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Fifteenth Ernst Rabel Lecture, 2016

What Family Law for Europe?

By Katharina Boele-Woelki, Hamburg*

Contents

I. A brief look into the recent past

Almost fifteen years ago, I listened to a presentation at a conference in Amsterdam that was delivered by a young law professor. He spoke about the idea of *ius commune* and the harmonisation of private law in general by taking many aspects into account while focusing on the economic parts of private law. In answer to my question, whether we should not include family law in the overall process of harmonising private law, he answered that this field of law was definitely culturally defined and that the opportunities for any harmonisation are very limited. I doubted whether this was actually the case

* The memory of Ernst Rabel, founder and first Director of our Institute, is honoured and acknowledged by a lecture series first begun in 1988. The lectures take up current and foundational topics which lie in areas of research comprising the work of Rabel and the Institute. The Institute's presentation of the ongoing lecture series is made possible through donations made by Frederick Karl Rabel († in 2009 in Bethesda, Maryland), the son of Ernst Rabel, as well as the support of the Institute's alumni association, "Friends of the Hamburg Max Planck Institute for Comparative and International Private Law e.V.". – This is an expanded version of the fifteenth Rabel Lecture presented on 17 October 2016.

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and asked him why he held this view. He replied spontaneously: "You can read it in Zweigert and Kötz's book on comparative law." Notwithstanding the uncontested authority of the cited book, both arguments – *first* that family law is culturally defined and *second* that the opportunities for any harmonisation are very limited – are no longer convincing. Besides, the unification process has not been mentioned at all in that work of reference. Remarkably, you cannot find this specific statement in the book by Zweigert and Kötz – at least I was not able to locate it. Eventually, however, you can draw such conclusion from the total absence of anything that comes close to family relations. But there are many others who have expressed themselves in the way the young professor was thinking, the eminent scholars would have done. According to this view, the cultural and historical diversity is unbridgeable and therefore family laws are not spontaneously converging and cannot be deliberately harmonised: "The unification of family law is a hopeless quest […]".[1] Even in 2001 a similar view was expressed by the European Council.[2]

"What family law for Europe?" is a broad and admittedly ambitious question. Merely posing such a question is not sufficient. An answer should be provided. Such an answer, which will look into the future, however, requires a look into the past and the present as well. There the fundaments have been laid upon which the future will be built. My look in the past, however, will be restricted to the recent past of about two decades. The tale of two millennia of family law in Europe has been told by Masha Antokolskaia, who has investigated harmonising tendencies from a comparative and historical perspective.[3] This study is of great value when searching for explanations for the differences and similarities between the various family systems.

Of course, referring to Europe requires some definition. In my analysis, Europe has not been confined to the European Union but covers the greater Europe to which the countries of the Council of Europe belong. It makes little sense to only focus on the EU and exclude for example Switzerland, Norway or Russia when speaking about European trends and developments in the field of – for instance – parental responsibilities, social parents or surrogate motherhood. Comparing different systems, trying to find similarities and differences and searching for inspiration, either for improving one's own

[1] *Otto Kahn-Freund*, Common Law and Civil Law – Imaginary and Real Obstacles to Assimilation, in: New Perspectives for a Common Law of Europe, ed. by Mauro Cappelletti (1978) 137–168, 141.

[2] Council Report on the need to approximate Member States' legislation in civil matters of 16 November 2001, 13017/01 JUSTCIV 129, p. 114: "Family law is very heavily influenced by the culture and tradition of national (or even religious) legal systems, which could create a number of difficulties in the context of harmonisation."

[3] *Masha Antokolskaia*, Harmonisation of Family Law in Europe: A Historical Perspective – A Tale of Two Millennia (2006).

law, for finding a common core or for finding the better law should not be hindered by organisational legal borders.

In the time following Dieter Martiny's famous 1995 article "European Family Law – Utopia or Necessity?"[4] (a work which he has further developed in subsequent publications, most importantly in a contribution to the well-known book entitled "Towards a European Civil Code"[5] – something which most likely will never become true), the situation in family law has dramatically changed. Today, the unification of private international law in family matters is common practice within the Union, whereas the harmonisation of substantive family law is gradually taking place in various areas. Both processes are accompanied and supported by numerous comparative studies, and the whole body of literature can hardly be overlooked any more. From a scholarly perspective, the statement that European family law is flourishing is no exaggeration.[6]

II. Necessity, feasibility and desirability of a European family law

At the opening conference of the Commission on European Family Law (CEFL) in December 2002, the perspectives for the unification and the harmonisation of family law in Europe were extensively analysed and discussed.[7] The CEFL was established in 2001 and the Organising Committee felt the urgent need of having a fundamental discussion on the necessity, feasibility and desirability of a European family law, since the CEFL had started to draft common Principles of European Family Law based on comparative research.[8] Such an academic initiative in family law was new, and to date no other group of academics or practitioners having the same purpose has been established. At this first CEFL conference both enthusiastic believers and suspicious non-believers were present. Proponents and opponents raised their voices and finally contributed to the book that was later published in the European Family Law Series. Some of the participants strongly

[4] *Dieter Martiny*, Europäisches Familienrecht – Utopie oder Notwendigkeit?, RabelsZ 59 (1995) 419–453.

[5] *Dieter Martiny*, Is Unification of Family Law Feasible Or Even Desirable?, in: Towards a European Civil Code, ed. by Arthur Hartkamp / Martijn Hesselink et al. (2011) 429–458.

[6] See, for example, the work: European Family Law, ed. by Jens M. Scherpe, vols. I–IV (2016) and its review by *John Eekelaar* in: International Journal of Law, Policy and the Family 31 (2017) 114–125.

[7] *Nina Dethloff*, Arguments for the Unification and Harmonisation of Family Law in Europe, in: Perspectives for the Unification and Harmonisation of Family Law in Europe, ed. by Katharina Boele-Woelki (2003) 37–64.

[8] See *Katharina Boele-Woelki*, The Principles of European Family Law: Its Aims and Prospects, Utrecht Law Review 1 (2005) 160–168, available at <www.utrechtlawreview.org>.

objected to the idea of a "unified European family code",[9] which they feared the CEFL was attempting to establish. This was a total misunderstanding since the CEFL has no political legitimation; it is an academic initiative and it only provides models and a reference framework as to how family law in Europe can be harmonised. This was clearly communicated right from the start. Above and beyond that, we should keep in mind that the European legislature at that time and also today only has competence regarding the unification of the rules governing private international law relationships, including family matters.[10] Regarding substantive family law, it is generally accepted that the European Union had *no* competence under the EC Treaty to unify or harmonise these areas,[11] and the Lisbon Treaty has not brought about any changes in this respect. Article 81 of the TFEU, like the former Article 65 of the EC Treaty, speaks of measures in the field of judicial cooperation in civil matters "having cross-border implications". It is however possible to take a different view. Due to the fact that no time indication is provided regarding the required cross-border implications, it is arguable that each internal relationship which is connected to only one national jurisdiction can – hypothetically – become a cross-border relationship. In order to guarantee the free movement of persons in Europe, the EU Commission should take appropriate steps to avoid a loss of legal position, which, for instance, can arise with a change of residence if the connecting factor is not immutable but the applicable law is based on the habitual residence in question.[12] According to this broad interpretation of Article 81, the European Union could even take measures in order to harmonise or unify substantive family law in Europe.

At the CEFL conference in 2002 – which can be considered the very first opportunity for having a broad discussion among family lawyers and scholars in Europe – diverse approaches emerged related to the necessity, feasibility and the desirability of a harmonised and unified family law for Europe. At the end our Turkish/Scottish colleague Esin Örücü compiled a list of questions.[13] They are still relevant, and they have determined the structure of this contribution to a very large extent:

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[9] See in particular *Marie-Thérèse Meulders-Klein*, Towards a European Civil Code on Family Law? – Ends and Means, in: Perspectives (n. 7) 105–117; *idem*, Towards a Uniform European Family Law? – A Political Approach General Conclusions, in: Convergence and Divergence of Family Law in Europe, ed. by Masha Antokolskaia (2007) 271–282.

[10] Art. 81 Treaty on the Functioning of the European Union (TFEU).

[11] *Walter Pintens*, Europeanisation of Family Law, in: Perspectives (n. 7) 3–33, 22 with many references.

[12] See *Nina Dethloff*, Arguments (n. 7) 37; *idem*, Europäische Vereinheitlichung des Familienrechts, AcP 204 (2004) 544–568.

