MATRIMONIAL CONVENTIONS AND SAME-SEX MARRIAGES. COMPARING THE NETHERLANDS, ENGLAND AND USA LAW

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Abstract: *The present research focuses on two of the most controversial topics of law of matrimonial relations nowadays: the matrimonial conventions and same-sex marriages. Both of these law institutions and the values that justify them are in progressive changing all over the world and especially in Europe. However the Romanian law system, at the moment of writing, does not recognise these institutions and a comparative research can provide us better perspectives.*

I will try to cover the law figures from above by comparing the law from two states of Europe, Netherlands and England, and the law of USA.

For the understanding of the marriage agreements and the same-sex marriage it is crucial to analyse the basic principles of the matrimonial imperative regimes in each of the compared system.

The main question of the research is: Which of the compared systems of law provides the highest liberty for entering into marriage agreements or same-sex marriages?

Rezumat: **Convenţii matrimoniale şi căsătorii între persoane de acelaşi sex. Comparaţie între dreptul olandez, englez şi american.** *Prezenta cercetare se focalizează pe două dintre cele mai controversate subiecte de drept a relaţiilor matrimoniale din ziua de azi: convenţiile matrimoniale şi căsătoriile de acelaşi sex. Ambele instituţii şi valorile care le justifică progresează peste tot în lume, in mod special în Europa. Totuşi, sistemul de drept din România, la momentul scrierii, nu recunoaşte acest drept, iar o cercetare de drept comparat ne poate oferi perspective noi.*

Se va încerca acoperirea figurilor juridice de mai sus, comparând dreptul a două state din Europa, Olanda şi Anglia, şi dreptul SUA.

Pentru înţelegerea contractelor matrimoniale şi căsătoriilor de acelaşi sex este crucial a se analiza principiile de bază ale regimurilor primare imperative în fiecare dintre sistemele comparate.

Principala intrebare a acestei lucrari este: Care dintre sistemele de drept comparate oferă cea mai mare libertate pentru încheierea de convenţii matrimoniale şi căsătorii de acelaşi sex?

***Keywords**:* family, marriage, matrimonial conventions, comparative law

Cuvinte cheie: familie, căsătorie, convenţie matrimonială, drept comparat

''Act as though you were through your maxims a law-making member of a kingdom of ends''
Kant (Ole Lando translation)

Introduction

This paper is a comparative research in the field of matrimonial relations from Netherlands, England and USA. The research focuses on two of the most controversial topics of matrimonial relations nowadays, the marriage agreements and same-sex marriages. Both of these law institutions and the values that justify them are in progressive changing all over the world and especially in Europe.

I will try to cover these changing perspectives by analysing the law from two states of Europe and the law of USA. I have chosen these states because Netherlands represents the modern system in Europe while England by the contrary has a conservatory system of law at the same time the law of USA represents a developed society that can give us a perspective from out of Europe.

Nonetheless at the time of writing the legislator in Romania is trying to introduce in the Civil Code new features about the matrimonial contracts and this comparative study can make us available an instrument of comparison. As a concept a comparative study can help the lawyers to understand better their system and gather more knowledge about other methods while trying to improve their own.

The structure of the research is formed by country reports about the studied institutions, reports that try to analyse the same aspects of the law, to answer the same questions, to have the same basis of comparison, while finding the differences and the similarities in the comparison parts. For the understanding of the marriage agreements and the same-sex marriage it is crucial to analyse the basic principles of the matrimonial imperative regimes in each of the compared system.

The main question of the research is: Which of the compared systems of law provides the highest liberty for entering into marriage agreements or same-sex marriages? I will answer this question in the conclusion part.

Other sub-questions will be used in order to answer the main question: Is there a common core about marriage agreements and same–sex marriage between Netherlands, England and USA? Which of the systems has for the future spouses the highest legal certainty? What are the main differences and similarities between the analysed institutions in the compared systems? These questions will be answered in the comparison part.

The marriage contracts (ante-nuptial agreements/prenuptial agreements, postnuptial agreements or matrimonial agreements etc.) are a form of juridical acts, which make part from the large category of contract. They express the juridical liberty in the field of matrimonial relations[1]. Normally the prenuptial agreements should meet all the elements of general contracts, but also some specific elements, which confers them a unique physiognomy (the parts of a prenuptial agreement can only be the future spouses, and the agreement itself is an ''*accessorium sequitur principale''* for marriage). Are going to be investigated only the contracts which present difficulties or challenges in the systems of law from above and those which can represent a common law or a relevant and unique aspect for their country.

Same sex marriage means a marriage entered into by two people of the same sex while quasi-marriage represents all the other partnership schemes for same-sex couples like reciprocal benefits, domestic partnerships, civil unions...etc.

Throughout the country reports I will explain, where necessary, the meaning of the terms used and the institutions analysed in function of the specific of that system of law.

Marriage contracts: Dutch Report

1. The matrimonial imperative regime in Netherlands

Since 1 January 1992 Holland has a new civil code, which is a re-codification of the Civil Code of 1 October 1838 based on the French Civil Code, Code Napoleon. The Dutch marriage and matrimonial institutions are provided by Book 1: Family Law of the Civil Code.

In Netherlands the marriage is recognised for the persons of a different sex or of the same sex as well as the registered partnerships. There are very few differences between marriage and registered partnerships and there is a simple procedure of converting the marriage in registered partnership and vice-versa[2]. In the procedure of splitting up the difference is that the registered partnerships can be ended by way of mutual contract. Also the legal consequences of marriage and registered partnership are almost the same, the only differences that exist are the same as between hetero marriage and same-sex marriage and will be analysed in the chapter of same-sex marriage (the inter-sate adoption and the presumption on paternity).

The Dutch marriages and registered partnerships are accompanied by one matrimonial property imperative regime that enters into force any time when the spouses do not make a marriage contract. Once they go into a marriage contract the Civil Code provides two other schemes of the matrimonial imperative regime that can be chosen by the spouses only by a marriage contract.

A comparative study of the neighbouring countries' matrimonial regimes of Netherlands showed that there is great diversity and that the common core of principles is small[3]. Even so the matrimonial regimes of the countries can be split in three categories: Countries with no community of property, countries with community of property during the marriage or those with community of property that comes into force only after the termination of the marriage[4]. The matrimonial property regime in the Netherlands makes part of the second category and it was also named as a ''universal community''[5].

However the Netherlands has a unique regime of community because it provides for the community of all assets, and by all assets in this case is meant all assets existing at the moment of marriage and during the marriage, including the testamentary and *inter vivos* gifts[6]. This stipulation is provided by Book 1, Family Law and the Law of Persons, article 93 and 94 of Code Civil: ''A general community of property exists between the spouses by operation of law from the time of the solemnization of the marriage insofar as no derogation is made therefrom by a marriage contract'' and ''The community comprises, where its assets are concerned, all present and future property of the spouses...''[7]. There are some exceptions from the statutory community of property: - ''the property that was provided by last will of the testator or when a gift was made stating that it would fall outside the community ''; property and debts which have a close affinity to one of the spouses and pension rights (Art. 94, CC) etc.

