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Towards an Inclusive Family Law

Legal-ethical framework based on autonomy and responsibility

ABSTRACT: This article reflects on ways to render family law more inclusive. It elaborates on theoretical/conceptual approaches such as care ethics, responsibility ethics, and an understanding of family by agreement. In addition, I will consider the European jurisprudence on Art. 8 ECHR, which has been highly relevant to the evolution of family law for a long time. Inclusive family law can embrace various branches of family law, such as an alternative to pure kinship law within filiation law, including caring for persons as family members within the adult protection law and how to foster the autonomy of cognitively impaired persons regarding founding a family. The concept may also expand to procedural law. In this article, we will discuss examples from filiation law.

Keywords: family law, inclusion, care ethics, responsibility ethics, private ordering, families by agreement

Schlagworte: Familienrecht, Inklusion, Pflegeethik, Verantwortungsethik, private Bestellung, Familien durch Vereinbarung

1. Inclusive family law

Family is not a “natural” or “institutional” fact imposing marriage, family names, and so on. The family was invented and did not always exist.¹

According to this statement, published in a topical legal journal 15 years ago, family law’s current role is based “on a specific worldview that perceives social life as divided between market and family” and the idea that market structures serve our productive lives and the family structures of our affective lives: the so-called *family-market dichotomy* (going along with the state-civil society and man-woman dichotomy).² The authors argued that this underlying assumption led to the distinction between family law and contract law, which has emerged worldwide in legal systems. Treating family law as something “special,” “other,” or “complicated,” which is separated from general legal developments and reforms in society, is a so-called *family law exceptionalism* (see point 5), i. e., always being

1 Janet Halley, Kerry Rittich, *Critical Directions in Genealogies and Contemporary: Studies of Family Law Exceptionalism*, Am. J. Comp. Law 2010, 755.

2 Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, *Harvard Law Review* Vol 96 No. 7 May 1983, 1497 and *The Myth of State Intervention in the Family*, *University of Michigan Journal of Law Reform* 18 1985, 835.

left behind, having left many invisible, existing forms of family before the second half of the 20th century, and being at risk of leaving behind future family forms. By transcending the market-family dichotomy, reforms could progress better. So, when we discuss the ongoing changes in family structures and filiations laws, we must keep in mind (at least in our opinion) this *mind-opening constructionist view and eventually consider it an aspect of the still ongoing construction of family law*:

Traditional civil law family law doctrine does not favor private ordering or private agreements (see point 5). Traditional doctrine focus on “statutes,” namely the marriage statute and the general state protection, and (eventually) admit some additional/liberalized statutes. So far, only contracting in pecuniary rights and duties is generally accepted. Civil contract lawyers, on the other hand, will also claim that “family law” is “something different” (exactly) because of private autonomy, which is at the core of contracts so that everyone may also end his or her contract. This often leads to whether one wants to “abolish our families” with private ordering. The answer is, of course, negative. Both sides tend to forget that statutes also do not “naturally” prevent high divorce rates and that there have always been “special contracts” within family law. In this line of thinking, we will consider the continuing evolution of families by agreement as a reconciliation and mitigation of this former market-family distinction and the longstanding dichotomy between family and contract law (see point 5).

The importance of individuals and their characteristics, societal changes in family structures, and technological advancements have significantly transformed family relationships since the 19th/beginning of the 20th century when civil codes in continental Europe entered into force.³ Legal frameworks have evolved considerably and are likely to evolve further to include more diverse and complex family forms in order to provide rights and protect individuals in their choices towards (yet) non-legally foreseen family structures (e.g., single, patchwork, co-partnering, multigenerational, polyamorous, or surrogacy families).⁴ The following serves as a very down-to-earth example: The December 2024/January 2025 edition of “wir eltern,” a Swiss parenting magazine that is over 100 years old, features portraits of multigenerational, same-sex, and polyamorous families. Although we as jurists might already be tangled in legal and political strategies of reform processes (which is quite understandable⁵), we should ask ourselves what the goal of these transformations is and whether there is no ethical framework that could guide our directions of (and beyond) legal revisions in family law to make it more inclusive in the future.

“Inclusive” in this article should be understood literally because it *aims to embrace more forms of families* in our family law than traditional kinship rules would allow. Furthermore, it is open to future developments. An allusion to the UN Convention on the

3 e.g., France (1804). Belgium (1804); Netherlands (1830); Italy (1942); Switzerland (1907/1912); Germany (1896).

4 Konrad Duden/Denise Wiedemann (eds.), *Changing Families, Changing Family Law in Europe*, 2024; see ECtHR Jurisprudence on de facto families under point 3.

5 Audre Lore, *The Master’s Tool Will Never Dismantle the Master’s House*, in: Berkley Edition, *Sister Outsider: Essays and Speeches*, 1984, 110–114.

Rights of Persons with Disabilities (CRPD) from 2006⁶ is, however, intended because the concept of an “inclusive family law” has the potential to encompass more than just filiation law based on autonomy and care, as will be discussed in this article. We also expand on this to further future topics (we are working on) of better access to family and family law by cognitively impaired people and to enlarge the notion of family and personal protection of vulnerable people *ex lege*, in general, through a factual caring person (e.g., an elderly person with dementia who has been cared for by a specific person in institutions).⁷

Although this is a minor reason, I would also like to replace the term “modern” or “modernization” of family law⁸ because of its questionable reputation as “modernity” within social sciences (rarely discussed in Civil law doctrines)⁹ and its limited meaning regarding timely changes.

An “inclusive family law” is intended to create an environment where the rights of all family members can be protected and all members can be treated fairly, regardless of their characteristics, family settings, and statutes. An inclusive family and filiation law shall give answers to such complex questions/matters:

- Why should a person who is giving birth be treated legally in the same manner, whether she is a single person, a parent to twins, a person who wishes to live in a family with two other parents, one who does not want to be a parent at all, or one who is a trans man who wishes to be registered as a “father”?
- Suppose care responsibilities toward the child to be born are guaranteed. Do we have a proportional public legal interest to limit people’s access by “age limits” to assisted reproduction technologies?
- When we consider establishing multi-parent families, how can we protect adult “children” from too many care “responsibilities”?

6 The CRPD, which has been in force in Switzerland since 2014, states that member states must eliminate all discrimination concerning marriage and families. People with cognitive impairments must also have the right to families, with or without children, Art. 23 CRPD; however, the CRPD does not use the term “inclusive.”

7 See references n. 77 *in fine*.

8 The first important report on the ongoing revision of Swiss Family Law of 2015 was titled “Modernisierung des Familienrechts”, see the author of this report Ingeborg Schwenzer; *Grundlinien eines modernen Familienrechts aus rechtsvergleichender Sicht*, *RabelsZ* 71 (2007) 705; Anne Röthel, *Familienrecht unter den Bedingungen der Moderne – eine Erprobung*, *RabelsZ* 89 :1, 2025, 5–8.

9 With Gaavraty Spivak, it is about “the mute that upholds modernity”; Can the subaltern speak?, in: *Marxism and the Interpretation of Culture*, Cary Nelson and Lawrence Grossberg (eds) 1988; Ralf Kornemann, *Kritik an der Moderne*, 1985.

2. Legal framework of autonomy and autonomy

I. Autonomy always comes with relations

Self-determination or personal autonomy is fundamental for our democratic and liberal society and state. Autonomy in a traditional liberal sense means the absence of external restrictions and obstacles to doing what we think we should: have a relationship with x and y, start a family life, and have children or not.¹⁰ We are autonomous when we are not hindered by external determination from doing what we think we should. If “other people” or the state tell us whom to love or marry and how many children we should have, we are externally determined. However, this image of autonomy is also a mere ideal, one we need and will *not* give up:¹¹ We are individuals within a specific context, community, and relationship; this means we are always dependent on others when we decide. Children, for example, rely on their parents and need a lot of care. Women are still considered the primary caregivers in our society.¹² So, when starting a family, both *autonomy and responsibility* are important: a) towards the persons who need care because any person who needs care is dependent and b) towards the person who gives care because, in most societies, care work within families is unpaid. In short, autonomy comes with relations and responsibilities.

Feminist philosophers¹³ and bioethicists¹⁴ have, however, advanced the concept of *relational autonomy* mainly as a reaction against a classical liberal understanding of autonomy, as have Jennifer Nedelsky¹⁵ or Jonathan Herring¹⁶ in law (see point 3). It is a promising *yet vague* concept of autonomy in specific relations. From a contractual law perspective, the relational aspect of autonomy is not fundamentally different from the relational perspectives underlying any agreement/contract (see point 5): Contract law is about dealing with the autonomous expressions of individuals (wills), their corresponding wills, or their incomplete or defective wills. A contract is, per se, about balancing interests and relations and “finding the middle” (*Bydlinsky*), always knowing that

10 Going back to Kant’s concept of autonomy : Kritik der praktischen Vernunft, Teil 1, 1788, in : Kants Werke, Akademie Textausgabe Bd. V, Berlin 1968, 1ss, 33ss; Grundlegung der Metaphysik der Sitten, in : Kants Werke, Akademie Textausgabe Bd. IV, 1968, 387ss.

11 Sandra Hotz, *Selbstbestimmung im Vertragsrecht, Unter besondere Berücksichtigung von Verträgen zu «Liebe», Sex und Fortpflanzung*, 2018, 516ss.

12 Ute Sackofsky, *Autonomie und Fürsorge*, Kritische Justiz 54/2021 Heft 1, 47; Susanne Baer/Ute Sackofsky (eds.), *Autonomie im Recht: Geschlechtertheoretisch vermessen*, 2018.

13 Catriona Mackenzie/Natalie Stoljar (eds.), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self*, 2000; Catriona Mackenzie, *The Importance of Relational Autonomy and capabilities for an Ethics of Vulnerability: New Essays in Ethics and Feminist Philosophy*, 2014, 33; see already Marilyn Friedman, *Autonomy, Gender, Politics*, 2003; Beate Roessler, *Autonomie und der Versuch eines guten Lebens*, 2019.

14 Onora O’Neill, *Autonomy and Trust in Bioethics*, Cambridge 2002; John Christman, *Relational Autonomy and the Social Dynamics of Paternalism, Ethic Theory, and Moral Practice*, Vol. 17 (2004) Issue 3, 369; Nathalie Stoljar/Catriona Mackenzie, *Relational autonomy in feminist bioethics*, in: Routledge Handbook of Feminist Ethics, 2022, 71ss.

