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Regulation of Proprietary Relations between Spouses in the New Family Law Act:

Toward Better Regulation by Means of Private Autonomy?*

1. General considerations

In history as well as today, the marriage can be viewed either as a contractual relationship between individuals that is arranged by the family members or as a specific status or position of spouses that is granted to the spouses by the competent authority—i.e., the state or the Church.² Accordingly, the traditional marriage can be seen on one hand as a matter for the family members—the matter of a man and a woman or a larger family—or on the other hand a matter of the state or the Church. Therefore, the consequences of the marriage could also either be regulated within the circle of the family members themselves or fall under the competence of the state or of religious authorities. Where proprietary relations between spouses are concerned, also these rights and duties can be determined by the concerned individuals—i.e., the spouses—according to their own will or set forth as mandatory rules by the competent authority.

In continental Europe, it is common today that after the conclusion of the marriage the proprietary consequences will *ex lege* automatically apply for the spouses.³ The state has regulated the proprietary relationship between spouses by enacting the laws that stipulate the matrimonial property regime. The legal order is aimed at guaranteeing an appropriate and safe proprietary relationship for the married couple even if the spouses are unaware of the legal consequences.

At the same time, almost all of the European legal orders recognise also, at least to some extent, the right of spouses to regulate their proprietary relations according to their own will and preferences.⁴ In modern

¹ These ideas were firstly expressed by the author in ISFL Regional Conference in Porto, 10–12 September 2009: Family Solidarity *versus* Social Solidarity in an Era of Planetary Crisis, where the author held the speech on the topic as follows: Regulating Ownership of Matrimonial Property—Task of State or Spouses? Recent Proposal to modify the Law of the Matrimonial Property in Estonia.

² For more about the concept of marriage, see M. Antokolskaia. Harmonisation of Family Law in Europe: A Historical Perspective. Intersentia 2006, pp. 273–312; M. Antokolskaia. Development of Family Law in Western and Eastern Europe: Common Origins, Common Driving Forces, Common Tendencies. – Journal of Family History 2003/28, pp. 52–69.

³ Conclusion made on the basis of the information on the family law in different European countries published by the European Judicial Network in civil and commercial matters: <http://ec.europa.eu/civiljustice>, also R. Süß, G. Ring. Eherecht in Europa. Angelbachtal 2006; European Family Law in Action. Vol IV: Property Relations between Spouses. K. Boele-Woelki, B. Braat, I. Curry-Sumner (eds.). Intersentia 2009, pp. 1189–1217.

⁴ *Ibid.*

times, it has been pointed out that the essence of the marriage has changed in the course of the last century. A fundamental change in values and conceptions has led to a gradual shift of focus from status to contract. The law concerning the consequences of marriage and divorce is characterised by a general withdrawal of the state, and the primary focus is on the private autonomy of the spouses. Therefore, the marriage today is conceptualised less as a status and more like a contractual relationship between spouses.⁵

In the light of these developments, which have led us to the shift of paradigm in marriage concept and, further, also in matrimonial property law, the question arises of whether the status of a spouse conferred by a competent authority could (at least as regards the matters of proprietary rights and duties) be totally replaced by the mutual agreement between spouses or the spouses should be at least promoted to regulating their proprietary relations themselves according to their own will.

2. Recent developments in Estonia

In Estonia, radical legal changes have taken place in the last 15 years concerning the right of the spouses to regulate the proprietary relationship by means of a contract. According to the Marriage and Family Code of the Estonian SSR⁶ (hereinafter ‘MFC’), spouses were not allowed to conclude a contract in order to regulate the proprietary relations between them and the mandatory rules of the matrimonial property regime applied for all in a spousal relationship in Soviet times. The freedom of contract of spouses was not recognised in relation to these matters. When one bears in mind that in a totalitarian society there is always very little space for private autonomy, it is clear that the proprietary consequences of a marriage were at that time the business of the state and not of the spouses.

