born out of wedlock was enacted. The number of children born out of wedlock had increased considerably by the turn of the 20th century. Upholding disadvantageous rules for these children was found to be an inappropriate method of promoting marriage, even though marriage was considered the preferable family form, representing a moral value to be promoted by society.²³ Granting these children legal rights also in respect of the father challenged the traditional family concept. In 1969, children born to unmarried parents were granted full inheritance rights. Since then it is economically irrelevant from the child's point of view whether or not the parents are married.

Another important change challenging traditional values is connected to women entering the labour market and becoming economically independent of their husbands. This probably contributed to an increase in divorce statistics, women becoming less inclined to remain in a marriage exclusively for economic reasons.²⁴ Moreover, women's gainful employment made it possible to focus on the needs of the individual, rather than on the needs of the family as a unit. The respect for the dignity of the human being has accentuated the need for legislation to protect individual rights and interests.²⁵

In 1969, a committee was appointed by the Swedish Government to review the Marriage Code, as well as to evaluate the need for legislation as regards cohabitation without marriage. The Committee presented its results in 1972, recommending the

²¹ See: Statistics Sweden, www.scb.se. The figure includes cohabitees with children together. The number of cohabitees without children is unknown since there is no registration of such relationships.

²² See: Government Bill (prop.) 2002/03:80 Ny sambolag, p. 24.

²³ A. AGELL, "Individ, familj, stat – Om värderingar i familjerättslagstiftningen under 1900-talet", *Svensk Juristtidning* 1984, p. 716.

²⁴ A. AGELL, "Individ, familj, stat – Om värderingar i familjerättslagstiftningen under 1900-talet", *Svensk Juristtidning* 1984, pp. 720 f.

²⁵ See: B. GOMARD, "Law and Society", *Scandinavian Studies in Law* 1993, vol. 27, p. 39, where the dignity of the individual human being and her rights and independence are highlighted as emphasized aspects in the legal development of the past century, the belief in the sanctity of marriage as a bond with religious significance having lost its unique position within family law.

introduction of an Act, granting the cohabitee with the greatest needs the right to take over the joint dwelling after the cessation of the cohabitation.²⁶ At that time cohabitee relationships were already common in Sweden, which accentuated the practical need for regulation. As a result, the Act on the Joint Dwelling of an Unmarried Couple was enacted in 1973.²⁷

In this context, attention was focused, *inter alia*, on altered prerequisites for satisfying sexual demands, as sexual life had gradually been separated from reproduction purposes. Moreover, it was stated that the focus had shifted from regarding the family as a stable economic unit providing commodities for its members, to emphasizing the emotional aspects of family life.²⁸ Even though changes in society facilitated the introduction of rules on cohabitee relationships, it should be noted that the issue was still quite controversial and that the Act of 1973 was limited in scope, only providing certain rules on the right to take over the joint dwelling.

When the situation of cohabiting couples was subject to further investigation in the early 1980s and the new Marriage Code of 1987 was enacted, cohabitation without marriage was no longer considered to be controversial.²⁹ Many couples – mainly belonging to the younger generation – cohabited for a period of time before marrying. Thus cohabitation often functioned as a preliminary stage to marriage and it was considered desirable to achieve a smooth transition between cohabitation and marriage, assuring that couples would not be deterred from marrying.³⁰ As a result, the Cohabitees Joint Homes Act was enacted in 1987, replacing its predecessor, the 1973 Act. The new Act granted the cohabitees upon separation the right to a division of the joint dwelling and the joint household goods, widening the material scope of its predecessor.

In addition, a corresponding Act, “the Homosexual Cohabitees Act”, was enacted.³¹ This Act consisted of one section, referring to, *inter alia*, the Cohabitees Joint Homes Act, placing same-sex cohabitees on (in principle) an equal footing with cohabitees of different sexes. Since 1 July 2003, there is only one Cohabitees Act, applicable to different-sex couples as well as same-sex couples.

²⁶ Committee Report (SOU 1972:41), Familj och äktenskap 1.

²⁷ Lag om ogifta samboendes gemensamma bostad, which entered into force on 1 January 1974.

²⁸ Committee Report (SOU 1972:41), Familj och äktenskap 1, pp. 250 f.

²⁹ Committee Report (SOU 1981:85), Äktenskapsbalk, p. 116.

³⁰ Government Bill (prop.) 1986/87:1 Äktenskapsbalk m.m., pp. 40 f.

³¹ Lag (1987:813) om homosexuella sambor.

3.1.2. *The Neutrality Theory*

*“New legislation should [...] be neutral as far as possible with regard to various forms of cohabitation and divergent moral concepts. Marriage has had and should have a central place within family law, but we ought to endeavor to ensure that family law legislation does not include any regulations, which create unnecessary difficulty or inconvenience for those who have children and establish a family without getting married.”*³²

This frequently quoted passage from the preparatory works to the 1973 Act on the Joint Dwelling of an Unmarried Couple formed the cornerstone of the so-called neutrality theory in Swedish family law. In short, the essence of the neutrality theory is that legislation should remain neutral as far as different forms of cohabitation and moral values are concerned. Individuals should be free to develop their own personal lives in accordance with their own wishes, to choose the living arrangement they prefer and to determine the ethical norms for their family life.³³ The role of family law should be restricted to providing solutions to practical problems.

Fulfilling these criteria in legislation proved to be difficult, since the alleged neutrality contained contradictory aims. The neutrality theory was aimed, *on the one hand*, at preventing unequal treatment (discrimination) on the basis of family form. *On the other hand*, the objective was also to grant couples the freedom to choose the legal form for their relationship, without forcing the same rules upon them.³⁴ Obviously these two goals could not be attained at the same time. The Committee solved the problem by using a two-sided approach. Thus neutrality in the sense of *non-discrimination* was provided in the fields of social welfare law and taxation law, treating cohabitees and spouses equally in these areas. Neutrality in the sense of *protecting couples' freedom to choose the legal form for their relationship* was provided in the field of traditional family law, retaining a clear distinction between formal marriage and informal cohabitation. It was, however, considered necessary to limit this freedom by the Act of 1973, in order to protect the cohabitee with the weakest financial situation.

The ideology of neutrality was introduced as a means of dealing with the increasing number of couples cohabiting without marriage. It was stressed that *marriage should still have a central place within family law*. Neutrality was by no means supposed to diminish the importance of marriage.

³² Committee Report (SOU 1972:41), Familj och äktenskap 1, p. 58 (as translated by J. GRAVERSEN, “Family Law as a Reflection of Family Ideology”, *Scandinavian Studies in Law* 1990, vol. 34, p. 79).

³³ See: Government Bill (prop.) 1973:32 Kungl. Maj:st proposition med förslag till lag om ändring i giftermålsbalken, m.m.; given Stockholms slott den 9 mars 1973, p. 84.

³⁴ Committee Report (SOU 1972:41), Familj och äktenskap 1, p. 91.

According to critics, the allegedly neutral position nevertheless strengthened the status of unmarried cohabitation and was a signal from the legislator to society that marriage was no longer the preferable family form.³⁵ Moreover, the impact of legislation in areas such as tax law and social welfare law is particularly great in the Swedish legal system. Thus legislation can be used effectively in these areas as a tool for changing behavior, for instance through promoting gender equality by introducing disadvantageous rules on domestic work, with the political ambition to encourage women's independence.³⁶

Irrespective of whether or not the theory of neutrality *intended* to change people's behavior, it is clear that the Committee was by no means oblivious to the impact that legislation can have in this respect. The 1969 guidelines by the Government to the Committee on Family Law comment on the use of legislation as a tool for changing attitudes:

*"[...] [L]egislation is one of the most important instruments society possesses when it comes to meeting the wishes of individuals or to link the development in new paths. [...] [T]here is no need to relinquish the use of legislation on marriage and the family as one of several instruments of reformative efforts towards a society where every adult individual is responsible for himself [or herself] without being economically dependent on relatives and where equality between men and women is a reality."*³⁷

Despite the obvious impact of legislation, it was not considered suitable to persuade cohabiting couples to marry, using legislation as a tool to promote marriage.³⁸ As ANDERS AGELL puts it, marriage should be regarded as providing the ultimate set of rules for couples living together – especially for couples with children. Protecting family stability should be in the interest of the legislator, statistics showing that unmarried couples are more likely to separate than spouses.³⁹ Furthermore, according

³⁵ A. AGELL, "Legal Issues of the Late 1990's, Family Forms and Legal Policies, A Comparative View from a Swedish Observer", *Scandinavian Studies in Law* 1999, vol. 38, p. 206. AGELL is one of the most persistent critics as regards the neutrality theory. See e.g.: "The Swedish Legislation on Marriage and Cohabitation. A Journey without a Destination", *Scandinavian Studies in Law* 1980, vol. 24, pp. 21 ff. See also: *idem*, *Familjeformer och lagstiftningsideologi*, Vetenskapsakademien, Torsten och Ragnar Söderbergs stiftelser, Stockholm, 1998, p. 11.