15 Jennifer Nedelsky, *Law’s Relations: a relational theory of self, autonomy, and law*, 2011.

16 Jonathan Herring, *Relational Autonomy in Family Law*, 2014, 11–27.

there are *significant dependencies and vulnerabilities* of parties, without a doubt, of children or unpaid caregivers, as well as of any lovers or parents. So, the question is more about detecting/setting criteria on a procedural basis for the situations of needed (special) protection. Social contract law has a long tradition of dealing with power asymmetries and taking responsibility.¹⁷

From the perspective of autonomy, denying it and/or hindering individuals directly or indirectly from starting families as they choose is not an option:

Firstly, it would be anachronical. We are in the middle of a legal development to foster identities and individual choices, expecting human rights law to represent all people (see point 2). An “*identity turn*” englobes approaches that examine positionings, narratives, and engagement of people in the states that have been marginalized and/or excluded to contribute towards promoting a more affluent (and more critical) understanding of rights.¹⁸ It is about legal personhood, which is inherent to all of us, and how states can “provide” for better protection of legal identities based on autonomy (e.g., does this include birth registration? What else is needed to provide for identity?), which should go hand in hand with a “*positive dismantling of hierarchies*.”¹⁹

Secondly, it is not necessarily proportionate (guaranteeing children’s best interests and health). A legal-ethical framework of autonomy, responsibility, and care will also help us adjust autonomy. For example, we can consider obligations to make persons or parties more autonomous through counseling. Relatedness is very much connected to care ethics, taking responsibility, and caring (cf. *point 3*).

II. The right to autonomy in relationships, reproduction, and family

A. *International legal foundations*

We can increasingly rely on international law to protect identity and autonomy in relationships, reproduction, and family, which is applicable and/or has an impact on domestic laws:

Respect for one’s autonomy to choose among various options according to one’s reasons for shaping life, including the choices regarding relationships, reproduction, and starting a family, is founded on the right to autonomy and self-determination and is based on international law (Art. 8 ECHR, Art. 22 UN-CRPD, Art. 17 UN-Pact I).²⁰

The right to freedom of marriage is regularly separately protected by international laws (Art. 8, 12 ECHR, Art. 23 al. 2, 3 ICCPR, the “*right to marry and to found a family*”

17 Peter Benson, Contract, in: *A Companion to Philosophy of Law and Legal Theory*, Patterson (ed.), 1996, 29–63; Tilmann Reppen, *Die soziale Aufgabe des Privatrechts*, 2001.

18 Bruno Latour, One more Turn after the Social Turn: Easing Science Studies into the Non-modern World in: *The Social Dimensions of Science*, E. McMullin (ed.), Notre Dame University Press, 1992, 272.

19 Jessica Knouse, *From Identity Politics to Ideology Politics*, 2009 Utah L. Rev. 749, 770–785, J.M. Balkin, *The Constitution of Status*, 106 Yale L.J. 2313, 2343 (1997).

20 Andrea Büchler, *Reproduktive Autonomie und Selbstbestimmung*, 2017, 11.

as such is protected) and constitutional laws; forced marriages are especially prohibited internationally and nationally.²¹ Discrimination based on gender is often also a matter of enforcing certain social and moral norms that Christianity characterizes.²²

Art. 12 of the ECHR guarantees every human being the right to marry and find a family from the age of majority by the national laws governing the exercise of this right. In many European countries, marriage remains the only legally regulated form of relationship³⁹ and cannot be separated from “starting a family.” The figures speak for themselves: firstly, most Swiss people do *not* want to be childless, and second, parents favour “marriage” compared to others. Over 98 % of parents are married when they have a second child.²³ One function of marriage today continues to be parenthood’s economic and legal security. Accordingly, traditional sociology sees marriage still as “responsible parenthood.”²⁴ And then again, it would be too easy to understand marriage solely through statistics (related to parenthood); it also requires qualitative analysis of the cultural representations, which might underline the individual meaning of marrying²⁵ or the fact, that there is no other public (known) legal choice to protect the care-giving person within families.

Reproductive autonomy is the freedom to choose if, when, and how many children a person wishes to have with whom (Art. 16 let. e CEDAW).²⁶ Reproduction in Europe is, in principle, a matter of choice, not of sexual intercourse, as there are assisted reproduction technologies (ATR); however, its access is restricted by the state.²⁷ Today, it is uncontested that *not* wishing and wishing to have a child are part of our reproductive autonomy and individuality;^{28,26} in addition, they are not a question of pro- or anti-natalist policies of a democratic liberal state—for example, by putting heavy financial incentives

- 21 Council of Europe, Convention on preventing and combating violence against women and domestic violence “Istanbul-Convention,” 11.5.2011, in force in Switzerland since 1.4.2018 (Systematic Legal Sources 0.311.35); Art. 181a Swiss Penal Code and Art. 94/Art. 105 para. 5 Civil Code; whereas detection and prevention remain a significant problem, for example, the statement of the UN Human Rights Council during the Covid-19-pandemic and Child and forced marriages: [https://docs.un.org/en/a/hrc/48/l.7/rev.1\(21.9.2025\)](https://docs.un.org/en/a/hrc/48/l.7/rev.1(21.9.2025)).
- 22 cf. Art. 15, 8 al. 2 Swiss Constitution; Anne Kühler, ‘Lebensformenpolitik und Privilegierung der Ehe im Licht staatlicher Neutralität’, in: Bettina Bannwart et al. (eds.) *Keine Zeit für Utopien? Perspektiven der Lebensformenpolitik im Recht*, 2021, 45ss.
- 23 See Fleur Weibel, *Die Praxis des Heiratens: Über die Anerkennung verbindlicher Liebesbekenntnisse*, 2024, open source access: <https://doi.org/10.14361/9783839471524>, 10, 65 with a substantial critique on how to empirically measure ‘new family forms’; Sandra Hotz, *Ehe für alle – Wie weiter, Teil 2*, Schweizerische Juristenzeitung 2021, 299.
- 24 Heike Matthias-Bleck, *Warum noch Ehe? Erklärungsversuche der kindorientierten Ehe*, 1997, 129; Rosemarie Nave-Herz, Heike Matthias-Bleck, Dirk Sander, *Ehe – Triumph der Tradition?*, Familie und Recht 7, 1996, 1.
- 25 Weibel (n. 22), 69, may underline the individual “meaning of marriage.”
- 26 Swiss Supreme Court Decision from 1999: ATF 115 Ia 234, consid. 5a.
- 27 Swiss Assisted Reproduction Act, 1999.
- 28 ²⁶ Carolyn McLeod, *The Right to Reproduce*, in: The Routledge Handbook of Feminist Ethics, 2023, 451; Roessler (n. 12); in her essay “Schwangerwerdenkönnen,” Essay über Körper, Geschlecht und Politik, 2019, Antje Schrupp examines reproduction in this sense from the perspective of people with and without a uterus.

on reproduction or other pressure on women to procreate (e.g., arguing that life can be only “good” with a child or encouraging not to procreate; see also *point 3*).²⁹

Furthermore, there is a broad consensus that the *child’s interests are paramount* whenever children’s matters are involved (Art. 3 UN-CRC).³⁰

B. *Acquis of Art. 8 ECHR*

Within this international legal framework the European Court of Human Rights’s jurisprudence on Art. 8 ECHR, in particular, has become a cornerstone in European domestic family laws, protecting autonomy in relationships, reproduction, family, and equality. For Switzerland, for example, the European jurisprudence has impacted the evolution of family and filiation rights.³¹ It will continue to do so, mainly because there is *no legal definition of “family” in domestic law*.³²

a. Protection of private and family life

Adequate protection of private and family life must be ensured, including at the level of the legislature, which is also responsible for ensuring that legislation and case law are free from arbitrariness.³³ Even if Art. 8 of the ECHR guarantees primarily negative rights to one’s freedom of choice to family and private life, it also enshrines *positive obligations to render self-determination and choices to family and private life possible*—for example, to decide the manner of birth.³⁴ Alternatively, informed consent to any medical treatment concerning birth should be expressed and enforced. Art. 8 ECHR protects against any

²⁹ McLeod (n. 26), 452.

³⁰ ECtHR, *G. T. B. v. Spain*, 16.11.2023, no. 3041/19, § 81, § 117.

³¹ e.g., ECtHR, *Jäggi v. Switzerland*, 13.7.2006, no. 58787/00 on adoption; *Emonet and other v. Switzerland*, 13.12.2007, no. 39051/03 on family life after adoption, *D. B. and other v. Switzerland*, 22.11.2022, no. 58817/15 and no. 58252/18 on filiation law in a surrogacy case; however, this does however not mean that there aren’t any conservative decision, e.g., *Lavanchy v. Switzerland*, 19.10.2021, no. 69997/17; see footnotes 36, 39; Michelle Cottier/Judith Wytenbach, Switzerland in: Büchler/Keller (eds.), *Family Forms and Parenthood. Theory and Practice of Article 8 ECHR in Europe*, 2016.

³² Depending on the context, a different definition of family is used in the Swiss Civil Code (CC); for example, Art. 169 CC regulates the protection of the “family home,” the provision figures in the section on matrimonial law and is therefore linked to marital law. In other words, it favours protecting the “family home” for a family without children; Art. 333 CC under section 9 on “Family community” regulates the so-called “liability of the head of the ‘family,’ who can also be a “manager” of a private clinic or of a day nursery, who is responsible for “household ‘members” who are subject (e.g. minors or patients) under their responsibility. There is also no legal definition of “family” at a constitutional level: Art. 13 of the Swiss Federal Constitution (Const.) broadly covers the protection of privacy and “family life” (includes the protection of “*mode de vie*” see Swiss Supreme Court Judgement as early as 1977, Arrêt du Tribunal fédéral (ATF) 103 Ia 293 consid. 3) and links to Art. 8 ECHR and the *de facto family*. The protection covers individuals, couples, and married and unmarried couples with or without children. In contrast, Art. 14 Const. protects the “family” based on marriage, and Art. 41 para. 1 litera c Const. aims to protect and promote “families” as a community of parents and children.

³³ Martin Nettesheim Art. 8 N 5, *Handkommentar EMRK*, edited by Meyer-Ladewig et al., fifth ed, 2021.

³⁴ ECtHR, *G. T. B. v. Spain*, 16.11.2023, no. 3041/19 § 112; *Lozovyye v. Russia*, 24.4.2018, no. 4587/09, § 36.

arbitrary decisions that follow from these positive obligations.³⁵ Even if the member states enjoy a certain margin of appreciation,³⁶ this must never justify any violation of the Convention (i. e., a breach of procedural fairness; Art. 6 CEDH).

