REVISTA INTERNACIONAL

CONSINTER

DE DIREITO

Publicação Semestral Oficial do
Conselho Internacional de Estudos
Contemporâneos em Pós-Graduação

ANO VIII – NÚMERO XV

2º SEMESTRE 2022

EL IMPACTO DE LA REVOLUCIÓN TECNOLÓGICA EN EL DERECHO

Europa – Rua General Torres, 1.220 – Lojas 15 e 16 – Tel: +351 223 710 600
Centro Comercial D'Ouro – 4400-096 – Vila Nova de Gaia/Porto – Portugal
Home page: revistaconsinter.com
E-mail: internacional@jurua.net

ISSN: 2183-6396-00015

Depósito Legal: 398849/15

DOI: 10.19135/revista.consinter.00015.00

A presente obra foi aprovada pelo Conselho Editorial Científico da Juruá Editora, adotando-se o sistema *blind view* (avaliação às cegas). A avaliação inominada garante a isenção e imparcialidade do corpo de pareceristas e a autonomia do Conselho Editorial, consoante as exigências das agências e instituições de avaliação, atestando a excelência do material que ora publicamos e apresentamos à sociedade.

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Editorial Juruá
2022

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A **Revista Internacional CONSINTER de Direito** é uma publicação de cariz periódico do **CONSINTER – Conselho Internacional de Estudos Contemporâneos em Pós-Graduação** que tem por objetivo constituir-se num espaço exigente para a divulgação da produção científica de qualidade, inovadora e com profundidade, características que consideramos essenciais para o bom desenvolvimento da ciência jurídica no âmbito internacional.

Outra característica dos trabalhos selecionados para a **Revista Internacional CONSINTER de Direito** é a multiplicidade de pontos de vista e temas através dos quais o Direito é analisado. Uma revista que se pretende internacional tem o dever de abrir horizontes para temas, abordagens e enfoques os mais diversos e, através deste espaço, colaborar com um melhor diálogo acadêmico.

Resultado de um trabalho criterioso de seleção, este volume que agora se apresenta destina-se a todos aqueles que pretendem pensar o Direito, ir além da sua aplicação quotidiana, mas sem deixar de lado o aspecto prático, tão característico das ciências.

Capítulo 03

DIREITO PRIVADO

PRENUPTIAL AGREEMENT: PROVISIONS ON ALIMONY AND PATRIMONY PENALTIES IN CASE OF DIVORCE

PACTO ANTENUPCIAL: DISPOSIÇÕES SOBRE ALIMENTOS E ESTIPULAÇÃO DE PENAS PATRIMONIAIS EM CASO DE DIVÓRCIO

DOI: 10.19135/revista.consinter.00015.25
Recebido/Received 29/07/2022 – Aprovado/Approved 23/11/2022

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Abstract
The present study aims to analyze the content limits of the prenuptial agreement, notably by approaching the existing dichotomy between private autonomy versus state interference in Family Law. Under this approach, it is intended to verify whether the aforementioned pact could include (i) a provision that deals with alimony; and (ii) inclusion of property penalties due by one spouse to the other in case of rupture of the marital relationship. There are few scientific works that address the specificities and controversies of the institute in the Brazilian legal system. In addition, research shows that the number of prenuptial agreements signed in the country has practically doubled in the last ten years, which reinforces the relevance of this study. The method used is deductive, through bibliographic research, including using comparative law, notably Portuguese law.
Keywords: family law; marriage; private autonomy; prenuptial agreement.
Resumo
O objetivo do presente trabalho é analisar os limites de conteúdo do pacto antenupcial, notadamente pela abordagem da dicotomia existente entre a autonomia privada versus interferência estatal no Direito de Família. Sob este enfoque, pretende-se verificar se no referido pacto poderia constar (i) disposição que verse sobre pensão alimentícia; e (ii) inclusão de penas patrimoniais devidas por um cônjuge ao outro em caso de rompimento da relação conjugal. São raros os trabalhos científicos que abordam as especificidades e controvérsias do instituto no sistema jurídico brasileiro. Além disso, pesquisas demonstram que o número de pactos antenupciais lavrados no país praticamente dobrou nos últimos dez anos, o que reforça a relevância deste estudo. O método empregado é o dedutivo, através de pesquisa bibliográfica, inclusive utilizando-se o direito comparado, notadamente o direito português.

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Palavras-chave: direito de familia; casamento; autonomia privada; pacto antenupcial.
Summary: 1introduction; 2 Limits To Private Autonomy In Family Law; 3 Alimony; 4 Statutory Criminal Penalties; 5 Conclusion; References.

1 INTRODUCTION

In Brazil, the legislator emphasized the freedom to agree, by establishing in art. 1.639 of CC/2002 that, before the marriage is celebrated, it is lawful for the betrothed to stipulate, as to their assets, whatever they want.

Considering that the legal provision mentions stipulation of rules by the betrothed regarding "the goods", such as that the legal regulation of the prenuptial agreement is inserted in the Civil Law, within the Subtitle called "Of the Regime of Assets between Spouses" (Special Part, Book IV, Title II), it is concluded that the main function of the prenuptial agreement is to enable the betrothed to choose of its patrimonial status in a personalized way, adapted to its specificities, through the definition of a marital regimes.

