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## Remarks on Certain Aspects of the Codification of Family Law

(made in connection with the incorporation of family law  
into the new Civil Code)

**Abstract.** In 1998 the government of the Hungarian Republic decided that a new Civil Code is to be drafted. In 2000 the Main Committee of Codification issued guidelines for the new Civil Code, determining, among others, that the new Code is to be cast into separate books, after the model of the Dutch Civil Code, and that one of these separate books is to be devoted entirely to family law, i.e. a branch of law which has been enunciated in a separate Act since 1952. The present study examines some of the topical questions raised by a reform of family law in general, and the relevance of the above considerations to such an undertaking, in particular. The author makes a few proposals concerning the determination of independent principles for the family law materials which are to be included in the Civil Code, raises and discusses a number of questions in the area of marital property law which are in need of regulation or re-regulation, and discusses a few questions of child-parent relationships and of a reform in children's rights as related to some of the requirements enunciated in the U.N. Convention of Children's Rights.

**Keywords:** family law, matrimonial property, children's right

From the beginnings of the travaux préparatoires of the first Hungarian Civil Code, Gyula Eörsi was an influential personality who left his distinctive mark on both the process, which began in 1953, and the final outcome, which was enacted in 1959 and became virtually the first legislative enactment on civil law to be made in Hungary. Obviously, the value of his contribution to its codification is not lessened by the fact that nearly 40 years after the Code had entered into force the changes in socio-economic relations which determined its substance at the time of its adoption and, in particular, the profound transformations that had taken place over the past ten years, gave rise, in 1998, to a need for elaborating a new Civil Code.

Clearly, the new Code is not intended to decry the merits of the old one of 1959, which was drafted with the effective involvement of Gyula Eörsi,

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accomplishments which are still adequate to serve the needs of present-day socio-economic relations. It is intended not only to replace the rules that, in terms of either approach or substance, no longer serve, or serve inadequately, the said pattern of relations, or to be better adapted to the law of the European Union, but also to extend its scope of coverage, incorporating fields of law which did not come under the aegis of the Civil Code of 1959.

This concept led, firstly, to a statement of policy, according to which the Civil Code should follow the so-called monist principle by embracing the traditional commercial law, also called “private commercial” law, and, secondly, with the ruling of the Main Committee of Codification dated 1 June 2000, to the decision, *inter alia*, that family law should likewise be part of the Civil Code, even if as a separate book. This was in contrast to the family-law legislation and legal practice as well as the view advocated or at least prevalent even in jurisprudence over the past 50 years since the adoption of the Family Act in 1952, which have treated family law as an independent branch of law.<sup>1</sup>

At the present stage of codification it will be noted, if only for the sake of completeness, that the two studies commissioned by the Ministry of Justice similarly stated the case for a separate codification of family law rather than for its coverage by the Civil Code.<sup>2</sup> What the Main Committee of Codification recognized was only the fact that family relations or family-law relations differed from other civil-law relations in several aspects and that this point should be taken into account in the course of codification.

Hence, in the new situation, it became the concern of codification to revise, on the one hand, the rules of family law—not necessarily those laid down in the Family Act only—in a context responsive to the need to bring those rules into closer harmony with the rules of the Civil Code where the specific features of family relations do not warrant deviation and, on the other, to consider, where appropriate, the peculiarities of familial relations and the principles which control them but diverge from civil-law requirements, which are basically tailored to economic conditions. Again, and this point is likewise worth making, the integration of family law into

<sup>1</sup> See *A Kodifikációs Főbizottság 2000. Június 1-i határozatai* (1 June 2000 Decisions of the Main Committee on Codification), *Polgári jogi kodifikáció* (Codification of Civil Law), No. 2 of Vol. II, 4.

<sup>2</sup> Körös, A.: *A Ptk. és a családjog kapcsolata—a gyakorló jogász szemével* (The Link between the Civil Code and Family Law, through the Eyes of a Legal Practitioner). *Polgári jogi kodifikáció*, No. 1 of Vol. I, 3–9, and Weiss, E.: *Az új Polgári Törvénykönyv és a családjogi viszonyok szabályozása* (The New Civil Code and Regulation of Family Law Relations). *Polgári jogi kodifikáció*, No. 2 of Vol. II, 4–13.

the Civil Code should prompt traditional civil law to take greater account, in some questions, of the interests of involved in the protection of the family than has been the case so far.

There are two more aspects to which it is justified to call attention in connection with the integration of family law into the Civil Code.

First, while in revising the material of civil law, looking as it does to economic life, the legislator will have to keep in mind approximation to the law of the European Union, and legislation on family law will have to be more responsive to the family-law provisions of the European Convention on Human Rights, to the judicial practice followed in matters of family law by the Court of Human Rights at Strasbourg in pursuance of these provisions, and, among other international conventions, particularly to the United Nations Convention of 1989 on the Rights of the Child, for the added reason that members states are required to submit periodic reports on the application of this convention to the international forum of the Committee on the Rights of the Child.

Second, while civil law or, more accurately, the law of property and the law of obligations as two principal areas thereof, should be open to economic policy and economic life in the first place, family law should be open to family policy and social policy, including children's rights, which equally affect family relations, and social rights.

Moreover, the "private-law concept of the person", formed by Tamás Lábady as one to be retained in the codification of civil law, namely the "autonomous, sober-minded and risk-taking businessman who is bold enough to venture and has a sense of responsibility",<sup>3</sup> will not be, nor should necessarily be, a match for the concept of the person in family law relations. True, this concept of the person is not necessarily one either of all civil-law relations or of civil-law property relations, especially if it is remembered that parties to civil-law relations may be infants incapable of action and even unborn children with retrospective effect in the case of live birth.

We have chosen the following three topics to be discussed in the course of the codification of family law, notably the basic principles of family law, certain issues of matrimonial property law and matters concerning parental rights and duties and, related to them, the rights of children.

### **Basic Principles of Family Law**

<sup>3</sup> Lábady, T.: Alkotmányjogi hatások a készülő Ptk. szabályaira (Effects of Constitutional Law on the Rules of the Civil Code under Preparation). *Polgári jogi kodifikáció*, No. 2 of Vol. II, 15–16.

The approach to the ongoing codification will recognize, where warranted, the *raison d'être* of formulating independent principles for the separate books of the Civil Code, including the book on family law. This calls for a review and a revision of the current principles of the Family Act and perhaps also justifies the proposal for reformulating them. At the same time, the codification is seeking to eliminate overlaps in, while giving more consolidated treatment of, the general principles of the Civil Code.<sup>4</sup> No doubt, this may also be true of the basic principles embodied in the preambular provisions of the book on family law.

Some of the preambular provisions or, one might say, basic principles of our Family Act currently in force were taken directly from the Constitution, some others, were borrowed a little later from the Civil Code and were enunciated as basic principles also of the Family Act and, finally, the scope of its preambular provisions has recently been extended to include the requirement of the United Nations Convention on the Rights of the Child to give absolute primacy to the interests of children.