In Art. 8 ECHR (right to respect for private life), *private life is a broad term* that does not lend itself to an exhaustive definition. It includes physical and psychological integrity and can encompass aspects of their *physical and social identity*. Elements such as gender identity or identification, sexual orientation, and sex life fall within the personal sphere protected by Art. 8 of the Convention.³⁷ In parallel, there has been an evolution towards de-pathologization—for example, regarding the right of trans persons to obtain a civil register entry with the desired/changed gender³⁸—without proof of any medical interventions, which has led to national revisions (e. g., Switzerland, Germany, France).³⁹

b. Protection of the right to personal autonomy and individuality

Art. 8 ECHR undoubtedly protects the *right to personal autonomy or self-determination to establish and develop relationships with other human beings and become a parent*. This right has become an essential aspect of individuals' identities whenever a legal parent-child relationship is concerned. This right includes the decision to give birth (a positive obligation) and the circumstances under which a child shall be born.⁴⁰ After birth, it consists of a child's right to birth registration⁴¹ and birth recognition.⁴²

Fostering the facets of our legally recognized individuality goes with *the right to know one's origins and have them recognized*.⁴³ Under Art. 8 al. 1 ECHR, knowledge of one's parentage is part of the essence of Art. 8 ECHR; see also Art. 7–8 of the United Nations Convention on the Rights of the Child (hereafter UN-CRC). In short, everyone should be able to establish details of their identity as individuals, including parentage and proof thereof. In the opinion of the Court, paternity actions fall within the scope of protection of Art. 8 ECHR when family ties are involved but also because it is a matter

35 ECtHR, *Jevremovic v. Serbia*, 17.07.2007, no. 3150, § 98; *X and Y v. the Netherlands*, 26.03. 1985, Series A no. 91, § 23.

ECtHR, *Shofman v. Russia*, 24.11.2005, no. 74826/01, § 33; *Kalacheva v. Russia*, no. 3451/05, 7.05.2009, § 31; *Jevremovic v. Serbia*, 17.07.2007, no. 3150/05, § 98; *Mikulic v. Croatia*, 7.2.2002, no. 53176/99, §§ 57.

36 ECtHR, *Callamand v. France*, 7.4. 2022, no. 2338/20, §§ 55; *Honner v. France*, 12.11.2020, no. 19511/16, § 32, § 35.

37 ECtHR, *W. W. c. Poland*, 11.7.2024, no 31842/20 §§ 82; *Schlumpf v. Switzerland*, 8.1.2009, no. 29002/06, §; *Van Kück v. Germany*, 12.6.2003, no., § 69 with further ref, see too ECtHR, *Baret and Caballero v. France*, 14.9.2023, nos. 22296/20 and 37138/20, on deciding on one's own gametes and reproduction.

38 ECtHR *YY c. Turkey*, 10.10.2015, no. 1479/2015 and 2018: S. V c. Italy, 11.10.2018, no. 55216/08.

39 ECtHR *Garçon et Nicot c. France*, 6.4.2016, no. 79885/12. In this light, it was necessary to revise the Swiss Civil Code to simplify the “change of sex,” according to Art. 30b Civil Code as of 2021.

40 ECtHR, *Sclazo v. Italy*, 6.12.2022, no. 8790/21, §§ 58, §§ 63.

41 ECtHR, *G. T. B. v. Spain*, 16.11.2023, no. 3041/19, § 81, § 117.

42 ECtHR, *D. B. and other v. Switzerland*, 22.11.2021, no 58817/15 et 58252/15). Each parent-child relationship is entered in the civil status register, but the entry has no constitutive effect and is purely declaratory (ATF 5A-238/2023, c. 4.7).

43 ECtHR, *Sclazo v. Italy*, 6.12.2022, no. 8790/21, §§ 58, §§ 63.

of establishing one's own identity and origins.⁴⁴ Not examining a right of access between the biological parent and the child would thus violate Art. 8 ECHR.⁴⁵

In addition, the Court acknowledges the notion of autonomy as fundamental in the interpretation of Art. 8 ECHR.⁴⁶ This means that any teleological interpretation should be made in light of “autonomy.”

This continuing development of legal protection of individuality *is in line with the requirement to consider any discriminatory grounds for violence under Art. 8* in conjunction with Art. 14 of the ECHR, as recalled in a ruling by the European Court of Human Rights on Apr. 11, 2024.⁴⁷ The ECtHR's case law on discrimination attributes the distinction between legitimate and illegitimate children to origin. It requires a detailed and understandable justification, whereby grave reasons must be given as to why the predominant consensus of the member states, the changed moral attitudes of the signatory states, and the dynamic interpretation of Convention law—which is intended to prevent old-law discrimination from being carried over into the present day, especially in matters of family law—is not followed.⁴⁸

c. De facto – families

The European Court of Human Rights has already recognized for some time that the concept of “family” referred to in Art. 8 covers not only relationships based on marriage but also other families by factual ties (= de facto families) in certain situations: families based on the existence of the emotional relations or on responsibilities that parents took, without any biological and legal relationships between parents and children,^{49,47} as well as wherever the parties cohabit outside any marital relationship or other factors demonstrating that a relationship is sufficiently stable. In particular, this is the case for the relationship between two women living together under a civil solidarity pact with the child that one of them conceived through medically assisted procreation and whom she raised jointly with her partner.⁵⁰ According to the ECtHR, defining a minimum period of cohabitation that could characterize a de facto family life is inappropriate.⁵¹ Still, the *Great Chamber in Paradiso and Campanelli v. Italy* (2017) did precisely that and held

44 ECtHR, *Laakso v. Finland*, 15.01.2013, no. 7261/05, §§ 38; *Mikulic v. Croatia*, no. 53176/99, § 53, *Odièvre v. France*, no. 42326/98, § 29.

45 ECtHR, *Schneider v. Germany*, 15.9.2011, no. 17080/07; *Anayo v. Germany*, 21.12.2010, no. 20578/07.

46 ECtHR, *G. T. B. v. Spain*, 16.11.2023, no. 3041/19, § 81, § 117; ECtHR, *Ternovszky v. Hungary*, 14.12.2010, no. 67545/09, § 22.

47 ECtHR, *Allouche v. France*, 11.4.2024, no. 81249/17.

48 ECtHR, *Lavanchy c. Switzerland*, 2022, 19.10.2021, no. 6997/17.

49 ECtHR, *C. E. and Others v. France*, 24.3.2022, nos. 29775/18 and 29693/19, §§ 49, §§ 53.

50 ECtHR, *Honner v. France*, 12.11.2020, no. 19511/16, § 61 handovers from one partner to the other went severely, and the child was reluctant to go to the applicant; so, under such circumstances, the Court held that it could not call into question the French ‘authorities’ conclusion that it was not in the ‘child’s best interests to continue meeting with the applicant; ECtHR, *Callamand v. France*, 7.4. 2022, no. 2338/20, §§ 19 held that by refusing to maintain contact, the French authorities had failed to strike a fair balance between the ‘applicant’s interest in preserving her private and family life and the ‘child’s best interests.

51 ECtHR *Honner v. France*, *ibid.*, § 50; *Callamand v. France*, *ibid.*, §§ 19.

that the conditions for a *de facto* family had not been met despite the intended parents having lived with the child for approximately eight months.⁵²

In the case of a cohabiting relationship without the presence of children, a right to family reunification under Art. 8 ECHR is only recognized if the cohabitants have been in a close relationship for a long time and have lived together and if there are concrete indications of a marriage that is seriously intended and imminent. A right to reside in Switzerland with a view to marriage under Art. 8 ECHR merges with the right that may be inferred from Art. 12 of the ECHR and cannot go any further.⁵³

According to *Baret et Caballero v. France* (2023), parent recognition might not yet be guaranteed depending on the state,⁵⁴ in contrast, there is jurisprudence on the access of a single person to *medical-assisted reproduction technologies*.⁵⁵

Access to *medical-assisted reproduction technologies* falls within the scope of personal autonomy according to Art. 8 al. 1 ECHR protection, and the European Court considers that concerns based on moral considerations or social acceptability must be taken seriously in a sensitive domain like artificial procreation. However, there are not sufficient reasons for a complete ban on a specific artificial procreation technique, e. g., ovum donation.⁵⁶ The Court is aware of ongoing medical and technological developments and societal changes in this field:⁵⁷ The Court, notwithstanding the wide margin of appreciation afforded to the Contracting States, the legal framework devised for this purpose must be shaped in a coherent manner that allows the different legitimate interests involved to be adequately taken into account. According to case law, we can note some developments, e. g., international recognition of birth registration (8 years of waiting to register the second parent was far too long for the child and for birth registration itself).⁵⁷ Any mother of intention must (also) have the possibility of obtaining legal parenthood when the child has been conceived with sperm from the father of intention and eggs from a donor and carried by a surrogate mother. The intended mother needs to be considered immediately and automatically as the legal mother; it is sufficient that she can be recognized and registered as the child within max. six weeks, or she can adopt the child anytime (also as an adult) without having to undergo unnecessary questioning on her personal life, provided that the child's best interests are protected and the procedure is effective and rapid.⁵⁸

52 ECtHR, *Paradiso Campanelli v. Italy*, 24.1.2017, no. 25358/12.

53 Swiss Supreme Court judgments, ATF 144 I 266, para. 2.5, 2C_178/2024 E. 1.3.1.; and judgment 2C_976/2019 of Feb 24, 2020, para. 4.1.

54 ECtHR, *Yochevy and Ganeva v. Bulgaria*, 11.5.2011, nos. 18592/15, 43863/15.

55 ECtHR, *Baret and Caballero v. France*, 14.9.2023, nos. 22296/20 and 37138/20 § 90; S.H. and Others, 3.11.2011, no. 57813/00 § 100; *Costa and Pavan*, §§ 64 and 71.

56 ECtHR, S.H. and Others, 3.11.2011, no. 57813/00 § 100.

57 ECtHR, *D.B. and other v. Switzerland*, 22.11.2021, nos. 58817/15 and 58252/15.

58 ECHR, Advisory Opinion of 10 Apr. 2019, No P16-2019-001, §§ 35, §§ 47, § 52 and §§ 55; confirmed in ECtHR, *D. v. France*, 16.7.2016, no. 11288/18, §§ 50, 58 and § 64, ECtHR C. and E. v. France, 19.11.2019, nos. 1462/18 and 17348/18, §§ 37.

III. Summary and open questions

We can resume the continuous development of legal protection for individuals through the European Court of Human Rights rulings, which touch upon or expand the choices of relationships, reproduction, and forms of parenting. This is not a development to return *to*; it is part of the “*identity turn*.” The ongoing process of legally recognizing all subjects of law in their facets of identity is at the very center of civil law and any family community.

We can also tell that certain social relationships between a child and a de facto parent outside marriage and the traditional two-parent family are (partly) legally recognized. A de facto family may refer to a private arrangement where two individuals live together in a relationship but are not legally married. A de facto family includes such arrangements with or without children. To our knowledge, there is no judgment on such an arrangement of more than two adults. These relationships may not be recognized as such but are afforded some legal rights and responsibilities made by parenting and financial support arrangements (or agreements). The cornerstone of any decision regarding parenting arrangements is the child’s best interests. This paramount principle guides the Court’s deliberations (Art. 3 UN-CRC).

