Article

Cristina González Beilfuss*

Agreements in European Family Law – The Findings, Theoretical Assessments and Proposals of the Commission on European Family Law (CEFL)

https://doi.org/10.1515/ercl-2022-2042

Abstract: This paper presents the findings, theoretical assessments and proposals made by the Commission on European Family Law in its Principles on European Family law in connection to agreements in family matters. It discusses, in particular, whether proposals were made on the basis of the common core of the jurisdictions surveyed or rely on a better law approach.

Keywords: private autonomy, family law, Commission on European Family Law (CEFL)

Résumé: Cet article présente les conclusions, les évaluations théoriques et les propositions faites par la Commission pour le droit européen de la famille dans ses Principes de droit européen de la famille sur les accords en matière familiale. Il examine, en particulier, si les propositions ont été faites sur la base des éléments fondamentaux communs à tous les systèmes juridiques étudiés ou si elles reposent sur une recherche de la meilleure loi.

Zusammenfassung: In diesem Beitrag werden die Ergebnisse, theoretischen Einschätzungen und Vorschläge vorgestellt, die die Kommission für das europäische Familienrecht in ihren Grundsätzen zum europäischen Familienrecht im Zusammenhang mit Vereinbarungen in Familiensachen gemacht hat. Dabei wird insbesondere erörtert, ob die Vorschläge auf der Grundlage des gemeinsamen Kerns der untersuchten Rechtsordnungen gemacht wurden oder auf einem Reform-Ansatz beruhen.

***Corresponding author: Prof. Dr. Cristina González Beilfuss**, Universitat de Barcelona, Barcelona, Spain, E-mail: cgonzalezb@ub.edu

1 Introduction

Modern Western family law increasingly resorts to private autonomy in order to shape family relationships. In a secular society in which men and women are equal it seems only natural that intimate relationships should be open to free choice and agreements.

Private autonomy is, however, problematic in family law. First, because a family is more than the sum of two autonomous individuals.[1] It is a relationship marked by solidarity, particularly whenever a family fulfils the social function of taking care of vulnerability.[2] Private autonomy must thus be subject to limitations in order to adequately protect children, disabled adults and possibly the weaker member of the relationship, who happens to be often the partner providing care-work. Gender is an important consideration. The liberal subject, as originally conceived, was male, which implies that the concept of autonomy blended out family and care work,[3] which continues to be performed predominantly by women.

Agreements and the limitations to which they are subject have been a recurring matter in the Principles of European Family law developed by the Commission on European Family law (CEFL). The present contribution will analyse its findings, theoretical assessments and proposals as regards the role of private autonomy in the fields covered so far, namely, in connection to divorce and maintenance between former spouses,[4] parental responsibilities,[5]

1 See A. Barlow, 'Solidarity, autonomy and equality: mixed messages for the family?' *Child and Family Law Quarterly* (27) 2015, 223, 224. See also T. Sverdrup, 'Family solidarity and the mind-set of private law' *Child and Family Law Quarterly* (27) 2015, 237, 237.

2 See M.A. Fineman, 'Equality, Autonomy, and the Vulnerable subject in Law and Politics', in M. A. Fineman and A. Grear, *Vulnerability. Reflections on a New Ethical Foundation for Law and Politics* (Surrey: Routledge, 2013) 22.

3 As very aptly summed up by C.N. Degler, 'John Locke and Adam Smith celebrated the principles of individual rights and actions, but the individuals they had in mind were men. On the whole women were not then thought of as anything but supportive assistants-necessary to be sure, but not individuals in their own right. The individual as a conception in Western thought has always assumed that behind each man – that is, each individual – was a family. But the members of that family were not individuals, except the man, who was by law and custom its head'. See C.N. Degler, *Women and the Family in America from the revolution to the present* (New York: Oxford University Press, 1980) 189 as quoted by U. Beck and E. Beck-Gernsheim, *The normal chaos of love* (Cambridge: Polity Press, 1995) 57.

4 K. Boele-Woelki, F. Ferrand, C. González-Beilfuss, M. Jänterä-Jareborg, N. Lowe, D. Martiny and W. Pintens, *Principles of European Family law regarding Divorce and Maintenance between Former Spouses* (Cambridge: Intersentia, 2004).