In the view of jurisprudence, moreover, the scope of the general principles of family law is not a closed one: some legal scholars consider it to be now wider, now narrower. Thus, for instance, there was a view, still represented during the 1960s and even in the early 1970s, which enumerated voluntary marriage, the freedom of marriage and the freedom to choose one's marital partner among the basic principles of family law.<sup>5</sup> This may undoubtedly have been explained by the fact that these precepts had also been enunciated in Art. 16 of the Universal Declaration of Human Rights, in Art. 23 of the International Covenant on Civil and Political Rights, and in Art. 12 of the European Convention on Human Rights. Still, in the context of our present-day conditions, we hold that application of these requirements can be ensured without formulating them as preambular principles of family law. Besides, among the constitutional principles, the principle of the separation of State and Church was likewise articulated in family law as a separate principle for a long time. This may likewise be dispensed with as such today.<sup>6</sup>

<sup>4</sup> See Vékás, L.: in: *Az új Polgári Törvénykönyv koncepciója* (The Concept of the New Civil Code), 2001, kézirat (Manuscript), 12.

<sup>5</sup> For these views, with authors and sources indicated, see in: *A családjogi törvény magyarázata* (Commentaries on the Family Act). Budapest, 1988. Vol. I, 22–23.

<sup>6</sup> See *A családjogi törvény magyarázata. op. cit.*, 1. c., in the preceding note.

Later, in the early 1980s, the question was raised whether the principle of equity should be accepted as a separate basic principle of family law.<sup>7</sup> This idea can be supposed to have emerged from a perhaps stronger than adequate endeavor of the legislators at the time of drafting the Civil Code to block the way to a judicial practice which admits considerations of equity, and the legislators continued judging such practice of “eroding” the law to be pernicious in later times. It was in opposition to that “retrenchment” that the need was expressed for a wider scope to be left for equity in judicial practice in consideration of the specific features of family relations.<sup>8</sup> I believe that the requirement, formulated with effect even for the future, that both legislation and judicial practice concerning matters of family law should take into account the peculiarities of family relations will, in questions where appropriate, allow considerations of equity and that there is no need to formulate such a basic principle expressly among the family-law principles of the Civil Code now in the making.

As regards now the basic principles of the Family Act currently in force, the integration of the family-law rules into the new Civil Code will naturally eliminate the need for the basic principles taken from the Civil Code to be enunciated as separate basic principles of family law. At the same time, it stands to reason that those preambular principles of the Civil Code which do not figure as such in our current Family Act—particularly good faith and fairness, which will in all certainty be retained by the new Civil Code as determinant principles underlying the exercise of rights in family law—will become general principles governing the exercise of rights in family law, as well.<sup>9</sup>

It was as a result of the family law’s being enunciated as a separate Act that the Amendments of 1986 to the Family Act took over from the

<sup>7</sup> Csíky, O.: Családjogunk fejlődésének újabb tendenciái (New Tendencies in the Development of our Family Law), *Jogtudományi Közlöny*, 1980. 560.

<sup>8</sup> Earlier Eörsi argued that the mere gap-filling role of equity itself was acceptable but within rather narrow limits even in judicial practice concerning family law. As he wrote, care should be observed in invoking equity also in family law because it may exert a sapping and eroding effect even there (Eörsi, Gy.: Megjegyzések a Legfelsőbb Bíróság Polgári Kollégiumának iránymutató döntéseire, 1965–1966 február (Comments on the Authoritative Decisions of the Civil Division of the Supreme Court, February 1965–1966), *Állam-és Jogtudomány*, 1966. 260.

<sup>9</sup> In the absence of a separate provision of law, *Kőrös* presents, rightly in all certainty, this principle as being already one such, in: *A családjog kézikönyve* (Manual of Family Law). Budapest, 2000, Vol. I.19.

Civil Code and incorporated the principle of the exercise of rights according to their designation—although reference to the related prohibition of the abuse of rights was only made in the ministerial exposé de motifs added to this statutory provision—and the principle of harmony between social and individual interests; the latter, however, was abolished in 1991 as a basic principle of the Civil Code.

Of course, it becomes unnecessary to formulate these two requirements as separate basic principles of family law, but two of the pertinent topics may nevertheless deserve mention.

First, as concerns the civil-law rules which prohibit any abuse of rights, neither legal practice nor jurisprudence is unanimous about the question whether the sanction set forth in Art. 5 (3) of the Civil Code—namely substitution of declarations at law or, more accurately, of declarations of consent for court judgements—is also applicable in family relations or this rule may not apply to the substitution of declarations at family law.<sup>10</sup> In my view, which I have set out on several occasions, the substitution of declarations at law for court judgements should not be recognized in the domain of family-law relations.<sup>11</sup> With respect to several types of declaration at family law, the Family Act allows, without reference to an abuse of rights or even the intention to ascertain whether such abuse is the case, guardianship authorities to substitute their own declarations for declarations of consent thereof. In respect of consent by the blood parent to the adoption of his/her child, a question which has carried the greatest weight in past practice, it will obviously remain the appropriate solution to enumerate in the Code itself the certainly exceptional cases in which the consent of blood parents to adoption will not be required, again on grounds other than abuse of rights in the first place.

Second, I would see merit in the idea of postulating harmony between family and individual interests rather than between social and individual interests, and this not merely on the plane of a requirement for the exercise of rights as presently prescribed for the accommodation of social and individual interests, but also at the level of legislation.

As concerns the constitutional principles of family law, most of them are to be upheld in the future.

<sup>10</sup> For a presentation of divergent views, see Körös: *A Ptk. és a családjog kapcsolata — a gyakorló jogász szemével. Polgári jogi kodifikáció. op. cit.* 6.

<sup>11</sup> Thus, as early as in: *A családjogi törvény magyarázata* (Commentaries on the Family Act), 1988. Vol. I, 33, and then: *Az új Polgári Törvénykönyv és a családjogi viszonyok szabályozása* (The New Civil Code and Regulation of Family Relations), 8.

The constitutional principles to be upheld include that of the protection of marriage and the family (which conforms to Art. 15 of the Constitution), the equality of spouses in marriage and family life (which conforms to Art. 66 (1) of the Constitution spelling out the equality of men and women in several other respects and the application of related rules in the field of family law), the protection of the child and primary consideration for the interests of minors (which conform, on the one hand, to Art. 67 (1) of the Constitution and, on the other, to the broader definition of these principles in the Preamble to and Art. 3 of the United Nations Convention on the Rights of the Child with respect to family relations.)

The time is long gone when increased responsibility for the child and promotion of the education of youth—which are formulated by way of basic principles, as it were, in Art. 1 of the Family Act—were enumerated by jurisprudence among the general principles as ones which deserve special mention along with other requirements of family law, even though they undoubtedly imply duties which fall, at least partly, within the domain of family law.

Giving a separate formulation to the constitutional principles of family law in the preamble to the book of the Civil Code on family law is justified, apart from the importance of these principles, by the fact that, as against the opposite view embraced by jurisprudence, acceptance was gained, with regard to the general principles of the Civil Code, by the approach that the principles and the positive rules of the Constitution should exercise their hold over private-law relations and their subjects through the medium of civil-law norms rather than by direct means.<sup>12</sup> At the same time, the requirement as formulated in the concept of the Civil Code concerning the basic principles of civil law that those principles should not henceforth reappear in the rules of civil law cannot stand the test in the realm of family law. Both the requirement of the protection of the family and the principle of equality of spouses, and, in particular, the protection of the interests of the child are, where appropriate, repeatedly invoked in the current rules of the Family Act, and these norms must be adhered to in the future.

Moreover, certain constitutional principles and precepts that are formulated in general terms may call for further exposition and interpretation. We will mention but two examples at this point.

