A General Perspective to the History and the Harmonisation Idea of Family Law in Europe

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Family Law is characterized by its diversity and variety, deeply rooted in peoples' history, culture, mentalities and common moral values. According to some aspects, harmonisation of family law rules is impossible because family law of different European countries grows out of their unique national cultures and history. In the family law in Europe, especially the field of marriage, divorce, extra matrimonial cohabitation, the status of out of wedlock children and matrimonial property law in Europe, sometimes convergence and sometimes divergence is observed. At all events, the question about the convergence and modernisation trends is highly controversial in the past and still. (See also detailed in: Masha, Antokolskaia, "Harmonisation of Family Law in Europe: A Historical Perspective", in: Masha, Antokolskaia, Convergence and Divergence of Family Law in Europe, Intersentia, Antwerpen- Oxford, 2007, p. 11 et seq.). From the late 1960's to the present, there are lots of tendencies about the terms of "freedom and equality". Despite these converging trends towards more equality and more freedom, national differences create clear dissimilarities, not only between Common Law and Civil Law countries, Northern and Latin countries, but also between border-countries, such as France, Germany and Netherlands and even between Nordic countries. Despite more or less converging sociological samples, it is also difficult to extract from them a "common core" that might be a resource for unification, in other words, "law unification" is a hard goal to achieve (See detailed in: A. Agell, "Is there one system of Family Law in the Nordic Countries?", European Journal of Law Reform,

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Vol. 3, 2001, p. 313–330 ; identical with: Marie-Thérèse Meulders-Klein, "Towards a European Civil Code on Family Law?", in: Katharina Boele-Woelki, Perspectives for the Unification and Harmonisation of Family Law in Europe, Intersentia, Antwerp-Oxford-New York, 2003, p. 109 et seq.). On the other hand, according to some aspects, "law unification" is necessary and urgent in European Union in general sense. Integration of Europe signifies "being a union". Becoming a "united whole" brings "unity in law" and necessitates "a unified law" especially in the field of "family law". It is true that "law" has always a cultural and historical context. Neither the economically oriented private law nor family law can be observed as autonomous from culture, values, ideals or historical background. This culturally shaped link, however, despite the differences should not obstruct to the harmonisation of family law (See also in: Pintens, "Grundgedanken und Perspektiven einer Europaeisierung des Familien und Erbrechts", FamRZ, 2003, 329, p. 351–352. ; identical with: Nina, Dethloff, "Arguments for the Unification and Harmonisation of Family Law in Europe", in: Katharina Boele-Woelki, Perspectives for the Unification and Harmonisation of Family Law in Europe, Intersentia, Antwerp-Oxford-New York, 2003, p. 59). In the general principles of family law, there are religious (common medieval canon law), historical (part of Roman law) and cultural roots common to Europe. From a historical perspective, some institutions of family law, especially marriage, have declined to be uniform throughout Europe. There is a clear growing affinity to "harmonisation" especially in the field of marriage in Europe in the last decade. (Helmut, Coing, "Europaeisches Privatrecht", Vol. 1, 1985, p.224. ; Wolfram, Müller-Freienfels, Ehe und Recht, 1962, p.13. ; Masha, Antokolskaia, "Would the Harmonisation of Family Law in Europe Enlarge the Gap between the Law in the Books and the Law in Action?", FamPra., 2002, p. 261, 278). In this area (law of marriage) more than in others, it would be possible to talk about a "ius commune" based on canon law. However, it could be so early to talk about an absolute and complete "consensus" about the necessity and entity of the harmonisation idea in the proper sense of family law already exist in Europe. (Masha, Antokolskaia, "The "Better Law" Approach and the Harmonisation of Family Law", in: Katharina Boele-Woelki, Perspectives for the

Unification and Harmonisation of Family Law in Europe, Intersentia, Antwerp-Oxford-New York, 2003, p. 159).

