FAMIGLIE, PERSONE, SOCIETÀ

10

FAMIGLIE, PERSONE, SOCIETÀ

La famiglia oggi è una istituzione plurale. Non esiste più la "famiglia", ma le "famiglie". Sebbene il modello più diffuso sia quello della famiglia eterosessuale monogamica fondata sul matrimonio, in molti Stati si ammettono anche le convivenze non matrimoniali, sia registrate che di fatto, sia etero che omosessuali, come anche il matrimonio *same-sex*, con regolamentazioni differenti. La collana, con il contributo offerto anche da esperti di diritto processuale, internazionale, canonico ed ecclesiastico, costituisce un'analisi dei contenuti di questa nuova "famiglia", illustrandone l'evoluzione, e cercando di anticiparne i sentieri futuri, seguendo gli orientamenti del diritto vivente e degli ordinamenti sovranazionali. I lavori editoriali approfondiranno l'interessenza tra la famiglia, le persone e la società, secondo la lettura offerta dal dialogo perpetuo tra le legislazioni (nazionale e sovranazionale) e le Corti (Corte di Cassazione, Corte di Giustizia, Corte EDU), riscattando le unioni affettive dal loro isolamento e ristabilendo in tal modo rilievo al "valore persona", senza discriminazioni, per promuoverne la tutela all'interno della "famiglia" e nell'ambito della "società". La garanzia dei diritti della "persona" impone una particolare attenzione nei confronti delle "persone minori di età", che all'interno della "famiglia", quale dimensione plurale, esplicano la loro personalità, diventando adulti, membri delle future società. Questo lavoro ha la pretesa di offrire agli operatori del diritto una pronta e completa risposta giuridica alle questioni che si possono presentare nella prassi, analizzandone le criticità, con la legislazione aggiornata, la guida bibliografica, gli orientamenti della giurisprudenza, nazionale e sovranazionale e, trattandosi di una materia in continua evoluzione, suggerendo spunti di riflessione sui cambiamenti in atto nella realtà sociale italiana e comunitaria. L'approccio di carattere pratico alle tematiche esaminate e la completezza della trattazione, rendono l'opera di notevole ausilio a tutti coloro che, a titolo vario, desiderano approfondire la conoscenza delle questioni che investono la dimensione "famiglia" , con riferimento a profili di diritto sostanziale, processuale, canonico, ecclesiastico, comunitario ed internazionale.

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a Michele Sesta e alla "Scuola Bolognese" da Lui fondata

(to Michele Sesta and to the 'Bolognese School' he founded)

"Le mariage est un contrat du droit des gens dont les catholiques romains ont fait un sacrement".
("Marriage is a contract under the law of nations, which Roman Catholics have transformed into a sacrament".)

(Voltaire, *Dictionnaire Philosophique*, in *Oeuvres complètes de Voltaire*, 20, *Dictionnaire philosophique*, IV, Paris, 1879, p. 27).

"Videns quales, et quantae indies suscitentur in foro lites, ac moveantur inter homines concertationes circa materias in capitulis matrimonialibus, et pactis nuptialibus que in contractu matrimonii fiunt, inclusas…"
("Observing the types of disputes that arise in the forum and the frequency of disagreements among individuals regarding the issues addressed in marriage contracts and nuptial agreements included therein…").

(Fontanella, *De pactis nuptialibus, sive de capitulis matrimonialibus*, I, Genevae, 1686, Ad lectorem, III).

"Gimme the Plaza… the jet and $150 million, too!"

(Title of a *New York Post* article dated February 13, 1990, referring to Ivana Trump's demands during her divorce from Donald Trump, based on a prenuptial agreement the newspaper described as "written in gold").