Article 99 also stipulates the cases for dissolution of the community of property by law: upon the ending of marriage, on a judicial separation, trough a court order which terminates the community of property and very important as a result of a subsequent marriage contract[8]. The spouses or the registered partners can opt out of the matrimonial property regime in a matrimonial agreement and remain in a separate property regime of their own assets, in a total exclusion of community of property. Fortunately for spouses there are two other possible regimes that can be functional for their marriage: the community of gain and loss and the community of fruits and profits and income, and both of them are enacted in Civil Code. These two regimes can be entered only by marriage contracts that state no other alteration from the rules of these regimes of Civil Code.

2. Marriage contracts in Netherlands: juridical characters and establishment

Title 8 of the Book 1 of the Dutch Civil Code enacts Marriage Contracts. Article 114 generates the possibility of two kinds of marriage contracts that can be settled in two different periods of time concerning the marriage solemnization. First there are the prenuptial agreements (I named them so for the simple fact that they are created before the solemnity of marriage) which are made by the prospective spouses prior to entry into their marriage.

Second there are the marriage contracts made by the spouses during their marriage and I can name them postnuptial conventions (because they are created already in a matrimonial state of affairs). The distinction is necessary for the understanding of the effectiveness and enforceability, of those conventions, in front of the courts and by the courts.

While the enacting of the prenuptial agreements does not need an approval by a court order to be effective the postnuptial conventions (marriage contracts made during a marriage) or the alteration of a marriage contract during marriage needs the District Court approval (Art. 119, CC)[9]. Continuing the Court can give its full or partial approval for postnuptial contracts only when there is no risk that creditors would be prejudiced and when the contract respects the rules of mandatory law, *bonos mores*, or public policy.

The primary relations between marriage contracts and matrimonial imperative regime are given by articles 121 and 123, CC. There is stated that the parties may derogate in marriage contracts from the provisions of matrimonial imperative regime as long as they respect the mandatory law, *bonos mores* or public policy.

The other two matrimonial regimes the ‘’community of benefits and income’’ and the ‘’community of profits and loses’’ are available only by means of a marriage contract that stipulates the choice of one of them and does not derogate explicitly or by the nature of the stipulations. These two regimes are regulated in articles 123-128, Code Civil, and represent the originality of the Dutch matrimonial law because they are regulated as primary regimes while entering into force only when they are chosen trough the instrument of a marriage contract by the consent of the spouses.

3. The Dutch law rules for an effective marriage agreement: imperative rules and limits.

3. a) Imperative rules and general limits

Primary imperative that I will talk about is connected with the formal aspects of the marriage agreements and is presented by article 115, CC.: '' In order to be valid, marriage contracts must be entered into by notarial instrument''[10] . It is obvious that the lawmaker was aware about the high importance of a marriage contract for ones life and that this rule is made to protect the consent of future spouses or actual spouses. The official and formal aspect of it can make the parties to think harder at the consequences that the contract could and would include.

We also have seen above that if a prenuptial agreement is signed there is no need for a court order while when a matrimonial agreement is signed the court approval is mandatory.

The explanation of this can be found on a psychological and utilitarian level. The psychological point is to be found between the spouses when one of them can benefit more easily from the weakness of the other by means of 'trust' and impose 'hard clauses' in the matrimonial agreement then when they would not be spouses yet (the case of prenuptial agreements). Secondly, the utilitarian point is designed to protect the creditors of one of the spouses or of both spouses from the fraudulent behaviour of the partners by means of a postnuptial agreement. The judge has also to check if the terms of the matrimonial agreement are not contradictory with the rules of mandatory law, *bonos mores* or public policy.

An additional imperative linked to the formation of marriage contracts orders that the persons consent have to be actual at the time the instrument is made (Art. 117, CC), conversely ''power of attorney to enter into a marriage contract must be given in writing and contain the provisions to be included in the marriage contract'' (Art. 115, CC)[11] .

There are too rules with regards to the substantiality of the marriage agreements and its limits. The parties can not derogate from the rights arising from parental responsibility or from the rights conferred by law to a surviving spouse and ''the parties may not provide that a spouse is committed to a larger share of the liabilities than that spouse shares in the community property'' (Art. 121, CC).

3. b) The conditions for marriage agreements that state the 'community of benefits and income' and the 'community of profits and loses''

Since in the Netherlands a marriage agreement can entail and provide exactly and entirely one of the two complementary matrimonial property regimes I will try to analyse marriage agreements which contract these out of the ordinary regimes.

Readily available are two main characteristics of these institutions: they are designed by the Civil Code in a number of articles (Art. 123-128, CC) and they can only be enforced by means of a marriage agreement that states their name and

no alteration from what is written in the Civil Code. While the legislator named the primary matrimonial property regime in Netherlands as ''statutory community of property'' these institutions are named as ''community of benefits and income'' and ''community of profits and loses''. This shows that they are ''communities'' of matrimonial property regimes that can be established by marriage agreements. They can be seen like the second and the third matrimonial property regimes or as different schemes of the primary regime. The idea is that they function independent from the statutory community of property, by their own rules, when they are chosen by the spouses in a marriage contract.

Beginning with article 123 and article 128 the Civil Code unequivocally says that when a community of benefits and income and a community of profits and loses is agreed in a marriage contract articles 124-127 shall apply, as long as there has been no derogation from them explicitly or by the nature of the stipulation and they embrace the following main ideas.

A community of benefits and income and a community of profits and loses shall comprise all property which the spouses acquire during the lifetime of the community. We can already see that here is a difference between these complementary communities and the imperative statutory community of property because the first ones do not comprise the actual property of the spouses into the community, only the future property of the spouses. There are as well some exceptions like hereditary succession, bequests of gifts, some items of property gratuitously acquired and any amount connected on a claim which does not form of community. In the community shall enter all debts of the spouses excepting those which were present at the beginning of the community or those strictly connected with the private property of the one of the spouses.

Until now all this rules are applied for both of the complementary communities; however there are some provisions which differentiate the community of benefits and income from the community of profits and loses. In the case of community of benefits and income the property and debts which belong to a business or profession fall outside the community of benefits and income while contrary, for community of profit and loses them enter into the community.

3. c) The conditions for marriage agreements that state a clause of obligation in respect of netting income or capital

Some specific articles that treat the marriage contracts are speaking about netting covenants that contain obligations in respect of netting income or capital. These rules are not imperative and they only apply when there is no derogation from them in a marriage contract that provides an obligation of a net income or capital. The general rules for Netting Covenants are recognized by the articles 132-140, CC, while the articles 141-143 established Periodical Netting Covenants and Final Netting Covenants.