There is a growing and sensible trend in the same direction but in different speed. Notably, "increasing liberalisation of divorce, equal rights for women and men, less discrimination against illegitimate children and their parents, and the growing importance of the child's welfare and the recognition of the rights of children, legality of same-sex relationships" are the most important common improvements and highlighted amendments. Also, there is a strong compromise to custody for children after divorce and to give legality to factual relationships (especially same-sex) between parents and between parents and children. Despite the varieties, family law in Europe today is based on a number of common basic principles. These basic values have found their legal foundation in the European Convention on Human Rights throughout Europe. Moreover, there is a foundation of a common legal culture and concept in Europe, which brings about a "European cultural identity". There are so many similar changes about the social meaning of family and perception of familiar relationships. Lots of life patterns, such as economic and social circumstances, the demographic trends of decreasing birth, increasing life expectancy are at an accelerating pace converging in the European countries. Despite of regional variations, historical and cultural differentials, the forms of family life and the "perception of family term" across Europe are changing: the number of marriages is in decline; the number of factual partnerships, the reality and acceptability of same-sex relationships (in some countries the legality of same-sex marriage such as Holland, Spain, Nordic countries) and extramarital births is rising. Divorce rates are increasing, as are the consequent numbers of single parents" (identical with: Dethloff, "Arguments for the Unification and Harmonisation", p. 60- 61).

The legality of same-sex partnerships/marriages or attitudes towards modern medical reproduction techniques, in vitro fertilization and its parentage problems, are ethically problematic and sensitive areas of family law and always are open to question. In general sense, "evolutions in family law" which are shaped by a social reality are very

similar throughout Europe today. However, harmonisation in such areas is really difficult to achieve, but the effort about the harmonisation of European Family Law and comparative legal studies are of inestimable value. Harmonisation should not mean to "entail the tearing of foreign systems from a cultural context that is very different and subsequently transplanting them". The thing that will be done is, to start from common fundamental values and to congregate over the most suitable solutions to realize this aim (identical with: Dethloff, "Arguments for the Unification and Harmonisation", p. 63- 64).

If the history of family law is analysed during the whole of the last two millennia, it could be confirmed that the process is similar to "a spiral rather than a linear development". During the first spin of this spiral, the permissive Classical Roman Family Law was replaced by the restrictive canon Family Law of Middle Ages. During the second spin, the medieval canon family gave way to the permissive law of our times. The informal, secular, private character of Classical Family Law almost disappeared at the end of the High Middle Ages only to return again in our times, although as part of a much more sophisticated legal system. The last centuries of the development of the family law in Europe can be characterized as a progressive development, which the speed is varied from time to time and from one country to another, but the direction has clearly been the same everywhere: from patriarchal, restrictive, transpersonalistic law, to modern, permissive, personalistic law. Changes in different legal systems do not take place at the same speed of progress, but when change occurs, the direction is always the same (See also detailed in: Harry, Willekens, "Explaining two hundred years of Family Law in Western Europe", Vuga, The Hauge, 1997, p. 60). Briefly, the spiral development of family law in Europe during the last two millennia can be divided into two major periods: from the Roman times to Protestant Reformation, and from the Reformation to the present. The main event of the first period is the transformation from the diversity of Roman law and various "barbarian" customary laws, to the uniformity of the medieval canon family law. This period could be considered as an era of overwhelming "convergence". The medieval family law unification occurs spontaneously, with the result of

considerable efforts of the Catholic Church. In the sixteenth century, the Reformation divided Europe into Protestant and Catholic countries. And then the Enlightenment, the French Revolution and the subsequent Restoration brought about further division. In general, it is possible to conclude that the Reformation theology and then the Enlightenment progressive thought instigated the second period of development of family law in Europe. When compared with the first period, the characteristic of the second period is undoubtedly increasing divergence rather than convergence. Generally speaking, it could be said that after the Reformation, the development of family law in Europe followed the same pattern, but the profundity and pace of these developments differed significantly. From the sixteenth century onwards, the Reformation, the Enlightenment, industrialisation, urbanisation, liberalism, socialist and feminist ideas were pan-European events. The general social, economic and political developments in the whole of Europe were similar (See detailed in: identical with: Masha, Antokolskaia, Harmonisation of Family Law in Europe: A Historical Perspective, A Tale of Two Millenia, Intersentia, Antwerpen-Oxford, 2006, p. 83 et. seq.)

