POLAND

SEPARATION OF ASSETS WITH EQUALISATION OF ACCRUED GAINS (ACCRUALS): A MARITAL PROPERTY REGIME FOR THE MODERN FAMILY?

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Résumé

La séparation de biens avec un partage des acquêts est un des régimes matrimoniaux adoptés en 2005, mais ce n’est pas le régime de prédilection en Pologne car les contrats de mariage n’y sont pas très populaires et qu’il y a un manque d’information à ce sujet dans les médias. Ce chapitre présente les grandes lignes de ce régime et suggère quelques nécessaires réformes. Il fait également état de l’utilité de ce régime tant dans l’Union européenne que dans des pays comme les États-Unis.

I INTRODUCTION

Separation of assets with equalisation of accrued gains¹ is one of the marital property regimes introduced to the Family and Guardianship Code² in Poland in 2005.³ Regulation of the regime was initially limited because lawmakers intended to observe the regime’s adoption by couples before implementing

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¹ There are different translations of the name of this regime, which in Polish is termed ‘rozdzielność majątkowa z wyrównaniem dorobków’. For example, a translation previously used is ‘separate property with compensation for possessions gained’ (see N Faulkner Kodeks rodzinny i opiekunczy. The Family and Guardianship Code (CH Beck, 2010). However, in our opinion, a literal translation shows the most important characteristics of this regime. See also Anna Stępień-Sporek, ‘Sharing of Accruals as the Best Solution for Marriage?’ in B Verschraegen (ed) Family Finances, (Jan Sramek Verlag, 2009) 369–379.

² Act of 25 February 1964 (Dz U no 9, item 59 as amended), hereinafter ‘the Family Code’ or KRO.

³ It was introduced by the act of 17 June 2004 on amendment of the Family and Guardianship Code (Dz U no 162, item 1691).

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further regulations. However, although the regime has been in force for almost a decade and has certain advantages, it is still not very popular among couples.\(^4\)

The reasons for this regime's lack of popularity are two-fold. First, marital property agreements are not generally popular, although their number continues to increase. Secondly, there is a lack of information in the media: there have not been any social campaigns aimed at popularizing the regime and scholars have not written much about it. Spouses considering this regime are alone in their choice and do not have enough assistance on either the doctrinal or jurisdictional details. Problematically, the consequences of the regime may turn out differently than the spouses would expect.

However, this marital property regime is important and popular across Europe, with similar regimes applied in different countries in the European Union.\(^6\) For example, the French–German Agreement of 2010\(^7\) has introduced an optional marital property regime based on participation in accrued gains\(^8\) and all members of the European Union have been invited to join this agreement. The Principles of European Family Law Regarding Property Relations Between Spouses also stipulates participation in acquisitions\(^9\) as one of the default regimes (a regime applied when spouses have not agreed otherwise). This regime is based on a separation of property during the marriage and a sharing of some assets upon the dissolution of the regime (principle 4:17).\(^10\) Separation

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\(^{5}\) K Pietrzykowski in K Pietrzykowski (ed) Kodeks rodzinnego i opiekuńczego. Komentarz (CH Beck, 2010) 509. There are neither official statistics regarding marital agreements of spouses nor a register of such agreements. Therefore, it is hard to give precise numbers.


\(^{8}\) In this regime, during marriage, each spouse has his or her own property and upon its dissolution a pecuniary claim arises. It is a claim regarding a share in the growth of the other spouse’s property (participation in acquisitions). For more details, see C Gonzáles Beilfuss ‘The Franco-German Treaty Instituting a Common Matrimonial Regime of Participation in the Acquisitions: How Could Catalonia Opt in? in AL Verbeke, JM Scherpe, C Declerck, T Helms and P Senaeve (eds) Confronting the Frontiers of Family and Succession Law (Intersentia, 2012) 626.

\(^{9}\) Participation aux acquis, Errangenschaftsbeihilfung.

of assets with equalisation of accrued gains is rather different from the two above-mentioned regimes,¹¹ but the aims of the regimes are the same — to give one spouse a share in the other spouse's property. These international approaches prompt the consideration of the Polish regime of separation of property with equalisation of accrued gains, which can serve as a model not only for European lawyers, but also for American lawyers.