<sup>12</sup> Vékás, L.: in: *Az új Polgári Törvénykönyv koncepciója. op. cit.* 4; for the opposite view, see Lábady, T.: *Alkotmányjogi hatások a Ptk. szabályaira* (Effects of Constitutional Law on the Rules of the Civil Code). 13 *et seq.*

While, in respect of the principle of the protection of marriage and the family, what called for explanation earlier was the question of how the principle of the protection of marriage could be reconciled with the rather liberal rules of divorce law, today it is the principle of the protection of the family that calls for an answer to the question whether this principle should be limited to the traditional family based on blood relations or founded by adoption or should be extended to actual family relations. To the family lawyer, it has always been unambiguously clear that the family protected and contemplated by family law is not identical with the notion of the small or nuclear family as elaborated by sociology. With the present-day pattern of family relations kept in mind, however, family relations increasingly mean actual family relations such as that between step-parent and step-child or foster parent and foster child. What is more, it is not exceptional today for the family lawyer to have to deal with confrontations between biological and birth parents. At any rate, it can be stated that the notion of family life protected by Art. 8 of the European Convention on Human Rights has increasingly been given an expansive interpretation by the European Court of Human Rights at Strasbourg.

With regard to the principle of equality of spouses it should be noted that such equality is expressly extended by Art. 5 of Additional Protocol 7 to the European Convention on Human Rights to the period subsequent to the dissolution of marriage in respect of both the spouses and their children. There is no doubt, however, that to ensure the equality of spouses in that phase of family life is no easy task either for the legislator or for the courts and the custodianship authorities who have to decide and then to enforce the decisions in these questions.

The protection of the interests of children presents a manifold challenge, and, obviously enough, only a part of those interests falls within the purview of family law. Yet, in regard to them, one may question whether there is a case for having some of the related principles and rules, which are explicitly treated as matters for family law in the United Nations Convention on the Rights of the Child as well as in the Hungarian Act on the Protection of Children, written into our family law as provisions or, where relevant, even as basis principles thereof. We will make but two special points on this score.

One of the most important principles similarly relevant to regulation by family law concerns the requirement—absent from the current Family Act, but formulated in the Preamble to the aforesaid Convention—that the child should grow up in a family environment, and in a way spelled out in Art. 7 of the Convention, that is to say, that such environment should, where



possible, be his/her parental family, that the child should not be separated from his parents whenever possible or, more specifically, should only be separated when so required by his paramount interest (Art. 9, para. (1), of the Convention). The Hungarian Act on the Protection of Children extends this principle, and rightly so, to separation from other relatives, all the more so since Art. 8 of the Convention makes it a duty of the States parties to respect the right of the child to maintain his family relations.

In this respect the Act on the Protection of Children recognizes wide-ranging rights for children who have been removed from their family environment and committed to professional or long-time care in a social establishment.

Among its rules relative to the right of parental custody even the current Family Act contains the right of children with power of discernment, as defined in Art. 12 of the United Nations convention on the Rights of the Child, to freely express their opinion in matters affecting them and to be heard in judicial or administrative proceedings in which they are involved.

Certain additional rights, those designed to ensure the protection of children and safeguard their interests, could be given wider scope than they have today, if not by the provisions of family law which embody basic principles, by other family-law rules of the new legislation. Again, to give but one example, though Art. 8, paras. (1) and (2), of the Act on Protection of Children recognizes the right of the child to file complaints with the forums specified by law in matters of concern to him and the right as stated in Art. 7 of the Civil Code to take proceedings, where his fundamental rights are violated, before the court or other organs specified by law, there still is no forum which the child might, in cases presumably not so frequent, look to for help and support in such matters.

### **Some Questions of Matrimonial Property Law**

1. Matrimonial property law is the part of family law which was hardly, if at all, adjusted to the changed pattern of socio-economic conditions, albeit adjustment would already have been warranted in many respects, and which therefore calls that the need should be addressed with the greatest momentum both for substantive change and for more detailed regulation than is the case at present.

The rules of the Family Act of 1952 on matrimonial property law were framed in an era which sought to promote a speedy withering away of private property, which may explain why these rules were enunciated in

such sparing terms. It must be admitted that in respect of the personal property that remained, the legislator rightly sought to devise a matrimonial property regime which made due allowances for the equality of spouses, the differences in earnings between men and women, and the duties of the wife in the household and the upbringing of children.

Rather soon, practice came to show that the rules on matrimonial property, set out in as little space as five articles, were inadequate to meet the needs even under conditions of shrinking private or personal property playing an ever smaller role in economic life, and that the Family Act had left numerous matters unsettled. The gap was first filled by judicial practice partly in the form of directives, partly in the form of individual judgements, and then some of the relevant rules were supplemented by the 1974 and 1986 Amendments to the Family Act. By 1986, however, new times had begun to breathe in the patterns of economic conditions and property relations, but the Family Act was slow to respond to them. True, the Amendments of 1986 adjusted standards by recognizing again the possibility of concluding matrimonial property contracts, which had been abolished in 1952, but the relevant provisions were even more laconic and incomplete even in comparison with the pre-existing rules of the Family Act.

In addition, Directive No. 10 of the Supreme Court on matrimonial property law matters was repealed in the meantime on the ground, admittedly most questionable, that what had not been legislatively covered among the points raised in the Directive had meanwhile been similarly recognized and followed in practice.

The past ten years have seen further significant changes in property relations and in the direct or indirect participation of private persons, whether married or not, in economic life. In view of these changes, the rules of matrimonial property law call for much more flexible treatment—more differentiated where necessary, but more elaborate, in any case—in respect of inter se relations of spouses, relations between spouses and third persons, particularly of relations between persons participating in economic activities. Yet the need is invariably for legislative regulation which takes account of the interest in the protection of the family, of the fact that the family life-style influences the property relations of spouses and is normally shaped by their common will, and, naturally, of the interests of children.

Moreover, mention should be made of the fact that even though it is the family-law rules on matrimonial property that come closest to matters dealt with in civil-law and have stood in need of application of the underlying civil-law rules in the past, these rules are treated by nearly all legal systems in a way different from other civil-law relations, in response

to the distinctive features of everyday family relations and of the jointly shaped patterns of family living. This holds primarily for the rules on matrimonial property matters affecting the internal (*inter se*) relations of spouses as well as their external property relations with third persons, though to a lesser extent.

The rules of matrimonial property law are typically rules which were laid down in legislative enactments by all countries of Europe during the 19th century or in the first third of the 20th century, enactments in which significant substantive and conceptual changes have since been pressed for either by the changing patterns of family relations, particularly the recognition of the equality of spouses, the growing predominance of dual income families, the increasing participation of women in economic life, or by shifts in the make-up of assets owned in the Western part of Europe as elsewhere.

The trend of change, even if accomplished in different ways by the various systems of law, is towards laying down rules of matrimonial property law which, at least with the statutory matrimonial property regime prevailing, will ensure that both spouses share in the increase of their property achieved during marriage, even though by the activity of one of the spouses, and that their shares are equal, apart from a few exceptions as observed in the different legal systems. This requirement has consistently been satisfied by the Hungarian matrimonial property law in force.