After the regaining of independence, as Estonia recognised again the ideas of the liberal state and grounded her legal system with three pillars—freedom, justice, and law—which were laid down as such in the Constitution of the Republic of Estonia⁷, the civil law of the Republic of Estonia was drafted on the basis of the principles of the 1940 draft of the Civil Code⁸, which led to the recognition of the principle of private autonomy as a basis of civil law. Although the conceptual bases of the Family Law Act from 1994⁹ (FLA 1994), which entered into force in 1995, remained to a great extent the same as in the Marriage and Family Code of the Estonian SSR, the new Family Law Act of 1994 recognised the freedom of contract between spouses in matrimonial property relations.¹⁰ As before 1995 the spouses were not allowed to conclude a contract in order to regulate their proprietary relations differently from what is provided for in law—i.e., there was recognised only one matrimonial property regime—the Family Law Act of 1994 recognised, besides the legal matrimonial property regime, also the contractual regime. Although there were formal requirements stipulated for matrimonial property contracts and these set some limits as to substance, the freedom of contract of spouses remained rather free of limits.

In the mid-1990s, the essential reform of family law was postponed. It was held that any change in the family law affects the whole of the society emotionally and that radical reforms in that sphere should be undertaken with greater than ordinary prudence.¹¹

The same argument was brought forward as the Parliament of the Estonian Republic read the draft law. Also, social scientists were involved in the process of lawmaking. Being against change in the legal matrimonial property regime, the social scientists came up with the idea to let the spouses themselves decide which matrimonial property regime would be the most suitable for them.¹² This occasionally expressed idea was picked

⁵ For more about the question ‘From Status to Contract?’ see D. Schwab. *From Status to Contract? – Aspekte der Vertragsfreiheit im Familienrecht im Lichte seiner Reformen.* – Sonderheft der Deutschen Notar-Zeitschrift (DNotZ Sonderheft) 2001, p. 9; B. Dauner-Lieb. *Eheverträge im Spannungsfeld zwischen Privatautonomie und verfassungsrechtlicher Aufwertung der Familienarbeit.* – Forum Familienrecht 2002/5, p. 151; S. Hofer, D. Schwab, D. Henrich (Hrsg.). *From Status to Contract? Giesecking 2005.*

⁶ Eesti NSV abielu- ja perekonnakoodeks. Passed on 31.07.1969. – ENSV Teataja 1969, 31 (appendix); RT I 1992, 11, 168 (in Estonian).

⁷ Eesti Vabariigi Põhiseadus. Adopted by a referendum held on 28 June 1992. – RT 1992, 26, 349; RT I 2003, 64, 429 (in Estonian).

⁸ Eesti Vabariigi Ülemnõukogu 6. juuli 1992. a otsus Eesti Vabariigi pankrotiseaduse rakendamise kohta (Resolution of the Supreme Council of the Republic of Estonia of 6 July 1992 on the Implementation of the Bankruptcy Act of the Republic of Estonia), § 7 7). – RT 1992, 31, 404 (in Estonian). See also: P. Varul. *Eesti õigussüsteemi taastamine (Restoration of Estonia’s Legal System).* – Juridica 1999/1, pp. 2–4 (in Estonian); P. Varul. *Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia.* – Juridica International 2000 (V), pp. 104–118.

⁹ Perekonnaseadus. Passed on 12.10.1994. – RT I 1994, 75, 1326; 2005, 39, 308 (in Estonian). Some of the English language versions of the Acts of the Republic of Estonia are available at <http://www.legaltext.ee>.

¹⁰ E. Salumaa. *Abielu- ja perekonnakoodeksi uus redaktsioon tulekul (A New Version of the Marriage and Family Code on its Way).* – Juridica 1993/1, p. 14 (in Estonian).

¹¹ P. Varul. *Austatud lugeja! (Foreword).* – Juridica 1995/1 (in Estonian).

