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## Contractualisation of Family Law in Continental Europe

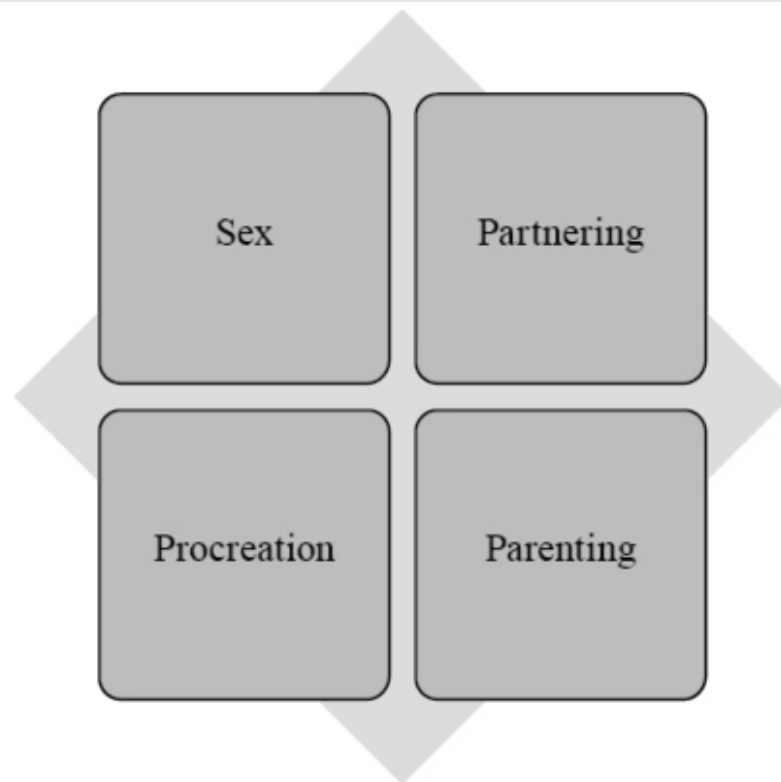
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### 1 Context

Family law, as the public (State) regulation of the natural, moral and legal functions of the family (three functions distinguished by von Savigny, see Kennedy, 2010), is a fairly recent branch of law (Maine, 1861, 86: '*law had not yet penetrated in the precinct of the family*').

Families can be considered to fulfill two basic natural functions: solidarity between generations in general, and particularly towards children, on the vertical axis, and solidarity between partners, particularly in light of their commitment to the first function, on the horizontal axis (Cliquet and Avramov, 1998; Swennen, 2012).



### *family law*

#### *1 The quadrants of*

The regulation of both of these axes has long been left to the individuals and families concerned, and to civil society. Two fairly recent movements of the (State) legalisation of families can be distinguished. However, even nowadays, the power of State regulation must not be overestimated (Müller-Freienfels, 2003, 36).

In the *first movement*, the new field of family law was developed by the end of the 18<sup>th</sup> century, in the 'no-man's land' at the junction between public law and private law, which at that time only concerned persons, goods and actions (Müller-Freienfels, 2003, 32-33). Individual family members, rather than families as such, became the addressees of public norms concerning the family (Glendon, 2006, nr. 27; Maine, 1861, 99).

The first idea, inspired by liberal thought, was to reform the family empires (cf. 'Paternal Dominion' in Hobbes' *Leviathan*) and to create family republics, in which the principles of *liberté*, *égalité* and *fraternité* would apply (Demars-Sion, 2005; Sagnac, 1898, 305).

A second, underlying, idea was to break down the power of civil society, and of families (Müller-Freienfels, 2003, 34 and 37-38) as intermediate bodies between the State and the individual, to the advantage of the State itself. It seems to me that the "*movement from Status to Contract*" (Maine, 1861, 100) was actually a movement towards State intervention.

A third idea was to strengthen the State by involving families in the creation of the identities of Nation States, so that families would become the basic units of these states (see in general Lenaerts, 2012, 27 *et seq.*). The moral concept of the family was legalised through an appeal to the *Volksgeist* (national spirit), which could be considered as a form of invented tradition (Halley and Rittich, 2010, 772 with reference to *Hobsbawn & Ranger*). The romantic notion of the *Volksgeist*, as mirrored by family law, transcended the individual. In this regard, *von Savigny* argued that the regulation of family relations should be withdrawn from the individual's will, and thus from the rational *contrat social* theory (on the preceding: Kennedy, 2010, 811, 813, 816 and 818; adde Bonini-Baraldi,

2003, p. 302 *et seq.*). A divide between ‘sense and sensibility’ in law therefore emerged. The distinction ‘contract’ *versus* ‘status’, and the consequent family exceptionalism (Halley and Rittich, 2010, 754), or *particularisme* (Müller-Freienfels, 2003), was born.