This chapter presents the regime of separation of assets with equalisation of accrued gains, suggesting a direction for necessary reform that could increase the regime's popularity. The chapter also endeavours to address the usefulness of the marital property regime for families in both the European Union (where efforts to harmonise marital property law were recently undertaken) and in other countries such as the United States. The latter shares to some extent the concept of the regime but may also be interested in alternatives to its two current regimes, particularly given that American couples, themselves, are free to agree to their own property arrangements by virtue of a premarital or marital agreement.¹²

II CONCEPT OF THE REGIME

Separation of property with equalisation of accrued gains (accruals) is a type of separation of property¹³ and is a contractual regime adopted by spouses through a marital agreement before or during marriage. According to art 51² KRO, the provisions on separation of property apply. During marriage, spouses

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¹¹ Separate property of each spouse is comprised of two parts: reserved property (biens reserves, Vorbehaltseigentum) and acquisitions (acquêts, Errangenschaft). The latter is more important because a claim on participation regards this part of property. Acquisitions are all property that is not reserved property. Reserved property includes: (a) assets acquired before the commencement of the regime, (b) gifts, inheritances and bequests acquired during the regime, (c) assets substituting reserved property, (d) assets that are personal in nature, (e) assets exclusively acquired for a spouse's profession, (f) increase in value of the property included in (a) to (e) (principle 4:19). There is also a rebuttable presumption that assets are owned jointly by both spouses (principle 4:20). The reasons for its introduction are practical. In many cases, it is not possible to prove who is the owner of an asset (K Boeke-Woelki, F Ferrand; C Gonzalez Beilfuss, M Jantnera-Jareborg, N Lowe, D Martiny and W Pintens Principles of European Family Law Regarding Property Relations Between Spouses (Intersentia, 2013) 164).

¹² In states with equitable distribution, the uncertainty of property outcomes in cases of divorce are similar to those in countries that recognise the separation of property with equalisation of accrued gains in that they are based on extensive judiicial discretion and litigation. In determining a particular division under the equitable distribution approach, American courts consider several legislated factors, such as the length of marriage, the causes for the dissolution of the marriage, the age and health of the parties, and the amount and sources of income, as well as the vocational skills, liabilities, and needs of each party. Margaret Ryznar 'All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases' (2010) 86 North Dakota Law Review 115. In the minority community property states, each spouse has an interest in the community property, as opposed to separate spousal property holdings. Ira Mark Ellman 'O'Brien v. O'Brien: A Failed Reform, Unlikely Reformers' (2007) 27 Pace Law Review 949, 951.

do not have common property and each spouse has his or her own property which is managed by that spouse. No action regarding this separate property requires the consent of the other spouse. The key issue in this regime comes after the dissolution of the regime: a spouse whose accrued gains are less than the accrued gains of the other spouse may claim for equalisation of gains by payment or transfer of rights (art 51 § 1 KRO).

The accruals are the increases in the value of the property of each spouse after concluding a marital agreement (art. 51 § 1 KRO). The accrued gains are a book value and not specific assets. The amount of accruals is in money and the claim for equalisation of accruals is thus monetary. In order to establish the amount of accruals, spouses may prepare an inventory of property, but there is no legal obligation to do so. However, the lack of inventory can be problematic after a long-lasting marriage, and spouses may have difficulty proving their rights.

Although it seems clear what accruals are, there are some unclear areas on which opinion is divided, such as whether one should take into account the net value of property of each spouse or the gross value of property. However, the separation of property with equalisation of accruals is similar to the community of property regime, which is based on gross value of property. If the results of both regimes should be alike, the gross value of property should be decisive in distribution of property.

In their marital property agreement, spouses may decide how accrued gains are calculated, which is advisable given that the relevant regulation is unclear on the issue. If the spouses do not provide for it, according to art 513 § 2 KRO, the calculation of accrued gains does not take into account property acquired before concluding the marital agreement, or that referred to in art 33, points 2, 5–7 and 9, and any assets purchased in exchange for them, but will include the value of:

(a) donations made by either spouse, with the exception of donations to the common descendants of the spouse and minor donations normally made to other people;

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15 E.g. Elżbieta Skowronska-Bocian claims that the gross value should be determinative (see *Małżeńskie ustrój majątkowe* (LexisNexis, 2008) 135). In her opinion, an opposing position could encourage spouses to overburden their property. An opposing opinion is presented by Tadeusz Smyczyński (*System Prawa Prywatnego, Prawo rodzimne i opiekunskie*, Tom 11 (CH Beck, 2009) 465–466).