However, the present article discusses whether it would be possible to regulate in the prenuptial agreement other issues that go beyond the strict definition of the patrimonial status of the marriage, notably if the betrothed could stipulate clauses on the alimony obligation due between them in the event dissolution of the relationship marital. In other words, whether it would be valid and effective to set parameters, limit, or even waive future alimony in favor of one of the spouses. In addition, it is intended to address the possibility of including a clause stipulating the establishment of property penalties in case of divorce, either due to voluntary and unmotivated breakup, or due to the culpable dissolution of the marital relationship.

Despite various controversies about the prenuptial agreement's breadth of content, scientific researches in Brazil that addresses its specificities are rare. In general, the institute is superficially mentioned in national doctrine.

Added to this is the fact that the number of prenuptial agreements drawn up in the country increased by about 95% (ninety-five percent) between 2006 and 2017[3], which emphasizes the topic´s relevance, thus inspiring the present study.

To face the proposed problem, the research followed the legal-exploratory methodological type, applying the deductive methodology and the bibliographic research technique, in national and foreign literature, jurisprudence of the Superior Courts, scientific journals and periodicals.

In addition, the comparative method of realities was applied, using foreign doctrines referring to the institute under study as a source of research, in order to understand the approach received by the prenuptial agreement and the current way of its application in other countries.

[3] O Censec – Central Notarial de Serviços Compartilhados registrou 23.660 pactos antenupciais lavrados no território nacional no ano de 2006, ao passo que no ano de 2017 foram registrados 46.161 convenções matrimoniais. Available in: <www.censec.org.br>.

2. LIMITS TO PRIVATE AUTONOMY IN FAMILY LAW

In Chapter VII, Title VIII, the Constitution of the Federative Republic of Brazil deals with Family Law, enshrining in art. 226, §7 that "family planning is a couple's free decision". Even family planning, or the "principle of freedom of choice", is raised by the doctrine to the category of constitutional principle (ROSENVALD, 2015, p. 103).

For Lôbo:

> *The principle of freedom in the family is contemplated, in the Constitution, in a diffuse way, having two aspects: freedom of the family entity, before the State and society; and freedom of each member vis-à-vis the other members and vis-à-vis the family entity itself. Freedom is realized in the constitution, maintenance and extinction of the family entity; in family planning; guarantee against violence, exploitation and oppression within the family; in the most democratic, participatory and solidary family organization*[4].

The aforementioned constitutional principle, applied in conjunction with art. 5, item II, allows to state that the Fundamental Norm intended to expand private autonomy in Family Law, as Madaleno well observes:

> *action, always aiming at the defense of the family unit, the greatest value to justify the dignity of the human person.*
> *With the advent of the current Political Charter of 1988, raising the concern with the preservation of the dignity of the human person to the detriment of the patrimonial interests of the people, in the wake of this evolution, the Civil Code of 2002 revised its concepts and institutes for the depatrimonialization of family relationships, starting to value the individual and his legal connections. In this sense, says Rodrigo da Cunha Pereira, 'the field of application of private autonomy has expanded, which also bends, especially in the context of family relationships'.*
> *And, in fact, in the evolution of family law, the loosening of the bonds that marked an intense predominance of mandatory application norms can be felt, as a specific example happened with art. 230 of the 1916 Civil Code, prohibiting the incidental alteration of the property regime, even under judicial supervision*[5].

In an infra-constitutional basis, Civil Code/2002 introduced, in the Brazilian legal system, the principle of minimal state interference, by prohibiting any person, of Public or Private Law, from interfering in the communion of life established by the family, as established in its art. 1.513: "It is forbidden for any person, of public or private law, to interfere in the communion of life established by the family".

The aforementioned principle comes "from the family transformations, especially after the second half of the last century, bringing to light the old

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4 LÔBO, Paulo Luiz Netto, *Código Civil comentado*, São Paulo, Atlas, 2004. v. XVI, pp. 257-258.

5 MADALENO, Rolf, *Direito de família*. 7. ed. rev., atual. e ampl, Rio de Janeiro, Forense, 2017, pp. 87-88.

dichotomy between state interference versus private autonomy in Family Law and, in particular, in marriage.

Pereira (2006, p. 154) observes that:

> *The applicability of the principle of minimal state intervention is linked to the issue of private autonomy, which goes far beyond patrimonial law, and has become, in contemporary times, one of the most relevant issues. It brings us back, as has been said, to the serious discussion of the boundaries between the public and the private*[6].

On the other hand, although it enshrines the principles of freedom of family planning and minimal state interference, the legal system prioritizes the full protection of the family and its members, from which it is concluded that the private autonomy of the spouses could never reach their own family entity dignified existence, under the terms of the *caput* of art. 226 of Federal Constitution/88, enjoys "special State protection*"*.

In the book "Civil Law in Constitutional Legality", Perlingieri (2008, p. 1023) warns that negotiation autonomy in the family field cannot be uncontrolled, pointing out the possibility of state intervention, for example, to decree the alimony´s agreement iniquity, in order to "effectively control in defense of those contractors who have the greatest need for solidarity".

Like any social form, the family is under State control, which is why family relationships "cannot be exempt a value judgment, from a confrontation with the values of the current system, with its public order". The aforementioned state control "over personal and family vicissitudes is justified if and insofar as it is done in terms of guaranteeing fundamental rights" (PERLININGIERE, 2008, p. 980).

Notwithstanding the relevant transformations that have taken place in Family Law, from a hierarchical and marital relationship to an egalitarian and (re)centered in the person's rights, this branch of legal science "continues to be marked by the preponderance of cogent, imperative, non-derogable norms by the will of the parts.