However, unlike the rules of Hungarian matrimonial property law, most foreign laws leave more scope for spouses to replace the statutory matrimonial property regime by another, contractually stipulated regime, an optional one, the detailed rules of which are similarly established by law. In the course of recodifying the family law there may be some ground for elaborating rules to govern such optional regimes of matrimonial property law in Hungarian law, too.

Equal sharing by both spouses in property acquired during marriage or married life can, in principle, be ensured by either of two property regimes. One is the regime of the community of property, which is embraced in Hungarian law. Under this regime, any property acquired by the spouses during married life except for assets of separate property specified by law, is held in joint ownership from the moment of acquisition, and this community of property is indivisible. The other is similar to the community of jointly acquired property regime of earlier Hungarian law, which, retaining proprietary independence and responsibility during marriage, recognizes a share for the spouses, at the end of marriage, in the increment of property taking place in the other spouse's property during the continuance of marriage.

While the marriage subsists, the spouses live under a separation of property regime, though subject to certain exceptions, but the property acquired during marriage will, at the end of marriage, be due to the spouses in equal shares, again subject to certain exceptions, regardless of the extent to which the property was acquired in common or separately.

There is no doubt that this kind of matrimonial property is flawed just as the conjugal community of property regime under Hungarian law is, and that the failing of either regime can be remedied by statutory regulations only to a certain extent. Still, even if the current unrealistic restrictions on the disposal of common property should be modified by a new rule, what seems to be more realistic is a regime of community of jointly acquired property in respect of, e. g., property contributed by one of the spouses to his/her economic undertaking or to such undertaking with a person other than his/her spouse. Such an arrangement requires, on the one hand, much greater freedom of disposal, within the sphere of his/her undertaking, for the spouse engaged in economic activities and, on the other, allows scope for risk involved in the economic undertaking to be borne solely by the property of the spouse engaged in economic activities. Today, in point of fact, such an arrangement can only be made by stipulating the separation of property regime, which places at a much greater disadvantage the spouse not participating in economic activities and, indeed, at one which is presumably against the desire of most spouses.

If this regime is adopted as an optional one of matrimonial property—or even if the right is recognized for the spouses to stipulate this regime in respect of their property assets such as serve a specific purpose, with the rest of their property remaining under the control of the statutory matrimonial property law—, there will emerge other issues that will, or may, call for regulation both in the inter se relations of the spouses and in respect of protection of creditors. A few examples will suffice. There will doubtless have to be a group of property assets—depending on the purpose for which it is intended, primarily a dwelling used jointly by the spouses—in respect of which it will be necessary to retain the right of joint disposal. Similarly, the right of separate disposal must not entail avoiding payment of expenditures on the common life and the upbringing of children, or of the property acquired by way of gift or inheritance may not invariably be regarded as an increment of property subject to distribution. Besides, more attention will have to be devoted to whether movements of assets as between spouses are purported to take away the coverage of debts.

It is not advisable to rule out, as an option, the regime of separating all assets of property. In such a case, the creation of conditions for joint

occupancy and defrayal of the expenses of a common household and the rearing of children may nevertheless be considered as matters that must be excluded from a full separation of property and may be in need of appropriate regulation.

Of course, in respect of goods jointly purchased from the earnings or incomes of both spouses, the marital partners may, even during marriage, have common property even under both matrimonial property regimes we have described in this paper.

With the optional matrimonial property regimes recognized and duly regulated, it would be necessary for the community of property regime, commonly accustomed and accepted as it is, to be maintained as a statutory matrimonial property regime in the future.

The current rules of this regime, however, call for various degrees of adjustment, modification or, where appropriate, interpretation.<sup>13</sup> It is all the more justified to keep this in view since, in Hungarian practice, marriage settlements cannot be assumed to gain currency in the future and consequently the statutory matrimonial property regime can likewise be assumed to remain in operation in the majority of marriages.

2. The statutory matrimonial property regime of the Family Act is a community property regime which, but for the statutorily defined exceptions, creates a community of property acquired by the spouses either in common or separately throughout their matrimonial life. As against the terminology used by the Family Act, this community of property means not only joint ownership, but also a community of other components, notably of assets and liabilities, or of rights pertaining to the spouses and, with appropriate exceptions, obligations imposed on them, and the common property, again without the current Family Act spelling it out, is due to the spouses in equal shares, at least at the time the community property is divided.

Legal systems which adopt, as a general rule, the community of property, i.e. the community of property acquired jointly during marriage, tend—one might say, as a matter of fact—to enumerate those items of property that do not form part of the community property of spouses; that is to say, they constitute their separate property—or liabilities—, but are not uniform in incorporating in, or omitting from, this structure of regulation the presumption that the property of spouses is jointly owned. While the Hungarian Family

<sup>13</sup> For proposals partly differing from, partly wider in scope than, those presented below, see the study by Körös: A házassági vagyonyjog korszerűsítésének elvi kérdései (Conceptual Questions of Streamlining the Matrimonial Property Law). *Polgári jogi kodifikáció*, No. 2 of Vol. III. 5–7.

Act does not declare such a presumption, judicial practice persists in applying it and perhaps gives it, as often as not, greater emphasis than warranted. There is an opinion that the presumption of common property should be legislatively spelled out.<sup>14</sup>

This notwithstanding, there are, admittedly, drawbacks, even if left unmentioned, to the statutory confirmation of this presumption and, in particular, to giving it too much emphasis. A legal declaration to the effect that forming part of separate property is any asset which, whether acquired prior to or during marriage, is not clearly shown—by e. g., a premarital entry in the real estate register or a certificate of inheritance issued during marriage—to have the status of separate property cannot be claimed to be a confidence-building mark of a marriage at all. Such declarations at law, merely embodying the existence of separate property at the time of entering marriage and written into matrimonial property contracts, are not exceptional even today, nor can they be prohibited, but, in a society where conclusion of marriage settlements is far from common, they somehow imply that the intending spouses face up, *ab initio*, to the possibility of dissolving the marriage into which they are about to enter.

The scope of separate property as defined by the Family Act in force is more or less in conformity with regulations valid in other countries. In addition to acquisitions under any title before marriage, separate property chiefly includes, among the items acquired during marriage, assets acquired by way of donation or succession and serving exclusively for personal use, by one of the spouses. In our conviction, the matters and problems which judicial practice is seized of in connection with the statutorily defined items of separate property—and one might add that related questions do emerge in respect of all such assets—are to be settled by practice as before and call for no modification to the relevant provisions of the Act, regardless of whether we endorse the current practice or would find the opposite to be appropriate.<sup>15</sup>

However, what was omitted from the Family Act and is in need of legislative coverage is this: while the scope of separate property was defined satisfactorily in the main, the Act is almost completely silent on the separate liabilities or debts of one of the spouses or, more accurately, the

<sup>14</sup> See, e.g., Kőrös: *A házassági vagyonjog korszerűsítésének elvi kérdései. Polgári jogi kodifikáció. op. cit.* 8.

<sup>15</sup> For instance, we have repeatedly stated that what we would deem appropriate is the opposite of the current practice, which, endorsed also by authors of commentary literature, regards property acquired under a succession contract as constituting common property.

only point covered concerns the question whether the spouse withholding his/her consent to transactions effected without his/her consent is or is not liable, and to what extent, for debts so incurred.

This matter cannot be solved by merely stating let alone presuming that a debt incurred before marital life is a separate debt and that a debt incurred during marriage is a common debt encumbering the common property of the spouses.