[13] *Esin Örücü*, A Family Law for Europe: Necessary, Feasible, Desirable?, in: Perspectives (n. 7) 551–572, 558.

> "Should freedom of movement be the vehicle for protecting family life? […]
>
> Who says there is a need to harmonise Family Law in Europe?
>
> Who says there is a need to unify rather than harmonise Family Law?
>
> Why should conflict of law rules not be sufficient? […]
>
> How should harmonisation and unification be achieved? Through general principles, a Restatement, competition of rules, directives, regulations, a Code, top-down, bottom-up?
>
> What about legitimacy? Obviously, if [the work of the CEFL] remains at the level of an academic activity, the question of legitimation does not arise, although arrogance might!
>
> Should any such development be applicable to cross-border family ties only?
>
> Is this a deliberate step towards a European political union? If so, is there anything to be learnt from the United States of America? What lessons can be learnt from the Scandinavian experience?
>
> Is there respect for diverse family forms in the present Family Laws? Are human rights concerns adequately voiced? What is 'respect' and which rights will be protected and respected?
>
> If there is European consensus on European standards in Family Law, should these standards be in place before the enlargement of Europe or should other experiences emanating from […] Central and Eastern Europe be amalgamated into the European vision?
>
> Is there anything the so-called 'progressive North' and the 'conservative South' can learn from the emerging values statements of Central and Eastern Europe?
>
> Should the basis of family rights be EU citizenship and human rights rather than the free movement for persons?
>
> Should the basis of harmonisation be traditional values or value pluralism? […]
>
> Should the principle of subsidiarity be respected where global European solutions may be more appropriate for issues concerning principles such as 'equality', 'freedom', 'interest of the child', 'free movement of persons' and property rights?"

These questions finally culminated in asking:

> "What is our aim, what do we want to achieve and is it politically and socially advisable? What is the justification for keeping things as they are and what is the justification for change?"

The conference proceedings from then provided extensive but, as expected, no unanimous answers to these pertinent questions. Additionally, since then many things have changed, such as the enlargement of the EU, the many revisions of national family law, the publication and in some countries the adoption of the CEFL Principles, the adoption of European Regulations

regulating cross-border family matters, the increasing use of the enhanced cooperation mechanism predominantly in the field of family law, and the European Court of Justice and the European Court of Human Rights rendering new and trendsetting decisions which are contributing to the further harmonisation of family law in Europe.

In the following discussion Örücü's questions are grouped into four parts: *First*, who are the main actors and the driving forces behind the unifying and harmonising process? *Second*, which ideals, moral concepts, standards and values should be decisive? *Third,* how do our family systems in Europe respond to the multicultural challenges posed by family relations of people with different beliefs and cultures and, *fourth*, how does the interaction between private international law and substantive law in family matters function? Here, I shall take same-sex relationships as an example. Finally, I shall provide a brief outlook for the further development of family law in Europe. It will be a personal assessment, based on my experience as to how certain areas of family law have developed in the recent past and how they possibly will and should develop in the near future.

III. Main actors and driving forces

1. Global and regional organisations and their legislation

Which areas of family law have been legislated at the international and European levels? Ever since the revival of the Hague Conference on Private International Law[14] after the Second World War, international family law has been one of the three main areas of this international organisation. Out of the forty instruments that have been adopted to date, seventeen address the law of persons, family and succession. In terms of ratifications, the frontrunners are child-related conventions, which have been ratified by the majority of the European countries. The European Community, later succeeded and replaced by the European Union, became a Member of the Hague Conference on 3 April 2007.[15] Since then the Union represents all Member States at the negotiating table in The Hague, and they speak – after having previously agreed on the Union's point of view – with one voice. This process of coordination at the global level has become inevitable because within the Union, the process of unifying private international law rules for family relations has received a tremendous boost since the entry into force of the Treaty of Amsterdam in 1999.[16]

[14] See <www.hcch.net>.

[15] With the entry into force of the Treaty of Lisbon on 1 December 2009.

[16] *Jürgen Basedow*, EU-Kollisionsrecht und Haager Konferenz – Ein schwieriges Verhältnis, IPRax 2017, 194–200.

In the field of cross-border relations in family matters the European legislature has been extremely active.[17] Several Regulations exist in the area of international family law; however the initial aim to bind all Member States[18] has not and will not be achieved. The increasing fragmentation of the uniform private international law rules as adopted by Regulations is based on two different circumstances.[19] First, three Member States made a reservation when the Amsterdam Treaty of 1997[20] entered into force.[21] Denmark is not bound by Article 81 TFEU and can determine for itself, via an Agreement with the Union, that a Regulation also applies to Denmark. Ireland and the United Kingdom have the right to opt into a Regulation, which they have decided to do, for instance, in respect of the Brussels IIbis Regulation and the Maintenance Regulation, but with a few modifications for the UK. Based on an Agreement concluded between Denmark and the European Union in 2005, a few provisions of the Maintenance Regulation – which constitute an amendment of the Brussels I Regulation – also apply in and in relation to Denmark.[22]

Uniform rules regarding jurisdiction, applicable law, and recognition and enforcement of decisions[23] have been adopted for divorce and legal separa-

[17] Since 1 December 2009, Article 81 TFEU has provided the competence for the European legislature to adopt measures in the field of judicial cooperation in civil matters having cross-border implications. Previously, Article 65 EC Treaty as revised by the Treaty of Amsterdam provided this competence.

[18] On 1 July 2013 Croatia acceded to the Union.

[19] See also *Maarit Jänterä-Jareborg*, Europeanization of Law: Harmonization or Fragmentation – A Family Law Approach, Tidskrift utgiven av Juridiska föreningen i Finland [JFT] 2010, 504–515.

[20] The Amsterdam Treaty of 18 June 1997 entered into force for the then fifteen Member States on 1 May 1999. The Treaty amended the Treaty on European Union (Treaty of Maastricht of 7 February 1992) and the three Community Treaties (European Coal and Steel Community (ECSC), European Atomic Energy Community (EAEC) and the European Community (EC)). The amendments primarily concerned the Treaty on European Union (TEU) and the EC Treaty (TEC).

[21] As a consequence, the European Community – on 1 December 1999 replaced by the Union – acquired its own competence to legislate in matters concerning co-operation in civil matters having cross-border implications.

[22] The European Union and Denmark agreed that the Brussels I Regulation also applies to Denmark (OJ 2005 L 299/62). In accordance with Article 3(2) of that Agreement Denmark notified the Commission of its decision to implement the contents of the Maintenance Regulation to the extent that this Regulation amends Brussels I (OJ 2009 L 149/80). This means that the provisions of the Maintenance Regulation apply to relations between the Union and Denmark with the exception of the provisions in Chapters III (Applicable law) and VII (Cooperation between Central Authorities).

[23] A few Regulations also address the cooperation of central authorities, which has been added as a fourth area in addition to the three classic private international questions.

tion,[24] parental responsibilities[25] and maintenance.[26] However, not all Member States are bound by the respective Regulations. On the conflict-of-law rules regarding the law applicable to divorce, the Member States could not reach unanimity. Hence, for the first time in European law, the enhanced cooperation mechanism was used. This is the second reason for the current fragmentation. Thus, the Rome III Regulation only binds sixteen (and from 11 February 2018 onwards, seventeen) Member States.[27] The other twelve (eleven) Member States continue to apply their national conflict-of-law rules regarding divorce.

Two Regulations covering matrimonial property[28] and the property relations between registered partners[29] will enter into force in January 2019. The proposals were published in 2016, but it is worth observing that the European Commission first announced its intention to legislate these two areas back in 2011. It took the European Commission five years to draft two Proposals. It is not expected that Ireland will opt into these Regulations, since its substantive law rules and conflict-of-laws approach fundamentally differ from the continental European position. The same applies to the UK system, but after Brexit, which will take place in 2019, the UK will not even consider any step in this direction. Denmark will not be bound either. Moreover, both Regulations will most likely be adopted by only eighteen Member States as enhanced cooperation instruments (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, Netherlands, Portugal, Slovenia, Spain and Sweden).[30] This was the best possible result that could be obtained. The

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[24] Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (Brussels IIbis) and Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ("Rome III Regulation").

[25] This issue is also covered by the Brussels IIbis Regulation.

[26] Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. The United Kingdom opted into the Maintenance Regulation (OJ 2009 L 149/73). As to Denmark, see above n. 22.

[27] Initially Rome III entered into force for fourteen Members States (Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain). Lithuania, Greece and most recently Estonia have joined subsequently. For the reasons for (not) joining Rome III see *Katharina Boele-Woelki*, For better or for worse: The Europeanization of International Divorce Law, Yearbook of Private International Law 2010 (2011) 17.