Milagres (2008, p. 211-228) also explains that "the cogent norms (*jus cogens*) protect high social interests and do not admit a non-consensual disposition. They are non-derogable by the parties".

However, the content of imperative norms has changed. This is because marital public order, once used to be hierarchical and patriarchal, is now based on conjugal equality.

Regarding the public norms fluidity content, in Family Law, should be mention the lesson of Lafayette Rodrigues Pereira (1945, p. 165) who argued that it would be prohibited to include a clause in a prenuptial agreement that "offends the marital power, as the one that deprived the husband of fixing the marital domicile, or of being the couple's head", or that "taking away from the husband the right to correct children".

[6] PEREIRA, Rodrigo da Cunha. *Princípios fundamentais norteadores do direito de família*, Belo Horizonte, Del Rey, 2006, pp. 54.

Currently, such men´s attributions are shared in equal conditions with women in conjugal life, being certain that would defy the principle of equality (art. 226, §5 of FC/88), public order and good customs, that the clauses established in prenuptial agreement, privileging the patriarchal structure of the CC/1916, rules that were previously considered consistent with the Brazilian legal system (CAHALI, 2002, p. 214).

Therefore, there was a movement in the content of the binding norms of marriage, which are currently aimed at ensuring the life´s communion full protection, instituted by the family, notably applying the principle of legal equality between the spouses.

In exact sense, the Portuguese author Xavier (2000, p. 483) explains that negotiation freedom cannot violate the principle of legal equality between the spouses, nor disregard the general needs and requirements of the communion of life established by the family entity.

Perlingiere (2008, p. 468 and 976) also argues that "the family community must be inspired like any social formation, on the principle of democracy", which brings the idea of legal equality between family members, which allows participation, on equal terms, in the direction of conjugal society, without disregarding "the freedom of each one to build his own world of human relationships".

Thus, it is concluded that, despite the reduction of state interference in Family Law in recent years, this branch of legal science continues to be permeated by public order norms, non-derogable by the will of the members of the family entity.

However, the content of public policy norms modified, being currently focused on the constitutional principles that guide the legal system, notably that of legal equality between spouses, lending itself to also ensure the fundamental rights of family members and communion full of life instituted by it.

Based on this conclusion, in the following chapters, will address about the possibility of including in the prenuptial agreement a provision that deals with alimony, and also the feasibility of including property penalties due by one spouse to another in case of rupture of the marital bond.

3. ALIMONY

In Brazil, relatives, spouses or partners can ask each other the alimony they need to live in a way that is compatible with their social condition, which is due when the person who pleads for it does not have sufficient goods or can not provide, through their work, their own maintenance, on the other hand, the one who is

claimed can provide them, without embezzlement of what is necessary for their sustenance (articles 1694 and 1695 of Civil Code/2002)[7].

The maintenance obligation is based on the principle of family solidarity and on the duty of mutual assistance between betrotheds, in accordance with art. 1566, item III, of Civil Code/2002, which extends beyond the rupture of the marital bond.

About that, the Superior Court has already manifested itself, in REsp 995.538/AC, *in verbis:*

> *SUMMARY: Based on the principle of family solidarity, the duty to provide maintenance between spouses and partners is of an assistance nature, due to the marital bond or stable union that one day brought the couple together, despite the breakup of the relationship, underlying the legal duty of mutual assistance (REsp 995.538/AC, Reporting Justice NANCY ANDRIGHI, THIRD CLASS, judged on 03/04/2010, DJe 03/17/2010)*[8].

Despite the wide regulation of the institute in civil legislation, it is questioned whether the spouses could stipulate in the prenuptial agreement, clauses on the maintenance obligation due between them in the event of dissolution of the marital bond. In other words, whether it would be valid and effective to set parameters, limit, or even waive future alimony in favor of one of the spouses.

Cardoso presents a practical example of maintenance obligation provisions, extracted from the prenuptial agreement signed by the Separate Property Ruling in the 14th Notary Public of São Paulo, in the following terms:

> *3) The contracting parties establish that, if by chance they come to legally separate, the man will pay the woman a monthly and temporary pension to his future wife, in the amount of R$ 10,000.00, observing, for this to occur, the exception and the following hypotheses: 3.i.1) No no alimony shall be owed to the wife, to be paid by the man, if the separation takes place before the end of 12 months from the conclusion of the marriage, regardless of the reason for the separation, whether or not there is an allegation of guilt by either party; 3.i.2) If the legal separation takes place after the 13th month of marriage, and provided that the separation is demonstrably motivated by the man, he will pay his wife alimony in the same monthly amount adjusted above, which must be corrected by the variation of the IGPM, in the period, between this date and the date of its incidence. (...) and will have as its final term the expiration of the established period of 5 (five) years, counted from the date of the legal separation (...) 4) If there are children of this conjugal union, the contracting parties will be equally responsible, under the terms of which advocates the civil law in force, including pensions for children, each contractor paying half of the corresponding*

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7 BRASIL, *Lei n. 10.406, 10 de janeiro de 2002*. Institui o Código Civil. Diário Oficial da União, Brasília, DF, 11 jan. 2002. Available in: < http://www.planalto.gov.br/ccivil_03/Leis/2002/L10406compilada.htm >Acess in july 7th 2022.

