

Research Article

# The United States Experience on Premarital and Nuptial Agreements as a Frame of Reference for a Reform of the Peruvian Civil Code

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## Abstract

In Peru, despite the numerous reforms of family law that have modified the rules of the Civil Code or that have been given by means of laws that exist outside the walls of said Code, the legislator has preferred not to make any changes in the legal treatment of the regimes that regulate the economic relations between spouses, in spite of the change of convictions and customs in the society and, especially, without considering the spaces of greater freedom that the new generations are looking for. After 40 years of the Civil Code (1984), it is essential to rethink the rules that still exist and that respond to an outdated worldview about the way in which the new families organize their economic relations. Globalization, the permanent displacement of people to other countries, the achievements of women and the demand of the new generations to organize and plan, according to their own interests, the acquisition of assets and their distribution during and after the dissolution of marriage, demand a profound revision of the subject. The author, who has explored the U.S. experience of premarital and nuptial agreements on other occasions, persists in outlining new reasons to argue that there are principles and institutions of contract law that are compatible with family law and whose application, in his view, would not only be advisable in a society where people are less inclined to marry because of the rigidity of the legal treatment of marital property, but, above all, because the search for greater rooms to agree in advance and plan the economic regime for the acquisition of property and for the assumption of financial obligations of the spouses during and after marriage, is part of the process known as contractualization of family law. The essay is based on the American experience and the initiatives of the Uniform Law Commission and the American Law Institute to demonstrate the complementarity that can exist between the freedom of the parties to enter into marital or premarital agreements and ex post judicial control, which translates, for the author, into a possible modernization of family law through the application of contractual institutions and principles that should not be interpreted as a renunciation of the main principles of family law.

## Keywords

Contractualization, Marriage, Legislation, United States, Prenuptial, Marital Agreements

## 1. The Era of 'Families by Consensus'

A recent book by Professor Brian H. Bix, under the title *Families by agreement. Navigating choice, tradition and Law*

[1] came into my hands when I was writing these lines, and I was fortunate to find solid arguments that have important

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correlate in the history of family law in the United States of America and in its very rich jurisprudence about the subject of this essay<sup>1</sup>.

Although the initial topic of this paper was focused on prenuptial agreements, the history of an important instrument as the Uniform Premarital and Marital Agreements Act of 2012 (hereinafter, UPMAA), drafted by a working group created by the Uniform Law Commission<sup>2</sup> (hereinafter, ULC) in the United States of America, and of which the main Reporter was, precisely, Professor Bix, encouraged me to extend some of the ideas proposed for prenuptial agreements to marital agreements due to the need have a similar regulation for both agreements with small differences as will be explained below.

I should point out that I have written about this topic elsewhere some years ago as we will see [2]. However, Professor Bix's most recent publication [1] covers topics that go beyond pre- and post-nuptial agreements and, in addition, includes all those agreements that are nowadays concluded within family law in the United States and that are an undeniable sign of the expansion of the private order within said field. This expansion is nothing more than the possibility for the members of a family group -and sometimes one of them with third parties- to be able to agree on certain topics that have traditionally been subject to mandatory rules: agreements not only on the rights and duties arising from marriage but also between cohabitants (*cohabitation agreements*), between spouses to reconcile or to separate (*separation agreements*), between adoptive and biological parents to adopt a child -subject to judicial approval-, on the use of assisted reproduction techniques and the expansion of arbitration in family law, among others matters.

These *families by agreement* or families by consensus, and all those situations that today arise from agreements within family law, reveal an increase (or a recognition?) of private autonomy in this field that are, strictly speaking, an undeniable reality that has existed for several decades and that some authors have baptized as the privatization of family law or *contractualization of family law* in the words of Jules and Nicola [3].

Local doctrine, unfortunately, does not pay attention to this

trend. I assume that the idea of privatizing rooms, always traditionally filled with a legal regulation of a compulsory nature must cause some perplexity. An example of this is the silence kept (or fear?) by the group in charge of proposing reforms to the Civil Code [4] that concluded in a Preliminary Draft under the auspices of the Ministry of Justice published in 2019 to incorporate some of the rules that I proposed on prenuptial and marital agreements taking as a reference the experience of the United States of America [5]. In view of the lack of pronouncement, I published the text of the proposal in the fourth edition of my book that collects various essays on family law. The Preliminary Draft only contains clarifications in some articles of the matrimonial property regime, which in my opinion maintains the rules of a closed system with little room for agreements freely entered between the spouses according to their interests.