[28] Proposal for a Council Regulation on jurisdiction, applicable law and recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2016) 106 final.

[29] Proposal for a Council Regulation on jurisdiction, applicable law and recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2016) 107 final.

[30] Council Decision authorising enhanced cooperation in the area of jurisdiction, applic-

reasons why presumably no unanimous agreement has been reached will be explained later. Hence, the future holds further fragmentation of the unifying process due to the enhanced cooperation mechanism.

EU Regulations for cross-border relationships	Divorce	Parental responsibilities	Maintenance	Property relations spouses	Property relations registered partners
Which court decides?	27 MS	27 MS	28 MS	18 MS *(enhanced cooperation)*	18 MS *(enhanced cooperation)*
Which law applies?	17 MS *(enhanced cooperation)*	*(synchronisation)*	26 MS	18 MS *(enhanced cooperation)*	18 MS *(enhanced cooperation)*
Recognition and enforcement of decisions	27 MS	27 MS	28 MS	18 MS *(enhanced cooperation)*	18 MS *(enhanced cooperation)*
Co-operation of central authorities		27 MS	27 MS		

Meanwhile, in June 2016, a Regulation aimed at simplifying the circulation of public documents between all Member States was adopted. This Regulation covers public documents which are relevant to prove family life events. The list is very long and includes matters such as birth; a person being alive; death; name; marriage, including capacity to marry and marital status; divorce, legal separation or marriage annulment; registered partnership, including capacity to enter into a registered partnership and registered partnership status; dissolution of a registered partnership, legal separation or annulment of a registered partnership; parenthood; adoption; domicile or residence; nationality.[31] This Regulation will considerably facilitate the free movements of persons within the Union.

A few other family law issues, such as the law on surnames, formal relationships (marriage and registered partnerships), parentage, adoption and the protection of adults, have not yet been regulated by the European legislature. Many international conventions adopted by the Hague Conference on Private International Law (HC) and the Council of Europe (CE) still dominate these areas, but the pertinent question is: for how long? Monitoring the European law-making process for more than a decade reveals that slowly but surely the areas which are today regulated by either international

able law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, 28 April 2016, 8112/16 JUSTCIV 69.

[31] Included are also the absence of a criminal record and the right to vote and stand as a candidate in municipal elections and elections to the European Parliament.

conventions or the national rules of each Member State will be replaced by European rules in the long run. The European added value of an EU instrument which addresses the protection of vulnerable adults, for example, has been highly welcomed in a recent study of the European Parliament.[32] In the very near future, however, the European Commission's motto will most likely be "all hands on deck" since the Regulations regarding property between spouses and registered partners will enter into force in January 2019. In addition, the revision of the Brussels IIbis Regulation[33] will take place.

EU Regulations, CE and HC Conventions	Circulation of public documents	Names	Marriage / Registered partnership	Parentage	Child abduction	Adoption	Protection of Adults
Which court decides?					EU HC	HC	HC
Which law applies?		CE	CE HC	CE	HC	HC	HC
Recognition and enforcement of decisions	EU	CE	CE HC	CE	EU HC	HC	HC
Co-operation of central authorities	EU				EU HC	HC	HC

2. The European Courts' jurisprudence

Which role do the European Courts play when trying to answer the question of my contribution?

In cases of the violation of European citizens' rights and freedoms, either the Court of Justice of the European Union (ECJ, Luxembourg) or the European Court of Human Rights (ECHR, Strasbourg) ultimately decides. These European Courts have given impetus to the reform of substantive family law in Europe. If they have decided that a national rule violates international or European legal rules, national legislatures are bound to change

[32] *Joëlle Bergeron*, Protection of Vulnerable Adults, European Added Value Assessment Accompanying the European Parliament's Legislative Initiative Report, European Parliamentary Research Service 2016, <http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581388/EPRS_STU(2016)581388_EN.pdf>.

[33] Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411/2.

the law accordingly. In 2010, for example, the Strasbourg court decided that unmarried fathers have a right to obtain joint parental authority, even if the mother objects (her consent can be replaced by a court decision). Today, this has become part of the general standard, which applies in all European countries. However, it is not the task of the European Courts to develop an overall family law for Europe, since their judgments are based upon the cases that have been submitted by private parties. As a result, the shaping of family law in Europe through decisions of the European Courts is fragmentary. Moreover, there have been instances where both courts decided differently on the same subject (e.g. regarding transsexuality and child abduction). Nevertheless, in the last two decades the European supranational courts have taken decisions which have – despite continuing differences – stimulated the further convergence of substantive family law and provided guidance for the application of unified private international law.

In this context, Article 8 of the European Convention on Human Rights, which contains the right to respect for one's private and family life, has become, through decisions of the ECHR, the most significant building block in the approximation of family laws in Europe. Article 12 ECHR, which guarantees the right of women and men of marriageable age to marry and to establish a family, has been used in the fight for the recognition of same-sex relationships. Although the Court leaves a margin of appreciation for the forty-seven contracting states, a minimum standard has been established. This minimum standard has been adapted in line with fundamental changes in society, such as the equality between children born in and out of wedlock and the general acceptance of cohabitation.

Three recent comparative studies which combine human rights, legal theory, private international law, European law and family law are exemplary of how legal research in the field of family relations is today designed and carried out. They convincingly demonstrate that family law is no longer a strictly national discipline. It has been internationalised and Europeanised.

First, a long awaited comparative study on the impact of Article 8 of the European Convention on Human Rights on family forms and parenthood was published in 2015 by Andrea Büchler and Helen Keller.[34] The study saw a team of family law experts investigate the impact of the decisions of the ECHR on national law in eleven jurisdictions (Austria, Croatia, England and Wales, Germany, Greece, Hungary, the Netherlands, Poland, Spain, Sweden and Switzerland). The comparison of these individual analyses has revealed that the pace and direction of changes in national jurisdictions based on the Court's jurisprudence vary considerably. The examination of how the Court's case law has been received in the investigated countries has

[34] Family Forms and Parenthood, Theory and Practice of Article 8 ECHR in Europe, ed. by Andrea Büchler / Helen Keller (2015).

clearly shown that family law matters are still considered, to a very significant extent, as falling under national law, and that the relevant domestic regulations – according to the authors/editors – are still diverging considerably based on the choices made by national legislatures. In respect of the Court's jurisprudence, Büchler and Keller are critical. They criticise three aspects: (i) the Court's unpredictability; (ii) the expansion of the Convention's scope through reading many positive obligations into Article 8; and (iii) the failure in fulfilling its essential function.[35] The Court has ascribed a privileged status to marriage, whereas a genuinely functional approach would instead equally encompass all relationships which fulfil the task of a family.

Second, another interesting study which compares the jurisprudence of the two European courts with three national jurisdictions (Ireland, Germany and the Netherlands) was finalised in 2015 by Nelleke Koffeman from Leiden University.[36] It addresses so-called morally sensitive issues and cross-border movement in the EU. The basic ingredients of this research are two thematic case-studies – one on reproductive matters and one on legal recognition of same-sex relationships. Both European Courts have generally taken a very careful approach to such matters, leaving ample room for states to decide on these issues at the national level. Both the Luxemburg Court and the Strasburg Court have repeatedly emphasised in cases concerning these topics that their judgments applied only in the case at hand and that they were "not called upon", or that it was not their "task", to answer "general questions" or to "broach" ethical questions. According to the author it proves difficult to avoid the impression that these Courts have been eager to find a "way out" in such cases, in order to avoid addressing the respective thorny issues. In the two case-studies both European Courts have taken a specific approach that can be referred to as "in for a penny, in for a pound". It entails the idea that states may decide whether or not to grant a certain right or entitlement at national level, but once they do indeed grant that right or entitlement and thereby act within the scope of European law, they must do so in a way which meets European standards. In other words, the European Courts respect national decisions in these areas in their most fundamental and principled form, but national measures that give effect to such principled choices are then subjected to the courts' scrutiny as soon as they have a connection with European law. Finally, the wide margin of appreciation that the European Court of Human Rights generally accords in

[35] See *Andrea Büchler / Helen Keller*, Synthesis, in: Family Forms (n. 34) 501, 540, 564. See also *Walter Pintens*, Familienrecht und Rechtsvergleichung in der Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte, FamRZ 2016, 341–351.