Furthermore, we can state that a biological father’s position has changed fundamentally over the last 50 years. There is an increased desire to take action for filiation and to know one’s descendants, a right deduced from personal rights.⁵⁹ So, when, for example, legal parentage and sperm donation are open to married mothers (e. g., in Switzerland since 1.7.2022, Art. 255a CC), there is without exception, *from the beginning*, a *third* biological parent, in whatever way this sperm donation took place (officially recognized sperm donation institution or private sperm donation by a friend). The concept of the two-parent principle has yet to be addressed directly by the Court.

Once a “family” is legally recognized, state parties are required to protect vulnerable families, single-parent families, and Roma families under the principle of equality of treatment (e. g., regarding Art. 16 European Social Charter).⁶⁰

Art. 3 al. 2 UN-CRC demands that state parties undertake to ensure the child such protection and care as is necessary for their best interest and well-being, considering the rights and duties *of their parents, legal guardians, or other individuals legally responsible for them*, and shall take all appropriate legislative and administrative measures to this end. In our opinion, this provision is seriously violated when the *mater semper certa est* rule is applied to surrogates who do not wish to be legal and social mothers to a child but (just) birth givers. It seems objectionable from the point of view of personal and family freedom for a third country to impose on a woman the obligation to become a mother under Art. 8 ECHR, even though she has freely decided only to give birth to children for the benefit of third parties.

59 Swiss Supreme Court, 5A_76/2024, para.3.1; BGE 147 III 209, para. 5.1–5.2 with further ref.

60 ECtHR, *Yochevy and Ganeva v. Bulgaria*, 11.5.2011, nos. 18592/15, 43863/15 §§ 51, § 57.

In reviewing the national courts' decisions to exercise their margin of appreciation, the European Court seeks not to interfere too much in domestic affairs whenever there is no European consensus. It aims to balance all the interests of the family members involved. However, legal and ethical interests between family members have also *changed over time*.

With the revision of the Swiss law of filiation on Jan 1, 1978, for example, children born outside marriage were placed on an equal footing with those born to married parents.⁶¹ To ensure legal certainty and security of family relationships, there is, in the first place, easy DNA testing available to all.

Today, children born outside marriage will generally no longer interfere with the so-called traditional family structure. Because there are, in certain parts, at least almost 50 % of binational marriages (e.g., in the City of Zurich) and a high 40 % divorce rate (in Switzerland), there is no doubt that we are very much accustomed to complex family structures. Eventually, this will remain an aspect of one's private identity (Art. 8 al. 1 ECHR) – not only to understand one's origin but also to be acknowledged legally, even if it is very late in life and parents have already passed away.⁶²

Furthermore, reproduction constitutes a legal issue pursuant to Article 16, letter e, of CEDAW, particularly when the rule of *mater semper certa est* is applied to surrogates who do not wish to assume the roles of legal and social mothers to a child, but merely serve as birth givers. It appears objectionable from the perspective of personal and family freedom for a third country to impose upon a woman the obligation to become a mother under Article 8 of the European Convention on Human Rights (ECHR), even if she has voluntarily consented solely to giving birth for the benefit of third parties. The situation in which their children would not be deprived of significant familial relationships has not been addressed by the Court.

Furthermore, when access to reproductive technologies is limited to certain people, we can argue that we are no longer able to control our reproductive futures fully; thus, reproductive autonomy is violated.⁶³ Access to IVF treatments should, therefore, be protected and regulated predominantly in the *child's best interest*⁶⁴ and available to and affordable for everyone. Bionormativity, in the sense of privileging biological families

61 Swiss Supreme Court Decision ATF 149 III 370, recital 3.6.2. At the same time, the discriminatory dualism between inheritance and paternity, which did not create a legal parent-child relationship, was abolished.

62 ECtHR, *Mizzi v. Malta*, 12.01.2006, no. 2611/02, § 81; *Grönmark v. Finland*, 6.7.2010, no. 17038/04, §§ 55, there was no realistic possibility of successfully bringing the matter.

63 Kurt Seelmann, *Zugang zur Fortpflanzungsmedizin für alle?* expertise on the access to medically assisted reproduction, 2018; *ibid.*, *Tauglichkeit des Kindeswohl Gedanken für die Begrenzung von Fortpflanzungsverfahren*; expertise on the best interest of child concept in its limiting function about reproductive procedures, 2023, all commissioned by the Swiss Federal Office of Public Health, 2023.

64 Different treatment of sperm and egg donation cannot be justified in the best interests of the child; the best interests of the child cannot justify the exclusion of combined gamete donation: Berhard Rüetsche, *Rechtsgutachten zum Fortpflanzungsmedizingesetz (FMedG): Gesetzgeberischer Handlungsbedarf bei einer Zulassung der Eizellenspende* (Legal opinion on the Reproductive Medicine Act (FMedG): Need for legislative action on the authorization of egg donation) Lucerne 2023, mandated by the Swiss Federal Ministry of Health, nos. 37–40.

over all sorts of families, is legally problematic.⁶⁵ In *Baret/Caballero v. France* (2023),⁶⁶ the Court acknowledges the fact that when the national legislature (in France 2021, in Switzerland 2022) opened up assisted procreation to female couples (and eventually to single women), it once again raised the question of the justification for maintaining the prohibition to use gametes and embryos post-mortem by the (single) surviving party, if the deceased party made a corresponding declaration of intent before death.

Although gay and trans people are today able to marry and fulfill their wish to have a child if they are women, they are still on the sidelines when it comes to securing their parental rights. Couples who have children should also be legally protected, and the instance in which their children would not be deprived of significant family relationships has not been addressed by the Court.⁶⁷

In the end, reproductive autonomy can only be achieved in practice when all women and girls have the complete economic, social, and political power and resources to make healthy decisions about their bodies, families, and communities in all areas of their lives. The core elements of a *reproductive justice approach* are the right to have children, the right not to have children, and the right to nurture the children we have in a safe and healthy environment.

3. Ethical framework

I. Why an ethical framework?

Given the ongoing limitations of the current legal frameworks concerning inclusive family law as outlined in points 1 and 2/III, I wish to broaden the scope of normative considerations to include ethical aspects. This expansion aims to transcend existing rules and jurisprudence in order to conceive innovative models of family structures. Laws should be amended and adapted in accordance with our medium- and long-term ethical principles. Moreover, in a civil law jurisdiction characterised by direct democracy, it is impractical to revise our Civil Code periodically every two or three years without risking a loss of coherence. Establishing an ethical framework will facilitate flexibility in accommodating new developments while maintaining essential limitations.

Where shall we begin? As ethics centres on evaluating actions, we can first try to be as specific as possible, meaning we can look at ethical questions within the very concrete family relationships at a particular time, understanding there will always be changes. Secondly, it is not a matter of identifying our moral convictions as individuals but a *systematic process of reflection* and an attempt to clarify, structure, and justify our convic-

65 Seelmann (n. 62); Wiesemann (n. 61) 13; Christensen (n. 61), 216, McLeod (n. 26), 516.

66 N. 35.

67 The legal limbo they find themselves in Switzerland, for example, is a source of uncertainty for them and their families. Swiss law does not explicitly define legal transition, mainly reduced to sex change in the civil register; see Marie Fonjallaz, *Les parents trans**, *l'impensé des nouvelles réformes du droit civil*, in: Vuille et al. (eds.), *In corpore – What does the law do to our bodies*, 2025, 71ss.

tions (ethics has a claim to itself). After a structured analysis, we might realize that the moral difference between two cases with the same effect of a decision has different underlying intentions.⁶⁸ Ethics also aims to remain relevant beyond the rapid technological changes underway, which may enrich legal analysis and offer resources for interpretation in complex cases not covered by law. If, for example, someone without parental rights cares for a child, this will correspond to the value of responsibility and should impact our decisions/interpretation of their legal relationship. The law can and shall be modified and adapted according to our medium- or long-term ethics. For example, the proposed Swiss legal revision of an “adoption procedure light” in 2024 resulted heavily from the fact that a child in Switzerland had to wait much too long (eight years) for the second caring parent of the legal father to be recognized legally, according to the European Court of Human Rights.⁶⁹ This revision shall also provide the possibility to adopt the child of one’s partner without the condition of sharing households for three years upon the moment of adoption, which has also been criticized.⁷⁰

In this sense, ethical considerations on the responsibility to care for a child may unfold on different levels: at an individual level, one may adopt the perspectives of the child-parent relationships and raise the question of the “right” decision considering our chosen (standard) value of who is taking care. At an institutional level, ethics of responsibility could focus on schools, child healthcare institutions, and other political institutions and their choices. It could be, for example, an unethical (not illegal) choice of school authorities to ignore a legally non-recognized person caring for a child (e. g., the mother of a school friend of a 15-year-old girl who has taken care of her daughter’s friend for more than 16 months, without any authority decision). An ethic of responsibility to care at the public level may eventually be taken on by national ethics commissions and/or adopted into laws on national or international levels.

Finally, we must be clear that we are writing about ethical responsibilities in a changing world. This means our ethical values must be adaptable.

II. Taking responsibility for a child

Familial relations include relationships between parents and children and their responsibilities (or duties) to each other. We can divide the latter into parental and filial responsibilities.⁷¹ Filial responsibilities are discussed in the literature because of the aging

68 Two examples: 1) person no.1 neglects a child deliberately because she feels the other four little children need her care more; person no. 2 neglects her child intentionally because she puts all her efforts into escaping the ‘authorities’ power. The result of negligence for the child is the same, but we will likely have more sympathy for person no. 1’s intentions because they correspond better to the value of caring. Of course, we may also understand the intentions of person no. 2, but it is not clear that the authorities would not find a better solution for all the children.

69 ECtHR, *D.B. and other v. Switzerland*, 22.11.2021, no 58817/15 et 58252/15.

70 Sandra Hotz, “Ehe for alle – Wie weiter?“, *Schweizerische Juristenzeitschrift*, no. 2/2021.

71 Monika Betzler/Barbara Bleisch (eds.), *Familiäre Pflichten*, 2015, 9.

of our societies⁷² but must be excluded here. However, they are connected to a child's number of parents and must be limited (see point 5/III). Caring for a child is also substantially different and unique because the *power imbalance is, from the beginning, incomparably more significant* than among adults, who are not in need of care and often have established social relations and material resources.

Taking responsibility for a child, namely caring, seems a *sharable ethical value in our societies*. Undeniably, children need care in the form of physical, intellectual, and material help (the less mature the child, the more help required). Because of this significant power asymmetry between the caregiver and care receiver, adults also bear legal and social responsibilities to care. De jure assisting, nourishing, caring, educating, and paying maintenance can be enforced if the legal filiation is established for a parent and there is an obligation to do so. Parents, in practice, take responsibility for their actions (or omissions) towards a child and the resulting consequences for their development and best interests. However, for all other people in a child's life who are not legally recognized as parents and who stand outside family law, there are (generally) no such clear obligations, so responsibilities remain. Furthermore, we cannot enforce commitment to emotional support or parental love even if we agree on them legally and ethically.