¹² See Perekonnaseaduse eelnõu sotsiaalsete mõjude analüüsi aruanne (Analysis Report on Social Influence of the Draft Family Law Act). Available at http://www.riigikogu.ee/?rep_id=577301 (in Estonian).

up by the legislator, who began to develop and expand it. As a result of that, in spring 2009 the legislator made a proposal to eliminate the then-current matrimonial property system, which consisted of the legal and contractual matrimonial property regimes. The intention was to replace the existing system with the obligation of all spouses to choose the matrimonial property regime on their own when getting married.^{*13} The intention of the legislator was to create a totally new matrimonial property system, according to which there would be no legal matrimonial property regime but several matrimonial property regimes from among which the spouses have to choose before concluding the marriage.^{*14} The same idea was written into the Draft of Acts Related to Civic Status Act.^{*15} These developments point indirectly to the fact that, from the point of view of the legislator, regulation of proprietary rights and duties between spouses should be primarily the concern of the future spouses and not so much of the state. This also refers to the idea that marriage should be mostly understood as a contractual relationship between spouses and not really as a status given by the legal order.

For now, the Estonian Parliament has adopted the new Family Law Act^{*16} (hereinafter 'FLA 2009') and the Acts Related to Civic Status Act^{*17} (hereinafter 'ARCSA'). These new legal acts entered into force on 1 July 2010. Notwithstanding the previously mentioned ideas about abolishing the legal matrimonial regime in Estonia fully and introducing the obligation of all spouses to choose a matrimonial property regime, the interpretation of the paragraphs of the new Family Law Act and of the Acts Related to Civic Status Act leads to the conclusion that the system of matrimonial property remains still fundamentally the same—there will be both the legal and the contractual matrimonial property regime available for spouses.^{*18} As regards the contractual property regime, the general idea of the new Family Law Act is to restrict the freedom of contract between spouses and to set clear rules concerning the substance of matrimonial property contracts. It is held that the Family Law Act, from 1994, allows the spouses too wide a freedom of contract. Therefore, the quite unlimited freedom of contract of spouses was to be replaced by the right (but not the obligation) of spouses to choose from among three matrimonial property regimes stipulated by law.^{*19}

As a conclusion, Estonian family law has undergone a radical change in the last 20 years—legally ignored freedom of contract between spouses in relation to matrimonial property matters in Soviet times has been replaced with relatively unlimited possibilities for spouses to regulate their proprietary relations differently from what is provided for by law, with this change coming about after the restoration of the Republic of Estonia. Now the new Family Law Act seeks to find the balance between the previously applied regulations. Hence, the legal matrimonial property regime is not replaced by the unconditional obligation to conclude a matrimonial property contract, but the spouses are encouraged to take responsibility for the proprietary relations with each other and strongly recommended to regulate their proprietary relations according to their own will—i.e., to choose the matrimonial property regime appropriate for them.

3. The intention of the spouses as a basic principle for matrimonial property law?

It is a well-known fact that all matrimonial property regimes stipulated in law have their advantages and disadvantages.^{*20} Each matrimonial property regime has its own aim and own purpose for covering the needs of a specific type of family and family life. No one legal matrimonial property regime is perfectly suited to all of the couples living under the same jurisdiction, because the factual relationship between the spouses and the needs of the spouses are not the same. Therefore, it is useful for the spouses to have the possibility of shaping their proprietary relationship according to their needs and interests.

In order to enable spouses to do that, the legal order has to leave the task of regulating the proprietary relations between spouses to the married couple. If the state is going to waive its competence to regulate the proprietary relations between spouses, it should do this to the benefit of the spouses. As marriage is, at least in principle,

¹³ Perekonnaseaduse eelnõu ja seletuskiri 20.05.2009. a redaktsioonis 55 SE (Draft Family Law Act and Explanatory Letter in the wording of 20.05.2009). Available at <http://www.riigikogu.ee> (in Estonian).

¹⁴ These ideas were expressed in the Parliament of Estonian Republic on 25.03.2009, see the shorthand note of the second reading of the draft law in Parliament on 29.03.2009. Available at <http://www.riigikogu.ee> (in Estonian).