On the other hand, it is paradoxical but true that almost all the most important changes in our family law have taken place outside the walls of the Civil Code. Some modifications have given more room to decisions anchored on personal autonomy, especially the procedures that allow the no judicial dissolution of the marriage. I am referring, as I have already done before, to the separation agreements and the subsequent divorce (that resemble the *marital settlement agreements* of the United States experience) foreseen by Law 29227 that regulates the non-contentious procedure before the municipalities and notary's offices [6]. Article 4 of this law requires the spouses: (i) not to have minor or disabled children, or if they do, to have a final court judgment or (this is something innovative) a conciliation agreement issued by a State-approved conciliation center without the intervention of a judge, that encompass matters related to the exercise of the parental authority, alimony, custody of minor children and/or disabled children; and (ii) not to have assets subject to the community property regime, or if there are any, to have an agreement for the substitution or liquidation of the mentioned patrimonial regime.

This law has favored agreements on matters that were reserved to the competence of the judges and for that reason it is curious that the legal order be complacent with the separation agreements and not with those that the spouses or the pretenders to that status wish to enter to. There is undoubtedly an explanation for this preference: marital settlement agreements or separation agreements, contribute to the closing of a marital crisis and avoid or reduce the levels of judicial litigation. The same has occurred in the North American experience.

In our country the only room available to the spouses is to change the property regime before or after the marriage, choosing marital or separate property, usually in a monolithic manner. However, when assets are separated, the interested parties could introduce some nuances only in case those variations don't collide against mandatory rules.

Premarital and marital agreements are entered to regulate the rights, duties, responsibilities, etc., between future spouses or spouses without leaving the future of that matters to uncertainty and to organize their own lives based on clear rules

1 This is by no means Professor Brian Bix's first major contribution. If I were to refer to his other works on the same subject I would be obliged to cite, at the very least, the following: 'Bargaining in the shadow of love: Premarital Agreements and how we think about marriage', 'The public and private ordering of marriage', 'The ALI Principles and agreements: seeking a balance between status and contract', 'The private ordering and Family Law, Agreements in Family Law', as well as the essay he co-wrote with Professor Barbara Atwood, 'A new Uniform Law for premarital and marital agreements', in which he explains the scope of the UPMAA (2012) which is then discussed in the text. Professor Bix has other essays on the same argument and so his book brings together some of the ideas he has expounded over 25 years.

2 The Uniform Law Commission - formerly the National Conference of Commissioners on Uniform State Laws - is a nonprofit and nonincorporated organization established in 1892 that develops and proposes soft law to harmonize the laws of the different jurisdictions of the United States in a wide variety of areas. It has approximately 350 commissioners who are appointed by state governors. They must be lawyers appointed by an official agent, but this appointment does not convert their work in statute law.

that reduce or avoid discussions. In these agreements the parties choose the ownership regime of the acquisitions during the marriage (that applies in case of dissolution or death), in addition to the support between the spouses, the contribution to the home, the insurances and their beneficiaries, the assumption of debts during and after the marriage, among several other matters that are not of little importance and that seek to establish a treatment according to the interest of the parties that does not coincide always with the legal regime.

Given that such agreements try to replace the rules imposed by the law, it is not uncommon to reject them for that reason. It is highly predictable that it will be argued, as it has been in some jurisdictions in the United States of America, that those agreements encompass matters in which public policies are involved. However, this starting point against its admissibility reveals a prejudice and ignores that, in our environment, there are not few agreements to separate properties between spouses that could be quite asymmetrical. And given that there are no legal parameters or minimum requirements for these separations to be enforceable (in our country), the results could be less advantageous than in the case of having a discipline such as the one that exists in the North American country for the agreements that are the object of this essay.

Two news are important to better understand the current local context. According to news published in the digital platform of the Estado, on February 17, 2022, most Peruvians today prefer to marry choosing separate property. On the same platform, news dated January 31, 2024, reports that in the year 2023, almost 9 thousand separate agreements entered by people married were registered in the Personal Registry (part of the Public Registry System).

Within this same local scenario, we also find a rule inside the Civil Code that provides for the cessation of the alimony obligation between husband and wife upon dissolution of the marital relationship (Article 350). Then, if a premarital or a marital agreement modifies or extinguishes this duty at the end of marriage should not be disqualified if the law itself admits it as a default rule.

To support the convenience of admitting such agreements, I will explain briefly the experience in the United States of America, without prejudice to make some warnings and clarifications where necessary, given the incursion into a system that belongs to the Common Law system.

