



PÁZMÁNY *1635*
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Pázmány Law Working Papers

2020/7

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The Promises We Make... and Break

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The Promises We Make... and Break

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For better or for worse, in sickness and in health we promise to have and to hold, to be true to, love and honour each other all the days of our lives.¹ When in a legal bond, a contract for example, there are certain rights and obligations that we had agreed upon and if these duties are not fulfilled, serious legal consequences of breach are applicable. What happens when we bind ourselves for a long time, for life on principle in marriage? Surely there are legal obligations expected of the spouses, but in the long-term keeping these promises sometimes becomes so challenging that the further existence of the bond is questioned. In the case of marital break down the broken promises might be cause, and also request some sort of acknowledgement or appreciation.

The topic of this work is the Western notion of marriage, and some of the major legal families² are used for demonstration of the broader concepts. This paper firstly tackles the legal nature of the marital bond to further elaborate on how rights and obligations are special. Also there is a comparison to contracts to better draw the line as to the characteristics of spousal responsibilities. Then, divorce and its evolution is looked at – this is done throughout in a historical perspective – to comprehend the modern aim and consequences of the no-fault system, whether there are effects in family law for violation of obligations. Only to arrive to the possibility of other, non-family law redresses for infringement of marital duties and to evaluate these. Whether family law or private law should offer remedies for these cases is questionable, since fault-based divorce has become less prominent and its sanctions are withdrawn. Does this mean that personal rights and responsibilities are *lex imperfecta*, have no real legal binding force? What is the legal nature of these rights?

Why is law involved with the intimacy of marital relationship beyond formation and dissolution in the first place? Marriage is a complex legal phenomenon, therefore it is hard to strike the line between private and public. It is obviously an institution in the range of private law, regulating the most intimate choice of private life, but also concerns society's interest and therefore it is a public law institution as well. It must be examined what balance is required in the regulation taken into account the social position of the marital relationship and marriage as a private life institution. The legal rules govern spouses' interpersonal and economic relationship with each other, with other family members but also their personal and economic relationship with third parties. This makes its regulation very mixed. Unlike typical private law relationships marriage has numerous

¹ Catholic wedding vows e.g.: The order of celebrating matrimony – Roman rite

² Mainly Spanish for Continental Latin, Hungarian for continental Germanic, US for common law.

mandatory norms. At the same time, as opposed to for example friendship marriage has legal consequences, it forms a family and gives rights and duties to the parties and also to those who are in relationship with them, first and foremost the family, but society as a whole as well. The structurally reproductive relationship of marriage provides for the best interest of the next generations and its regulation gives a framework for that.

As an ultimately private institution whether or not the rights and responsibilities are met during the course of marriage remain unseen for jurisprudence. The reason for this is two-fold. On the one hand it derives from that fact that this is the most personal (legal) institution there is, so the state has to keep a respecting distance. On the other hand, it is the consequence of the nature of the relationship itself. That is the rights and obligations in a functioning relationship are the relationship itself, the giving and receiving is what the relationship is made of. While the relationship works there is no measuring ratios of how much is given. In marriage all is given by one spouse and all of the other is received by them at the same time over the course of the relationship, so temporally shifts are equalized over time. Obviously, if the contribution is not mutual or if it shifts greatly that will affect the functioning of the marriage itself.³

Only in the case of marital breakdown is law allowed to enter the relationship by the claims of financial division of marital property and of remedy for infringement and settling spouses' demands. Additionally, this sheds light on a tension between fairness in divorce, that is division of assets equally and fairness of marriage, that is unity, equal investment thereof.⁴ Obviously, the rights and responsibilities govern the relationship throughout its life not merely in the case of a breakdown. However, it would not be beneficial either for the individual or the society to directly intervene with its authority to enforce marital duties. In personal relationships voluntary compliance with law's obligations is the only way to preserve the relationship itself. That is to say, if individuals are not willing to comply with the responsibilities deriving from an intimate relationship with another person, then law may have some remedies to compensate, far less effectively to sanction – so as to discourage such behavior – however, practically no means to enforce compliance.