[36] *Nelleke Koffeman*, Morally Sensitive Issues and Cross-Border Movement in the EU – The Cases of Reproductive Matters and Legal Recognition of Same-sex Relationships (2015).

these matters has resulted in an even wider margin being accorded, which also fits in with the picture of a careful or even evasive Court.

Finally, the study of Keiva Carr of the European University Institute in Florence in 2014 should be mentioned.[37] She has investigated the principal hypothesis that the interpretation of European Union law, both primary and secondary law, is having a deconstructive effect on national family law and is reconstructing it via the European Union legal order. This can be broken down into two issues: Has a deconstruction of traditional family law taken place? And has the family been subject to a reconstruction at the EU level? Both questions are carefully answered in the affirmative. Undoubtedly, her research question is intriguing, ambitious and extremely challenging. It is also original for Carr's attempt to understand the development of family law regulations in Europe by simultaneously analysing labour and employment law. This has shed new light on the reasons why family law in different areas has gradually developed into what we are facing today. Inevitably, the two European Courts have directed the way forward. The author has questioned the change in discourse at the EU level from one being based on a market logic to a more socially inclined grammar. In this vein, the fundamental rights perspective has been examined, particularly considering the influence of the European Human Rights Convention and the Charter of Fundamental Rights of the European Union. Following on from this, the effects of the EU Citizenship provisions have been investigated and how this move, to what can arguably be conceived as a European identity-building project, could potentially reconceptualise family law in Europe.[38]

These three studies not only perfectly illustrate the kind of questions which are currently posed in family law but also display how intra-disciplinary legal research is undertaken. The authors provide different answers to partly the same questions, whereby one is more cautious or more critical than the other. It is reassuring to notice that family law – like many other areas of law – has been studied from and in combination with various legal fields in order to detect and determine interrelated effects.

3. The CEFL and its Principles

I would like to turn to other comparative research in the field of family law. After existing for more than seventeen years, the work of the Commission on European Family Law can be assumed to be known by many. The

[37] *Keiva Carr*, Deconstructing and Reconstructing Family Law through the European Legal Order, Doctoral Thesis European University Institute 2014, available at <http://cadmus.eui.eu/handle/1814/32811>.

[38] See The Right to Family Life in the European Union, ed. by Maribel González Pascual / Aida Torres Pérez (2017).

task of this academic commission is comparative research in the field of family and inheritance law in the European countries with the aim of creating common principles that can be used as a European standard or model. The frequently raised argument that family law in Europe does not lend itself to harmonisation was one of the motivations to examine whether this statement actually holds up. In many areas, mainly through international legislation, there is much similarity or convergence of family law regulations. On the other hand, there are also major differences. In formulating common principles, it should therefore be established which values and standards serve as a framework.[39] It is also important to know whether the observed differences could nevertheless be reconciled, because they can be qualified as minimal or because the developments point in the same direction. A striking example of developments in the same direction is the increasing liberalisation of divorce laws throughout Europe.

Therefore, in the process of harmonising family law in Europe, the CEFL is playing a considerable role. Since I am still involved in this project, evidence by others should be provided. First of all, the CEFL Principles of European Family Law, which encompass divorce, maintenance between former spouses, parental responsibilities, property relations between spouses and in the future de-facto unions, have been addressed in legal literature.[40]

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[39] *Katharina Boele-Woelki*, Ziel- und Wertvorstellungen der CEFL in ihren Prinzipien zum europäischen Familienrecht, in: Liber Amicorum Walter Pintens (2012) 167–186.

[40] *Triin Göttig / Liis Hallik / Triin Uusen-Nacke*, Legal Regulation of Divorce in Estonia: Comparison with the Principles of European Family Law as Regards Divorce and Maintenance of a Divorced Spouse (2006) 244; *Yong Wu*, The New Trend in European Family Law Harmonization – from the Perspective of CEFL, [Chinese] Contemporary Law Review 2008/4; *Frederik Swennen*, Het nieuwe Belgische echtscheidingsrecht en de CEFL-beginselen inzake echtscheiding en alimentatie tussen gewezen echtgenoten, in: Actuele ontwikkelingen in het familierecht (2007) 43; *Anu Pylkkänen*, Liberal Family Law in the Making: Nordic and European Harmonisation, Feminist Legal Studies 15 (2007) 289–306; *Christina Gyldenløve Jeppesen de Boer*, Joint Parental Authority: A Comparative Legal Study on the Continuation of Joint Parental Authority after Divorce and the Breakup of a Relationship in Dutch and Danish Law and the CEFL Principles (2008); *Robert Fucik*, Das Kindschaftsrecht des ABGB und die Prinzipien zum europäischen Familienrecht betreffend elterliche Verantwortung, in: Festschrift 200 Jahre ABGB, Bd. II (2011) 1685–1702; *Andrina Hayden*, Shared Custody: A Comparative Study of the Position in Spain and England, in: InDret, Revista para el Análisis del Derecho 1/2011, <http://www.indret.com/pdf/795_en.pdf>; *Zdeňka Králíčková*, Limits of Europeanisation of Czech Family Law within the Recodification of the Czech Civil Code, in: Principles, Rules and Limits of Europeanisation of National Legal System, ed. by Filip Křepelka / Rajko Knaz / Markéta Selucká (2011) 189–206; *Rebecca Volkmer*, Die elterliche Sorge bei nichtehelichen Kindern – insbesondere die Rechtsstellung des nichtehelichen Vaters – und die Prinzipien der Commission on European Family Law (2011); *Philipp Beuermann*, Der nacheheliche Unterhalt: Grundlagen und Ausgestaltung im deutschen Unterhaltsrecht und in den Prinzipien der Commission on European Family Law (CEFL) (2013); *Madelene de Jong / Walter Pintens*, Default Matrimonial Property Regimes and the Principles of European Family Law – A European-South African Comparison (part 1), Tydskrif vir die Suid-Afrikaanse Reg 2015, 363–378; *Pablo Quinzá Redondo*, Spanish Matrimonial Property Regimes

They are compared with national systems, and quite often the various authors conclude that the CEFL model provides better solutions than the national family law system. However, it is up to national legislatures whether and how to take action. A few have already been inspired by the models proposed by the CEFL.[41] For example, in 2008 the Portuguese legislature took advantage of the work of the CEFL in modernising the law of divorce and parental authority. As a result, some of the Portuguese rules are identical to the CEFL Principles.[42] Another example of CEFL's impact has been in the development of Norwegian law. The Norwegian Child Law Commission 2008 proposed alternating residence and referred inter alia to the Principles Regarding Parental Responsibilities and in particular to Principle 3:20 as part of its justification.[43] The same holds true for the new Czech Civil Code which became effective on 1 January 2014. The Czech rules on parental responsibilities are to a large extent designed according to the CEFL Principles on Parental Responsibilities.[44] Finally, the reform of Danish matrimonial property law should be mentioned[45] and also the Dutch Act of 24 April 2017 on the amendment of the universal community of property into a restricted community of property.[46] The explanatory report to the Dutch amendments contains many references to the CEFL regime of community of acquisitions.[47] Not only do these examples illustrate that the final results are considered to be in accordance with the scientific standard for reliable and comprehensive comparative research; they also show that the Principles are more than merely academic hypotheses, functioning instead as guide-

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and CEFL Principles Regarding Property Relations between Spouses, European Journal of Law Reform 2015, 329–340; *Nina Dethloff / Anja Timmermann*, CEFL-Prinzipien zu den vermögensrechtlichen Beziehungen zwischen Ehegatten, djbZ 19 (2016) 55–58.

[41] *Katharina Boele-Woelki*, Zwischen Konvergenz und Divergenz: Die CEFL-Prinzipien zum europäischen Familienrecht, RabelsZ 73 (2009) 241–268; *Walter Pintens*, Towards a Ius Commune in European Family and Succession Law?, A Plea for more Harmonisation through Comparative Law (2012).

[42] *Guillerme De Oliveira*, Changes Going on in Portuguese Family Law, FamRZ 2008, 1712–1714.

[43] Norges offentlige utredninger 2008:9 82. On 9 April 2010, a provision on alternating residence was enacted, § 36 Children Act. See *Tone Sverdrup*, Norway: Equal Parenthood: Recent Reforms in Child Custody Cases, in: The International Survey of Family Law (2011) 303–312.

[44] *Zdeňka Králíčková*, New Family Law in the Czech Republic: Back to Traditions and Towards Modern Trends, in: The International Survey of Family Law (2014) 71–95.

[45] See Ægtefællers Økonomiske Forhold, Betænkning afgivet af Retsvirkningslovsudvalget, Betænkning Ministeriet for Børn, Ligestilling, Integration og Sociale Forhold 2015 Nr. 1552, 154, 244, 249.