## 2. An Overflight of the United States Legal Experience

### 2.1. Brief Reference to the Era Prior to the Admission of Premarital Agreements

As part of the heritage of English law, in the United States the principle of 'coverage' was applied to marriage: man and wife became one and, consequently, could not contract between them [7]. This, without prejudice to the state of sub-

mission to which the wife was subjected, who had no capacity to contract without the intervention of her husband who acquired the property in his name. In return, the husband took care of his wife. These were the nuances of the public institution of marriage with strong influence of religious ideas [8].

The *unity of person* provided by marriage prevent to enter into premarital or marital agreements with few exceptions for prenuptial agreements to allow the wife the enjoyment of certain assets as a sort of *separate property* [9].

Later, the so-called *community property* or common property was imported by the *Common Law* of the colonies influenced by Spanish and French laws (Louisiana, Texas, California, Washington, Idaho, Arizona, Nevada and New Mexico), which overcame the old idea that what was acquired belonged only to the husband [10] and which ended up being imposed in almost all the American jurisdictions.

The 70s and 80s of the last Century were a time of great change in American family law. Not only the fault as a rule for granting divorce was abandoned. There were also notable changes in the admission of cohabitation agreements, which had its most widespread thrust thanks to the case *Marvin v. Marvin* decided in 1976 by the Supreme Court of California [11], and in other topics of family law that did not receive a uniform but rather varied treatment due to the high number of state jurisdictions.

### 2.2. Towards the Acceptance of Premarital and Marital Agreements

One of the main changes in family law in the United States in the 1980s of the past Century was the greater acceptance of premarital agreements. As has been argued [12] these are agreements concerning the rights and duties of the spouses during the marriage and after its dissolution by divorce or death.

The fundamental purpose of prenuptial agreements is to discard the marriage normative regime by means of agreements that alter the rules - traditionally considered as unchangeable - related to the distribution of assets, the payment of debts, the support between the parties (alimony) or the custody of the children, which is - this last point - the hard core of the family law and that, in any case, cannot impoverish the legal situation of the descendants - especially in North American law, where for decades the best interest of the child standard has been applied to refuse the execution of certain agreements. On the other hand, it makes no sense to enter those agreements to repeat what the law foresees. Moreover, a prenu can grant more rights than those guaranteed by law.

In the United States of America, historically the courts were less hostile to premarital agreements in case of death and very suspicious of divorce because it was presumed (by the courts) that the eventual imbalance of an agreement could be an incentive for divorce if this was 'cheaper' or more convenient for one of the spouses if the result was compared with the legal regime [13]. Additionally, the reference to eventual

different bargaining powers between the parties or the procedure with which it could have been concluded, determined that the scrutiny by the judges was more severe to know if was entered with coercion or if there was lack of adequate information.

Bix [1] points out, among the various factors against its admission, the assumption of the married status as an unchangeable condition by private agreements because public policies, protection of third parties -usually the descendants-, the one-sided agreements, the mediation of coercion (i.e. the bride is forced to sign a premarital agreement the day before the wedding under threat of cancellation of the ceremony), the exploitation of the weakness or vulnerability of one of the parties and the so-called bounded rationality. Bounded rationality explains the decision process adopted by those seeking a satisfactory, but not necessarily optimal, outcome. The prestigious Professor Melvin Aron Eisenberg wrote in 1995 a provocative essay on the subject [14]. The limits of cognition and the limits of contract where he explained the contracting process. According to this author, the assumptions that the parties act with full knowledge and rationally that seek to maximize expected utility are not true because the contracting parties have cognitive limitations. Contracting involves actions taken based on what will happen in the future, and the future is always characterized by uncertainty. In other place, Eisenberg [15] alluded to three kinds of cognitive limitations: (i) bounded rationality; (ii) limits to disposition or irrational disposition; and (iii) defective capacity. Limited rationality -which is the one of interest here is related to the impossibility of assimilating or gathering all the information needed during the contracting process to make an optimal decision: there is not always time, energy or memory capacity -people are not computers and may have problems organizing the data they accumulate-. Taking information requires all these resources and many actors do not want to allocate resources, the costs are high, or they make choices over certain ranges of rationally assumed ignorance. Others process information imperfectly because of their inability to understand it or because of the complexity of the decisions to be made.

The diversity of decisions by state jurisdiction on premarital agreements, however, did not offer a good picture to stakeholders. At the same time, in America there was an evident erosion of marriage which could not be stopped or slowed down until prenuptial agreements were allowed.

