

Current Developments in the National Laws of Maintenance

A Comparative Analysis

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Abstract

Maintenance law in European jurisdictions is in a state of constant transformation. Recent reforms, however, show some areas of major concern. In child maintenance law, particularly joint custody of the parents and an alternating residence of the child make the need for a better calculation of maintenance more apparent. The use of guidelines with tables and formulas is on the rise. In maintenance after divorce, the growing influence of the principle of self-sufficiency is leading to reductions of the maintenance payments made to former spouses. Enforcement of maintenance claims, the role of the State and the relationship with social security benefits remain difficult.

Keywords: child maintenance, maintenance after divorce, calculation of maintenance, enforcement of maintenance claims, social security benefits.

A. Introduction

Maintenance law as such is by no means a new legal institution. Nevertheless, owing to changes in family law and changes in socio-economic factors, it is in a state of constant transformation nearly everywhere. Maintenance is generally understood as the provision of benefits, in the framework of a family relationship, to meet the everyday needs of another. In general, it depends on the needs of the maintenance creditor and the ability to pay of the debtor. This kind of transfer exists in all European legal systems.¹ There is, however, in respect of the extent and intensity of the obligation, a considerable range of variation between the legal systems.

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1 See D. Martiny, 'Unterhalt', in J. Basedow et al. (Eds.), *Handwörterbuch des Europäischen Privatrechts*, Mohr Siebeck GmbH & Co., Tübingen, Germany, 2009, p. 1576; id., 'Maintenance', in J. Basedow et al. (Eds.), *Encyclopaedia of European Private Law*, 2 Vols., Oxford, forthcoming, 2012; European Judicial Network – Maintenance claims, <http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ec_en.htm>.

In the following contribution only some basic structures, aspects and new trends are addressed. A certain focus is placed on maintenance for children and maintenance after divorce. Substantive law and some procedural issues are explained in this respect. Additionally, some basic differences between civil law and common law jurisdictions can be mentioned. Despite the close relationship with social security and the interdependencies between private and public law, only a few remarks can be made in that regard.

Maintenance law is a part of family law, which is generally regulated in national Civil Codes (e.g. Austria,² Belgium,³ France,⁴ Germany⁵ and the Netherlands⁶). It is to be found in a Family Code mainly in the former socialist countries (e.g. the Czech Republic,⁷ Estonia⁸ and Poland⁹) and in special statutes in the Nordic countries and in common law jurisdictions (e.g. England¹⁰ and Ireland¹¹).

In recent years, apart from minor adjustments, reform laws that deserve special mention are that of 2008 in Poland,¹² the Belgian reform of maintenance law of 2010,¹³ the German reform of maintenance law of 2007¹⁴ and the reforms of divorce law in Belgium (2007),¹⁵ France (2004)¹⁶ and Portugal (2008).¹⁷

2 §§ 140-143 Austrian Civil Code, §§ 66-80 Marriage Act.

3 Arts. 203-211, 301 Belgian Civil Code.

4 Art. 205 *et seq.*, 371-372 French Civil Code.

5 §§ 1460 *et seq.*, 1569 *et seq.*, 1601 *et seq.* German Civil Code.

6 Arts. 1:157, 1:160, 1:392-408 Dutch Civil Code. See W. Schrama, 'Who Needs to Pay in The Netherlands?', in I. Curry-Sumner & C. Skinner (Eds.), *Persistent Problems, Finding Solutions: Child Maintenance in The Netherlands and the UK*, 2009, p. 15 *et seq.*; D.A. Klüsener, 'Niederlande', in *Nomos Kommentar BGB Familienrecht* No. 20 *et seq.*, 2nd ed., 2010.

7 In the future in the new Civil Code.

8 Family Law Act of 18 November 2009.

9 Arts. 27, 60, 128 *et seq.* Family and Guardianship Code.

10 Child Support Act (CSA) 1995 as amended; s. 23, 25 Matrimonial Causes Act (MCA) 1974 (c. 18); Children Act 1989 – cf. T. Amos, 'Englisches Unterhaltsrecht – paternalistisch oder pragmatisch? – und wie es durch die Prismen der UnterhaltsVO und der Haager Unterhaltsübereinkommen aussehen könnte', in D. Coester-Waltjen *et al.* (Eds.), *Europäisches Unterhaltsrecht*, 2010, 39, 41 *et seq.*

11 Family Law (Maintenance of Spouses and Children) Act 1976; The Judicial Separation and Family Law Reform Act of 1989, The Family Law Act 1995, The Family Law (Divorce) Act 1996.

12 Act of 6 November 2008 – cf. A. Mączyński, 'Die Modernisierung des polnischen Familien- und Vormundschaftsgesetzbuches', 2009 *FamRZ*, p. 1555 *et seq.*

13 Loi visant à promouvoir une objectivation du calcul des contributions alimentaires des père et mère au profit de leurs enfants of 19 March 2010 – see N. Dandoy, 'La loi du 19 mars 2010 visant à promouvoir une objectivation du calcul des contributions alimentaires des père et mère au profit de leurs enfants', 2010 *Rev. trim. dr. fam.*, p. 775 *et seq.*; J.-P. Masson, 'Le calcul des contributions alimentaires des père et mère', 2010 *J. Trib.*, p. 585 *et seq.*

14 Act amending maintenance law of 21 December 2007, Official Gazette 2007 I 4189 – see K. Kroll, 'The Reform of German Maintenance Law', in B. Atkin (Ed.), *The International Survey of Family Law*, Jordan Publishing Ltd., Bristol, 2007, p. 85.

15 Loi réformant le divorce, Law of 27 April 2007. – See W. Pintens, 'Entwicklungen im belgischen Familienrecht 2006-2007', 2007 *FamRZ*, pp. 1491, 1494 *et seq.*

16 Loi n. 2004-439 du 26 mai 2004 relative au divorce.

17 Lei n.º 61/2008 de 31 de Outubro – Altera o regime jurídico do divórcio, Diário da República 2008, 7644. Cf. G. de Oliveira, 'Changes Going on in Portuguese Family Law', 2008 *FamRZ*, p. 1712 *et seq.*

Comparing maintenance law is not an easy task because there are many differences in the details, and what really counts in the end is what is awarded and how effectively the national system works. This, however, is a very complex process. Comparing only certain aspects, while ignoring others (*e.g.* the different legal and social backgrounds) may be misleading. There is no uniform law on maintenance. However, in 2004, the Commission on European Family Law (CEFL) developed Principles Regarding Divorce and Maintenance between Former Spouses.¹⁸

Changes in family structures and relationships exert a strong influence on maintenance law. Births outside marriage are still rising. In the Eastern parts of Germany and in some East European countries, more than 60% of all children are born out of wedlock. It is true that a considerable portion of the parents live together in the same way as married couples do and that many of them marry at a later point in time. Nevertheless, there is often less stability than within a marriage, and there are more single parents who have never been married than they were in the past. Another significant category is divorced parents, predominately women. For example, in France, approximately a quarter of all families are *familles monoparentales*.¹⁹ As a result, there is less stability than before, and maintenance claims are quite common.

While divorce rates in some places are indeed no longer rising, to a great extent this merely reflects the increase in extramarital cohabitation. Maintenance is increasingly not a problem of maintenance in kind but of financial contributions. However, Polish statutory law was recently amended to clarify that maintenance vis-à-vis disabled persons can also be provided by care.²⁰ Since people live longer today, care and support for the older generation has to be organized. In some jurisdictions, maintenance law plays an important role in this. It is to be expected that it will be more difficult to obtain maintenance in the wake of the recession currently affecting many countries.