[46] Wet tot wijziging van Boek 1 van het Burgerlijk Wetboek en de Faillissementswet teneinde de omvang van de wettelijk gemeenschap van goederen te beperken (Staatsblad 2017, 177), which will enter into force on 1 January 2018.

[47] Kamerstukken II 2013–2014, 33 987.

lines to be "filtered" into national – or European – legislation and becoming black-letter rules.[48]

The question arises: Why would we need more harmonised family law in Europe? Are the unified private international law rules not sufficient? Why should we do more?

In her article on the Europeanisation of law as exemplified by family law, Maarit Jänterä-Jareborg clarifies the need for more harmonisation.[49] She convincingly illustrates that the unification of private international law (jurisdiction, applicable law and the recognition and enforcement of foreign decisions) in Europe[50] has a limited impact on European integration since through this process the substantive rules of the national jurisdictions remain untouched. The differences between the various substantive family law systems continue to exist. In some areas these differences are significant and might have unforeseen consequences for international families and couples. In Malta or Ireland for example, divorce is only possible after four years of separation whereas in Spain it can be demanded by one spouse at any time provided the marriage has lasted for at least three months. The spouses need to choose the most advantageous applicable law, which is not a problem if, first, they are allowed to do so and, second, if the couple is in agreement. If they are not, each party can use one of the jurisdictional grounds found in Article 3 of the Brussels IIbis Regulation for starting the divorce proceedings, whereby different considerations may play a role. Is the most advantageous law the one that allows a quick divorce or the law which stipulates very strict requirements so that the divorce can be blocked for a certain period of time? Moreover, the financial consequences of divorce can differ enormously depending on the applicable law. Under German law, lifelong maintenance can potentially be granted, whereas in Finland a maintenance claim will generally not be successful. A quick petition to the courts ensures that any court thereafter will have to stay proceedings until the first court has established whether it actually has jurisdiction. The *lis pendens* provision[51] snaps like a mousetrap.[52] Fewer differences between the substantive family laws would considerably simplify the decisions that need to be taken by international couples when they cannot agree between themselves. That is why the CEFL is aiming to contribute to the further harmonisation of the family law systems in Europe.

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[48] *Jänterä-Jareborg*, JFT 2010, 504.

[49] *Jänterä-Jareborg*, JFT 2010, 504.

[50] *Cristina González Beilfuss*, The Unification of Private International Law in Europe: A Success Story?, in: The Future of Family Property in Europe, ed. by Katharina Boele-Woelki / Joanna Miles / Jens M. Scherpe (2011) 327–340.

[51] Article 19(1) Brussels IIbis Regulation.

[52] *Jänterä-Jareborg*, JFT 2010, 504, 505.

4. European conferences and research projects on family law

What about the legal discourse in Europe at international conferences, and what kind of topics are addressed in research projects? To date, the CEFL is not the only entity that has organised multiple international conferences on family law in Europe. The Academy of European Law in Trier has also been engaged in European family law conferences since 2002. Scholars, judges, lawyers and notaries from all European countries are meeting on an annual basis to discuss recent developments in the field of substantive family law and private international law. These conferences have become an institution since they enable the necessary and fruitful exchange of knowledge and experience. Moreover, in recent years the European Commission has funded several European research projects which were all finalised with conferences and publications. One of the first was the project "What international family law is 'necessary for the proper functioning of the internal market'?", initiated by Antwerp University colleagues Johan Meeusen, Marta Pertegás, Gert Straetmans and Frederik Swennen. Currently the projects "Empowering European Families – Towards more Party Autonomy in European Family and Succession Law", undertaken by Christiane Wendehorst from Vienna and Wendy Schrama from Utrecht, and "Planning the Future of Cross-border Families: A Path through Coordination", directed by Ilaria Viarengo from Milan, are under way. In addition, two studies which focus on migration and children and more generally on the interplay of migration law and private international law have recently been finalised by a group of Belgian, Dutch, French, German and Italian legal scholars.[53]

IV. Ideals, moral concepts, values, standards and their evolution over time

One of the features of family law is that it concerns everyone and therefore everyone has an opinion on it. In-depth and specialised legal knowledge, such as in tax law or insolvency law, is not required when discussing a general problem. Should same-sex couples be allowed to adopt? Should the period of separation required for divorce be shortened or even abolished?

[53] Both studies were requested by the European Parliament's Committee on Legal Affairs and commissioned, overseen and published by the Policy Department for Citizens' Rights and Constitutional Affairs. See *Sabine Corneloup / Bettina Heiderhoff et al.*, Private International Law in a Context of Increasing International Mobility: Challenges and Potential, PE 583.157, June 2017, <www.europarl.europa.eu/RegData/etudes/STUD/2017/583157/IPOL_STU(2017)583157_EN.pdf>; *idem*, Children on the Move: A Private International Law Perspective, PE 583.158, June 2017, <www.europarl.europa.eu/RegData/etudes/STUD/2017/583158/IPOL_STU(2017)583158_EN.pdf>.

Should only a judge have the competence to pronounce a divorce? Should children be heard in proceedings regarding the divorce of their parents? Should there be shared residence resulting in the children living with both their parents? Should the spouse/partner who cares for the children be entitled to maintenance in the event of divorce/separation, and if so, for how long? The number of topics is immense and reflects the diversity and complexity of family relations. Everyone's ability to discuss such matters is obvious; everyone has some form of family relationship, most people enter into intimate relationships with other people at some point in their lives, some separate and find a new partner, many have children and support these children and even the children of their new partner. Yet personal experiences and preferences should not prevent one from looking at the bigger picture.

Family relations are lived within the boundaries and possibilities that the law – and particularly human rights law – permits. Those opposing the harmonisation or unification of family law in Europe often rely on the rationale that family laws are embedded in the unique and cherished national cultural heritages of particular countries. Governing the interface between the social and private spheres, family law is presented as "deeply rooted in peoples' history, cultures, mentalities and values".[54] However, there exists a strong case against the cultural constraints argument. Although widely (and rather uncritically) adopted, it has not been well-scrutinised. Although there are, indeed, a number of national peculiarities, their influence is insignificant compared to the interplay between pan-European ideological trends. The reform of divorce laws that has taken place during the past century exemplifies how the influence of religion and culture over the law has subsided. These elements have been replaced by unpredictable and often rapidly changing public attitudes, which interact with an intensely political process.[55] During the last decade, it has become apparent that when left-leaning parties gain key roles in government or a majority in parliament, reforms liberalising family law tend to follow soon after. This has occurred in Belgium, Denmark, Germany, Finland, France, Malta, the Netherlands, Norway, Portugal, Spain and Sweden. It clearly demonstrates that political influence has become the main determinant of the evolution of national family laws.[56] The recent evolution of family laws in Europe and their underlying reasoning provides evidence that

> "the cultural constraints argument is beyond redemption. Its core assumptions cannot be upheld. Family law is not so much embedded in unique national cul-

[54] *Marie-Thérèse Meulders-Klein*, Towards a European Civil Code (n. 9) 105.

[55] *Stephen Cretney*, Breaking the Shackles of Culture and Religion in the Field of Divorce?, in: Common Core and Better Law in European Family Law, ed. by Katharina Boele-Woelki (2005) 3–14.

[56] *David Bradley*, Family Law, in: Elgar Encyclopedia of Comparative Law[2], ed. by Jan M. Smits (2012) 314–338.

ture and history, but rather in a pan-European culture and history. Pertinent national family laws are determined by political, rather than cultural factors, and these are fluid."[57]

Moreover, societal change which cannot necessarily be mapped accurately with comparative legal tools also influences our values.[58] While cohabitation without marriage was frowned upon half a century ago, it is now almost universally accepted and thus is one of the issues needing family law regulation. Monogamy remains the basis for the regulation of relationships, but who would have thought only thirty years ago that marriage would be opened up to same-sex couples?[59] Today this is reality in twelve European Member States, and others will follow.