¹⁵ Perekonnaseaduse eelnõu ja seletuskiri 25.03.2009. a redaktsioonis (Draft of Acts Related to Civic Status Act and Explanatory Memorandum in the wording of 25.03.2009); shorthand note of the second reading of the draft law in Parliament on 29.03.2009. Available at <http://www.riigikogu.ee> (in Estonian).

¹⁶ Perekonnaseadus. Passed on 18.11.2009. – RT I 2009, 60, 395 (in Estonian).

¹⁷ Perekonnaseisu toimingute seadus. Passed on 20.05.2009. – RT I 2009, 30, 177 (in Estonian).

¹⁸ See FLA § 24 (2) and ARCSA § 37 (4).

¹⁹ Perekonnaseaduse eelnõu ja seletuskiri 28.05.2007. a redaktsioonis 55 SE (Draft Family Law Act and Explanatory Letter in the wording of 28.05.2007). Available at <http://www.riigikogu.ee> (in Estonian).

²⁰ For more about the types of matrimonial property regimes, see M. Antokolskaia (Note 2), pp. 455–484.

based on the equal partnership of the spouses, the spouses are supposed to be able to regulate the proprietary rights and duties in relations to each other by mutual consent. Thus, granting them the task of regulating their proprietary relations according to their own will and on their own responsibility could lead to the regulation that is most in accordance with the factual relationship and needs of the spouses. As far as the legal order recognises the principle of private autonomy, it would be compatible with the key principles of private law.

In every European state, private law as a whole is based on the principle of private autonomy, which gives the individual the possibility of shaping the legally binding private relationships. According to the principle of private autonomy and of freedom of contract, individuals are entitled to shape their private relationships according to their own will on their own responsibility.^{*21} Also, § 19 (1) of the Constitution of the Republic of Estonia stipulates that everyone has the right to free self-actualisation, which, above all, includes the freedom to do something or not, as well as the freedom to enter into an autonomous private relationship or not.^{*22}

Accordingly, almost every European legal order also recognises the possibility for spouses to enter into a contract with each other in order to determine their proprietary rights and duties between themselves, but the boundaries of the freedom of contract are rather different, mostly subject to court review.^{*23}

The right of the spouses to regulate their proprietary relations on their own is based on the freedom, self-determination, and autonomy of individuals, as well as recognition of gender equality, which has historically allowed women to take part in legal transactions on their own. There has been recommendation that all European states recognise the right of spouses to regulate at any time the financial consequences of the dissolution of their marriage by agreement and that those states encourage the courts to take into account the agreement of the spouses, as long as the overall result of the agreement seems just and reasonable.^{*24} However, there is no comprehensive suggestion of recognising the autonomously created proprietary relations between spouses in any case and in all matters between spouses. Nevertheless, self-determination is an important part of matrimonial property law, though the extent of the autonomy of spouses varies enormously from state to state.

In conclusion, one can state in general that, regardless of the exact extent of the private autonomy in matrimonial property relations, there are broadly two types of regulations in Europe concerning the contractual property relations between spouses.^{*25} Firstly, the spouses may be given a right to stipulate mutual proprietary rights and obligations different from those provided for in the law—i.e., to modify the legal marital property regime, or to waive the legal marital property regime completely and stipulate their own rights and duties by mutual consent. Secondly, the spouses may be granted the right to choose between the different matrimonial regimes stipulated by law and in addition may have the right to modify the chosen matrimonial regime as far as said modification is in accordance with the aim of the law.

In analysis of the role of private autonomy in proprietary relations between spouses in Estonia, it has to be pointed out that, in comparison to other European legislation, the spouses here have been left nearly unlimited possibilities to shape their proprietary relations according to their own will until the New Family Law Act entered into force. Thus it is that private autonomy between spouses has been largely recognised.