B. Categories of Maintenance Obligations

Family law generally draws a distinction according to the source and ground of the obligation to provide maintenance, *i.e.* maintenance among relatives (mainly child support), spousal support and maintenance between former spouses. There is more or less a close link between the family situation and the status from which maintenance obligations are derived. However, a general legal concept of 'maintenance law' encompassing all these kinds of obligations is developed with varying degrees of precision in the national legal systems.

18 See K. Boele-Woelki *et al.*, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, Intersentia, Antwerp, 2004; K. Boele-Woelki & D. Martiny, 'Prinzipien zum Europäischen Familienrecht betreffend Ehescheidung und nachehelicher Unterhalt', 2006 ZEuP, p. 6 *et seq.*; E. Örucü & J. Mair (Eds.), *Juxtaposing Legal Systems and the Principles of European Family Law on Divorce and Maintenance*, Intersentia, Antwerp, 2007.

19 See Institut national de la statistique et des études économiques (INSEE), Structure des familles avec enfants, <www.insee.fr/>.

20 Art. 145 § 2 Polish Family and Guardianship Code – *cf.* Mączyński, *supra* n. 12, at p. 1558.

C. Maintenance Between Relatives and General Issues

I. Maintenance Between Relatives

The encompassing concept regarding maintenance among relatives, with reciprocal maintenance claims between ascendants and descendants, is still to be found in the Roman law-influenced European legal systems (e.g. as in France,²¹ Germany,²² Italy²³ and Poland²⁴). Under this system, basically everyone has potential maintenance claims against his or her relatives, spouse or ex-spouse. A web of claims and obligations links family members and generations together into a tightly knotted system, one which can work only with the help of special rules on the priority and subsidiarity of claims²⁵ and obligations.²⁶ It goes without saying that under this approach, there is a constant debate on the value and rank of every legal position. There is an increasing tendency to give children the highest priority. This has been done recently in the Netherlands in accord with an already established court practice.²⁷ In Germany, the priority of a minor child's claim has also been a major goal of reforms undertaken.²⁸

II. Child Maintenance

Child maintenance is mainly of practical importance if the parents separate or divorce. In children's maintenance claims, the maintenance debtor's ability to pay is a condition for a claim; the debtor must be in a position to meet his or her responsibility.²⁹ Debtors are expected to make reasonable efforts to perform their obligations. The debtor has, however, a right to sufficient means for his or her own support (in Germany a self-support reserve, *Selbstbehalt*).³⁰ Often there is a minimum level of support fixed by statute that has to be paid.³¹ Another basic requirement of maintenance claims is the need of the maintenance creditor; in the case of children, however, such need exists as a general rule.

The main purpose of child maintenance is the provision of a regular and reliable source of financial support that helps offset the child's everyday living costs. It is the most important and intensive kind of maintenance and is a generally recognized obligation. Towards one's own children, there is an intensified maintenance

21 *Obligation alimentaire*, Art. 205 *et seq.* French Civil Code.

22 *Verwandtenunterhalt*, §§ 1601 *et seq.* German Civil Code.

23 *Alimenti*, Art. 433 Italian Civil Code.

24 *Obowiązek alimentacyjny*, Art. 128 Polish Family and Guardianship Code.

25 Cf. § 98 Estonian Family Law Act; § 1609 German Civil Code; Art. 433 Italian Codice civile; Art. 5 Maltese Civil Code; D. Martiny, *Unterhaltsrang und -rückgriff*, Vol. I, Mohr Siebeck, Tübingen, 2000, p. 467 *et seq.*

26 Cf. § 105 *et seq.* Estonian Family Law Act; § 1606 German Civil Code; Art. 433 Italian Codice civile; Art. 12 Maltese Civil Code; Art. 129 *et seq.* Polish Family and Guardianship Code; Martiny, *supra* n. 25, at p. 255 *et seq.*

27 Art. 1:400 para. 1 Dutch Civil Code – cf. A. Mom, 'Reformen im niederländischen Familienrecht', 2009 *FamRZ*, pp. 1551, 1554.

28 See § 1609 No. 1 German Civil Code.

29 Art. 135 Polish Family and Guardianship Code.

30 See Düsseldorf table, 2010 *FamRZ* 1960.

31 Cf. § 1612a German Civil Code.

obligation.³² The distinction between children born within and outside marriage has – with some exceptions³³ – been abolished in maintenance law. Legitimate and illegitimate children are today treated equally.³⁴

III. Maintenance for Parents

Maintenance obligations in respect of adults do not exist everywhere.³⁵ In many legal systems, there is generally no age limit for maintenance claims (e.g. France,³⁶ Germany³⁷ and Poland³⁸), whereas in common law countries and in the Nordic legal systems, maintenance claims of adult persons are unknown.³⁹ In cases of need in these jurisdictions, such persons depend solely on their own efforts or – as far as accessible – on social security benefits.

On the other hand, maintenance claims by parents are in line with the Roman common law obligation of children to support their parents and, where necessary, more remote *ascendants*.⁴⁰ Today, compared with the different forms of social security, such claims have only a gap-filling function and the policy behind them is often questioned.

In countries where such claims exist, they are generally not made by the parents themselves but are used mainly for recovery purposes by public institutions. The function of these claims must thus be seen in conjunction with social security. Rising costs for the care of the elderly lead to more extensive claims of public institutions trying to obtain recovery.

The pressure on ageing children and the potential endangerment of their own economic situation have led to a constant debate on reform in several jurisdictions. There are generally some restrictions on recovery in statute law. However, the most decisive role is played by the courts and, particularly, the German Federal Supreme Court. The court has, during the last decade, developed several restrictions concerning the calculation of maintenance and the amount that can

32 In France *obligation d'entretien* (Art. 203 French Code civil); in Italy *mantenimiento* (Art. 156 Italian Codice civile).

33 See Art. 93 Maltese Civil Code.

34 See, e.g., for France C. Bourreau-Dubois & I. Sayn, *Evaluation de la mise en place d'une table de référence pour le calcul de la contribution à l'entretien et à l'éducation des enfants* – Rapport final, 16 November 2010 with references, <http://hal.archives-ouvertes.fr/docs/00/58/30/68/PDF/2010_I_Sayn_rapport_beta_cercrid_pour_cnaf_251110.pdf>; for The Netherlands Schrama, *supra* n. 6, at p. 19 *et seq.*, 28 *et seq.*; for England Amos, *supra* n. 10, at p. 43.

35 See J. Ribot, 'Family Law and Intergenerational Family Solidarity – Should There be Enforceable Maintenance Rights vis-à-vis Adult Relatives?', in B. Verschraegen (Ed.), *Family Finances*, 2009, p. 33 *et seq.* – There is a special regime under Art. 6 Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

36 Art. 205 *et seq.* French Civil Code.

37 §§ 1601, 1602 German Civil Code.