16 Eg decision of the Supreme Court of 15 April 2011, II CSK 430/10.

17 Property acquired by inheritance or donation.

18 Rights that cannot be transferred and may only be exercised by one person; items received as damages for bodily injury or triggering a health disorder, or as a compensation for harm suffered; debts concerning remuneration or other gainful activities.

19 The scope of accruals is similar to the scope of common property under the default regime of community of property (see art 31–33 KRO).
(b) services rendered personally by one spouse to the other spouse's property; and

(c) investment and expenditure on the property of one spouse from the estate of the other spouse.

There are many ambiguous areas of the regime. For example, the scope of accruals is not clear: it is doubtful whether the increase in the value of property acquired before the conclusion of the marital agreement is part of accrued gains. Spouses usually expect such a result,\(^20\) but it seems that the entirety of property acquired before the beginning of the discussed regime is outside of accruals. Also undefined is how to calculate donations between spouses — whether they should be included in the property of the donor or the recipient. The next question regards the services rendered by one spouse. The Family and Guardianship Code does not definitively answer to whose property such services are added — to the property of the recipient spouse or the provider spouse. In this context, especially problematic are the services rendered by a spouse of an entrepreneur that cause damages. Furthermore, the regulation does not answer the question of whether services should be chargeable or not. Problems arise in drawing a line between services rendered as part of the spouse’s duty to act for the good of the family pursuant to art 23 KRO and extraordinary services, which can be calculated as accruals.\(^21\)

Accrued gains are calculated according to the state of the property at the time of the dissolution of the regime and according to the prices upon equalisation (art 51\(^3\) § 3 KRO). The dissolution of the regime takes place upon the death of either spouse, divorce, annulment, legal separation,\(^22\) entrance into a marital agreement that selects another regime, incapacitation,\(^23\) and judgment on separation of property.\(^24\) Situations wherein the regime ends by virtue of a judgment — particularly in cases of divorce, separation, or annulment — can be unfavorable to the spouse entitled to the claim on equalisation. The administration of each spouse’s property is not limited and in cases of conflict between the spouses, it is probable that they will try to reduce their property, taking into account the moment that is relevant to the calculation of accruals. In the case of divorce, that moment is when the judgment is final. Thus, there are no measures to protect the entitled spouse from the other spouse’s disloyal behaviour.

The claim on equalisation of accrued gains can be reduced for important reasons (art 51\(^4\) § 2 KRO). Such reasons include, for example, situations wherein one spouse wrongfully does not use his or her abilities to earn money,


\(^{22}\) Art 54 KRO.

\(^{23}\) Art 53 KRO.

\(^{24}\) Art 52 KRO.
leaves his or her family, or spends his or her money on drugs and alcohol.\textsuperscript{25} The wording of this provision is effective because regulations should not be too casuistic and indeterminate language is especially useful in the field of family law, where relationships between spouses differ and analyses of the individual circumstances of each case are essential.

Spouses can elect equalisation of accrued gains by agreement without a court. In their agreement, they decide on the sum that should be paid by the richer spouse or the rights that should be transferred to the entitled spouse. If the spouses cannot agree on the manner or the rate of compensation (equalisation), the court will decide (art 51\textsuperscript{4} § 3 KRO). The court may decide only on the payment of money.\textsuperscript{26}

A special rule is applied upon the death of either spouse. In such a case, the equalisation of accrued gains occurs between the heirs and the surviving spouse. Some representatives of this doctrine say that this rule can be applied only when the surviving spouse is not an heir.\textsuperscript{27} However, it may be unfair that the situation of heirs would depend on whether the surviving spouse is an heir or not.