³⁶ J. GRAVERSEN, "Family Law as a Reflection of Family Ideology", *Scandinavian Studies in Law* 1990, vol. 34, p. 91. See also: A. AGELL, *Familjeformer och lagstiftningsideologi*, Vetenskapsakademien, Torsten och Ragnar Söderbergs stiftelser, Stockholm, 1998, p. 12, where he argues that the legislator's ambition to change sexual roles, by disadvantageous rules regulating women's domestic work, affect their freedom of choice.

³⁷ Committee Report (SOU 1972:41), *Familj och äktenskap* 1, p. 58. (The first sentence is my translation and the remaining part was translated by Graversen, Jørgen, *Family Law as a Reflection of Family Ideology*, *Scandinavian Studies in Law* 1990, vol. 34, p. 82).

³⁸ Committee Report (SOU 1981:85), *Äktenskapsbalk*, p. 116.

³⁹ A. AGELL, "Should and Can Family Law Influence Social Behaviour?" *The Changing Family, Family Forms & Family Law*, edited by J. EEKELAAR/T. NHLAPO, Hart Publishing, Oxford, 1998, pp. 126 ff.

to AGELL, marriage has lost its ideological and religious meaning and merely constitutes a contract. Thus promoting marriage should not be controversial.⁴⁰ Also the preparatory works to the Cohabitees Act of 2003 emphasize that marriage – and nowadays also the registered partnership – provide the ultimate legal protection.⁴¹

3.1.3. *Forcing Rules on Unmarried Couples?*

Marriage and cohabitation are both voluntary unions in the sense that no one may be forced into either form of family life. However, a valid marriage requires that the prospective spouses in the presence of a competent official *explicitly consent* to becoming husband and wife. Their consent constitutes a marriage contract, according to which the spouses agree to the rights and duties connected to marriage.⁴² The Cohabitees Act, however, becomes applicable when the requirements in the Act are met, *without any official procedure of consent*. In this respect, one might say that the Cohabitees Act “forces” certain rules on unmarried couples. Considering this basic difference between marriage and cohabitation, the legal effects of a cohabitee relationship cannot be as far-reaching as those of a marriage.

Nevertheless, extending the scope of property to be included in property distribution was considered when the Cohabitees Act of 2003 was enacted.⁴³ More precisely, it was discussed whether also motor vehicles should be included. The Government found, however, that such an extension demanded a further investigation of its effects. Including motor vehicles might not best serve the purpose of protecting the *weaker party*.⁴⁴ Extending the scope of the Act is a delicate matter, the starting point being that cohabitees have *chosen* not to marry and that their freedom to choose their form of family life should, as far as possible, be respected. However, it is noteworthy that the Government is not alien to the idea of extending the scope of the Cohabitees Act, provided that this is in the interests of the weaker party.

⁴⁰ A. AGELL, “The Swedish Legislation on Marriage and Cohabitation. A Journey without a Destination”, *Scandinavian Studies in Law* 1980, vol. 24, p. 36.

⁴¹ Government Bill (prop.) 2002/03:80 Ny sambolag, p. 25.

⁴² A valid marriage contract presupposes a wedding ceremony, according to a judgment by the Supreme Court in 1985 (Nytt Juridiskt Arkiv 1985 s 185). See: A. AGELL, “Legal Issues of the Late 1990’s, Family Forms and Legal Policies, A Comparative View from a Swedish Observer”, *Scandinavian Studies in Law* 1999, vol. 38, p. 199.

⁴³ Committee Report (SOU 1999:104), Nya samboregler, p. 199.

⁴⁴ The Government pointed out that there are often two cars in a household, one of which might be a company car. In such cases a division of property would only include the joint car – not the company car – and this would, perhaps, be disadvantageous for the weaker party. Although the Government found that it is likely that the protection of the weaker party demands an extended application of the Act, the achievement of this might not be best served through the proposal concerning motor vehicles and the issue should therefore be further investigated. See: Government Bill (prop.) 2002/03:80 Ny sambolag, pp. 31 f.

3.1.4. *What Kind of Regulation do Cohabitees Prefer?*

According to critical doctrine, the legal development in the field of family law has been more about achieving political goals than meeting the demands of the population in general. What kind of regulation do cohabitees prefer? Are cohabitees content with the prevailing system? Would they prefer a more extensive regulation or do they, on the contrary, find the existing regulation to be too far-reaching? The most accurate answer to these questions is most likely that cohabitees in general do not know what they want or even what rules apply.

A survey in connection with the enactment of the Cohabitees Act of 2003 showed that cohabitees in general lack a sufficient knowledge of the applicable rules and that they are usually oblivious of what applies until the relationship ends. It may be a painful experience when the other cohabitee makes use of the provisions on the division of property. On the other hand, the survey showed that about half of all cohabitees were under the delusion that *all* of their property – not only joint property, acquired for the purpose of joint use – is to be divided equally upon separation.⁴⁵

The introduction of a registration procedure for cohabitation without marriage could solve some of the difficulties as regards cohabitees' presumed lack of consent (and knowledge) to be submitted to a certain set of rules. A registration procedure could also, through information from the officiating person, ensure that the cohabitees are aware of the legal effects obtained. A drawback, also explaining why registration has not been introduced, is that many cohabitees would refrain from making use thereof. As a result, the law would risk not encompassing those cohabitees who are in a particular need of protection.⁴⁶

It is a serious problem that many cohabitees are unaware of the differences between cohabitation and marriage and that they are sometimes even under the delusion that the cohabitation creates the same legal effects as a marriage.⁴⁷ Keeping this misconception in mind, it is hardly surprising that many cohabitees do not bother marrying! This problem was addressed when the Cohabitees Act of 2003 was enacted and the importance of spreading information about the Act was strongly emphasized.

⁴⁵ Committee Report (SOU 1999:104), Nya samboregler, p. 381.

⁴⁶ Government Bill (prop.) 2002/03:80 Ny sambolag, p. 27.

⁴⁷ This general lack of knowledge is also disquieting when speaking in terms of forcing rules on unmarried couples without their expressed consent, since the cohabitees are most likely also unaware of their possibility to reach an agreement excluding property from division.

3.2. REGULATING SAME-SEX PARTNERSHIPS

An interesting question is how the ideology of neutrality has developed and paved the way toward the recognition of same-sex relationships as a family form.

3.2.1. Legislative History

The first landmark event in Sweden as regards the legal position of homosexuals occurred in 1955, when the Supreme Court gave a ruling in a custody dispute concerning a lesbian mother's suitability to be the legal guardian of her child.⁴⁸ The Court found that the mother's homosexuality as such did not make her unfit as a guardian. It should be noted that homosexuality was classified as an illness in Sweden until 1979, although homosexual behavior was decriminalized in 1944.⁴⁹ The second landmark event took place in 1973, in connection with the enactment of the Act on the Joint Dwelling of an Unmarried Couple. In this context Parliament commented on same-sex relationships and stated that: "*cohabitation between two persons of the same sex is a perfectly acceptable form of family life from society's point of view*".⁵⁰ This ideological position was the starting point for further development in this field.