38 Art. 128 *et seq.*, 133 Polish Family and Guardianship Code.

39 G. Ring & L. Olsen-Ring, 'Skandinavien', in *Nomos Kommentar BGB Familienrecht* No. 123 – cf. Service des études juridiques, Sénat, *Étude de législation comparée* no 189 – L'obligation alimentaire envers les ascendants, 2008, <www.senat.fr/lc/lc189/lc1890.html>

40 E.g. § 97 Estonian Family Law Act; § 1606 German Civil Code; Art. 8 Maltese Civil Code.

be imposed on the obliged children.⁴¹ According to established case law, the standard of living of the children is not to be affected in a noticeable and permanent manner. The generally accorded self-support amount (*Selbstbehalt*) is higher in these cases, and there is a relatively comprehensive list of costs on which the child can rely. These include, for example, costs for their own old-age provisions and the family home.⁴² In Belgium, a standard formula fixed by an ordinance is used.⁴³ In France, a comprehensive study commissioned by the Economic and Social Council proposes a reform easing the principle of subsidiarity for public welfare benefits.⁴⁴

IV. Calculation of Maintenance

1. Methods of Calculation

Statutes very often only state the principle that there is an obligation that is dependent on the needs of the claimant and the ability of the debtor. However, for the practical enforcement of maintenance, it is necessary to reach precise amounts based on rational and convincing criteria. Sometimes the calculation of maintenance encounters nearly insurmountable difficulties. On the one hand, there should be individual justice and economically justifiable results while on the other hand, transparency and simplification are demanded. It can therefore come as no surprise that nearly everywhere one finds constant amendment and debate.

The Belgian law of March 2010 strives for more precision and aims to define the different elements for the calculation of maintenance.⁴⁵ The new law makes a distinction between ordinary and extraordinary costs. Ordinary costs cover the daily needs of the child, whereas extraordinary costs occur in situations that are uncommon or that happen by chance.⁴⁶

The methods of assessing maintenance differ considerably.⁴⁷ A distinction must be drawn between systems that leave the determination of maintenance basically to the discretion of the judge in the individual case and those that attempt to achieve a certain standardization. Where the individual calculation

41 See more in detail D. Martiny, 'Verwandtenunterhalt für erwachsene Kinder und alte Eltern', in S. Berghahn (Ed.), *Unterhalt und Existenzsicherung*, Nomos Verlag, Baden-Baden, 2007, p. 55 *et seq.*

42 Federal Supreme Court (*Bundesgerichtshof*) 28 July 2010, 2010 NJW 3161 = 2010 FamRZ 1535 with references.

43 See Service des études juridiques, L'obligation alimentaire envers les ascendants, *supra* n. 39.

44 See C. Basset, *L'obligation alimentaire: des formes de solidarité à réinventer*, 2008, <www.conseil-economique-et-social.fr/rapport/doclon/08051914.pdf>.

45 See Law of 19 March 2010 – Loi visant à promouvoir une objectivation du calcul des contributions alimentaires des père et mère au profit de leurs enfants; Masson, *supra* n. 13, at p. 585 *et seq.*

46 Art. 204bis § 4 Belgian Civil Code – more in detail Dandoy, *supra* n. 13, at p. 781 *et seq.*; W. Pintens, 'Entwicklungen im belgisches Familienrecht 2009-2010', 2010 FamRZ, p. 1488.

47 Cf. Martiny, *supra* n. 25, at p. 182 *et seq.*

approach is of primary importance (e.g. as in Ireland⁴⁸ and Poland⁴⁹), the determination is, in theory, made exclusively on the basis of an individual assessment.

Determining the amount of child maintenance on an individualized and more or less discretionary basis is the traditional approach applied in France and Belgium. However, the new Belgian statute of 2010 aims to make the setting of maintenance more rational. Yet it should be noted that the new law neither prescribes a certain mathematical method nor goes into detail in respect of the amount in individual cases.⁵⁰ Judges use a number of privately developed methods,⁵¹ and there is a reform commission that may make proposals on the relevant costs and the calculation of maintenance.⁵²

A second more formal distinction in maintenance assessment is made between jurisdictions that specify precise calculations by statute as opposed to those leaving the task of maintenance determination to the courts. Sometimes – as in Germany – both techniques are used in combination. In German law, there is now a minimum level of maintenance for minor children.⁵³ A minor child may demand maintenance as a percentage of the applicable minimum maintenance from one parent, with whom it does not live together in one household. The minimum maintenance is based on double the tax allowance for the material subsistence level of a child (child allowance) under tax law.⁵⁴ The monthly rate depends on the age of the child.

There are also different approaches for the setting of maintenance. One approach is that the primary obligation of the non-resident parent is to provide for the costs of any children. This generally leads to minimum standards of support that must be met for all children with a scale of higher amounts to be paid by parents with higher incomes. This approach is followed basically in Germany and also in the Netherlands.

In Germany, the Düsseldorf support table finds application.⁵⁵ For the non-binding Dutch TREMA system, there is an ongoing reform debate.⁵⁶ Tables are found in the Nordic countries, too. In Sweden, parents must contribute towards a child's needs in reasonable proportion to these needs vis-à-vis their combined

48 See s. 5 Family Law (Maintenance of Spouses and Children) Act 1976.

49 J. Gora, 'Kindesunterhalt im deutschen und im polnischen Recht: Bedarfskorrektur im grenzüberschreitenden Rechtsverkehr', 2008 ZKJ, p. 455 *et seq.*

50 Masson, *supra* n. 13, at p. 490.

51 E.g., the Renard method – cf. Pintens, *supra* n. 46, at p. 1488.

52 See Art. 1422 Belgian Code of Civil Procedure – cf. Pintens, *supra* n. 46, p. 1489.

53 § 1612 a German Civil Code.

54 § 42 para. 6 sentence 1 of the Income Tax Act [*Einkommensteuergesetz*]. Since 2010 per year (2 x €2.184) = €4.468, per month €464.

55 Text FamRZ 2010, 1960 (State 1 January 2011) – see J. Soyka, 'Die Düsseldorfer Tabelle – Stand: 1.1.2011', 2011 FamRZ, p. 73 *et seq.*

56 The name TREMA is derived from a law journal. More in detail C. van Baalen-van IJzendoorn & I. Curry-Sumner, 'Determining Child Maintenance: A View From a Dutch Practitioner', in I. Curry-Sumner & C. Skinner (Eds.), *Persistent Problems, Finding Solutions: Child Maintenance in The Netherlands and the United Kingdom*, Wolf Legal Publishers, Nijmegen, 2009, p. 53 *et seq.* – cf. also M. Antokolskaia, 'Child Maintenance in Shared Residence Arrangements: Care Instead of Money?', 2011 IFL, pp. 313, 317.

capacity. The child's needs are expressed as a proportion of a standard monthly amount, which is the basis for adult benefit rates, depending on age.⁵⁷ A different approach – which may well lead to similar results – is based on a specific percentage or fraction of parental income. Such a court-developed percentage formula is used in Austria.⁵⁸

It is true that standardization can lead to more legal certainty and precision. On the other hand, it is very difficult to reflect the individual circumstances of parties in highly different situations through the use of numerous exceptions, variations, etc. Overly rigid approaches may hinder private arrangements. In other fields, such as parental responsibility, an arrangement reached by the parents is seen as useful in avoiding conflicts.

If the parents apply for a divorce, often a precondition for the dissolution of the marriage is that there is at least a declaration whether there is a consensual determination of child maintenance, *e.g.* in Germany.⁵⁹ An interesting approach is the Dutch reform of divorce law which came in force in 2009.⁶⁰ According to this law, a precondition for divorce is that the parents present a so-called parenting plan (*ouderschapsplan*). In this plan, the parents shall propose a solution not only for allocating parental responsibility, but also for child maintenance.⁶¹ The aim of the provision – that the parents themselves have to look actively for a solution – is to be welcomed. However, it remains to be seen how effective the requirement will be because the process of party consent occurs at the beginning of the proceedings (when potential difficulties are often underestimated or problems cannot be solved).