8 STJ. RECURSO ESPECIAL, REsp 995.538/AC, Rel. Ministra NANCY ANDRIGHI, TERCEIRA TURMA, julgado em 04/03/2010, DJe 17/03/2010). Available in: <https://stj.jusbrasil.com.br/jurisprudencia/583716180/recurso-especial-resp-1720337-pr-2018-0016836-3>. Acess in july 7th 2022.

> *pension. For the establishment of these obligations, the judge will be the arbitrator, with the supervision of the Public Prosecutor's Office, under the terms of the law*[9].

Firstly, the clause establishing the waiver of the maintenance obligation between future spouses is considered null, since there is no way to exclude the duty of mutual assistance arising from marriage, whose foundation can be found in the principle of family solidarity (MADALENO, 2017, pp. 719-722).

The prenuptial agreement does not contain clauses that offend the spouses dignity (or their fundamental rights and guarantees), such as the exemption from the duty of mutual assistance, "which would defy social solidarity (FC/88, art. 3th)", which is why "the clauses harmful to the reciprocal rights of the consorts or even harmful to the interests of the children will be considered unwritten" (ROSENVALD; FARIAS, 2015, p. 315-317).

Cahali (2002, p. 51) clarifies that since maintenance constitutes a "right inherent to the personality, it will be protected by the State with rules of public order, resulting in its inalienability".

In Brazil, alimony arises from the law, not from the will of the parties. And as it is an marriage effect imposed by the State, it is non-derogable by the spouses, since it constitutes a public policy norm (CAHALI, 2002, p. 259).

Rizzardo (2007, p. 631) explains that "the waiver of the exercise of a right or a duty, such as claiming maintenance, is not authorized in the event rupture of marital bond".

For Tartuce and Simão (2010, p. 144 and 145), the clause that enshrines the waiver of alimony in the event of separation or divorce would be null for violating an absolute law precept (public order).

In this sense, Cardoso clarifies:

> *[...] even if the waiver clause is established in the pact, it will not prevent the right of the spouses to claim maintenance, provided that the legal requirements for that, provided for in arts. 1,694 and following of the Civil Diploma, and even divorce, when alimony arising from marriage*[10].

Thus, it is understood that the duty of mutual assistance is part of the basic imperative statute of marriage, constituting a non-derogable norm by the will of the parties, especially because it is closely linked to the full communion of life instituted by the family.

Santos adds that

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[9] CARDOSO, Fabiana Domingues. *Regime de bens e pacto antenupcial*, São Paulo, Método, 2011, pp. 167.

[10] CARDOSO, Fabiana Domingues. *Regime de bens e pacto antenupcial*, São Paulo, Método, 2011, pp. 171.

> *clauses that, inappropriately, admit infidelity between the spouses, dispense with mutual assistance, including financial assistance, release any one of the spouses from the maintenance, custody and education of the children and emphasize mutual respect and consideration, are not valid, which are conjugal duties provided for in art. 1,566*[11].

Furthermore, the right to maintenance only arises from the end of the communion of life between the spouses – if the legal requirements are present -, which is why it would not be possible to stipulate the waiver of a right that does not yet exist for the spouse. time of drafting the prenuptial agreement, as Cahali explains:

> *In turn, the maintenance obligation arises from the breach if the legal requirements are fulfilled, and, therefore, it will become a right to be exercised at that time.*
> *[...] Before verifying the right to food, there is no way to consider its waiver, even in the face of uncertainty as to the emergence, in the future, of the obligation, due to the need to fill in other elements besides simple dissolution*[12].

In the same tone, Gomes (1978, p. 329) observes that "what no one can do is renounce future maintenance [...]".

Another interesting argument for not admitting alimony waiver in prenuptial agreement, is brought by the German doctrine, which argues that imperative norms capable of generating reflections on the interests or rights of third parties cannot be modified by the will of the spouses, according to Joachim Gernhuber, Koester-Waltjen (1994, p. 59) and Ulrike Börger (1983, p. 39). This happens because, as if the maintenance person is married, "it is to its spouse that it must address itself before visiting any of the relatives" (CAHALI, 2009, p. 481).

To those united by relatives ties, whether ascendants, descendants or even collaterals, the reciprocal duty of assistance is imposed, but it is essential to observe the order of priority of calling to the legally delimited alimony:

1st) spouse (art. 1,694 of CC/02);

2) parents and children (art. 1696 of CC/02);

3rd) ascendants, in order of proximity (art. 1696 of CC/02);

4th) descendants, in the order of succession (art. 1697 of CC/02);

5) to the brothers, same-pareted and unilateral (art. 1696 of CC/02).

In same sense, considering that the country's normative sets an order of those who are obliged to provide alimony, if the spouse's waiver to provide alimony is admitted, third parties may be called to be entitled to the obligation in their place, burdening those to the detriment of this .

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11 SANTOS, Francisco Cláudio de Almeida, *O pacto antenupcial e a autonomia privada.* In: BASTOS, Eliene Ferreira; SOUZA, Asiel Henrique de (Coords.), Família e jurisdição, Belo Horizonte, Del Rey, 2006, pp. 206.

12 CAHALI, Francisco José, *Contrato de convivência na união estável*, São Paulo, Saraiva, 2002, pp. 261.

It is what determines the art. 1,698 of Civil Code/2002:

> *If the relative, who owes maintenance in the first place, is not able to fully bear the burden, those of immediate degree will be called to compete; being several people obliged to provide maintenance, all must compete in proportion to their respective resources, and, if an action is brought against one of them, the others may be called to join the dispute*[13].