Another area where major changes have taken place is shared parenting after divorce/separation. A quarter of a century ago it was unquestioned that the child would reside with only one parent having sole parental responsibility, to be determined by the court. Today parents generally share joint responsibility, which in several jurisdictions obliges the court to examine whether shared residence is an option in the event of the separation of the parents. The child has the right to be cared for by both parents, and the prevailing opinion in those jurisdictions is that shared residence is the best way to give effect to that right.[60]

The recent changes in family law in Europe are based on several values, concepts, ideals and standards such as the equality of the sexes, the best interests and welfare of the child, private autonomy, solidarity among spouses and partners, and the protection of the family home as well as a fair share of the matrimonial property for each spouse. The content of these general values is hardly surprising; they are the starting point designated by international and European treaties, conventions and agreements, and they are binding for every legislature. Thus the equality of the sexes and the mandate of non-discrimination are to be found in the European Convention on Human Rights, the European Charter on Fundamental Rights, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[61] and the UN Convention on the Rights of the Child (CRC), with the latter defining the concept of the best interests of the child. In the

[57] *Masha Antokolskaia*, Family Law and National Culture: Arguing against the Cultural Constraints Argument, Utrecht Law Review 4 (2008) 25–34, 34, available at <www.utrechtlawreview.org>.

[58] *Dieter Martiny*, Europäische Vielfalt – Paare, Kulturen und das Recht, Forum Familienrecht 2011, 345–355.

[59] *Caroline Sörgjerd*, Reconstructing Marriage: The Legal Status of Relationships in a Changing Society (2012).

[60] *Natalie Nikolina*, The Influence of International Law on the Issue of Co-Parenting – Emerging Trends in International and European Instruments, Utrecht Law Review 8 (2012) 122–144, available at <www.utrechtlawreview.org>.

[61] See the comprehensive study: Women's Human Rights and the Elimination of Dis-

future, these common values will stimulate further family reforms, whereby more convergence towards less state intervention and more private autonomy will take place. The last decades have shown that, once a "progressive" family law has been adopted, a return to a "conservative" system does not take place. Family law reforms in Europe move towards liberalising the rules.

Regarding cross-border family relationships, the guarantees relating to the free movement of persons contained in the Treaty on the Functioning of the European Union (Articles 21, 45, 49) and the free movement of workers and citizenship Directives are and will continue to be of paramount importance. They may not be restricted unless subject to justification. With regard to the scale of the hindrance required, the European Court of Justice has adopted a considerably broad interpretation.[62] For example, in the case of *Grunkin and Paul*,[63] the German authorities' refusal to register a double-barrelled surname for a child born to German parents in Denmark was held, in light of the resulting inconveniences, to sufficiently constitute an obstacle to free movement. In addition, significantly, the European Court of Justice has expressly recognised that the right to free movement should be interpreted in light of Article 8 of the European Convention on Human Rights.[64] Consequently, the acquisition or loss of the legal effects of family relationships that results from crossing borders should be recognised as an impediment to exercising one's right to free movement.

V. Multicultural challenges

Another issue deserves our attention, namely the relationship between our current family laws in Europe and the family laws, cultures and religions which people of other nations have brought to Europe, mainly through immigration. Many questions have arisen: How do the various systems cope with each other? Can they be reconciled or accommodated to a certain extent, or should no one system be superior to any other? Would it be possible to apply religious rules instead of our state rules? During the last two decades these kind of questions have been asked over and over again.[65] Both legislatures and courts have been equally challenged to decide and regulate the various issues, such as the recognition or non-recognition of polygamous

crimination / Les droits des femmes et l'élimination de la discrimination, ed. by Maarit Jänterä-Jareborg / Hélène Tigroudja (2016).

[62] ECJ 13 December 1989 – Case C-49/89 (*Corsica Ferries*) [1989] ECR 4453.

[63] ECJ 14 October 2008 – Case C-353/06 (*Grunkin and Paul*) [2008] ECR I-7639.

[64] ECJ 11 July 2002 – Case C-60/00 (*Carpenter*) [2002] ECR I-6279.

[65] See *Ralf Michaels*, Religiöse Rechte und postsäkulare Rechtsvergleichung, in: Zukunftsperspektiven der Rechtsvergleichung, ed. by Reinhard Zimmermann (2016) 39–102.

marriages and child marriages. Both types of marriages are not in accordance with the European standards of family relations; however, generally not recognising these relationships in our jurisdictions does not solve all the problems. Consider for example the status of children born into a polygamous relationship.

Marital captivity constitutes another pressing problem. What is meant by this term? People marry worldwide, within or across borders, either civilly or religiously, or based on both forms of marriage. Obtaining a civil divorce in Europe is usually not too difficult, but the civil divorce will generally not end a religious marriage. Moreover, if spouses have celebrated only a religious marriage, can this be dissolved or annulled by a state court in Europe? Obtaining the dissolution of a religious marriage can be complicated. Whenever someone, usually a woman, is unable to terminate her religious marriage and is therefore "trapped" in that marriage against her will, that person is in a situation of marital captivity. These cases are often characterised by cross-border elements such as the nationality of the persons involved or the place of the marriage celebration. If one of the spouses in a religious marriage does not cooperate in dissolving it, even though his or her action is required according to his/her national law, the other might bring a tort action against the non-cooperating spouse. In the Netherlands, for instance, the courts have responded to these cases by imposing financial pressure in the form of awards for damages.[66] Under the title "Marital Captivity: Bridging the Gap between Religion and Law", extensive research is currently being undertaken at the University of Maastricht. The project has been funded by the Dutch Organisation of Science and Research.[67]

What about children, who are surrounded by values, belief systems, religion, tradition and customs which they have not played a part in creating? They are subject to the values of both our societies as well as those of their parents and have therefore been characterised as "sacrificial lambs".[68] In a recent book, edited by Maarit Jänterä-Jareborg, the child at the intersections of society, family, faith and culture has been explored from an interdisciplinary and comparative perspective. Child marriage is one of the situations where a conflict arises between our European values and norms, and what the child's family regards as in the child's best interest. To our understanding

[66] *Pauline Kruiniger*, Huwelijkse gevangenschap: twee oplossingen in internationaal privaatrechtelijk perspectief, NIPR 2016, 444; *Frans van der Velden*, Enchained Marriages: Is there a Way out?, in: The Citizen in European Private Law: Norm-Setting, Enforcement and Choice, ed. by Caroline Cauffman / Jan Smits (2016) 133–140.

[67] See <www.maastrichtuniversity.nl/about-um/faculties/law/departments/private-law/projects/marital-captivity-bridging-gap-between>.

[68] *Esin Örücü*, The Child as the "Sacrificial Lamb" to Society, Family, Religion and Culture, A Comment, in: The Child's Interests in Conflict, The Intersections between Society, Family, Faith, and Culture, ed. by Maarit Jänterä-Jareborg (2016) 185 f.

a child marriage is wrong, it robs far too many children of their chance for a life of their own choosing, we need to protect children against it and society should be more active in trying to prevent it.[69] From our point of view the child is exposed to significant harm or risks of being harmed.[70] Our actions are based on state law.[71] According to the parents' religion or beliefs, however, the child is harmed or risks being harmed if the parents' outlook on the issue is not respected, be it on underage marriage[72] or other issues, such as the shaping of the child's cultural or religious identity or even the circumcision of a male child. In Europe, regarding the latter, two contrasting interpretations of the child's best interest are to be distinguished: on the one hand, an approach that links these interests to the incorporation of the child within the religion, tradition and group to which his parents or one of them belong and, on the other, a more individual conception of the child's best interest, emphasising the boy's right to physical integrity and endowing him with the right to make his own decision once he has attained the necessary maturity to do so.[73]

Whichever view one may take, reconciling the conflicting interests is a necessary part of the discussions in the Europe of today. It also touches upon family law when taking decisions on parental responsibilities, the child's (change of) residence or the child's return in case of abduction.

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[69] *Göran Lambertz*, Child Marriages and the Law – With Special Reference to Swedish Developments, in: The Child's Interests in Conflict (n. 68) 85–110, 86.

[70] *Maarit Jänterä-Jareborg*, The Child in the Intersections between Society, Family, Faith, and Culture, in: The Child's Interests in Conflict (n. 68) 1–30.

[71] In Germany, the Gesetz zur Bekämpfung von Kinderehen, BGBl. 2017 I 2429 entered into force on 22 July 2017. The centerpiece of the new regulation is the automatic non-recognition of marriages concluded outside of Germany by persons under the age of sixteen. Marriages concluded by persons between the ages of sixteen and eighteen shall only be recognized if severe negative consequences were to occur otherwise. Critical *Dagmar Coester-Waltjen*, Kinderehen – Neue Sonderanknüpfungen im EGBGB, IPRax 2017, 429–436; *Michael Coester*, Die rechtliche Behandlung von im Ausland geschlossenen Kinderehen, StAZ 2016, 257–262; *Dieter Schwab*, Die verbotene Kinderehe, FamRZ 2017, 1369–1374 and *Rainer Hüßtege*, Das Verbot der Kinderehe nach neuem Recht aus kollisionsrechtlicher Sicht, FamRZ 2017, 1374–1380.

