

# FAMILIE & RECHT

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## Family Law and Economics Introduction to a RETHINKIN. seminar

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## Introduction

RETHINKIN. (Rethinking legal kinship and family studies in the Low Countries) is a Scientific Research Network (WOG) 2015-2019 of the Research Foundation Flanders. It currently joins the entire Flemish academic research into family law with the Dutch Alliantie Familie & Recht (Alliance Family and Law – ACFL, NIG and UCERF) as “Low Countries”. RETHINKIN. will first draw a *Roadmap for Kinship & Family Studies in the Low Countries* as a stepping stone to the development of its further scientific activities under the EU Framework Programmes for Scientific Research and Innovation. A continuous dialogue with an international multi- and transdisciplinary panel will allow the expansion of the current research landscape so as to cultivate new areas in alliance with other disciplines.

One of the objectives of the network is to redefine the family laws of the Low Countries on the basis of inter- and multidisciplinary research, conducted under the broader umbrella of family studies.

Hence, RETHINKIN.'s legal scholars sought inspiration in family economics on the occasion of a closed international expert seminar on household production and on informal elderly care that was organised on 12-13 November 2015 in Ghent and Kortrijk. The programme of the preliminary family economics workshop comprised four presentations:

Economic Analysis of Household Production – *prof. dr. Laurens Cherchye, prof. dr. Bram De Rock and prof. dr. Frederic Vermeulen (KU Leuven)*

Distribution of Household Income – *prof. dr. Gerre Verbist (UAntwerp)*

Household production in social security: the case for divorce insurance – *dr. Joris Ghysels (Maastricht University)*

The Role of Informal Eldercare in Aging Societies – *Beth Zikronah Rosen (The World Bank)*

This short contribution introduces micro-, meso- and macro-economic issues that have arisen in relation to family law. It shortly refers to the presentations on these issues. The presentations are published hereinafter. The speakers aimed at offering *economic* insights to legal scholars and at determining whether inter- and multidisciplinary family law and economics research is feasible and desirable.

With regard to *household production*, economic research could provide useful insights e.g. on ways to valuing and compensating the investment that was made through the division of household labour, thereby allowing one of two partners to acquire an additional university degree, upon divorce or separation.

With regard to *elderly care*, combined demographic and economic research can help with defining legal and policy incentives and disincentives for intergenerational informal care.

## **Economics of the Family**

Much of the research into the economics of the family is still influenced by Nobel laureate BECKER's path breaking *Treatise on the Family* of 1981, even though his socio-biologically inspired claims on sexual specialisation in the household have been highly criticised for confirming the 'sexual family'-norm to the detriment of women (i.a. FINEMAN 1995).

BECKER studies both individual family members and families as economic entities both from micro- and macro-perspectives and both as consumers and producers. He applies the rational choice assumption to them, i.e. the assumption that economic actors aim at maximising utility, based on stable basic preferences and influenced by implicit and explicit markets, tending towards market equilibrium. He applies this assumption to mating (and separating) strategies, fertility strategies, division of labour in the household and to downwards and upwards inter- generational caring investments. At the RETHINKIN. conference, an economic analysis of household production, and sexual specialisation, was presented by the KU Leuven researchers Laurens CHERCHEYE, Bram DE ROCK and Frederic VERMEULEN.

## **Economics of Family Law**

It is important for lawyers to understand how families function and, consequently, how legal and policy measures can serve as a (dis)incentive for (un)desirable behaviour or how they cast a "shadow

of the law” on market bargaining (comp. MNOOKIN and KORNHAUSER 1979). They serve as instruments to determine the respective roles of the market, the family and the state.

However, ‘Family Law Exceptionalism’ (‘FLE’; HALLEY 2011a and b; HALLEY and RITTICH 2010) has long formed an obstacle to applying economic analyses to family law. ‘FLE’ considers family law as a distinctive branch of law, to which market rules do not and should not apply, for family relations are not based on utility but on altruism and affection. Family law would therefore belong to a private realm, separated from the (public) market.