TABLE OF CONTENTS

CHAPTER I

THE CONTRACTUAL APPROACH TO FAMILY LAW: HISTORICAL BACKGROUND, MARITAL PROPERTY AGREEMENTS AND AGREEMENTS IN TIMES OF MARITAL CRISIS

1. From Contract… back to Contract: Overview of Private Autonomy in Family Law

1.1. *Party Autonomy in Family Law: Its Role and Its Enemies*

A spectre is haunting European family law—the spectre of contractualisation. Over the last few decades, one of the most hotly debated topics among family law scholars has been the role played by private ordering and party autonomy in shaping personal and property relations within couples and households of all kinds[1]. This phenomenon has

(1) Oberto, *I contratti della crisi coniugale*, I, Milano, 1999, pp. 28 ff.; Brinig, From *Contract to Covenant: Beyond the Law and Economics of the Family*, Harvard, 2000; Fenouillet and de Vareilles-Sommières (eds), *La contractualisation de la famille*, Paris, 2001; Bonini Baraldi, *Variations on the Theme of Status, Contract and Sexuality: an Italian Perspective on the Circulation of Models*, in Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Antwerpen, 2003, pp. 300 ff.; Hofer, Schwab and Henrich (eds), *From Status to Contract? – Die Bedeutung des Vertrages im europäischen Familienrecht*, Bielefeld, 2005; Tardia and Brignone, *Gli accordi patrimoniali tra coniugi in vista del divorzio*, in *Rassegna di diritto civile*, 2008, pp. 1 ff.; Bix, *Private Ordering and Family Law*, in *Journal of the American Academy of Matrimonial Lawyers*, Vol. 23, 2010, pp. 249 ff., *Minnesota Legal Studies Research Paper No. 10-59*; Fusaro, *Marital contracts,* Ehevertrag*, convenzioni e accordi prematrimoniali*, in *Nuova giurisprudenza civile commentata*, 2012, II, pp. 475 ff.; Scherpe (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, London, 2012; Cabrillac, *La contractualisation du lien familial, l'exemple des régimes matrimoniaux*, in Siffrein-Blanc, Agresti and

become so prominent that even the EU legislation nowadays explicitly acknowledges the existence of "contracts governed by family law"[2]. While some legal writers continue to treat family law as predominantly public law[3], this perspective is no longer shared by a growing number of jurisdictions worldwide, as will be illustrated in this essay.

Contractual freedom constitutes an expression of the fundamental principle of self-determination, recognised by Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private and family life[4]. Within this framework, private ordering

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Putman (eds), *Lien familial, lien obligationnel, lien social*, Livre I, *Lien familial et lien obligationnel*, Aix – Marseille, 2013, pp. 93 ff.; Swennen, *Contractualisation of Family Law in Continental Europe*, in *Familie & Recht*, 2013, available online at https://www.bjutijdschriften.nl/tijdschrift/fenr/2013/07/fenr-d-13-00003.pdf; Balestra, *Convivenza* more uxorio *e autonomia contrattuale*, in *Giustizia civile*, 2014, pp. 133 ff.; Bugetti, *La risoluzione extragiudiziale del conflitto coniugale*, Milano, 2015; Queirolo and Heiderhoff (eds), *Party Autonomy in European Private (and) International Law*, Tome I, Ariccia, 2015; Swennen (ed.), *Contractualisation of Family Law – Global Perspectives*, Antwerp, 2015; Dosi, *Il diritto contrattuale della famiglia. Le funzioni di consulenza e negoziazione dell'avvocato*, Torino, 2016; Hohloch, *The Privatization of Family Law in Germany*, in *Familia*, 2017, pp. 582 ff.; Mazzilli, *The Privatization of Separation and Divorce in Spain and Italy: a Comparative Study*, in *Familia*, 2017, pp. 563 ff.; Montinaro, *Marital Contracts and Private Ordering of Marriage from the Italian Family Law Perspective*, in *The Italian Law Journal*, 2017, pp. 75 ff.; Caricato, *La privatizzazione del diritto di famiglia*, Siena, 2020; González Beilfuss, *Agreements in European Family Law – The Findings, Theoretical Assessments and Proposals of the Commission on European Family Law (CEFL)*, in *European Review of Contract Law*, 2022, 18(2), pp. 159 ff.; Oberto, *Contratto e famiglia*, in Roppo (ed.), *Trattato del contratto*, VI, Roppo (ed.), *Interferenze*, Milano, 2022, pp. 84 ff.; Sesta, *Manuale di diritto di famiglia*, Milano, 2023, pp. 135 ff.; Oberto, *Giubileo d'argento per i patti prematrimoniali. Venticinque anni di oscillazioni sul tema degli accordi preventivi in materia di crisi coniugale*, Roma, 2026, pp. 39 ff.

