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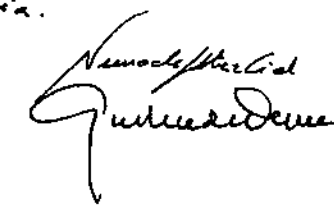

PORTUGAL

FAMILY LAW IN PORTUGAL

Guilherme de Oliveira[*] *and Nuno de Salter Cid*[**]

I GENERAL OUTLINES

In Portugal, social, political and legislative discourse recognise the Family as a "fundamental element of society".[1] This expression – used in the Universal Declaration of Human Rights and constantly repeated, with minor variations, in the numerous international texts relating to the family which followed the Declaration, and in the Constitutions of various countries – brings out the current awareness of its special importance to the human condition, and consequent need of suitable protection by the State, in relation to third parties and even to abusers among its own members.

In Portuguese law, several legal texts refer to the Family, either as a social group worthy of protection in itself – because its interests, to some extent, transcend the purely individual interests of its members – either to regulate the constitution, content and effects of family relationships, or to regulate some

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1 Concerning social discourse, see Nicole Malpas and Pierre-Yves Lambert, *Les européens et la famille. Eurobaromètre*, Brussels, (1993), at 82, where it is shown that the family is regarded as the most important factor in life by 99% of the Portuguese questioned on the matter; on the political level, see Isabel Dias, "Família e Discurso Político", *Sociologia*, Vol. IV, (1994), at 97-171, where the discourse of the Portuguese State, of the principal political parties in Parliament and of the various constitutional governments from 1976 to 1993 is analysed; in the legislative field, see, in particular, the text of articles 67 and 68 of the Constitution of the Portuguese Republic (C.R.P.).

A. Bainham (ed.), *The International Survey of Family Law 1996*, 345-361.

aspects of relations that, although not having directly a family nature, have an actual or potential connection with family relationships.

At the constitutional level, one must emphasise the principles set out in articles 36, 67, 68 and 69 of the Constitution of the Portuguese Republic (C.R.P.).[2]

According to article 67, n. 1: "The family, being a fundamental element of society, has the right to the protection of the society and of the State and to all the conditions which allow the personal fulfilment of its members"[3], and according to article 68, which proclaims motherhood and fatherhood to be "of special social value", fathers and mothers have the right to equal protection "in the accomplishment of their irreplaceable role towards to their children". Children are entitled to the same protection, namely against the abuse of family authority (article 69).

The principles set out in article 36 are also highly relevant: 1. Every citizen has the right to constitute a family and to contract marriage in conditions of full equality; 2. The requirements and effects of marriage and of its dissolution, by death or divorce, are regulated by (civil) law, regardless of its form (Roman Catholic or civil marriage); 3. Spouses have equal rights and duties in relation to civil and political capacity and regarding the upbringing and education of their children; 4. Children born out of wedlock cannot be discriminated against on that ground; 5. Fathers have the right and duty to educate and raise their children; 6. Children must not be separated from their parents except on the ground of their failure in accomplishing their fundamental obligations to them and only by means of a judicial decision; 7. Adoption is regulated and protected by law.

2 The original version of the current C.R.P dates from 1976 and was revised in 1982, 1989 and 1992, but this last revision did not affect the quoted articles. In regard to the mentioned constitutional principles, see Pereira Coelho, *Curso de Direito da Família*, Coimbra, (1986), at 63 ff., and Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa, Anotada*, Coimbra, (1993), at 219 ff. e 350 ff.

3 Article 67, 2, states the main obligations of the State "for the protection of the family".

At the level of ordinary legislation, apart from references to other legal texts and rules on the matter[4], one should underline: in the Civil Code (C.C.)[5], articles 1576 to 2020; in the Civil Proceedings Code (C.P.C.)[6], articles 28-A, 618, n. 1, 822, f), 823, n. 3, 825, 864, n. 1-a), and 3, 864-B, 912, 1404 to 1408, 1412 to 1424 and 1442 to 1446; in the Civil Registration Code (C.R.Civil)[7], articles 96 to 191 and 245 to 284; in the Penal Code (C.P.)[8], articles 152, 172 ff., 177 and 247 to 250; and in what is commonly known as Minors Tutelary Organisation (O.T.M.)[9], especially articles 146 ff..

It is from this still long list, that we will try to point out the solutions which most clearly show the present normative framework of family relationships.

The Constitutional proclamation, in 1976, of the principles of equality between spouses and between children born in and outside wedlock, imposed the introduction of profound changes in Portuguese family law, where opposite principles had previously ruled. Regarding the Civil Code, which contains the main normative core on the matter, those changes were introduced by Law Decree 496/77 of November 25, 1977. Taking this opportunity, it went further than the Constitutional imperative required and, as far as possible, it tried to bring the Code into line with the philosophy of the new Fundamental Law and the spirit of the revisions already adopted in other European legal systems.[10]

4 Namely in the fields of Rent legislation (residential urban housing, in particular) and of Fiscal, Labour and Social Security legislation.