2. Determination by Courts and Authorities

Maintenance claims are generally decided by family courts (*Familiengericht* in Germany, *juge aux affaires familiales* in France). In England, too, courts can still have jurisdiction in some cases.⁶² However, in general, an administrative determination of child maintenance by the Child Support Agency (CSA)⁶³ takes place according to a statutory formula originally introduced by the Child Support Act

57 More in detail M. Jonker, *Het recht op levensonderhoud: een gedeelde zorg – Een rechtsvergelijking tussen Nederland, Noorwegen en Zweden*, 2011, p. 197 *et seq.*

58 See F. Kerschner, 'Österreich', in *Nomos Kommentar BGB Familienrecht* Nos. 36, 49, 54 – for the Zurich tables in Switzerland see A. Rumo-Jungo, 'Finanzielle Sicherung Alleinerziehender', in L. Franco & D. Staehelin (Eds.), *Innovatives Recht, Festschrift für Yvo Schwander*, Dike, Zürich, 2011, pp. 171, 180 *et seq.* with references.

59 See § 133 para. 1 No. 2 Family Proceedings Act (*Familienverfahrensgesetz*).

60 *Wet bevordering voortgezet ouderschap en zorgvuldige scheiding* of 27 November 2008, *Staatsblad* 2008, 500 – see Mom, *supra* n. 27, at p. 1551 *et seq.*

61 Art. 815 *Wetboek van Burgerlijke Rechtsvordering* (Rv).

62 See A. Woelke, 'England und Wales', in *Nomos Kommentar BGB Familienrecht* No. 26.

63 Now a part of the Child Maintenance and Enforcement Commission (CMEC), a non-departmental public body – see Amos, *supra* n. 10, p. 41 *et seq.*; J. Davidson, 'Sanctions for Non-Recovery in the United Kingdom', in I. Curry-Sumner & C. Skinner (Eds.), *Persistent Problems, Finding Solutions: Child Maintenance in The Netherlands and the United Kingdom*, Wolf Legal Publishers, Nijmegen, 2009, p. 69.

1995.⁶⁴ Since then, there have been several efforts to simplify the formulae for calculating child maintenance.⁶⁵

At the onset of the CSA system, the main day-to-day carer who was on benefit (particularly income support) could not make a valid private agreement with the other parent. However, this led to an overload of cases, and since July 2008, all parents have the choice of setting up a child maintenance arrangement using the CSA or making a private agreement about child maintenance with the other parent.⁶⁶ There are, however, plans for a new reform.⁶⁷

3. Maintenance Calculation and Joint Custody

In the case of separation or divorce of the parents, the general rule today is that custody or parental authority is often exercised jointly by both parents, and that the child may reside with both parents on an alternating basis. In addition to various models of shared custody, also other solutions are possible, namely, situations may arise where the child resides primarily with one parent but goes from time to time (but on a regular basis) to the home of the other parent. Particularly in French law, according to the so-called *garde alternée*, the residence of a child may be fixed alternately at the domicile of each of the parents.⁶⁸ Belgium provides for *hébergement commun*, which means an 'equally divided alternating residence'.⁶⁹

If the child spends time with both of the parents, it is difficult to assess maintenance.⁷⁰ Since the parent with whom the child spends most of the time still has to bear fixed costs, it is obvious that it would be unfair that minor contributions of the other parent should reduce child maintenance. On the other hand, at a certain grade of contributions, the other parent should be relieved. However, in

64 Today maintenance is 15% of the net income for one child, 20% for two children and 25% for three.

65 More in detail C. Skinner & I. Curry-Sumner, *The UK Child Support Policies: Principles and Formulae*, in I. Curry-Sumner & C. Skinner (Eds.), *Persistent Problems, Finding Solutions: Child Maintenance in The Netherlands and the United Kingdom*, Wolf Legal Publishers, Nijmegen, 2009, pp. 31, 41 *et seq.*

66 There is also the so-called Child Maintenance Options, a service run by the CMEC. Child Maintenance Options aims to provide impartial information and support to help parents make 'informed choices' about child maintenance – see Skinner & Curry-Sumner, *supra* n. 65, p. 48 *et seq.*

67 See Department for Work and Pensions, *Government's Response to the Consultation on Strengthening Families, Promoting Parental Responsibility: The Future of Child Maintenance*, July 2011, <www.dwp.gov.uk/docs/strengthening-families-response.pdf>.

68 Art. 373-2-9 French Civil Code.

69 Art. 374 § 2 Belgian Civil Code – Loi tendant à privilégier l'hébergement égalitaire de l'enfant dont les parents sont séparés et réglementant l'exécution forcée en matière d'hébergement d'enfant of 18 July 2006 – for child maintenance see Antokolskaia, *supra* n. 56, p. 316 *et seq.* – cf. also M.-T. Casman *et al.*, *Évaluation de l'instauration de l'hébergement égalitaire dans le cadre d'un divorce ou d'une séparation*, 2010, <www.lesfamilles.be/documents/RapportULG.pdf>.

70 See D. Martiny, 'Gleichheit und Verschiedenheit elterlicher Unterhaltsbeiträge – rechtsvergleichender Kommentar', in K. Scheiwe & M. Wersig (Eds.), *Einer zahlt und eine betreut? Kindesunterhaltsrecht im Wandel*, Nomos, Baden-Baden, 2010, p. 83 *et seq.*; Antokolskaia, *supra* n. 56, p. 315 *et seq.*

some systems there is a tendency to exclude or restrict reductions. In Germany, for instance, a reduction cannot take place in principle until the child spends approximately half of the time with the other parent.⁷¹ In Austria, if the child lives during equal periods with its father and mother and the economic situation of the parents is basically the same, the parental contributions are generally restricted to care (*Betreuungsunterhalt*).⁷² However, there can remain a monetary claim if one parent has borne substantial extra expenses (clothes, shoes, etc.).⁷³

However, in many jurisdictions there is a growing tendency to tackle the problem with fixed amounts and tables. There are tables with fixed amounts of child support, depending on the number of days or nights the child spends time with the other parent.

In France, the situation began to change in 2010. Now there is an official, albeit non-binding, annual table of reference (*table de référence*) indicating a minimum level of child support, depending on the costs of a child, the income of the debtor, the number of children and the extent of contact with the child.⁷⁴ The detailed table distinguishes three groups of contact – ‘reduced’, ‘classic’ and ‘alternate’ – and allocates the contributions.⁷⁵

There are also fixed amounts in Sweden⁷⁶ and in England and Wales. If the child stays with the non-resident parent at least 52 nights a year, there will be an allowance made for this under English law.⁷⁷ In Norway⁷⁸ and Sweden⁷⁹ as well there will be a reduction.

It is evident that, in many cases, an alternate residence leads to rising costs. There is particularly a danger for the main caregiver and low-income parents. For example, a variety of costs remain for the mother despite the fact that the child is

71 Federal Supreme Court 28 February 2007, NJW 2007, 1882 = FamRZ 2007, 707 = FF 2007, 197 note by I. Rakete-Dombek. More in detail K. Scheiwe & M. Wersig, *Cash und Care: Kindesunterhaltsrecht und Geschlechter(un)gleichheit*, V&R unipress, Göttingen, 2011, p. 70 et seq.

72 Supreme Court (*Oberster Gerichtshof*) 13 July 2010, 2010 iFamZ 172 – cf. also E. Gitschthaler, ‘Neue Betreuungsmodelle – neue Unterhaltsmodelle’, 2010 EF-Z, p. 172 et seq.