As a consequence, under the influence of pan-European cultural, economic and ideological trends, the evolution in the field of family law is very similar and moving in the same direction: from a restrictive, traditional family law to a more permissive, modern family law. There is a tendency of modernisation of family laws in Europe but the similarity of the development towards modernisation is different from convergence of family law in the European countries. The main character of this development period from the Reformation is observing as a divergence rather than a convergence. When there are different rules and tendency of divergence on the law systems, unification and harmonisation of family laws in the European countries should be made after the determination of distinct rules. With this point of view, there are some examples of unification and harmonisation that could be explained later not only in Europe but also in the whole world (in USA and in the Nordic countries). Currently, things have changed and family law has progressively gained importance in Europe and now moved to the foreground. With all of the

areas of law, family law perhaps is the one where the necessity to respect human rights is the most important (See also detailed in: Carsten Smith, "Human Right as a Foundation of Society", in: Lodrup/Modrav, Family Life and Human Rights, 2004, p. 15). For example, in a civilised society, right to marry and right to found a family must be guaranteed. Up to date, the Europeanization of Family Law has been a matter of "harmonisation". Legal doctrine and case law play an important role on unification and harmonisation (See detailed in: identical with: Walter, Pintens, "Europeanisation of Family Law", in: Katharina Boele-Woelki, Perspectives for the Unification and Harmonisation of Family Law in Europe, Intersentia, Antwerp-Oxford-New York, 2003, p. 16).

The Council of Europe with its European Convention and with certain other conventions has an important goal for the protection of "human rights" and "fundamental freedoms". The Council of Europe is cheering the harmonisation through recommendations of the Consultative Assembly and resolutions of the European Ministers of Justice as well as through scientific meetings, rather than composing unification of law by international conventions. The two Treaties are very important: "The International Treaty on Civil and Political Rights" of December 19th, 1966 and "the Convention of Children's Rights" of November 20th, 1989, as well as the Hague Conventions of Private International Law. The conclusion is: An institutional unification of "substantive law" still has a long journey to go, at first a spontaneous approximation of laws is necessary and this harmonisation of family law will be a task for research and education. The unification of family law with international conventions is not entirely out of the question and some of them can be achieved: "European Convention on Jurisdiction and Recognition and Enforcement of Judgements in Matrimonial Matters (28 May 1998)". More than the Council of Europe, the European Court of Human Rights has served as a catalyst for harmonisation through its decisions and judgments', which have given a rough sketch of European Family Law. The judgements have an important role in eliminating discrimination. Also, under the authority of the European Committee on Legal Cooperation, the "Committee of Experts on Family Law" in the European Family Law

Commission has been studied to locate the lines of an area of common legal standards in the field of family law in Europe" (identical with: Pintens, Europeanisation of Family Law, p. 16- 17). On September 1st 2001, at the University of Utrecht, a Comission on European Family Law is established by six professors. This comparative research and establishment has an important goal and specific academic work. The main aim of this Commission is to create a set of Principles of European Family Law that are thought to be most suitable and common for all of the European countries. The Commission is finding, analysing and comparing rules and then formulating and creating non-binding codes for all of the European countries. The act is academic. After these studies, it could be obviously said that there are common principles that can serve unification for family law. This actuality also shows the possibility and necessity of the "unification" in the field of "European Family Law". (See detailed in: identical with: Katherina, Boele-Woelki, "Building on Convergence and coping with Divergence in the CEFL Principles of European Family Law", Convergence and Divergence of Family Law in Europe, Intersentia, Family Law Series, Antwerpen-Oxford, 2007, p.253 et. seq.).

At the same time, the European Commission with its advisory and consultation committees set up tenders regarding the comparative research to be carried out, green papers, public hearings, proposals and revised proposals before the final instrument is approved. In the field of cross-border family relationships, this has resulted as binding instruments for the European member states (Brussels I, Brussels II, and Council Regulation, No. 44/2001 -on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters- (22.12.2000), Council Regulation (EC), No. 4/2009 -on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations- (18.12.2008), Council Regulation, No. 2201/2003 –on concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000- (27.11.2003). See detailed in: Nina, Dethloff, Familienrecht, 29. Auflage, Verlag C. H. Beck, München, 2009, p. 18). Finally, the Common Princi-

ples will declare that coming to a composition between the various legal systems of Europe and beyond can be reached. It will add weight to the voices of those who advocate the preparation of a European Civil Code and encourage the harmonisation adherents (See detailed in: Winfried Tilmann, "Zur Entwicklung eines europäischen Zivilrechts", Festschrift W. Oppenhoff 1985, p. 495-507; Peter Mansel, "Rechtsvergleichung und europäische Rechtseinheit," JZ 1991, p. 529-534; Peter Hommelhoff, "Zivilrecht unter dem Einfluss europäischer Rechtsangleichung", AcP 192 (1992), p. 71-107).