State regulation in this first movement primarily concerned the formation and dissolution of a certain status, whereas the regulation of its content was still left to families’ – that is to say: husband or father’s – privacy.

The influence of the *Volksgeist* on family law – or the cultural, native nature of family law – is the reason why the indigenous regulation of families was upheld by imperial powers in the colonies (Kennedy, 2010, 836 *et seq.*). It is also the main reason why family law has long been considered as an unsuitable subject for comparative law (Glendon, 2006, nr. 9; Müller-Freienfels, 1968, 175-176). However, some comparatists specifically refer to the cultural nature of family law with a view to creating a European identity (e.g. Boele-Woelki, 2005, 161).

In the *second movement*, the legalisation of the family in light of a cultural policy shifted towards legalisation in the framework of States’ socio-economic policy (Halley and Rittich, 2010, p. 758). During the 19<sup>th</sup> and 20<sup>th</sup> centuries, the opposite market-family came to the forefront (Kennedy, 2010; Thom, 2011). Families were revalued as intermediate bodies to which market rules could not, and should not, apply, in order for them to fulfil the functions of solidarity that could no longer be assumed by the market and the State (Runciman, 2011, 15 and 17). In this regard, the state relied on families’ socio-economic function (Glendon, 2006, nr. 27) and on their function of societal risk management (Thom, 2011, 33-35).

In this movement, State regulation concerned the content of family relations, rather than the entering or exiting of such relations.

The economic crises of the 21<sup>st</sup> century seem to confirm the aforementioned status of the family. Broadly speaking, Christian-Democrat policies appear, overall, to have succeeded the consecutive liberal and socialist policies. These evolutions are fairly comparable in all Western capitalist societies. Yet unification is still objected to from a policy-perspective (Bradley, 2008, 269).



## 2 Fields of regulation in family relations

The 20<sup>th</sup> century was characterised by the human rights perspective that was taken in family law, which has been criticised for its ‘sterility’ (Glendon, 2006; also see Halley and Rittich, 2010, p. 768).

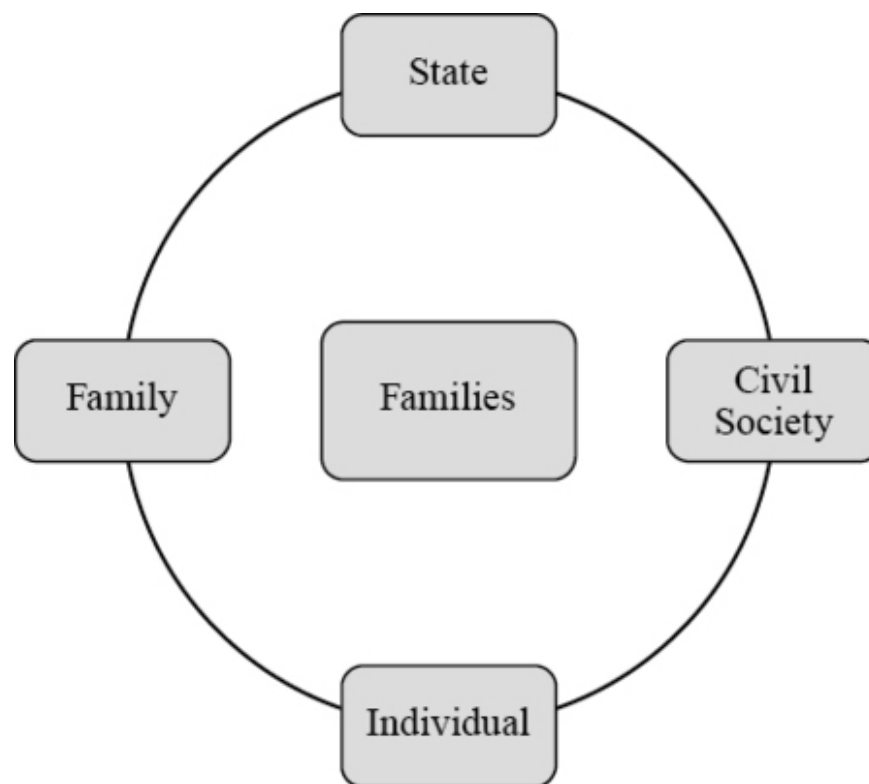
The (State) legalisation of the family came under attack by individuals, families and civil society, who relied on their (family or organisational) privacy in challenging the State (or other public authorities’) monopoly in regulating family relations (Rimanque, 1980, nr. 98-99). In particular, minority groups made requests for the neutral (State) public regulation of families, in order to generate pluralist effects (compare Pintens 2003, 331; Thom, 2010, 24 and 28 on ‘discursive communities’). Interestingly, immigrant groups from former colonies often make such requests in the former colonising State.