73 *Landesgericht Zivilsachen Wien* 26 September 2011, 2012 EF-Z 36.

74 See *Circulaire CIV/06/10 ‘Circulaire de diffusion d’une table de référence permettant la fixation de la contribution à l’entretien et à l’éducation des enfants sous forme de pension alimentaire’*.

75 See more in detail Bourreau-Dubois & Sayn, *supra* n. 34.

76 Ch. 7 § 3 Parent Act (*Föräldrabalk*).

77 s. 1, 7 The Child Support (Maintenance Calculations and Special Cases) Regulations 2000, Statutory Instrument 2001 No. 155.

78 See *Forskrift om fastsetjing og endring av fostringstilskot* of 15 January 2003 No. 123 as amended – cf. Antokolskaia, *supra* n. 56, at p. 317 et seq.; Martiny, *supra* n. 70, at p. 92.

79 Ch. 7 § 4 Parent Act (*Föräldrabalk*) – see Jonker, *supra* n. 57, at p. 202. – If a child has alternating residence with both parents who are living on a similar economic level, there seems to be no legal basis for maintenance payments, see A. Singer, ‘Time is Money?: Child Support for Children With Alternating Residence in Sweden’, in B. Verschraegen (Ed.), *Family Finances*, Jan Sramek Verlag, Vienna, 2009, pp. 591, 596 et seq. Cf. also Antokolskaia, *supra* n. 56, at p. 316.

for a certain time with the father. In some jurisdictions, like Sweden, there is thus a special state benefit for such cases.⁸⁰

D. Maintenance Between Spouses and Registered Partners

I. Maintenance During Existing Relationship of the Couple

Maintenance during the existing relationship of the couple consists mainly of family and spousal support. In some jurisdictions, full same-sex marriages have been introduced, such as in Belgium,⁸¹ the Netherlands,⁸² Portugal,⁸³ Spain⁸⁴ and Sweden.⁸⁵ For such same-sex couples, the same rules apply to maintenance obligations and property consequences of divorce as for opposite-sex marriages. Therefore, there are insofar no specific developments.

Maintenance claims may also exist in registered partnerships. There is, however, no uniformity in Europe. Whereas in some countries, such as Italy and Poland, partnerships are not recognized as such, in other jurisdictions, there exist multiple types of partnerships. Some of these partnerships are also open to opposite-sex couples and have only reduced financial consequences.⁸⁶ This is the case in Belgium,⁸⁷ Luxembourg⁸⁸ and France,⁸⁹ countries in which there is a regime for same-sex as well as for opposite-sex couples. The law of Luxembourg restricts maintenance obligations generally to the time of the existence of the partnership. Only if one partner is in need can the judge, by way of exception, impose a maintenance obligation in respect of the time following the dissolution of the partnership.⁹⁰ Under Belgian maintenance law, obligations exist during legal cohabita-

80 See Information from *Försäkringskassan* 19 October 2008, Maintenance support [*Underhållsstöd*] in the case of alternate residence [*Underhållsstöd vid växelvis boende*], <www.forsakringskassan.se/irj/go/km/docs/flk_publishing/Dokument/Publikationer/Faktablad/Andra_sprak/Engelska/underhallsstad_vaxelvis_eng.pdf>.

81 Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil du 13 février 2003.

82 Wet van 21 December 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet openstelling huwelijk).

83 Lei no. 9/2010 Permite o casamento civil entre pessoas do mesmo sexo of 31 May 2010, *Diário da República* 2010, 1853.

84 Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio.

85 *Äktenskapsbalk* as amended 1 May 2009.

86 See N. Dethloff, 'New Models of Partnership: The Financial Consequences of Separation', 12 *ERA Forum* 2011, pp. 89, 92 *et seq.*

87 *Loi du 23 novembre 1998 instaurant la cohabitation légale* (German translation *Belgisch Staatsblad – Moniteur Belge* 2000, 6167).

88 Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats, *Mémorial A* n 143 du 6 August 2004.

89 Art. 515-1 French Civil Code.

90 Art. 12 Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats.

tion; these ends upon dissolution of the cohabitation.⁹¹ Under the French *pacte civil de solidarité*, all mutual obligations cease upon dissolution.⁹²

In other jurisdictions, such as Germany⁹³ and Austria,⁹⁴ the maintenance rules in such a registered partnership are basically the same as in a marriage. On the whole, the introduction of same-sex marriages and registered partnerships has not changed maintenance law profoundly. According to their respective weight, the new legal institutions were simply integrated into the existing maintenance system.⁹⁵

II. Maintenance After Divorce

1. Different Systems

Maintenance after divorce has to be seen in the context of other consequences of divorce such as matrimonial property, where participation and sharing of property dominate. Although European legal systems also differ starkly in respect of post-divorce maintenance, they follow mainly the dominant approach of the civil law countries by embracing separate maintenance claims.⁹⁶

In contrast to this, in English law, comprehensive financial relief is at the centre of interest.⁹⁷ Property may be transferred to a spouse, and maintenance is awarded only where no lump-sum payment is possible. The English point of view that there is a single and indivisible system for redistributing assets and income⁹⁸ is also one of the reasons for the decision of the United Kingdom not to opt into the proposed EU Regulation on matrimonial property.

2. Criteria for Maintenance Claims

In determining maintenance claims, some jurisdictions have extensive and detailed statutory regulations; this holds true, for example, in Germany where the regulatory system was in principle upheld also under the reform law of 2007.⁹⁹ However, more common is an approach that basically contains a list of factors that are deemed to be relevant. The CEFL Principles of 2004 reflect this approach

91 Art. 1477 para. 4, 1477 para. 2, Art. 215 Belgian Civil Code.

92 See Arts. 515-4, 515-7 French Civil Code and F. Ferrand & L. Francoz-Terminal, 'Entwicklungen im französischen Familienrecht 2006-2007', 2007 *FamRZ*, pp. 1499, 1501.

93 §§ 5, 12, 16 Act on Life Partnerships (*Lebenspartnerschaftsgesetz*) of 16 February 2001 as amended.

94 §§ 12, 20-23 Bundesgesetz über die eingetragene Partnerschaft (EPG) of 30 December 2009.

95 In Scotland a financial provision may also be obtained where cohabitants cease to cohabit; s. 28 Family Law (Scotland) Act 2006.

96 More in detail N. Dethloff, 'Vermögensrechtliche Folgen der Scheidung – Kritische Bestandsaufnahme und europäische Perspektiven', in C. von Bar & A. Wudarski (Eds.), *Deutschland und Polen in der europäischen Rechtsgemeinschaft*, 2012, p. 477 *et seq.*

97 ss. 21 ff Matrimonial Causes Act 1974.

98 See Amos, *supra* n. 10, at p. 40 *et seq.* – It is only to the extent that the order is designed to provide support that it will qualify as 'maintenance' for the purpose of the Maintenance Regulation. Cf. Judgment of 6 March 1980 in Case 120/79, *de Cavel II*, [1980] ECR 741; Judgment of 27 February 1997 in Case C-220/95, *van den Boogaard v. Laumen*, [1997] ECR I-1147 (both decisions on the Brussels Convention, but equally applicable to the new Regulation).