On the official European level, those voices heretofore have only supported from the European Parliament with a resolution requesting the Member States to commence the necessary preparatory work for the drawing up of a European Code of Private Law which took place on 26 May 1989. In the preamble of the resolution, it is declared that unification should be visualized in branches of private law which are highly important for the development of the single market, such as contract law. They may; therefore, end up probably in a revised from taking into account scholarly criticisms, practical experiences and political negotiations - in the (partial) codification the absence of which has led to their coming into existence. Until then, like the old ius commune, they may only aspire to be applied not *ratione imperii*, but *imperio rationis*. The phenomenon that legal texts drawn up in the form of draft articles have a greater persuasive force and tend to exert a stronger influence on courts and arbitrators than a discussion of legal principles in a text book, however clear that may be, can also be observed on a national scale. In addition, there are points of views; this must be also in UNIDROIT Principles and The Principles of European Contract Law (identical with: Arthur, Hartkamp, Towards a European Civil Code, Kluwer Law International, 2004, p. 125- 131 et. seq.).

After analysing the underlying problematic fact patterns and identify their solutions with a closer examination, it could be determined a quite number of converging tendencies in European Family Law, just because of these legal changes only reflect socio-demographic developments in familial behaviour. For instance, the most remarkable fact is the "rise in

the divorce rate". Since 1970s, it has more than doubled nearly everywhere in Europe. The other example is that, the rise in age at first marriage, the general decrease in marriages and cohabitation has increased in all countries, in some places dramatically indeed. A general decline in fertility rates can also be observed. On the other hand, the number of out-of-wedlock births has also increased dramatically in recent decades. These demographic improvements have nevertheless not eventuated with the same speed in all European countries. Family Law could not become ineffective to these profound socio-demographic changes. There are so many problematic areas in the family law throughout European countries, such as cross-border marriages, law of divorce and discrimination against illegitimate children, legality for the same sex-partners relationships in all Europe, formal equality between the spouses and so on. To solve these common problems, uniform rules on these tendencies should be built. For the problematic areas, it should be found "**universal common law principles**" that give an absolute guarantee and compromise "**equity, justice and fairness**" and include a high protection especially for women and children (See the example rates detailed in: identical with: Ingeborg, Schwenzer, "Methodological Aspects of Harmonisation of Family Law", in: Katharina Boele-Woelki, Perspectives for the Unification and Harmonisation of Family Law in Europe, Intersentia, Antwerp-Oxford-New York, 2003, p. 146- 149).

It can be absolutely said that: "Being a union required harmony". Throughout Europe, different cultures with different histories come together to achieve their common goals for human well being, prosperity and so many profits. The dispensation of justice could be easy with applying harmonised rules to the Union's public. Harmonisation brings simplicity, certainty and predictability of the law. If all countries in a Union applied the same International Law Rules, different solutions of jurisdiction and the interpretation divergences in a particular case would be minimised as far as possible. In Europe, family couples from different nationalities are coming together. The number of multinational marriages is growing continuously. More than 15% of people in Europe entering into marriage or to the other "de facto" or legal relationships (same-sex

or heterosexual) are from different nations, often from European States. Children with two citizenships are growing in a stead fast manner; the mobility and migration of people are increasing. The people do not leave their own countries whose marriage is established or their children were born. On average, more than 1.5 million people immigrate to EU each year. The European Union has many civil servants, many of whom live in another community state with their partners or families. Therefore, there are many problems that will be faced because of the different nationalities and law sources (See detailed in: identical with: Dethloff, Arguments for the Unification and Harmonisation, p. 37, 38).

Firstly, when family bonds cross one or more national boundaries-because of the citizenship of family members or a move in residence or domicile-it is always necessary to decide which family law rules have to/should be applied to the problem, in other words, which national law will be applicable. To determine the applicable law (often a lengthy and costly process) is very hard to achieve. In cross-border cases, the courts or administrative bodies have international jurisdiction. At the same time, the courts can also apply international agreements or regulations, such as Brussels Regulation (No 44/2001 of 22 December 2000), the Lugano Convention (Lugano Convention of 1988 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters), Brussels II Regulation (No 1347/2000 of 29 May on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and in Matters of Parental Responsibility for Children of both Spouses) to administer justice. However, some countries still have not even signed these Conventions. For example, for the non-EU citizens that live in EU boundaries, applying these regulations can be also a problem. If, however, the applicable law is decided, through the conflict of law rules, after having found the relevant source, one still needs to establish the relevant provision of the conflict of law rules. This process has considerable difficulties. After determining the rules that will be applicable, it is also a problem to set the content of the applicable rule. The foreign law must be applied in the same way as it is in its native country. But, needless to say that, most judges- as in the case of lawyers or notaries- are not qualified to do so. In