An ethical framework of care could incorporate caring, as it is widely recognized that caring is vital for children's emotions, well-being, development, and health. In this context, responsibility entails being reliable and accountable for providing and maintaining a stable, supportive environment. Some authors also argue that a legal obligation to remain involved with a child solely applies to "the primary carer."

We should consider that individuals have differing priorities in child-parent relationships. Some focus on the duration of responsibility, whereas others prioritize the quality of time spent or financial versus educational responsibilities. There is also the risk of misunderstanding children's needs for care, and parents may first need to cultivate the ability to distinguish their own needs from those of the children they care for.

An ethical framework of care for children *must always include children's participation*. Without children's involvement behind the veil of ignorance on public, institutional, and individual levels, there cannot be a meaningful, inclusive, legal, and ethical approach to regulating families. This goes hand in hand with Rawls's adoption of perspectives,⁷³ and it should remind us that we can change our perspectives because individuals are, at least in our culture, 50 years after *The Theory of Justice*,⁷⁴ generally more claimed and robust. Today, we are also much more used to taking on different roles within families (e.g., we can be sperm donors and parents, intentional parents and surrogates, and child and parent, most likely, parents might become like children to us later in life). So, within an ethical framework, we are interested in the coherence between our values and choices

72 E.g. Claudia Mills, Pflichten gegenüber älteren Eltern, in: Betzler/Bleisch, 2015, 260ss.

73 Felix Heidenreich, *Theorien der Gerechtigkeit*, 2011, 122.

74 John Rawls, *Theory of Justice*, 302, 511, wrote that we needn't "abolish the family," but basic structures and institutions that the people behind the "veil of ignorance" would choose should be defined so that citizens can agree with them; for a discussion, see Jennifer Finch, *Family Obligations and Social Change*, Cambridge 1989, 40.

in the lifespan of each decision made and the context (relational setting). Incorporating the ethical value of taking responsibility for the ones who need care into family law will create a more compassionate and just legal framework for families. This will ultimately foster equality among familial communities and support healthier family relationships and outcomes.

III. Care ethics within family law

Carol Gilligan's proposal on *care ethics* in the 1980s started a great debate. Although reflections on care ethics within family law exist, they remain rare.⁷⁵

Ethics of care in family law emphasize contextual and relational considerations, focusing on empathy, understanding, well-being, and responsibility. Namely, Gillian Douglas and Jonathan Herring have suggested that taking care should have a defining role within family law.⁷⁶

Herring proposes four criteria for care: *meeting needs, respect, responsibility and relationality, and defining caring relationships* (e.g., by duration, activities, and commitment within the relationship). We can call this a "function-based" approach to family compared to traditional status/form-based approaches.⁷⁷ A sexual relationship is, for example, irrelevant in meeting such aims. It is a good idea to focus on the intended or existing relationships, their legal and social contexts, and how care work can or should be done. Then again, "function-based" recognition will involve normative assessments in selecting care indicators. However, this begs the question of determining when the nature and degree of care are sufficient to justify legal recognition.

Care is undoubtedly a central obligation in family law, which is based (factually and legally) on the relationships built and, in the end, maintained through love, affection, and mutual ongoing care. However, family law does not regulate or enforce mutual responsibility of feelings (e.g., love, friendship), making it challenging to handle care relations legally. For example, we cannot expect care work among partners if one has violated the other for a long time. Additionally, among spouses who agreed to live together "until they die," a partner is not legally obliged to care for the other one personally once dementia has altered the partner completely. However, there is a *financial* obligation to

75 Carol Gilligan, *Another voice*, 1980: care ethics can be understood differently: first, it is about how to value daily care work within families; second, it is about how to behave morally towards society; and third, it's also about a state's obligation to families and their members because they care.

76 Gillian Douglas, *Obligation and Commitment in Family Law*, 2020, chapter IV, 812ss.; see too *Obligation and Commitment in Family Law—Author's response*, Jerusalem Review of Legal Studies, Volume 22, Issue 1, December 2020, 147–159; Jonathan Herring (n. 15), 2014. See for more recent interesting ideas based on care ethics: Elise Goossens, *Family Solidarity Model of Unmarried Partners* in: Duden/Wiesemann (n. 3), 59ss, 67ss, with a model of a care-centered relationship, in which, for example, financial claims between partners stem from a vertical caring relationship between a parent and a child. Verle Vanderhulst, *From Kinship to Careship*, a search of a new concept in: Swennen et al., *Re-Thinking Laws Families and Family Law*, 2024, 50ss, how to include long-term caring people in institutions as members of the family.

77 Herring (n. 75).

do so. – In short, we do not marry to care. Neither marriage nor parentage means giving up on the decision to form or maintain a commitment to a relationship that rests on one's own. Caregiving and caring about others often go hand in hand; whereas the first might be enforced, the second cannot.⁷⁸ states in Australia provide a valuable case study of how and to what effect a “functional” family law model on care might work.

Parental responsibility will include *the obligation to care, education, and maintenance*. Care is (also) recognized with the concepts of contact and shared care, emphasizing attention. To some authors, caring for a child is a matter of parents' rights and obligations; the “primary carer” is legally obligated to maintain involvement with the child. The ethics of responsibility to care at the point of starting a family are clearly not the same as when families are about to have a fourth child or at their end (death, not divorce or adulthood), but they are also not entirely different.

IV. Ethics of responsibility with a focus on technological progress

When searching for existing concrete responsibility ethics, we can lean, for example, on *Hans Jonas*. According to his principle of responsibility (1979), every person should act so that the effect of their actions is compatible with the continuity of human life on earth and the next generations. The goal is to rein in technological and societal progress so that we can shape it and make it less destructive for us. Although his ethics do not explicitly address families, they can be applied to family law. He addresses vulnerability first and duty second, meaning that we must act responsibly to protect and support those under our care (in the long run). He also stresses the transparency of decision-making in family law.

Finally, considering Jonas's wishes to integrate long-term well-being and future generations, ethical responsibility seems vital. The newborn is one of his archetypes of responsibility. Seeing a helpless baby is, at least in modern European societies, regular enough to encourage one to take responsibility for and nurture it.⁷⁹ Although witnessing a baby might trigger a *sense* of responsibility, true responsibility involves *active*, consistent action. Applied to newborns or young children, Jonas's ethics would mean that their needs are prioritized. A child born through IVF, eventual sperm and egg donation, and surrogacy requires ethical reflection before we embark on a journey into unknown families. We must consider whether the boundaries are respected and whether the human being remains recognizable as a human being.

We cannot envision a more inclusive understanding of family and ignore the rapid technological evolutions and the populational realities. In her essay on future technological generations or families, Haraway sees a remaining duty to care for parents: “Parenting is about caring for generations [...]; reproducing is about making more of

⁷⁸ Douglas, (n. 76), siden. 792.

⁷⁹ Hans Jonas, *Das Prinzip Verantwortung. Versuch einer Ethik für die Technologische Zukunft*, 1979, 80, 234.

oneself to populate the future.”⁸⁰ Whatever it may mean to be a parent in the age of reproduction technologies, robotics of care, and AI-set nannies, our interactions with robots, for example, may be regarded as actual (i. e., real) care work within a family or for future generations.

At the same time, reproductive medicine and biomedical research, seconded by bioethics, have brought new interests to bear on *the embryo* and protecting the best interest of the child born by ATR. One actual field of application of an ethical framework of responsibility is, therefore, the question of limiting ATR (e. g., do we need legal age limits?) and/or making it specific to sperm and egg donations or the use of cryopreservation of oocytes and embryos (*postmortem*⁸¹).

The cryopreservation of oocytes is an excellent example because it may not be legally regulated, but it is practiced (for example, in Switzerland). Cryopreservation was developed in the wake of the technological progress of nitrification. It offers women more autonomy to influence their fertility and decide when to start a family. Still, it will never be their exclusive choice to become pregnant when sperm donation and access to IVF are restricted to couples by law. On the contrary, we can argue that cryopreservation of oocytes fosters the concept that reproductive responsibilities and family-work planning lie on the backs of women and upholds the two-parent principle and traditional family ideas.⁸² Financial interests and the idea of state birth regulation are also behind it. We cannot say that technological progress fosters only autonomy and self-determination. Still, if there are no health issues connected to cryopreservation for the involved (namely the child), then there is not enough public interest to limit the cryopreservation of oocytes.

Surrogacy, again, is one of the most debated topics, oscillating among liberal-capitalistic, conservative-religious, and feminist arguments. About 40 years ago, the famous Californian *Baby M case* (1985) on surrogacy was decided and highly discussed because the surrogate mother who gave birth refused to give up her parental rights and child. Thirty years ago, in *Johnson v. Calvert* (1993), the discussion was about a racist exclusion of the paternity of a “black surrogate” who had no standing, even if she was genetically related to the child. Since then, practices of surrogacy have evolved continuously, and discussions on the tightening or liberalization of laws on surrogacy take place all over the world. Twenty years later, in 2013, a 35-year-old woman with congenital absence of the uterus (Rokitansky syndrome) underwent transplantation of the uterus (UTx) in

80 Donna Haraway, “*Speculative Fabulations for Technoculture’s Generations*,” *Australian Humanities Review* 50 (Month, 2011): 95, 116. Whether the interactions with robots provide genuine care or not, we need to consider pressing questions raised by robots entering close relations with humans: Can we be human in the same way now? How are our societies changing in terms of our encounters with and production of robots?

81 ECtHR, *Baret and Caballero v. France*, 14.9.2023, nos. 22296/20 and 37138/20.

82 See Vagias Karavas “Ermächtigung durch Technik?” Zum Umgang mit Technikoptionen im liberal-demokratischen Rechtsstaat am Beispiel der Eizellkonservierung and Claire Grino “la place du genre dans l’usage de la cryopréservation des gamètes” in: Hotz, Cottier, Kapferer (eds.), *Law on the move*, 2021, 151ss, 177ss.

Sweden.⁸³ Today, another ten years later, the feasibility of UTx procedures has been proven with 46 healthy children in 88 procedures. This makes surrogacy practically unnecessary and can provide for social, genetic, and gestational parenthood simultaneously (it bears, however, other ethical problems).⁸⁴ In the future, an artificial womb as a medical device might do the work.⁸⁵

Reproductive technologies are thus progressing rapidly, and a biomedical discussion might be too limited. Biomedical law sometimes detaches the body from the relationships surrounding it. Physical and genetic functions and characteristics of bodies, body parts, and embryos are emphasized and thus increasingly “objectified.” This also applies, for example, to pregnancy, which is increasingly monitored and medicalized, and to the typical “female reproductive capacity,” which is essentialized.