99 §§ 1569 *et seq.* German Civil Code.

stating that in determining a claim for maintenance after divorce, account should be taken particularly of factors such as

- the spouses' employment ability, age and health;
- the care of children;
- the division of duties during the marriage;
- the duration of the marriage;
- the standard of living during the marriage;
- any new marriage or long-term relationship.¹⁰⁰

The Portuguese legislator used a similar list of factors.¹⁰¹ However, in recent years, the matter has become even more complicated than before. It is not only a question of which single factor shall be taken into account and what the conditions are for the single element. There is also an ongoing debate on the foundations, the purpose and the limits of maintenance after divorce.¹⁰²

Where there are several types of divorce, the idea is gaining ground that granting maintenance should not depend on the type of divorce.¹⁰³ Increasingly on the wane is the principle that a spouse cannot receive permanent spousal support when found to be at fault in the break-up of the marriage.¹⁰⁴ However, fault for the divorce plays a relatively important role under Polish law.¹⁰⁵ Misconduct of the claimant is also at least a factor in other systems.¹⁰⁶ Also in the recent Belgian reform, certain acts of the maintenance claimant can on application of the debtor be a bar to a maintenance claim.¹⁰⁷

In recent years, the idea of a 'clean break' has gained ground. Its aim is to avoid any further financial relationship between the former spouses to the greatest extent possible and to arrange their financial situation in such a manner as to allow each party to start afresh without being bound by the past.¹⁰⁸ The French Civil Code primarily provides for a special compensatory payment (*prestation com-*

100 CEFL Principle 2:4.

101 Art. 2016 Portuguese Civil Code – see R. Teixeira Pedro, 'Family Solidarity and the Principle of Self-Sufficiency – The Role Played by the Obligation of Spousal Maintenance: An Overview of the Portuguese Law', 25 *Int. J. Law Policy Family* 2011, p. 135 *et seq* – cf. also S. Müller-Bromley, Portugal, in *Nomos Kommentar BGB Familienrecht* No. 45.

102 See J. Ribot, 'The Financial Consequences of Divorce Across Europe', 12 *ERA Forum* 2011, p. 71.

103 *Id.* at p. 78 *et seq* – cf. also CEFL Principle 2:1.

104 Cf. Ribot, *supra* n. 102, p. 84 *et seq.*

105 See Art. 60 § 1, 2 Polish Family and Guardianship Code; B. Bugajski, 'Scheidung nach polnischem Recht', 2007 *iFamZ*, p. 215 *et seq.*; M. Kędzior & D. Ferenc-Kopeć, 'Die Ehescheidung und der naheheleliche Unterhalt im deutschen und polnischen Recht vor dem Hintergrund europarechtlicher Entwicklungen', in C. von Bar & A. Wudarski (Eds.), *Deutschland und Polen in der europäischen Rechtsgemeinschaft*, 2012, p. 511 *et seq.*; I. Ludwig, Polen, in *Nomos Kommentar BGB Familienrecht* No. 23.

106 See § 1579 No. 7 German Civil Code and E. Alofs & A. Mortelmans, 'Het belang van de fout in alimentatierecht na echtscheiding: een rechtshistorische en rechtsvergelijkende studie van België, Nederland, Frankrijk en Engeland', 2010 *Tijdschrift voor privaatrecht*, p. 383 *et seq.*

107 Art. 401 § 2 Belgian Civil Code – cf. Pintens, *supra* n. 15, p. 1494.

108 Cf. Ribot, *supra* n. 102, at pp. 72, 79 *et seq.*

pensatoire), which is to compensate any economic detriment after divorce.¹⁰⁹ Compensatory benefit shall take the form of a lump sum, the amount of which shall be fixed by the judge.¹¹⁰ Where a debtor is not able to pay the lump sum, the judge shall fix the arrangements for its payment, within the limit of eight years, in the form of monthly or annual payments.¹¹¹ However, cutting the former economic relationship between the ex-spouses totally may be difficult and, in practice, often only periodic maintenance is granted.

Today, the starting point for maintenance obligations after divorce is increasingly self-sufficiency; each spouse should provide for himself or herself after divorce.¹¹² Primarily Sweden follows the approach that after a divorce, each spouse is responsible for his or her own support.¹¹³ However, if either of the spouses needs money for his or her maintenance for a transitional period, he or she is entitled to an allowance from the other spouse according to what is reasonable. In exceptional cases, a spouse can obtain maintenance for a longer period.

Strengthening self-sufficiency, particularly of women and mothers, was also a main goal of the 2007 German reform of maintenance law¹¹⁴ and is also a concern of other legal systems. However, a precondition for the success of such an approach is also an appropriate social security and labour market policy. Particularly, the danger of applying a policy change retroactively to marriages of a long duration creates some discomfort.

Maintenance to care for a child is still a ground for maintenance claims. However, in German law this has been restricted. A divorced spouse may demand maintenance from the other for the care for or upbringing of a common child for at least three years after birth.¹¹⁵ The duration of the claim to maintenance is extended as long as and to the extent that it remains equitable. Here, the concerns of the child and the existing possibilities of childcare are to be taken into account.¹¹⁶ However, only reasons relating to the individual child are taken into account for determining this claim.¹¹⁷ In general, the care-giving parent is obliged to use the possibilities of a childcare institution once the child has reached three

109 See Art. 270 French Civil Code – judgment of 6 March 1980 in Case 120/79, *de Cavel II*, [1980] ECR 741 has classified the *prestation compensatoire* in France as maintenance. The decisive argument for this result was that it concerns financial obligations between the former spouses which are determined according to the means and needs of both parties.

110 Art. 274 French Civil Code – see more in detail P. Junggeburth, 'Frankreich', in *Nomos Kommentar BGB Familienrecht* No. 109 *et seq.*

111 Art. 275-1 French Civil Code.

112 Cf. CEFL Principle 2:2.

113 Ch. 6 § 7 Marriage Act (*Äktenskapsbalk*) – see G. Ring & L. Olsen-Ring, 'Skandinavien', in *Nomos Kommentar BGB Familienrecht* No. 34.

114 Cf. §§ 1569 *et seq.* German Civil Code; G. Brudermüller, 'Nachehelicher Unterhalt: der Deutsche Weg', in A. Böhler & M. Müller-Chen (Eds.), *Private Law*, 2011, p. 251 *et seq.*

115 § 1570 para. 1 sent. 1 German Civil Code.

116 See § 1570 para. 1 sent. 2 German Civil Code and Federal Supreme Court 30 March 2011, 2011 *FamRZ* 791 = 2011 *NJW* 1582.

117 Federal Supreme Court 1 June 2011, 2011 *FamRZ* 1209 = 2011 *NJW* 2440.

years of age. The extent of such an obligation and possible exceptions are subjects of intense discussion.¹¹⁸

For the granting of maintenance, also the generally accepted requirements apply. Post-divorce maintenance is dependent upon the creditor spouse having insufficient resources to meet his or her needs and the debtor spouse's ability to satisfy those needs.¹¹⁹

According to German case law, an unlimited maintenance claim is still the rule, its limitation the exception.¹²⁰ However, the newly created provisions have opened the possibility of reducing post-marital maintenance, and/or of setting a time limitation to it, under the equity aspects of individual cases.¹²¹ Limiting the period during which the maintenance obligation exists finds more and more expression in national family statutes.¹²²

In the Netherlands, for example, the court may limit the duration of maintenance for a period, ranging from the duration of a short marriage up to a maximum of twelve years.¹²³ In 2007, the Belgian legislator restricted maintenance after divorce to the same period as the marriage lasted. Only in cases of extreme hardship may maintenance be granted for a longer period.¹²⁴ The extension of this restriction to marriages that had been previously dissolved was, however, later declared unconstitutional. Although, it was argued, the legislator does have the power to restrict maintenance after divorce for the future, a retroactive application of the new law would violate principles of legal certainty and the protection of legitimate expectations of divorced spouses.¹²⁵