The netting covenant system is applicable when there is a partial or an entire separation of property[12]. One of the most popular versions is the Amsterdam-netting Covenant provided by more than 75% of marriage contracts. In this scheme spouses have no community of property while the contracts say that, every year, the surplus of the incomes of both parties will be netted on a 50:50 basis, after the costs of joint households have been deducted[13].

4. (Non)/enforcement of prenuptial agreements in the Dutch legal system

Like in any contracts that belong to French Family of Civil Codes the enforceability of marriage contracts is designed by two principles: ''*pacta sunt servanda''* and *''res inter alios acta''*. These two principles explain the force of the contract between spouses and the relativity of the effects of the contract for parties and third persons.

Once more the effects of the Dutch marriage contracts can be distinguished as there is a prenuptial agreement (before marriage) or a postnuptial agreement (after the solemnization of marriage). Concerning prenuptial agreements the date of the solemnization of the marriage is central because this is the date when they enter into force (Art. 117, CC), while the postnuptial agreements ''enter into force on the date following that on which the instrument is executed unless the instrument specifies a later date'' (Art. 12, CC).

Normally the third persons have to respect the marriage conventions on a general principle of contracts while the marriage contracts can be raised against third persons if the marriage contracts are opposable for them. The opposability in the situation of Dutch marriage contracts is made by a public system of publicity: Matrimonial Property Register. With reference to prenuptial agreements Article 116 of the Dutch Civil Code enunciates that provisions of the marriage contracts (prenuptial agreements in this case) ''may be raised against persons who were unaware thereof only if these provisions were registered in the Public Matrimonial Property Register''. This register is kept at the clerk's office of the district court of the jurisdiction were the marriage was officialised or at the clerk's office of the district court in The Hague if the marriage was entered into outside Netherlands (Art. 116, CC). The situation of the publicity is slightly different when we move towards postnuptial contracts. What has changed is the time that a postnuptial agreement has to be registered in Public Matrimonial Property Register before the effects of the publicity can appear. Article 120, CC institutes a period of fourteen days prior to the provision of marriage contracts can be raised against third persons unaware thereof.

Beyond the rules from above a crucial principle that has a general application for contracts in Netherlands is the good faith principle. This is stated in article 6:2(1), CC and specifies that 'a rule which would bind the parties by virtue of law, usage or legal act shall not apply to the extent that under the circumstances this would be

unreasonable by the standards of reasonableness and equity''[14]. The principles of reasonableness and equity now permit the courts to derogate from the Civil Code when they find to be unreasonable to follow it[15].

Marriage contracts: English Report

1. The matrimonial imperative regime in England

In English law '' formalizing a relationship has no automatic impact to the parties property rights''[16], there is no ''matrimonial property regime '' or better said there is a regime of separation of property. During the marriage the spouses keep their own property, but the property can be the subject to the courts' wide distributive powers if there would be a judicial separation.

''The rights of the parties must be judged on the general principles applicable in any court of law when considering questions of title of property…while making full allowances in view of [their] relationship''[17]. So even if the parties keep their own property while being married, in case of a divorce in the ancillary relief procedure the courts can split the property as they believe is fair in view of their relationship.

The Matrimonial Causes Act is the substantial law for divorce in England and can be invoked for determining the rights and the interests of the spouses along with the general principles of property law which are used to define the status of the ex spouses about their property. Both property law and the principles applicable on divorce invoke the concept of fairness[18]. The next chapters will explore the law of prenuptial agreements in England which imposes the most difficulties of enforcement for English future husbands, leaving away the post-nuptial agreements and the separation agreements that are easy to enforce in front of an English court[19] under sections 34 to 36 of the Matrimonial Causes Act (1973) and which do not represent any complications at all.

2. Marriage contracts (Prenuptial agreements) in England: juridical characters and establishment

There is a high percentage of marriages end in divorce, and couples, particularly those marrying for a second time, want to make pre-nuptial agreements. Those kinds of agreements are rare in English law, primarily because they are not directly enforceable by the English courts[20].

Pre-nuptial agreements, usually involve an agreement in contemplation of the failure of the relationship, regarding the disposition of the parties' financial resources, what jurisdiction or forum is applicable and what limitations have the parties for applying the exercise of the courts discretion[21].

In English law pre-nuptial agreements must be studied in connection with the ancillary relief rules, established by Matrimonial Causes Act 1973, and with the case law which deals with it, because this is the substantial law for divorce and

implicitly for marriage agreements. Section 34(1) of the Matrimonial Causes Act 1973 provides that any provision in a maintenance agreements (the rule is applicable for prenuptial agreements) between spouses which purports to restrict the right to apply to court for an order for financial relief is void.

This is a very important principle recognized in the field of English matrimonial conventions, and means that the court can regulate the spouses' financial affairs after divorce, and that the parties can not exclude the jurisdiction of the courts in their agreement[22]. Hyman v Hyman, 1929, was a case about a separation agreement, but the decision of the court applies also for prenuptial or ante-nuptial agreements. The husband tried to exclude the jurisdiction of the court to regulate their financial affairs, paying the wife an amount of money for contracting that she was not entitled to any different provision and that the jurisdiction of the court is excluded. An agreement made in contemplation of future separation was considered **contrary to public policy** in that time, while '' Wife's right to future maintenance is a matter of public concern, which she cannot barter away…. Furthermore divorce was something that changes statutes, necessitating the preservation of the court jurisdiction…''[23].

The second principle which rules the matrimonial law is established under Part II of the 1973 Act: '' Power of the courts to make financial provision and property adjustment orders after dissolution of marriage''[24]. These are imperative rules and the spouses can not avoid them. When the courts make financial provisions or property adjustment orders they have to regard to all the circumstances of the case: (s. 25, MCA), Matters to which court is to have regard in deciding how to exercise its powers: the income, earning capacity, property and other financial resources, the financial needs, obligations and responsibilities, the standard of living enjoyed, the age of each party, **the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it**, etc.

Through all the circumstances and matters of the case or the ''**conduct of the parties''** that courts have to take into account we can find the growing importance of pre-nuptial agreements. Even if ante-nuptial agreements are not a binding law in England, the courts could enforce them indirectly when they are doing the s. 25 exercise, because they might be a very important circumstance of the case as long as they actually are the conduct of the parties.

In H v H is the beginning of the concept that the courts will take into account the prenuptial agreement as part of spouses conduct and the circumstances in which it was established[25]. In K v K (Ancillary Relief: Prenuptial Agreement), the couple who had one child separated after 14 months of marriage. They signed a pre-nuptial agreement after receiving independent financial advice from their solicitors. The court decided that the wife's conduct in willingly signing the prenuptial agreement was one of the factors to be taken into account and that it would not be unjust to hold her to the terms of the agreement[26], but there were other important circumstances for the case too, like the birth of a child.

Hence I will reintegrate the prenuptial agreements in the English law for the understanding of the prenuptials particularly issues, finding their limits, their concrete enforceability and their legal effects.