(2) *See* the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), art. 9, Para 2. (d). On this particular rule *see* also below, at para. 3.3.

(3) *See* Swennen, *Private Ordering in Family Law: A Global Perspective*, in Swennen (ed.), *Contractualisation of Family Law – Global Perspectives*, op. cit., p. 8 s.

(4) *See* ECHR, 16 December 1992, Case 13710/88, *Niemitz v Germany*, Mn 29: "Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings"; for contractual relations *see* Harris, O'Boyle, Warbrick, Bates and Buckley, *Law of the European Convention on Human Rights, Oxford University Press*, 2nd ed., Oxford, 2009, pp. 364 ff. and Grabenwarter, *Europäische Menschenrechtskonvention*, 4th ed., München, 2009, para. 22, Mn 13. Cf. also Article 7 of the European Charter of Fundamental Rights (2007/C 303/01); rather explicitly Article 2, para. 1, of the German Basic Law; for the interaction of self-determination and marital contracts *see* also Dauner-Lieb, *Gütertrennung zwischen Privatautonomie und Inhaltskontrolle*, in *Archiv für die civilistische Praxis*,

and party autonomy appear as the most effective instruments to achieve family law's ultimate goal—ensuring that each individual is free to pursue happiness in their own unique way. This may also explain why creating a coherent, comprehensive, and satisfactory system of family law is so challenging and demands significant effort.

As the French author Jules Renard aptly observed, "Si on bâtissait la maison du bonheur, la plus grande pièce serait la salle d'attente"—"If we were to build the house of happiness, its largest room would be the waiting room". Indeed, family law may be regarded as the waiting room of every legal system, where unfulfilled aspirations, unrealised expectations, desires, hopes, nostalgic longings for Puritan ideals ("God, Fatherland, Family"), and yearnings for freedom seek resolution—often through the most powerful tool that States still wield: the law.

Legal systems, however, tend to respond to these complex needs in inconsistent, partial, slow, and often delayed ways—thereby shifting the burden onto judges. Judges become therefore the true *gardiens des promesses* or "guardians of promises," as framed by the title of a well-known French essay on the role of the judiciary in democratic governance(5)—or, more precisely, the guardians of promises made by politicians and left unkept. In this context, contractual freedom can serve as a key that empowers individuals to unlock the door of that vast "waiting room".

Of course, contractual freedom is not unlimited. Even in jurisdictions where this freedom is fully embraced within family law, certain inalienable principles must be respected. Compliance with core fundamental rights and mandatory legal norms is a general prerequisite for all types of contracts, including those beyond the realm of family relations. As Hans Kelsen famously warned, complete autonomy of the parties cannot exist in private law. In fact, it is the legal system that determines that a contract "produces law, so that the legal determination ultimately stems from the law itself—not from the legal subjects who are subject to it"(6).

210, 2010, pp. 580 ff., as well as Sanders, *Statischer Vertrag und dynamische Vertragsbeziehung*, Bielefeld, 2008, pp. 106 f.

(5) Garapon, *Le gardien des promesses*, Paris, 1996.

(6) Kelsen, *La dottrina pura del diritto*, Italian translation by Treves, Einaudi, n.p., 1956, p. 57.

Paradoxically, this principle is illustrated in legal provisions that allow parties to choose stricter regulatory frameworks for their family relationships. Consider the "covenant marriage contracts" found in some U.S. states, where couples can opt for a form of marriage in which divorce is significantly more difficult than under default legal provisions(7). Here, private autonomy is so robust that it creates its own limitations—yet this is only possible because the legal order permits such autonomy, precisely in line with Kelsen's theory.