3. *Termination of Obligation*

It is generally accepted that remarriage of the claimant excludes a maintenance claim against the former spouse. The same applies if there is, as far as existent in the national system, a new registered partnership of the claimant. However, it is not very clear whether merely the factual opportunity of securing a degree of sustenance in a new intimate relationship with a third party or the real savings realized by living in a non-marital cohabitation is in itself a sufficient reason for denying a maintenance claim.¹²⁶ In the recent Belgian reform legislation, living as a couple may lead to a loss of maintenance.¹²⁷ Similarly, in Germany, the claimant's subsequent involvement in a stable relationship may lead to a termination of maintenance.¹²⁸ The Portuguese divorce reform followed an intermediate

118 See M. Wellenhofer, 'Zur aktuellen Entwicklung des Ehegattenunterhaltsrechts', 2011 *FamRZ*, pp. 685, 687 *et seq.*

119 See for Art. 401 § 1 Belgian Civil Code Pintens, *supra* n. 15, at p. 1494.

120 See Wellenhofer, *supra* n. 118, at p. 688 *et seq.*

121 § 1578b BGB German Civil Code.

122 Cf. Ribot, *supra* n. 102, p. 82 *et seq.*

123 Art. 1:157(4)-(6) Dutch Civil Code.

124 Art. 401 § 4 Belgian Civil Code – cf. see more in detail W. Pintens, 'Entwicklungen im belgisches Familienrecht 2008–2009', 2009 *FamRZ*, pp. 1535, 1536.

125 See more in detail Pintens, *supra* n. 124, p. 1536.

126 Cf. Ribot, *supra* n. 102, at p. 84 *et seq.*

127 Art. 401 § 10 Belgian Civil Code.

128 § 1579 No. 2 German Civil Code.

approach.¹²⁹ Here the cohabitation of either party is a factor in determining their ability to pay and their needs.

4. *Multiplicity of Obligations*

In all legal systems, the problem of multiple maintenance claims arises. When assessing the obliged spouse's ability to satisfy the needs of the entitled spouse, the maintenance claims of minors must be given precedence.¹³⁰ The priority of minors was one of the aims of the German reform of maintenance law in 2007.¹³¹

Within the existing system of maintenance, after divorce the relation between obligations vis-à-vis the ex-spouse and a new spouse of the debtor spouse is a difficult point. In Germany, in the past, the maintenance claim of the former spouse was given priority under certain circumstances. This has been changed with the reform of 2007, which also intends to relieve the economic burden on so-called second families. Now there is – as in other jurisdictions – in principle equal ranking. Under the reform law, the primary obligation stands in respect of minor children; on the second rank are the claims of parents caring for children.¹³² Nevertheless, ascertaining the correct method of calculation is difficult also under the new law.¹³³

Today there is widespread consensus that the approach of promising maintenance claimants their former standard of living is, in many cases, unrealistic.¹³⁴ Nevertheless, also under the current German law – at least for the starting point of assessing the need of the ex-spouse – the amount of maintenance has to be determined in accordance with the marital standard of living.¹³⁵ Whereas there is consensus that the circumstances at the point in time in which the divorce became final are, in principle, decisive for the determination of the marital standard of living, the German Federal Supreme Court developed a formula to lower the standard of the maintenance claim for the ex-spouse where there is a second marriage. The divorced spouse's maintenance need was accordingly to be determined by adding up the adjusted incomes of the divorced spouse, the maintenance debtor and the new spouse. The result then had to be divided by three. However, this so-called division-by-three method (*Dreiteilungsmethode*) had no foundation in the statute, violated the expectations of the divorced spouse and has been declared unconstitutional.¹³⁶ According to the German system, the problem can only be solved by the rules on priority of claims or ability to pay, not by manipulating the concept of needs.

129 Art. 2016-A (1) Portuguese Civil Code.

130 CEFL Principle 2:7(a).

131 See now § 1600 No. 1 German Civil Code – still equal rank of children and spouse under Art. 5 para. 2 Maltese Civil Code.

132 § 1609 No. 1, 2 German Civil Code – in the same rank are also divorced spouses in the case of a long marriage.

133 See Wellenhofer, *supra* n. 118, at p. 685 *et seq.*

134 Cf. Ribot, *supra* n. 102, at p. 80 *et seq.*

135 § 1578 German Civil Code.

136 See Federal Constitutional Court 25 January 2011, 2011 *FamRZ*, p. 447 with note by H. Borth – cf. for the ongoing debate D. Pauling, 'Unterhaltskonkurrenz zweier Ehegatten nach Verwerfung der Dreiteilungsmethode', 2012 *NJW*, p. 194 *et seq.*

E. Enforcement and Sanctions

Effective enforcement of maintenance claims begins with advice to the claimant. A very important stage is consequently information gathering undertaken by the court. This has been reformed in many jurisdictions in the recent years. Additional to the adversary system, access to supplementary information about the financial situation of the debtor is often necessary.¹³⁷ It is interesting that in Belgium, the Code of Civil Procedure was amended in 2010 so as to specify what has to be the content of a maintenance judgment.¹³⁸ The court is obliged to state the different means, costs, social security benefits, etc., which were taken into account. It is evident that good documentation makes it easier to assess the different maintenance issues. The parties as well as other institutions obtain better insight, and also in the event of modification it may be easier to judge the case.

The means of enforcing judgments are a subject of their own. Maintenance is often not paid and enforcement by means of execution is often difficult.¹³⁹ Mediation is increasingly proposed, but it is hard to say what the results are. There have been many smaller reforms to strengthen the rules on execution. In Belgium, it was recently stipulated by law that the court may order the establishment of a bank account for the payment of maintenance. The court may also prescribe the details for the management of this bank account.¹⁴⁰ Common methods of enforcement are wage garnishment and property seizure. The possibility for the court to afford the maintenance claimant access to the assets of the debtor has also been extended by the last Belgian reform.¹⁴¹ Ireland has amended its legislation to give the courts the power to regard a maintenance debtor's failure to comply with a court order as a contempt of court and to deal with it accordingly, including by means of imprisonment.¹⁴² Sometimes, there is also a national enforcement authority, for example, the Dutch LBIO, which can recover maintenance within the Netherlands.¹⁴³

137 Cf. for Germany §§ 235, 236 Family Proceedings Act.

138 Art. 1421 Belgian Code of Civil Procedure – cf. Dandoy, *supra* n. 13, at p. 777 *et seq.*; Masson, *supra* n. 13, at p. 588 *et seq.*; Pintens, *supra* n. 46, at p. 1488.

139 For the UK see Davidson, *supra* n. 63, at p. 69 *et seq.*

140 Art. 204 § 4 Belgian Civil Code – cf. Dandoy, *supra* n. 13, at p. 784 *et seq.*; Pintens, *supra* n. 46, at p. 1488; Antokolskaia, *supra* n. 56, at p. 317.

141 Art. 204ter para. 2 Belgian Civil Code – cf. Pintens, *supra* n. 46, at p. 1489.

142 The Civil Law (Miscellaneous Provisions) Act 2011.

143 Landelijk Bureau Inning Onderhoudsbijdragen, see <www.lbio.nl/> – cf. M. Jonker, 'Enforcement of Child Maintenance in The Netherlands', in I. Curry-Sumner & C. Skinner (Eds.), *Persistent Problems, Finding Solutions: Child Maintenance in The Netherlands and the United Kingdom*, Wolf Legal Publishers, Nijmegen, 2009, pp. 83, 95 *et seq.*; D.A. Klüsener, 'Niederlande', in *Nomos Kommentar BGB Familienrecht* No. 29.