3. The English law rules for an effective prenuptial agreement: limits and imperative rules

First of all, in England, prenuptial agreements' limits are developed by case law, especially the rules under which a prenuptial agreement has all the chances to be taken into account when the courts are dealing with s 25 exercise. Of course there are few principles and imperative rules in statutory law, Matrimonial Causes Act, 1973.

When the parties are entering in a prenuptial agreement there must be:

-Full disclosure - there are cases where dimension of full disclosure was developed[27] - in a case the husband had hidden his assets and entered into a prenuptial agreement without full disclosure[28].

-Independent legal advice: as Ormrod L.J. said in underlined the situation of ''possibly bad legal advise''[29]. Before entering the agreement being legal advised properly is a circumstance that must be taken into account, and the conclusion is that a court would not put to much weight on the agreement made out of properly legal advice.

How close to the marriage the agreement was made, a 21 days before rule? A rule which gives to the future parties of the agreement time and opportunity to reflect on their decision, and consider the future implications of the contract with calm, without any time pressure.

There should also be:

-No disparity of bargaining power, or no exploitation of it, and no pressure by one party on the other: Ormrod L.J. in E v E.

-''a recital to the effect that the parties wish to enter into legal agreement with the intention to enter legal relations which will be treated as binding on them; a recital setting out why the parties are entering the agreement;. a recital setting out why the agreement is regarded as fair; ''[30]

-A provision for regular (say 5 yearly) reviews and in particular reviews following the birth of children[31]. This is a very interesting limitation of the agreements, because the birth of a child it appears to be a very important factor of the case, provided by Matrimonial Causes Act s. 25 (1) and by the courts decisions in K v K, 2003. Also the 5 yearly review even if there is no children must be done in order to maintain the importance of the prenuptial agreement (in practice the prenuptials in long marriages loose their weight). The courts developed this requirement in order to impose fairness between parties.

-''definition of any property regarded as non-matrimonial property (unmatched Contributions, discrete business assets, inherited property), etc.[32]

Other principles and vital rules implied in a matrimonial contract, provided by statutory law, are:

- The parties of an agreement can not exclude the jurisdiction of the courts regarding ancillary relief: 1973 Act provides the whole jurisdiction of the courts regarding ancillary relief.

- The parties of an agreement can not limit the courts jurisdiction: 1973 Act set up a total power of the courts regarding ancillary relief.

- The convention between spouses must be valid under the other circumstances, regarding the law of contract.

The very important idea is that the agreements must be fair, both procedurally and substantively, at the moment of signing and at the time of performance.

4. (Non) enforcement of prenuptial agreements in the English legal system

For analyzing the concrete enforceability of the English prenuptial agreements we will continue to study the prenuptials at the time of performance, because this is the moment when the English courts exercise their power in order to enforce or not the agreements. If all the procedurally and substantively conditions regarding the formation were respected, the courts would now check the circumstances in the moment of the performance, trough the eyes of the s.25 exercise, in order to entail fairness between spouses. But if the procedurally and substantively conditions regarding the formation were not respected then there are little chances for a court to enforce the agreement. We should not forget that under the 1973 Act, the Prenuptial Agreements are not binding for the courts, but they can be enforced indirectly because they are a circumstance of the case.

So, which would be the most important conditions for a prenuptial agreement to be enforced indirectly, or not to be enforced by the English courts? Those factors are: the duration of the marriage, the birth of a child, the contributions which each of the parties has made for the welfare of the family, the conduct of the parties and any other new circumstances relevant for the case, that have appeared between spouses since the marriage started.

In M v M, 2002 the couple who have one child entered into a prenuptial agreement and divorced after five years of marriage. The judge held that the court should decide what weight should be attached to the agreement treated as a circumstance of the case, trough all the other circumstances. ''Even if the agreement did not dictate all entitlement of the wife, was borne in mind as one of the most relevant circumstances of the case. Other relevant factors in departing from equality were the comparative shortness of the marriage and the fact that the husband had created the family wealth''[33]. In K v K, 2003, the judge decided what legal effects would have the prenuptial agreement taking into consideration the short marriage, the birth of the child and that the wife did not contributed with anything to the wealth of the husband.

A very important case which might change the perspectives of the prenuptial agreements in England is Crossley v Crossley, 2007. The prenuptial agreement between the parties was negotiated by experienced lawyers. The parties separated fourteen

months after the marriage which was between mature adults, both of them had been previously married and divorced and they had no children. Also the prenuptial agreement provided that there will be retention of each of the parties of their separate properties. Lord Justice Thorpe said: 'this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case'[34].

Thorpe LJ also said that the classification of the 'Crossley prenuptial as akin to a marital property regime which people enter into in continental Europe to elect whether they should be separate or community property'[35]. This case shows us that the autonomy of the parties is increasing in English matrimonial conventions.

Marriage contracts: American Report

Having to do with 50 states and the District of Columbia in this part I will present strictly the law of the United States that I believe is the most representative for matrimonial property relations. It is not possible in this research to compress all the jurisdictions but is possible from a comparative standpoint to encompass the common core in the Unite States and to set the basis for a new and more complex research.

1. Basic principles of the Matrimonial Imperative Regime in USA

The Supreme Court of the United States noted in *Maynard v Hill* (1888) that, while marriage 'creates the most important relation in life, as having more to do with the morals and civilization of a people than any other institution', it is a subject that belongs to the control of the state courts and especially the state legislatures[36].

At the moment when Unites States were established as a colony the authority to grant divorce was taken by the Parliament of England. Only after the Revolution this decentralised control of marriage and all the institutions connected to marriage in the United States has been taken by the States Legislatures being provided under the Tenth Amendment of the Us Constitution. The American Federalist system allows individual states to define everything from who may marry to when they can divorce[37]. There are authors who sustain that such a decentralised control of marriage and divorce in unparalleled in any other nation[38]. There are some acts that try to unify or harmonise the law at a federal level like Uniform Premarital Agreement Act but the field of matrimonial relations in regards to agreements about matrimonial property and the matrimonial statutes themselves are still different organised. I will try to contour first the common core of these matrimonial institutions throughout the majority of states and then I will analyse the law of the states with the most specific and newest features.

Also in the United States is a high diversity of opinion of what marriage and matrimonial relationships represent and for whom they are opened. Outside hetero marriage which of course is recognised in every state there are different civil

relationships like ‘’reciprocal benefits’’, ‘domestic partnerships’, ‘civil unions’ and ‘same-sex marriages’. Yet the marriage agreements can be presented as a common core or representative law for the United States only if they are studied in accordance with the UPAA principles as we will see in the next chapters.

2. Marriage contracts in USA: juridical characters and establishment

The emergence of marriage contracts in USA law can be explained from a constitutional angle. There has always been a tension between federalism and states rights because under the Constitution of the USA certain powers and prohibitions were split between federal government[39] and individual states[40]. As part of this equation the states were not allowed to develop legal rules that limit the individual freedom to enter in contracts.