In addition, the State itself can be burdened in the event that there are no other relatives of the hyposufficient spouse legally and factually able to provide material assistance, which reinforces the public interest in prohibiting the waiver of the right to alimony, as observed by Cahali (2002, p. 50-51), when referring to the principle of irrevocability set forth in art. 1,707 of CC/2002:

> *In the basis of the principle, it is intended that 'the waiver is not allowed because the public interest predominates in the relationship, which requires that the indigent person be supported and does not allow us to increase the burden of public charities*[14].

Therefore, it can be concluded that it is not lawful to include a clause in the prenuptial agreement that allows for the waiver to the right to claim alimony at the end of the marriage, even because such right "is linked to the principle of the person's dignity, solidarity, the right to live", which are stipulated in the 1988 Federal Constitution, also preventing resignation in form of a pact" (CARDOSO, 2011, p. 171).

As for the prefixation, the establishment of bases, or the limitation of alimony, it appears that there is an express provision in the legal system on how to quantify the maintenance obligation, under the terms of art. 1,694, §1 of the CC/2002, which brings the possibility-need binomial as a guiding criterion for alimony.

Initially, it appears that it would not be effective to limit the right to alimony, either in terms of quantity or even in terms of time. This because, even if the spouses establish that the alimony would be due for a period and in a determined amount, such a provision would not be effective if in the eventual end of the communion of life, the financially disadvantaged spouse needs a larger amount to maintain and the other consort has a way to provide it, for as long as the situation persists.

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[13] BRASIL, *Lei n. 10.406, 10 de janeiro de 2002*. Institui o Código Civil. Diário Oficial da União, Brasília, DF, 11 jan. 2002. Available in: < http://www.planalto.gov.br/ccivil_03/Leis/2002/L10406compilada.htm >Acess in: july 7th the 2022.

[14] BRASIL, *Lei n. 10.406, 10 de janeiro de 2002*. Institui o Código Civil. Diário Oficial da União, Brasília, DF, 11 jan. 2002. Available in: < http://www.planalto.gov.br/ccivil_03/Leis/2002/L10406compilada.htm >Acess in: july 7th the 2022.

Cahali (2002, p. 259) states that "the acquisition of the right to alimony is only completed with dissolution. Hence, it is premature to talk about a contractual stipulation regarding the pension if the obligation even exists".

Although the quantitative and temporal aspects of the maintenance obligation must be verified at the time of the end of the communion of life, it is considered possible to establish clauses in the prenuptial agreement on the matter, which despite not being linked to the definition of alimony, constitute an evidence to solve any existing dispute in the end of the marital relationship.

If it appears in a prenuptial agreement, that a betrothed would undertake to pay R$ 20,000.00 (twenty thousand reais) per month to the other, for a period of five years from any eventual separation in fact, that provision would constitute an indication of the financial possibility of the one who has committed to such payment, as well as the other consort needs.

Cardoso observes that:

> *[...] believing the bride and groom to be indispensable for the prior stipulation of alimony in case of rupture or dissolution of the society, they will be able to adjust the basic parameters for the future pension, such as, for example, the minimum amount until a judicial fixation; or, even, that it will be the equivalent and sufficient to pay for housing, health plan and food under the same conditions at the time of separation; or another that corresponds to the desires and needs of the consorts.*
> *The ideal in these cases is for the pact to have timeless parameters, is that, to allow, even over the years, the measurement of the amount or at least the minimum rules for pensions, under penalty of the contrary disturbing the litigious situation even more. of the parties and create procedural turmoil in eventual starvation action, or simply the consideration of the convention as unwritten*[15].

The stipulation of parameters for the establishment of an eventual alimony, especially when accompanied by the respective justification for doing so, would be important to understand the family´s guidelines planning outlined by the spouses, which could also gain relevance for the establishment of the pension in an eventual lawsuit.

Going back to the previous example, suppose it was stated in the prenuptial agreement that the spouses established the monthly payment of R$ 20,000.00 (twenty thousand reais) for a period of five years, because it was decided by both that one of them would totally or partially abdicate the professional career to manage the couple's domestic duties.

Certainly, such provisions should be considered by the judge in any dispute between the parties, helping to define the standards of the maintenance obligation, mainly in the establishment of provisional alimony, which are fixed in a summary judgment court.

[15] CARDOSO, Fabiana Domingues, *Regime de bens e pacto antenupcial*, São Paulo, Método, 2011, pp. 168.

In a judgment of the Court of Justice of the Federal District and Territories, the judges used the prenuptial agreement as a parameter for fixing provisional alimony, which demonstrates the lawfulness and usefulness of a clause on the matter in the prenuptial agreement:

> *SUMMARY: Request for reduction of provisional food. Value provided for in prenuptial agreement. 1. Provisional maintenance must be maintained, once arbitrated in compliance with the prenuptial agreement signed by the parties, in the event of dissolution of the conjugal partnership. 2. There is no way to reduce the amount of the alimony fixed provisionally, considering that the appellant did not demonstrate that the appellant was able to maintain himself without alimony. 3. Interlocutory appeal known and not provided (TJDF; AGI 2010.00.2.000253-7; Ac. 437.651; 3rd Civil Panel; Reporting Judge Nídia Corrêa Lima; DJDFTE 08/12/2010; p. 258).*

In a judgment of the Court of Justice of Minas Gerais, it was stated in the summary that "the inalienable nature of the right to receive alimony does not extend to its quantification, a patrimonial issue that capable parties can dispose of", which is compatible to the reached in the present study (TJMG – Civil Appeal 1.0245.14.023806-5/002, Rapporteur: Des. Oliveira Firmo, 7th Civil Chamber, judgment on 11/28/2017, precedent published on 12/07/2017).