In 1978, the Government appointed a special committee to investigate, from a legal perspective, homosexual individuals' conditions of life and the occurrence of discrimination in different sections of society. In the Committee's extensive report of 1984,⁵¹ it proposed to introduce the Homosexual Cohabitees Act, which was adopted in 1987. The Act consisted of one section, according to which same-sex cohabitees in principle were put on an equal footing with cohabitees of different sexes, through a reference to the Cohabitees Joint Homes Act. Through this legislation Sweden was the first country in the world to introduce family law legislation regulating same-sex relationships. The Committee also considered whether cohabitees of the same sex should be given the option of registering their relationship. At that point, however, such legislation was not considered desirable, as it would highlight same-sex couples in a negative manner and thereby risk strengthening prejudices in society.⁵²

⁴⁸ Judgment of the Supreme Court (NJA 1955 p. 63).

⁴⁹ Committee Report (SOU 1984:63), *Homosexuella och samhället*, pp. 33 and 45.

⁵⁰ Report of the Parliamentary Legislative Committee (LU 1973:20) *Lagutskottets betänkande i anledning av Kungl. Maj:ts proposition 1973:32 med förslag till lag om ändring i giftermålsbalken m.m., jämte motioner*, p. 116 (my translation).

⁵¹ Committee Report (SOU 1984:63), *Homosexuella och samhället*.

⁵² See: M. Jänterä-Järeborg/C. Sörgjerd, "The Experiences with Registered Partnership in Scandinavia", *FamPra.ch* 3/2004, p. 580 f., with further references.

At the same time, the Committee also considered making marriage available to same-sex couples, but found that such a reform should not be effected. The main reason given was that it was not possible, from society's point of view, to regard same-sex cohabitation as completely equal to cohabitation between partners of different sexes. For example, same-sex couples could not be granted access to a religious wedding ceremony. Since differences in treatment based on sexual orientation would be discriminatory to same-sex couples, it was not feasible to allow same-sex couples to marry.⁵³ Hence, preserving the traditional concept of marriage as an institution available to different-sex couples remained desirable.

The question of introducing a marriage-like union for same-sex couples reappeared in the early 1990s, resulting in the adoption of the Registered Partnership Act of 1994. This legislation was extremely controversial. In fact, it was so controversial that the Government could not agree on a Bill to be presented to Parliament. Instead Parliament took the matter into its own hands and voted on the basis of a Bill prepared by its Legislative Committee. This procedure – an Act entirely being drawn up by Parliament – was unique and has to my knowledge never been used before.

Objections mainly had to do with difficulties in cross-border situations, since the registered partnership only existed in a few countries at that time, as well as the structure of the legislation.⁵⁴ Parliament did not find that the criticism should stop the planned Act, an argument being that the same objections were raised in connection with the Cohabitees Joint Homes Act, which, nevertheless, had turned out to be desirable.⁵⁵

Subsequent legal development has taken place with remarkable speed and without facing much resistance. The exceptions enumerated in the Act have gradually been abolished or they have diminished through subsequent amendments. In 1999, a committee was appointed by the Government to investigate the conditions for children in same-sex families. Its task was, *inter alia*, to determine whether the legal differences between same-sex and different-sex couples as regards the right to adopt a child were justified from the point of view of the best interests of the child. In 2001, the Committee presented its results and proposed that all differences in treatment be abolished.⁵⁶

⁵³ Committee Report (SOU 1984:63), *Homosexuella och samhället*, p. 98.

⁵⁴ Report (1993/94:LU28), *Registrerat partnerskap m.m.*, p. 12.

⁵⁵ Report of the Parliamentary Legislative Committee (1993/94:LU28), *Registrerat partnerskap m.m.*, p. 36 and 69. See also: M. BOGDAN, "Registrerat partnerskap och svensk internationell privaträtt", *Svensk Juristtidning* 1994, pp. 782 f.

⁵⁶ See: M. JÄNTERÄ-JAREBORG/C. SÖRGJERD, "The Experiences with Registered Partnership in Scandinavia", *FamPra.ch* 3/2004, p. 581, with further references.

The Government endorsed the Committee's report in this respect and the new rules entered into force on 1 February 2003.⁵⁷ Thus Sweden is today one of the few countries that permits registered partners to jointly adopt children, also children from abroad. It was considered desirable to include international adoption, even though no country at that point appeared to be willing to place a child in a same-sex family abroad.⁵⁸ Also so-called stepchild adoption was made possible, i.e. when one partner adopts the child of the other partner. Placing registered partners on an equal footing with spouses as regards access to adoption was particularly important since cohabitants are not allowed to adopt jointly in Sweden.⁵⁹

It should be emphasized that there is no *right* to adopt a child, but only *a right to be examined as prospective adoptive parents*. The Government did not focus on ideological concerns of neutrality when enacting the legislation. Instead, the reform was based on the best interests of the child. The practical impact of the reform is so far limited to domestic cases of so-called stepchild adoption, the countries of origin being opposed to placing their children in same-sex families abroad. Still, from an international point of view, the reform is of great symbolic significance, setting a positive example and encouraging other States to follow suit.⁶⁰

A currently topical issue concerns whether marriage should be made gender-neutral. The Legislative Committee of the Swedish Parliament has recently instructed the Government to appoint a parliamentary committee for the purpose of investigating the feasibility of such a reform.⁶¹ It is considered likely that general attitudes concerning same-sex marriages have changed in a positive direction, making the time ripe to investigate the issue anew. Moreover, a Bill is currently being prepared to give lesbian couples access to artificial procreation methods at public hospitals and joint legal parenthood for lesbian couples.⁶²

3.2.2. The Legislator Creating Public Opinion

"Our standpoint has an ideological foundation, based as it is on human equality, both as between individuals and under the law. We acknowledge homosexual love as equal in value

⁵⁷ Government Bill (prop.) 2001/2002:123 Partnerskap och adoption, p. 34.

⁵⁸ Committee Report (SOU 2001:10), Del A, Barn i homosexuella familjer, p. 353.

⁵⁹ In Sweden, single persons, spouses and registered partners are allowed to adopt children.

⁶⁰ M. JÄNTERÄ-JAREBORG, "Registered Partnerships in Private International Law: The Scandinavian Approach, *Legal Recognition of Same-Sex Couples in Europe*, edited by K. BOELE-WOELKI/A. FUCHS, European Family Law Series No. 1, Antwerp/Oxford/New York, 2003, pp. 154 f.

⁶¹ See: M. JÄNTERÄ-JAREBORG/C. SÖRGJERD, "The Experiences with Registered Partnership in Scandinavia", *FamPra.ch* 3/2004, p. 582, with further references.

⁶² See: M. JÄNTERÄ-JAREBORG/C. SÖRGJERD, "The Experiences with Registered Partnership in Scandinavia", *FamPra.ch* 3/2004, p. 582, with further references.

to heterosexual love. We affirm, we do not deny, love between persons. Love is an important driving force of both personal and social development.

From this point of view we do not feel it to be incumbent on society to have viewpoints concerning the way in which people choose to live together. Society's tasks ought instead to be that of enabling people to live in accordance with their own preferences and personalities, not preventing them from doing so, so long as this does not cause harm to others.

We wish to accommodate the desire of homosexual couples for a valuable setting for their relations, as a way of manifesting their love. We also wish to accommodate the need of homosexual couples for economic and legal security in their relations. We wish to create greater awareness of, understanding for and openness concerning homosexuality and homosexual relations. One important way of achieving this, in our belief, is by establishing, as far as possible, legal parity between homosexual and heterosexual cohabitation.”⁶³

It is clear that the Registered Partnership Act would not have been possible without the previously developed neutrality theory. The concept of neutrality has, however, become more articulated. Consider this for a moment: Originally, the neutrality theory aimed at, *inter alia*, keeping family law legislation neutral and free from moral values. In the context of the registered partnership, neutrality is no longer a subtle and discrete guideline, but an ideological tool expressed openly to justify the political agenda!

The ideological standpoint of the Committee (quoted above) is weighted with ethical and moral human values, resembling the standpoints frequently expressed in connection with human rights issues. The Committee was well aware of this. In its opinion, legislation placing same-sex couples on an equal footing with different-sex couples was in line with the underlying intentions of international instruments such as the UN Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁶⁴

It is clear that long-term relationships, also in same-sex relationships, were given a special value by the Committee. The value of promoting long and lasting relationships supported the enactment of the Registered Partnership Act.⁶⁵

3.2.3. Possible Explanations for the Low Figures on Partnership Registration

Despite the political ambitions, the practical impact of the Registered Partnership Act has been modest in Sweden. During 1995-2003, a total of 3,440 persons registered a partnership. This figure is low when considering that at least 450,000 (5 percent) out

⁶³ Committee Report (SOU 1993:98), Partnerskap, Del A, p. 21.