[72] *Susan Rutten / Esther van Eijk et al.*, Gewoon getrouwd, Een onderzoek naar kindhuwelijken en religieuze huwelijken in Nederland (2015), available at <https://www.rijksoverheid.nl/documenten/rapporten/2016/02/11/gewoon-getrouwd-onderzoek-naar-kindhuwelijken-en-religieuze-huwelijken-in-nederland>.

[73] *Marie-Claire Foblets*, The Body as Identity Marker, Circumcision of Boys Caught between Contrasting Views on the Best Interests of the Child, in: The Child's Interests in Conflict (n. 68) 125–162, 126.

VI. The recognition of same-sex relationships: double-sided effects

In European jurisdictions, marriage as both a legal and social institution has undergone significant changes, particularly in the last few decades. Divorce reforms, the rise of prenuptial agreements and the recognition of same-sex relationships have resulted in a recent evolution of the otherwise centuries-unchanged institution.[74] It has dramatically changed what today constitutes a family. Families of today consist of a father and a mother and children, but they can also consist of two dads or two moms and their children.

Particularly, the legal recognition of same-sex relationships is having double-sided effects within the European Union. On the one side, the introduction of a new institution for same-sex partners and subsequently the opening of marriage has harmonised the family law systems to a very large extent.

EU Member States	Registered partnership	Marriage
Denmark	1989–2012	2012
Sweden	1993–2009	2009
Netherlands	1998	2001
France	1999	2013
Belgium	2000	2003
Germany	2001–2017	2017
Finland	2002	2017
Luxemburg	2004	2015
Spain	1998 *(regionally)*	2005
England and Wales, Scotland	2005	2014
Slovenia	2006	
Czechia	2006	
Hungary	2009	
Portugal		2010
Austria	2010	
Ireland	2011	2015
Malta	2014	
Croatia	2014	

[74] *Nicola Barker*, The Evolution of Marriage and Relationship Recognition, Background Paper prepared for UN Women, Families in a Changing World: Public Action for Women's Rights' Progress of the World's Women 2017–2018, Kent Law School, July 2016, available at <https://kar.kent.ac.uk/57606/>.

Cyprus	2015
Estonia	2016
Italy	2016

It all started in Denmark in 1989 with the Registered Partnership Act. Many countries have followed suit, with Germany becoming the most recent country where, since 2017, same-sex couples can enter into marriage.[75] Within the European Union different paths have been followed and the legal landscape is still changing. Four countries – Portugal, Denmark, Sweden and Germany – only offer marriage. In eleven countries both marriage and registered partnership or a civil union is possible, whereas in three countries – Belgium, France and the Netherlands – both institutions are accessible to both heterosexual and homosexual couples. It is a colourful picture which is to be complemented by six countries which, due to constitutional constraints and political reasons, are neither willing to provide a legal status for same-sex couples nor recognise a status which such a couple may have obtained abroad. These countries are Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia.[76] Their position has caused, on the other side, a further fragmentation in the process of unifying the private international law rules in family matters. When the Rome III Regulation was drafted, the participating countries (Bulgaria, Latvia, Lithuania and Romania)[77] that do not recognise same-sex marriages[78] were already accommodated. If a same-sex couple of different nationalities marries in one of the twelve Member States where this is possible and later moves to a country where their status as a married couple is not recognised, they can only seize the court of their last habitual residence if they want to obtain a divorce, pursuant to Article 3 of the Brussels IIbis Regulation. This court must first decide whether the marriage is to be recognised, otherwise a divorce cannot be granted. This preliminary question about the existence, validity or recognition of a marriage is *explicitly excluded* from the scope of the Rome III Regulation.[79] This means that the preliminary question is usually answered independently from the main question. Either international or national recognition rules are

[75] In Germany, the Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts, BGBl. 2017 I 2787 entered into force on October 2017. From that date it will no longer be possible for same-sex partners to conclude an *eingetragene Lebenspartnerschaft*; see *Dieter Schwab*, Eheschließung für Personen gleichen Geschlechts, FamRZ 2017, 1284–1289.

[76] *Kees Waaldijk*, More and More Together: Legal Family Formats for Same-sex and Different-sex Couples in European Countries, Families and Societies Working Paper Series 75 (2017), <http://www.familiesandsocieties.eu/wp-content/uploads/2017/04/WorkingPaper75.pdf>.

[77] Poland and Slovakia are outside the Rome III Member States.

[78] The dissolution of registered partnerships is not covered by Rome III.

[79] Article 1 section 2 under b.

consulted. If, according to these rules, the marriage is not recognised, then there cannot be a divorce. Surprisingly, Article 13 of the Rome III Regulation deals with the preliminary question. It determines that the Regulation does not oblige a court to pronounce a divorce when its law does not deem the marriage to be valid. Apparently, this superfluous provision was drafted in order to address the concerns of those Member States that do not want to recognise same-sex marriages. However, this provision violates the principle of the free movement of citizens, the right to divorce, the right of access to justice and proves that Rome III fortifies traditional family law values.

As a result, same-sex couples requesting a divorce in a Member State other than their country of matrimony will receive one only once a choice of forum and a *forum necessitatis* are introduced. However, so far these *fora* have not been included in the Recast of Brussels IIbis,[80] whereas the selection of the competent court in divorce proceedings was generally acknowledged many years ago in one of the first drafts. The drafters of the Brussels IIbis Recast focussed on parental responsibilities and left the provisions on divorce untouched, probably because the issue of same-sex marriages would have hindered the next and necessary step, namely to improve the legal position of children.

A clarifying word on the application of the family law Regulations which address marriage seems appropriate: Generally speaking for countries which make no distinction between different-sex and same-sex couples, it is not possible to distinguish between the one and the other.[81] In none of the Regulations was the term marriage restricted to a man and a woman. It is left to national law.[82] This is a good decision since countries which want to use the broader meaning of marriage are not hindered by others which have restricted this institution to different-sex couples. In turn, they are not bound to apply the provisions of the Regulation to couples which they do not recognise as a married couple. Therefore, from a national point of view

[80] Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411/2; *Marc-Philipp Weller*, Die Reform der EuEheVO, IPRax 2017, 222–231.

[81] The German private international law rules make a distinction between different and same-sex marriages. The latter fall under the rule for (recognition of) registered partnerships (Article 17b para. 4 EGBGB) whereas German substantive law makes no difference between both types of marriages and institutionally has abandoned registered partnerships from the entry into force of the Act on Same-Sex Marriages. See *Peter Mankowski*, Das Gesetz über die "Ehe für alle", seine Folgen und sein europäisches Umfeld im internationalen Privat- und Prozessrecht, IPRax 2017, 541–551.

[82] See on the discussion: *Katja Dengel*, Die europäische Vereinheitlichung des Internationalen Ehegüterrechts und des Internationalen Güterrechts für eingetragene Partnerschaften (2014) 81–100. For the current proposal in the field of matrimonial property law she prefers to define "marriage" autonomously: "Eine Ehe ist eine stabile Partnerschaft zwischen zwei Personen mit eherechtlichem Status" (100).

– if the respective legislature has decided accordingly – marriage includes both forms, and the Regulations may be applied by the respective national courts. This does not apply to the institution of registered partnerships or civil unions, which might have the same or similar effects as marriage, but which are to be considered as a separate institution distinct from marriage.

Finally, why did the matrimonial property Regulation and the property between partners Regulations end up in the enhanced cooperation process. Apparently, because countries that do not recognise same-sex relationships would otherwise have been obliged to apply the private international law rules (jurisdiction, applicable law and recognition and enforcement) to these couples.[83] As has been indicated earlier, this is causing a further fragmentation of the unified private international law system. However, things might change. First, the conservative political climate can also change in those countries which are currently objecting to any recognition of same-sex couples. Moreover, a decision of the European Court of Justice can alter the situation. Expectedly, the guaranteed free movement of persons would be one of the main arguments in favour of recognising the legal status of same-sex couples in all Member States.

VII. A brief outlook for the near future

I have been sketching the recent past and the present. It is now time to look into the near future and answer the main question: what family law for Europe? In doing so, I would like to address a list of ten points.