An appeal to human rights paradoxically thus led to the delegalisation of the family, or, more specifically, public delegalisation. The public authorities must therefore yield to the private ordering, or privatisation, of the family.

In this paper, I will only consider the private regulation by individuals or families themselves. I will consider the contractualisation of family law: the ordering of the family by families and individuals through legally binding private instruments. It is thus only this part of privatisation that enters the public sphere.

In addition, civil society may appeal on its group rights of religious or associational natures, with a view to achieving legal pluralism to the advantage of religious, ethnic, or (other) minority groups. I will not elaborate on this particular approach in my paper.

I thus envisage a quadrangular system of formal family regulation (compare with the triangular system proposed by Runciman, 2011, excluding the individual). In my view, the most influential systems underlying all four formal regulators appear to be, on the one hand, human rights, and, on the other hand, the economy.



*families*

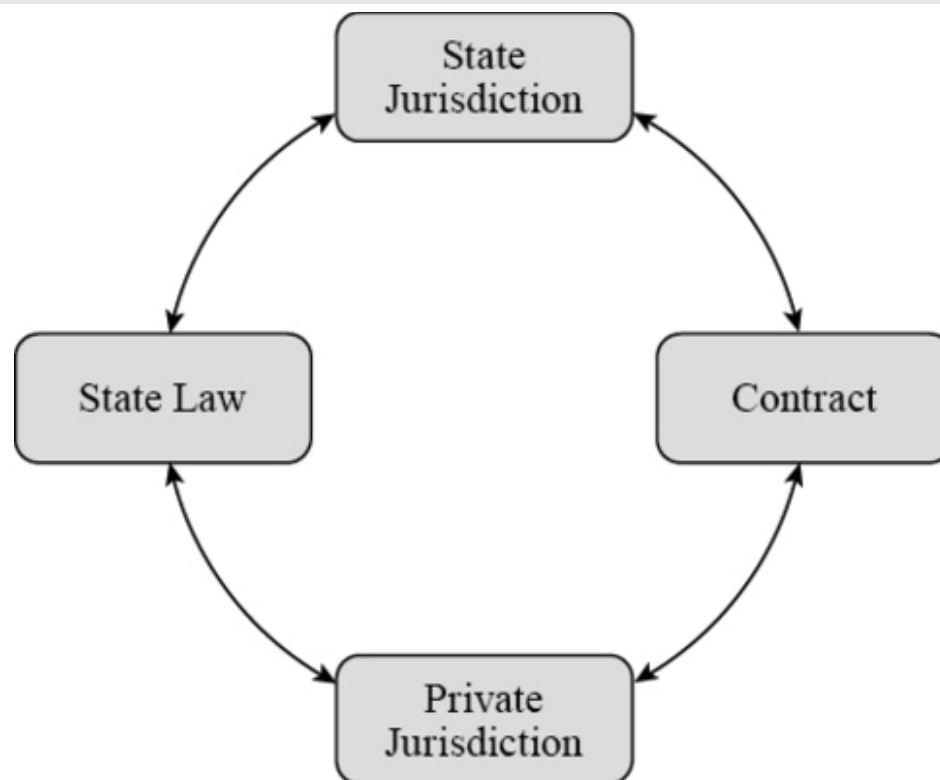
*3 Regulators of*

I will now elaborate upon the substantive and the procedural (jurisdictional) contractualisation of family law respectively.

With regard to substantive contractualisation, I will assess the extent to which the formation, content and dissolution of family relations may be designed contractually, with legal effect upon State jurisdiction.

Concerning jurisdictional contractualisation, I will research if, and to what extent, contractual settlements between parties, or by a third party, can be achieved.

I will draw upon the two Continental ‘mother’ legal systems, France and Germany, and upon their respective ‘daughters’, Belgium and the Netherlands, which can be considered half-sisters of one another in view of their shared past under the Code Napoléon.



4

### *Substantive and Procedural Contractualisation*

## **2 Substantive contractualisation**

There appear to be three reasons why the legalisation of one's family *status*, immutable by contract, is upheld in the 21<sup>st</sup> century (see, in general, Atwood, 2012).

*Firstly*, the existence of intimate relationships might distort the respective bargaining positions of family members. Since families consist of individuals who have opposing interests (Müller-Freienfels, 2003, 32), their equal bargaining position should be safeguarded.

*Secondly*, the dynamics of family relations may cause an earlier contract to have unfair results in cases where vital personal interests are concerned (Müller-Freienfels, 2003, 32).

*Thirdly*, as mentioned above, families continue to fulfil important social security functions that the state cannot provide for (also Sörgjerd, 2012, p. 320).