5 K. Boele-Woelki, F. Ferrand, C. González-Beilfuss, M. Jänterä-Jareborg, N. Lowe, D. Martiny and W. Pintens, *Principles of European Family law regarding Parental Responsibilities* (Cambridge: Intersentia, 2007).

matrimonial property[6] and *de facto* unions.[7] The analysis will be preceded by a brief presentation of CEFL and its working methods.

2 On CEFL

CEFL is a scientific organisation that was founded in 2001 under the leadership of Katharina Boele-Woelki. It consists of two groups, on the one hand, an Organising Committee of seven members, which has remained relatively stable throughout the years[8] and, on the other hand, an Expert Group, gathering family law specialists from all over Europe, including non-EU States like Switzerland, Norway and Russia.[9] All members of the Organising Committee are part of the Expert Group.

The Organising Committee prepares and coordinates the work. It formulates the questionnaires on the basis of which national reports are written by the experts, and drafts the Principles of European Family law, taking the comparative overview of the national reports as a starting point. The Principles are finalised after discussion and debate with the Expert Group.[10]

The Principles of European Family Law are the main result of CEFL's endeavours.[11] They cover the above mentioned five subject areas and aim at inspiring national legislators wishing to modernise their legal systems. New legislation

6 K. Boele-Woelki, F. Ferrand, C. González-Beilfuss, M. Jänterä-Jareborg, N. Lowe, D. Martiny and W. Pintens, *Principles of European Family law regarding Property relations between spouses* (Cambridge: Intersentia, 2013).

7 K. Boele-Woelki, F. Ferrand, C. González-Beilfuss, M. Jänterä-Jareborg, N. Lowe, D. Martiny and V. Todorova, *Principles of European Family law regarding Property, maintenance and succession rights of couples in de facto unions* (Cambridge: Intersentia, 2019).

8 The Organising Committee is at present composed of Katharina Boele-Woelki (Hamburg), Frédérique Férrand (Lyon), Nigel Lowe, (Cardiff), Dieter Marttiny (Hamburg). Maarit Jänterä-Jareborg (Uppsala) and the present author.

9 The Expert Group has changed over the years, depending on the respective working-field and the jurisdictions covered, for a complete overview see K. Boele-Woelki, 'The Commission on European Family Law. Taking stock after almost 20 years', in K. Boele-Woelki and D. Martiny, *Plurality and Diversity of Family Relations* (Cambridge: Intersentia, 2019) 4–5.

10 The working method used by CEFL was intensely discussed in its initial period See K. Boele-Woelki, 'The working method of the Commission on European Family law', in K. Boele-Woelki (ed), *Common Core and Better Law in European Family law* (Cambridge: Intersentia, 2005) 15–38.

11 In 2003 the Organising Committee of CEFL launched a book series, the European familiy law series at the International Publisher Intersentia (https://intersentia.com/en/product/series/show/id/9168/). At the time of writing 51 volumes have been published. CEFL has as well organised six European Family law Conferences in Utrecht (2002 and 2004), Oslo (2007), Cambridge (2010), Bonn (2013) and Hamburg (2018).

influenced by the Principles thus contributes to the harmonisation of Family law in Europe.[12]

Each principle consists of a black letter rule that is accompanied by a comparative overview. There is also reference to the international instruments relevant in the respective subject matter area and a Comment. The Comparative overview and the Comment are part and parcel of the Principles and should be read together with the blackletter rule.

In some cases, CEFL proposes principles that reflect the position of the existing law. These principles are based on the 'common core' of the majority of the legal systems surveyed. But, in other cases, CEFL opts for proposing principles based on the better law, either because no common core can be identified or because after evaluation the common core does not seem adequate and fit for the future. The better law can be inspired by solutions offered by the jurisdictions surveyed or be a completely new rule, at least in European law.[13]

It goes without saying that a better law approach necessarily entails subjectivity. CEFL's values are, however, openly disclosed in the Comments to the Principles and more generally in their Preambles.[14] CEFL aims at facilitating the mobility of persons,[15] promoting the equality between the sexes[16] and the best interests of the child,[17] and most importantly in connection to the subject matter of

12 A few results can be mentioned in this respect. In 2008 Portugal reformed the law of divorce and parental authority. Some of the rules are identical to the CEFL principles. In 2008 the Norwegian Law commission proposed alternating residence and partially justified this choice on the basis of Principle 3:20 of the European Principles. The reform of Danish and Dutch matrimonial property law has been inspired by the Matrimonial Property Principles. At European level there is reference to CEFL in the Explanatory Memorandum to the Council of Europe Recommendation on preventing and resolving disputes on child relocation. See Boele-Woelki, n 9 above, 12–14. The impact of the Principles on Czech law is substantial. See Z. Králícková, 'Changes in Czech Family Law in Light of the Principles of European Family Law' *Law, Identity and Values* 2021-1, 85–95.