Without claiming to be comprehensive, the following list of questions would call for regulation. The obligation of maintenance originating from a legal title prior to marriage or during marital life and imposed on one of the spouses could not normally be classified as a separate debt. Damage which one of the spouses has caused, even during marital life, to a third person by a criminal offence or otherwise willfully or perhaps through gross negligence would reasonably have to be classified as forming part of separate liabilities, while other cases of damage would not. As for the costs of the maintenance of separate property, it would be justified to make regulation dependent on whether or not an asset of separate property is also used to meet the needs of the common life. Obviously enough, its consignment to separate debts is unwarranted in the former case, but is warranted in the latter.

The question whether—in addition to an express enumeration of the items of separate property and statutory classification of all other assets as belonging to the community property of spouses—there is ground for a separate provision that the two sources of property form a community, may be at issue. One such item of property treated with emphasis in the Family Act is the proceeds of separate property or, more accurately, the net income derived therefrom. Other items include royalties pertaining to inventors, innovators, authors and other persons creating intellectual products and falling due during marital life. Whereas some foreign laws contain rules consigning the proceeds of separate property to common property, there are no foreign laws which treat royalties separately.

Two points are worthy of consideration here. First, the fact that the explanatory comment added by the Ministry to the 1986 Amendments to the Family Act refers to the possibility and justifiability of making settlements on royalties diverging from the law as a reason in support of the fairness of matrimonial property contracts, which have recently been reintroduced by legislation. Secondly, it is far from unambiguously clear whether by framing that rule, the legislator has widened or narrowed the scope of common property, because the rule in question also implies that the particular intellectual creation itself (invention, innovation, etc.)

remains the author's own property, which the other spouse has neither any right to dispose of nor any matrimonial property claim to a share in, if its proceeds are realized in a form other than royalty. Such a conclusion was reached by, e. g., the Supreme Court in its ruling which upheld the position of the Hungarian Bureau for the Protection of Authors' Rights in a case involving an author's estate with unsold figurines.

Some experts attack the in-force regulation in another respect, judging it inequitable that an author's proceeds from earlier work created before marriage should, if the royalty has fallen due during marital life, belong to common property, at least as a general rule. Such a rule is found to be inequitable especially in cases where an intellectual product was created during a previous marriage of the author, when the former spouse might have contributed, even if indirectly, to enabling the author to "safely engage in creative work".<sup>16</sup> Still, it is more than contrary to the actual facts of life to allot, by operation of law at any time after dissolution of the marriage, to the former spouse a share of royalties for work done during the existence of the marriage with him or her.

3. A matrimonial property law which is to deal with three parts of property—the common property of spouses and the smaller or larger separate property owned by the spouses—should devote greater attention than do the current rules of the Family Act, to the intermingling or merger of these sub-divisions of property, to questions of investments or other outlays from the separate property of one spouse which increase the property of the other spouse or the common property, or, conversely, investments or other outlays from the common property which increase the separate property of either spouse, and to whether or not such investments or outlays are to be reimbursed.

This set of questions was not yet covered at all by the Family Act of 1952. Some guidance for regulations was provided by Directives No. 5 and No. 10 of the Supreme Court, which came to be incorporated—though in part only and certainly not at the proper places, among other rules - in the subsequent Amendments to the Family Act.

It is only in an extended sense of the term that one may speak of a merger of sub-divisions of property in respect of separate property lived

<sup>16</sup> See Tóthné Fábián, E.: *A házassági vagyonyjog egyes elemeinek áttekintése* (A Review of Certain Aspects of Matrimonial Property Law). In: Veres, J.: *Emlékkönyv* (Memorial Volume), Szeged, 410; and this view shared or the in-force rule of the Family Act is at least held rigid by Kőrös: *A házassági vagyonyjog korszerűsítésének elvi kérdései. Polgári jogi kodifikáció. op. cit.* 10.



off during marital life—and we might add—regardless of whether the spouses were compelled to do so by temporary difficulties in meeting the expenses of the common household or the separate property was used up through the common will presumably of both spouses to secure a higher level of living, thereby affording extra opportunities for children or raising funds for an occasional spending of larger sums of money as a result of an acquisition of sizable non-communal property.

The provision of the Family Act which in such cases does not, in general, recognize any claim for reimbursement to separate property is certainly right, but exceptional cases are likewise acceptable in which reimbursement in respect of lived-off separate property may be admissible. To take one example, the spouses secure for any reason their common life by using up the separate property of one of them, while leaving the separate property of the other spouse intact, thus creating a situation which, without a recognition of claims for reimbursement, would unbalance the financial standing of the spouses, and result in unreasonably great disproportions in their property holdings.<sup>17</sup>

The intermingling or merging of common and separate property in cases where investments or other disbursements undertaken in one sub-division and financed from another sub-division result in a significant increment value of the other sub-division should naturally receive different treatment. Strictly and practically speaking, it is only in cases of this kind that one is justified in speaking of an intermingling of sub-divisions of property.

Such intermingling or merger of sub-divisions in the property of spouses can be said to be an everyday occurrence. The spouses may jointly own a house built on a building plot which forms part of the property held by one of them separately or may use their common property to enlarge a dwelling which one of them had at the time of marriage or inherited during marriage, or, conversely, they may draw on a sizable inheritance conferred on one of them to invest in an asset of common property, to enlarge it or to increase its value. Mere defrayal of the costs of management and maintenance of property in one sub-division out of funds in the other sub-division would not be deemed, at least in general, to be an instance of intermingling property even in cases like this.

Moreover, for purposes of treatment under family law, outlays resulting in enhancement of value should likewise be distinguished according to

<sup>17</sup> See *A családjogi törvény magyarázata* (Commentaries on the Family Act, 1988, Vol. I, 373; and Körös: *A családjog kézikönyve. op. cit.* 193.

whether the increased value is still existent at the time of the distribution of the property or has been used up during the common conduct of life or may subsequently have become depreciated for reasons beyond the control of the spouses. The latter cases should be disregarded in respect of claims for reimbursement.

As regards incremental property which preserves its value and is to be reimbursed to different sub-divisions in the course of the distribution of assets, present-day judicial practice is far from uniform and consistent in establishing when the intermingling or blending of sub-divisions affecting, as it often does, immovable property creates a claim for a share in property, with account taken of the increase in value, or a claim “only” for refund in money. Judicial practice has, recently in any case, recognized claims for sharing in property in a wider scope than do Art. 137 (3) of the Civil Code and Opinion No. 7 of the Civil Division of the Supreme Court, recognizing claims of ownership in respect of internal alterations and the provision of modern facilities which do not affect the structure of a building, provided that they have created new and enduring value. There is, however, no answer to the question about a rationale for such a practice, and the best one gets in justification, without that policy being questioned in principle, is that the effective rules of the Family Act confer no power on the courts to adopt such a practice.<sup>18</sup> Yet it may be questionable whether this matter should be one of those in which continuance of a practice deviating from the provisions of the Civil Code appears to be justified, once the family law has been integrated into the Civil Code. Supposing but not suggesting that it is, there would be a need for a statutory regulation to this effect, with a statement of its justification.

For that matter, a distinction between claims of ownership and claims for refund in money is of relevance particularly to dwellings used by the spouses, where the question of whether the dwelling is in joint ownership or is separate property held by one spouse has relevance in deciding how the spouse/s may live in the family home after divorce.

