Editorial: The Evolution of Family Law – From Status to Contract and Relation

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During the last 35 years, family law has undergone profound changes throughout western industrialized countries. With minor time lags[1] the development has been surprisingly even. It is thus possible to speak in family law today of 'uniform law through evolution'.[2] The legal development is, however, but a reflection and at the same time part of the developments occurring in society as a whole, as they already become apparent in official statistics.

The most salient feature is the rise in the divorce rate. Since the 1970s of the last century, it has more than doubled nearly everywhere.[3] In many countries, the probability of divorce has now reached 40 to 50 per cent. The development in Scandinavia, however, where a certain stagnation at this high level has been observed since the 1980s, shows that the saturation point might now have been reached. The high number of divorces brings about manifold further developments. These are on the one hand the rapid increase of children living in stepfamilies and on the other hand the growing number of single parent families. This is again closely linked to the phenomenon described generally as the feminization of poverty. Studies on poverty have shown that in many countries divorce constitutes a much higher risk factor for women than for men.[4]

Developments parallel to the rising divorce rate are the increase in age at first marriage and the general decrease in marriages. Taking the example of France, this

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1 Latecomers in the international development are Switzerland and Austria; cf. the contributions by *A. Büchler* and *M. Hinteregger* in this issue of the *European Journal of Law Reform.*

2 Compare already G. Luther, 'Einheitsrecht durch Evolution im Eherecht und im Recht der eheähnlichen Gemeinschaft' in (1981) 45 *RabelsZ*, pp. 253 *et seq.*

3 Compare Council of Europe, *Recent Demographic Developments in Europe* (Strasbourg, 1998) at T2.5; S.B. Kamerman and A.J. Kahn, *Family Change and Family Policies in Great Britain, Canada, New Zealand, and the United States* (Oxford, 1997).

4 Compare for Switzerland: R. Leu et al., *Lebensqualität und Armut in der Schweiz* (1997); Canada: A. Diduck and H. Orton, 'Equality and Support for Spouses' in (1994) 57 *MLR* 681, at pp. 684 *et seq.*; A. Sifris, 'Australia' in (2000) 14 *AFL* 1, at p. 3.

European Journal of Law Reform, Vol. 3, No. 3

means that today approximately 44 per cent of all women below the age of 50 remain unmarried, compared to approximately 92 per cent of all women of this group who married at least once in their lives in 1970.[5]

Simultaneously, cohabitation has increased in all countries, in some places indeed dramatically. In the Scandinavian countries cohabitation can be considered as an actual alternative to marriage, whereas in many other countries extra-marital unions are of shorter duration and frequently formalized based on a pattern of child-oriented marriage.[6]

With regard to the number of births, a general decline in fertility rates can be observed. Since about 1965, the reproduction rate of the population has fallen to a below-replacement level in all developed countries.[7] On the other hand, the number of out-of-wedlock births has increased dramatically during the last decades. In some countries, namely of the Scandinavian region, it has reached a level between 50 and 65 per cent.[8]

These socio-demographic developments are closely linked with and strongly based on a profound change in values. This shift can be characterized on the one hand as secularization, meaning the long-term societal process of decline in the importance of religion, and on the other hand as emancipation. Indeed, the second half of the 20th century has been marked by women's emancipation, the levelling out of gender inequalities, which has brought about deep changes in society and consequently in the law. The second major emancipation movement of the 20th century was the movement for the rights of the child, the major achievement of which is that children are now increasingly perceived as subjects rather than as simple objects. This change in values has significantly contributed toward the development of what one might call the plurality of private living arrangements. Besides the traditional marriage-based nuclear family, there is an increasing diversity of family forms: childless marriages, single parent families, reconstituted families, families constituted by artificial procreation, cohabitation without marriage, same-sex couples and more.

Family law could and indeed has not stayed unresponsive to these profound socio-demographic changes. The legal development can be circumscribed as moving 'from status to contract and relation'.[9] Legal regulation in family law is becoming

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[5] Compare Council of Europe, *Recent demographic developments in Europe* (Strasbourg, 1998) at T2.2.

[6] Compare for Germany R. Nave-Herz, 'Familiale Veränderungen in der Bundesrepublik Deutschland seit 1950', in (1984) *ZSE*, at pp. 45 *et seq.*

[7] Compare F. Rothenbacher, 'Social Change in Europe and its Impact on Family Structures' in *The Changing Family* (J. Eekelaar and T. Nhlapo (eds)) (Oxford, 1998) at pp. 3, 5.

[8] Norway 48.6 per cent in 1997, Denmark 46.3 per cent in 1996, Iceland 65.2 per cent in 1997: Council of Europe, *Recent Demographic Developments in Europe* (Strasbourg, 1998) at T3.2.