13 See K. Boele-Woelki, 'Building on Convergence and Coping with Divergence in the CEFL Principles of European Family law', in M. Antokolskaia (ed), *Convergence and Divergence of Family Law in Europe* (Cambridge: Intersentia, 2007) 263.

14 See further K. Boele-Woelki, 'Ziel und Wertvorstellungen der CEFL in ihren Prinzipien zum Europäischen Familienrecht', in A. Verbeke *et al* (eds), *Confronting the frontiers of Family and Succession Law. Liber Amicorum Walter Pintens* (Cambridge: Intersentia, 2012) 173.

15 See Preamble of the Divorce and Maintenance Principle: Boele-Woelki *et al*, n 4 above, 7; Preamble of the Parental Responsibilities Principles: Boele-Woelki *et al*, n 5 above, 7; Preamble of the Principles regarding property relations between spouses: Boele-Woelki *et al*, n 6 above, 31; Preamble of the Principles on De Facto unions: Boele-Woelki *et al*, n 7 above, 51.

16 See Preamble of Divorce and Maintenance Principle: Boele-Woelki *et al*, n 4 above, 7; Preamble of the Principles regarding property relations between spouses: Boele-Woelki *et al*, n 6 above, 31.

17 Preamble of the Parental Responsibilities Principles: Boele-Woelki *et al*, n 5 above, 7.

this paper, striking the right balance between respecting self-determination and protecting the weaker party in the relationship.[18]

3 Agreements in the Principles

The following section will analyse the five sets of Principles published so far and illustrate the place allocated to private autonomy and agreements as well as the justifications for the choices made.

3.1 Divorce and Maintenance Between Former Spouses (2004)

The Principles on Divorce and Maintenance between former spouses were published in 2004. They consist of 20 Principles, 10 referring to divorce and 10 in connection to maintenance between former spouses.

3.1.1 Divorce

CEFL proposes two types of divorce, divorce by mutual consent and divorce without the consent of one of the spouses. The grounds for divorce are no longer relevant.

Divorce by mutual consent is the preferred type of divorce. Consent is defined in Principle 1:4 (2) as an agreement between the spouses that their marriage should be dissolved. It is not required that spouses also agree on the consequences of the divorce. Divorce remains consensual even in the absence of such agreement.[19] The Principles, however, incentivise agreements in connection to matters ancillary to the dissolution of the marriage.

Principle 1:5 requires a reflection period unless spouses have been factually separated for six months when divorce proceedings are initiated.[20] The reflection

18 The Preamble of the Divorce and Maintenance Principles phrases this as follows – '*desiring to balance the interests of spouses and society*' (see Boele-Woelki *et al*, n 4 above, 7). The Preamble of the Principles regarding property relations between spouses talks of '*striking a balance between the spouses' private autonomy and their solidarity*' (see Preamble of the Principles regarding property relations between spouses: Boele-Woelki *et al*, n 6 above, 31). The Preamble of the Principles on De Facto unions phrases the idea as follows: '*Striking the balance between the private autonomy of those living in de facto unions, and their interdependence and Community of interests*' (see Preamble of the Principles on De Facto unions: Boele-Woelki *et al*, n 7 above, 51.

19 See Boele-Woelki *et al*, n 4 above, 32 (Principle 1:4).

20 See Boele-Woelki *et al*, n 4 above, 33 (Principle 1:5 (3)).

period can be dispensed with if there is agreement about the consequences of the divorce and spouses have no children under the age of 16. In the absence of such agreement or if children are younger than 16, the reflection period is for three months. The reflection period is extended to six months where there are children younger than 16 and spouses cannot agree about the consequences of divorce.