Pursuant to art 51\textsuperscript{4} § 2 KRO, if the decedent had brought an action for divorce, annulment, or legal separation, the spouse’s heirs may demand that the obligation of equalisation of accrued gains be reduced. This privilege is important but applies only if the relationship was deteriorated and the marriage was going to end.

The claim on equalisation of accrued gains is terminated after 10 years. This period starts when the marriage ends. Sometimes it is a few years after the end of the regime because marital property regimes can be changed during marriage by a marital property agreement. According to art 121 point 3 Civil Code,\textsuperscript{28} a limitations period does not start and, if started, is suspended for claims made by one spouse against the other for the duration of the marriage.

In summation, separation of property with equalisation of accrued gains is an additional option for couples seeking a marital property regime in Poland. In the United States, each state has one of two default marital property regimes: community property, wherein marital property is held together by the spouses, and the common law system, wherein marital property may be held separately. The majority of American states have a common law system as the default regime, and upon divorce, the judge has significant discretion over the property

\textsuperscript{25} T Smyczyński in System Prawa Prywatnego, Pravo rodzinne i opiekuńcze. Tom 11 (CH Beck, 2009) 474.
\textsuperscript{26} M Nazar in J Ignatowicz and M Nazar Pravo rodzinne (LexisNexis, 2006) 190.
\textsuperscript{27} T Sokołowski in T Sokołowski and H Dolecki (eds), Kodeks rodzimny i opiekuńcze (Wolters Kluwer, 2013) 359.
\textsuperscript{28} Act of 23 April 1964 (Dz U no 16 item 93 as amended).
distribution no matter who holds legal title to the property. In equitably dividing the property between the spouses, courts in common law states will consider factors such as the length of marriage, the causes for the dissolution of the marriage, the age and health of the parties, and the amount and sources of income, as well as the vocational skills, liabilities, and needs of each party. Although courts often award half of the marital property to each spouse, even a 95/5 split between the spouses may be considered equitable. To avoid this default property regime, couples may contract by a premarital or marital agreement to employ a different marital property regime. The various marital property regimes currently being explored in Poland and other European countries can offer couples in the United States new options in structuring their own property regimes by agreement.

III DIRECTION OF AMENDMENTS

Current regulation in Poland on separation of property with equalisation of accrued gains is not comprehensive, especially compared to that concerning the default regime of community property. On the one hand, it is logical that the most important rules on property relations are developed by most spouses themselves and, therefore, legislative provisions on contractual regime should not be developed. On the other hand, there remain many doubts on how to apply the regime and ensure the equalisation of accrued gains. This ambiguity discourages spouses from selecting the regime. Certainty is important, particularly in the property relations of spouses who want to be sure of the financial consequences of their regime. Therefore, at least some amendments to the current regulation should be considered.

31 For example, Indiana is a common law state that requires equitable distribution of marital property at divorce, but the Indiana Code provides that: ‘The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence.’ Factors to rebut the presumption that an equal division would not be just and reasonable include: the contribution of each spouse to the acquisition of the property, the extent to which the property was acquired by each spouse before the marriage or through inheritance or gift, the economic circumstances of each spouse at the time the disposition of the property is to become effective, the conduct of the parties during the marriage as related to the disposition or dissipation of their property, and the earnings or earning ability of the parties as related to a final division of property and a final determination of the property rights of the parties. Indiana Code 31-15-7-5.
32 See, eg, Bean v Bean, 115 SW3d 388, 393 (Mo Ct App 2003).
33 Margaret Ryznar and Anna Stepni-Sporek ‘To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context’ (2009) 13 Chapman Law Review 27.
One of the potentially problematic aspects of the separation of property with equalisation of accrued gains regime is the lack of necessary consent by the other spouse on property actions, particularly when they involve the family home and significant assets.\textsuperscript{34} The Polish Family and Guardianship Code does not contain an extended regulation regarding protection of the family home. The only exception is art 28\textsuperscript{1} KRO, stating that if one of the spouses has the right to a residence, then the other spouse is authorised to use the residence in order to meet the needs of the family. This provision is applicable to all marriages, regardless of which regime governs their property relations. However, it is insufficient to prevent a spouse from transferring the family home. For this reason, protection of the family home is guaranteed by both the French–German Agreement\textsuperscript{35} and the Principles of European Family Law Regarding Property Relations Between Spouses.\textsuperscript{36} It is true that introducing rules to protect the family home is a limitation of freedom on the administration of property by each spouse — a notable characteristic of regimes based on separation of property — but it is important to strike the proper balance between the rights of each spouse and the family as a whole. Particularly in cases of conflict between the spouses, it is essential to provide legal instruments that guarantee family members rights to occupy the home.