In all legal systems, the formation, content and dissolution of family relations, therefore, fall outside the scope of party autonomy. Some statutory provisions, for example, explicitly forbid spouses or registered partners to conclude agreements contrary to the *bona mores* and public order, or to derogate from the rights or obligations arising for them from marriage or registered partnership, or from the rules on parental authority or guardianship.<sup>1</sup> More specific prohibitions apply in some legal systems, for example, the prohibition of surrogacy agreements in Article 16-4 French Civil Code.

Nevertheless, the use of familial contracts appears to be increasing, both in vertical and in horizontal family law (in general, with regard to Germany: Bergschneider, 2009).

## Vertical family law

With regard to the formation of vertical family relations, some statutory provisions explicitly protect party autonomy. For example, the man who consents to (artificial) insemination of his partner will be considered the father of the child.<sup>2</sup> Furthermore, in line with the ECtHR *Evans* case,<sup>3</sup> both parents' contractual decision vis-à-vis the (*post-mortem*) use of gametes or embryos is decisive.<sup>4</sup>

Traditionally, contracts concerning the attribution of parental authority, either as a whole or vis-à-vis certain matters, are not considered to be valid (Rimanque, 1980, nr. 93). A contractual condition stipulating that a woman be required to transfer partial parental authority to the parents of her late husband is therefore null and void.<sup>5</sup> Nevertheless, some case law has been seen to validate contracts through which the *de facto* custody of a child was attributed to a third party by the parents (Swennen, 2013).

Contracts concerning educational choices are traditionally also considered to be contrary to the parents' legal rights.<sup>6</sup> However, contracts on the (non-)denominational education of children appear to be widespread, and are respected by State courts with a view to the necessary continuity in the education of a child (see already Perreau, 1909, 517 and Rimanque, 1980, nr. 93 and 94). Family charters may also often contain positive or negative provisions regarding educational choices, such as religion or educational direction (Swennen, 2011; Evans Whiting, 2001).

One general exception appears to be the validity of contracts between divorcing or separating parents on the parental authority and/or housing of the child.<sup>7</sup> Only in the Netherlands is the formation of such an agreement generally compulsory before a case is referred to the court.<sup>8</sup>

## Horizontal family law

It is accepted that private arrangements cannot be exempt from legal conditions to *form* horizontal family relations. Contracts adding conditions are also void. However, the indirect imposition of additional conditions on family formation, in the form of suspensive or resolute conditions to a gift or to contractual heirship, has been accepted. For example, the French Supreme Court has validated a resolute condition to a gift, which required that a young adult would not marry before reaching the age of 30, unless having been granted the consent of his grandparents.<sup>9</sup> In addition, the German Constitutional Court has validated the condition to contractual heirship in a former Royal family's House Law, which stipulated that the consent of the chieftain of a family was required for marriage of the hereditary chieftain. An internal appeal to the Family Council was possible.<sup>10</sup>

With regard to the *content* of family relations, each legal system has so-called 'primary familial rights and obligations', which automatically apply to a relationship, and cannot be derogated from by the partners by contract. However, contracts vis-à-vis such rights and obligations have been upheld (Asser/De Boer 1\*, 2010, nr. 182). For example, the Belgian Supreme Court has taken into account an agreement not to have children.<sup>11</sup> Also, some case law on the validity of an agreement concerning a sexually 'open marriage',<sup>12</sup> or the nature of sexual intercourse – *in casu* SM<sup>13</sup> – exists – at least with regard to the past behaviour of spouses. Moreover, agreements on religion seem to have been

widespread during the 20<sup>th</sup> century (Perreau, 1909, 517; Rimanque, 1980, nr. 22).

Last, but not least, the contractual regulation of the (pecuniary consequences) of the *dissolution* of family relationships is also accepted.

Alimony agreements may be concluded in pre-marital, marital or separation contracts; some systems are more open to such contracts than others (Swennen, 2008). Remarriage (or entering another form of partnership) seems generally to be accepted as a resolutive condition of alimony. This is not the case with regard to the requirement of remaining single as a condition of a gift. Much depends on the *causa* of such agreement (e.g. Paal, 2005).

More reluctance exists with regard to contracts concerning the grounds for divorce, or on the exercise of the right to divorce. It would appear that, at best, a (pre-)marital agreement on the costs of divorce proceedings if incurred within a certain period from the date of the marriage, may be accepted. These agreements, and other similar agreements, can never amount to a penalty clause where the right to divorce has been exercised (compare Bix, 2010, 270-271).

Likewise, agreements in which spouses opt out of certain grounds for divorce, as is the case with some American marriage covenants, are also not accepted. It would also appear to be impossible to opt into grounds for divorce (Bix, 2010, 270). However, I am of the opinion that such contracts or clauses may be qualified – and ‘saved’ – to be used as evidence during divorce proceedings.