5 Approved by Law Decree (D.L.) 47344, of November 25, 1966, and subjected to several amendments which are relevant the subject of this article, made by D.L.: 496/77, of November 25, 1977 (particularly relevant); 185/93, of May 22, 1993; 227/94, of September 8, 1994; 163/95, of July 13, 1995; 329-A/95, of December 12, 1995 (see only article 4); and 35/97, of January 31, 1997; and by Law 84/95, of August 31, 1995.

6 Approved by D.L. 44129, of December 28, 1961, and then amended by various legal texts – of which D.L.: 47690, of May 11, 1967; 261/75, of May 17, 1975; 605/76, of July 24, 1976; 368/77, of September 3, 1977; 513-X/79, of December 27, 1979; 207/80, of July 1, 1980, deserve special attention – this Code was recently and substantially revised by D.L. 329-A/95, of December 12, 1995, and 180/96, of September 25, 1996.

7 Approved by D.L. 131/95, of June 6, 1995, and already amended by D.L. 36/97, of January 31, 1997.

8 Approved by D.L. 400/82, of September 23, 1982, and substantially revised by D.L. 48/95, of March 15, 1995.

9 D.L. 314/78, of October 27, 1978, currently under very extensive revision.

10 On the Reform, which is known among us as the "1977 Reform", see the enlightening preamble to the D.L. cited, particularly items 1, 2, 4 and 11 to 46, Almeno de Sá, "A revisão do Código Civil e a Constituição", *Revista de Direito e Economia*,

It was remarkable progress. And of such a kind that one could almost say that the present legal framework is, in essence, the product of the 1977 Reform, except, to some extent, as regards divorce and adoption.[11] We shall examine it in broad outline, within the limits this article imposes, paying special attention to the marital relationship and leaving aside the question of maintenance (articles 2003 to 2020).[12]

II MARRIAGE, SEPARATION AND DIVORCE

Marriage is legally defined as "the contract between two persons of opposite sex who intend to constitute a family by living in full community of life, according to the provisions (...)" of the Civil Code (see article 1577). Both Roman Catholic and civil marriages are recognised by the State and therefore they produce (civil) legal effects (articles 1587 ff.).[13] The law does not prohibit the celebration of weddings through the rites of other religious faiths, but no (civil) validity or effect is given to them; they are simply treated as *de facto* unions.

In order to contract a valid marriage, both parties must have the capacity to marry, which implies the non-existence of the impediments established by the civil law (articles 1600 ff.).

The wedding must be preceded by a preliminary process of proclamations[14], with the aim of ascertaining the parties' capacity to marry. It must be organised by the competent Civil Registry Office according to the requirements of the chosen form (kind) of marriage (articles 134 ff. of C.R. Civil). The celebration itself must also comply with the formalities (solemnities) described in the law (civil or canon, as the case may be). The validity of the marriage depends on the absence of any ground for rendering it void (article 1628) or voidable (articles 1631 ff.)[15] under the civil law, or on grounds for nullity under the canon law (article 1625), and, in general, its effectiveness depends on its registration, which is obligatory and dates back in its (civil) effect to the date of celebration, being effected by transcription of the parochial register in the case of Catholic marriages (articles 1651 ff.).

The personal effects of marriage are governed by the principles of legal equality of the spouses and of their joint right to control family life (article 1671). The law sets out the most significant duties of the spouses and binds them to their reciprocal fulfilment: respect, fidelity, cohabitation, co-operation and assistance (article 1672). The family home is the primary place where the duty of cohabitation is to be fulfilled; the spouses are to chose where it should be by mutual agreement and live there together unless serious reasons prove otherwise. In default of agreement, and on the application of either one of the spouses, the court can decide where it is to be settled or moved (article 1673).[16]

Regarding names, the law allows each spouse the right to keep his/her personal surnames adding thereto up to two of the other[17], except where he/she has kept a former spouse's surname, which is allowed in the case of widowhood, where, if it is so declared at the celebration of the new marriage, it may be retained even after the second marriage (articles 1677 and 1677-A).[18]

A foreign citizen married for over three years to a Portuguese citizen may acquire Portuguese nationality. For this purpose, it is sufficient that he/she manifests his/her intention by a declaration made during the marriage, which

3, (1977), at 425-488, and AA.VV., *Reforma do Código Civil*, Lisboa, (1981).

11 In the first case, because the changes resulting from the Reform, though quite important, both in systematic terms and in the basic plan, were relatively less significant, having been preceded by innovative legislation approved in 1975 and 1976 – we refer to the Additional Protocol to the Concordat [of 1940] signed between the Holy See and the Portuguese Republic, of February 15, 1975, and to D.L. 261/75, of May 27, 1975, 561/76, of June 17, 1976, and 605/76, of July 24, 1976 –; and in the second case, because its regime, although also largely resultant from the solutions of the Reform, was thereafter substantially revised by the above mentioned D.L. 185/93.