⁶⁴ Committee Report (SOU 1993:98), Partnerskap, Del A, p. 33.

⁶⁵ Committee Report (SOU 1993:98), Partnerskap, Del A, p. 29.

of the 9 million inhabitants in Sweden are estimated to be homosexual.⁶⁶ The low figures imply that many same-sex couples live together in informal cohabitee relationships. One can only speculate on possible explanations for the low figures on partnership registration.

One explanation could be that the legislation does not meet the demands of same-sex couples, since it is modelled on heterosexual marriage legislation.⁶⁷ There has been opposition to same-sex marriage from lesbian and gay communities, primarily in the United States, arguing that marriage as such promotes neither equality nor freedom. From this perspective, which is supported by certain feminists, marriage is not worth striving for, since it is modelled on a patriarchal and unequal institution.⁶⁸ In Sweden, however, such arguments are not common. Swedish critics have suggested that there was no practical need for the Registered Partnership Act in the first place.⁶⁹ The Committee, however, did not share this view stating that:

*“The only unquestionable difference between homosexuals and heterosexuals is that homosexuals are emotionally attracted by persons of the same sex. A typical pair relationship between two women or two men is very similar to a pair relationship between a man and a woman.”*⁷⁰

Another possible explanation for the low registration rates in Sweden could be that marriage, as such, still has a special value and that same-sex couples choose not to formalize their relationship unless they can have “the real thing”, i.e. a marriage. This discussion is interesting from an ideological perspective, particularly in light of the ongoing debates on making Swedish marriage legislation gender-neutral. If one finds it likely that opening up marriage to same-sex couples would increase the number of formalized same-sex relationships, one must admit that contracting a marriage has greater significance than merely obtaining legal rights and duties. If marriage, as such, has been reduced to a secular contractual agreement without any remaining ethical

⁶⁶ See: M. JÄNTERÄ-JAREBORG/C. SÖRGJERD, “The Experiences with Registered Partnership in Scandinavia”, *FamPra.ch* 3/2004, p. 587, with further references.

⁶⁷ A. AGELL points out that the needs of homosexual couples have not been explored. See: “The Legal Status of Same-Sex Couples in Europe – A Critical Analysis”, *Legal Recognition of Same-Sex Couples in Europe*, edited by K. BOELE-WOELKI/A. FUCHS, European Family Law Series No. 1, Antwerp/Oxford/New York, 2003, p. 127.

⁶⁸ D. COOPER, “Like Counting Stars?: Re-Structuring Equality and the Socio-Legal Space of Same-Sex Marriage”, *Legal Recognition of Same-Sex Partnerships, A Study of National, European and International Law*, edited by R. Wintermute/ Andenæs, Hart Publishing, Oxford and Portland Oregon, 2001, p. 75 with further references.

⁶⁹ A. AGELL, *Äktenskap, Samboende, Partnerskap*, Second Edition, Iustus förlag, 1998, p. 266.

⁷⁰ Committee Report (SOU 1993:98), *Partnerskap*, Del A, p. 27.

value,⁷¹ then the introduction of gender-neutral marriage legislation alone is not likely to persuade same-sex couples, previously unwilling to register a partnership, to formalize their relationship by marrying.

A third explanation could be that same-sex couples believe that the legal protection afforded by the Cohabitees Act is sufficient. In this context, however, the problem related to cohabitantes' general lack of knowledge concerning the applicable rules should be taken into account. Moreover, it is possible that some couples wish to keep their relationship "in the closet", avoiding the public statement that the registration of their relationship entails.

Finally, a different approach to the issue is to focus on access to marriage as a question of equal treatment and non-discrimination. The desirability of marriage and the practical effects of a reform are not the issues at stake, but the individual *right* to marry. From this perspective the low registration rates are irrelevant; advocating same-sex marriage does not automatically imply that all homosexuals *should* in fact marry, if they are given the possibility to do so. Instead it is a question of supporting the equal treatment of individuals, not investigating the practical impact which such legislation would have.⁷²

4. CONCLUDING REMARKS

In this article, I have shown that the ideology of neutrality has had a decisive impact on Swedish family law in the past decades. This impact has in fact been much more comprehensive than anyone could have foreseen when the first legislation on unmarried cohabitation was drafted in the early 1970s. The subtle and discrete idea of neutral family law legislation – opening up the possibility to regulate unmarried cohabitation – has become an efficient political tool for promoting certain human values through legislation. In my opinion the chain of events has resulted in a positive re-evaluation of old-fashioned ideals in the field of family law.

⁷¹ See e.g.: A. AGELL, "Swedish Legislation on Marriage and Cohabitation. A Journey without a Destination", *Scandinavian Studies in Law* 1980, vol. 24, p. 36, where he argues that the legislator has endeavoured to frame the marriage legislation as a secular contract without ideological concerns, and that society should thereby be free to actively recommend marriage as the preferable family form.

⁷² C.R. FELDBLUM, "The Limitations of Liberal Neutrality Arguments in Favour of Same-Sex Marriage", *Legal Recognition of Same-Sex Partnerships, A Study of National, European and International Law*, edited by R. WINTERMUTE/M. ANDENÆS, Hart Publishing, Oxford and Portland Oregon, 2001, p. 56.

Finally, I would like to return to the question asked initially: What is a family? Many people today are likely to agree that neither marriage nor children are necessary to constitute a family. Since the family concept has been disconnected from the reproductive function, regarding a same-sex couple – who is unable to have biological children together – as a family is logical in my opinion. Today, same-sex couples have found ways to have children and are demanding the right to marry and to be granted access to artificial procreation methods at public hospitals. Whereas different-sex partners have drifted away from marriage as the traditional form for family formation, same-sex partners are returning to old ideals, demanding the right to create a “nuclear family”! Keeping this in mind, it appears that neutrality is *reviving*, rather than *killing* the family concept, although in modernized terms.

**PART FOUR: THE REVISED BRUSSELS II
REGULATION**

HABITUAL RESIDENCE CONSIDERED AS A EUROPEAN HARMONIZATION FACTOR IN FAMILY LAW (REGARDING THE “BRUSSELS II-BIS” REGULATION)

ANNE RICHEZ-PONS

1. INTRODUCTION

Since the second half of the 20th century, the reference to the criterion of residence, generally qualified as habitual, has progressed in every branch of private international law. Community law also refers to it more and more frequently. Actually, habitual residence plays a central role in Council Regulation (EC) n° 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, adopted by the European Community in the field of judicial cooperation in civil matters. It is a suitable way to ensure the distribution of competences within the European Union.

As regards the concept of habitual residence, we can observe that it is not defined by the "Brussels II-bis" Regulation while at the same time article 2 of this Regulation defines a number of concepts or expressions that are used in the Community text. However, the lack of a definition of habitual residence is nothing to be surprised about. Indeed, it is rarely defined by the texts which use it and, if such is the case, the definitions are laconic to say the least. As a matter of fact, this reluctance to define the concept is quite usual. Actually, the explanatory memorandum of the Regulation is explicit on this point: “In line with customary practice within the Hague Conference where the concept of 'habitual residence' has been developed, the term is not defined, but is instead a question of fact to be appreciated by the judge in each case.”

If it is usually considered that residence corresponds to the physical presence of a person in a particular place, qualified by a length of time revealing stability, this is not so much a definition as mere elements without which residence would remain totally undefined. Made up of factual elements, it is eminently concrete and does not seem liable to be summed up in a few words which would convey all its meaning. And so

it appears that the lack of a definition cannot reasonably be attributed to the fact that the concept is too simple to be defined.

Consequently, several arguments can be put forward to justify such an explicit reluctance to define habitual residence. To begin with, it could possibly be argued that the concept should remain as close as possible to its usual meaning: defining it might indeed bring about speculation concerning its contents, and may lead to breaking up the concept rather than unifying it. In addition, there would be no more habitual residence in French law than there would in German or Dutch law: somehow the concept would be "universal". Finally, and this is an important point, even if one wanted to define the concept, it appears that it would eventually be impossible to do so in general and abstract terms, valid whatever the context, because the concept would be functional. When we study the concept as a whole, we are inevitably led to observe that the concept of habitual residence is interpreted differently according to the function which is allotted to it, according to the objective of the conflict rule which refers to it.