It is claimed by HALLEY c.s. that artificially segregating family law from other branches of law, which are considered to govern the market, prevents correctly taking into account the distributive functions of the household. They therefore propose to apply an economic family paradigm to family decision-making. Such an approach ties in with the etymology of both ‘economy’ – as household management – and ‘family’ – as members of a same house(hold). The paradigm of the economic family e.g. can contribute to better bridging informal family care and paid care work on the market so as to achieve a more equal distribution of the family’s full income. To that end, private family law is researched as one functional whole with public family law, i.e. social security law or tax law, and with family policy measures such as career break schemes (e.g. SWENNEN and VERHAERT 2015).

Undoing ‘FLE’ has not gone uncriticised itself. BRINIG (2000) and others, for example, object to equalising domestic work with employment relations. Emotions within family relations would prevent considering the family as an exchange relationship. The argument is that an exchange mentality – or ‘tit for tat’-strategy – could destroy the family, for which functioning unconditional love would be the pre-requisite.

BECKER himself nonetheless has elaborated how the framework he offers can also apply to nonmaterial behaviour. Moreover, economic analyses do not necessarily imply commodification or commercialization of production within the family, e.g. of informal care.

I claim that the economic family paradigm can be helpful for the legislature in four respects when developing family law.

## 1. Avoiding legislative mistakes

First, the legislature could take into account the effect of legal rules on purposeful behaviour, i.e. using economic insights on family functioning to predict the impact on family activities of family regulation. The introduction of no-fault divorce can serve as an example. No-fault divorce allows each spouse to petition divorce

unilaterally and to strive towards a (financially) clean break. Many legal systems indeed prefer a lump sum payment or division of property to (long-term) post-divorce support obligations. The no-fault divorce regime is based on the hypothesis of two economic independent spouses upon separation, at least after a rehabilitation period. But that assumption is actually wrong to the detriment of women. Women's specialisation in household labour does not give access to social security rights, is marriage specific and is not portable after divorce. Moreover, after a divorce mostly women will have the primary care for the common children and thus maintain their specialization in non-market employment. Those non-market investments during and after marriage are not valued in the context of the division of property, because household production and investments in human capital are neither divided nor dividable. Since the introduction of no-fault divorce this disadvantage to mostly women is not or amply compensated by post-divorce support entitlements. In sum, the other spouse – mostly the male – can withdraw from marriage before and without making investments and without the family's 'full income' being divided. For him, marriage has become less costly. This raises the risk of opportunistic behaviour and of women and children's poverty (hereto *in extenso* TSAOUSSIS 2008).

The seminar participants pointed at the safeguards, *i.a.* in terms of maintenance, that still exist in the continental no-fault divorce regimes. They were also not convinced that spouses would anticipate opportunistic behaviour.

At the RETHINKIN. seminar, Joris GHYSELS of Maastricht University made a case for a divorce insurance in social security to cover the social risk of divorce. That proposal caused a profound discussion. GHYSELS elaborated his proposal as insurance for the loss of income in households with minor children, upon divorce or separation of the parents, and limited to a short period of several years or even just months. The risk would be widely spread through tax contributions.

Some participants to the seminar rather proposed a shift of the risk to the market instead, e.g. in a compulsory insurance system financed with employers' and employees' contributions or on an individual basis in instruments akin to life insurances or pension savings plans.

Other participants opposed to organising an insurance system either in social security or on the market, because a beneficiary of any kind of insurance should not be allowed to decide to incur the insured risk. The question then arose whether the decision to divorce or separate can be considered intentional incurrence of risk.

Introducing a divorce or separation insurance would allow the abolition of maintenance obligations altogether. However, different participants pleaded for family solidarity through maintenance obligations, rather than shifting the risk to the state or the market. According to them, it should be a priority for the legislatures to adapt the maintenance regime so as to enhance its efficiency and effectiveness.

At the end, everyone agreed that the proposed divorce insurance is interesting and should be further researched, *i.a.* in relation to maintenance law.