The urgency of a homogeneous treatment and greater certainty led the Uniform Law Commission (ULC) to propose a Uniform Law in 1983, which was accepted in different States - in 27-, some with a similar text -13 States- and others with variations and greater requirements. In any case, the aim was to offer parameters or rules that favored the execution of prenups and that allowed future parties to have a wider margin of freedom in the drafting of their agreements, without prejudice to the scrutiny of the Courts to verify compliance with the minimum requirements anchored, fundamentally, in voluntariness and access to adequate information on the assets of

the other party.

I must emphasize that the Uniform Premarital Agreement Act (hereinafter, UPAA) was, like all ULC proposals, *soft law* because it was a proposal without state approval, but it enjoyed - as is usually the case with ULC or ALI initiatives - a high degree of authority and persuasiveness due to the experience of the professionals involved experts in case law and state and federal regulations who are experienced lawyers, judges and University professors.

The UPAA promoted the celebration and execution of a *premarital agreements* in response to a large number of people who wished to marry and continue their careers outside the home [16] and, above all, without concerns on future discussions related to their patrimonial relationships, especially those who enjoyed economic independence and those who were thinking of remarrying, a situation that became very common in the United States due to statistics that indicated that almost 50% of marriages ended in divorce.

Under this premise, the main goals of the UPAA were to provide a sense of confidence and a good dose of predictability of judicial decisions and to place in the hands of whoever refused to fulfill it the proof of lack of freedom or information. In other words, enforcement was encouraged unless circumstances that reduced freedom or access to information were proven.

Section 3 of the UPAA (*Content*) set forth the subjects that could be the subject of agreements:

- 1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
- 2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
- 3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
- 4) the modification or elimination of spousal support;
- 5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
- 6) the ownership rights in and disposition of the death benefit from a life insurance policy;
- 7) the choice of law governing the construction of the agreement;
- 8) and any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

The rights of a minor (to parental care) could not be affected by a premarital agreement.

As for the formal requirements, the agreement had to be in writing and signed by both parties. What the *Common Law* doctrine calls *consideration* (bargain) was not required, since the opinion was unanimous in the sense that the celebration of the marriage is sufficient (§ 2, *Formalities*).

According to § 6 (*Enforcement*), the party that did not want

to perform the agreement had to prove that (i) it did not enter into the agreement voluntarily or (ii) that there had been exploitation or that there was asymmetric situation, as in the case of unconscionability, and that before to enter to it (a) he/she did not receive reasonable disclosure about the assets and finances of the other party; and (b) he/she did not gave up to participate in such assets even if it had been given information.

Unconscionability is an institution born in the jurisdiction of the *Equity*. It challenges a contract or one or more clauses of a contract for being openly unfair or disproportionate as a result, usually, of the greater bargaining power of one of the parties. This figure is applied when there is a gross disproportion between the duties and rights of the parties or when the assumption of risks is made without an appropriated compensation that can be the result of the advantage derived from deception, of a much more sophisticated knowledge, among other circumstances. The doctrine distinguishes, roughly speaking, between *procedural unconscionability*, related to the way an agreement was entered into (taking advantage of ignorance, vulnerability, bounded rationality, etc.) and *substantive unconscionability*, related to the content of the agreement (disproportionality, content contrary to public policy, etc.) that is shown to be unfair, especially at the time of its performance [17]. It can appear not only in contracts of adhesion or consumer contracts. Today this institution is found in the Uniform Commercial Code, section 2-302 and in the Restatement (Second) of Contracts, § 208 [18].

The UPAA was adopted and passed into law in 27 states and in D.C.: Arizona, Arkansas, California, Connecticut, Delaware, Columbia D.C., Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Mexico, New Jersey, North Carolina, North Dakota, Rhode Island, South Dakota, Texas, Utah, Virginia and Wisconsin. And, of course, as could not be otherwise, the action or sanction did not always respond to the proposed uniform model, thus generating different criteria [19]. Some states legislation imposed some requirements before the celebration of the marriage: disclosure of information, independent legal advice and, in general, greater protection or paternalistic vision [20].