An agreement about the consequences of the divorce is thus construed as facilitating access to divorce. The reflection period is not intended to serve the purpose of reconciliating spouses. Its function is to give spouses an opportunity to reach agreement.[21]

Principle 1:6 enumerates the matters upon which spouses should reach agreement. These are, on the one hand, parental responsibility and child maintenance issues, in cases where this is relevant, and on the other hand, financial matters such as the division or reallocation of property and spousal maintenance.

Agreements need to be made in writing. Whether the agreement is or is not binding is left to national law. Principle 1:7 however requires that the competent authority should at least scrutinise the validity of the agreement.

Divorce on the basis of mutual consent did not reflect the common core of European law at the time the divorce principles were drafted.[22] Consent played a role but the most common ground for no-fault divorce in the jurisdictions surveyed was the irretrievable breakdown of the marriage. It was only after intense debates with the Expert Group that the decision was taken to depart from the common core and advocate for two types of divorce depending on whether there is agreement to divorce or not.

Departure from the common core was justified by reference to self-determination and also practicality. In view of divorce rates in European jurisdictions, it did not seem convenient to require an investigation into the reasons for the breakdown of the marriage that also meant an intrusion into the spouse's private sphere. Account was also taken of the fact that in practice the irretrievable breakdown was deduced from physical separation which reflected the spouses' intention to terminate the marriage. It thus seemed more straightforward to directly admit mutual consent as a ground for divorce.

In connection to agreements about the consequences of divorce, the comparative overview showed that 12 of the 22 jurisdictions surveyed required or favoured an agreement between the spouses.[23] A strong tendency in favour or against the necessity of spousal agreement could thus not be established. Principle

21 Boele-Woelki *et al*, n 4 above, 32 (Comment to Principle 1:4).

22 See Comparative overview to Principle 1:3, Boele-Woelki *et al*, n 4 above, 24–25.

23 Boele-Woelki *et al*, n 4 above, 37.

1:6 however clearly favoured agreement in order to incentivise that spouses take joint responsibility for the past and the future of their relationship.[24]

A distinction is drawn between agreements concerning parental responsibility and maintenance towards children and agreements on financial matters. Agreements affecting children are not binding. Principle 1:7 and 1:10 provide that the decision is taken by the competent authority. This authority is required to take agreements between spouses into account, subject to two conditions, first, that the agreements are legally valid and second, that they are consistent with the child's best interests.[25]

The attitude towards agreements on the financial consequences of divorce for the spouses is more liberal. The crucial issue of whether agreements can be set aside was not fully addressed in the Divorce Principles. The Comparative analysis showed that there was no common core as regards scrutiny of agreements.[26] Some legal systems viewed agreements as a mere contractual matter and put the stress on autonomy whereas others looked also into the substance of the agreement and evaluated whether they were detrimental to a spouse's interests.

In this first set of Principles, CEFL chose a cautious approach. The Comment to Principle 1:7 highlights that a rule requiring the competent authority to scrutinise every agreement could lead to an increase in conflicts[27] and thus frustrate consensual divorce. In view of the absence of a common core as regards scrutiny Principle 1:7 established only a minimum standard. The competent authority must at least scrutinise the validity of the agreements concerning financial matters. This entails that national law may provide a broader scrutiny that could encompass control over the content of the agreement.[28]

3.1.2 Maintenance Between Former Spouses

Maintenance between former spouses follows the same rules regardless of the type of divorce (Principle 2:1). It is dependent on the creditor spouse having insufficient resources to meet his or her needs and the debtor spouse's ability to satisfy those needs (Principle 2:3).

Principle 2:10 establishes that spouses should be permitted to make agreements concerning the extent, performance, duration and termination of the maintenance obligations and the possible renouncement of the claim to maintenance. The

24 Boele-Woelki *et al*, n 4 above, 40.

25 See also F. Ferrand, 'Divorce and Spousal Agreement', in K. Boele-Woelki (ed), *Common Core and Better Law in European Family law* (Cambridge: Intersentia, 2005), 79.

26 Boele-Woelki *et al*, n 4 above, 48.

27 Boele-Woelki *et al*, n 4 above, 49.

28 Ferrand, n 25 above, 79–80.

agreements should be in writing and the competent authority should at least scrutinise the validity of the agreement.