## **2. Using incentives to encourage altruistic behaviour**

In his paper *The Family and the State* (supplement to Ch. 11 of his *Treatise*), BECKER has illustrated the importance of considering family functioning and its aim at efficiency with regard to downwards and (subsequent) upwards intergenerational care. He considers care as an exchange of child support for old-age support, within the family and through State intervention. Parents prefer investing in their children's human capital in return for a commitment of care for them when elderly. BECKER in this context refers to a "social compact" between generations whereby taxes on adults for the education of their children are returned by old-age pensions. The state, however, only safeguards a minimal threshold and encourages supplementary investments by children with tax and social security exemptions and incentives. This allows elderly parents to negotiate care with their offspring. The success of such system evidently also depends on (forced) heirship rules.

Beth ZIKRONAH ROSEN of The World Bank highlighted the importance of informal care in aging societies at the RETHINKIN seminar and pointed at the current challenges for legislatures and policy makers. ZIKRONAH ROSEN presented data on women's engagement with care; research on men's engagement is underway.

## **3. Using disincentives to discourage opportunistic behaviour**

A third use of the economic family paradigm can be made to discourage opportunistic behaviour.

For example, legal provisions on the matrimonial property regimes in many legal systems allow opportunism when the complete separation of property in a prenuptial agreement is allowed and the jurisdiction of the courts to correct this is, or can be, excluded. One of the issues in this regard is the asymmetrical access to information and the over-optimism bias of (future) spouses.

The question therefore arises whether an imperative matrimonial property regime should be imposed. It is known that matrimonial property law influences the labour market participation of spouses and that the default matrimonial property regime may cause partners to rather opt for cohabitation.

A solution proposed by the BECKERS in 1997 is not to impose matrimonial property laws but to oblige spouses to conclude a matrimonial property contract at arm's length, which could be assessed *ex ante* or *ex post* (BECKER and BECKER 1997). Remarkable comparable evolutions exist in this regard in the German and English legal systems (hereto SWENNEN 2015).

The seminar participants were sceptical about compulsory pre-nuptial agreements, because safeguarding an arm's length agreement would necessitate a comparable government intervention as would be the case with a default matrimonial property regime. Also, spouses would tend to conclude incomplete contracts or would simply not apply what they agreed upon the breakdown of the marriage.

#### **4. Family economics as benchmark for protective measures**

Considering investment in the human capital of children, BECKER claims that state regulation mimics the agreements that would be concluded, should the children be capable of concluding contracts themselves, and should the parents optimally commit to their children. State regulation would thus improve efficiency of the functioning of the family as a whole. The State can also reduce inequality by supplementing parental investment to an efficient level.

At the RETHINKIN. conference, Gerlinde VERBIST of the UAntwerp presented more general options to more equally distribute household income. On the one hand, cash benefits and (progressive) tax measures are two financial instruments that should be more efficiently used. On the other hand, services should be affordable and accessible for the financially weaker households. During the discussion, VERBIST pointed at the difficulties in striking a balance between offering cash benefits or rather services, which would of course also depend on the available budget.

Parents are not necessarily altruistic and the state should deal with the negative externalities parental agreements imply, in order to improve efficiency in family activities. The state could e.g. consider imposing restrictions on the right to divorce for parents in order to avoid divorces that would be detrimental for the children both materially and non-materially. The state could also avoid paternal delinquency in paying child support, by safeguarding minimal contact between father

and children which may serve as an incentive to make support payments.

## Conclusion

The examples above suggest that contractualisation or private ordering between partners and parents might improve family efficiency, as an invisible hand, to some extent controlled by the state, like in other fields of law. Many other examples are elaborated in literature, e.g. with a view to regulating the adoption and surrogacy market, insights exist that a limited right to sell babies could be the better option (see already LANDES and POSNER 1978).

The participants to the seminar, including the economic scholars, however, were sceptic about that claim. Since the family currently at the least cannot be considered as a market, it is doubtful whether the invisible hand would work at all. A quite intrusive government intervention would be needed anyhow.

Nonetheless, the participants were optimistic about the feasibility and desirability of family law and economics research.

The best attainable form of such research would be somewhere in-between the interdisciplinary and multidisciplinary methodologies. The research questions should be co-designed interdisciplinary, but the research should subsequently be conducted multidisciplinary, by different researchers each from their perspective. Transdisciplinary collaboration, with the research users, was also considered important. Bringing expertise together in those ways could make the RETHINKIN. project cutting-edge.

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