

UNIFICATION OF LAW IN THE FIELD OF FAMILY LAW – ROADS AND DEAD-END-ROADS

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Abstract: Article deals with the problem of the harmonisation and unification of the family law in the European Union as the consequence of the building the single European Space. The main claim of the author is that a speedy unification of substantive family law, particularly one that is decreed by European institutions, would lead to loss on national and regional legal culture, what according the author can't be justified. The alternative is a close cooperation of individual European cultural groups or neighboring countries and the unification of the conflict of laws provisions and of the law of jurisdiction of the courts as well as by enacting regulations on (mutual) recognition and enforcement of court decision.

Keywords: European Union, family law, unification, cooperation, conflict of laws, jurisdiction of the courts, mutual recognition.

I. Unification of the substantive family law

In the European legal policy an all-embracing unification in the field of family law is oftentimes considered as desirable. On a comparative law basis a “Commission on European Family Law” (CEFL)“, composed of numerous professors from all over Europe, is compiling the so called “Principles of European Family Law” (Principles) since 2001. In the fields “Divorce and Maintenance Between Former Spouses”¹ and “Parental Responsibilities”² these Princi-

- 1 Katharina Boele-Woelki, Walter Pintens, Frédérique Ferrand, Cristina González-Beilfuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny (ed.), *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, Intersentia: Antwerp-Oxford, 2004.
- 2 Katharina Boele-Woelki, Frédérique Ferrand, Cristina González-Beilfuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny, Walter Pintens, *Principles of European Family Law*

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ples exist already, whereas the work on “Property Relations Between Spouses”³ is still in progress.

More recently however the single European nations and regions legal tradition is stressed as a value of its own. This paradigm shift is observable for example in comparative law that does not any longer mainly look for common ground but instead emphasizes what the individual legal systems distinguishes from each other. Plurality – and not equality or unification – is now considered as an value of its own.

Others claim, that, in particular in the field of family law, elements of an European legal culture do indeed exist and could be used as basis for an unification of law. One line of argument points to the canon law fundament of the European matrimonial law. However, at the best such a fundament would back the western part of Europe with the intellectual centre Rom, but that is, of course, not identical with entire Europe. Moreover, from this tradition only the principle of consent and the spouse’s duty to mutual assistance have survived. The rest was washed away by numerous changes like the creation of far reaching possibilities to get divorced or the creation of same-sex marriages – not even to mention the alterations that took place concerning the purpose of marriage or the question by whom the marriage ceremony has to be performed.

In favour of the existence of a European legal culture another line of argument⁴ points to the achievements during the last decades: Equal rights for men and women, reduction of discrimination against homosexual relationships that nowadays, too, have the possibility of entering into a relationship that is legally acknowledged, growing acceptance of extramartial cohabitation, reduction of discrimination of children born out of wedlock or the perception of children as legal persons rather than as mere objects of their parental custody. On the basis of the Convention for the Protection of Human Rights and Fundamental Freedoms these standards could be transposed in the legal system of the Member States by the European Court of Human Rights. In fact this is already taking place, however on a very different range, depending on the respective national legal system.

Moreover, working with these alleged basic principles of European legal culture would require in particular a very abstract perspective that not only ignores the various exceptions but also the fact that these principles may be understood differently in the various European regions. Also, in many parts the aforementioned Principles appear as a intersection of terms detached from the legal reality, that are connoted unequally in the various legal systems and that are con-

regarding Parental Responsibilities, Intersentia: Antwerp-Oxford, 2007.

3 <http://ceflonline.net/principles>.

4 Walter Pintens, Europeanisation of Family Law, in : Katharina Boele-Woelki (ed.), Perspectives for the Unification and Harmonization of Family Law in Europe, Intersentia: Antwerp-Oxford 2003, p. 6.

structured differently, depending on the respective legal system in its total and the particular legal culture. In some cases they are not even this, but elevate things to Principles that influential CECL members consider as being “modern”. The contemporary way of comparison of law highlights this findings prominently because it avoids to declare legal instruments from different legal systems prematurely as identical without taking the differences into account that derive from the normative overall context or the way the law is applied. Especially in the field of family law these differences are rather large.

Under the umbrella of an alleged „European legal culture“ two cultural areas exist that are completely different and separated for now 1000 years. With Turkey a country would join this circle that belongs to a third large cultural area. Thinking about a European unification in the field of family law would, therefore, makes it necessary to consider at least three different levels of legal cultures: An alleged European Legal Culture, the different legal-cultural areas in Europe (the West, the East, the Islamic Culture), national legal cultures and, as not all European states have a unified family law, even regional legal cultures: For instance the Spanish regional laws (*fueros*) differ sometimes quite strongly. However, this does not constitute an existential problem for Spain – a finding that is endorsed by the example of the USA with its 50 matrimonial laws that are partly based on completely different principles.