On the other side, an ethics of responsibility to care, focusing on technologies, could adapt quickly. One guiding value we can agree on is that children should be born and represent the next generations. An ethics of responsibility to care will offer opportunities for alternative ways of family life provided by reproductive technologies. To care for children will, for example, include informing them of their origins. Being responsible and caring for all family members involved—be it a sperm donor or a surrogate mother—will change our perspective on sperm donors and pregnant women as mere service providers who have no rights and can be exploited.

Such inclusive thinking could lead us to reflect, for example, on creating registers. At least, when cross-border cases of recourse to ATR first emerged, they should have led us to reflect on whether our conflict-of-law rules are appropriate in the face of new modes of creating parentage.

4. The need to question some basic norms of family law

Within such a legal-ethical framework, we can create space for more diverse relationships and families to flourish that respect the right to autonomy and the ethics of responsibility to care equally.⁸⁶ However, we must also allow ourselves to question some basic norms of traditional family law: the legal supremacy of marriage, the two-parent principle, and the *mater semper certa est* rule. These norms are rooted in social and legal expectations of traditional parenthood and bio-normativity.

83 The uterus was donated from a living, 61-year-old, two-parous woman. In-vitro fertilization treatment of the recipient and her partner had been done before transplantation, from which 11 embryos were cryopreserved: Hakan Okgun, *Miracles of science, birth after uterus transplantation*, Epub 2014 Oct 6. <https://obgyn.onlinelibrary.wiley.com/doi/10.1111/jog.15825>.

84 Nicola J. Williams, Rosamund Scott, Steven Wilkinson, *The ethics of uterus transplantation*, *Bioethics*, 32 (2018), 478–480.

85 The idea is that preemies could spend a few weeks continuing to develop in this device after birth so that when they're transitioned out of it, they are capable of surviving and have fewer complications than with conventional treatment.

86 Claire Chambers, *Against Marriage, An Egalitarian Defense of the Marriage-Free State*, 2017, pp. 20.

Opening the circle of legally recognized family forms does *not* mean ignoring love, family bonds, or the “meaning of marriage”⁸⁷ and people’s wishes for commitment, weddings, and/or religious blessings. Today, pastors may spontaneously marry lovers who want a Christian blessing—even several times.⁸⁸ There exist so-called “covenant marriages” in three U. S. states that allow couples to opt for marriage with premarital counseling, which is then more difficult to divorce than in a “conventional” marriage.⁸⁹ Today, people consider marrying a form of “self-expression” without wanting to parent and/or enter into a relationship.⁹⁰ Co-parenting platforms, which allow future parents to find each other without the intention to marry and enter into love relationships, are increasingly common.⁹¹ In short, a legal deinstitutionalization of marriage will not diminish the individual meanings of marriage or the wish to parent. The fact is that, on the one hand, men wrote our legal history and family laws a very long time ago.⁹² On the other hand, in today’s legal practice, our authorities must draw “*family trees*” to follow the existing complex personal relationships of children that are no longer (only) based on linear blood kinship but on various choices and parental agreements. Single-, two-, and multi-parent families of different forms have become very common because of the multiple marriages and divorces during parents’ life spans. The wish for co-parenting among gay and lesbian couples is relatively new after the reign of nuclear families in the 1950 s.

Questioning a two-parent principle as a fundamental norm does not mean that all children will have three or four parents in the future who will dispute child issues, and all responsibilities will be lost. On the contrary, the future of an inclusive approach to families means enlarging the circle of shared care responsibilities and guaranteeing the child’s best interest. More loving hands might prevent parental burnout.⁹³ Alternatively, Simone de Beauvoir said it prevents maternal “slavery” and a kinship-property-relation⁹⁴. This brings us back to respecting (better) personal choices to take responsibility and promoting equality among the chosen familial communities, which are, in the end, also questions of *better individual well-being and health*.

87 The creation of a mutual recognition and affirmation of the importance of the other person’s existence seems important: Weibel (n. 22) 10; for a “new symbolic function” of marriage, see the study of Heike Matthias-Bleck (n. 23), 132; Jan Pryor, *Marriage and Divorce in the Western World*, in: Abela / Walker (eds.), *Contemporary Issues in Family Studies*, 2014, 46–58, 54.

88 Swiss Daily Newspaper “Tages-Anzeiger,” Jul 15 2024, 17.

89 Steven Nock, Laura Sanchez, James D. Wright: *Covenant Marriage. The movement to Reclaim Tradition in America*, 2008; Katharina Shaw Spaht, “Louisiana Covenant Marriage: Social Commentary and Legal Implications,” *Louisiana Law Review* 59 (1998): 64; Louisiana was the first state to enact “conventional marriage” in 1997; in Arizona and Arkansas, this happened in 2001 and 2022, respectively; discussions have occurred in approx. 20 other states, but covenant marriages remain controversial.

90 Weibel (n. 22) 60; for about ten years, “solo weddings” for women have been on the market successfully (<https://www.bbc.com/news/blogs-news-from-elsewhere-30574801>, 21.9.2025); see also “sologamy” (<https://en.wikipedia.org/wiki/Sologamy>, 21.9.2025).

91 Matthias-Bleck (n. 23), 132.

92 Simone de Beauvoir, *Le deuxième sexe*, 1949, 179, 899.

93 Moira Mikolajczak, Marie-Emilie Raes, ME., Hervé Avalosse, Isabelle Roskam, et al. *Exhausted Parents. Sociodemographic, Child-Related, Parent-Related, Parenting and Family-Functioning Correlates of Parental Burnout*, *J Child Fam Stud* 27, 602–614 (2018).

94 Simone de Beauvoir (n. 91), 179, 899; Lewis (n. 107, Abolish) sidenote 55.

Only within this historical web of the legal supremacy of marriage and the two-parent principle can we understand the third fundamental principle of family and filiation law, which I would also like to question: the *mater semper certa est* rule. The person who gives birth is always the “mother” or “the first parent” or, in a less personalized hierarchical manner, will fill “the first position of parentage.”⁹⁵ The *mater semper certa est* rule and the two-parent principle may have made perfect sense within the legal supremacy of marriage, a mother giving birth and a father marrying the mother. Today, almost 40 % of children in Switzerland are born out of wedlock. About 6.5 % of those giving birth underwent ATR.⁹⁶ Questioning the *eo ipso* legal parentage of the person giving birth would not mean (legal) parental responsibilities are lost, because firstly, the birth certificate remains to be filled out. Then the civil registering of parentage (upon agreement or declaration) could become decisive. Secondly, hardly any person giving birth does not want to be a parent, except for surrogates, to whom the *mater semper certa est* rule nevertheless applies.⁹⁷

It seems a good time to question these basic norms because reforms in filiation laws are on their way that (understandably) struggle with these three underlying basic norms of family law. Currently, some promising revisions underway in Europe will make it easier to take account of changes in society and of the diversity of family constellations (on very different scales; e. g., in *Germany*, the Self-Determination Act has been in force since 2024).⁹⁸ This enforces human dignity, the right to free personal development, and the right to gender self-determination. The ongoing reform of the German Filiation Law foresees that in the future, it shall be possible to agree on and determine who is a parent alongside the “birth mother” before a child is conceived and that a biological father who is not yet the legal father but wants to take responsibility should have his legal position strengthened. However, the two-parent principle shall be kept.⁹⁹ In the *Neth-*

95 For an example of so-called “first” and “second” paternity: Sandra Schröder, *Wer hat das Recht zur rechtlichen Vaterschaft?* 2015.

96 Statistics of the Swiss Federal Office on birth as of 2024: <https://www.bfs.admin.ch/bfs/de/home/statistiken/bevoelkerung/geburten-todesfaelle.html>; <https://www.bag.admin.ch/de/fortpflanzungsmedizin-zahlen-fakten> (21.9.2025).

97 Anatol Dutta, “Künstliche Fortpflanzung in ‚Anbieterrechtsordnungen‘ – ein Blick über Europa,” in Dutta et al. (eds.) *Künstliche Fortpflanzung und europäisches Familienrecht*, 2015, 362; Christiania Fountoulakis, *L’impact de la procréation médicalement assistée sur l’établissement et la destruction du lien de filiation*, FamPra. ch 2011 261. Sandra Hotz, Jérôme Saint-Phor, *Reconnaissance de la filiation par suite du recours à la maternité de substitution – un rappel de la ratio legis, analyse de l’arrêt du Tribunal fédéral 5A_545/2020*, Newsletter DroitMatrimonial.ch juin 2022.

98 “Gesetz über die Selbstbestimmung in Bezug auf den Geschlechtseintrag (SBGG),” as of Apr 23, 2023, passed by the German Bundestag on Apr 12, 2024; as of Aug 1, 2024, it is possible to submit a declaration to change the gender entry and first names, and as of Nov 1, 2024, the Self-Determination Act will finally replace the Transsexuals Act of 1980.

99 Report of the Ministry of Justice as of January 2024 “Bundesministerium der Justiz, Eckpunkte zur Reform des Abstammungsrechts,” p. under https://www.bmj.de/SharedDocs/FAQ/DE/Abstammungsrecht/FAQ_Abstammungsrecht.pdf?__blob=publicationFile&v=2 (21.9.2025) and the Draft for a new Law as of December 9 2024 “Diskussionsentwurf des Bundesministeriums. Entwurf eines Gesetzes zur Reform des Abstammungsrechtsreformgesetzes – AbReG the https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/DiskE/DiskE_AbReG.pdf?__blob=publicationFile&v=4

erlands, the government is considering legislation recognizing up to four legal parents in two households, and legislation on surrogacy to secure the positions of all involved is foreseen.¹⁰⁰ In *Switzerland*, a quicker, simplified adoption is foreseen for the child of an intended parent if the other partner is the legal parent.¹⁰¹ The second parent should be determined by will/recognition. In the opinion of a minority of the expert group on the reform of filiation law (report 2021), multiple parenthood may be possible based on an agreement.¹⁰² No reform project would be intended to give up the basic norm of the *mater semper certa est* rule other than reformulating it in a gender-neutral manner (first parent, first position of parenthood).