The prenuptial agreement is a unique instrument, the provisions of which must be considered in a coherent and systematic way. Therefore, is reinforced that, although the right to alimony only arises with the breakup of the communion of life – if legal assumptions are present -, the inclusion of a clause that establishes an obligation to pay monthly, in the eventual ending marriage, cannot be disregarded by the judge for the establishment of an eventual maintenance obligation, as it is an integral part of the family planning outlined by the spouses.

Not infrequently, the establishment of such an obligation is what attenuates and comforts one of the spouses, justifying, for example, adopting the Separate Property Ruling, especially in those cases in which there is a great difference in the parties financial situation.

In summary, it is concluded that the prefixation of alimony in the pact does not link the definition of the maintenance obligation to the end of the communion of life, either in terms of the value – which may be greater or less than that stipulated between the spouses, the depending on the alimony binomial -, or regarding the transitoriness of the pension.

Nevertheless, it is considered lawful to include clauses in the agreement, precisely to express the family planning guidelines adopted by the couple, with the aim of helping to solve any imbroglio arising from the marital breakup.

4. STATUTORY CRIMINAL PENALTIES

In the scope of prenuptial agreement content, it discussed the possibility to include a clause stipulating the establishment of property penalties in the event of divorce, either due to voluntary and unmotivated rupture, or due to the culpable dissolution of the marital relationship.

Such provision may occur by establishing an amount to be paid by one spouse to the other at the end of the marriage, or even adding of conditions (suspensive to one regime and resolutive for another) in the event of divorce, as for example, in the event that the spouses agree on a regime of partial communion that becomes a Separate Property Ruling with the dissolution of the marital bond.

The patrimonial penalties can be fixed in the prenuptial agreement for different reasons and purposes, with a "merely compensatory character, to offset the frustration of the expectation created when the family entity was formed", or "it may have a reparatory feature, to recover any damages experienced due to the entering the relationship, such as resignation from the professional activity performed or career advancement" (CAHALI, 2002, p. 244).

Generally, indemnification clauses for marital relationship breakup are inserted in pacts that adopt the Separate Property Ruling, willing to compensate, at the end of the marriage, the financially disadvantaged spouse who, for example, has left their job to move to the other consort's city.

In prenuptial agreements, clauses stipulating payment of amounts in proportion to the duration of the marriage are common, precisely considering the insertion of that low-income part in the standard of living provided by the most financially wealthy.

In this approach, the establishment of a patrimonial penalty, in order to avoid a sudden decrease in the standard of living of one of the spouses, would be similar to the institute of compensatory alimony, which, according to Cora Cristina Ramos Barros Costa and Fabíola Albuquerque Lobo[16],

> *to reestablish the spouse or partner who suffered a worsening in their financial situation after the marital relationship ended, which translates into an economic imbalance in relation to the position of the other, being entitled to a pension fixed in a court decision.*

Cahali (2002, p. 244), referring to the contract of cohabitation in a common-law marriage, considers it feasible to establish a clause previously fixing compensation in the event of a possible rupture of the relationship, which "may be caused by the voluntary and unmotivated rupture, or the wrongful dissolution of the relationship, in accordance with what remains contractually established by the parties".

[16] Available at: <http://civilistica.com/a-atual-pertinencia-dos-alimentos/>.

However, the author notes that:

> *the indemnity cannot be excessively onerous; must be reasonable, verifying the reasonableness with parameter in the patrimony of the cohabitants and respective economic-financial standard, otherwise the clause will harm the main purpose of the stable union, destined to the constitution and preservation of a family. If the nature of the relationship is not respected, the forecast would represent a risk contract or economic game, between its participants, and the expectation of its formation only as a potential source of wealth should be repudiated in family relationships*[17].

Tepedino also sees no obstacle to the provision in the pact of property penalties due by one spouse to the other with the end of the marriage:

> *In the field of property relations, controversy is outlined regarding the clauses that provide for indemnities in the event of infidelity of one of the spouses or in case of termination of the union. Here, too, there does not seem to be any a priori legal impediment to such an agreement [...]*[18].

In the same sense is the doctrine of Cardoso (2011, p. 204), which states that there are no legal reasons to consider null or ineffective the existence of a clause in the prenuptial agreement that regulates the payment of compensation in case of breach marriage contract or failure to perform any of the marital duties.

It should be noted that the stipulation of indemnity clauses is common among Hollywood artists, as observed by Rosenvald and Farias, who consider the aforementioned indemnity agreements in the prenuptial agreement to be valid:

> *isconsorts to another, in the event of marital dissolution. Here, it is worth remembering the clauses common among Hollywood artists, stipulating values for the time of relationship, as a true competition. As stated elsewhere, the prenuptial agreement is a legal transaction and, as such, is subject to private autonomy. As a result, we do not see any obstacle to the establishment of such compensation provisions, through which the parties contemplate possible compensation in favor of one of them. It would be the case of that spouse who abandoned a certain job or possibility to accompany the other when the marriage is celebrated. It is a form of compensation for reciprocal marital options*[19].