12 These articles, and all others mentioned below with no source indication, are from the Civil Code.

13 On this question, see the explanation given below in the text.

14 Leaving aside the cases of "emergency marriages" and of the secret marriage, regulated by Canon Law as "marriages of conscience", but the dispensation from the preliminary process does not alter the requirements or the legally established sanctions (articles 1599, 1622 ff. and 1658).

15 However, if it is proved that one or both spouses entered the marriage in good faith – unaware of or blamelessly ignorant of the defect rendering the marriage voidable, or with consent extracted by coercion – the rules of putative marriage are applicable (articles 1647 f.).

16 On this matter, see Salter Cid, *A Protecção da Casa de Morada da Família no Direito Português*, Coimbra, (1996), at 119 ff.

17 But if both wish to adopt each other's surnames without losing their own, they must do so by way of establishing a common name: a family name.

18 In the case of divorce, keeping surnames of the former spouse depends on his/her consent or on judicial authorisation; in any case, however, the one who keeps them can be judicially forbidden to do so (articles 1677-B and 1677-C of the C.C., and 1414 and 1414-A of the C.P.C.).

declaration must be registered in the Central Registry Office. The acquisition of nationality may be subject to opposition. Nevertheless, the declaration of nullity of a Catholic marriage, or the annulment of a civil one, does not affect the nationality acquired by the person who has contracted it in good faith. If a Portuguese citizen marries a foreign citizen, he/she does not thereby lose his/her Portuguese nationality, unless he/she has acquired the nationality of the spouse by the marriage and renounces Portuguese nationality.[19]

Concerning the patrimonial effects of marriage, the ruling principle is also that of equality, but, unlike the personal effects, imposed by the law, here the principle of autonomy applies, whereby those effects depend, in general, on the matrimonial property regime chosen in the prenuptial agreement (article 1698) or applicable in default of such a contract (article 1717). Generally, not only can the parties choose one of the three regimes provided in the C.C. – *community of acquests*, *general community* and *separation of assets* (articles 1721 ff.) – but also they can stipulate other patrimonial rules leading to the creation of a regime different from the ones envisaged or to one which combines their rules.[20] The default regime is *community of acquests*, whereby, in general terms, assets (things or rights, real or personal) acquired for value during the marriage become subject to community. If the regime adopted is that of *general community*, with some express exceptions imposed by law, all the assets each spouse had before getting married become part of the community along with any assets subsequently acquired, whether for value or gratuitously. And finally, if the chosen or imposed regime is *separation of assets*, each of the spouses retains the ownership and fruition of all the assets already acquired before marriage, as well as of the ones acquired during the marriage, and has, generally, the right to their free administration (management) and disposition.

Regarding the matrimonial property regime, the principle of immutability (article 1714) prevails. The only admissible changes are: the revocation of certain provisions included in the prenuptial agreement; judicially ordered simple separation of assets, or separation of persons and of assets; and other cases of separation of assets during the marriage that are envisaged by law (article 1715).[21]

Concerning the management of assets, as a rule, each of the spouses manages his/her own assets, and both of them share the management of their joint assets (article 1678).

Regarding the alienation or charging of assets, one must distinguish between disposals *mortis causa* and *inter vivos*. In relation to the former, the law allows either spouse to dispose of his/her own assets and of his/her moiety of the joint assets, within the limits of his/her quota of assets freely disposable on death (articles 1685 and 2156, ff.); as to the latter, again one must distinguish: whether personal (movable) assets (article 1682) or real (immovable) assets or commercial business assets (article 1682-A) are at stake, and special protection is imposed by law concerning the disposal of the matrimonial home, for which, on pain of voidability, the consent of both spouses – or a judicial decision that dispenses with the consent of one of them – is always required, regardless of the matrimonial property regime.[22]

Concerning the spouses' debts (articles 1690 ff.), the law provides that each of them is entitled to contract debts without the other's consent, determines for which of them both are responsible and for which only the one engaged in the transaction is, and which assets are available in either case, and, finally it refers to the eventual compensation due for any payments made.

When the patrimonial relationships between the spouses end[23], article 1689 applies. First the debts are to be settled – to third parties and/or between the spouses – and the partition of the joint assets is made.[24] Once liabilities are settled, each spouse receives his/her own assets and the moiety of the remaining common property.

19 On this matter, see Law 37/81, of September 3, 1981 (Law of the Nationality), with the amendments introduced by Law 25/94, of August 19, 1994, and see D.L. 322/82, of August 12,1982 (Regulation of Portuguese Nationality), with the amendments resulting from D.L. 253/94, of October 20, 1994, and 37/97, of January 31, 1997.

20 There are, however, some restrictions: certain matters cannot be the subject of a prenuptial agreement (article 1699, n. 1); certain rules apply whatever the matrimonial property regime (see, for example, articles 1680, 1682, n. 3, 1682-A, n. 2, and 1682-B); in one case the general community of assets regime cannot be chosen (article 1699, n. 2); and there are even cases where a separation of assets regime is imposed by law (article 1720).