Considering that the contents of the concept depend on the function which is allotted to it, in the first place we shall analyze the role of habitual residence in the "Brussels II-bis" Regulation; then, we shall see how it is determined and what elements can be regarded as constitutive of the concept.

2. THE FUNCTION OF HABITUAL RESIDENCE IN THE "BRUSSELS II-BIS" REGULATION

It is a fact that habitual residence can equally express a material and geographical proximity and be the expression of the link which unites a person with the social background in which he is settled. Both aspects of the concept may possibly be the reason why Council Regulation (EC) n° 2201/2003 has made habitual residence an element for designating the competent jurisdiction as regards divorce, legal separation or marriage annulment procedures and actions regarding parental responsibility. This connecting factor is not exclusive, but it is nevertheless generally preferred by the Community legislator.

Indeed, the choice of habitual residence seems to be justified by eminently pragmatic considerations equally related to the territorial and procedural proximity which the criterion implies (2.1.), and the will to favour a criterion expressing a person's belonging to the local community in which he is settled in a sufficiently stable and effective way (2.2.).

2.1. HABITUAL RESIDENCE, EXPRESSION OF A MATERIAL AND GEOGRAPHICAL PROXIMITY

Under Article 3 of the Regulation, in matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State in whose territory: the spouses are habitually resident; the spouses were last habitually resident, insofar as one of them still resides there; the respondent is habitually resident; either of the spouses is habitually resident in the event of a joint application; the applicant is habitually resident if he or she has resided there for at least a year immediately before the application was made (the delay is reduced to six months if the applicant is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her ‘domicile’ there). Taken in isolation, nationality only determines competence if it is common to both spouses (for the United Kingdom and Ireland, the “domicile” must be common to both spouses). According to these provisions, the “Brussels II-*bis*” Regulation (this was already the case in the “Brussels II” Regulation) makes habitual residence a pivotal element for the designation of the internationally qualified jurisdiction.

In matters of parental responsibility, even if the Regulation makes provision for a certain number of derogatory grounds of jurisdiction, article 8 of the Regulation makes habitual residence the appropriate criterion for the designation of the competent jurisdiction.

The role of habitual residence as an autonomous connecting factor is important in so far as this criterion is the most appropriate by which to express a geographical and a material proximity between the dispute or the parties and the court of competent jurisdiction, and to guarantee a good administration of justice and respect for procedural justice. Indeed, it is normal that foreigners established in a country, who are not merely in transit, should be able to settle a dispute without having to return to their country of origin. Travel as well as travel expenses should always be reduced to a minimum. Pleading outside one’s country of residence may also cause difficulties due to different legal procedures. On the other hand, the judges who are geographically close to litigious facts are the most suitable to estimate the situation and to take appropriate measures, and then to have them enforced; they carry out their mission under the best conditions. Indeed, some authorities may intervene more quickly than others and, more generally, may prove more able to devise appropriate arrangements. When the courts are in close proximity, it is easier to establish disputed facts because investigations, hearings and inquiries can be carried out more easily, and information is more accessible.

Furthermore, the choice of habitual residence in the Community Regulation also seems to proceed from another justification. Actually, if habitual residence expresses a geographical and material proximity, one can also admit that the concept conveys, for a person, the sense of his/her belonging to a social background, that it emphasizes the effectiveness of a link between an individual and his living environment.

2.2. HABITUAL RESIDENCE AS A MARK OF BELONGING TO A SOCIAL BACKGROUND

Habitual residence can be considered as a 'belonging' tie: that which links an individual to his living environment. Actually, from a pragmatic point of view, it seems obvious that if a person has his habitual residence in a Member State, considering the time he has spent there, definite links will be created between him and his host country, that in which he ordinarily lives. He gradually moves his interests from his country of origin to the local community into which he integrates as time passes. It is also for this reason that the Community legislator seems to have preferred habitual residence as an appropriate criterion for the designation of competent jurisdictions.

Thus, habitual residence expresses a form of effective 'belonging' to one's living environment, to one's host community. This form of belonging is different from the political and juridical belonging which nationality may represent (or, in the case of the United Kingdom and Ireland in particular, the domicile of the person). But its importance must not be underestimated, particularly in Community Law. It is a fact that, in Community Law, nationality may have been considered to be a discriminating factor, which cannot be the case with habitual residence (it may be noted that if the jurisdictional privileges based on nationality can exceptionally be referred to, the Regulation puts the situation of a person who has his habitual residence in a Member State in the same category as that of a national of this State). Beyond the absence of discrimination that is inherent in the concept, Community Law acknowledges that habitual residence has an integrative vocation within the Community, which is ample justification for its prevalence.

After examining these two functions of habitual residence, considered both as a place and a link, it would be appropriate to analyse the concept of habitual residence as such and especially to discover how it is determined.

3. THE DETERMINATION OF HABITUAL RESIDENCE UNDER THE BRUSSELS II-BIS REGULATION

We have seen that habitual residence has no definition in the Community text; more generally, it is not defined in Private International Law. Nevertheless, the absence of a definition does not mean that one does not know how to determine it. The concept of habitual residence is both adaptable and very concrete. It is eminently pragmatic. Thus, residence, particularly described as “habitual”, excludes a short stay, a momentary presence; it implies – as the term indicates – a “habit” of life in a particular place. Even if the Regulation requires six months’ or one year’s habitual residence in cases of divorce, legal separation or marriage annulment, it must not be inferred that habitual residence cannot be established below that duration. It simply means that habitual residence sometimes requires a certain length of time before its effects can take place.

To discover whether a person has his habitual residence in a particular place, every element of fact, material as well as objective, must be taken into account. A resolution by the Council of Europe¹ states that “in determining whether the residence is habitual, account is to be taken of the duration and the continuity of the residence as well as other facts of a personal or professional nature which point to durable ties between a person and his residence”. It is obvious that a link becomes established between a person and a territory from his arrival onwards, but the nature of this link is liable to evolve with the passing of time and to reveal an increasing quality of establishment insofar as links become inextricably forged with the living environment.

In her explanatory report,² Mrs Borrás refers to a decision of the Court of Justice of the European Communities and points out that habitual residence can be defined as the place “in which the official concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests. However, for the purposes of determining habitual residence, all the factual circumstances which constitute such residence must be taken into account”. This extract has an indicative value rather than a definitional value. The character of permanence which is referred to may seem excessive considering the objectives aimed at by the conflict rule. In other respects, the reference to intention does not seem absolutely necessary:

¹ Resolution (72)1 on the Standardisation of the legal Concepts of “Domicile” and of “Residence” adopted by the Committee of Ministers of the Council of Europe on 18 January 1972. See Rule No. 9 in the annex.

² A. BORRÁS, *Explanatory report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters*: OJEC C 221/27, of 16 July 1998. See, for example, CJEC, *Pedro Magdalena Fernández v Commission of the European Communities*, Case 452/93 [1994] ECR 4295.

an intentional element can be taken into account to reveal or confirm the existence of a residence in a place. As such, this element alone cannot be considered as a constituent element of the concept. Thus, the search for an intentional element may occur when the duration in a place is still insufficient to decide on the existence of a residence (in which case the duration of the stay, for example, can be taken into account). That search for intent may also occur, for instance, when the person concerned stays in several places, and the problem is to know which of his residences can be described as habitual. The intentional element which is referred to must always be objectively estimated by the judge whose job it is to determine whether a person has or does not have his habitual residence in a particular place; it is inferred from all the facts in the inherent situation.

So far, no national court has ever submitted any preliminary question to the Court of Justice of the European Communities concerning the interpretation of habitual residence as it is used in the context of family matters and parental responsibility. But this will probably be the case in the near future. It remains to be seen what sense the Court of Justice will give to the concept. There may be some who will disapprove of the very principle of a definition, but no lawyer can be prevented from wondering about the meaning of certain terms, especially if one considers that a homogeneous interpretation of Community texts must prevail.