many cases, there is a result of incorrect application of foreign legislation. The variety of national family laws in Europe also raises other problems in cross-border family status. The differences between legal regimes and law systems can lead to the loss of legal positions or changes in rights or obligations in cases where a change of residence to another state causes the applicability of different laws. Legal positions provided for under the law of one state may no longer exist or is recognized in the new state. As an example, registered partnerships are in danger of losing their rights through a change of residence. This is because; there are different legal arrangements around the EU. In some countries, the legality of same-sex couple's relationships are arranged as a "marriage, but some of others approve them as a "registered partnership". In child law, there are also a lot of problems about the child's rights. As it can be seen, the loss of legal positions due to lack of internationally uniform decision-making is a big problem and should be considerably thought. As it has been told, there are conventions about unified rules (Brussels I and II Regulations), but not sufficient. To prevent this situation arising and to solve the problems, "unification of the family law of conflicts" in Europe would be necessary. Uniform rules on conflict of laws can guarantee internationally uniform decision-making and security of people's gained status/vested rights. For instance, with the common principles, there will be no change in legal relationships accordingly to the change of residence/domicile. In addition to this solution, integration into the state residence will (should) be easier. This unification fact can prevent the loss of family law status and also its legal effects. This can only be achieved with the unification and/or harmonisation of family law rules in European Union. (See detailed in: identical with: Dethloff, "Arguments for the Unification and Harmonisation, p. 41- 53 et seq.).

As an example; "European marriage" is a marriage which has cross-border implications. Such a marriage should be closed and be dissolved under the same conditions and take place in the entire scope. By creating a "uniform substantive family law" for cross-border situations, the difficulties encountered by the currently existing legal effect of diversity for couples whose relationship because of their nationality or residence of a

foreign connection. The spouses can choose the European marriage as an option model. And also, there is one more benefit to unify the rules. The free movement of people is in the protection of EC Treaty (European Union). Differences between the legal regimes of the member states, which limit the exercise of the basic freedoms guaranteed by the EC Treaty, must not prevent a citizen of the Union from living their home country. Without loss of a right, the couples can choose their residence freely. This harmonisation of family law brings EU to avoid limitation on the free movement of people and also the equality that is in violation of the EC Treaty" (identical with: Dethloff, Arguments for the Unification and Harmonisation", p. 43- 57.).

"The European Union is embracing a new agenda in the field of family law. Already one regulation has been adopted, with many more are forthcoming. This is a new field of effort for the EU. European Family Law for cross-border situations is today a reality. In the political rhetoric of the EU, unified rules on various international family law matters are claimed to be essential for integration in Europe. That respond to the European citizen's justified expectations on what the Union should do for him or her. The citizen shall be able to count upon that judgements rendered in one Member State will be recognized in the other Member States. In addition, the citizen shall have access to justice within the whole Union. More generally, the vision is establishing an "a genuine judicial area in the EU where freedom, security, justice and predict-ability prevail". Finally, European Families need a harmonised and unified Family Code" (See detailed in: identical with: Clare, McGlynn, "Challenging the European Harmonisation of Family Law", in: Katharina Boele-Woelki, Perspectives for the Unification and Harmonisation of Family Law in Europe, Intersentia, Antwerp-Oxford-New York, 2003, p.219 et. seq.).

Briefly, it could be said that;

Besides the utilitarian and practical reasons that are understandable in economic terms such as contracts, liability, securities or in procedural terms, there are also an increased number of bi-national and multinational families and family conflicts as a result of the greater fragility of couples

connected with the mobility of people within the European scope. Obvious thing to do is to simplify their legal problems and their lives by unifying substantive and procedural rules. To recognize their legal status and vested interests throughout Europe could prevent the loss of rights. This will bring "justice". It is also a matter of political reasons to strengthen the authority of European leaders in the Member States of the EU and a will to give the new citizens of the Union a feeling of identity and citizenship (See the Draft Council Report 13017/01 of 29.10.2001 on the necessity to approximate Member States' legislations in civil matters including Family Law, marriage and the law of succession). This provides "new space of freedom, security and justice" to the Union. The most important thing is to establish the "ideal model of what the modern family should be in a civilized nation" and to come to a determination over the "unified family law codes" grounded on common values and morality which will serve a top notch (Meulders-Klein, Towards a European Civil Code on Family Law, p. 107- 108).

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