21 E.g., absence (article 108) and levying of execution against one of the spouses (articles 825 of the C.P.C.).

22 On this matter, see Salter Cid, *A Protecção...*, at 155 ff.

23 Which happens in case of dissolution (by death or divorce) or of invalidation (by nullity or annulment) of the marriage and in case of separation of persons and assets (articles 1688 and 1795-A).

24 Generally, partition is made according to the matrimonial property regime, but there are exceptions to this rule (articles 1719 and 1790) and cases where the law determines that a particular asset or right should preferentially go to one or the other or to the surviving spouse (articles 1731, 2103-A and 2103-B).

There is no self-contained systematic body of rules to cover *de facto* separation, but it leads to a diversity of effects[25] when it can be regarded as a demonstration of the disruption of the community of life implied by marriage. This does not happen if the *de facto* separation is not wanted by both spouses[26], but it occurs if, despite an appearance of community of life, the spouses treat each other like strangers.[27]

The simple judicial separation of assets (articles 1767 ff.) is, of necessity, litigious, it is irrevocable and affects only property relationships; it is the proper procedure, in a marriage under a regime of community, to prevent one spouse from jeopardising the other's assets due to his/her mismanagement. Once this separation is decreed, their matrimonial regime turns into that of separation of assets, and there is a partition of the common property, out of court or by inventory, as if there had been a dissolution of the marriage.

Separation of persons and assets (article 1794 ff.) is provided for a deeper crisis in the matrimonial relationship and, having personal and patrimonial effects, though not putting an end to the relationship, alters it significantly. Such separation is basically subject to the legal framework applying to divorce, although there are certain peculiarities to be taken into account.

The law allows the spouses the possibility of applying for divorce by mutual agreement, in court or the Civil Registry Office if, in the latter case, the couple

25 Among others, we note the following: generally, it exempts the spouse who is not to blame, or not principally responsible, of the fulfilment of the duty of assistance (article 1765, n. 2); it is a ground for litigious separation of persons and assets and for divorce (articles 1779, 1780, a), 1782 and 1794) and, once proved in the appropriate proceedings, can benefit the innocent or less guilty spouse (articles 1789 and 1794); it can determine the judicial regulation of parental authority (article 1909); and it can be an obstacle to succession rights of the surviving spouse over the occupancy of the matrimonial home and of rural holdings (see, respectively, article 85, n. 1-a), of the Regime do Arrendamento Urbano, approved by D.L. 321-B/90, of October 15, 1990 (R.A.U.), article 23, n. 1, of D.L. 385/88, of October 25, 1988, and article 19, n. 2, of D.L. 394/88, of November 8, 1988).

26 Except for the case of absence, since when one of the spouses has been missing for a certain period of time without being heard of it constitutes grounds for separation of assets, and even for separation of persons and assets or for divorce (articles 108, 1781, b), and 1794), regardless of the cause.

27 Because there is a relevant *de facto* separation if the spouses, although living under the same roof, regularly treat each other as strangers, see Acórdãos of Relação do Porto (R.P.), of December 13, 1979, October 30, 1984 and December 10, 1991, all in *Boletim do Ministério da Justiça (B.M.J.)*, n. 293, at 440, n. 341, at 477, and n. 412, at 554, respectively.

does not have minor children or, if they have any, where the exercise of parental authority has already been judicially regulated[28]; it is the so called divorce by mutual consent (article 1773), which is provided for in articles 1775 ff. of the C.C., 271 ff. of the C.R.Civil, and 1419 ff. of the C.P.C. In applying, the spouses do not have to reveal the reasons for the divorce, but, besides their mutual consent, the following requirements must have been complied with: the couple must have been married for at least three years, must have agreed on the provision of maintenance for the party who needs it, on the exercise of the parental authority over minor children and on the future of the matrimonial home. And, finally, it is required that such agreements give sufficient protection to the interests of the spouses and of their children, otherwise their judicial approval must be refused and the application for divorce must be rejected.

When application for divorce is made to the court by one of the spouses against the other, this is referred to as litigious divorce (article 1773); the provisions of articles 1779 ff. C.C., and 1407 and 1408 C.P.C. then apply. Litigious divorce is based on a wrongful violation of marital duties, which, by its seriousness or repetition, compromises the prospect of community of life (article 1779), or on (prolonged) disruption of the life in common: on the grounds of six consecutive years' *de facto* separation; at least four years' absence without news of the absent spouse; or on the disturbance of the mental faculties of the other spouse for over six years if, due to its seriousness, it compromises the prospect of the life in common (articles 1781 ff.).

Divorce dissolves the marriage and its legal effects are identical to dissolution by death, excepting those provided by law (article 1788).[29] If one spouse is mainly or exclusively to blame for the divorce, this can have various effects, in particular in relation to property interests (articles 1790 ff. and 2016).