4. CONCLUSION

To conclude, it can be observed that the choice of habitual residence as a connecting factor seems to be quite appropriate for various reasons. In the first place, it allows individual interests to be satisfied, a close connection between the dispute and the competent Courts thereby being ensured. It also satisfies the interest of Community law since it provides a fair distribution of competences within the Member States of the European Union. Beyond that, it also contributes to the harmonization of the various legislations which is much sought after by Community legislation. It is a fact that, for the moment, those two elements – habitual residence and nationality (or domicile in the United Kingdom and Ireland) – are by no means mutually exclusive; on the contrary, there is broad consensus concerning them and both can express an effective or juridical belonging within a community. Community law could even go further and admit that the will to coordinate the legal systems of the Member States could also be reflected in a more frequent recourse to the concept of habitual residence; and the Community legislator could widen its recourse to other fields. And then one may gradually be persuaded to consider that habitual residence is bound to become the only criterion in the long run, and will thus completely ensure the free movement of persons which constitutes the cornerstone of Community law.

THE IMPACT OF SUBSEQUENTLY CHANGED FACTS ON THE EXEQUATUR PROCEDURE UNDER BRUSSELS IIBIS

CLAUDIA RAMSER

1. INTRODUCTION

The new Brussels *Iibis* regulation¹ marks a further milestone in the development of European family law. This cutting regulation heralds the introduction of a ‘European Enforcement Order for visiting rights’. Under Brussels II² the enforcement of foreign judgments concerning parental responsibility was stringently linked to the exequatur procedure, i.e. these decisions were subject to an intermediate procedure in another member state. The new Council Regulation brings about the abolition of the exequatur procedure for certain decisions, such as decisions on the rights of access and certain judgments concerning the return of the child.³

For these decisions, according to the new regulation the following procedure applies: After having issued such an enforceable judgment, the judge of origin shall certify that certain procedural minimum standards have been adhered to during the proceedings (Article 40 ff. Brussels *Iibis*).

These minimum requirements consist of, amongst other things, the legal hearing of all parties, including the children.⁴ With judgments on the right of access that were delivered in default, it should be established whether the person defaulting was given the opportunity to arrange his or her defence or whether this person has accepted the decision unequivocally (Article 41 para. 2 (a) Brussels *Iibis*).

¹ Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, *OJ L* 338, 23.12.2003, p. 1 ff.

² Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, *OJ L* 160, 30.06.2000, p. 19 ff.

³ C.f. Articles 40 – 42 Brussels *Iibis*.

⁴ Depending on the maturity and age of the child.

In the case of an order on the return of a child, where no declaration of enforceability is required, it is additionally necessary for the judge of origin to have into account, when delivering the judgment, the reasons for and the evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Child Abduction Convention⁵ (Article 41 para. 2 (c) Brussels IIbis). When such a certificate is delivered, the decision can immediately be enforced in the relevant state. A declaration of enforceability is therefore not required.

Nevertheless, according to Brussels IIbis, the exequatur procedure is still insisted upon for decisions other than the aforementioned decisions concerning parental responsibility.

The judge who decides upon a question of parental responsibility will base his judgment on the facts as they appear after the trial. However, once a judgment has been issued, new factors may come to light making an examination and modification of that decision necessary.

Imagine the case of a mother who has been granted a right of access but then neglects to give the child necessary medical treatment. Or, the father who becomes addicted to drugs; the parent is diagnosed as suffering from a mental or contagious disease; sexual abuse of the child is revealed; the parent squanders the child's assets for his / her own purposes.

These changed facts can be taken into account at two levels. Firstly, by means of modifying a judgment; and, secondly, within the framework of enforcement.⁶ In the case of a merely national question of parental responsibility, national law, which already formed the basis of the original judgment, determines the conditions and the procedure for any amendment.⁷ In transnational cases, however, cooperation between the legal systems concerned is required.⁸

⁵ Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; see http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=24.

⁶ Furthermore, the courts may, subject to the conditions of Article 48 Brussels IIbis, determine the practical arrangements for the exercise of rights of access.

⁷ According to § 1696 of the BGB (German Civil Code), for example, judgments concerning parental responsibility matters may be changed provided that the child's best interests are seriously and sustainably affected.

⁸ An international regulation on the consideration of subsequently changed circumstances in the area of the recognition and enforcement of foreign decisions is contained in, for example, the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and the Restoration of Custody of Children in Article 10, para. 1 (b). According to this regulation, the recognition and enforcement of decisions on custody may be refused if it is found that, by reason of any change in the circumstances, the effects of the original decision are manifestly no longer in accordance with the welfare of the child.

What part does Brussels IIbis play?

With regard to this question, this contribution will first examine how far the courts of a member state, which is different from the member state where the judgment was issued, may obtain jurisdiction for modification under Brussels IIbis. Then enforcement aspects will be discussed.

2. JURISDICTION FOR MODIFICATION

Under Brussels IIbis jurisdiction on matters of parental responsibility is generally given to the court of a member state where the child is habitually resident at the time the court is seized (Article 8 Brussels IIbis).

Thus, under Brussels IIbis, a revision of a judgment by a court of another member state is not excluded either. The possibility of modification is generally to be welcomed as in the very sensitive area of family law subsequently changed facts can be taken into account. Nevertheless, a risk of misuse is implied: one party may try any means possible to torpedo an unpleasant or disadvantageous judgment.⁹ Under Brussels IIbis, for the first time, steps have been taken to minimize this danger by introducing continuing jurisdiction according to Articles 9, 10 Brussels IIbis.

Pursuant to Article 9 Brussels IIbis, the court of the child's former habitual residence retains jurisdiction for a three-month period following the move if the holder of access rights continues to have his or her habitual residence in this member state and if he or she has not accepted the jurisdiction of the courts of the member state of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction. The aim of Article 9 Brussels IIbis is thus to allow for some continuity. A modification of its earlier judgment to reflect the change in the child's situation will be made by the court which is closest to the child at the time of the relocation.¹⁰

⁹ Due to a modifying decision, the original decision may be practically superfluous. This may be illustrated by a decision of the German courts in 1983, where an Italian father initially succeeded in proceedings before the *BGH* (German Federal Supreme Court). The *BGH* decided that the order for the return of the child, delivered by an Italian court, had to be declared enforceable. However, two months later the mother was conferred with parental responsibility by a *Amtsgericht* (German Magistrates' court, c.f. *BGH*, *FamRZ* 1983, 1008 ff.; *OLG Düsseldorf*, *FamRZ* 1984, 194 ff.; especially *SIEHR*, *IPRax* 1984, 309 ff.

¹⁰ Explanations of Article 11 of the Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance, COM (2002) 222 final, *OJ C* 203 E, 27.08.2002, p. 155. At the same time, the holder of parental responsibility who is left behind is relieved of the obligation to bring

In cases of child abduction the court of the child's former habitual residence generally retains jurisdiction, according to Article 10 Brussels *Ibis*. This provision will prevent the establishment of an artificial jurisdiction as a result of the child being abducted.¹¹

Therefore under Brussels *Ibis* a misuse of jurisdiction for the purpose of obtaining a revision of the original judgment will not be totally excluded, but it will be much more difficult to do so. At the same time Brussels *Ibis* ensures that modifications of judgments regarding parental responsibility will, in general, remain possible for the court of the child's habitual residence, as it is considered to be the judge of the child's situation. Compared with Brussels II, this consideration of various interests demonstrates an important improvement.

3. ENFORCEMENT

Having analysed the possibility of modifying a judgment, the impact of subsequently changed facts on the enforcement shall now be examined in detail.

As mentioned above, Brussels *Ibis* distinguishes between judgments which can be enforced without any declaration of enforceability being required, and decisions which still have to undergo an exequatur procedure.

3.1. ENFORCEMENT WITHOUT A DECLARATION OF ENFORCEABILITY

We will first focus on judgments which can be enforced under Brussels *Ibis* in a simplified way, namely when there is no need for any intermediate procedure. As result of the abolition of the exequatur procedure there will be no further intermediate examination of foreign judgments in the enforcing member state. Thus, the enforcement cannot be stopped by denying a declaration of enforceability on the grounds of violating the *ordre public*.¹²

the case in an unfamiliar setting, unless he chooses to avail himself of this possibility; c.f. the explanation of Article 4 of the Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility, COM (2001) 505 final, *OJ C* 332 E, 27.11.2001, p. 269.