To question the basic norms of family law is also a risk.¹⁰³ Current right-wing movements are fostering the biological two-parent principle. In *Italy*, the Meloni government has ordered local authorities to stop registering children of same-sex parents in both their names. Some straightforward pronatalist policies have been put in force. For example, in *Hungary*, the Orbán government established heavy incentives for the heterosexual two-parent principle and parents no older than 40 years.¹⁰⁴ Abortion laws have been restricted since the post-Dobbs decision in the U. S. and Poland (and elsewhere), not to forget the failure of the Contraception Act and the right to IVF falling into legal limbo in Alabama. In Russia and China, there is pressure on women to marry and to have children.¹⁰⁵ Beyond straightforward pronatalist laws and practices, there is, of course, subtle societal pressure on women to procreate. Otherwise, their lives might not be “good.”¹⁰⁶

Attempts to restore the traditional patriarchal order “where a father is a father” and women “resume their natural and moral positions within the household,” as well as the

100 Multi-parenthood has been a topic in Dutch politics since the State Commission for Reassessment of Parenthood rendered their expert report on multi-parenthood in 2016; see <https://www.universiteitleiden.nl/en/news/2016/12/government-commission-for-reassessment-of-parenthood-central-role-for-best-interests-and-rights-of-the-child> (21.9.2024). The Minister for Legal Protection and the Minister for Culture, Education and Science brought the issue back to Parliament on Oct 6 2023. In June 2023, the Minister for Legal Protections announced legislation proposing a regulation for surrogacy; see <https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorstelgegevens&qry=wetsvoorstel%3A36390> (21.9.2024). cf. Nola Cammu, “Legal Multi-parenthood” in Context: Experiences of Parents in Light of the Dutch Proposed Family Law Reforms, *Family & Law*, July 2019, 10.5553/FenR/.000042 (21.9.2024); Sara Verburgt, *Family Law Netherlands 2024, Trends and Developments*, 29.2.2024.

101 The Swiss Federal Council opened the consultation procedure on this amendment to the Civil Code at its meeting on Jun 26, 2024. Children living from birth with a legal parent and the intended parent should be able to be adopted more easily by the latter: <https://www.admin.ch/gov/fr/accueil/documentation/communiqués.msg-id-101589.html> (3.3.2025).

102 This proposal would consider children able to have parent-child relationships with more than two parents, ensuring that this seems to be in the child’s best interest. Alexandra Jungo; Regina Aebi-Müller (?); Eva Maria Belser; Andrea Büchler; Kai Burkart; Michelle Cottier; Samia Hurst-Majno; Philippe Meier; Heidi Simoni; Matthias Stein, *Bericht und Empfehlungen der Expert-inn-engruppe zum Revisionsbedarf im Abstammungsrecht*, 2021 (cit. Swiss expert report).

103 Emilia Roig, *Das Ende der Ehe*, 3rd ed., 2023, 15.

104 From taking over state fertility clinics and providing grants and mortgage gifts to total tax exemption, cf. Eva Fodor, Getting paid to have children, Hungary’s “carefare” regime, *The Loop*, European Consortium for Political Research’s Science Blog (<https://theloop.ecpr.eu/getting-paid-to-have-children-hungarys-carefare-regime>, 21.9.2025).

105 There are also attempts to hinder divorce, cf. Swiss Daily Newspaper “*Neue Zürcher Zeitung*,” 12.8.2024, 5.

106 McLeod (n. 26), 452.

backlash against gender issues in general, are profound.¹⁰⁷ Additionally, some feminists (those against surrogacy, for example) or some *bioethicists* (trying to balance family and science, altruism and commercialization, etc.) may directly or indirectly support traditional family ideas, which only foster naturalization.¹⁰⁸

Finally, we must also face the fact that the Human Rights Court's legitimacy is challenged because it aims to protect human rights against the states that must comply with and implement the courts' judgments based on Art. 8 ECHR.¹⁰⁹ Questioning essential family and filiation law norms is *highly emotional and political*. Family formation by civil law not only influences access to reproduction technologies but impacts entire established branches of public law, such as social security, tax, or migration laws.¹¹⁰ If specific familial communities are recognized as families by law and others are not, the legal order has an equality problem.¹¹¹

Being inclusive does not mean "abolishing the family" but rethinking the fundamental structures (and institutions) that people behind the "veil of ignorance" would choose. These structures and institutions should be defined so that citizens can agree.¹¹² The ethical framework of care and responsibility has limiting effects. Any proposed *private ordering* of families must keep up with a powerful counterpart: a state with economic and political interests in legally framed fields.¹¹³ *Public ordering* of families, on the other side, which has also been asked for in literature so that families may "survive," is not the focus of this article but is, of course, also an option.¹¹⁴ However, to my understanding, *we must start with the subjects of law* and citizens of our state and what they live and choose as families or communities, homes, and places they care for, not the other way around.

107 Judith Butler, *Who's Afraid of Gender?*, (2024), 14; for organizations defending traditional family, see also 48.

108 Sophie Lewis, *Full Surrogacy Now: Feminism against Family*, 2021, 160; idem, *Abolish Family, A Manifesto for Care and Liberation*, 2022, who states that only by thinking beyond "the family" we begin to imagine what might come after; at the same time, "if it would be better to call for an expanded family, or a reformed version of the family, rather than an abolished one" (siden. 51) and then again states, that any reform of "family" will retain in one way or the other to the concept of kinship-property-relation (siden. 55) or to put it differently: what will result "from the family or survive in spite of the family" ? (siden. 63)

109 Miles Jackson, *Judicial avoidance at the European Court of Human Rights: Institutional authority, the procedural turn, and docket control*, International Journal of Constitutional Law, Volume 20, Issue 1, January 2022, 112ss; Corina Heri, *Deference, Dignity and "Theoretical Crisis": Justifying ECtHR Rights Between Prudence and Protection*, Human Rights Law Review, Volume 24, Issue 1, March 2024.

110 Olsen (n. 2) *Michigan Journal of Law Reform* 18, 835; Frederik Swennen, "Chapter 1. Private Ordering in Family Law: A new Perspective," in Swennen et al. (eds) *Ius Comparatum. Global Studies in Comparative Law* 2015, 3; Büchler (n. 19), 5.

111 John Stuart Mill, *On Liberty and Subjection of Women*, 89, 173; Chambers (n. 85), 49; Kühler (n. 21), 45ss., 57.

112 John Rawls (n.73)302, 511, for a discussion see Mary Barbara Walsh, "Private and Public Dilemmas. Rawls on Family," *Polity* 44, no. 3 (July 2012): 426 and already Jennifer Finch, *Family Obligations and Social Change*, 1989, 40.

113 If we consider, for example, migration law, in which "family unification" is a normative principle, a new inclusive understanding of family will remain very difficult to enforce: Sandra Hotz, Nula Frei, Anne-Laurance Graf, "Gender, Kritisches und genderbewusstes Migrationsrecht," in: Uebersax et al., *Handbuch für Ausländerrecht*, 2022, 249ss.

114 Christian Seiler, *Grundzüge eines öffentlichen Familienrechts*, 2008, 64, or see Chambers (n. 85), who proposes state directives, 20.

Any additional “status” or “family form” legally recognized (e. g., registered partnership, same-sex marriage, parents) is prone to exclude “others.”

Furthermore, families are (still) considered unique, influential, and altruistic communities whose members are more likely prepared to do anything for the other people in this community, which means that *care work* within families will often be continued on familial grounds, even if other participants in an open care market regulated by contract and business law are no longer doing so. Therefore, it may also be obstructive and have negative consequences to be coined a “family” and thus involve special regulations for families, such as expressed, for example, in literature by the term “family law exceptionalism.”¹¹⁵

Families, by private agreement based (at least partially) on intention, agreements, and contract laws adapted to family law, would have the potential to foster and recognize the relational and lived responsibilities and care work more equally to “other types” of work. The discussion of altruistic v. commercialized surrogacy would probably not have occurred within a contract law frame (once agreed, it is not illegal). From my perspective, it is difficult to see an advantage in the fact that all kinds of people earn much money from the business of paid reproduction (any form)—doctors, reproduction clinics, placement agencies—except for pregnant women or egg donors themselves.

In any case, we must stop constructing gestation, giving birth, and caring (or parenting) as individual fulfilment of any person with a uterus. Pragmatically considered, each of them works but has very different implications.¹¹⁶

5. Families by agreements

I. Private ordering – a question of degree

The principle of private autonomy also governs our private laws. Autonomy in intimate/ personal relationships and reproduction are strictly personal rights subject to *informed consent* and *contractual freedom*.¹¹⁷ Contracts and informed consent are only valid within the legal framework (they must not derogate from imperative legal provisions nor infringe public policy) and if the concerned person acts with free will and enough information to have free will. In recent years, the term “families by private ordering” has been used because it is a softer denominator than the contextualization of family law.¹¹⁸ However, in the last few decades, we have witnessed some studies on using modern contrac-

115 Jannet Hallet, *What is Family? A Genealogy*, Yale Journal of Law 2013 1: 1–109 and 2: 189–293, see Halley (n.1), 753ss.; Hotz (n. 10), 538 s.

116 Lewis (n. 107, Surrogacy), 170.

117 Hotz (n. 10), 79 .

118 Brian H. Bix, *Families by Agreement*, 2023; Swennen (n. 109) ‘A topic breakdown was proposed to national reporters based on preliminary research (Swennen, 2013): considering their feedback, a questionnaire of 28 general and specific questions was distributed; Margalit Yehedzkel, *Determining Legal Parentage: Between Family Law and Contract Law*, Cambridge University 2019.

tual devices and doctrines to regulate the establishment of legal parentage privately. This involves exploring whether and to what extent there is room, legally and ethically, for using contractual devices and doctrines to regulate the establishment of legal parentage privately. This article offers intentional parenthood as the most appropriate and flexible normative doctrine for resolving the dilemmas that have surfaced in determining legal parentage. By using the certainty of contract law, determining the legal status of parenthood will be seen as the best method to sort out ambiguities and assure both parental and children's rights.

Alternatively, based on intention/will, we will not discuss whether one could also acknowledge different family statuses, such as a single-, two-, three-, or four-person families, by public law. However, any defined "status" (like categories) is prone to excluding some families and becoming outdated over time.

The problem remains that civil partners will not be able to opt for personal rights and obligations such as cohabitation, fidelity, or reproduction, whereas opting for parental arrangements concerning work, financial responsibilities, and property rights for one's family is possible. Furthermore, we will still need specific prevention, such as pre-agreement, state control, and a legal framework for developing family arrangements (see II–III).

Inclusive family law by agreement is based on autonomy, responsibilities, and our (complex) living arrangements that we might have chosen beforehand or tacitly and/or have (just) grown into (not to change it is again an agreement).¹¹⁹ For example, a multi-generational household is not something to be planned upon marriage; it develops depending on one's personal life condition and that of the elder or younger generation.¹²⁰ Then, we will need to decide what type of multi-parenthood, by agreement or arrangement, is legally recognized and whether there are limits on the content or number of people with whom we can agree or arrange families—or if we cannot agree on more than two legal parents.¹²¹ Moreover, a "third" parent (e. g., the biological, non-legal father or the social, non-legal mother) should be (only) granted explicitly individual legal rights, such as a right of access, a right to information, and/or maintenance obligations, even if they do not gain legal parental status. Anne Sanders (2018), for example, proposes to take multi-parenthood into account more conceptually, which exists as various parental connections (intentional, gestational, genetic, and social connections) to the child. The more of these connections there are, the more limited the legislator's power of disposal is and the greater the protection of the parents will be.