## Boundaries of contractualisation

How can the aforementioned practices be reconciled with the asserted immutability of status?

I found the courts to be quite benevolent towards so-called ‘family law agreements’. Courts acknowledge the particular nature of such agreements: in doing so, they exercise restraint, on the condition that the agreements respect two boundaries (compare Bergschneider, 2009, nr. 37; Glendon, 2006, nr. 9).

A *first boundary* is that of the best interests of the child (e.g. Subelack, 2012). Any agreement on family relations may subsequently be called into question before State courts with a view to the modification of the best interests of the child. The Belgian Constitutional Court appears to be of the opinion that a marginal assessment by a court would not be sufficient to warrant consideration of the child’s ECHR-rights.<sup>14</sup> In addition, the Belgian Supreme Court has ruled that a court may go beyond the low level of scrutiny allowed by a statutory provision in order to uphold the best interests of the child.<sup>15</sup> Nevertheless, courts have been seen to take past agreements between parents into account, with a view to safeguarding continuity in the education of the child (Rimanque, 1980).

A *second boundary* is the marginal assessment of all family law agreements by State courts. On the one hand, it seems that courts respect the particular nature of such agreements by employing a non-interventionist approach. In other words, there is a lower level of scrutiny compared with contract law in general (Atwood, 2012; Subelack, 2012; Swennen, 2008, nrs. 63-72).<sup>16</sup> On the other hand, family law agreements are subject to a marginal assessment based on the three reasons for the protection of the family status, that I have set out above. Moreover, the horizontal application of human rights instruments allows State courts to intervene. I will now start by addressing this benchmark for

assessment.

*Firstly*, the content of the agreement may not be *evidently* contrary to the *bona mores* or public order (Swennen, 2011a). In this instance, the scrutiny is lower than in contract law in general.

Human rights protection will be applied to the individual family members through the (indirect) horizontal application of human rights instruments (in private law concepts). This protection applies even in cases in which the individual consents to the violation of his or her rights,<sup>17</sup> at least with regard to the core of these rights (Frumer, 2001, 433). The ECtHR indeed appears prepared to protect contracting parties from themselves (compare Frumer, 2001, nrs. 500 and 561). In the *Refah Partisi* case, the ECtHR referred to private law as concerning the organisation and functioning of a society as a whole, and stated that this cannot be superseded by the freedom of individual citizens to enter into contracts.<sup>18</sup> Thus, a convention will (only) be declared void in these cases:

A non-derogable human right is violated in a contract, through which, for example, corporal punishment would be applied to the partner or children (Molfessis, 2009, 85 and 92).<sup>19</sup>

A derogable human right is violated in such a way that is *blatantly inconsistent* with the human rights instrument, or under circumstances that provide the state with a *particularly serious reason* to intervene.<sup>20</sup> For example, the German Constitutional Court found a provision in a testamentary contract incompatible with the right to marry as protected by Article 6 of the Basic Law, because it constituted a *serious* interference (*einem schweren Eingriff*) with that right. The provision excluded any descendant who entered into a morganatic marriage (a marriage with a woman of uneven social rank) from being a remainderman. Such indirect discrimination on the basis of birth was considered *contra bona mores*.<sup>21</sup> This argumentation is comparable to the *Pla & Puncernau* judgment of the ECtHR, concerning the overruling of the interpretation of a testament by a national judge. He had interpreted a fideicommiss in favour of 'a son or grandson of a lawful and canonical marriage' as excluding adoptive children.<sup>22</sup> The Court restated that 'very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention'.<sup>23</sup>

It is not, however, always clear what amounts to a 'blatant' inconsistency, or which reasons might be 'weighty' enough to justify a difference in treatment on the basis of birth status. One could argue that this is only the case when the very essence of a right is impaired.<sup>24</sup> For example, the German Constitutional Court accepted a provision of a testamentary contract under which a descendant would be excluded as a remainderman where the chieftain did not consent to the descendant's marriage. The refusal of such consent could only be based on family traditions, and could be assessed by an arbitration board. It was therefore not considered *contra bona mores*.<sup>25</sup> In my opinion, contracts through which a wife agrees to be subordinated to her husband are null and void (compare such contracts in the American 'Bible belt' McClain 2007, 858).

Some authors, however, consider any restriction upon a human right to be unacceptable (Dirix, 1982, nr. 27). This opinion appears to be incompatible with the case law of the ECtHR itself.

When an agreement enters the public sphere, the same human rights obligations should apply as to public authorities (Dirix, 1982). Much depends on the social security functions fulfilled by the family in a certain legal system.