Concerning the children's future and maintenance, and the exercise of parental authority (articles 1905 and 1906), it is up to the court to make the final

28 The possibility to apply for divorce by mutual consent to the Civil Registry Office (as well as for separation of persons and assets, in the same cases) is recent (see D.L. 131/95 and 163/95, above-mentioned).

29 Among these, one should note differences in relation to, e.g.: the right to the name (articles 1677-A and 1677-B); parental authority (articles 1904 and 1905); the right to maintenance (articles 2016 and 2018); succession and property rights in general (article 2133, n. 1-a) and b), and n. 2, and 2317, d)); the future of the matrimonial home either owned by one spouse alone or by both (articles 1793 and 2103-A); and the transmission of the tenancy rights over the matrimonial home (articles 84 and 85 of the R.A.U.).

decision[30], always in accordance with the minor's interest. Custody can be granted to either parent[31], but "a very close relation" must be maintained with the non-custodial parent. The exercise of parental authority is normally a matter for the parent to whom the minor is entrusted. However, its continued joint exercise, common decisions on particular issues, or management of the minor's assets by the non-custodial parent, are all matters that parents can agree between themselves. Besides, the non-custodial parent can always monitor the minor's education and living conditions.

Finally, as to the future of the matrimonial home[32], a distinction must be made according to whether it is rented[33] (article 84 R.A.U.) or is owned by one of the spouses (or ex-spouses) individually or by both of them in common[34] (article 1793). In the first case, failing agreement, the court is to decide which of them takes over the tenancy; in the other cases, and on request of the non-owner – or joint-owner – spouse (or ex-spouse), the court can award a tenancy right to him/her.

III FILIATION

The law relating to filiation is divided under two large chapters: the first dealing with its establishment (articles 1796 to 1873) and the second – which also covers tutorship and management of assets, as means of conveying the parental authority[35] – deals with its effects (articles 1874 to 1972).

30 Parents can agree between themselves on both aspects, but always subject to judicial approval.

31 Where safety, health, moral upbringing or education are at risk, the minor can be placed in the custody of a third party or of an establishment for education or assistance. On this matter, see articles 1905, n. 2, 1907, 1918 and 1919.

32 On this matter, see Salter Cid, *A Protecção...*, at 316 ff.

33 Residential tenancy is subject to the R.A.U. rules – as is normal – where it is subject to a special regime, the relevant rules have to be respected.

34 Or, of course, when they alone are co-owners of it, or when one or both of them only have some other right to the dwelling, the use of which as a family home is the subject of the case, and the regime of which allows it to become so occupied, as happens in the case of the rights of usufruct and superficies (articles 1444 and 1534).

35 Taking account of their default nature in relation to the parental authority, and the limits of this article, we omit their description and only underline their purpose of protecting the interests of the minor.

The rights and duties emerging from filiation – or from parenthood based on it – are only taken into account when filiation has been legally established (article 1797). In this chapter, the principle that rules – almost exclusively – is that of biological truth. It is a fact that, in various cases, either maternity or paternity is legally presumed (articles 1816, n. 2, 1826, n. 1 and 1871, n. 1), but the presumption of maternity can be rebutted (1816, n. 3) and there are only certain cases where the presumption of paternity may not be rebutted (article 1838)[36]; it is also true that, as to children whose parents are related in direct line, or are siblings, once filiation is established in relation to one progenitor, this excludes the possibility of its being established in relation to the other, but this restriction only applies to its official determination (articles 1809, a), and 1886, a)).[37]

Separating – as indeed the law does – maternity from paternity, we shall briefly refer to the main rules for the establishment of each one[38]: as far as mother is concerned, filiation arises from the fact of birth, and can be established by declaration (articles 1803 ff.) or, judicially, through official verification (articles 1808 ff.) or by means of an action to establish maternity, brought by the son or daughter for this purpose (articles 1814 ff.); as to the father, if it does not result from the complex interplay of legal presumptions arising in consequence of his marriage (articles 1826 ff.), it arises by recognition: in consequence of admission of paternity or as the result of a judicial decision in an action to establish paternity (articles 1847 ff.).

A study of the effects of filiation shows the spirit of mutual respect, solidarity and participation through which the system seeks to guide this family relationship, and the concern Portuguese law has towards minors' interests.

Parents and children owe each other mutual respect, help and assistance (article 1874, n. 1) and, although children are, in principle, subject to parental authority up to their majority or emancipation, owing their parents obedience, the latter must exercise that authority in the children's interest and, accordingly,

36 This rule establishes the prohibition, except in the articles which follow it, against impugning the presumed paternity of the mother's husband in relation to a child born or conceived while the marriage subsists. The extent of this is, however, very narrow.

37 Official investigation of maternity or paternity is also inadmissible after two years have elapsed since the date of the birth (*ibid.*, par. b)).