Principle 2:10 takes a very broad and liberal approach towards agreements. It even permits that spouses stipulate that no maintenance should be paid at all. The Comment, however, clarifies that the Principle does not deal with the question of whether renouncement to maintenance prevents a spouse from resorting to a competent authority at a later date.[29]

In connection to scrutiny Principle 2:10 follows Principle 1:9. It does not impose a uniform standard but only a minimal obligation requiring the competent authority to control the validity of the agreement. The Comment explains that a uniform approach seemed inadequate in view of the gap between continental civil law and common law systems and also because the matter is connected to different possibilities of compensation under matrimonial property law or access to social security benefits.[30]At the same time there is, however, reference to the need to prevent an unreasonable or unfair agreement from being binding between the spouses.[31]

3.2 Parental Responsibilities (2007)

The Principles on Parental Responsibilities were published in 2007. Parental responsibilities are defined in Principle 3:1 as a collection of rights and duties aimed at promoting and safeguarding the welfare of the child. Parental responsibilities encompass, in particular, care, protection and education, maintenance of personal relationships, determination of residence, administration of property and legal representation.

A key distinction in this set of Principles is between the attribution and the exercise of parental responsibilities. Holders of parental responsibilities are, in the first place, the persons whose legal parentage has been established (Principle 3:8). Filiation as such is outside the substantive scope of the Principles.

Principle 3:9 establishes that persons other than a parent can be attributed parental responsibilities. The common core of the legal systems surveyed at the time of drafting the Principles was that the attribution of parental responsibilities to a person other than a parent fell outside the scope of party autonomy.[32] Principle 3:9 does not take a position in this regard and leaves the matter to national law.

29 Boele-Woelki *et al*, n 4 above, 132.
30 Boele-Woelki *et al*, n 4 above, 133.
31 Boele-Woelki *et al*, n 4 above, 132.
32 Boele-Woelki *et al*, n 5 above, 75.

Agreements pay, by contrast, a pivotal role in the exercise of parental responsibilities. The rule is that parental responsibilities that are held jointly must also be exercised jointly (Principle 3:11) and that important decisions have to be taken by parental responsibility holders together (Principle 3:12). Agreements on the exercise of parental responsibilities are generally admissible. It is even possible to agree on a sole exercise of parental responsibilities by one parent (Principle 3:15).

Agreements are, however, subject to the best interests of the child and may be scrutinized by the competent authority (Principle 3:13). There are rules to deal with disagreement on exercise. Joint holders of parental responsibilities may apply to the competent authority, who should promote agreement between the parties before allocating the decision-making power to one of them or deciding the dispute.

The Parental responsibility principles also contemplate agreements in connection to specific matters. Principle 3:20 establishes that if the holders of parental responsibilities are living apart they need to agree upon with whom the child resides. They may agree that the child reside on an alternate basis with one and the other holder. Principle 3:27 deals with agreements on contact. In the same vein, Chapter VIII of the Principles dealing with procedure promotes alternative dispute resolution.

The comparison of the jurisdictions surveyed showed that agreements played an increasingly important role in parental responsibility matters and were generally respected.[33] CEFL did not depart from the common core in this respect.[34] Agreements are, however, restricted insofar as they have to respect the best interests of the child. Principle 3:7 provides that the interests of the child should be protected whenever they may be in conflict with the interests of the holders of parental responsibilities. The manner in which this is to take place is not concretised further.

Another important feature is that according to the Principles, agreements may be scrutinised by the competent authority. The approach is flexible. The Comments highlight that scrutiny is particularly relevant in case of divorce or separation.[35] Whether agreements are directly enforceable or only after approval by a competent authority rests with national law.

33 Boele-Woelki *et al*, n 5 above, 92.
34 Boele-Woelki *et al*, n 5 above, 93.
35 Boele-Woelki *et al*, n 5 above, 94.

3.3 Property Relations Between Former Spouses (2013)

The next working field comprised property relations between spouses. The Matrimonial Property Principles were published in 2013. They are structured in three Chapters. The first Chapter contains the general rights and duties. Chapter II is entirely devoted to Marital Property Agreements. Chapter III proposes two different Matrimonial Property Regimes, a system of participation in acquisitions and a system of community of acquisitions.