1. My first point concerns combined comparative research in the field of family relations since scholars from the areas of economics, sociology and psychology are studying the same real-life events as family lawyers, such as partnering, parenting, separation/divorce, blended families and care for children and the elderly.[84] These scholars should know that the framework in which the family relation functions is to a large extent determined by family law rules, which often have a mandatory character. In turn the legal scholar should be careful with assumptions for which no evidenced-based proof can be provided. Evidently, family relations are not only extremely suitable for, but require and deserve multidisciplinary research cooperation. The trend towards more comparative family law, on the one side, and more

[83] See Die Europäischen Güterrechtsverordnungen, Tagungsband, hrsg. von Anatol Dutta/Johannes Weber (2017); *Dieter Martiny*, Die Anknüpfung güterrechtlicher Angelegenheiten nach den Europäischen Güterrechtsverordnungen, Zeitschrift für die gesamte Privatrechtswissenschaft 2017, 1–33, 4.

[84] See *Katharina Boele-Woelki*, Combined Comparative Research in the Field of Family Relations: Some Reflections from the Legal Perspective, Journal of Family Research/Zeitschrift für Familienforschung, Special Issue no. 10 (2015) 239–256.

multidisciplinary research into family relations, on the other, has resulted in studies which combine the one with the other. Restricted comparative research regarding family relations is increasingly undertaken. This kind of research consists of comparative legal research and research into the same problem from another or various other disciplines conducted in *only one of the countries* that have been selected for the comparative legal study. However, synchronised comparative research should be our ultimate goal. This approach is more demanding. It consists of comparative legal research and research into the same problem from another or various other disciplines which is conducted *in the same countries* that have been selected for the comparative legal study. This can only be achieved through cooperation between the various disciplines, thereby resulting in large European and international research teams. This kind of Union-wide or global cooperation has been encouraged by the 7th Framework programme of the EU and the programme Horizon 2020. In the field of family relations, it is the future.

2. My next points address specific areas of family law. How will they develop? I continue with the increasing and to my mind necessary recognition of same-sex relationships, which is a fascinating phenomenon. It has caused intense debates about new family forms. Expectedly, within Europe the number of jurisdictions which allow same-sex couples to obtain a legal status as registered partners or spouses will increase. Within the Union the right to freely move within the Member States, Article 8 of the European Convention on Human Rights and the European Charter on Fundamental Rights are guaranteeing equality of all couples. Already today, we can speak of the right to relate.

3. In a few European jurisdictions the next steps towards putting same-sex couples into the same legal position as different-sex couples as regards children have already been taken. They may adopt children and in some jurisdictions the co-mother who is a spouse or registered partner of the birth mother is considered the second legal parent if the child is born into such a relationship. More jurisdictions will follow.

4. Medical advancement poses new questions, for example, whether a child can have more than two legal parents and whether multiple parenthood can be based upon an agreement between, for instance, a lesbian couple and a donor. Apart from this situation, parentage law is challenged to provide solutions not only for legal but also for biological, intended and social parenthood.[85] New differentiations and concepts will be established.

5. For about a decade, surrogate motherhood has been on the agenda. So far, the lack of harmonised substantive law rules is causing difficulties in

[85] See the vision for the future on legal parentage, parental responsibilities and surrogacy of the Dutch Government Committee on the Reassessment of Parenthood (Staatscommissie Herijking Ouderschap) in its report on: Child and Parents in the 21st century (2016).

obtaining a global or at least a joint European approach towards the cross-border surrogacies which are allowed in Asia, in some jurisdictions of the United States and in some Eastern European countries. Courts in different European countries have been challenged to decide on whether surrogacy agreements or the status as legal parents which commissioning couples have obtained abroad should be recognised. In the best interest of the children born out of surrogacy, many courts have rightly decided that they should neither be parentless nor stateless. A common stance is becoming visible and this trend will continue.

6. The consequences of divorce and separation for children will continue to demand our attention. Alternating the residence of children after divorce and the relocation of children with one of the parents within or outside the home jurisdiction are two relatively new issues which due to the recognition of joint parental responsibilities after divorce are being intensively discussed all over Europe. Also in this field, the comparative perspective provides fruitful information.[86] In particular the courts have formed the law. Since these parent-child disputes require a case-by-case analysis, it is doubtful whether legislatures will adopt hard and fast rules for the (change of) residence of the child after his or her parents have separated or divorced. An alternative to court proceedings might be provided by "parental coordination" as it is called in the U.S., Canada and South Africa. Parenting coordination is a child-focused ADR process in which a mental health or legal professional with mediation training and experience assists high-conflict parties in implementing parenting plans and resolving pre- and post-divorce parenting disputes in an immediate, non-adversarial, court-sanctioned private forum.[87]

7. The breaking-up of de-facto unions and their consequences for property matters and maintenance has been addressed by many comparative family law scholars, given that the (estimated) number of these informal relationships in all European countries has steadily increased. Accordingly, it makes sense to take stock of what has been tried and what has or has not worked elsewhere. In 2018, the CEFL most likely will have finished its model as to how de-facto relationships can be regulated. Since in the vast majority of jurisdictions specific legislation is missing, this model might be a source of inspiration for national legislatures in their quest to protect the weaker party in such a relationship. In order to achieve greater legal certainty, legislating this area might be considered.

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[86] See *Anne-Rigt Poortman / Ruben van Gaalen*, Shared Residence After Separation: A Review and New Findings from the Netherlands, Family Court Review 55 (2017) 531–544.

[87] *Madelene de Jong*, Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce, in: The Law of Divorce and Dissolution of Life Partnerships in South Africa, ed. by Jacqueline Heaton (2014) 577–629, 615; *Karl Kirkland / Amber Ritter*, Parenting Coordination in Alabama: The Current Status, Faulkner Law Review 2011, 247–285.

8. Turning to international family law, my eighth point addresses the relationship between global and regional unification. In the recent past – although frequently denied – a kind of competition between the Hague Conference on Private International Law and the European Commission was noticeable. To the benefit of all, the new instruments in the field of international maintenance matters fortunately show how perfectly these two organisations can cooperate. More cooperation of this kind is desirable since both organisations are focussing on the same or similar topics.

9. Still in the area of international family law, the expected Brexit will not lead to major changes.[88] Brussels IIbis and the Maintenance Regulation will cease to be applicable in and in relation to the United Kingdom. As regards all other family regulations, the UK decided not to opt in. Regarding parental responsibility, the relationship between Member States and the UK will be governed by the Hague Convention on the Protection of Children of 1996, and regarding the recognition and enforcement of decisions relating to maintenance obligations, the Hague Convention of 1973 will be applicable in relations involving the contracting states. Within the two years after the announcement to leave the Union, the UK will be allowed to contribute to the negotiations within the European Commission on current or even new instruments to be adopted in the field of international family law; however one should not expect much UK activity. Instead, the UK might focus on putting alternatives in place of the Brussels IIbis and the Maintenance Regulation through domestic legal mechanisms that can replicate the reciprocal effect of the rules in these two Regulations.[89] After the two-year period, new conventions may be concluded between the EU and the UK. Within the Hague Conference on Private International Law, where the EU is negotiating for all Member States, the UK will play the same role as any other Member State of the Hague Conference. As regards substantive law, Brexit will not lead to any changes. The UK still belongs to Europe, whether in- or outside the Union. Cooperation in comparative legal projects will continue, but the European funding of such projects will probably decrease where the principal investigators are located in the UK.

10. My final point is on a personal note. Twenty years ago, I submitted a research proposal to the Netherlands Organisation of Scientific Research,

[88] See *Jonathan Fitchen*, The PIL consequences of Brexit, Nederlands Internationaal Privaatrecht 3 (2017) 411–432, 429 f.

[89] The House of Lords EU Committee has expressed doubts that otherwise there will be great uncertainty affecting both UK and EU citizens, see: Brexit: Justice for families, individuals and businesses?, 17th Report of Session 2016/17, <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/134.pdf> and the Policy Paper by the UK Department for Exiting the European Union of 22 August 2017, Providing a cross-border civil judicial cooperation framework, A future partnership paper, <https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>.

on European family law. It was rejected as being far too unrealistic and absolutely unfeasible. This was the unanimous opinion of the reviewing international expert panel, although I only proposed several comparative studies in some specific fields of (international) family law in order to detect common trends and developments. The foregoing was meant to prove that the experts of those days did not dare to take a risk and allow out-of-the-box thinking. In retrospect, huge steps towards establishing a European family law have been taken. All my research proposals of twenty years ago were later funded and carried out, and many more have followed. More importantly, I am not the only one. Was it really a utopian idea to investigate family law from a comparative angle, trying to sort out in which fields of family law harmonisation would be possible and pondering over how the law should accommodate international couples? My answer has never changed.