On the contrary, Santos states that the indemnity clauses for the duration of the marriage provided by one spouse to the other would not be valid, as they are "irreconcilable with full communion of life":

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17 CAHALI, Francisco José, *Contract of coexistence in the stable union*, São Paulo, Saraiva, 2002, pp. 245.

18 TEPEDINO, Gustavo. *Civil law topics.* 3. ed. rev. and current, Rio de Janeiro, Renovar, 2004.pp. 244.

19 ROSENVALD, Nelson; FARIAS, Cristiano Chaves de. *Civil law course: families*. 7. ed. rev. amp and current, São Paulo, Atlas, 2015. v. 6.pp. 317.

> *This clauses application, in the specific case, is of paramount importance for the establishment of the limits of private autonomy, in addition to the other principles mentioned above, being certain that, through it, they will be seen to be irreconcilable with the full communion of life, in prenuptial agreements, in Brazilian law, without forgetting the aforementioned examples, indemnity clauses for the duration of the marriage provided by one spouse to the other, demeaning, dishonorable or criminal conduct imposed on one of the spouses, obligation to work incompatible with the personal qualification of the spouse or the unequal and unfair allocation of family expenses to one of the spouses*[20].

It is interesting to note that, although she states that the spouses freedom to agree, cannot offend the full communion of life established by the family, Xavier (2000, p. 541-543) does not consider illegal, at the beginning, the norms that impose patrimonial penalties in case of divorce, even when it is stipulated that the penalty will only apply if the other consort is found guilty of ending the marriage.

In this vein, the author reports that: it

> *may happen that the spouses intend to agree on a regime of communion that becomes separation with dissolution by divorce, but only in the event that one of them, expressly designated, is declared guilty or the main culprit in the divorce. This clause can be explained above all by an objective that we have already explained and that frequently guides the attitudes of the spouses in the patrimonial field (and is, moreover, presupposed in the norm of art. 1791º). One of the spouses may want to benefit the other with a community regime (or because, in the case of acquired community, they exercise a much better remunerated profession), but only as long as they consider him/her worthy of such benefit. Which, of course, will no longer be the case if he turns out to be the sole or main culprit in the divorce. On the other hand, it would be unfair for the beneficiary spouse to cease to be a beneficiary because of a divorce for which he did not contribute. Having verified these circumstances, such a clause will appear to us to be perfectly lawful*[21].

However, the aforementioned Portuguese author points out that the circumstances of stipulating patrimonial penalties, especially when linked to the existence of guilt for the end of the marital relationship, must be verified in the specific case, given that the imposition will not be lawful if the intention is to restrict the freedom of the other party to resort the divorce:

> *It deserves some attention to stipulate conditions that constitute, in some way, the fixing of property penalties in case of divorce. This will be the case, for example, if the spouses agree on a regime of communion that becomes a separation upon dissolution by divorce. As the validity of the conditions included in matrimonial agreements is generally established, the problem will have to be resolved in the general rules*

[20] SANTOS, Francisco Cláudio de Almeida, *The prenuptial pact and private autonomy.* In: BASTOS, Eliene Ferreira; SOUZA, Asiel Henrique de (Coords.), Family and jurisdiction, Belo Horizonte, Del Rey, 2006, pp. 209.

[21] XAVIER, Maria Rita, *Limits to private autonomy in the discipline of property relations between spouses*, Lisbon, Livraria Almedina – Coimbra, 2000, pp. 543.

> *applicable to the conditions. Specifically, one might ask whether a condition of this type does not unlawfully restrict the freedom of the spouses to have recourse to divorce. In this regard, it is worth recalling what the doctrine has been saying about the restrictive conditions of freedom. It is understood that these are unlawful conditions only when the intention of the disponent is to restrict the freedom of the other party. When there was no intention to restrict freedom, but another intention, for example, to provide for the situation that would arise if the event referred to in the condition were to occur, then it will be valid*[22].

The fact is that the aforementioned Portuguese author, unlike the Brazilian author Santos (2006, p. 209), does not consider that the indemnity clauses for the end of the marriage would necessarily offend the communion of life established by the marriage.

In line with the position adopted by the aforementioned Portuguese author, it is concluded that the clauses establishing property penalties in the event of divorce should not be considered invalid, *a priori,* given that in certain situations the establishing provisions of this nature may be totally justifiable. and important for the personal regulation of the spouse´s patrimonial/personal life.

Especially because the stipulation of an amount to be paid by one spouse to the other, at the end of the marriage, can provide greater security and well-being to those whose financial situation are not favorable, allowing the couple to live in communion of life, directing their efforts for the full personal fulfillment of family members.

According to Antônio Carlos Mathias Coltro, referring to the contract of cohabitation in a common-law marriage, it would be inappropriate "not to recognize a valid clause in which compensation is established that one partner owes the other at the end of the common-law marriage", given that:

> *In any case, if the clause is not contrary to good customs, public order or general principles of law, the parties being able to contract, there is no reason to prevent them from doing so*[23].

However, the clauses establishing an amount to be paid by one spouse to other in an eventual break in the marital relationship cannot be excessively onerous, but must be consistent with the standard financial possibility of both spouses, under penalty of constituting, in Cardoso's teachings,

> *propelling springs of family disagreements or encouraging breaking up the relationship, which would completely distort the purpose of marriage and the full communion of life inherent to the conjugal relationship and the family*[24].