[9] Compare already I. Schwenzer, *Vom Status zur Realbeziehung* (Baden-Baden, 1987).

less and less oriented towards status. The trend is to give priority to the autonomous private regulation of the private sphere on the one hand and, where an amicable settlement is not possible, to take the actual relationships and not the existing status as a reference point on the other hand.[10]

Up to the middle of the 20th century, western industrialized legal orders were characterized by their pronounced focus on status. Divorce law typically endeavoured to prevent the dissolution of the legal ties of marriage. The power of the spouses to dispose freely of their marriage was, at least formally, strictly rejected. Divorce appeared at the most as a sanction against the spouse who had violated his or her marital duties. This view was mirrored in the legal consequences of divorce: the patrimonial status of the spouse who bore no fault for the failure of the marriage was upheld, decisions on child custody followed rigid criteria. On a procedural level, individual needs were subordinate to the goal of preventing divorce and protecting the superpersonal institution of marriage. In keeping with the exclusive focus on marital status was the ostracism of non-marital family relationships, which generally carried the stigma of immorality. A clear distinction was drawn between children born in and out of wedlock.

A fundamental change in values and conceptions beginning in the 1970s of the 20th century has led to a gradual shift of focus from status to the actual relationship regardless of status. In divorce law, this development was first reflected in the abolition of the concept of fault. Nowadays, consensual divorce is at the centre of legal practice. This trend is encouraged on a procedural level through simplified procedures where couples agree on divorce and through the inclusion of mediation as an instrument to assist couples in reaching such an agreement. The law concerning the consequences of divorce is also characterized by a general withdrawal of the state; again, the primary focus is on the private autonomy of the parties. At first, this led to the belief that a clean break was to be brought about between spouses insofar as their patrimonial situation subsequent to divorce was concerned. It was not until the 1990s that various legal systems recognized it was illusory to believe that formal equality alone should enable divorced women to provide sufficient income for themselves and their progeny. This realization has led to a reorientation of the law of maintenance and matrimonial property, the function of which is increasingly perceived as being the equalization of marriage-related disadvantages.[11] Thus, it is the actual relationship alone which forms the relevant criterion also in post-marital maintenance law.

Status has also lost its relevance in child law. Children born in and out of wedlock are largely if not indeed completely, put on an equal footing in practically all legal systems. The primary focus of the pertinent legal rules is on the welfare of the child. Thus, emphasis is placed on the importance of both parents for the child and,

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[10] Compare also B. Atkin, in this issue of the *European Journal of Law Reform.*

[11] Compare the contributions by A. Agell, B. Atkin, A. Büchler, J. Eekelaar and M. Hinteregger in this issue of the *European Journal of Law Reform.*

accordingly, on joint parental custody, regardless of whether the parents are married, divorced or not married, whether they live together or not.[12] It cannot however be ignored that joint custody and the whole underlying concept may lead to further problems in high conflict cases.[13] The actual relationship is also gaining importance as regards the law concerning relations with foster and stepchildren. The increasing recognition of the subject quality of children in all procedures bearing influence on their interests is another fundamental innovation. The child's right to be heard and the instrument of child advocacy especially enjoy widespread recognition thanks to the United Nations Convention on the Rights of the Child, to which the majority of the states here focused on are party.

Finally, non-marital cohabitation has undergone a fundamental reassessment. In many countries, the legislator has intervened, partly in order to offer unmarried couples a legally recognized form of cohabitation, partly in order to solve at least the most pressing problems resulting from the dissolution of non-marital relationships.[14] In other countries, this remains the task of the courts. The most recent development with regard to non-marital cohabitation is the legal recognition of same-sex relationships which, where it has not actually been implemented, is at least an issue in the majority of countries.[15]

Considering the breakneck speed of the changes in family law over the past decades, fear may subsist where it might all be leading to. Family law like family itself is in a state of constant flux. But maybe this only reflects its everlasting vitality. We can but ask ourselves what the function of family law in this ever-changing society might be. If it is no longer the protection of the institution of marriage, then on the one hand it must be to not hinder people in their quest for an individual form of partnership and family and on the other hand to guarantee the protection of the weak where individuals fail in that quest. It is the task of the law to support and promote the stability of personal relationships.

One cannot ignore that all the developments described above concern mainly those countries which traditionally adhere to the Christian, occidental view of marriage. On a universal scale, however, there is a plethora of other models which will instil themselves in our consciousness as the mingling of the cultures continues. Perhaps they, too, will determine the course of family law in western industrialized nations in the decades to come.

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[12] Compare especially the contributions by F. Bates and A. Büchler in this issue of the *European Journal of Law Reform*.

[13] Compare C.S. Bruch, in this issue of the *European Journal of Law Reform*.

[14] Compare especially for New Zealand B. Atkin, in this issue of the *European Journal of Law Reform*.

[15] Compare the contributions by A. Agell, B. Atkin, A. Büchler, N. Dethloff and E. Roca in this issue of the *European Journal of Law Reform*.