F. Role of the Welfare State

I. Role of the State

Today the welfare State plays a more or less active role in the field of maintenance for different groups such as children and single parents and the elderly.¹⁴⁴ Although the respective national rules are often very complicated and the different systems are hard to compare, some general remarks can be made.

For maintenance law, social security payments are relevant because from an economic point of view, they are also income of the maintenance creditor. Some social welfare benefits are always available provided their requirements are met. Often there are also specific child benefits independent of existing maintenance claims. For these child benefits, such as the Dutch *kinderbijslag*¹⁴⁵ or German *Kindergehalt*, there remains only the question of which parent can receive the benefit also in the sense of maintenance law or can deduct some amounts from his or her obligation because the other parent receives the payment. In Germany, the legislator has on several occasions modified the respective legislative provisions. In principle, the child benefit is divided between the parents.¹⁴⁶ In France, there is help in the form of an *allocation de soutien familial* (ASF) by the *Caisse d'allocations familiales* (Caf).¹⁴⁷ The Cour de cassation has recently clarified that the *allocation familiale* counts as income of the parents.¹⁴⁸

Other social welfare benefits are also financed with government resources, but are based on supplementary support systems. This means that this form of support is dependent on the available income of the welfare recipient and can only be claimed in the event of a default of private support. However, discharging the maintenance debtor is not the purpose of the social security benefits. If the benefit is paid only on a subsidiary basis, maintenance claims are as a rule not reduced by a corresponding amount.¹⁴⁹ There is often an express provision that the maintenance obligations and family solidarity take priority, e.g. in France for social assistance (*aide sociale*)¹⁵⁰ and in Germany for *Sozialhilfe*.¹⁵¹

For subsidiary payments, there is often a recovery claim by the public institution that granted the benefit.¹⁵² This may be an independent claim of the institution. Often there is a subrogation of the claim, which means that the public insti-

144 Cf. R. Farrugia, 'State Responsibility in Enforcing Maintenance Obligations Towards Children', in B. Verschraegen (Ed.), *Family Finances*, 2009, p. 71 *et seq.*

145 The rules for who can receive child benefit and how much it will be are set down in the National Child Benefits Act (*Algemene Kinderbijslagwet – AKW*).

146 See § 1612b para. 1 No. 1 German Civil Code.

147 Cf. also Martiny, *supra* n. 25, at Vol. II, p. 1259 *et seq.*

148 For the *allocations familiales* Cass. civ. 17 November 2010, n 09-12621, *Gazette du Palais*, n 328-329, 24-25 November 2010, *Jurisprudence*, p. 10 note by E. Pierroux, 'Allocations familiales: je vous hais?', *Gaz. Pal.*, n 12-13, 12-13 janvier 2011, *Jurisprudence*, p. 10 = *Petites Affiches* 2011 No. 92 S. 6 note by M.-C. Aubry = 2011 *Rev. Trim. Dr. Civ.* 117 note by J. Hauser.

149 Cf. Art. 145 § 4 Polish Family and Guardianship Code.

150 See Art. 142-6 French *Code de l'action sociale et des familles*.

151 § 2 Social Security Act (*Sozialgesetzbuch*) XII.

152 For The Netherlands Jonker, *supra* n. 143, at p. 89 *et seq.*

tution may use the maintenance claim for the purpose of recovery.¹⁵³ In these cases, recovery claims are based on special provisions of public law and maintenance law.¹⁵⁴

II. Advance Maintenance Payments

If the maintenance debtor is not able to pay or does not pay child maintenance, advance maintenance payments can often be claimed out of public funds. Accordingly, there is a close connection with social security benefits and the public safety net generally protecting against life's mishaps and risks.

There are, as already explained, different types of security benefits. Many states have special systems stepping in if maintenance is not paid.¹⁵⁵ There are, for example, guaranteed maintenance payments in Sweden in the form of 'maintenance support' (*underhållsstöd*).¹⁵⁶ A similar system is advance maintenance payment (*Unterhaltsvorschuss*) under German law.¹⁵⁷ In other countries, such as the Netherlands, the general welfare benefits system also covers this risk.¹⁵⁸ Under EU law, these systems of financial support must not be discriminatory and may not be restricted to national citizens. Accordingly, after a judgment of the ECJ, Austria had to change its policy on advance maintenance payment (*Unterhaltsvorschuss*).¹⁵⁹ There is, however, also a tendency to encourage recipients of social assistance to seek maintenance payments from the debtor. Where the claimant fails to make a required effort to secure support from the debtor, there is a threat of reduced state support, as is the case, for example, in the Netherlands.¹⁶⁰ In the United Kingdom, this is inherent to the child support system.

G. Conclusion

Maintenance law is in a constant state of transformation. Changes in family patterns also influence the economic situation of claimants and debtors and the use of maintenance law. A private transfer of means cannot be isolated from the economic situation of families and the parties.

153 In Germany mainly § 37 Social Security Act II; § 94 Social Security Act XII; § 7 Maintenance Advancements Act – cf. also Martiny, *supra* n. 25, at Vol. II, p. 1130 *et seq.*

154 Under the European rules, they can be enforced as maintenance as has been decided by the European Court of Justice concerning the former Dutch Law on general assistance (*Algemene Bijstandswet*), see ECJ, Judgment of 14 November 2002 in Case C-271/00, *Gemeente Steenbergen v. Luc Baten*, [2002] ECR I-10489 = 2004 IPRax 237 with note by D. Martiny 195.

155 In Poland, there is a law of 7 September 2007.

156 Cf. Jonker, *supra* n. 57, at p. 262 *et seq.* – see also Information from *Försäkringskassan*, 19 October 2008, General information about maintenance support [*underhållsstöd*], <www.forsakringskassan.se/irj/go/km/docs/flk_publishing/Dokument/Publikationer/Faktablad/Andra_sprak/Engelska/underhallsstod_eng.pdf>.

157 Maintenance Advancement Act (*Unterhaltsvorschussgesetz; UVG*) of 2 January 2002 (as amended).

158 Law on work and assistance (*Wet werk en bijstand; WWB*) – see Jonker, *supra* note 57, at p. 226 *et seq.*

159 See *Unterhaltsvorschussgesetz (UVG)*.

160 See Jonker, *supra* n. 143, at p. 90 *et seq.*

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The core area of maintenance law is still child support. There is a trend to intensify this maintenance obligation, to give it priority and to make enforcement more efficient.

The calculation of maintenance is increasingly seen as one of the most important fields of maintenance law. Particularly for child maintenance, there is a growing trend towards using standardized methods. However, defining specific categories, models and appropriate maintenance amounts remains difficult. As a reaction to the extended use of more flexible models of shared responsibility, there is a growing tendency to set fixed amounts in favour of the non-resident parent who practices access and partially cares for the child.

In nearly all jurisdictions, a trend is emerging to restrict maintenance after divorce. It is regarded as more common that women are active in professional life and are (or should be) participants in the labour market. Self-sufficiency can be more readily assumed. Additionally, temporal restrictions are more and more common. It is, however, difficult to strike a balance between self-sufficiency and compensation of marriage-related detriments and persistent need.

The role of social security and state support is different in the European jurisdictions. The real impact of maintenance obligations cannot be assessed without taking this into account. The pressure on maintenance claimants and debtors may collide with their role as parents.