Anne Sanders is also in favour of a parental agreement that can be introduced with the consent of the parents involved, whereby this author differentiates between parental contracts, rights, and duties under the assigned parental rules and those who want to es-

119 Andrea Maihofer, "Pluralisierung familialer Lebensformen – Zerfall der Gesellschaft oder neoliberal passgerecht?" in: Pühl/Sauer (eds.) *Kapitalismuskritische Gesellschaftsanalyse. Queer-feministische Positionen*, 2018, 113, 124, 133.

120 Weibel (n. 22) with further ref.

121 Bix (n. 117), 56.

establish a private-autonomous parental status; the latter is not possible or lawful, because adoption is reserved for this purpose.¹²²

II. Parental agreements

An inclusive family law within a legal-ethical framework balancing autonomy and responsibilities could expand to various family forms based on an agreement on how to start a family and how to parent.

The term *parental agreement* may be used in various ways. It includes agreements on deciding binding legal parentage and may also include agreements on how to parent.¹²³ Agreements in this first sense on legal parentage may also add or subtract certain parental rights and responsibilities, such as custody, access, or visiting rights. We can, for example, imagine an agreement in which four parents would split their parental responsibilities equally or a third parent (e.g., a grandmother, a biological father, a surrogate, an egg donor) has distinct visiting rights.

Families, by parental agreement, can replace state-recognized marriage (because it is also considered parental agreement) or exist beside it; they can concern non-married or married people and encompass paternal responsibilities and/or rights and/or duties relating to property. Most legal systems already provide for some explicit regulations on prenuptials and agreements on matrimonial property laws¹²⁴ (e.g., written form, the duty of information, the prohibition of abuse of rights in the phases of execution and performance of a contract, the ban on exoneration clauses in the post-contractual phase), but in general, they do not (yet) allow contract families. Marriage is determined “a status” in family law, even knowing it is a form of contractual relation. To Blackstone, marriage was already seen in “no other light than a civil contractual relationship.”¹²⁵ An agreement can be made pre- or post-birth and later, in principle, without time limitation because we are discussing strictly personal rights. Parental agreements enable all parties to take responsibility and make considered and binding decisions in advance on their responsibilities and their care work. Furthermore, they would signal the need to foster the right to autonomy and the choice to take responsibility for care and caring.

Because we are discussing strictly personal rights and contracts, in principle, we must be able to dissolve agreements; however, once the private parenting agreement is officially confirmed, there cannot be a way to dissolve one’s responsibility towards a child. So, in this case, private ordering within family law must have a legal framework (see point 5, “remaining legal order”).

122 Anne Sanders, *Mehrelternschaft*, 2018, 380, 389, 391.

123 For example, Bix, (n. 117) 122 on religious upbringings.

124 Hotz (n. 10), 136ss.

125 Blackstone’s Commentaries on the Laws of England, Book the First: Chapter the Fifteenth: Of Husband and Wife, in: https://avalon.law.yale.edu/18th_century/blackstone_bk1ch15.asp (3.3.2025).

The degree of private ordering available is ultimately a political decision. A legal hierarchy within parenthood and the old-new legal supremacy of the two-parent principle might represent two steps forward and one step back. We must decide on general grounds and criteria such as responsibility to care, not on opportunities of single cases, for example, maintenance questions of a 17-year-old daughter who is apt to take legal actions. The German Civil Court (Bundesgerichtshof) decided on Sept 23, 2015, that there is a binding agreement between the mother and her partner in favour of a future child, acknowledging his role as a responsible parent including financial obligations, when he consented to sperm insemination by a third sperm donor.¹²⁶

Before a child is conceived, it is possible to decide with a parental agreement who will become the child's second parent and the person who will give birth to the child. Such a form of parental agreement, which does not flout the *mater semper certa est* rule, is foreseen in the German revision of filiation law: the agreement should enable a legally secure parent-child relationship to be established with the second parent early, particularly in the case of private sperm donations (so-called cup donations). A parental agreement could also have an effect only after one's death: a single mother can also make a parental agreement with her brother if she cannot take on her parental responsibilities anymore (and does not wish the state or her parents to interfere).

Moreover, when personal relations become relatively complex (e. g., artificial reproduction, patchwork families), carefully drawn-up contracts might generally be helpful and, ultimately, also in the best interests of the child because the legal parentage will be regulated and/or certain visiting rights are, for example, written down. The contract parties might have considered possible future conflicts and specific conflict-solving methods. Whereas the surrogacy contract, for example, is currently illegal in Switzerland, contractual possibilities remain in California.

III. Remaining necessary legal framework

The need for a regulatory framework remains because we cannot expect every person to make intentional parental agreements and take responsibility, even after extensive sensitization and counselling on these contracts (which is essential).

Secondly, an authority must promptly acknowledge the agreements and remain aware of their changes (with electronic civil registers, this seems feasible).

Thirdly, we all know that agreements also come with risks because of the peril of power and subordination. There is enough evidence of private ordering in prenuptial contracts or divorce agreements.¹²⁷ Feminist literature also considers contract law patriarchal and often considers contracts (on women's bodies) the subordination tool

¹²⁶ BGH (Bundesgerichtshof), Highest German Civil Court, Az. XI ZR 99/14.

¹²⁷ Michelle Cottier et al. The move to private ordering in divorce, gender and the role of family lawyers in Switzerland, in: McLean/Treloar (eds.) *Research Handbook Family Justice Systems*, 2023, 318ss.

par excellence¹²⁸ Some ask even for the abolishment of contract law in society.¹²⁹ These scholars deserve credit for pointing out, among other aspects, that subordination and democracy are incompatible.

However, power imbalance has been topical in social contract law¹²⁹ for a long time, so firm knowledge and legal instruments are available to mitigate it. From a consumer contract or medical law perspective, for example, we know that *everything should begin with information and accompaniment* to bridge the existing imbalances; without proper, understandable information, we cannot consent to/declare our will to contract. – Legal information and counselling by a neutral/state party *could be a reasonable legal offer or even a condition*. In analogy to divorce agreements, which courts in Switzerland must authorize, we could at least regulate all the documents accompanying such contracts. (We would create inequalities again between marriage and parenthood by status, but then again, “covenant marriage” might be an option.) It is not a contract like any other, but it does remain a contract.

Furthermore, the state must ultimately know and control legal recognition between parents and children beyond private agreement because *the public interest in protecting children’s rights and well-being remains*.¹³⁰ In addition, the state must consider how to preserve a child’s knowledge regarding their biological and genetic relations (and create registers) and the health issues of the persons involved when using ATR.

Suppose no parent wants to take responsibility for a child. *In that case, the law must assign parental duties and rights*: most legal orders and reform projects on filiation propose that at least one parent shall be guaranteed by biological bond or kinship and uphold the *mater semper certa est* rule because it is “easy” and because, in most cases, a “mother” gives birth to a child and wants to be “mother”.¹³¹ However, such a person would typically also be *willing* to be a parent. . . Families by agreement, require counselling and public notarization; this corresponds to the great importance of filiation for parents and children.

Moreover, it is clear that—like marriage—these special types of standing contracts at the intersection of family and contract law *are principally not to be dissolved once officially recognized, at least not until a child is an adult* (e. g., 18 years). However, we would need to create a procedure for dissolution for exceptional reasons, ensuring that no child remains without a parent. At such a stage, the state could alternatively rely on factual care relationships and genetic relationships on a tertiary basis. Such a cascading assignment of parenthood¹³² would align with the legal and ethical frameworks of autonomy, care, and responsibility.

128 Namely Carol Pateman, *The Sexual Contract*, 1988, 209, 214, already aligned in the 1980 s marriage, prostitution, and labour contracts; Cathrine McKinnon, 474, 173.

129 Carole Pateman/Charles Wade Hills, *On Contracts and Dominion*, Cambridge 2007, 22, 26.

130 Hotz (n. 10), 479.

131 Germany, Switzerland.

132 See, for example, Art. 378 Swiss Civil Code on cascading power of legal representation in the medical domain.

At this point, people might argue that a “status” model might remain the better model for children (and the third or fourth parent could be one only by agreement). However, with the actual status model, children are not cared for, and the state must greatly assist. I am not saying that private ordering will prevent child negligence or abuse, but having an inclusive family model will prevent children from being “left alone.”

6. Conclusion

Following the jurisprudence based on Art. 8 ECHR, every person has the right to personal autonomy regarding relationships, reproduction, and parenting. The latter, however, is up to date within the framework of the existing two-parent principle. Even if there are still open questions, the trend in this jurisprudence emphasizes individuality and the need to recognize various family forms by assuming responsibility. So when legal marriage is the only state-recognised relationship, and the mono- or two-parent principle is the only form of legally recognised parenting to limit this private autonomy. In such a scenario, these practices merit scrutiny from a public interest perspective. Any practices, justifications of practices, or legal provisions that are upheld solely based on their historical precedent or religious or legal origins merit scrutiny.

Families, by agreement, leave space for very different forms. Therefore, this approach is inclusive and a step towards a more inclusive family law. Each adult is responsible for supporting, caring for, teaching, and building a relationship with their child, regardless of whether the child is born to a single-parent, patchwork, multi-parent, or adoptive family. The responsibility to care for their child is a shared responsibility. Acts (and omissions) will be measured by law and their correspondence to the value of responsibility. The more people take responsibility for a child, the better. A single parent may wish to share duties with a friend or brother or the older generation, or in a multi-parent family, three or more adults have agreed to play a vital role in a child’s life; everyone shares the same parental responsibilities.

Contract law offers appropriate and flexible normative doctrines for resolving the evolving open questions in determining legal parentage. Because of its certainty, determining the legal status of parenthood will be seen as a fair method to sort out ambiguities and ensure parental and children’s rights. Moreover, children who are advanced in maturity can be easily included in discussions “on their family,” with contracting (e.g., blended families, and adoptions).

Parental roles involve not only physical care but also financial care. Many millions of divorced parents support their children financially. This role could and should also be valorised; any parent and child should be able to accept it as a positive parental intention, duty, and responsibility.

If the concept of the two-parent principle is abolished, lesbian and gay couples who raise children together could be legally protected, and children would not be deprived of significant family relationships. Additionally, something very similar to a four-parent model is already practiced successfully by many millions of divorced people today. In

patchwork families, daily routines, weekends, and vacations are highly planned and regulated, mostly privately agreed upon.

However, once counseling and parental agreements are considered legal and ethical standards for balancing autonomy and responsibilities, they will significantly impact filiation law and custody, access, or contact rights.

As lawyers, we might be focused on highly contentious childcare cases. However, because we know these cases so well, every prior consultation and every advance agreement seems like an opportunity. We should consider this seriously for children's well-being.

Society and the law have demanded family ties to date, but reproductive medicine can no longer contractually invalidate them. The consequences of losing such networks of relationships, which also guarantee intergenerational cohesion, remain to be seen.

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