38 For fuller explanation, see Guilherme de Oliveira, *Critério Jurídico da Paternidade*, Coimbra, (1983), particularly at 143 ff., ID., "O estabelecimento da filiação: mudança recente e perspectivas", in AA.VV., *Temas de Direito de Família*, Coimbra, (1986), at 89-110, and ID., *Estabelecimento da Filiação*, Coimbra, (1991).

watch over their safety and health, provide for their maintenance, direct their education[39], represent them and administer their assets.[40] And the law provides that, according to the children's maturity, their views on important family matters must be taken into account and their autonomy respected (articles 1878 ff.).

While the marriage subsists, the exercise of parental authority generally belongs to the parents[41], and this applies also for unmarried parents who live together as man and wife, if they have declared this intention in the course of the civil registration of their child (articles 1901, n.1, and 1911, n. 3). However, the law provides for the possibility of imposing a total or partial[42] prohibition on the exercise of such authority by one or other or by both parents (articles 1913 ff.).

IV ADOPTION

Adoption is regarded as a source of a (legal) family relationship, and the tie it creates can only be constituted by judicial decision, preceded by an inquiry whose aim is to evaluate the advisability of such an action; but the law does make provision for advance placement of the minor, with the clear purpose of providing for his immediate needs. All the emphasis here is placed on the interest of the adopted person, whose emotional and/or material needs it is intended

39 Note, however, that parents are not responsible for the costs incurred in maintaining children and related to their safety, health and education, to the extent that the children are able to pay for these from their own income, and that this income can be used by parents to meet those costs (articles 1879 and 1896).

40 However, not only are certain assets excluded from parental management, but also there is a long list of acts of a patrimonial nature which they are not allowed to perform without judicial authorisation, on pain of invalidity (articles 1888 ff. and 1892 ff.).

41 In the case of divorce, separation, declaration of nullity of marriage or annulment, the rules already summarised in relation to litigious divorce apply. For a fuller explanation, see M.C. Sottomayor, *Exercício do poder paternal relativamente à pessoa do filho após o divórcio ou a separação judicial de pessoas e bens*, Porto (1995), and ID., *Regulação do poder paternal nos casos de divórcio*, Coimbra, (1997).

42 One limited to the powers of representation and of management of the child(ren)'s assets. Otherwise, even if there is no prohibition, if it is necessary to protect the minor's property, other appropriate provisions can be judicially ordered.

to meet, although the interests of the existing children of the adopter are not to be neglected (articles 1576, 1973, 1974 and 1978).

There are two kinds of adoption: it may be either full or limited, and the latter may be converted into the former if the appropriate requirements are met (article 1977). The regime provided for full adoption shows especial precautions, since it is irrevocable[43] and leads to total integration of the adopted person (and of his descendants) into the family of the adopter, of which he will be thereafter regarded as son/daughter (articles 1976 ff.).[44] In relation to limited adoption, the requirements are less strict, given that it is revocable and does not lead to such integration, but its regime does not, for all that, lack precautions (articles 1992 ff.).

The minimum age limits required for adopting are: 25 years for full joint adoption[45], for one parent adopting a spouse's child and for limited adoption, and 30 years for full sole adoption by an unmarried adopter; the maximum age limit is 50 years, except for adoption of a spouse's child, where no age limit is imposed. As for the adopted person, he must, as a rule, be under 15 on the date of the petition to the court for adoption[46] (articles 1979 f., and 1992 ff.).[47]

The adoption process has shown some deficiencies in terms of efficacy, particularly because of its undesirable slowness and a certain failure of liaison between the departments and sectors involved. Nevertheless, the Government has recently announced the "Programme Adoption 2000", aimed at overcoming quickly the difficulties that have been found.[48]

43 The judgement ordering it can only be reviewed in truly exceptional cases and on very restricted grounds (articles 1990 f.).

44 The extinguishing of family relations between the adopted child and his natural family is subject to two important exceptions: impediments to marriage resulting from kinship remain and it is not applicable in the case of adoption of the spouse's child (article 1986).

45 In this case, it is also required that the adopters have been married for at least 4 years and that there is no separation of persons and assets or *de facto* separation.

46 There is an exception where, on that date, he is under 18 years old and has not been emancipated, provided that he/she has been placed with the adopter(s) since a time when he/she was under 15, or that he/she is the adopter's spouse's child.

47 For a fuller explanation of the legal regime of adoption in force, see Rui Sá Gomes, "O novo regime da adopção", in AA.VV., *Temas de Direito da Filiação*, Lisboa, (1994), at 63-155, and see Piries de Lima and Antunes Varela, *Código Civil Anotado*, Vol. V, Coimbra (1995), at 503-573.

48 See *Diário da República*, II Série, n. 92/77, of April 19, 1997.

V CONTROVERSIAL ISSUES

From time to time, normal and inevitable divergences emerge in legal interpretation. We selected some, among the numerous examples to which we could refer.