In 1990, the Pennsylvania Supreme Court decided a *leading case* that had a more 'privatist' orientation than the UPAA itself. I refer to *Simeone v. Simeone* (581, A.2d 162) whose markedly 'contractualist' approach resembles the case *Marvin v. Marvin* for *cohabitation agreements*. In *Simeone v. Simeone*, the Pennsylvania Supreme Court approved a set of rules on prenuptial agreements [21]. For this Court, decisions denying enforceability to premarital agreements rested on the belief that the parties did not have an equal level of skills and that women did not have the knowledge to understand the nature of such agreements. However, society had evolved to the point that women could no longer be considered the 'weaker party' in marriage. On the contrary, the stereotype of the woman as a housewife at the side of the man who works outside the home was no longer a current model. Wives had

become generators of income. Therefore, it was untenable to maintain the presumption of women as uninformed, uneducated, uncultivated and exposed to disadvantages in the event of entering into a prenuptial agreement. The woman of the end of the last century had, for the referred court, an important education, knowledge of finances, could generate income and having assets. As they had the same status as men, it was not possible to maintain a paternalistic vision that did not fit reality.

For the Pennsylvania judges who decided this famous case prenups can also be reviewed by applying contractual remedies that protect the parties from coercion, inducement of mistake, fraud, inequity at the time of entering the contract, or changes in circumstances that occur over time. For all this, it is convenient to make use of such remedies without departing, if necessary, from the principles of family law.

After several years of work by a group of experts, in 2000, the American Law Institute<sup>3</sup> (hereinafter ALI), under the leadership of Professor Ira Mark Ellman, as Chief Reporter, released the Principles of the Law of family dissolution, Analysis and Recommendations.

The ALI proposal addresses many more matters within which Chapter 7 (*Agreements*) was included, referring not only to prenups, but also marital agreements, separation agreements and domestic partners agreements.

In general, all agreements must not only be subject to the policies of the State, but the proposal also foresaw the fulfillment of certain requirements: absence of coercion, informed consent, a period of time (30 days) prior to the wedding to analyze its scope, independent legal advice, clear language on the scope of the waivers to which one or both parties would be exposed with respect to the rights that the law granted to the contracting parties, and information -at least approximate- of the income and assets of the other party [20].

The proposal exhibited a mediating position since the ALI considered the principles of contracting (private autonomy) applicable without renouncing the invocation of rules and principles of family law.

On the other hand, the premise on which the proposal was based is the presumption that the prenup satisfies the minimum requirements for celebration. The presumption is rebuttable and in the face of its eventual challenge whoever

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3 The American Law Institute (ALI) was founded in 1923 by a group of prominent judges, lawyers and professors who became known as The Committee on the Establishment of a Permanent Organization for the Improvement of the Law. This Committee pointed out, at the time, that two of the main defects of American law were uncertainty and complexity, which were directly reflected in the administration of justice. The lack of certainty, according to the ALI's presentation, stemmed from the lack of consensus on the fundamental principles of the Common Law, while the complexity was attributed to the overwhelming difference between the rulings of the various jurisdictions in the United States. When the ALI was created, its mission was to promote the clarification and simplification of the law and its better adaptation to social needs to ensure a better administration of justice and to encourage the work of scholars and scientific development. 2023 marked the first century of the founding of the ALI and an extraordinary compilation book of essays was published under the editorship of Andrew S. Gold and Robert W. Gordon: The American Law Institute. A Centennial History (2023).

sustains the validity of the *prenup* must prove: (a) that it was signed at least 30 days before the marriage; (b) that both parties had independent legal advice and reasonable opportunity to enjoy it before signing any agreement; and (c) that if signed without legal assistance for each party the agreement was drafted in plain language understandable to an adult of ordinary intelligence without legal training on: (i) the nature of the rights and claims that would arise upon dissolution of the marriage that have been modified and the scope of such modification; and (ii) that both parties were aware that their interests with respect to the agreement could be adverse.

The ALI also proposed a regulation for *marital agreements*. These, unlike the prenups, faced another kind of difficulties because the American Courts started from the premise that, upon marriage, a series of fiduciary rights had arisen between the spouses (a status) and, consequently, the alteration or disregard of them was shown as a clash against the applicable legal framework, especially regarding the participation in the property acquired and in the alimony support after the divorce between the ex-spouses.

Although there are many authors in American law who describe marriage as a contract, in the end it is considered an institution regulated by the State without denying that its origin must be a free and voluntary union, that is, it is not only a status, but it also has an important component of liberty and consent, which reminds us of the evolution noted by Main as a contrast between the medieval legal framework and the one born in the modern age [which reminds us of the evolution noted by Main as a contrast between the medieval legal framework and the one born in the modern age [22].