Among the provisions of the Family Act which govern claims for reimbursement, the rule under which no such claim in respect of investment from common in separate property or, conversely, from separate in common property is admissible “where the expenditure was incurred with intent to abdicate claims” does not work nor is it necessarily applied by the courts, though for a different reason. Such intent is certainly motivated by trust in

<sup>18</sup> See Körös: A házassági vagyonjog korszerűsítésének elvi kérdései. *Polgári jogi kodifikáció. op. cit.* 14.

the continued existence of the marriage, while reimbursement of the value of investment will take place upon dissolution of the marriage or, probably less frequently, upon termination of the marriage in the event of the death of one of the spouses.

Numerous matters relating to claims for reimbursement and not covered by the Family Act are adequately settled by judicial practice which relies partly on the repealed Directives of the Supreme Court, but some of the arrangements adopted would nonetheless require legislative coverage, albeit without an unduly casuistic regulation.

4. The integration of family law regulation into the Civil Code requires that special attention should be paid to the specificity of the relationship between spouses and the function of conjugal community property. This, in turn, requires, that regulations different from the relevant rules on civil-law community property should be introduced for the use and management of conjugal community assets, the defrayal of the costs of maintenance and, in particular, the disposal of common property.

Such a different regulation has been adopted by the Family Act, but some of the relevant provisions are in need of rethinking and revision, mostly in the wake of the changes that have taken place in economic conditions since their introduction. This holds for the rules on the management and, to an even greater extent, of disposal of, common property.

With regard, first, to property management, the present-day patterns of daily relations and economic conditions require exceptions to be allowed to the general desiderate of joint management in respect of assets of common property necessary for the exercise of a profession or occupation, apart from the fact that, as against the current provisions of the Family Act, management extends not only to assets of property, but also to such other items as are in need of management. It stands to reason that the said assets of common property should be subject to exclusive management by the spouse who is assisted by them in pursuing his/her profession or occupation.

Finding the appropriate way to regulate disposal of common property is a more sophisticated and complex issue, to achieve which the legislator had to accommodate two conflicting interests in the past and will have to do the same in the future.

What common property should require, in any event during marital life, is, if only in general, joint disposal by the spouses and hence, especially in case of wrongful non-exercise thereof, protection of the rightful, reasonable interests of the spouse who is not involved in joint disposal. Still, on the other hand, legal regulation should also keep in view the

principle of security of transactions, considering that the right of disposal is, as a matter of fact, exercised externally, towards third persons. The requirement of joint disposal of common property, as would be dictated by the interest of spouses, would clearly be too much for the security of transactions to bear. A third person establishing a business relationship with one spouse cannot evidently be expected to pry into the marital status of his/her partner or, if the partner is married, into whether the other spouse has consented to the deal to be made with him. The rules of the Family Act, although stating the requirement for common property to be jointly disposed of, give priority to the interest of the security of onerous transactions, at least in general, by establishing the presumption of consent by the other spouse to a rather broad range of transactions with third persons.

Nevertheless, this area would certainly need more differentiated and more realistic regulation than is the case at present. The question of the joint disposal of common property arises differently and raises other problems in respect of movable and real property, and emerges, again differently, in respect of the property brought by one spouse into a business undertaking and of the property used to meet the needs of daily life of the spouses. And this list could be extended by the different ways in which the consequences of wrongful disregard of joint disposal ensue especially in inter se relations of the spouses and in external relations with third persons.

As for real property, if it forms part of common property and is registered as standing in the names of both spouses, joint disposal of it is an absolute requirement—real property may obviously not be either alienated or encumbered with consent not subject to formal requisites or based chiefly on presumptions—and a “mere” promise of the spouse effecting a transaction to obtain the consent of his/her spouse to the transaction will not authorize the third party to the transaction to use pressure to procure the consent of the other spouse. If, however, the real property which forms part of common property is, for any reason, registered as standing in the sole name of one spouse, the principle of public authoritativeness of real estate recording certainly must take precedence over the requirement of a joint disposal of common property. It is nonetheless justified to allow an exception to this rule in respect of dwellings used in common by the spouses, even if such an exception runs counter to the principle of public authoritativeness of real estate recording.

With regard to movable property (including rights, entitlements, claims, etc.), subjecting joint disposal thereof to practically no restriction

is certainly an undue or excessive requirement. It is acceptable in respect of assets used for the common life of spouses, but is unacceptable in respect of assets necessary for pursuing an occupation or profession and of those contributed to a business undertaking run by one spouse. It is unrealistic, furthermore, to require joint disposal even years after termination of the matrimonial relationship or, in the spelling of the law, for the period between the termination of matrimonial life and the division of the common property. A new enactment should replace these unrealistic rules with more life-like ones.

In the legislative process, however, what calls for a change is not only the excessive, unrealistic requirement of joint disposal, but also the protection of a spouse wronged in his/her intra-marital relation by the other spouse's act of unilateral disposal, and even the protection of that spouse against a third person acquiring property from him/her in bad faith, in the knowledge of the lack of consent on the part of the other spouse. The appropriate solution would be, again, to recognize claims for damages in the internal relations of spouses—claims that had once been recognized by, but were later omitted from, the Family Act—, just as it would also be appropriate to replace the current unrealistic rule governing cases in which one spouse is unlawfully deprived of common property by the other spouse after the matrimonial relationship is terminated but before the common property is divided. It would similarly be acceptable to recognize either claims for damages against mala fide third persons in external relations or the right to sue for cancellation of transactions concluded by the other spouse with such third persons. Today these matters are not legislatively covered at all.

5. And, finally, there are a few more matters relating to marriage settlements to be mentioned in the sphere of matrimonial property law.

In addition to the rules on formal requirements for marriage settlements, the Family Act is practically confined to providing that in such a contract husband and wife, or even in a premarital agreement the intending spouses may depart from the provisions of the Act in assigning certain assets to common or separate property. This provision is supplemented by the Decree of the Minister of Justice on the Enforcement of the Family Act, stating that contracts of sale, exchange, donation and loan made by spouses with each other during the existence of the matrimonial relationship must also be deemed to be marriage settlements as defined by the Act.

However, a marriage settlement may be of a content different from that determined by the Hungarian Family Act and, indeed, these differences boil down to either of two basic kinds. One is that which, as mentioned

earlier, is not covered by Hungarian law at all, namely the stipulation of an “optional” matrimonial property regime instead of the statutory regime; the other consists in the laying down of stipulations on certain details which depart from the relevant rules either of the statutory or of the optional regime. Such stipulations may also cover matters other than the specification of the assets of common or separate property which deviate from the provisions of the existing law. They may, *inter alia*, relate to the management or freer disposal of common property and make different arrangements in respect of assets used for business purposes or for the pursuit of an occupation in general, or of proceeds from separate property.

The current rules of the Family Act, at least if interpreted literally, leave little or no room for making similar stipulations, which are, beyond question, responsive to the needs of daily life. It would be absolutely necessary for further progress to be made in this respect. Of course, not even a future legislation will be able, nor could it be concerned, to determine fully the substantive details of the marriage settlement.