Such a focus on regional and national legal cultures may be criticized as backward-looking and structural conservatism; it may also easily slip to anti-European resentments. But on the other side, this focus is maybe due to the respect we own the cultural plurality in Europe and the human desire to cultivate it. However, heterogeneousness of legal systems has no end in itself. Therefore, there are no objections against a gradual integration of legal culture in the field of family law. In this field of law many European legal systems adopted already ideas from the neighbor states and, by this, lost their peculiarities. However, it makes a big difference if legal unity is growing step by step or if it is decreed pan-European respectively orientated blindly on alleged pan-European “Principles”.

The crucial questions therefore are: Which advantages would such a decreed unification of law offer? And: Would it outbalance or at least counterbalance the loss of culture that would come along with it in comparison with a gradual multipolar integration? The advocates of a decreed unification of law point to the benefit of legal certainty for bi- and multinational families in a Europe characterized by a considerable mobility of its population. However, the special position of bi- and multinational families does not justify a radical unification of family law in whole Europe. In average in the EC only 5 % of the inhabitants of a Member State are not a citizen of this state. Arguing with such exceptions is always dishonest or, at least, bears evidence of the inability to desist from the own belonging to a mobile European elite. In addition, legal certainty for bi- or multinational families can be achieved by other means.

The abstract guarantee of maximal mobility throughout Europe is not a value on its own by whose realization any kind of thoughtfulness may be put aside. In truth the call for unification of the substantive family law in Europe is often motivated by two factors: Firstly, the attempt to use the European level as a detour to implement “progressive” law that would not be capable of winning a majority in the single states. This blind “progressive thinking” is nothing less than a form of cultural imperialism.⁵ Secondly the effort to postulate the primacy of a globally structured economic order by claiming that the differences in Europe do not derive from cultural disparities but from the social conditions that have to be equalized. This argument is not convincing. First of all Europe would be reduced to a mere economic area. Secondly, the differences in the social conditions are, of course, part of a nation's or region's culture. They are even part of the legal culture as they are interdependent with the law in force.

However, the warning of a cultural loss by unification of law voiced by a family law scientist from Germany that also works on history of law may sound particularly strange, as one may claim that especially in Germany multiple unifications of family law have taken place in the last 120 years. For instance one can point to the German Empire of 1871 and the coming into effect of the German Civil Code (BGB) on January 1st, 1900: The confessional divided German Reich, in whose catholic south still canon matrimonial law that does not know the possibility of divorce was in force, and the protestant north, in particularly Prussia, adopted a unified family law based on the Prussian-protestant model. The constitution of the German Empire did not transfer such a competence to the Federal Government. But a few years after the formation of the Reich this competence was created by an amendment of the constitution. The already in 1875 adopted “Law on Civil Status”⁶ established the compulsory civil marriage throughout the German Reich. This was considered as a welcomed opportunity to finally get rid of the remnants of churchly influence in family law, a position that on the Bavarian level would never have been acceptable to a majority. As it turned out, this was also the first step to a “cultural abolishment concept” that was decided on in some kind of national flush but that by and large and in the medium term proved its worth. However, this unification of law procedure took place in a cultural area that was clued together by the togetherness in the Holy Roman Empire over the centuries, the same language and a very strong national spirit.

„The European citizen will seek European solutions“⁷ – true, but maybe one should wait until European citizen indeed exist. And this won't happen if the

5 Pierre Legrand, *Sens et non sens d'un code civil européen*, R.I.D.C. 1996, 811.

6 Reichsgesetz über die Beurkundung des Personenstands und die Eheschließung vom 6. Februar 1875, RGBl. 1875 I, p. 23.

7 Esin Örüçü, *A Family Law for Europe: necessary, feasible, desirable?*, in : Katharina Boele-Woelki (ed.), *Perspectives for the Unification and Harmonization of Family Law in Europe* (2003), p. 571.

European Commission tries to design the very same Europe that it considers as the “area of freedom” in a centralist manner without showing respect for the European cultural pluralism.

II. Legal harmonization

Hence, an assimilation of the substantive family law on EC level is not recommendable because the advantages that would go along with that for a minority would not outweigh the arising disadvantages for the majority. And other convincing reasons to act so do not exist. Even a transfer of competences to the EC – which would be necessary as luckily in the opinion of the majority of scholars and judges not even with the freedom of movement any kind of legislative power of the EC can be justified – is fortunately not acceptable to the majority.