The Portuguese legal system has a so-called optional civil marriage (for Roman Catholics). As we have seen, two kinds of valid and effective marriage exist: via Catholic and civil weddings. And it seems that these are not merely two distinct forms of celebrating the union, but rather two distinct marriages in the legal sense. It is certain that, in either case, the preconditions and formalities required by the civil law must be observed; civil law regulates the personal and the patrimonial effects of marriage; and, not only simple judicial separation of assets and separation of persons and assets are admissible, but also divorce is allowed. And yet, according to article 1625, jurisdiction in cases of annulment of Catholic marriages and dispensation of those that have not been consummated lies exclusively with the ecclesiastical courts and authorities. And, under article 1626, n. 1, once its definitive decisions have been reported to the competent civil court (of *Relação*) they become fully effective, subject neither to revision nor confirmation (see also article 7, n. 3, C.R. Civil). In view of the constitutional principle of competence of the civil law to regulate the requirements of marriage (article 36, n. 2, C.R.P.), the constitutionality of these rules has been questioned, but the majority of the leading authorities, and judicial decisions, disagree with this point of view.[49] And the competence of civil law to regulate the (civil) effects of annulment of a Catholic marriage and the applicability of the civil legal provisions for the putative marriage (articles 1647 f.) are not questioned.

49 Defending constitutionality, which presupposes a restrictive interpretation of article 36, n. 2, of the C.R.P., see Pereira Coelho, *Curso...*, at 68 ff. e 117 ff., and Antune Varela, "Anotação" (to the Ac. S.T.J. Março.06.1980), *Revista de Legislação e de Jurisprudência* (*R.L.J.*), Ano 113, at 329 ff..; for a contrary point of view, see Gomes Canotilho and Vital Moreira, *op. cit.*, at 221. Also on this matter, see Olavo Cunha, "O Sistema matrimonial português. Algumas notas acerca da coexistência do casamento civil e do casamento católico", *Direito e Justiça*, Vol. VII, 1993, at 38-51. For judicial decisions, see, e.g., the following Ac.: Relação de Lisboa (R.L.), of October 16, 1990, *Colectânea de Jurisprudência (C.J.)*, Ano XV, Tomo 4, at 152 f.; Relação de Coimbra (R.C.), of December 15, 1992, *C.J.*, Ano XVII, Tomo 5, at 80 ff.; and Supremo Tribunal de Justiça (S.T.J.), of February 22, 1994, *B.M.J.*, n. 434, at 640 ff.

Regarding proof of biological paternity, where it is not legally presumed, judicial decisions reveal two theories: according to one, the applicant (instigating the investigation) only has to prove his/her mother had sexual relations with the defendant (person under investigation) during the legal period for conception (articles 1798 ff.); according the other, that is not enough, since it must also be proved that she had sexual relations exclusively with the defendant. The latter view prevailed in the decision of the Supreme Court of June 21,1983 .[50] This decision was based on the sensible argument that simply proving that the applicant's mother had sexual relations with the defendant was not enough to establish the necessary biological truth, but only raising its probability based on the traditional presumption of the fidelity of women. But such decision was conditioned by the conviction that, at the time, it was not possible, in Portugal, to prove the biological tie through blood tests or other scientifically recognised methods, though this proof was already admissible by law (article 1801). In the light of this decision, some, interpreting it literally, maintain that only by proving the referred exclusivity can the applicant obtain a judicial declaration of paternity from the defendant, but there are those who, on the contrary, defend a more restrictive interpretation, since the requirement to prove exclusivity is only truly justified when the proof by scientific methods was not demanded, or in case of refusal to submit to the tests, or where the results of such tests were inconclusive.[51]

Another source of controversy was the problem of the placing of the burden of proof of fault – that is, who is to allege and prove the facts or circumstances which show or sufficiently indicate fault – in litigious divorce suits based on a blameworthy breach of cohabitation, concerning the spouses' duty of living together in a common household.[52] Some considered it was for the defendant

50 See *R.L.J.*, Ano 116, at 314 ff., and favourable "Anotação" of Antunes Varela (at 317 ff.).

51 On this matter, along with the decision of the Supreme Court and the "Anotação" referred to in the previous note, see Ac. S.T.J. of February 25, 1993, *B.M.J.*, n. 424, at 696 ff., Ac. S.T.J. of May 10, 1994, *R.L.J.*, Ano 128, at 180 ff., and "Anotação" to this of Guilherme de Oliveira, at 183 ff..