As regards the content of such a contract, however, it would be necessary to determine the restrictions that would be needed and justified. Thus, on the one hand, it should be spelled out that the freedom of contract may not prejudice fundamental interests of family protection and may not result in, among others, evasion of payment of expenses incurred in connection with the common conduct of life, or non-contribution to the sustenance of children, or in an unilateral exercise of the right of disposal in respect of the occupancy of a dwelling used by the spouses. On the other hand, and with adjustments for present-day economic conditions, such restrictions may also have a major role to play in ruling out the possibility of the freedom of contract being instrumental in practically defrauding the creditors of one of the spouses.

A further question which bears on the content of the marriage settlement may be that of whether such settlement should be allowed to contain a stipulation for the event of death, one which is, in this context, virtually a testamentary disposition or even qualifies as a joint testament of spouses, or of whether the freedom of contract should not be allowed so wide a scope in terms of content. While acquiescing in the fact that stipulations of a matrimonial property contract, in so far as they determine the list of items assigned to common and separate property in departure from the law, are bound to have a bearing on what remains in the property held by the spouses in cases where the marriage terminates as a result of death. I would not subscribe to the admissibility of incorporating testamentary dispositions in marriage settlements even if the Civil Code now in the

making were intended to allow again a narrow scope for joint wills to be made by spouses.<sup>19</sup>

Yet another question emerges as to the extent to which the general rules of contract law, laid down in the book of the Civil Code on the law of obligations, will or will not be applicable to marriage settlements fundamentally differing in function from contracts controlled by the law of obligations, particularly those tailored for commercial transactions. In all certainty, they will be applicable to a lesser extent in respect of the internal (*inter se*) relations of spouses, although defects of will existing at the time of contracting, for instance, may also be taken into consideration in this context, and they will be taken into consideration to an even greater extent if they bear upon the interests of third persons, creditors in particular. This question will call for closer scrutiny, especially once marriage settlements come into more general use.<sup>20</sup>

### **Parental Rights and Duties—Certain Matters concerning Children’s Rights**

1. Questions of the parent—child relationship as well as questions of a confirmation and protection of children’s rights have gained prominence in both legislation and legal practice in the sphere of family law across the world today.

Even though the traditional elements of the right of parental custody have seemingly remained unchanged, the principles governing exercise of the right of parental custody and some of the problems related thereto have undergone significant changes over the past few decades.

It would be justified for the basic principles guiding the legal regulation of the parent—child relationship to be included among the introductory provisions of the chapter of the new law on the right of parental custody, even if most of these principles are by no means new to Hungarian family law. The case may be argued for formulating such principles also in view of the requirements set forth in the United Nations convention on the Rights of the Child, notably

<sup>19</sup> For an opposite view, see Kőrös: A házassági vagyoni jog korszerűsítésének elvi kérdései. *Polgári jogi kodifikáció. op. cit.* 16.

<sup>20</sup> An additional question within the domain of matrimonial property law can be that of creating a harmony between matrimonial property law and company law, or at least between the rules of matrimonial property law and the property relations of some forms of company. We will not be concerned with this matter in the present paper.

(a) the principle of the exercise of parental rights in the best interest of the child;

(b) the requirement to involve children who are capable of making a decision, i.e. competent to formulate, and decide in, questions affecting them, and to take their opinion into account where possible;

(c) the right and duty of parents to exercise parental rights and perform parental duties in common; in this respect, however, the rights and duties of parents living apart from their child are in need of separate regulation;

(d) the provision to the effect that interference, whether by legislation or by administrative authorities, with the exercise of parental rights is admissible only in exceptional cases in the interest of the child; and

(e) the recognition of the right of the child to maintain his family relations, including his actual family relations,

In connection with the implementation of principles it should nevertheless be mentioned that the rights and duties of parental custody, particularly the duties of care and rearing, are seen and felt by a considerable majority of parents to be duties or responsibilities which are crucially different from legally prescribed rules and that parents generally find it natural, even without legal regulation, to exercise these rights and responsibilities in the interest of the child. The requirement that parental custody should be exercised in the interest of the child is nonetheless so fundamental, such a basic principle of family law that it is to be spelled out in this context even if it can be supposed to belong to the category of exceptional instances in which it will have to be enforced by legal means or, if disregarded, may even entail legal sanctions.

Still, the approach which considers minors to be a priori “unprotected” by reason of their age or of their place in the family and consequently finds that the parent—child relationship calls for increased control by the State and increased administrative intervention is certainly in need of reappraisal. Such rethinking must also be reflected in the revision of the rules as regards parental rights to property management and the right of parents to legal representation.

For that matter, the requirement of respect for the exercise of parental rights—and the exceptional nature of interference with the exercise thereof—follows from Art. 8 of the European Convention on Human Rights, Art. 5 of the United Nations Convention on the Rights of the Child, and Art. 67 (2) of the Constitution of the Republic of Hungary, which, gives it separate expression save with respect to the choice of the type of education which parents wish to ensure for their children.



Where there is cause for intervention because of an improper exercise of parental rights and responsibilities, the relevant powers are vested in the guardianship authorities in the first place and in the courts in more exceptional cases.

The right to parental custody to be exercised by parents in common was slow in replacing paternal authority, generally accepted as it was for a long time not only in Hungarian law, and the rules which, likewise characteristic not only of Hungarian law, drew a sharp demarcation line between rights of parental custody according as they were to be exercised over children born in or out of wedlock.

However, the right of custody to be jointly exercised by parents living together, whether spouses or cohabitants without a formal marriage bond, has come to be definitively accepted by current Hungarian law and, more or less generally, by the laws of other countries, it being understood, of course, that the modalities of joint exercise are determined by the parents themselves, and practice shows that in the majority of cases, which can be said to be typical, joint exercise of this right is a reality, that parents living together share, whenever possible, in the everyday care and rearing of children as well as in the adoption of major decisions affecting their children, and that joint exercise is motivated neither by the relevant provisions of law nor by the requirements prescribed in international conventions, but is rather a life style which parents have adopted regardless of those requirements and which they increasingly look upon as natural.

The question of how parents are to enjoy equality and exercise their rights in common after the termination of their matrimonial relationship or the dissolution of their marriage poses itself in a different way and is much more difficult to solve. From this perspective, it is inevitable for the joint exercise of rights to be prejudiced to some extent, but legislation is bound by international conventions to search means which are likely to reduce such prejudice and thereby to enable both the parents living apart from their child and the child living apart from one of his parents to maintain a parent—child relationship that is satisfactory by any measure even if altered by the change in their respective situations.

It is common knowledge that voluntary observance of the law is not typical of all such situations. In order for this requirement to be fulfilled in ways other than by recourse to legal means, a rather high degree of cooperation would have to be practiced with respect to their child by persons who are often highly estranged as spouses or cohabitants. This, however, cannot release the legislator from his duty to settle the rights of parents who live separately, on the one hand, and the law enforcement

authorities from theirs to facilitate, wherever possible, the enjoyment of these rights on the other. We will have more to say about this issue later.

As regards the right of children, as also embodied in Art. 8 of the United Nations Convention on the Rights of the Child, to maintain family relations, wider than those of the parental family, pertinent rules can be found in the current Family Act and more of them in the Act on the Protection of Children, but further progress in this direction would certainly be salutary.

2. Among the substantive elements of the right of parental custody, a revision may be called for by exercise of the parents' right to manage property and of parents' right and responsibility to act as legal representatives.