¹¹ C.f. the explanation of Article 5 of the Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility, COM (2001) 505 final (see *supra* note 10).

¹² According to Article 24, para. 2 and Article 15, para. 2 (a) Brussels II an application for a declaration to enforce a decision concerning parental responsibility (including rights of access and all the decisions on the return of the child) could be refused if the decision was manifestly contrary to the public policy of the member state in which enforcement was sought, taking into account the best interests of the child.

3.1.1. Judgments Relating to Rights of Access

Imagine the following case: The father of the child was granted a right of access by the court of the member state X. The mother and child have in the meantime moved to member state Y. The four-year old daughter has not had visiting contact with her father for two years. Now the father seeks to enforce the two-year old judgment which originally entitled him to a right of access. An expert states that the daughter would find a long-term visit to the father's home, in the absence of her mother, to be extremely unsettling with regard to her day to day life.¹³

Before analyzing this case pursuant to the rules of Brussels IIbis, it will be examined with regard to the historical development of Brussels IIbis. In 1999, the Tampere European Council endorsed the principle of mutual recognition of judicial decisions as the cornerstone of the creation of a genuine judicial area, and it identified visiting rights as a priority.¹⁴ As a first step, in 2000, France presented an initiative on visiting rights.¹⁵ In comparison to Brussels IIbis with regard to enforcement rules, this proposal had not reached the higher standards of the more recently enacted European Regulation. The parent, who was entitled to custody, was now able to instigate proceedings challenging the exercise of rights of access.¹⁶ Therefore the enforcement could be suspended if the parent having custody of the child established that, owing to a change of circumstances, exercising rights of access would pose a serious, direct risk to the child's physical or psychological health.¹⁷

In the case mentioned above, the mother would thus have had the possibility to instigate proceedings to challenge the exercise of access rights and, if a danger to the child's health was proved, the enforcement would have been suspended.

The French initiative was followed by a first proposal by the European Commission on matters of parental responsibility, which still reproduced the enforcement system

¹³ Case based on a decision of the OLG Zweibrücken on Article 10 para. 1 (b) European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and the Restoration of Custody of Children, *IPRspr.* 1994, No. 188.

¹⁴ See Presidency Conclusions of the European Council in Tampere, from 15 – 16 October 1999, No. 33 f.: http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm.

¹⁵ Initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children, *OJ C* 234, 15.08.2000, p. 7 ff.; see also BODARD-HERMANT, "Le droit de visite à l'épreuve des frontières", *Gaz. Pal.* 2000, 2, 6 f.; HELMS, "Der Verordnungsvorschlag der französischen Ratspräsidentschaft vom 26.6.2000 über einen Europäischen Besuchstitel", *IPRax* 2000, 361 ff.

¹⁶ C.f. Article 6 of the Initiative of the French Republic (see *supra* note 15).

¹⁷ See Article 4 (a) of the Initiative of the French Republic (note 15).

as foreseen in Brussels II.¹⁸ Yet, with regard to regulations on jurisdiction, the proposal was an innovation: for the first time, the continuing jurisdiction of the courts of the member state of the child's former habitual residence was stipulated,¹⁹ which is similar to the rules now established under Brussels II*bis*.

The new regulation now combines both methods without providing any possibility to suspend enforcement. Proceedings challenging the exercise of rights of access are no longer foreseen, and neither are proceedings relying on the *ordre public*.

Does this now mean, however, that in the case mentioned above, the changed circumstances cannot be taken into consideration during enforcement?

Brussels II*bis* does not aim to unify rules of enforcement. Enforcement still depends on the national law of the member state of enforcement. According to Article 47 Brussels II*bis*, judgments delivered by a court of another member state shall be enforced in the enforcing member state subject to the same conditions as apply to judgments delivered in that member state.

As a consequence, new factors may be taken into account during the enforcement of foreign judgments if they are also considered during the enforcement of national judgments. With regard to the enforcement of national judgments, German judicial practice and the legal literature are not unanimous. On the one hand, the possibility of taking subsequently changed facts into account is rejected,²⁰ whilst, on the other, an examination is required as to whether the delivered judgment still corresponds to the child's best interests.²¹

With regard to transnational enforcement, the international jurisdiction for modification, as a further relevant factor, cannot be neglected. If the courts of the enforcing member state do not obtain jurisdiction for revision, such as under Article 9 Brussels II*bis*, then any consideration of subsequently changed facts for the purposes of enforcement may not lead to a *de facto* amendment of the foreign judgment. Otherwise

¹⁸ Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility, COM (2001) 505 final (note 10).

¹⁹ C.f. Article 4 and Article 5 para. 2 of the Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility, COM (2001) 505 final (see *supra* note 10).

²⁰ OLG Karlsruhe *FamRZ* 1981, 203; OLG Bamberg *IPRspr.* 1999, No. 192; OLG Frankfurt *OLGR Frankfurt* 2002, 328.

²¹ OLG Düsseldorf *FamRZ* 1981, 601 and *FamRZ* 1993, 1349, 1350; BayObLG *FamRZ* 1985, 521 und *FamRZ* 1995, 500, 501; OLG Zweibrücken, *FamRZ* 1987, 90, 91 and *FamRZ* 1996, 877, 878; OLG Hamburg, *FamRZ* 1994, 1128 and 1996, 1093; KEIDEL/KUNTZE/WINKLER-ZIMMERMANN, *Freiwillige Gerichtsbarkeit*, 15th edition 2003, § 33 Nos. 19 and 42.

the enforcement of the original judgment would be made impossible, although a modification on the merits is not possible in the enforcing member state.

If the courts of the enforcing member state are competent to amend the judgment, it follows from Article 47 para. 2 Brussels IIbis that a modifying judgment which is delivered after an enforceable foreign judgment will prevail over the latter.

Moreover, a comparison of Brussels IIbis with the European Regulation on the European Enforcement Order²² reveals that any consideration of subsequently changed facts during enforcement is not imperatively excluded. The Regulation on the European Enforcement Order expressly contains a prohibition on any review as to the substance of the judgment in the enforcing member state (Article 21 para. 2), whereas Brussels IIbis does not.

To sum up a consideration of subsequently changed facts during enforcement seems to be at least possible if the following conditions are fulfilled:

- Such a consideration also takes place during the enforcement of national judgments;
- The courts of the enforcing member state have jurisdiction on the merits to modify the foreign judgment.

Regarding the case mentioned above, the following conclusion can be drawn: The lack of a relationship between the child and her father and the negative effects resulting therefrom could therefore be taken into consideration during the enforcement of the access order if such an examination of new factors may also take place during the enforcement of national judgments in member state Y.

3.1.2. *Judgments on the Return of the Child*

Besides judgments concerning rights of access, certain judgments on the return of the child are subject to enforcement where no declaration of enforceability is required. These judgments will not be dealt with in detail in this contribution. They are delivered by the court of the former habitual residence after a child has been abducted and a judgment of non-return, pursuant to the 1980 Hague Child Abduction Convention, is delivered by the courts of the member state to which the child has been abducted.²³

²² Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, *OJ L* 143, 30.04.2004, p. 15 ff.

²³ See further SCHULZ, “The New Brussels II Regulation and the Hague Conventions of 1980 And 1996”, *IFLJ* 2004, 22 ff.

If circumstances change after a return order under Brussels IIbis has been issued, the situation is similar to that described above with regard to judgments concerning rights of access. However, compare this with judgments on the return of the child, which are enforceable without the requirement of an exequatur procedure, the courts of the member state to which the child has been abducted barely have jurisdiction at all under Brussels IIbis. According to Article 10 Brussels IIbis, in cases of child abduction the jurisdiction of the courts of the member state of the child's former habitual residence generally continues.

In such cases, the question arises whether national constitutional law compels the courts to take any new circumstances into account during the enforcement of foreign judgments and what is the relationship between constitutional law and EC law.²⁴

The German Federal Constitutional Court, for example, has decided, regarding the 1980 Hague Child Abduction Convention, that an examination of Article 13 of this Convention, namely whether there is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation, cannot be renounced without violating fundamental German law.²⁵

3.2. THE EXEQUATUR PROCEDURE

Apart from the two exceptions mentioned above, enforceable judgments in those parental responsibility matters still falling under Brussels IIbis need a declaration of enforceability in order to be enforced in another member state.