The ALI proposal provided that in all those cases in which the claims of one of the parties for access to compensatory pensions -that is, for ceasing to have the type of life they had during the marriage- or in the participation of marital property are limited, the party invoking the agreement must prove that the other party knew, at least approximately, the assets and income of the party who enforce the agreement or that the party who challenges was provided with a statement containing such information. It is not necessary to have a detailed disclosure of assets and income. It is enough to promote a "general knowledge". Moreover, if the parties have lived together for many years and have shared and commingled their finances, or have been partners in business, such knowledge could satisfy the requirement for access to material information, although in most cases this does not occur.

Section 7.05 of *Principles* contemplated a series of recommendations to ensure that the enforcement of a prenuptial or marital agreement would not result in substantial injustice. Thus, it is proposed that a court should consider whether enforcement of an agreement would result in substantial injustice if and only if the party resisting enforcement shows that a material change of circumstances had occurred, which undoubtedly alludes to the figure of *hardship*. This rule leads to a revision of the agreement, to a *second look* to review the variation of the circumstances existing when the agreement

was entered: the birth of children -or their adoption-, the passing of a long time whose consequences could not be anticipated but which have a direct impact on the terms of the agreement, either on jobs, income, debts, age, time of marriage, in order not to allow an unfair result that is not tolerable.

In 2012, the ULC presented a new proposal to regulate both prenuptial and marital agreements that differ fundamentally by the time of conclusion, but whose objective is the same: to modify - or affirm - the legal regime of rights and obligations in the event of dissolution of marriage. The *reporter* or speaker was Professor Brian H. Bix. This is the Uniform Premarital and Marital Agreement Act (UPMAA).

One of the novelties of the UPMAA is that Section 5 leaves open the possibility to apply not only the common law principles but also the so-called equitable doctrines, that is, the remedies created by the jurisdiction of Equity, jurisdiction that historically mitigated some rigorous decisions of the Common Law Courts or that covered gaps of this body of law.

The UPMAA's Official Comments state that the contractual principles can be applied, which puts an end to the Courts' hesitations about the possibility of invoking them:

This section is intended to make clear that common law contract doctrines and principles of equity continue to apply where this act does not displace them. Thus, it is open to parties, e.g., to resist enforcement of premarital agreements and marital agreements based on legal incompetency, misrepresentation, duress, undue influence, unconscionability, abandonment, waiver, etc. (2012).

This means that for the UPMAA there is no incompatibility between the principles and rules of the Act and contractual institutions such as coercion, fraud, unconscionability and other remedies.

Curiously, Article 464 of the new Civil Code of the People's Republic of China (year 2021) [23], applies contractual principles to family institutions without disregarding the nature of the family agreement to which it applies, resembles this solution:

Article 464.- A contract is an agreement on the establishment, modification, or termination of a civil juristic relationship between persons of the civil law. An agreement on establishing a marriage, adoption, guardianship, or the like personal relationships shall be governed by the provisions of laws providing for such personal relationships; in the absence of such provisions, the provisions of this Book may be applied *mutatis mutandis* according to the nature of such an agreement.

Although the Chinese Civil Code has a strong Western influence, its reading reveals the reading of instruments such as the UNIDROIT principles on international commercial contracts and the European principles of contract law. And if one analyzes its gestation from the 2002 draft, it is also argued that it has been influenced by the *Common Law* [24] as is the case with the regulation of anticipatory breach of contract.

In line with the ALI' *Principles of the Law of Family Dis-*

*solution*, section 9 (f) allows the so-called *second look* (review) of the agreements considering the circumstances at the time when agreement is enforced, especially in case the judge discovers a case of hardship.

Perhaps the most important part of this initiative is Section 9, *Enforcement*:

A premarital agreement or marital agreement is unenforceable if a party against whom enforcement is sought proves:

- (1) the party's consent to the agreement was involuntary or the result of duress; that is, as says Fried, an agreement not freely formulated (but with knowledge) because it shows a promise made in response to improper pressure. [25].
- (2) the party did not have access to independent legal representation under subsection (b);
- (3) unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights under subsection (c) or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement;
- (4) or before signing the agreement, the party did not receive adequate financial disclosure under subsection (d).

For UPMAA, a party has adequate disclosure of finances if: (i) receives a reasonably careful description and a good faith estimate of the value of the property, debts and income of the other party; (ii) expressly waives in a separate, signed document disclosure of the other party's finances beyond the time it has had such disclosure; or (iii) has had adequate knowledge or a reasonable basis for knowledge of the information of the value of the property, debts and income of the other party.