*Secondly*, the agreement will be voided in cases of duress. Here, the scrutiny appears to be higher because of the specific nature of family relations.<sup>26</sup>

*Thirdly*, state courts may intervene in family law agreements in cases in which the dynamic nature of family relations has been ignored therein. In particular, such assessment will allow the courts to apply the *imprévision* theory (Rimanque, 1980, nr. 103; Swennen, 2008, nrs. 63-72).

*Fourthly*, a family law agreement will be judged contrary to public order in cases in which the family solidarity has shifted towards the public social security system (Swennen, 2008, nrs. 31-32). This would be the case, for example, where post-divorce support has been waived and the ex-spouse subsequently claims social security benefits.

I believe that State courts may be more likely to intervene on this ground vis-à-vis family law agreements compared with contract law in general, as well as publicly regulated contracts, such as labor contracts. In Section 1, I referred to the social security function of the family, which indeed does not apply to the same extent in other private law relationships, and which is derived from the principle of self-sufficiency.

My overall conclusion is that family law agreements are subject to a lower degree of scrutiny than contracts in general, except in cases in which the best interests of the child are endangered.

### 3 Jurisdictional contractualisation

#### Introduction and context

During the last decades, alternative dispute resolution or dispute settlement, particularly in family law conflicts, has become more widely used in all legal systems. In 1998, the Committee of Ministers of the Council of Europe recommended family mediation.<sup>27</sup> Subsequently, in 2008, the European Parliament and Council Mediation Directive was adopted.<sup>28</sup> However, none of the legal systems researched in this paper transposed this Directive on time. Whilst France,<sup>29</sup> Germany<sup>30</sup> and the Netherlands<sup>31</sup> have now transposed it, Belgium has, to date, not yet done so. I will include the relevant legislation hereinafter.

Most continental scholars appear to perceive the usage of ADR in family law conflicts to be a (successful) transplant from North America (ADR in general) and the Pacific (family group conferences) respectively.

This might be true from a short time perspective.

However, I believe it is useful to recall the French revolutionary legislation – mainly in force between 1790 and the French Directory (Lox, 1985). The Decree on the Judiciary of 16-24 August 1790 indeed created *family tribunals*, also known as *assemblies* or *boards* (Articles 12-14). All conflicts – including, family law conflicts – between husband and wife, and between near relatives, had to be presented before the *tribunal de famille* before they could be referred to the State's District Court. The *tribunal de famille* was also competent with regard to conflicts between ex-spouses concerning alimony, goods and children.<sup>32</sup> The tribunal was composed of four arbitrators, with each of the spouses having to appoint two arbitrators from among their close relatives or, in absence thereof, friends or neighbours. In cases in which the parties did not reach an agreement, the four arbitrators had to appoint an umpire. The parties could appeal against

the arbitrators' or the umpire's decision before the District Court. In addition to the *tribunal de famille*, there was also a *tribunal domestique* – the home tribunal – that was competent to sentence a minor to a period of incarceration of up to one year, where the minor's parents, grandparents or guardian(s) had very serious issues of dissatisfaction with regard to his or her conduct, and whose deviations they were no longer able to punish themselves. This tribunal was composed of six to eight close relatives or, in absence thereof, friends or neighbours. The President of the District Court had to validate the *tribunal domestique's* decree of incarceration (Articles 15-17). Finally, the family council (*assemblée de famille*) was set up to dissuade spouses from seeking divorce. As a rule, the spouses – or the spouse who wished to divorce – had to present their request before the family council three times with a view of reconciliation before the case could be referred to the District Court. The family council also decided on the question of who would educate the children after divorce.<sup>33</sup> The aforementioned systems of intra-family conflict resolution or settlement did appear to be quite unsuccessful (Demars-Sion, 2005; Maine, 1861, 99; Sagnac, 1898, p. 313).

Upon attending a conference concerning the law in Burundi after 50 years of independence from Belgium, I found it remarkable to learn that such rules on family courts are still in force in Burundi, as well as to a lesser extent in the Congo<sup>34</sup> and Rwanda.<sup>35</sup> The Burundese family council is competent in a variety of matters, and may decide on some conflicts, such as educational conflicts between parents, by applying the principles of the customary-law *Ubushingatahe* (selflessness, integrity and impartiality).<sup>36</sup>

## Overview

In all legal systems, in some cases, the court must seek to *reconcile* the parties in family law conflicts. France also has a system of judicial conciliators, in addition to judges.<sup>37</sup> Conciliation is compulsory in France prior to divorce proceedings.<sup>38</sup>

*In-court ADR* only appears to be available in Germany. The competent court may refer family law conflicts to a so-called *Güterichter* (conciliation judge).<sup>39</sup> This is a specific Chamber of the Court that cannot judge a case, but can employ any method of conflict resolution, including mediation.