This is another reason why marriage is not a contract, there are no services the parties owe to each other. Now, it is inevitable to define what sort of legal relationship is marriage once we choose rights and obligations as a theme. Moreover, to tackle the issue whether marriage is a kind of contract in its secular form. There certainly are contract-like characteristics in marriage. Including

³ Carolyn J. FRANTZ – Hanoch DAGAN: Properties of Marriage. *Columbia Law Review*, vol. 104., no. 1. 2004. 103.

⁴ WARDLE 136.

formation: just as in any contract the legal bond is brought about by the mutual binding statement of the parties. However, unlike other contracts binding a marriage involves acknowledgement of the State, of the society through the compulsory presence of a registrar. Comparatively, the number of the parties and their relations to each other is very much restricted. As is the exclusivity, that one can only be party in one marriage but there is no such limitation as to the number of contracts one can be involved with. Furthermore, termination of a contract might happen by performance, mutual consent of termination, unilateral termination and parties only have to appear before court if there is a disagreement, a breach or default. While termination of marriage can only happen by either the death of the parties or dissolution by the court. This derives from the fundamental difference of the essence or subject, scope of the two legal phenomena, and that is governed by the rights and obligations of each. The aim of a contract is generally the exchange of services, however the aim of marriage is a unifying legal status for companionship and founding a family. Rights and obligations in a contract aim the performance of each of the services and are more specific than in wedlock, for in marriage most of them are unpredictable and it is a long-term commitment, an open ended one so that it is not terminated with performance.⁵ Subscribed behavior in the case of contracts is tailored and very few general rules apply.

On the other hand, in marriage the specific consequences are fewer: economic, property rights, name rights, filiation but a number of obligations are attitudes really, a general measure for behavior. This gains specificity in the everyday life. Performance is continuous and obligations have to be performed personally, they cannot be transferred or delegated. Additionally, spouses are obliged even if the other is not performing their duties.⁶ Whereas strong cooperation makes the performance of some obligations without the other's compliance, also some non-performance might qualify as self-defense against the other's breach and so it cannot be regarded as breach itself. Similarities are with the requirement of cooperation and in contracts where duty to have care, guard the relationship of trust like agency or mandate contracts and in some respects a deed of association.

To repeat the rights and responsibilities can be classified into personal and economic. In fact most of the economic rights form part of marital property regimes that I shall not deal with now in detail, but let us focus on the personal rights of spouses. Such rights include cooperation, decision making, support, fidelity and loyalty, choice of residence and marital name rights. The requirement to be faithful is understood broadly and besides sexual exclusivity it encompasses mutual trust, loyalty

⁵ Jonathan HERRING: *Relational Autonomy and Family Law*. London, Springer, 2014. 16.

⁶ María Aranzazu NOVALES ALQUEZÁR: *Las obligaciones personales del matrimonio en el derecho comparado*. Madrid, Fundación Registral, 2009. 673.

and non-betrayal, non-neglect of physical, psychological and emotional commitment.⁷ Also it is declared in modern secular marriage that the spouses are equal and their rights and responsibilities are equal.

Additionally it is important to look at what compelling force do these rights have on the normative level, that is whether spouses are free to alter the scope of spousal obligations or can agree on breach. If the division of marital rights is economic and personal than a number of jurisdictions gives some authority in economic questions to the parties, although there is a wide variety as to the degree and enforceability of such agreements.⁸ Hence, the contractualization of marriage,⁹ to which *bonos mores* serves as the limit, in general.

However, in the case of personal duties no such freedom is allowed for the spouses.¹⁰ Regulations of marriage are generally cogent and so they must not be modified. Moreover, such intent of the parties results in void restrictions and if such conditions are made before tying the knot they may result in the non-existence thereof. Since, no conditions or reservations can be made to the declaration of marriage.

On the other hand, forgiveness for breaches of marital duties is legally relevant as it aims to put the breach behind, continue together and to avoid it in the future. It is a reunifying act in a relationship and therefore law recognizes this by ceasing the possibility of remedy.