3.3.1 General Rights and Duties

The general rights and duties contained in Chapter I of this set of Principles apply to all marriages, irrespective of the applicable matrimonial property regime. Following the model of the *regime primaire* of Belgium, French and Spanish law but with a more mixed content,[36] the general rights and duties are mandatory and cannot be set aside by agreement.

Principles 4:2 and 4:3 establish the basic principles that both spouses have equal rights and duties and that each spouse has full legal capacity and freedom to enter into legal transactions with the other spouse and third persons. Stating these two principles, which may seem self-evident, was considered important in view of the fact that European contemporary societies are pluralistic. They also lay down the foundations of the relationship between the spouses.

The general rights and duties contain Principles 4:4 dealing with the contributions to the needs of the family, 4:5 and 4:6 on the protection of the family home and household goods, 4:7 about spousal representation and 4:8 on the duty to inform. The closing Principle of this section is Principle 4:9 establishing that spouses should be free to enter agreements determining their marital property relationship.

3.3.2 Marital Property Agreements

Marital property agreements are subject to the Principles contained in Chapter II. Principle 4:10 reflects the common core of the jurisdictions surveyed. It allows spouses to choose a matrimonial property regime both before marriage is concluded and during the marriage. Marital property agreements are subject to form requirements. Principle 4:11 establishes that these agreements should be drawn up by a notary or other legal professional with comparable functions, dated

36 Boele-Woelki *et al*, n 6 above, 37.

and signed by both spouses. Such formal requirements also reflect the common core.

The intervention of a notary or equivalent professional ensures that the parties receive independent legal advice. Principle 4:13 outlines the obligations of the legal professional that should (a) give impartial advice to each spouse separately, (b) ensure that each spouse understands the legal consequences of the agreement and (c) ensure that both spouses freely consent to the agreement. The Principle does not require that each spouse be given independent legal advice by two different professionals. It does, however, not prevent national law from so providing.[37] The Comment highlights that even though the Principle does not address the effects of breach of duty by the legal professional, the common position in the jurisdictions surveyed is liability to disciplinary action and possibly to compensatory damages. The agreement itself is, however, not invalidated.

Principle 4:12 requires that spouses disclose their assets and debts when entering the marital property agreement. In this respect, CEFL chose not to follow the common core but to develop the general principle establishing an information duty between spouses.[38] Principle 4:12 is silent on the effects of non-disclosure. The Comment however points out that in those jurisdictions where disclosure is required, agreements can be set aside for non-disclosure.[39]

Principle 4:14 tackles the effects as regards third parties. Marital property agreements are binding as against third parties if at the time of making transactions with a spouse the information was publicly documented or the third party knew of the relevant parts of the agreement. The Principle reflects the clear common core. Since registration of the marital agreement is not a universal solution, the Principle leaves it for national law to prescribe how information is publicly documented.

Principle 4:15 contains a hardship clause that departs from the common core of the legal systems surveyed. In most European jurisdictions marital property agreements have the status of binding contractual provisions that cannot be modified or set aside except on grounds of general contract law. At the time the Principles were drafted, only a few jurisdictions had special family law provisions allowing the competent authority to intervene.[40] The exceptional hardship clause developed in Principle 4:15 follows this approach and allows the competent authority to set aside or adjust the marital property agreement in cases of exceptional

37 Boele-Woelki *et al*, n 6 above, 129.
38 Boele-Woelki *et al*, n 6 above, 125.
39 Boele-Woelki *et al*, n 6 above,125.
40 See comparative overview, Boele-Woelki *et al*, n 6 above, 136–137.

hardship having regard to the circumstances when the agreement was concluded or those subsequently arising.

The Comment to Principle 4:15 justifies departure from the common core in view of the following considerations. '*Such agreements should for several reasons be distinguished from other contracts. First, it should be taken into account that the parties are emotionally dependent on each other and trust in their relationship and its future which may lead them to disregard any negative side aspects of the agreement. Second, the influence of other family members whom the parties want to please should not be underestimated. Thirdly, these agreements are meant to be long lasting and very often do not take into account the changes that circumstances can force on the relationship, especially when it comes to issues such as childrearing and unforeseen illness of a family member, which may force one of the spouses, generally the wife, to leave the job market or to reduce gainful activity for the benefit of the family*'.[41]

The application of the hardship clause is not limited to extreme exceptional cases.[42] It should however be applied strictly in order not to undermine the contractual status of the agreement. The competent authority should strive to respect the content of the agreement as much as possible and intervene as minimally as it can. The first choice should therefore be to set aside merely parts of the agreement.