It is also undeniable that the path toward full recognition of contractualisation in family law remains strewn with obstacles and ingrained prejudices. According to some scholars, the purported *numerus clausus* of family formations has long obstructed the validity of contracts between cohabiting partners(8). Consequently, contractualisation would apply only to "traditional" families, excluding "new" family structures such as *de facto* cohabiting couples from the sphere of private autonomy(9).

Quite on the contrary, the historical analysis offered in this essay will demonstrate the deeply rooted nature of contractualisation in families of all kinds. The social need to consensually address practical issues arising from cohabitation is as old as civilisation itself(10). In fact, the social need to address consensually all relevant problems that can rise from the very fact of living under the same roof is as old as the world. These needs include not only patrimonial concerns related to family formation, but also the means to navigate the consequences of the dissolution of family ties. Today, contractualisation increasingly converges with *de-judiciarisation*, as I have discussed in previous works(11). The

(7) So, in Louisiana, Arkansas and Arizona, the statutorily prescribed contractual terms for a covenant marriage contract in all three States include limiting divorce to situations where there are proven allegations of serious fault, including adultery, conviction of a felony, abandonment for one year, or physical or sexual abuse of a spouse or a child of one of the spouses: *see* Hunter Jules and Nicola, *The contractualisation of Family Law in the United States*, in Swennen (ed.), *Contractualisation of Family Law – Global Perspectives*, op. cit., pp. 345 f.

(8) Swennen, *Private Ordering in Family Law: A Global Perspective*, op. cit., p. 8 s.

(9) This is the view of Swennen, *Private Ordering in Family Law: A Global Perspective*, op. cit., p. 1, 8 f.

(10) *See* below, para. 1; further reference at para. 10.

(11) *See* Oberto, *Il divorzio in Europa*, in *Famiglia e diritto*, 2020, pp. 129 ff.; Oberto, *Judges and Notaries: International and National Experiences*, available at https://giacomooberto.

trend among European legislators to remove mutual consent separations and divorces from court proceedings clearly reveals a desire to "pave a golden path" toward greater private autonomy in this domain.

Surprisingly, some academic essays still maintain that agreements in domestic relations "are not considered to be as binding upon the parties or the courts as contracts in general"[12]. This assumption is demonstrably inaccurate. On the contrary, "family contracts" of all types—marriage agreements, premarital arrangements contemplating divorce, separation and divorce settlements, contracts between cohabiting partners, and so on—are flourishing across Europe. Judges, notaries and scholars increasingly rely on general contract law provisions to resolve cases in the absence of specific legislation[13].

More than ever before, we grasp the wisdom of Henry Sumner Maine's observation made over a century ago: the evolution of progressive societies has indeed been a movement "from status to contract"[14].

1.2. *The Robust Historical Roots of Contemporary Family Law Contractualisation*

A deeper exploration of the history of family law reveals that even Roman law contained numerous provisions related to agreements between prospective spouses (or their families), known as *pacta nuptialia* or *pacta ante nuptias*. These terms closely resemble current expressions such as "antenuptial agreements" or "prenuptial agreements". A central feature of these contracts was the right of the parties to stipulate the restitution of the dowry. The dowry—consisting of land, real estate property, money, livestock or commercial assets—was provided by the

com/Giacomo_OBERTO_Presentation_Rome_6th_July_2023.pdf. On some special aspects of de-judiciarisation in France *see* Moracchini-Zeidenberg, *La contractualisation de la séparation et de ses conséquences en droit français*, in *Les Cahiers de droit*, Volume 59, numéro 4, décembre 2018, pp. 1113 ff., available at https://www.erudit.org/fr/revues/cd1/2018-v59-n4-cd04207/1055265ar/, pp. 1 ff.

(12) *See* e.g. Swennen, *Private Ordering in Family Law: A Global Perspective*, op. cit., p. 1.