The rights and responsibilities are the same and are not onerous but mutual. The aim and therefore the subject of the marriage is the life in common, the legislature declares the minimum obligations of the spouses for its functioning. Although fulfilment of these obligations belongs to the private life of the parties and are unenforceable but are deriving from the nature of the relationship. This fact does not make rights and obligations less legal, nevertheless, family law sanctions, consequences aim the termination of marital bond, community life or common property. However, the recent case law suggests if the breach is so serious that it constitutes a violation not in the scope of family law but calls for liability on the bases of dignity would personal injury sanctions be

⁷ Pamela MENDOZA ALONSO: Daños morales por infidelidad matrimonial. Un acercamiento al derecho español. *Revista Chilena de Derecho Y Ciencia Política* Vol. 2, N° 2, 2011. 47.

⁸ Even principally anti-pre-nuptial agreement jurisdictions show change e.g.: 2010. *Radmacher v. Granatino* UKSC 42

⁹ However, in the United States of America pre-nuptial agreements are concluded in a very different manner from European style – where such agreements only settle the property regime to govern the marriage. In US agreements personal conduct might be regulated and non-compliance might have its sanctions set out in a contractual manner. Nevertheless, their enforceability in court is not successful.

¹⁰ An exception might be covenant marriage in a few states of the USA: spouses agree in advance to enter a marriage having shared all information before getting married, have participated in a preparatory course and pledge to do everything possible, counselling etc. to repair a broken relationship and where divorce is only available on limited grounds. For more on this see: John WITTE JR. – Eliza ELLISON (ed.): *Covenant Marriage in Comparative Perspective*. Cambridge, Wm. B. Eerdmans, 2005., Katherine SHAW SPAHT: *Covenant Marriage Seven Years Later: Its as Yet Unfulfilled Promise*. *Louisiana Law Review*, vol. 65., no. 2. 2005., Steven L. NOCK – Laura Ann SANCHEZ – James D. WRIGHT: *Covenant marriage – A movement to reclaim tradition in America*. New Brunswick, New Jersey, London, Rutgers University Press, 2008.

appropriate. Otherwise with abolishing the fault-based divorce some claims are left without response, this is rooted in the history of the institution.

In the first place, we need to talk about the history of marriage and the evolution of divorce even when the topic is rights and responsibilities. Since, marriage has undergone probably more changes than any other private law institutions in the last two centuries: secularization, constitutionalization, contractualization, individualization mark this transformation. When marriage became a secular law institution many of its values have gradually become questioned. Slowly but surely criminal law's protection has been fading. Moreover, secular marriage is no longer indissoluble¹¹ – of course in some of the protestant legislations a form of dissolution had been made possible before. This led to a secular regulation where marriage breakdown was tied to enumerated faults, this system is referred to as fault-based divorce, where untying the bond was only possible if the plaintiff showed that the defendant had breached a spousal obligation. That derive from the fact that in continental legal systems the rights and responsibilities of spouses had been regulated. In contrast common law has no explicit list of duties of spouses,¹² still fault-based divorce played its role. Consequently, a certain family law liability was available for the wronged party. Naturally this meant lengthy trials with juicy details of both spouses wrongdoings or turning the court room into theatre where parties would sometimes play their roles of previously agreed faults just to break away from each other in divorce.¹³

However, with the social and moral changes of time this system had been losing its persuasive force and led to a non-fault divorce system. Where for granting a divorce only the breakdown of the marriage has to be shown and can be initiated unilaterally. There are a number of unexpected consequences that derived from this legislative trend, among them possible breach of duty without remedies.¹⁴

One step further is divorce on demand, in which case except for one party's will to divorce nothing has to be proven, not even irreversible breakdown of marriage.

Secondly, let us look at the available family law consequences. The effect of some breaches is that they may point towards the partner's inability to have custody over their children, however this

¹¹ There were exceptions Ireland and Malta among the last countries in the Western legal culture to introduce divorce in 1996 and 2011 respectively.

¹² Mary Ann GLENDON: *The Transformation of Family Law: State, law and family in the United States and Western Europe* Chicago, University of Chicago Press, 1989. 85.

¹³ Marie SUMMERLIN HAMM: Opportuning virtue: the binding ties of covenant marriage examined. *Regent University Law Review* 1999 (Spring) vol. 12. 73, 75.

¹⁴ E.g.: Lynn D. WARDLE: No-Fault Divorce and the Divorce Conundrum. *BYU Law Review* 1991 vol. issue 1. 79-142., Peter NASH SWISHER: Marriage and Some Troubling Issues with No-Fault Divorce. *Regent University Law Review* 2005 vol. 17. 243-259.

cannot be considered a sanction for noncompliance. Children simply cannot be subject to marital dispute over failing to fulfill obligations, or at least should not be.