Calculation of accruals can be very complicated and the lack of an inventory of initial property can make it more difficult. Currently, spouses can prepare such an inventory, but it is not legally required. Introducing a legal obligation to complete such an inventory is an interesting proposal.\textsuperscript{37} Marital property agreements in Poland are made by notarial deed,\textsuperscript{38} and perhaps the notary public should prepare such an inventory at the time of making the agreement between spouses choosing separation of property with equalisation of accrued gains.

The equalisation of accrued gains can be made even decades after the selection of the regime. During all these years, spouses are free to enter into any legal transactions regarding their separate property. One consequence is that a spouse who is entitled to a claim on equalisation may not know the size of the other spouse's property. Therefore, it seems necessary to introduce an obligation of spouses to inform each other on this issue, at least regarding their most significant transactions.\textsuperscript{39}

It is also advisable to follow the Principles of European Family Law Regarding Property Relations Between Spouses\textsuperscript{40} and introduce a rule that the accrued

\textsuperscript{34} T Smyczynski in System Prawa Prywatnego, Prawo rodzimie i opiekunie. Tom 11 (CH Beck, 2009) 471.

\textsuperscript{35} See art 5.

\textsuperscript{36} See principles 4.5 and 4.6.


\textsuperscript{38} See art 47 § 1 KRO.

\textsuperscript{39} T Smyczynski in System Prawa Prywatnego, Prawo rodzimie i opiekunie. Tom 11 (CH Beck, 2009) 470.

\textsuperscript{40} See principle 4:25.
gains should be calculated from a different moment when the regime ends upon divorce, separation, or on the basis of another judgment. In such cases, the decisive moment should be the day the lawsuit is launched. The proceedings can last years, during which time spouses can solely administer their property without any limitation, which may result in potentially disloyal behaviour.

The last proposal is to introduce specific regulation on whether debts should be taken into account in calculating the accrued gains. Legal certainty requires the legislator to make a decision on this question. Given the functional similarities of the discussed regime to community of property, debts should not be taken into account as they are excluded in the distribution of common property in the default regime.41

IV USEFULNESS OF THE REGIME

Separation of assets with equalisation of accrued gains can be appealing because it combines the best characteristics of separation of property and community of property. During the marriage, spouses have a broad freedom in the management of their property, which enables them to be active on the market and undertake different commercial activities despite their riskiness and size. Meanwhile, the property of the other spouse is protected because the creditors of the active spouse do not have recourse against him or her. On the other hand, a spouse who wants to be less active in the field of commercial activity and spend more time in the domestic realm can share in the accrued gains of the other spouse. These general characteristics of the regime make it initially appealing.

Although this regime was considered as a default regime while Parliament was reforming marital property law in 2004,42 legislators have abandoned this idea because Polish society is accustomed to community of property and it will not be easy to make any changes.43 There is also no universal regime that is good for all families because arrangements of relationships can differ and spouses decide who cares for the children and the home and who engages in paid labour.

However, it is important to establish the common model of family in Poland and then answer the question of whether this regime is suitable for this model of family. In Poland and other European countries, women have become more active at the labour market.44 At the same time, they continue to be active at home, often prioritising the family and devoting significant time to their

41 See, eg, decision of the Supreme Court of 15 April 2010, II CSK 430/10 and decision of the Supreme Court of 5 December 1978, III CRN 194/78.
42 The reform has been made by abovementioned act of 17 June 2004.
children and home.\textsuperscript{45} Although fathers are eager to spend more time with their children,\textsuperscript{46} women still devote more time to housekeeping and children\textsuperscript{47} and their incomes are often lower than the incomes of men. These factors suggest that separation of property, which guarantees the independence of each spouse, is not an ideal solution for these families if their chosen regime is to guarantee the lower-income or non-income spouse a share in the property acquired by the other spouse. The separation of property with equalisation of accruals regime and community of property are both this kind of regime, but the key difference is the moment at which a share in the property of the other spouse is acquired.