The question arising is therefore, by which other means legal certainty for bi- and multinational families can be achieved? The answer: Harmonization of law. When talking about harmonization one has to separate three different issues: (1) The international jurisdiction of courts has to be unified. (2) The criteria to decide which legal system is applicable in cases with a foreign element have to be standardized, too. So not the substantive family law but the conflicts of law provisions have to be unified. (3) Last but not least it must be guaranteed that court decisions of a member state are recognized in all other member states as easily as possible and that they can be judicially enforced.

These measures don't have to be restricted on the EC, that has the instrument of regulations to work with, but can also be fructified for non EC member states by the means of international treaties.

1. International jurisdiction of courts

a) The international jurisdiction of courts was unified by the Brussels-I-Regulation.⁸ As a basic rule persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State, Art. 2–4 Brussels-I-Regulation. Art. 5–7 Brussels-I-Regulation deal with special jurisdictions. They are orientated on the substantive or procedural familiarity with the subject.

b) As far as matrimonial law and the law of parents and child are concerned, the Brussels-I-Regulation is supplemented by the Brussels-IIa-Regulation⁹ that governs the divorce itself and the ancillary matters explicitly mentioned in the Regulation, in particular parental custody. The originally for the Rom-III-Regulation¹⁰ intended rules of jurisdiction and provision concerning agreements regulating the court jurisdiction did not come into force. The preparatory works

⁸ Regulation No 44/2001.

⁹ Regulation No 2201/2003.

¹⁰ Regulation No 1259/2010.

for the intended Rom-V-Regulation that shall deal with matrimonial property regimes do also not affect these court jurisdictions.

The Brussels-IIa-Regulation is based on the principle of residence; this rejection of the former principle of nationality works as a model for other areas of legal harmonization. Art. 3 Brussels-IIa-Regulation stipulates that in matters relating to divorce jurisdiction shall lie with the courts of the Member State in whose territory

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there.

It is noticeable that this jurisdiction is of exclusive nature if a spouse is sued that has his habitually residence in the territory of a Member State, Art. 6 Brussels-IIa-Regulation. For decisions dealing with matters of parental responsibility over a child who is habitually resident in a member state the jurisdiction lies with the courts of that member state, Art. 8 Brussels-IIa-Regulation. The following articles stipulate special jurisdictions for cases involving child abduction or change of residence.

c) Moreover the EC Regulation No 4/2009 contains provisions for the international jurisdiction in maintenance obligations that, too, are based on the principle of residence. The jurisdiction shall lie with:

- the court for the place where the defendant is habitually resident, or
- the court for the place where the creditor is habitually resident, or
- the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or
- the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

2. Conflict of law provisions

A unification of the conflict of law provisions would make certain that every European court has to decide a specific family law matter by applying the same substantive law. However, one has to be aware of the fact that this solution will provide less legal certainty compared with a unification of the substantive family law, because harmonizing the conflict of law provisions only does not guarantee that every court applies foreign law correctly. Beyond the question of legal certainty the unification of the conflict of law provision is the consistent advancement of the legal harmonization as it diminishes incentives for a “forum shopping” arising from the wide catalogue of jurisdictions particularly in divorce cases by the Brussels-IIa-Regulation.

The EC already enacted a couple of regulations harmonizing the Member States conflict of law regulations, namely in the areas of maintenance obligations and divorce. Others areas shall follow. However, even on this level legal harmonization has to face some serious problems.

a) Maintenance obligations are dealt with by EC Regulation No 4/2009 from June 18, 2011 (sometimes called Rom-VI-Regulation) that came into force on December 18, 2008. It applies to maintenance obligations arising from a family relationship, parentage, marriage or affinity, Art. 1. Because the question if such a family relationship is established continues to be covered by the national law of the Member States (recital 21), it is possible that the scope of application with regard to same-sex marriages or registered affinities will develop differently. Art. 15 of Regulation No 4/2009 refers to the Hague Protocol of November 23, 2007 on the law applicable to maintenance obligations (hereinafter referred to as the 2007 Hague Protocol). Only the EC ratified the 2007 Hague Protocol so far. Nonetheless the EC declared in the instrument of ratification that the conflict of law provisions concerning maintenance obligations shall be governed by the Hague Protocol from June 18, 2011 on, although under international law the Protocol is not yet in force. Exceptions exist for Denmark and GB. The Hague Protocol is applicable not only in relationship to other member states, but applies universally.