All legal systems contain rules on voluntary, court-referred mediation *outside the court*, on the initiative of the court after a conflict has been referred to it.<sup>40</sup> Only the German legislation allows, in addition to mediation, for the use of 'another method of ADR'.<sup>41</sup> It is only in France<sup>42</sup> and Germany<sup>43</sup> that the judge can oblige the parties to attend an information session (see also Verschelden, 2011). Only in France can the judge statutorily oblige the parties to try to achieve a mediated solution.<sup>44</sup> Some Belgian and Dutch judges can make orders in this regard *praetor legem* (Doek, 2012). The Belgian,<sup>45</sup> Dutch<sup>46</sup> and French<sup>47</sup> authorities specifically provide information on mediation to parties when they are referred to a court.

All legal systems allow extrajudicial ADR. Preceding reference to a court, this takes place upon the initiative of the parties, and can include the *post factum* court approval of the agreements achieved by the parties where the (notarial) form of the agreement which has been reached would not be sufficiently enforceable. Although it is only French law that has specific provisions on collaborative law,<sup>48</sup> this form of law is also applied in Belgium (Swennen, 2011b), the Netherlands (Kamminga and Vlaardingerbroek, 2012; Sandig, 2012)

and Germany (Kloster-Harz, 2009, 28-31).

Family group conferencing exists in Belgium and the Netherlands (www.eigenkracht.be; www.eigenkracht.nl; Roo, de, 2012). In Belgium, FGC only takes place within the legal framework in cases of juvenile delinquency<sup>49</sup> (thus *post factum*). I have proposed preventive FGC, for example, in divorce cases where there are minors involved (Swennen, 2013).

ADR clauses are not, as such, enforceable in any of the legal systems; each party can petition the court notwithstanding such a clause.<sup>50</sup> A judge could, however, take into account the breach of such a clause in his judgment (Doek, 2012). Moreover, parties can agree on a liquidated damages clause in cases of non-respect of a mediation clause.

In recent years, increasing interest has arisen in the use of ADR in cases in which the parties cannot resolve their conflict themselves or with aid of third parties or professionals. In such cases, the parties may agree on an *ad hoc* or general arbitration clause. Traditionally, arbitration clauses were not accepted because of the contractually immutable nature of status, which the parties are not free to decide themselves. However, this objection only exists with regard to the formation and dissolution of family relations. Arbitration is accepted vis-à-vis the content of family relations, such as agreements on separation and on children (Oldenborgh, van, 1995; Zonnenberg, 2012). In 2006, a Family Arbitration Court was created in the South of Germany (*Süddeutsches Familienschiedsgericht*), and has proven to be successful (Kloster-Harz, 2009, 32 et seq.; www.familienschiedsgericht.de). In 2012, a Family Arbitration Chamber was created in the Dutch Arbitration Institute (Breederveld, 2012). Comparable to arbitration clauses are those clauses that concern binding third party decisions. The advantage of arbitration clauses over other types of ADR clauses is that State courts have no jurisdiction in matters to which an arbitration clause applies, and the arbitrator's decision is enforceable. Appeal to a domestic court is only allowed on limited grounds.

## Conclusion

The overall conclusion is that, combined with substantive contractualisation, arbitration is an interesting option with regard to the content of family relations.

## 4 Conclusion

The contractualisation of family law is gaining ground in the public regulation of families. Both substantive and jurisdictional contractualisation can easily be applied to the content of family relations. It would appear that states benevolently tolerate substantive contractualisation through a lower standard of judicial review, and that they actively stimulate jurisdictional contractualisation, of the *content* of family relations. The *formation* and *dissolution* of family relations still seem to fall within the state's exclusive domain.<sup>51</sup> Some substantive incentives concerning the formation and dissolution of family relations may be added to family contracts or charters, without families having jurisdiction in this regard. The request to allow the administrative dissolution of family relations still persists (e.g. Breederveld, 2013).

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## Noten

**1** Belgium and France: art. 1387 and 1388 CC. See also art. 1478 Belgian CC. The Netherlands: art. 1:119(2) and 1:121 CC. In Germany, §§ 134, 138 and 242 BGB apply.

**2** E.g. art. 318, § 4 Belgian CC; art. 1:200(3) Dutch CC.

**3** *Evans v United Kingdom* Grand Chamber Judgment of 10 April 2007, §§ 85-89 with reference to the different points of view of the Warnock Committee, but explicitly considering that '[r]espect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to [the use of one's] genetic material without his or her continuing consent. [...] In the

Court's view, these general interests pursued by the legislation are legitimate and consistent with article 8.'

**4** E.g. art. 7, 13 and 42 Belgian Loi du 6 juillet 2007 relative à la procréation médicalement assistée et à la destination des embryons surnuméraires et des gamètes, [www.belgielex.be](http://www.belgielex.be).