Specifically, the separation of property with equalisation of accruals guarantees a share in the other spouse's assets after dissolution of the regime, but it demands legal action by the entitled spouse. It may be difficult, however, for an inexperienced spouse to take the necessary legal steps. In such a situation, community of property may be more favorable for the spouse because it gives him or her a share in the property acquired by the other spouse from the moment of its acquisition. Each spouse is entitled to the property and spouses have equal rights to common property. Both regimes provide for non-monetary contributions of each spouse, but at different times.\textsuperscript{48}

Thus, separation of property with equalisation of accruals may be a good solution for a marriage of two independent spouses with similar levels of education and activity in the market. In the traditional model of family, however, some practical obstacles may arise with the exercise of the rights of an entitled spouse. The existence of these factors has been noted by those considering replacing community of property with this regime as the default regime in Poland. When the model of the family changes and both spouses are active at work and at home, it may be time to consider a change in the default regime in Poland.

Couples in the United States can also learn from the experiences of Polish couples. As couples contract into their own property regimes in the United States, they should be aware of which property regime protects a lower-income or non-income spouse.\textsuperscript{49} If they do not agree on a marital property regime and live in a common law state, they may experience extensive litigation on the

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\item \textsuperscript{46} A Smith, \textit{Working fathers in Europe learning and caring? Centre for research on families and relationships, Research briefing 30, The University of Edinburgh, January 2007}, 2–3.
\item \textsuperscript{47} SM Bianchi ‘Maternal Employment and time with children: dramatic change or surprising continuity?’ \textit{Demography} nr 37/2000, 406–412.
\item \textsuperscript{48} B Resetar ‘Matrimonial Property in Europe: A Link between Sociology and Family Law’, \textit{Electronic Journal of Comparative Law} no 12/2008, 8.
\item \textsuperscript{49} A recent study suggests that the number of stay-at-home mothers in the United States is increasing for the first time in decades. D'Vera Cohn, Gretchen Livingston and Wendy Wang \textit{After Decades of Decline, A Rise in Stay-at-Home Mothers}, Pew Research Social & Demographic Trends, 8 April 2014, available at www.pewsocialtrends.org/2014/04/08/after-decades-of-decline-a-rise-in-stay-at-home-mothers.
\end{thebibliography}
Separation of property with equalisation of accrued gains is a regime combining elements of separation of property and community of property, which may make it appealing.\textsuperscript{51} Similarities between this regime and community property exist because both guarantee spouses a share in the acquisitions of the other spouse.\textsuperscript{52}

The proposals summarised in this chapter can make separation of property with equalisation of accrued gains more attractive for spouses,\textsuperscript{53} but they should nonetheless consider the model of their family. If it is a traditional model of family with a stay-at-home spouse and a breadwinner spouse, the couple may decide to select community of property, which provides an economically vulnerable spouse with legal title to the property. This can be beneficial for spouses not interested in litigation, which would be necessary under the regime of separation of property with equalisation of accrued gains.

Currently, separation of property with equalisation of accrued gains remains less desirable for spouses. Its regulation is not comprehensive and has at least a few gaps. Therefore, spouses who select the regime cannot be certain as to the regime’s consequences. Their situation is analogous to the situation of spouses in American common law states with equitable property distribution, which may result in various outcomes given judicial discretion.\textsuperscript{54} Both countries are representative of different legal cultures, but the experiences of each country can be helpful in planning legal reforms.

\textsuperscript{50} Margaret Rzynar ‘All’s Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases’ (2010) 86 North Dakota Law Review 115.

\textsuperscript{51} The minority community property states, each spouse has an interest in the community property, as opposed to separate spousal property holdings. Ira Mark Ellman ‘O’Brien v. O’Brien: A Failed Reform, Unlikely Reformers’ (2007) 27 Pace Law Review 949, 951.

\textsuperscript{52} Currently, it is a relatively unchanging institution. Reform of the regime and a public campaign could be helpful in making the regime more appealing.