Art. 3 of the 2007 Hague Protocol stipulates as general rule that maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor. In the case of a change in the habitual residence of the creditor, the law applicable changes, too. Therefore, the conflict of law provisions, too, are based on the residence principle. Art. 4 of the 2007 Hague Protocol amends this rule for mutual maintenance obligations between parents and children: If the creditor is unable, by virtue of the law referred to in Article 3, to obtain maintenance from the debtor, the law of the forum shall apply, Art. 4 para. 2. If even by this the creditor is unable to obtain maintenance from the debtor, the law of the State of their common nationality, if there is one, shall apply, Art. 4 para. 4.

Art. 5 of the 2007 Hague Protocol stipulates a special rule with respect to spouses and ex-spouses: In the case of a maintenance obligation between spouses or ex-spouses, Article 3 shall not apply if one of the parties objects and the law of another State, in particular the State of their last common habitual residence, has a closer connection with the marriage. In such a case the law of that other State shall apply.

b) The Rom-III-Regulation stipulates which substantive divorce law is applicable. The preliminary question if in the field of divorce law unified conflict of law provisions are really necessary for the functioning of the single European market and, connected with that, if the EC actually had the legislative competence, is answered in the affirmative implicitly by the Rom-III-Regulation. However, looking on the US and its domestic market that functions despite 50 different marriage laws the suspicion arises that the EC acted *ultra vires*.

The Rom-III-Regulation came into force on December 20, 2010 and shall apply from June 21, 2012 on, Art. 21. The regulation stipulates the law applicable involving a conflict of laws to divorce and legal separation, Art. 1 para. 1. The Rom-III-Regulation applies universally. Therefore the law declared applicable in the regulation applies even if it is not the law of a Member State, e.g. Norwegian law.

However, only 15 Members States (Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Rumania and Slovenia) take part at the so called “closer cooperation” within the EC, of which the Rom-III-Regulation is a part. Therefore its scope of application is limited to these Member States. Even in the field of divorce law it is still a long way to go for unified European conflict of law provisions. From a legal policy point of view, German scholars argue that it is doubtful if the sensitive international divorce law is the appropriate field to test the instrument of “closer cooperation”, even more as the Regulation with its far reaching choice of law possibilities, the change from the principle of nationality, which was so far the standard under German Law (Art. 17 para. 1 s. 1 Introductory Act to the German Civil Code, EGBGB), to the principle of residence and its extreme friendliness towards divorce (compare Art. 10 Rom-III-Regulation) is regarded as “modern, extensive and aggressive”¹¹. From a traditional point of view the design of this conflict of law provisions is indeed not strictly “neutral”. Rather it should help to enforce particular aspects of substantive law on the level of conflict of law provisions already: The facilitation of divorce to the greatest possible extent.

An economic domestic market alone doesn’t create a federal order with whom one may point to the US as a prototype for a residence orientated approach, and for good reasons the question on party autonomy concerning the choice of the law applicable is not answered homogeneous in Europe.

11 Staudinger/Mankowski (2011) vor Art. 13–17b EGBGB Rn. 39.

Art. 5 Rom-III-Regulation allows the spouses to designate the law applicable to divorce and legal separation provided that it is one of the following laws:

- the law of the State where the spouses are habitually resident at the time the agreement is concluded, or
- the law of the State where the spouses were last habitually resident, insofar as one of them still resides there at the time the agreement is concluded, or
- the law of the State of nationality of either spouse at the time the agreement is concluded, or
- the law of the forum.

If the spouses didn't designate the law applicable pursuant to Article 5, divorce and legal separation shall be subject to the law of the State:

- where the spouses are habitually resident at the time the court is seized; or, failing that,
- where the spouses were last habitually resident, provided that the period of residence did not end more than one year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that,
- of which both spouses are nationals at the time the court is seized; or, failing that,

where the court is seized.

c) As part of the Stockholm program the European Commission meanwhile also submitted proposals concerning martial property regimes (16.3.2011, COM (2011), 126) and registered partnerships property regimes (16.3.2011 COM (2011), 127). These proposals aim on a unification of the respective conflict of law provisions within a universal applicable Rom-V-Regulation. The proposal on martial property regimes embodies far reaching possibilities for the choice of law during the marriage in being (Art. 16, 18). In the absence of a choice of law martial property regimes shall be subject to the law of the State where the spouses were firstly habitually resident after marriage, or, failing that, of which both spouses are nationals at the time of marriage, or, failing that, of which the spouses considering all circumstances are closest linked with, Art. 17 of the proposal.

However, both proposals stipulate differing rules. Taking into account that in Europe the variety of regulations for legally framed partnerships is very broad, the classification will not always be easy. In addition, if terms like marriage etc. are to be determined autonomously, the danger of up- or downgradings arises. Last but not least the preliminary question if the particular legal partnership is valid is likely to cause difficulties, too.