So from the very beginning the ground for marriage contracts was set apart, of course with many limitations because marriage contracts had the cause in marriage which was under the total control of individual states (this control has been explained in the above chapter). Besides this the USA Constitution prohibits the promotion of any kind of religion, the known principle of separation of state from church. Motionless the courts in the early age refused to enforce marriage contracts on the grounds that they are contrary to the good of the public and the effect was that the judges were reflecting the religious ethic of their community. Though once with the separation of church from state and with the new era of values from the second half of the ninetieth century the first marriage agreement was enforced in 1970.

An additional factor that facilitates marriage agreements is the ‘no-fault’ divorce, first introduced in California, increased the number of divorces in the United States and this created the prolific field for the development of the marriage agreements[41].

In USA a typical marriage agreement that can be found in many American States is known under the name of prenuptial agreement or premarital contract, primary because they use to be made before the sacralisation of marriage. It was defined as being a simple written contract that is formed before marriage regarding the terms of the marriage[42]. There are also postnuptial agreements and separation agreements however even if these make part from marriage contracts they will not be analysed because they are not regulated in the same way throughout American States and the effort of comprising them would be to broad for this research.

The only marriage agreements that represent a common core in the Unites States are Premarital Contracts which were regulated in the Uniform Premarital Agreement Act (UPAA). The UPAA were drafted in 1983 by National Conference of Commissioners on Uniform State Laws and they were adopted (or its parts) by 26 states and introduced in two more legislatures in 2005[43]. In the prefatory note of the principles it has been explained their reason of being that is the existence of a

substantial uncertainty as to the enforceability of the premarital contracts and the lack of uniformity of treatment of them among the states[44]. The Act contains comments and explanation of each article and gives example of previous cases that had to do with the same subject.

Even if the principles were not adopted by all American states or sometimes was adopted a modified version of the UPAA, almost every state recognises the institution of prenuptial agreements. Nevertheless the present research will focus on the rules and effects of the prenuptial agreements established by Uniform Premarital Agreement Act as long as this Act represents the modern law and the common core in the United States.

The legal definition of the prenuptial agreements can be found in Section 1 of the Act, Definitions: "Premarital agreement means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage''. It is obvious from this article that other agreements like postnuptial agreements or separation agreements do not fall under UPAA. The UPAA defines also the concept of property in subs. 2 of s. 1: "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings. This subsection embraces all forms of property and interests therein[45].

3. The USA law rules for an effective marriage agreement: imperative rules and limits

The form of the premarital agreements ''...must be in writing and signed by both parties. It is enforceable without consideration'' (S. 2, Formalities, UPAA). Looking forward to ascertain the content of the premarital agreement, exactly what the parties may contract upon, the UPAA, in S. 3 Content, subs. a, presents an illustrative and not exclusive list:

'' (1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

(2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;

(3) The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;

(4) The modification or elimination of spousal support;

(5) The making of a will, trust, or other arrangement to carry out the provisions of the agreement;

(6) The ownership rights in and disposition of the death benefit from a life insurance policy;

(7) The choice of law governing the construction of the agreement; and

(8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty''[46].

As the paragraph 8 from above states that the parties of a premarital agreement can contract regarding all matters from the illustrative and not exhaustive list as long as there is not a violation of public policy or of a statute imposing criminal penalty. At the moment of adoption of the act, between states, was a disputed question if a premarital agreement may rule in regards to spousal support[47], nevertheless the Act did incorporate in subsection 4 from above the modification or elimination of spousal support. This Section also incorporates a choice for the choice of law governing the prenuptial agreement and the possibility to agree on the object of the agreement as being any kind of property irrespective of the way it was acquired that time that is not a violation of imperative norms.

Still the section 3 is ended by the subsection b that presents an expressive limitation of the premarital agreements' content in favour of the right of a child to support, right that can not be adversely affected by these contracts.

Another idea about the effectiveness of a premarital agreement under UPAA rules is what I would call from a civil law system perspective, the cause of the act. In section 4 is stated that ''a premarital agreement becomes effective upon marriage''. Interpreted a premarital agreement under this Act can create effects only after a solemnization of a marriage, in consideration of a marriage and never between people that live together in any form but marriage.

Finally the effects of a prenuptial agreement can be terminated by revocation or modified through an amendment. The form and the procedure is the same, it must be a written agreement signed by both parties (S. 5, Amendment, Revocation UPAA).

4. (Non)/enforcement of marriage agreements in the USA legal system

The UPAA has an entirely section (6) dedicated to enforcement. As a general idea in the enforcement section are presented the reasons why and when an agreement is not enforceable. Normally these reasons of not enforceability are established by principles of general law of contracts, however the UPAA has chosen to codify them in order to harmonise the law of enforcement of the states that have adopted the UPAA. Otherwise the UPAA would provide the same rules, content for the agreements throughout the states while they would be enforced in different ways and the scope of UPAA for harmonization would be perverted.

The party that wants to avoid the enforcement of a premarital agreement must prove one of the ''not-enforcement reasons from section 6. These reasons are:
- not execution of the agreement voluntarily (S6, Subs. a), p. 1) -here by execution is meant the consent given for the signing of the contract;
- If the agreement was unconscionable when it was executed (S6, subs. a), p. 2);
- Not providing a fair and reasonable disclosure of the property or financial obligations of the other party before signing the agreement (S6, subs. a), p2) i));

- did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided (S6, subs. a), p. 2) ii); and
- did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party (S6, subs. a), p. 2) iii).
- If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility (S6, subs. b)).

As we can easily recognise almost all the cases of non-enforcement are actually general principles of contract law transposed to premarital agreements which have to be respected in order to enforce premarital contracts.

For the understanding of the relation between the state law, UPAA and enforcement of the contracts I will continue to present a case that underlines this connection. As I already mentioned at least 28 states have adopted the UPAA or parts of it. What is very important about this is that, even if the states did not adopt the whole text of UPAA and they transformed it as for their system of law, they have now statutory law about premarital contracts as well as comprehensive statutes that cover the enforcement issues.

Marriage of Shanks (Iowa 2008) is a case about a prenuptial agreement voluntarily completed by the wife under Iowa's UPAA and enforced by the State's Supreme Court[48]. The facts of the case were presented in front of the court as follows. The agreement was drafted by the husband-to-be who was a lawyer and then presented to the wife-to-be. In first draft was proposed a separate ownership of the spouses assets gained before marriage and during the marriage and a joint ownership of the marital house. The future husband advised his partner to seek legal advice from an independent specialist. His future wife did go to a lawyer and made some adjustments to the draft and after that she gave the draft back to her husband-to-be. Again the husband-to-be made some small modifications to the draft and gave the draft to his future wife, advising her in the same time to seek independent legal advice. The wife-to-be signed the contract without going to a lawyer for legal advice and after six days they have got married.