In order to enforce such a judgment, an application for a declaration of enforceability must first be made. Then the competent court examines whether the declaration

²⁴ According to HELMS, "Internationales Verfahrensrecht für Familiensachen in der Europäischen Union", *FamRZ* 2002, 1593, 1602; SOLOMON "Brüssel IIa- Die neuen europäischen Regeln zum internationalen Verfahrensrecht in Fragen der elterlichen Verantwortung", *FamRZ* 2004, 1409, 1419 the state which is going to enforce the judgment will not be able to do so blindly if the enforcement endangers the indispensable principles of the enforcing member state. For the question whether the abolition of the *ordre public* reservation upon the creation of a European Enforcement Order is constitutional (regarding the German Constitution), see BECKER, "Grundrechtsschutz bei der Anerkennung und Vollstreckbarerklärung im europäischen Zivilverfahrensrecht", 2004, 74 ff.; STEIN, "Der Europäische Vollstreckungstitel für unbestrittene Forderungen tritt in Kraft- Aufruf zu einer nüchternen Betrachtung", *IPRax* 2004, 181, 186 f.; KOHLER, "Systemwechsel im europäischen Anerkennungsrecht: Von der EuGVVO zur Abschaffung des Exequaturs", in: BAUER/MANSEL (ed.), *Systemwechsel im europäischen Kollisionsrecht*, 2002, 147, 158; HEß, "Die Integrationsfunktion des Europäischen Zivilverfahrensrechts", *IPRax* 2001, 389, 394 f.

²⁵ *BVerfGE* 99, 145, 162.

should be denied on the grounds of Article 23 Brussels IIbis. Neither the jurisdiction of the court of origin, nor the substance of the foreign judgment may be examined. If, in such a case, circumstances have changed after the judgment was delivered, a declaration of enforceability may be denied on the ground of a violation of the *ordre public* according to Article 23 (a) Brussels IIbis.

Besides judgments in parental responsibility matters, Brussels IIbis also relates to the enforcement of orders concerning costs and expenses in proceedings under Brussels IIbis. These orders require the exequatur procedure as mentioned above.

Imagine the situation where such a foreign order has been declared enforceable. However, after the order was issued, the respondent already paid the whole amount of the costs and expenses. Will he succeed in appealing against the decision on the declaration of enforceability? This problem concerning the consideration of subsequently changed facts during an appeal against a decision on the declaration of enforceability has already been widely discussed regarding the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.²⁶

The main criticism is that taking changed factors into account would constitute a forbidden review as to the substance of the judgment. Furthermore, such a procedure would contrast with the aims of the Brussels Convention or, rather, the Brussels Regulations.²⁷

At a first glance, the wording of Article 31 para. 2 Brussels IIbis seems to stipulate that no further criteria for examination should be admitted. However, this does not mean a total limitation: for example, the judge would still have to deny an application for a declaration of enforceability relating to a maintenance judgment on the ground that it is not within the field of application of Brussels IIbis.²⁸

It has been argued by some German academics that if new circumstances are taken into consideration during enforcement, there is no review as to the substance, as the

²⁶ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), *OJ C 02*, 26.01.1998, p. 1 ff. The background to this discussion was that, according to § 13 of the German implementing Act (*Anerkennungs- und Vollstreckungs-ausführungsgesetz*), the debtor was also allowed to raise objections against the action itself during an appeal against the decision on the declaration of enforceability if the grounds for these objections did not yet exist at the time when the foreign judgment was delivered.

²⁷ See further for critical arguments, in particular, NELLE, “*Anspruch, Titel und Vollstreckung*“, 2000, p. 434 ff.; MÜNZBERG, “Berücksichtigung oder Präklusion sachlicher Einwendungen im Exequatur-verfahren trotz Article 45 Abs. 1 VO (EG) Nr. 44/2001?“, in “*Einheit und Vielfalt des Rechts*“, ed. SCHÜTZE, 2002, p. 745 ff.; LEUTNER, “*Die vollstreckbare Urkunde im europäischen Rechtsverkehr*“, 1997, 265 ff.

²⁸ C.f. MÜNZBERG, 746: “The formulation of this prohibition of refusal is imprecise”.

original judge did not base his decision on these facts.²⁹ However, this opinion is not shared in all the other member states.³⁰

This problem must finally be resolved with regard to the aims of Brussels IIbis and Brussels II. By means of a simple, unified procedure the formalities for rapid and automatic recognition and enforcement of judgments shall be simplified. If changed factors can be considered during the exequatur procedure, then the aims of accelerating and simplifying the enforcement of foreign judgments seem to be endangered. A long-term procurement of evidence or an investigation of foreign laws might be necessary. Furthermore, the unification of procedure would not be attained, as there is no consensus on this question among the member states. But at least during an appeal against enforcement, subsequently changed facts can no longer be ignored.

What is the value of a rapidly obtained declaration of enforceability which does not finally lead to the amount of money claimed? It seems to be much more efficient and less cumbersome if changed facts are already taken into consideration during the exequatur procedure.³¹

Consequently, the new German Act on the Implementation of Brussels IIbis³² provides that subsequently changed facts can be taken into account during an appeal against a decision on the declaration of enforceability if the refund of the costs and expenses of proceedings is claimed.

4. CONCLUSION

Transnational enforcement often provokes diametrically opposed fears:

- decisions are destroyed by any modification in a foreign state before enforcement takes place;
- decisions must be enforced at home, although they violate domestic fundamental laws.

²⁹ Compare regarding Council Regulation No. 44/2001: Geimer/ Schütze-Geimer, "Europäisches Zivilverfahrensrecht", 2nd edition 2004, Article 45 No. 11; Kropholler, "Europäisches Zivilprozessrecht", 7th edition 2002, Article 43 No. 2.

³⁰ C.f. NELLE, "Anspruch, Titel und Vollstreckung", 2000, p. 436 ff.

³¹ See the explanation to § 13 of the German Anerkennungs- und Vollstreckungsausführungsgesetzes (see *supra* note 26), *Drucksache des Deutschen Bundestages* 11/352, p. 22.

³² C.f. §25 Internationales Familienrechtsverfahrensgesetz, *Bundesgesetzblatt* 2005, I, p. 163 ff.; see further regarding the draft of the Act: SCHLAUß, "Neuordnung des internationalen Familienrechts-der Entwurf eines Familienrechts-Ausführungsgesetzes", *FPR* 2004, 279 ff.; WAGNER, "Der Referentenentwurf eines Gesetzes zum internationalen Familienrecht vor dem Hintergrund internationaler Rechtsinstrumente", *Kind-Prax spezial* 2004, 3 ff.

As mentioned above, especially in the sensitive area of family law, the revision of judgments may not be completely forbidden, but a flexible adaptation to changed facts is required. In comparison to Brussels II, Brussels IIbis makes significant progress in preventing all too easy modifications to unpleasant or disadvantageous foreign judgments: Articles 9 and 10 of the European Regulation lay down the continuing jurisdiction of the court of the child's former habitual residence in the case of judgments on access rights or if a child has been abducted.

The fear that domestic fundamental laws might be neglected is now increasing due to the abolition of the *ordre public* reservation within the framework of enforcement without a declaration of enforceability. With the abolition of the exequatur procedure for certain judgments on parental responsibility, a further supervisory authority is removed. There is a growing desire to consider new factors during enforcement. It seems to increase if the foreign judgment cannot be modified in the enforcing member state. However, in such a case, a danger exists that if changed circumstances are taken into consideration during enforcement, the lacking jurisdiction on the merits to modify the order will be circumvented.

Conversely, it seems at least possible that new circumstances can be considered during enforcement, without a declaration of enforceability being necessary, if the courts of the enforcing member state have jurisdiction on the merits to review the order and if, during the enforcement of national judgments, changed factors are also taken into account.

Regarding the exequatur procedure, the problem of taking subsequently changed facts into consideration, already known under the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, has still not been resolved by Brussels IIbis.

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10. *Common Core and Better Law in European Family Law*, K. Boele-Woelki (ed.)