(13) On this particular point *see* below, at para. 3.3.

(14) *See* Maine, *Ancient Law: Its Connections with Early History of Society and Its Relations to Modern Ideas*, New York, 1888, p. 164 f.

bride's family to the groom or his family to help bear the financial burdens of establishing a new household (*ad onera matrimonii ferenda*). While the husband had the right to manage those assets and enjoy their fruits (for the benefit of the family), he was not their legal owner in the full sense. Upon the dissolution of the marriage, he (or his heirs) was obligated to return them—a process known as *dotis restitutio*.

These *pacta nuptialia* often included clauses determining: *a*) *What assets* should be given back (e.g. those assets which had been given, or their monetary value), *b*) *To whom* the dowry would be returned (e.g. the wife, her father, brothers or heirs), or *c*) *When* this restitution would take place (e.g. several months or years after dissolution of marriage). Marriage dissolution in Roman law could be caused not only by death or *capitis deminutio maxima* (e.g. captivity or enslavement), but also by divorce. Roman legal sources offer detailed insights into how and when the dowry should be returned in cases of divorce, primarily guided by the terms of such agreements. Moreover, many passages in the *Digest* and the *Codex Justinianeus* reflect the understanding that divorce—rather than death—was the prototypical scenario contemplated when drafting agreements regarding the patrimonial consequences of marriage.

We may find one of the most compelling illustrations of this concept in the following passage from the Digest, which refers to the writings of the renowned second-century A.D. Roman jurist Julius Paulus: "It was asked whether the expression 'dowry to be returned upon dissolution of marriage' should be understood to encompass not only divorce but also death—namely, whether the parties to such an agreement intended for this clause to apply in the latter case as well. Many scholars believed this to be so, while others held a contrary view. The Emperor ruled that under no circumstances should the dowry remain with the husband"(15). This passage reveals that, during Paulus' time, interpretive doubt had arisen regarding a contractual clause in a marriage agreement that regulated the restitution of the dowry upon dissolution

(15) *See* D. 50, 16, 240: "Cum quaerebatur, an verbum: Soluto matrimonio dotem reddi, non tantum divortium, sed et mortem contineret, hoc est, an de hoc quoque casu contrahentes sentiant? Et multi putabant hoc sensisse; et quibusdam aliis contra videbatur: secundum hoc motus Imperator pronunciavit, id actum eo pacto, ut nullo casu remaneret dos apud maritum".

of the union (*soluto matrimonio*). The core issue was whether the clause applied solely to divorce or also extended to dissolution by death of a spouse. Notably, the framing of the question itself suggests that, in Roman thought, divorce—rather than death—was perceived as the more "natural" endpoint of marriage(16).

A significant confirmation of this perspective is found in the writings of Tertullian, who, around the same historical period, observed that the age of harmonious marriages had long passed. He remarked that, upon entering into matrimony, spouses now essentially committed themselves to repudiation, such that divorce had become the natural outgrowth of marriage ("Repudium vero iam et votum est, quasi matrimonii fructus")(17).

Even in subsequent centuries, after the Catholic Church and canon law had exerted control over marriage, there is evidence of prenuptial contracts that set patrimonial rules for the parties in the event of marital crisis (in this case, legal separation, since divorce was prohibited by the Church).

The first case we may mention in this context deals with a decision issued at the end of the 16th century regarding the validity of a marriage contract that we could, in modern terms, describe as a prenuptial agreement made in contemplation of legal separation. This case was reported by Francesco Maria Cardinal Mantica (1534–1614), one of the most renowned jurists of the time, who was made a cardinal by Pope Clement VIII. In this instance, the *Rota Romana* (the appellate and supreme court of the Papal States) upheld the decision of the lower court, the *Rota* of Bologna, which had declared valid and enforceable a notarial agreement concluded before marriage by a wealthy couple from that city. According to this premarital contract, the husband had promised to pay his wife a fixed annual sum in the event of legal separation

(16) On this rule and on other similar sources of the Roman law, *see* Oberto, *I contratti della crisi coniugale*, I, Milano, 1999, pp. 66 ff.; Magagna, *I patti dotali nel pensiero dei giuristi classici. Per l'autonomia privata nei rapporti patrimoniali tra i coniugi*, Padova, 2002, 157 ff., 239 ff., 271 ff.; Giumetti, *«Soluto matrimonio dotem reddi»: profili ricostruttivi dello scioglimento del matrimonio e della disciplina giuridica della dote*, Torino, 2022, pp. 96 ff.