After the failure of marriage the man wanted to enforce the premarital agreement. At the Court of appeal the man won his cause. First the Court of Appeal explained that, in Iowa, premarital agreements have to be enforced in concordance with Iowa UPAA. Under Iowa UPAA are three bases that can make an agreement unenforceable: voluntariness, unconscionability and financial disclosure. For the reason that Iowa UPAA was modelled after UPAA, having the same scope of increasing the certainty and enforceability and because in Iowa was absent any

other legislation in regards to premarital agreements the Supreme Court based its interpretation of the case on the comments and purposes contained by the UPAA[49]. In the case was not found any motive of non-enforceability.

Comparison and evaluation: Marriage Contracts

The structure of the research was presented in such a way as to easier the comparative aspects of the countries by analysing the same institutions in each country.

A common core between Netherlands, England and USA of the recognition, legislation and enforcement of marriage contracts is not hard to find because all the countries have made and make progresses for the implementation, development and protection of marriage agreements. The common core is to encompass more and more rights for the future spouses that want to enter into matrimonial conventions. Though each system uses its own tools the result tends to be the same: enlargement of the freedom of the spouses in the contractual matrimonial field.

The country that has the highest level of legal certainty for the enforcement of marriage agreements is Netherlands, where the contracts (both prenuptials and post-nuptials) are treated on the same level in the Civil Code while in the United States the states that managed to unify their legislation have done it only for prenuptial agreements. On the third place of legal certainty is England because in English Law a prenuptial agreement is not recognised (they are not an institution per se) by substantial law only by the procedural law in the Ancillary Relief procedures, as a circumstance of the case.

When it comes about the protection of third parties and creditors the Netherlands protects very well the third parties and the creditors from fraud by imposing a system of publicity for marriage agreements while USA and England do not have special procedures like this.

The most similarities are identified among the institutions of marriage agreements principally in relation to some parts of their formation, parties, content and legal effects; especially between Netherlands and USA (states which apply UPAA law) while England lines with them for more specific parts. These are the similarities: -all the states require a written form of the premarital contract, the parties can be only the future spouses and the agreement itself is made in consideration of marriage;

- if the contract is signed after marriage, it is named post-nuptial agreement, and every country has different provisions than those for prenuptial agreements;
- the content of the contracts is mainly about matrimonial property of the spouses and they change the matrimonial imperative regime of property;
- all the contracts have to respect the ‘’bonos mores’’;
- the parties may not derogate from parental responsibility;
- in all the contracts is present a principle of full disclosure of property; In Holland this is possible by means of the principles of reasonableness and equity as the

general principles that rules all contracts; In England the rule has been made by case law while in USA it is provided by specific provisions for premarital agreements in UPAA.

- in a way or another every country applies the general rules of contract for the enforcement and interpretation of prenuptial agreements ;

Searching for the differences they may be clearly seen because the English system of matrimonial conventions is unique, being developed by case law, and this is why I believe that it endows with the most differences, namely in the enforcement procedures.

These are the fundamental differences: - In Netherlands and USA the prenuptial agreements are established by statutory law in the Civil Code and UPAA respectively while in England they are not even recognised as an institution of substantial law;

- In Holland the prenuptial agreements can provide for the substitution of the matrimonial imperative system with another system of law while in USA the prenuptials can provide only for another state system that has adopted the UPAA; in England it is not possible to exclude the English law for the matters of ancillary relief and implicitly prenuptial agreements ;

- In Holland exists a unified system of marriage agreements that recognizes the same institution with the same substantial rules for both conventions, prenuptials and postnuptials while in England is made a big difference between those two; in USA the only unified law is the law of prenuptial agreements by means of UPAA.

- In England the enforcement of a prenuptial agreement is regarded only as a circumstance of the case, a juridical fact, and it depends of the other circumstances of the case like the birth of a child etc.

Despite the different historical and legal grounds on which the marriage agreements were established by applying the principle of functionality in comparative law I find the essence of the analysed institutions to be the same: to regulate a different regime of property than the legal one.

Same-sex marriages and quasi marriages

A new trend that explains the philosophy behind the concept of family rights is the functional perspective of the family. While the traditional view is encrypted in a strict model of what family is, and only that formal model is provided and protected by the law, the functional premise goes beyond formal family by embracing a dynamic and revolutionary outlook. This rationale encompasses the idea of dynamic change in law, dynamicity that reflects the changing social practices. According to this theory the law has to reflect and assist ‘’actual family experiences and needs, rather than as encouraging or mandating a particularly family form’’[50]. However the theory has many flaws because is based on the ‘’we exist’’ argument and in all cases the choices to legalise same-sex marriages are politically related and not metaphysically rationalised.

Only in United States a survey from 2007 identified 780, 000 same-sex couples while a survey from 2005 acknowledged that in 2000 more than 39% of same-sex couples were raising more than 250 000 children[51].

The countries that ultimately have recognised rights for homosexual's couples are Australia, Canada, USA and UK which are out of the continent and basically represent the common law system. In Continental and Civil Law Europe the Netherlands and Belgium have introduced marriage, quasi-marriage and semi-marriage to same-sex couples, other six countries have introduced quasi-marriage- Denmark, Norway, Sweden, Iceland, Finland and Netherlands or semi-marriage- France, Belgium and Germany[52]. There are also countries where marriage, quasi-marriage or semi-marriage is present only in some of their provinces - Spain, Switzerland, Canada, United States, Australia, and Argentina- or countries where same-sex couples are recognized as registered partners: Hungary and Portugal[53].

The next reports will explore the law of one of the promoters of same-sex marriages the Netherlands that represents the Civil Law System and one of the most conservatory systems of law, English law that has implemented new features vis-à-vis same-sex relations and represents the Common Law in Europe. From outside Europe I will try to find the common core of USA law.

1. Dutch same-sex marriage and quasi-marriage

Holland together with Norway can be considered the promoters of same-sex couples for the reason that they are among the first countries in Europe which have decriminalised the homosexuality in 1970-1974[54]. In 2001 the Netherlands was the first country in the world that has recognised the institution of same-sex marriage in the civil code[55] by two acts: Act on the Opening up of Marriage and the Act on Adoption by Persons of the Same Sex. The Civil Code of the Netherlands states now in Art. 30(1) that a ''marriage can be contracted by two persons of different sex or of the same sex''.

Other legislative modifications that entered into force in 2001with the scope of implementing into the whole system of law the institution of same-sex marriage are: The Adjustment Act of March 8, 2001 and the Act of October 4, 2001. The role of the Adjustment Act of March 8 was to ''adjust the language of the legislation other then civil code''[56]. The idea was to replace the gender words like ''mother'' and ''husband'' with non-gender words like ''spouse'' and ''parent''. With the Act of October 4 has been introduced in the Civil Code of Netherlands a new article (253sa) that considers the non-extension of the presumption of paternity to children born to same-sex married persons. This provision is strictly restricted to lesbian couples as long as only same-sex couples constituted by women can give birth to a child ''It would be pushing things too far to assume that a child born in a marriage of two women would legally descend from both women. That would be stretching reality. The distance between reality and law would become too great.