Perhaps, as I anticipated, a court may refuse to enforce a prenuptial agreement or marital agreement if one of the terms of the agreement, analyzed on a systematic basis, is unconscionable at the time of the performance or if its enforcement would result in a substantial hardship due to a material change of circumstances arising after the execution of the agreement.

This new Uniform Act proposal is not old enough to have found acceptance in all state jurisdictions. It has been adopted in a few states such as Colorado and North Dakota and is being proposed in other legislatures. Time will decide. It has persuasive force and authority to be put in force.

### 3. The Search for the Foundations That Justify the Regulation of Prenuptial and Marital Agreements

The process or trend of affirmation of personal rooms in a field traditionally reserved to the State regulations that theoretically protect family members, but which, in many cases, restrict their freedom, is not recent.

Therefore, to keep the imposition of a patrimonial regime

for both spouses and cohabitants -article 5 of the Constitution and 326 of the Civil Code (in Peru)- is to hold a solution that goes against the current trends. The decrease in the rates of nuptiality accompanied by the increase of cohabitation and within the first one the increase of the couples who marry separating their patrimonies is a reality to which the legislator continues closing his eyes.

The change of patrimonial regimen that the law currently allows to the spouses -as a block- without margins of maneuverability is another big limitation that our doctrine does not question. What is certain, however, is that, if the married couple agree not to have marital property or divorce, the result permitted by the law could be equal to that negotiated in a prenuptial or in a nuptial agreement and who knows if that change of patrimonial regime could be agreed with less information than that required in the USA legal system in which the requirements for the executions are very hard and the enforcement of the agreements are subject to the scrutiny of the Courts.

On the other hand, in our country, despite not having the freedom that can be achieved with the referred nuptial and prenuptial agreements, not few of the agreements that are executed to separate the marital property and assign the exclusive ownership over the assets that were previously held in common are openly asymmetrical and the reason of the distribution may respond to different causes: protection of the family patrimony because the business activity of one of the spouses; the agreement proposed by the spouse who has been the victim of an infidelity as a price to hold the marriage; the concealment of assets to not be shared with a child born out of wedlock; the cessation of the labor or productive activity of one of the spouses and to whom assets are assigned to generate funds from a lease or similar activities as an alternative source of income; different bargaining power between the spouses during the negotiation of the divorce; etc.

In addition, not all the changes of patrimonial regime agreements are assisted with independent legal advice. The lack of legal assistance translates into the impossibility of comparing the results of the agreement with the share that a Court would award in case of conflict or lack of agreement. Finally, the law also does not provide for procedures specifically created to review agreements entered to subject them to judicial scrutiny in case of drastic change of circumstances that would make it advisable to deny the enforcement of an unfair agreement.

What I intend to put on the table is that we do not have the best treatment of the property regimes that could be chosen by the spouses. And for this reason I believe that, as in many other areas in which we have relied on foreign experience - if not, remember the influence of the *Codice Civile e commerciale italiano* in contractual topics - in this matter the experience of the United States of America seems to me to be extremely instructive since it has been able to reconcile the fundamental principles of family law with those contractual institutions that can be applied to prenuptial and marital

agreements because it impossible deny their contractual nature.

Furthermore, if we are dealing with agreements of economic nature, as I have argued [26], I find no impediment to apply contractual remedies either because of some defect of consent, or because there has been an exploitation of the state of necessity of one of the parties or some other circumstance of similar importance, or to review the agreement due to a change of circumstances that could make unjust enforce the agreement.

At this point I believe that no one can doubt that beyond the affective relationship between spouses -or future spouses- the matters regulated in these agreements have an undeniable patrimonial nature and, consequently, tearing our clothes to apply the contractual remedies would be openly hypocritical under the excuse of alleging the presence of non-economic values, which no one denies or could deny.

For all those reasons, in 2017 I proposed the regulation of prenuptial and marital agreements in our Civil Code through 9 articles whose purpose I explained to the group in charge of proposing reforms to the Civil Code, with a text inspired by the UPMAA of which I highlight Article 5 that I believe necessary to share. Moreover, this proposal is a fortunate coincidence with article 464 of the new Chinese Civil Code (year 2001). The proposed text establish:

Article 5. Contract law rules and family law rules

5.1. The rules that regulate the contract are applicable to prenuptial and marital agreements insofar as they are compatible with their nature and content. If applicable, the rules on the vices of the consent, *laesio*<sup>4</sup>, hardship and those other remedies appropriate to the agreements entered. In the Common Law system “vices of the consent” will be excuses for nonperformance and encompass mistake, coercion, undue influence, fraud, and misrepresentation.