While the rules which empower the guardianship authority to take over regular control over property administration if the parents fail in their duty to manage the child's property are to be retained, the parental right to manage the child's property in other cases should be adjusted to real-life situations more closely and with greater confidence placed in parents. Much broader than warranted are the powers of guardianship authorities today, as a result of which they have a say, *ex officio* by operation of law, in the parents's exercise of the right to property management and practically withhold that right from parents who otherwise take due care of the interests of their children. Besides, these rules are of relevance particularly to widowed parents who are to continue rearing their child on their own, cases in which property inherited from the deceased parent is, as often as not, placed under close control by the guardianship authority without any reason and, where legal practice is treating the child as a person having interests *a priori* contrary to those of his parents. In other cases it depends on the parent or some other close relative wishing to give the child a gift to decide whether to give or not to give a child under 18 a gift of considerable value which is to come under close custody by the guardianship authority.

Moreover, Art. 84 and 85 of the Family Act are no less unrealistic and at least as ignorant of the decision-making autonomy of the persons concerned in these aspects of the parent—child relationship. Nevertheless, enforcement or non-enforcement of these unrealistic provisions may, in these cases, be free from administrative intervention, and although these rules are, in a large majority of cases, most likely to have very limited or no application, it would be necessary for a new legislation to replace them with such rules as are more responsive to real needs.

The rules on legal representation as formulated in the Family Act should be harmonized, on the one hand, with the provisions on the parental

administration of property, which are to be made more flexible, and, on the other hand, with the provisions of the Civil Code on legal representation. As for the latter, the current rules of the Civil Code, the Family Act and the Guardianship Decree fall a mile short of overlapping in certain respects.

In addition, attention should be drawn to the fact that in the field of family law the parents' right to, and duty of, legal representation includes not only representation in traditional declarations at civil law but also procedure of legal representation required by declarations at family law or consent thereto, as well as—in an area still further removed from civil law—acts of giving consent to medical treatment. Revision is called for especially with respect to the exclusion of the parent as a legal representative from declarations which concern the establishment of the child's family status.

Several rules, otherwise adequate in terms of substance, which govern exercise of the right of parental custody require re-casting at the level of laws as opposed to their present state of being part of the Guardianship Decree.

3. The rights and duties of parents living apart from their child should be given more attention than they are accorded by the current regulation. Cases in which one of the parents came to be living separate because of the termination of the matrimonial or extramarital relationship, including cases of acknowledged paternity where the acknowledging father has never lived together with his child, but attaches importance to building an effective father—child relationship, and in which a parent came to be living apart from his/her child because of the need for the child to be removed from the parental family are to be governed by different rules. For that matter, the latter cases are regulated by the Act on the Protection of Children, even if not satisfactorily in all respects.

The significant rise in the number of families affected by divorce or termination of married or unmarried common life and of children of such families as well as the fact that, under present-day socio-economic conditions, both parents increasingly participate in rearing and caring for their children while the couple are together, has led to an increased need in separating parents to strengthen the rights they will retain in respect of their children and, in a number of cases which is by no means negligible, probably also to a similar need in children for the maintenance of satisfactory contacts with the parent who comes to live separately. At the same time, for the parent living separately to be capable of exercising his/her rights and responsibilities retained in respect of children after the termination of the matrimonial relationship, both parents are required to cooperate properly in one way or

another and to accept the fact that both of them continue being the parents of their children.

Most of the rights recognized for, as also the increased responsibility resting on, the parent who lives separately in respect of his/her child are embodied in the parental right of joint custody retained, or adjudged, despite the dissolution of marriage or the termination of married life, and their actual substance is for the parents to forge.

Joint exercise of parental custody after divorce or the termination of married life nevertheless represents a higher degree of cooperation which it is not justified to make compulsory, because this right may only be recognized for parents willing to undertake and practice such cooperation in the interest of the child. However, a lower degree of cooperation, particularly provision for the child, opportunities to maintain satisfactory contacts with his parent who lives separately, is a matter not of commitment, but of legal duty. A kind of cooperation wider in scope than this is prescribed by those rules of the Family Act which accord to the parent who lives separately a right of joint decision-making on essential matters that are expressly enumerated in the Act as affecting the life of the child, so in the case of a dispute on matters in need of joint decision the parents can have recourse to a court.

The institution of joint custody was introduced by the Family Act as amended in 1995 on the model of foreign legislation and in pursuance of the principles and provisions of the Convention on the Rights of the Child. The rules of the Family Act recognizing this right in seeking a settlement in divorce actions or actions involving custody take due account of the child's interests as well as of the parents' willingness to cooperate, but those which settle this matter in cases where the community of living is broken up without a settlement having been reached are in need of revision. The general provision that, unless the parents agree otherwise, the rights of parental custody must be exercised jointly even if the parents no longer live together is unrealistic and needs to be revised.

As against the arrangement adopted by some foreign laws, we must be aware that recognition of joint custody after the community of living has been broken up or after divorce is more of an exceptional solution in Hungary today, while it should be spelled out by the new legislation in clear terms that a verdict of joint custody must not amount to a placement of the child which is divided between the two parents and alternating, e. g., weekly, fortnightly or monthly. Such arrangements are not accepted by the European systems of law which regulate this institution, whereas the practice doubtless prevailing and by far not exceptional in America cannot serve as an example for us to follow.

The foremost right of the parent who lives separately is to maintain regular contact with his/her child, a right which is today formulated by Art. 9 (3) of the United Nations Convention on the Rights of the Child even as a right of the child in respect of his parent who lives separately. The rules governing this fundamental right of parents and children are currently laid down partly in the Family Act, partly in the Government Decree on Guardianship. A new enactment should consolidate the relevant regulations at the statutory level, while eliminating minor deficiencies of substance in the existing provisions.

Furthermore, statutory provisions should take greater account of the links that exist between the rules for the placement of the child and the right to contact with the non-custodial parent.

This notwithstanding, as regards matters of contact with the non-custodial parent, mention should be made of the fact that questions more difficult than that of regulating the settlement of the issue of contact-keeping are often raised by the enforcement, by court order or the guardianship authority's decision, of the execution of sanctions against the parent who impedes the orderly exercise of the right of contact. Compulsory recourse to mediation might make some progress in this field, but such an obligation should naturally be imposed by law.

4. The rules on termination and suspension of the right of parental custody need revision to a smaller extent, but future codification should devote greater attention to ensuring that, for cases in which a child is temporarily or permanently removed from the parental family either because of the suspension or termination of the right of parental custody or for some other reason, there should be a legal rule which expressly provides that the child should be placed, where possible, with hi/her relatives and that, again where possible, brothers and sisters should not be separated. Observance of this requirement is in keeping with the provision of Art. 8 of the United Nations Convention on the rights of the Child which seeks to guarantee for the child the right to maintain his family relations.

Finally, let us raise the question whether, given the present-day pattern of familial relations, there is a need for regulations that are more responsive to the desiderata of family-law aims and to actual parent-child relationships, to cover relations between step-parents and step-children or, where such relations are lasting, even between foster parents and foster children.

Certainly, the questions discussed here must seem randomly selected from the perspective even of the process of codification which is going on at present. We have attempted to address—raise and answer—besides the basic family-law principles of the new Civil Code, some of the matters

covered by two main areas of family law, namely those dealing with marriage and relatives. Naturally, we do not claim that there are no other matters, either in these two parts or in the third part of family law on guardianship that do not call for debate or rethinking in the context of codification.