As is mentioned above, the aim of the new Family Law Act of Estonia is also to promote the spouses taking responsibility for the proprietary relations with each other. Therefore, it is strongly recommended to regulate proprietary relations between spouses according to the self-determination of spouses. In order to facilitate the autonomous creation of proprietary relations between spouses, in the new Family Law Act there are stipulated three different matrimonial property regimes, between which the spouses have to choose.

Thus, on one hand in Estonia the legislator imposes on the spouses the responsibility for the matrimonial property relations—i.e., makes autonomous creation of proprietary relations between spouses quasi-compulsory—which

²¹ For more about the principle of private autonomy see, e.g., W. Flume. *Allgemeiner Teil des Bürgerlichen Rechts*. Bd. 2. *Das Rechtsgeschäft*. 4. Aufl. Berlin, Heidelberg, New York, London, Paris, Tokyo, Hong Kong, Barcelona, Budapest 1992, pp. 1–2, 10–12; K. Larenz, M. Wolf. *Allgemeiner Teil des Bürgerlichen Rechts*. München 2004, pp. 393–394. See also: Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition). Tallinn 2002, p. 227 (in Estonian); Eesti Vabariigi Põhiseaduse Ekspertiisikomisjoni lõpparuanne. Põhiseaduse 2. peatükk „Põhiõigused, vabadused ja kohustused“ (järg) (Final report of the committee for expert analysis of the Constitution of the Republic of Estonia. Chapter 2 of the Constitution ‘Fundamental Rights, Freedoms and Obligations’ (continuation). Available at <http://www.just.ee/10725> (in Estonian).

²² For more about the aim of this subsection, see Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 2., täiendatud trükk (The Constitution of the Republic of Estonia. Commented edition. Second, amended edition). Tallinn 2008, pp. 196–201 (in Estonian); R. Maruste. *Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse* (Constitutionalism and the Protection of Fundamental Rights and Freedoms). Tallinn 2004, p. 347 (in Estonian); Eesti Vabariigi Põhiseaduse Ekspertiisikomisjoni lõpparuanne (Final report of the committee for expert analysis of the Constitution of the Republic of Estonia). Available at <http://www.just.ee/10716> (in Estonian).

²³ For more see, e.g., *European Family Law in Action*. Vol IV: Property Relations between Spouses (Note 3), pp. 1189–1217; I. Schwenzer. *Model Family Code*. From a global perspective. Intersentia 2006, pp. 82–83; J. Gernhuber, D. Coester-Waltjen. *Familienrecht*. 5. neubearb. Aufl., C. H. Beck 2006, pp. 138–142.

²⁴ See *Model Family Code*, Art. 1:38, 1:39; I. Schwenzer. *Model Family Code*. From a global perspective. Intersentia 2006, pp. 82–85.

²⁵ The same distinction has been also made by the Commission on the European Family Law, see *European Family Law in Action*. Vol IV: Property Relations between Spouses (Note 3), pp. 1189–1217.

is a rather unusual solution in the context of European legal orders. On the other hand, at least in comparison to the regulation of the Family Law Act from 1994, the first type of regulation mentioned above has been replaced with the second; i.e., the freedom of contract has been more restricted in its substance than it was formerly, but, when compared to that enshrined in other European legislation, the freedom of contract is still fairly extensive.

4. The obligation of spouses to determine the proprietary relations between themselves

Whilst spouses have the right, there is generally no obligation to exercise it. If they do not regulate proprietary relations on their own, the legal matrimonial property regime—i.e., the law enacted by the state—will apply. Normally, it is the task of the state to guarantee the protection of the proprietary rights and interests of spouses, while the spouses have only the right to regulate the proprietary relations, if they want to, and no obligation to realise the granted right.