Therefore this bill does not adjust chapter 11 of Book I of the Civil Code, which bases the law of descent on a man-woman relationship'' this was encompassed in the Explanatory Memorandum for the Act on the Opening UP of Marriage[57].

The logic consequences of this rule are that the female partner of the female mother can have joint parental responsibilities only if a man has legally not recognised that child.

In Dutch law the married partner will not automatically obtain the legal status of a parent and the inheritance law rules can not apply; only if the female partner of the mother of the child goes to a process of adoption will obtain the legal parent status[58] .

The second difference between marriage and same-sex marriage is about the inter-state adoption. Even though the adoption is possible for the same-sex couples in Netherlands, the inter-country adoption was banned in order to not have negative reactions from countries sending children to Netherlands for inter-state adoption[59]. Away from these two differences (presumption of paternity and inter-state adoption) the official conditions for marriage between same-sex and hetero-sex pairs are precisely the same.

2. English same-sex marriage and quasi-marriage

In England the recognition of the homosexual couples came along with the statutory law and not with the case-law. The Civil Partnership Act 2004 (CPA), entered into force in December 2005, has created a new formal status by granting virtually identical rights to marriage[60]. But the English conservative society did not fell with all in front of the 'functional family' theory and the law does not recognise the same-sex civil marriage.

There are at least two important sources of law which clearly established that a marriage is an institution between two people of a different sex: Hyde v Hyde 'one man and one woman to the exclusion of all others' and the Matrimonial Causes Act 1973 section 11 'a marriage is void -c) that the parties are not respectively male and female'. The CPA sets out the civil partnership which is a new legal relation in English Law and it is recognised only for the same-sex couples. Not recognising for the opposite sex couples the institution of civil partnership can be seen as a form of discrimination against heterosexuals[61].

CPA is a humongous law of 264 sections, from which 83 are about England and Wales, each of it having one or more paragraphs. It is a very complex act that sets rules for every single aspect of a civil partnership in high resembles with marriage. Starting with the formation procedure and going trough dissolution, nullity and other proceedings while ending with property and financial arrangements, civil partnership agreements and children. First article states that ''a civil partnership is a relationship between two people of the same sex''[62].

The formation of civil partnership is made by registration and any party who is already in a marriage or registered partnership can not be eligible to register. Two people are considered to be registered partners once they have signed the civil partnership document at the invitation and in company of a civil partnership registrar and in presence of each other and two witnesses (S.2, CPA). Under the same section is forbidden to use the religious service in the same time the civil partnership registrar is officiating at the signing of a civil partnership document. This provision is seen as discriminatory because different sex couples can register their marriage and participate in a ceremony in the same time.

There are many other proceedings to be respected by future civil partners almost like in the case of marriage: notice and proposed civil partnership and declaration (S.8, CPA), the notice of proposed partnership (S.21, CPA), proposed civil partnership to be publicised (S.10, CPA), Dissolution of civil partnership which has broken down irretrievably (S.44, CPA) nullity-Grounds on which civil partnership is void (S.49, CPA), separation orders (S.56, CPA) etc. Also for property orders and financial relief the conditions are the same as for marriage. The civil partners have the same rights for parental responsibilities and adoption like spouses have.

3. USA same-sex marriage and quasi marriage

Even if DOMA[63] has been adopted by many American States there are authors which believe that the homosexual rights can be resulted from social rights movements ''The civil rights movement in American politics has provided a model for other social movements seeking rights recognition and social change and spills over transnationally as the fundamental idea of rights claiming and rights seeking has roots throughout the liberal democracy''[64].

A recent comparative study from 2008 about same-sex relationships in the United States has divided the American States in three categories. First group of states are the states that ban the same-sex marriage and other same-sex relations -Alabama, Arkansas, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia and Wisconsin-their state Constitution has been amended in order to prohibit any union other than hetero relations[65]. In second class are analysed the states in which the law does not recognise the same-sex marriage while in some of these states other forms of same-sex relationships are accepted-Colorado, Hawai'i, Mississippi, Missouri, Nevada, Oregon, Tennessee, Arizona, California, Connecticut, Delaware, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, New Hampshire, North Carolina, Pennsylvania, Vermont Washington and Wyoming- from these group Hawai'i, Oregon, California, Connecticut, Maine, New Hampshire, Vermont and Washington have introduced legislative schemes for the registration of same-sex relationships[66]. The last group of states are those which did not codified a regulation against the recognition of same sex relationships and which recognise to a certain level the same-sex relationships-Massachusetts, New Jersey, New Mexico, New York and Rhode Island.

It is easy to see that the states in the USA are divided in many categories and that a common core about the recognition of same-sex relationships is hard to find. For instance the State of Hawai'i recognises the same sex relationships under the organization of 'reciprocal benefits' which is a scheme that permits the registration also for hetero couples. Reciprocal benefits are defined as being 'a legal partnership between two people who are prohibited from marriage'[67] ; legal partnership for which the state has opted to provide the rights of the partners in the statutory law. Other states like California, Maine, New Jersey, Oregon, Washington and the District of Columbia legalised the domestic partnership term that was associated with a registration scheme that offers fewer rights than a civil union, even if this is not always the case[68]. In Connecticut, New Hampshire, New Jersey and Vermont one can find the institution of civil union which in most of the cases offers the same rights, the same obligations and responsibilities, as spouses from regular marriages have.

Same sex marriage in USA was implemented in Massachusetts and California law by the Supreme Courts. In Massachusetts the case the changed the view was Goodridge v. Department of Public Health and the rationale of the decision was based on the constitutional provisions: ''The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens'' while the definition of civil marriage was given 'civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others ''[69]. The same was the case in California with the Supreme Court decision in so called In re Marriage Cases where the Court had to answer if a differentiation between marriage of different-sex couples and the domestic partnership of same sex couples is unconstitutional. After the Court found that the same-sex couples have the same substantial constitutional rights keeping a distinction of names between institution of marriage and domestic partnership would ban the same-sex couples from the ''historic and rightly respected designation of marriage''[70].

Comparison and evaluation: Same sex marriages and quasi marriages

I have found the institution of same sex marriage implemented in Netherlands and the states of Massachusetts and California. In all these three states the same sex marriage is treated almost the same as marriage. In Holland the same-sex marriage is legalised by statutory law while in USA this has been done by case law.

The common core of the countries, which do not recognise same sex marriage, is to legalise a scheme of quasi marriage that provides for the homosexual couples ''matrimonial rights'' like in England and some of the states from USA. In Holland it is possible for a homosexual couple to enter in a marriage or in a registered partnership as well as the heterosexual couples, while in England the registered partnership is opened only for homosexuals. The USA has a very diverse law, with the starting point of the countries which adopted DOMA; or with countries which recognise a quasi-marriage scheme only for same-sex couples; some of the states recognise it for both couples and finally some states provide same sex marriage along with quasi marriage schemes.

The differences between the types of registered partnerships are a matter of quantity -of rights- and not of quality-because they represent the same juridical institution- the civil recognition of a relationship.