However, the EC became victim of the scope of its own proposal insofar as Member States that did not enact rules about civil partnerships or same-sex marriages offered resistance against this proposal. Moreover, the British law does not know the martial property regime as it is commonplace e.g. in Germany, but offers the instrument of “financial relief” as consequence of a divorce. The tensions arising from these completely different approaches are evident. For the time being, a success of these endeavors is, therefore, unlikely, even more as according to Art. 81 para. 2 TFEU an unanimous decision in the Council of the European Union would be necessary.

As the matrimonial property regime is connected to numerous other areas of law, the implementation of this proposal would cause multitudinous difficult classification problems. In addition, problems about how to draw a line to other European regulations, including the intended regulation on the law of succession, would arise. However, that's of course no obstacle.

3. Recognition and enforcement

Finally a few words about recognition and enforcement of court decisions: On the basis of the Brussels-IIa-Regulation a judgment given in a Member State shall be recognized in the other Member States without any special procedure being required, Art. 21 para. 1. The following two articles stipulate some exceptions like e.g. if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought (ordre-public-reservation) or if due process of law was violated. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there, Art. 28 Brussels-IIa-Regulation.

The aforementioned EC Regulation No 4/2009 constitutes a new quality level of harmonization by abolishing the exequatur procedure, Art. 17.

This may cause difficult problems in individual cases, for example in case of a “clean break” via paying a “lump sum” under British law: In which situations have divorce consequences to be qualified as belonging to the area of maintenance obligations and in which as being governed by the matrimonial property regime? The answer to this question is important particularly as in the latter situation EC Regulation No 4/2009 is not applicable.

This has two consequences: A judgment given in a Member State has to be recognized by another Member State without any special procedure being required and without a chance to contest the validity of its recognition. A judgment given in a Member State which is enforceable in that Member State is enforceable in another Member State like a domestic judgment; a declaration of enforceability is no longer required. In addition to this one has to take into

account the cooperation of the new created “Central Authorities” of the Member States: A maintenance creditor may address the “Central Authorities” of his/her state of residence that will then take care of the enforcement of his/her maintenance claim in the foreign country, Art. 49 et seqq. EC Regulation No 4/2009. The character as a new quality level becomes apparent when comparing the EC Regulation No 4/2009 with the – so far only by Norway ratified and therefore not yet in force – Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance from 2007 (HCCH) that, contrary to EC Regulation No 4/2009, stipulates the customary rules about recognition and enforcement, Art. 23 HCCH.

The preparatory works for the Rom-V-Regulation, too, contain the mechanism of the EC Regulation No 4/2009 in its articles 26 and 32. This mechanism will therefore be the new standard. It will promote the European legal harmonization in a way that makes sense, provided that the respective Member State has sufficient safeguards to ensure a due process of law. However, to rely on that requires a considerable degree of trust.

4. Unification of substantive law revisited

Opposing a overhastily Europe-wide unification of substantive family law, this has to be pointed out explicitly, must not be put on the same level with the rejection of unifications of law on a regional scale in certain cultural areas or among neighbor states with a high degree of population exchange as a first step of a gradual integration.

An example for this is an agreement between Germany and France creating an optional matrimonial property regime between these two countries. However, this agreement has yet to be ratified. Although this matrimonial property regime is based on the structures of the German “matrimonial property regime “Zugewinnngemeinschaft” [community of surplus]”, it includes a number of alterations derived from French law. Due to that for German-French-couples this property regime is an interesting alternative to a “pure” German or French property regime. This special property regime will not only be open for German-French-couples, but for mere national marriages, too. The treaty is open for entry by other states. Who knows, maybe at the end of the development stands a central-European or even pan-Europe optional matrimonial property regime?

An example for a unification of law in a specific cultural area that is characterized by a distinctive emotion of togetherness is, of course, the Nordic legal family, whose states work together tightly in legislative matters for almost 100 years. However, who praises this as a directly transferable model for a unification of law in whole Europe is – I fear I am repeating myself – oblivious of the plurality of European legal culture.

III. Conclusion: Harmonization yes, unification no

Summing up: A speedy unification of substantive family law, particularly one that is decreed by European institutions, would lead to loss on national and regional legal culture that can't be justified. Possible however is a close cooperation of individual European cultural groups or neighboring countries. A unified European family law has to grow slowly.

The needs of bi- and multinational families can be met by a unification of the conflict of laws provisions and of the law of jurisdiction of the court as well as by enacting regulations on (mutual) recognition and enforcement of court decision. On this a number of important steps have been taken on the EC level already within the last ten years. Neighboring countries of the EC should, if possible, be included in this development.