From the legal point of view, the right and/or the duty of spouses to enter into a contract with each other is at the first stage an issue of state powers and human rights and freedoms, which are stipulated in the Constitution of the Republic of Estonia. According to § 26 of the Constitution, everyone has the right to the inviolability of family life. State agencies, local governments, and their officials shall not interfere with family life, except in the cases foreseen in the Constitution. It stipulates a negative obligation of the state—i.e., a duty **not** to act—of not interfering with family life unless doing so is otherwise allowed. Concerning family relations, there is also another relevant paragraph. According to § 27 of the Constitution, the family, being fundamental to the preservation and growth of the nation and as the basis of society, shall be protected by the state. This imposes on the state a positive obligation—a duty to act—of taking action in order to protect the spouses. Among other things, it means that the state is to enact the laws that guarantee proper protection for the spouses.^{*26}

Therefore, if the compulsory choice of matrimonial property regime gives the spouses the required protection, the delegation of the powers to the spouses would be in accordance with the above-mentioned paragraphs of the Constitution.

The delegation of regulation powers to the spouses might take place in different ways. Firstly, the state could refuse to regulate the proprietary relations between spouses and leave it as a whole to the competence of the spouses. In this case, there would be no protection for the so-called weaker or more vulnerable spouse (who need not always be a woman) and the circumstances would not be compatible with Constitutional values, especially with the principle of the social state. It would be too liberal (an) approach, which could, metaphorically speaking, be described in the ironical words of Roger Garaudy as a totally free action of totally free foxes in a totally free hen-house among totally free hens.^{*27} This approach would not be acceptable in the light of the values of today.

The second option, as is found in the case of Estonia's new Family Law Act, is that the state will not impose one legal matrimonial property regime on all spouses but make it possible and compulsory for the spouses to choose the matrimonial property regime that seems to be compatible with the real relationship and factual needs of the spouses in the best way. In this case, the state has to enact several matrimonial property regimes (e.g., community of property, limited community ownership; deferred community ownership; separated ownership, etc.). Here, the state takes an action to protect the spouses but also imposes on the spouses the duty to protect themselves on their own. At the Constitutional level, the question of the balance between the two Constitutional values—freedom and justice—arises. Nevertheless, from the standpoint of the Constitutional values, it would be possible to leave the task to spouses, if there is a balance between these values.

But even if so-called mandatory freedom to choose from between different regulations concerning proprietary rights and duties seems to be in accordance with the Constitutional values, one must also examine the willingness and ability of the spouses to determine the proprietary rights and duties in marriage. As many sets of statistics show, today spouses are not eager to conclude contracts to regulate matrimonial property relations differently from what is provided by law.^{*28} On the basis of this, one may assume that the spouses do not want to regulate the matrimonial property relationship on their own or they are not able to take responsibility. Therefore, it would be inappropriate to make the choice of matrimonial property regime compulsory for the spouses.

Furthermore, introduction of this kind of new matrimonial property system may also be seen as a refusal of the state to take responsibility for guaranteeing an equal and fair proprietary relationship between spouses. There

²⁶ For more, see Eesti Vabariigi põhiseadus: kommenteeritud väljaanne (Note 21), pp. 226–250; Eesti Vabariigi Põhiseaduse Ekspertiisikomisjoni lõpuaruanne (Note 22).

²⁷ U. Wesel. *Geschichte des Rechts: Von den Frühformen bis zum Vertrag von Maastricht*. München 1997, p. 446.

²⁸ Since 1995 there has been registered only 4095 matrimonial property contracts in Estonia. Statistics originates from the Estonian Ministry of Justice and shows the figures on 1.01.2009.

are several grounds for believing that without the state's patronage, many people would be left without the most elementary rights and claims against their spouse, which may lead to an unfair and impaired relationship.

Firstly, at least theoretically, the spouses can be seen as equal partners while in reality this is not always the case. But as regards freedom of contract, it has to be pointed out that, because a contract is to be concluded between at least two persons, the parties have to come to an agreement; i.e., here there has to be a shared intention of both parties. This leads to restricted private autonomy as far as one party is not allowed to shape the legally binding relationship alone. Further, creation of a two-sided relationship always encompasses also the risk of foreign determination—one of the parties may be hindered such that the relationship is not shaped according to his or her self-determination and for one or another reason has to accept a foreign determination.^{*29} In the case of obligatory choice of matrimonial property regime, this would lead to a situation wherein only one spouse actually determines the rules according to his or her will and therefore the interests of the other spouse are not protected.