Another consequence might be whether spousal alimony will be granted. This might depend on the spouse's compliance with matrimonial obligations or rather the fact whether their non-compliance led to the breakdown. Also, equality and mutuality is significant here as only a party who has complied with the obligations can refer to the other's infringement. This pledge of loyalty is so strong in matrimony that even binds ex-spouses in case of alimony claims. However, the only direct consequence of infringement of marital obligations is that it may yield in divorce. Some jurisdictions have a divorce system, where fault might play a role, even though unilateral and no-fault divorce is also available.¹⁵

Naturally, the role of divorce has to be briefly addressed here. If fault based and no-fault divorce is the two ends of the spectrum divorce systems might be classified in between as mixed or fault-blind, fault-regarding and fault-driven.¹⁶ Obviously, how weighty the state's interest is in preserving marriages is a debated question, the aim of modern divorce is shifting towards a tool for parties for their own, individualistic fulfilment, to go on with their lives separately, therefore divorce should only address the needs of caretakers and their children and the division of assets.¹⁷ If so and no-fault divorce prevails the marital wrongs must be addressed otherwise the system is not solely no-fault, but "no-responsibility"¹⁸ as well. The urge for some sort of compensation or evaluation of marital wrongs seems to survive even in 21st century marriage.

Now, what happens if one party is not complying with their legal obligations in a marriage? For example makes decisions about the family, or themselves without discussing or regardless of their spouse; or probably fails to support their spouse; or behaves aggressively, abusively or has a substance addiction and does not deal with it; or cheats on their spouse, or are infinitely selfish etc. All of these if not dealt with in the relationship may lead to breakdown and result in infringement of marital obligations. Obviously, both parties are responsible for the marriage however if both or one party is unwilling or unable to work on the problems of their life together and their human weaknesses this over time results in such unbalance in their equal responsibilities that might make the relationship inoperable. Furthermore, if such infringements cause harm to the other party, are

¹⁵ E.g.: France, England, Wales, Latvia, Lithuania. See: Masha ANTOKOLSKAIA: Divorce law in a European perspective. In Jens M. SCHERPE (ed.): *European Family Law volume III*. Cheltenham, Edward Elgar Publishing, 2016. 69., a Number of states in the US as well Barbara Bennett WOODHOUSE with comments by Katherine T. BARTLETT: Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era. *Georgetown Law Journal*. vol. 82. 1994. 2532.

¹⁶ WOODHOUSE 2532-2533.

¹⁷ LAUFER-UCHELES 232.

¹⁸ GLENDON 189.

they responsible at all for their behavior, is fault relevant at all, should some sort of sanction or reparation be provided?

There are roughly speaking, two trends for claiming compensation. One suggests that this is to be done within family law, with family law sanctions – as we have seen above –, the other prefers personal injury compensation for such claims. Much of the discussion surrounding the first option argues that current skyrocketing divorce rates are the consequence of no-fault and unilateral divorce law. On the other hand, some form of non-contractual liability is emerging in cases of breach of marital obligations that cause damage or non-material, moral damage however this is restricted to extreme cases.¹⁹ The merit of this line of argument comes from the unity of private law, therefore if such compensation is available in personal injury claim cases it should be available in relation to spouses, if all other requisites are met.

It has been argued that marriage is not a contract, law of non-contractual liability²⁰ provides an appropriately flexible realm for compensation an intentional or negligent breach of duty of care.

Major criticism of spousal liability include transferring the acrimony to a civil procedure through creating an even more intrusive litigation, but however intrusive it may be it ultimately ignores the complexity of familial relationships that are actually too intimate for objective judgment and the whole process is way too expansive to really balance any injustice no-fault divorce has caused.²¹

A number of jurisdictions has been on the way of discovering personal injury claims for spousal wrongdoing. Nevertheless, a mere breach of marital obligations is usually not enough, the plaintiff must bring a case about an extreme kind of breach, that has consequences that are not everyday occurrences.²² Some of these claims include physical abuse, extreme psychological abuse²³ and concealment of paternity, though these cases are seldom brought before the court and even more scarcely won.²⁴ The reason why only extreme dignitary harms are to be awarded with non-material damages is that unlike physical abuse, that is irrespectively of the relationship between the plaintiff

¹⁹ Pamela LAUFER-UKELES: Reconstructing Fault: The Case for Spousal Torts. *University of Cincinnati Law Review*, Vol. 79, 2010.