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[22] XAVIER, Maria Rita, *Limits to private autonomy in the discipline of property relations between spouses*, Lisbon, Livraria Almedina – Coimbra, 2000, pp. 141.

[23] COLTRO, Antônio Carlos Mathias. *References on the common-law marriage contract*. In: DELGADO, Mário Luiz; ALVES, Jones Figueiredo (Orgs.). New Civil Code, controversial issues, São Paulo, Method, 2005. v. 4, pp. 429.

In Germany, the doctrine admits the establishment of property penalties in case of divorce, but points out that it will be validity or not if the clause that conditions property effects to the recognition of guilt for the end of the marriage will depend on the reasons that led the parties to conclude an agreement of this type, as Xavier explains:

> *In Germany, although the authors expressly admit the conditions referring to divorce and even the duration of the marriage, doubts arise as to whether the spouses can make certain property effects favorable to one of them depend on the fact that the latter is not to blame for the divorce. Against the validity of such a clause, the concept of divorce expressed by the German legislature when it dispenses with guilt as a basis for divorce or as a relevant element for the determination of the respective property effects is challenged. On the other hand, it is possible that such a convention may, in certain circumstances, be against good morals. Everything will thus depend on the reasons that led the spouses or spouses to conclude an agreement of this type*[25].

The stipulation of property sanctions, from the end of the marital relationship, must have objective criteria, otherwise it will lead to returning the offensive and subjective judicial investigations to define who is guilty for the end of the marriage.

Following the results found so far, it appears that the intervention of the State-judge should only take place in the specific case, if it is found that the provisions contained in the prenuptial agreement offend the basic imperative statute of marriage, in particular regarding the norms of public order, good customs, social function, good faith principle, the fundamental rights and guarantees enshrined in FC/88.

In other words, the freedom of the spouses to agree should not be restricted *a priori,* giving them the opportunity to have ample legal regulation of the marital relationship appropriate to their specificities.

5. CONCLUSION

The prenuptial agreement is the instrument that embodies the freedom constitutional principle to agree (art. 226, § 7), a corollary of private autonomy in Family Law, allowing the spouses to discipline, individually, the legal status to be applied to the marital bond.

At the constitutional scope, the expansion of private autonomy in Family Law is concretized in art. 226, §7, which brings “the freedom choice principle”, providing that family planning is a couple's free decision.

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[24] CARDOSO, Fabiana Domingues, *Regime of goods and prenuptial agreement*, São Paulo, Method, 2011, pp. 204.

[25] XAVIER, Maria Rita, *Limits to private autonomy in the discipline of property relations between spouses*, Lisbon, Livraria Almedina – Coimbra, 2000, pp 543.

In an infra-constitutional basis, Civil Code/2002 introduced the principle of minimal state interference into the legal system, by prohibiting any person, under Public or Private Law, from interfering in the communion of life established by the family (art. 1,513).

Despite the decline in state control for family relations in recent decades, it appears that Family Law is still permeated by binding public order norms that restrict private autonomy in this area.

However, it appears that the content of the imperative norms has changed, considering that the conjugal public order, previously hierarchical and patriarchal, is now based on legal equality between the spouses and on the obligation of full communion of life.

In this order, it was concluded that the betrothed have broad freedom to regulate their legal status in marriage. However, they are not allowed to derogate from the rules of public policy, which make up the so-called basic imperative statute of marriage.

Thus, it is prohibited that the rules stipulated in the prenuptial agreement disregards the principle of equality and full communion of life established by the family. On the other hand, the State is prohibited from interfering in the communion of life of the spouses, which requires respect for their decisions as a couple, in the exercise of family planning.

Thus, a double effect is revealed regarding the general clause of full communion of life which, although it guarantees the protection of the independence of the spouses in the family sphere – including in relation to the State -, it prohibits them from disregarding the mutual interdependence arising from the communion itself, based on the principle of equality, which is also intangible.

From this, it was concluded that the effectiveness of the dual effect of full communion of life requires that the private autonomy of the betrothed is not limited *a priori*, allowing them to regulate the legal relations arising from marriage in a broad way, adequate to the specificities arising of family planning adopted by the couple.

Therefore, any adjustments to the prenuptial agreements clauses requires a case-by-case analysis, in order to verify whether the agreement´s content offends the precepts of public order.

Based on that, it was concluded that it would be lawful for the spouses to stipulate property penalties in the event of divorce, provided that such provisions are the result of a couple´s joint and conscious decision and do not affront the dignity of either party, in which case it would be up to the state interfere.

With regard to the maintenance obligation, it is concluded that it is not lawful to include a clause in the prenuptial agreement that allows the waiver of the right to claim maintenance at the end of the marriage, and that the advance payment of alimony in the agreement does not bind the definition of the maintenance obligation at the time of the end of the communion of life, either in terms of the value – which may be greater or less than that stipulated between the spouses, depending on the

alimony binomial -, or in terms of the transitoriness of the pension, although it is considered lawful to include clauses in the agreement instrument on the issue, precisely to express the family planning guidelines adopted by the couple, with the aim of helping to solve any imbroglio arising from marital breakup.

Finally, it should be pondered that, given the breadth of content in the prenuptial agreement, it is seen as an important instrument for the prevention of disputes, for the preservation of full communion of life and, also, to solve the existing problems in an eventual end of the marital relationship.

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