Exceptional hardship is not defined in the Principles. The Principle does, however, require that all circumstances should be considered, those that existed when the agreement was concluded and those that arose subsequently.

3.3.3 Matrimonial Property Regimes

Chapter III proposes two matrimonial property regimes that would function as legal regimes applying if spouses have not agreed otherwise by concluding a marital agreement. As the introduction to the Principles revealed, it was not possible to merge the elements of all national systems into a single one.[43] This was not feasible from a technical point of view since regimes differ substantially as to the basic question of whether marriage entails the creation of a separate mass of property belonging to the Community or not. Moreover, CEFL did not feel entitled to make a choice without a socio-economic research on care for children and elderly, female participation in the job market and more generally the distribution of work in the various European societies.[44]

41 Boele-Woelki *et al*, n 6 above, 138.
42 Boele-Woelki *et al*, n 6 above, 138.
43 Boele-Woelki *et al*, n 6 above, 25.
44 Boele-Woelki *et al*, n 6 above, 26.

After careful consideration, CEFL decided to focus on two systems, a community of property system and a participation system. The national legislator should choose one or the other.[45] A Participation system promotes the independence of spouses and is more suitable for spouses who both own property and/or are in the labour market, while a community regime promotes solidarity and is more suitable where one spouse neither owns property nor is in the labour market.

In connection to the matter discussed in this paper, several observations need to be made. First, that the two regimes proposed function as default regimes applying in the absence of a marital property agreement that could disregard them in total or in part. Spouses are free to restrict their choice of a property regime to a certain part of their assets or to exclude that their matrimonial property regime applies to specific assets or types of assets and agree that this property be non-marital. They may also conclude an agreement to change or modify their matrimonial property agreement for another.

Private autonomy also plays a role in connection to the liquidation of the regime. The Participation regime requires determination of the amount corresponding to the participation. The general rule is outlined in Principle 4:31. If one spouse's net acquisitions exceed the value of those of the other, the latter participates in the surplus to the amount of one half. The claim is a monetary one. Spouses are, however, free to set aside or adjust the rules on the participation (Principle 4:29). Such agreements can be set aside or modified by the competent authority in cases of exceptional hardship (Principle 4:32).

Similar rules apply to the distribution of the community property. Spouses can agree to set aside or modify the general rules of division (Principle 4:55). In cases of exceptional hardship, the competent authority can set aside or adjust the agreement (Principle 4:57).

The Principles allowing agreements follow the common core of the jurisdictions surveyed,[46] whereas the hardship clauses in connection to agreements were proposed by CEFL as the better law.[47]

3.4 Property, Maintenance and Succession Rights of Couples in *de Facto* Unions (2019)

The last working field so far has been the Principles on *de facto* unions. De Facto unions are defined in Principle 5:1 as those where two persons live together as a

45 Boele-Woelki *et al*, n 6 above, 26.

46 Boele-Woelki *et al*, n 6 above, 203 and 332.

47 Boele-Woelki *et al*, n 6 above, 216 and 338–339.

couple in an enduring relationship. Couples in a *de facto* union have not formalised their relationship.

Most jurisdictions surveyed do not have a comprehensive statutory framework applying to *de facto* unions.[48] The rules of the law of obligations and the law of property are often used for compensatory purposes and property division when the relationship ends. The comparative overview of the jurisdictions surveyed showed that this leads to unsatisfactory results.[49] General civil law rules do not pay regard to the special nature of the relationship.

CEFL therefore opted for proposing a unitary regime applying to *de facto* unions. The Principles do, however, recognise that different kinds of relationships fall under the definition. The information provided in the national reports actually showed that very many of these unions function as trial marriages. They very often terminate because the partners decide to marry each other. Of those who do not marry, very many end up separating. There are, however, *de facto* unions of a more enduring character.[50] In order to capture this diversity CEFL decided to create a special category of so-called qualified unions. A qualified union deserving special protection is a *de facto* union that has lasted at least five years or where there is a common child.