(17) *See* Tertullian, *Apologeticum*, ch. VI, para. 6. Tertullian's concern was evidently to present Christianity as an effective barrier against the degenerate customs of pagan Roman society during the imperial age.

(*separatio a mensa et thoro*). He had also agreed that, should he fail to fulfill this obligation for one year, his wife could sue him and demand the restitution of her entire dowry. As he failed to pay alimony for the year 1589, he was sentenced to return the dowry[18].

Even more interesting is the following case, decided on 20 June 1612 by the Supreme Court of Sicily. In this case, a Sicilian notary drafted a prenuptial deed for a couple residing in the city of Messina. In a curious mixture of Italian and Latin, the deed stipulated that, in the event of separation, the customary community of goods (a form of general co-ownership that was the default marital property regime in that part of Sicily at the time) would be considered as if it had never existed for that couple. Consequently, each spouse would, in the event of separation, reclaim only the assets they had brought into the marriage—effectively mirroring what we now call the "separation of property" regime[19].

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(18) "The judges [of the *Rota Romana*] upheld the [first-instance] judgment, which had stipulated that, in the event of legal separation: (a) Mr Constantine would be obliged to pay his wife, Mrs Lisia, an [annual] alimony of 270 *scuta* [a silver currency used in the Papal States at the time, with an approximate contemporary value of €80 per *scutum*]; and (b) should Mr Constantine fail to pay the said amount for a full year, Mrs Lisia would have the right to sue and request the court to compel restitution of her dowry. As Mr Constantine failed to make the payment in 1589, the court ruled that he was liable to return the full dowry to Mrs Lisia": *see Bononien. restitutionis dotis*, 16 May 1595, in Mantica, *Decisiones Rotae Romanae*, Romae, 1618, p. 539 ("Placuit Dominis, sententiam esse confirmanda: quia cum convenerit, ut in eventum separationis tori, D. Constantius teneretur D. Lisiae eius uxori praestare scuta 270, pro alimentis, et si in solutione eorum cessaverit per annum, ipsa possit agere ad restitutionem totius dotis: & D. Constantius dictam summam non solverit anno 1589, necessario sequitur, quod dos eidem D. Lisiae debeat restitui").

(19) "Mr Santoro Pagano married Mrs Cornelia de Pactis without expressly choosing between the "Greek" or "Messinese" matrimonial regime [i.e., the separate property regime: as a result, the marriage was deemed governed by the customary "Latin" regime of universal community of property]. Nevertheless, the marriage contract included the following clause: that, in the event (God forbid) of legal separation—without children, or where children were born but predeceased their parents as minors, or, having reached majority, died intestate—each spouse would retain only the dowries and assets individually contributed to the marriage, and no more. In such cases, the bride would be entitled solely to the sum of thirty *unzi* [*unzo*, *onza*, or *oncia* was the gold currency unit of the Kingdom of Sicily at the time, each equivalent to approximately €200]": *see* Giurba, *Decisionum novissimarum Consistorii Sacrae Regiae Conscientiae Regni Siciliae*, I, Panormi, 1621, p. 399 ("Sanctorus Pagano matrimonium contraxit cum Cornelia de Pactis, Nullo expresso contrahendi more, Graecorum, vel Messanensium: Sed cum pacto, Item che lo presenti matrimonio si intenda con patto, che casu (quod absit) di separatione di matrimonio, tanto senza figli come nati figli, et quelli morti in minori età, vel maiori ab