**5** French Supreme Court (Req.) 5 March 1855, *D.* 1855, 1, 341.

**6** Explicitly § 4 German Gesetz über die religiöse Kinderentziehung of 15 July 1921: 'Verträge über die religiöse Erziehung eines Kindes sind ohne bürgerliche Wirkung'.

**7** Belgium: art. 374 CC and art. 1256 and 1288 C.jud. France: art. 373-2-7 and 376-1 CC. Germany: §§ 1671 and 1687 BGB.

**8** The Netherlands: art. 1:247a CC.

**9** French Supreme Court (Req.) 16 January 1923, *D.* 1923, 1, 177.

**10** German Constitutional Court 21 February 2000, paragraphs 13-14, [www.bverfg.de](http://www.bverfg.de)

**11** Belgian Supreme Court 6 October 1988, *AC* 1988-89, 151.

**12** Belgian Supreme Court 24 June 1982, *AC* 1981-82, 1344.

**13** Belgian District Court Oudenaarde 23 December 2008, *RW* 2008-2009, p. 1741.

**14** Belgian Constitutional Court 7 March 2013 (case 30/2013), [www.const-court.be](http://www.const-court.be).

**15** Belgian Supreme Court 28 June 2012 (case C.11.0069.N), [www.cass.be](http://www.cass.be).

**16** E.g. Belgian Supreme Court 9 November 2012 (case C.12.0146.N), [www.cass.be](http://www.cass.be).

**17** Compare dwarf tossing and human dignity: UN Human Rights Committee, *Wackenheim* Communication No. 854/1999 of 26 July 2002.

**18** *Refah Partisiv. Turkey* Judgment of 13 February 2003, § 128.

**19** Compare *A v United Kingdom* Judgment 23 September 1998, § 22.

**20** Argument drawn from *Pla and Puncernau v Andorra* Judgment of 13 July 2004. Although this judgment concerned a testament, but the argumentation was explicitly extended to contracts in § 62.

**21** German Constitutional Court 22 March 2004, paragraph 42, [www.bverfg.de](http://www.bverfg.de).

**22** Judgment of 13 July 2004, §§ 46 en 59.

**23** Judgment of 13 July 2004, § 61.

**24** *Schalk and Kopf v Austria* Judgment of 24 June 2010, § 49. Compare with Article 17 E.C.H.R.

**25** German Constitutional Court 21 February 2000, paragraphs 13-14, [www.bverfg.de](http://www.bverfg.de).

**26** E.g. Belgian Supreme Court 9 November 2012 (case C.12.0051.N), [www.cass.be](http://www.cass.be).

**27** Recommendation No. R (98) 1 of 21 January 1998 of the Committee of Ministers to Member States on Family Mediation, [www.coe.int](http://www.coe.int).

**28** Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, *OJ L* 163/3.

**29** Ordonnance n° 2011-1540 du 16 novembre 2011 portant transposition de la directive 2008/52/CE (...), [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)

**30** *Mediationsgesetz* of 21 July 2012, [www.juris.de](http://www.juris.de).

**31** Wet Implementatie richtlijn 2008/52/EG betreffende bepaalde aspecten van bemiddeling/mediation in burgerlijke en handelszaken van 15 november 2012, [www.wetten.overheid.nl](http://www.wetten.overheid.nl).

**32** Décret du 20-25 septembre 1792; Décret du 8-14 nivôse an 2.

**33** § II Décret du 20-25 septembre 1792.

**34** Article 460 CC, in regard of divorce.

**35** Article 455 CC.

**36** Article 371 CC.

**37** Articles 831 *et seq.* C.proc.civ.

**38** Article 255 CC.

**39** § 278 (5) ZPO.

**40** Belgium: article 387<sup>ter</sup> CC. France: art. 22 *et seq.* Loi n° 95-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative, [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr). Germany: § 278a ZPO. The Netherlands: art. 818 (2) Rv.

**41** § 278a ZPO.

**42** Articles 255, 2° and 373-2-10 (3) CC.

**43** § 135 FamFG.



**44** Article 15 Loi n° 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux (...), [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr).

**45** Article 1254, § 4/1 C.jud.

**46** Project *Mediation naast rechtspraak*, [www.rechtspraak.nl](http://www.rechtspraak.nl).

**47** Article 1 Décret n° 2010-1395 du 12 novembre 2010 relatif à la médiation (...) familiale, [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr).

**48** Articles 2062 *et seq.* CC.

**49** Article 37*biset seq.* Loi du 8 avril 1965 relative à la protection de la jeunesse, [www.belgielex.be](http://www.belgielex.be).

**50** Dutch Supreme Court 8 May 2009, LJN BH7132, [www.rechtspraak.nl](http://www.rechtspraak.nl); also see Art. 5.2. Mediation Directive.

**51** E.g. France: article 2067 (2) CC.