Secondly, there is also to be taken into account the fact that marriage is expected to be a long-term relationship or at least it takes time before it comes to an end. In the course of the marriage, the actual relationship and the needs of the spouses usually change. So it is that the choice of today may be out of date tomorrow. In view of the fact that the spouses are allowed to change the choice of matrimonial property law in general only by mutual agreement and only in exceptional cases claim for ending of the matrimonial property regime in court^{*30}, a compulsory choice of matrimonial property regime is more likely to turn out to be improper for a couple and there are not enough remedies to eliminate the unfair choice. This leads to the conclusion that, if it is to fulfil its duties, the state is not allowed to ignore the need to regulate the proprietary relationship between spouses and has to take steps to afford the spouses proper protection. If the legislator would not stipulate the mandatory matrimonial property regime and would make it obligatory for the spouses to regulate their proprietary relations, there would be urgent need for effective mechanisms of control over the contracts, to guarantee protection for the spouses (e.g., judicial review).^{*31}

Thirdly, the majority of spouses do not have enough knowledge to make right and proper decisions while getting married. Although there is stipulated an obligation for the competent authority (the vital statistics officer; notary; or minister of religion of a church, congregation, or association of congregations who has been granted the right to contract marriages) to explain the essence of the various matrimonial property regimes, this would not be enough for imposing on the spouses the duty of choosing the right one.

In conclusion, on the one hand the obligatory choice of matrimonial property regime would be not compatible with the principles and values of today. Furthermore, it would most probably lead to serious practical problems.

5. Conclusions

Summed up, the principle of private autonomy enables the spouses to regulate their proprietary relations according to their own need, interests, and intention. It gives the spouses the possibility of shaping their proprietary relations as is most suitable for them. This possibility—that is, the right to shape the relationship between the spouses—would in many cases lead to that regulation that is in the greatest possible accordance with the factual relationship and needs of the spouses. Therefore, the possibility of choosing matrimonial property regime before getting married would probably avoid situations in which the spouses are not aware of the proprietary consequences of marriage.

On the other hand, compulsory choice of matrimonial property law is not acceptable as regards current values and principles. Even if the task of regulating the proprietary relations between spouses would be left for spouses, the state has the ultimate obligation to guarantee solidarity between the spouses and ensure protection for the more vulnerable spouse.

That protection may be either in the form of legislation (i.e., binding rules) or by way of jurisdiction (i.e., judicial review of the autonomous regulation of proprietary relations between spouses when needed). In any case, however, it is the state that is responsible for guaranteeing the fair substance of the contracts concluded by the spouses. This leads to the conclusion that regulating the proprietary relations between spouses is ultimately the task of the state and not of the spouses, although the state may give the spouses the right to regulate their rights and duties on their own.

Thus, by means of private autonomy, there is an opportunity to find the most appropriate solutions in some cases, but this does not hold in every case.

²⁹ See D. Medicus, S. Lorenz. *Schuldrecht I. Allgemeiner Teil*. 18. neubearb. Aufl. München: C. H. Beck 2008, p. 30.

³⁰ See FLA (2009) § 62.

³¹ For more about judicial review and inalienability of certain rights, see, e.g., S. Hofer *et al.*; D. Schwab. *Zur neuen gerichtliche Kontrolle von Eheverträgen und Scheidungsvereinbarungen*. – FS H. Holzhauser. *Recht als Erbe und Aufgabe*. Berlin 2005, pp. 410–429; D. Coester-Waltjen. *Liebe – Freiheit – gute Sitten. Grenzen autonomer Gestaltung der Ehe und ihrer Folgen in der Rechtsprechung des Bundesgerichtshofs*. 50 Jahre bundesgerichtshof. C. H. Beck 2000, pp. 985–1008.