Agreements are particularly relevant in connection to *de facto* unions. The Preamble of the Principles highlights the importance of private autonomy and the freedom to make agreements. The Comment to the Preamble explains that agreements between partners should be permissible and that they are binding between them. It further explains that the crucial issue is how to strike a balance between private autonomy and the protection of the weaker party.[51]

3.4.1 General Rights and Duties

The structure of this set of Principles closely resembles the Matrimonial Property Principles. Chapter II is devoted to the General Rights and Duties. The provisions therein contained are mandatory and cannot be set aside by agreement. General rights and duties comprise that both partners have equal rights and duties (Principle 5:4), that each partner should contribute to the expenses of the household according to his or her ability (Principle 5:5) as well as rules about the protection of the family home applying to the so called qualified *de facto* unions (Principle 5:6). The Chapter closes with Principle 5:6 establishing that partners are free to enter

48 Boele-Woelki *et al*, n 7 above, 41.
49 Boele-Woelki *et al*, n 7 above, 44–47.
50 Boele-Woelki *et al*, n 7 above, 32–34.
51 Boele-Woelki *et al*, n 7 above, 52–53.

into agreements determining their personal, economic and property relationship (Principle 5:7). This Principle reflects the common core of the jurisdictions surveyed. As the Comment highlights agreements between partners are subject to the general limitations of contract as well as to the mandatory limitations contained in the chapter on the General rights and duties just described and those laid down in Chapter III.[52]

3.4.2 Agreements

Chapter III deals with agreements. It contains two Principles. Principle 5:8 establishes that agreements can be made before or during the *de facto* union and after the partner's separation. This Principle reflects the common core of the jurisdictions surveyed.

Principle 5:9 deals with scrutiny by the competent authority. It provides that the competent authority has the power to scrutinise the agreement. The competent authority may set aside or adjust the agreements on the grounds of general contract law or serious injustice having regard to the contents of the agreement and the circumstances when it was concluded or those subsequently arising.

Principle 5:9 combines the common core and the better law approach. The rule that the competent authority can scrutinise agreements between partners on the grounds of general contract law is clear common core. CEFL however took the view that the rules of general contract law can be insufficient to protect the weaker party and that the competent authority should be able to set side or adjust agreements creating serious injustice.[53]

Serious injustice is less demanding than the exceptional hardship clause used in connection with marital agreements. This is justified in view of the fact that marital agreements need to be drawn up by a notary or legal professional with comparable functions. Such a formal requirement could not be laid down in this set of Principles because their scope is notably broader than the Matrimonial Property Principles and covers any aspect connected to their personal, economic and property relationship.[54]

As explained in the Comment,[55] the freedom to make agreements has the same function as an opt-out rule to the default system contained in the Principles. This default regime covers property and debts during the relationship (Chapter IV), separation (Chapter V) and death (Chapter VI). The last chapter (Chapter VII) deals

52 Boele-Woelki *et al*, n 7 above, 102.
53 Boele-Woelki *et al*, n 7 above, 111.
54 Boele-Woelki *et al*, n 7 above, 102.
55 Boele-Woelki *et al*, n 7 above, 104.

with disputes and closes with a principle establishing that alternative means of dispute resolution should be available.

4 Concluding Remarks

CEFL is presently embarked upon an exercise of evaluating the work done in the last two decades. This is still work in progress that needs to be discussed in the Organising Committee and the Expert Group. The following remarks do therefore only reflect the present writer's personal opinion.

A trend towards the contractualization of family relationships was certainly noted by CEFL during the elaboration of the Principles of European Family law. The common core of the jurisdictions surveyed is that agreements are not only permissible but desirable, particularly in connection to relationship break-up. As regards children, most jurisdictions do, however, still impose scrutiny by a competent authority. Agreements between parental responsibility holders are structured as proposals that can be rejected if not found in conformity with the child's best interest.

A scrutiny that goes into the examination of the content of the agreements is not the common core as regards property and maintenance between spouses. CEFL did, however, propose such scrutiny. In this regard there has been an evolution. In its first set of Principles CEFL left a scrutiny that went beyond general contract law to national law. The Matrimonial Property Principles and the Principles on De facto unions, however, do contain a hardship and even a serious injustice clause that would allow the competent authority to set aside or modify agreements which work against family.