Conclusion

We saw that applying the principle of functionality, of comparative science, the law figures that were studied in this comparative research tend to have the same function: marriage contracts modify the legal matrimonial property regime while the same-sex marriages and quasi marriages provide the civil law recognition for the homosexual relationships. The differences found between the countries are a matter of ''moral values'' or legislative option.

In Netherlands a marriage agreement is a compact institution that includes in the same time the prenuptial and postnuptial contracts while in England these contracts are of a different figure. The USA has managed to unify only the premarital conventions (UPAA) and this is the reason why they represent the common core.

Marriage for same-sex couples was found only in Netherlands, Massachusetts and California. England has the civil partnership which in the end provides almost the same rights as marriage does. In USA many countries are against homosexual relationships and they have adopted DOMA, while many others have different schemes of quasi-marriages.

The answer for the main question is Netherlands. Holland has the highest liberty for entering in marriage agreements and same-sex marriages. Every aspect of the institutions is codified in Civil Code which gives for the partners lots of possibilities for their contracts or marriage. Marriage contracts, marriage and registered partnerships are opened for every person regardless of their sex. Netherlands has as well the highest legal certainty because of the fact that it has a complex codification and the persons who are involved in this kind of law know how the courts would enforce it.

However England has a spectacular system for the enforcement of prenuptial agreements because they are only seen as a juridical fact. USA also is special because it has created DOMA and UPAA.

I conclude with the idea that the freedom in civil matrimonial relations is in direct proportionality with moral values behind the law.

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[35] As quoted by Mark Harper and Lucie Alhadeff Withers LLP, *Crossley v Crossley: Are pre-nuptial agreements now binding in England?*, Family Law Journal, April 2008, pg. 335

[36] As quoted by Hedieh Nasheri, *Prenuptial Agreements in the United States: A need for closer control?* , International Journal of Law, Policy and the Family 12, 1998, pg. 307-322, pg. 308

[37] Robin Fretwell Wilson, *The Harmonization of Family Law in the United States*, article published in *European Chalanges of Contemporary Family Law*, Edited by Katharina Boele-Woelki, 2008, pg 27

[38] Hedieh Nasheri, *Prenuptial Agreements in the United States: A need for closer control?*, International Journal of Law, Policy and the Family 12, 1998, pg. 307-322, pg. 308

[39] By government here I understand the whole body that rules the country based on constitutional powers and not only the executive power.

[40] Hedieh Nasheri, *Prenuptial Agreements in the United States: A need for closer control?*, International Journal of Law, Policy and the Family 12, 1998, pg. 307-322 pg. 309

[41] *Ibidem*, pg. 308

[42] *Ibidem*, pg. 307

[43] http://www.medlawplus.com/legalforms/instruct/statelaw.tpl

[44] *Uniform Premarital Agreement Act with Prefatory Note and Comments*, Drafted by National Conference of Commissioners on Uniform State Laws, USA, July 22-29, 1983, Prefatory Note

[45] *Ibidem*, Comments Subs. 2.

[46] I presented the entire Section 3, Content of the Uniform Premarital Agreements Act, for the reader to see exactly the words used by legislator in establishing the most important part, the content of a premarital agreement.

[47] *Uniform Premarital Agreement Act with Prefatory Note and Comments*, Drafted by National Conference of Commissioners on Uniform State Laws, July 22-29, 1983, Comments Subsection a).

[48] *Marriage of Shanks*, USA, Iowa 2008

[49] Fairshare cases: spotlight, *Prenuptial voluntary executed under state UPAA version*, American Journal of Family Law, pg. 104

[50] *Ibidem*, pg 156

[51] Lynn D. Wardle, *A Response to the ―Conservative Case for Same-Sex Marriage: Same-Sex Marriage and ―the Tragedy of the Commons*, BYU Journal of Public Law, Vol. 22, June, 2008, pg. 453

[52] Kees Waaldijk, Others May Follow: *The introduction of marriage, quasi-marriage and semi-marriage for same-sex couples in European Countries*, Judicial Studies Institute Journal, Vol. 5, 2005, pg. 105

[53] *Ibidem*, footnote no. 12

[54] Kees Waaldijk, *More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners*, *A comparative study of nine European countries,* Published by Institut national d'études démographiques Paris, 2005, pg. 49.

[55] Kees Waaldijk, *Others May Follow*: *The introduction of marriage, quasi-marriage and semi-marriage for same-sex couples in European Countries*, Judicial Studies Institut Journal, Vol. 5, 2005, pg. 106

[56] *Ibidem*, pg. 108

[57] http://www.emmeijers.nl/waaldijk

[58] Kees Waaldijk, *Others May Follow*: *The introduction of marriage, quasi-marriage and semi-marriage for same-sex couples in European Countries*, Judicial Studies Institut Journal, Vol. 5, 2005, pg 108

[59] *Ibidem*, pg 109

[60] Jenni Millbank, *The role of 'functional family' in same-sex family recognition trends*, Child and Family Law Quarterly, Vol. 20, No 2, 2008, pg 166

[61] Wade K. Wright, *The Tide in favour of equality: Same-sex marriage in Canada and England and Wales*, International Journal of Law, Policy and the Family 20, 2006, pg. 249–285, pg. 260

[62] *Civil Partnership Act 2004*, England 2004, Part 1, Introduction, Section1 Civil Partnership

[63] The Defense of Marriage Act, or DOMA, has been signed into law by President Bill Clinton on September 21, 1996. The Act has redefined the institution of marriage and grants the countries which adopted it the right to refrain from recognition of same sex marriage - Ian Curry-Sumner & Scott Curry-Sumner, *Is the union civil? Same-sex marriages, civil unions, domestic partnerships and reciprocal benefits in the USA*, Utrecht Law Review, Vol. 4, June 2008, pg. 237

[64] Miriam Smith**,** *Framing Same-sex Marriage in Canada and the United States: Goodridge, Halpern and The National Boundaries of Political Discourse*, Journal of Social & Legal Studies, Vol.16, March 2007, pg. 8

[65] Ian Curry-Sumner & Scott Curry-Sumner, *Is the union civil? Same-sex marriages, civil unions, domestic partnerships and reciprocal benefits in the USA*, Utrecht Law Review, Vol. 4, June 2008, pg. 239

[66] *Ibidem*, pg. 242

[67] Hawaii Reciprocal Beneficiaries, Rev. Stat. §572C-2, http://www.capitol.hawaii.gov/hrscurrent/Vol12_Ch0501-0588/HRS0572C/HRS_0572C-0001.htm

[68] Ian Curry-Sumner & Scott Curry-Sumner, *Is the union civil? Same-sex marriages, civil unions, domestic partnerships and reciprocal benefits in the USA*, Utrecht Law Review, Vol. 4, June 2008, pg. 245

[69] *Goodridge v. Department of Public Health*, Massachusetts, 2003

[70] *In re Marriage Cases*, California, 2008