²⁰ The general notion of non-contractual liability is used in this paper to refer to law of delicts and tors somewhat interchangeably independent of whether continental or common law systems are at hand.

²¹ LAUFER-UKELES 205.

²² E.g.: Spanish courts: STS 26 de noviembre de 1985 (RJ 1985\5901), SAP de Valencia 2 de noviembre 2004 (AC 2004\1994), JUR 2008\222445, SAP de Valencia de 5 de septiembre de 2007 (JUR 2007\340366), SAP de Barcelona de 16 de enero de 2007 (JUR 2007\323682), SAP de Cádiz de 3 de abril de 2008 (JUR 2008\234675), US courts: Koepke v. Koepke, 556 N.E.2d 1198 (Ohio Ct. App. 1989), though overruled by, 551 N.E.2d 1304 (Ohio 1990), Behringer v. Behringer, 884 S.W.2d 839 (Tex. App. 1994), Ward v. Ward, 583 A.2d 577, 581 (Vt. 1990), Hakkila v. Hakkila, 812 P.2d 1320 (N.M. Ct. App. 1991), Hungarian Supreme Court: Kúria Pvf.21819/2011/6., Kúria Pvf.21171/2009/2.

²³ This is intentional infliction of emotional distress in US jurisprudence an act of extreme, outrageous measure that caused emotional pain.

²⁴ LAUFER-UKELES 244.

and the defendant is outrageous and so is rape even between spouses or otherwise, but not every family dispute mounts to become a claim as quarrelling happens even in the best of families. However, if the psychological abuse is systematically cruel it could be evaluated as domestic violence.²⁵

Much the same way adultery in itself does not seem to reach this level of outrageousness, but that does not mean fidelity is not a marital duty. Criminal law and later family law has lost its sanctions towards infidelity, but fidelity seems to insist on remaining an obligation. Although, generally only cases where a spouse has kept the true paternity of her child a secret and it has caused great distress for the husband to learn that he is indeed not a father, are successful claims. There is dispute over whether this the concealment of origin needs to be intentional or a reckless behavior would also qualify as harm. Now, this shows how a jurisdiction looks at the obligation of fidelity, being reckless about the paternity means that the spouse knows that there is a chance the husband is not the father of the child, which may only happen if she committed adultery. Even if such a claim may only be awarded damages if there is a resulting child the root of the dignitary harm is infidelity, not knowledge of who the father is.

Whether the redress is material or non-material damages depends on the harm caused, but generally speaking emotional pain is more relevant in cases of dignitary claims, simply because they are easier to prove or do not need to be proved, once the outrageousness of the act has been established. However, since reparations are paid if negligent or intentional damages are done related to property management between spouses according to non-contractual liability, if the misconduct is related to personal obligations the same rules would apply. Exculpation may be extremely difficult in these cases even if they are regarded as non-contractual liability. The defendant would have to show that they did as it was generally expected in a given situation. Now, if there is a breach of marital duty at the root of the harm caused, it is unlikely to prove that fulfilling that duty was not generally required.

Dignitary harms are not enumerated claims usually, a number of personality rights derive from human dignity but it is an open-ended equation, not to mention that the listed specific rights were elaborated by jurisprudence. As for the costs of this sort of litigation there is no difference whether the plaintiff and the defendant were married or not, although if the compensation was part of the divorce litigation it would certainly have financial advantages, this does not seem possible without bringing fault-based divorce back which is opposed generally.

²⁵ Idem. 243.

This analysis argues that rights and obligations in marriage are indeed legal in nature and therefore jurisprudence looks for ways to appreciate breach of them. The remains of fault in divorce may target the wrongdoing party in limited instances, but also may affect the children. Ultimately, fault is slowly leaving family law but trying to find another realm. If marital wrongs offend the dignity of a spouse, there is little reason to justify why a similar behavior between others could mount to damages but not between spouses.