52 This is justified in doctrine and judicial decisions on the basis that it is understood that the duty of consortium – living together – includes the maintenance of sexual relations between the spouses. However, as certain decisions have noted, the problem may be expressed in the same terms in relation to the breach of any matrimonial duty (on this line, see e.g. Ac. S.T.J. of March 19, 1991, *Actualidade Jurídica (A.J.)*, Ano 3, n. 17, p. 15, and Ac. R.L. of March 29, 1993, *C.J.*, Ano XVIII, Tomo 2, at 129 f.). And the question is equally pertinent in relation to litigious separation of

spouse (accused) to show his lack of fault, or that the fault was that of the petitioner (accuser), and that all the latter had to do was to show the objective elements of the alleged breach (leaving the family home), in order to raise a presumption of the defendant's fault.[53] However, the majority of the leading authorities and judicial views held that the applicant did not have the benefit of any such presumption, and that, this being one of the elements constituting grounds for divorce based on the breach in question (article 1779, n. 1), it was for the applicant to prove the other's fault .[54] The Supreme Court, in its decision n. 5/94, of January 26,1994, finally pronounced in favour of the second opinion.[55]

We must, finally, mention another problem which currently splits both leading authorities and judicial opinion in Portugal: that of the validity of a promise to partition common assets made before a divorce, in view of article 1714, by which the premarital contracts and the legally provided matrimonial property regimes are immutable, save in exceptional cases. At the first instance level and on appeal much disagreement has been seen, but the Supreme Court, although not always for the same reasons, has unanimously held that a contract for such purpose is invalid, even when made with a view to divorce. Nonetheless, this view has not been universally shared.[56]

persons and assets suits.

53 By operation of the general rule of contract law, by which the debtor bears the burden of proving that the non-performance of the obligation was not the result of his fault (article 799, n. 1). On these line, see Ac. S.T.J. of February 17, 1983, *R.L.J.*, Ano 117, at 61 ff., and Lorenço Martins, *O ónus da prova e as acções de divórcio,* Lisboa, (1991).

54 By operation of the general rule of the law of proof, whereby "whoever asserts a right bears the burden of proving the facts constituting the alleged right" (article 342, n. 1). On this line, see Pereira Coelho, "Anotação" (to the Ac. S.T.J. cited in the previous note), *Rev. cit.*, at 64 and 91 ff., and in judicial decisions, see, e.g., Ac. S.T.J. of January 10, 1991, *B.M.J.*, n. 403, at 432 ff.

55 See *Diário da República,* I Série, n. 70, of March 24, 1994.

56 On article 1714, see Pires de Lima e Antunes Varela, *op. cit.*, Vol. IV, 2.ª ed., Coimbra, (1992), at 396 ff.. On the matter under reference, see: Rita Lobo Xavier, "Contrato-promessa de partilha dos bens do casal celebrado na pendência da acção de divórcio" (Anotação to the Ac. S.T.J. de May 26, 1993), *Revista de Direito e de Estudos Sociais*, (1994), n. 1-4, at 59-73, and Guilherme de Oliveira, "Anotação" (to the Ac. R.C. de November 28, 1995), *R.L.J.*, Ano 129, at 279 ff.; and in judicial decisions, in addition to those noted, see, e.g., the following: S.T.J. of April 27, 1989, *B.M.J.*, n. 386, at 463 ff.; S.T.J. of February 2, 1993, *C.J. – Acs. S.T.J.*, Ano I, Tomo 1, at 113 ff.; R.L. of December 9, 1993, *C.J.*, Ano XVIII, Tomo 5, at 141 f.; R.P. of February 14, 1994, *C.J.*, Ano XIX, Tomo 1, at 237 ff.; and R.L. of March

VI CONCLUSIONS

It could, without exaggeration, be said that the Portuguese legislator has demonstrated his concern to respond to current thinking which acknowledges the Family as a "fundamental element of society" with the right to its protection and of the State[57], and that our Family Law, having resolved, in favour of equality, the problem of the status of spouses and of children born in and out of wedlock, and having introduced other profound changes in the legal framework of marriage, of parent-child relationships and of adoption, has reached a reasonable level of maturity. And judicial decisions, with support of leading authorities, have satisfactorily resolved the specific and inevitable divergences of opinion raised by the interpretation and application of the law to real cases. Some of them still remain, others will certainly arise, but there is no reason to fear they will not also be resolved in the same way.

Just as in other European legal systems, which have undergone similar changes a little before or after those which occurred in Portugal, we have from time to time felt the need to alter or adjust our legislation. In an attempt to satisfy this need, certain legal texts have been introduced over the past ten years, and two further important alterations are in prospect, with the aim of overcoming, or at least minimising, the deficiencies that have been found in the chapter on minors' protection.

There are, naturally, many aspects which could still be improved, either in terms of basic options, or in relation to ensuring the efficacy of the present legal system, but we think we can assert that the legislative framework in force, mainly after the introduction of the reforms recently planned, will not raise major concerns. Were we living in calmer times, and were human nature less imperfect, the road to happiness would doubtless be more accessible. The laws we have can only offer a contribution in that direction.

21, 1996, *C.J.*, Ano XXI, Tomo 2, at 89 f.

57 The main inconsistencies are to be found in the chapter on taxes and fiscal benefits. For a synthetical perspective, although not completely up-to-date, see M.S. Paumier-Bianco, *Família e Imposto. A tributação da casa de morada da família,* Coimbra, (1992), and bibliography there cited.