5.2. In case of conflict between a prenuptial agreement or a marital agreement with any family law rule of unavoidable compliance, the latter shall prevail. However, the judge will evaluate the possibility of applying the provisions contained in those agreements and the norms that regulate family matters to the extent that no constitutional principle or public order principle is displaced.

5.3. No prenuptial or marital agreement may be contrary to the rules on the responsibilities of parents towards their minor children nor may it impede the relationship between parents

and their children. Neither may it broaden or restrict the grounds for divorce or promote the dissolution of marriage.

All this leads us to reaffirm that within family law the freedom to contract has never been a banished reality even though its scope of action is more restricted than in other areas of the law.

The notable difference between our current legal system and the proposal to implement a regime such as that of prenuptial and marital agreements such as the one existing in the United States of America is that in this later case the main decisions about the economic relationships between spouses are not left in the hands of the State.

Only those who choose not to have marital property after acquiring assets and asymmetrically dividing such properties will benefit from the complacent silence of a legal system that claims to defend egalitarian positions but is silent when agreements for the division of common assets are entered into in the shadows and without the possibility of any judicial scrutiny. A system that, curiously, resists allowing interested parties to enter into prenuptial and marital agreements that might be less unfair than those reached through the loopholes of a self-proclaimed democratic regime.

## 4. Conclusions

The preceding lines allow us to reach some conclusions:

- 1) The Civil Code offers spouses monolithic choices of property regimes within the marriage. In choosing one or the other, the scope for maneuverability is limited, especially in the case of the community of property. The law assigns consequences to the status, it organizes and does not allow for changes.
- 2) Agreements to replace marital property by separate property regime in which spouses could include provisions to modify the applicable legal framework are highly rare. Simply the variation of regime is an absolute change of the applicable rules and nothing more.
- 3) On the other hand, it is more frequent that in cases of substitution of common property by a separate property the spouses may find room for agreements better adapted to their interests and, sometimes [it is not the rule, by the way], for asymmetrical divisions of the assets not subject to any kind of judicial scrutiny as it is happen in the experience of the United States of America when the parties enter to a prenuptial or a marital agreement.
- 4) The evolution of the solutions offered by the northern country has reached a point where transparency through the exchange of information, the procedures and deadlines for the execution of prenuptial and marital agreements guarantee an informed consent with the relevant data. Additionally, the assistance of specialized advice ensures a better understanding of the rights of the parties, which may be waived, if necessary.
- 5) The proposals made by the Uniform Law Commission or by the American Law Institute at different stages show

<sup>4</sup> Laesio is a contractual remedy that comes from Roman law. It was revitalized in Justinian's compilation (ordered and carried out between the years 527 and 565 of the Christian era) and over the centuries appeared in the French Civil Code (1804) but with a regulation limited to the sale of land for less than half the price, very similar to its Roman origins. In the most influential civil codifications such as the German (1900), Italian (1942) and Portuguese (1966), disproportion between the obligations (their value) of the parties is always required [sometimes with objective parameters] because of taking advantage of the state of necessity or other circumstances that denote vulnerability in the other party. In the Common Law, the closest figure, but not the same, and with which it is usually compare, is unconscionability. Since there is not an adequate way to translate the term *laesio* into English (in Spanish the institution is called “*lesión*” and in English we should use the term injury, which seems to me to be quite inadequate), I have preferred to keep the Latin term.

an interesting confluence of contractual institutions and remedies in a field so sensitive as family law, but which - apparently - has provided solutions that are not only coherent with the patrimonial nature of this kind of agreement, but that, moreover, have never displaced the main principles of family law when they must be applied, as is the case when the rights of minors or with certain unwaivable guidelines or policies are at stake.

6) I am convinced that the American experience reviewed, and especially the UPMAA of which Professor Brian Bix was the Reporter, represent an extraordinary frame of reference that we could follow to give a touch of modernity to our family law and to build bridges between family law and the contractual remedies that our doctrine seems to ignore without any justification.

## Abbreviations

ALI	American Law Institute
ULC	Uniform Law Commission
UPAA	Uniform Premarital Agreement Act
UPMAA	Uniform Premarital and Marital Agreements Act

## Author Contributions

Yuri Vega Mere is the sole author. The author read and approved the final manuscript.

## Conflicts of Interest

The author declares no conflicts of interest.

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