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

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

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

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

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

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

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

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

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

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

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

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

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

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

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