Methodological Aspects of the Harmonisation of Family Law

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A. Introduction

Let me start by assuming that we all have reached the same answer to the open question of whether it is desirable to harmonise or even unify family law. That we all agree that the answer is yes. And that we further agree that this ambitious endeavour is feasible.[1] But even if we do come this far, our problems are not over. Indeed, it is here that I want to begin today: what methodological problems will we face as we start harmonising (or even unifying) family law?

'Methodos', the Greek notion, means 'the way to something', the systematic procedure to reach a certain goal. Thus, my analysis will be extremely practical. So let me take you on an adventurous journey of unifying family law, and let us see what pitfalls await us along the path.

B. Starting Point: The Comparative Method

I am convinced that comparative law must be our starting point.[2] But the comparative method has come under attack in recent years. Postmodernists

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[1] The more recent literature is predominantly optimistic, *see* M.V.Antokolskaia, *Would the Harmonisation of Family Law Enlarge the Gap between the Law in the Books and the Law in Action?*, 2002 Die Praxis des Familienrechts (FamPra.ch) 261-292; K. Boele-Woelki, *The Road Towards a European Family Law*, 1 Electronic Journal of Comparative Law (1997); D. Martiny, *Is Unification of Family Law Feasible or Even Desirable?*, *in* A. Hartkamp *et al.* (Eds.), Towards a European Civil Code 151-171 (1998); W. Pintens & K. Vanwinckelen, Casebook European Family Law 15 (2001); W. Pintens, *Rechtsvereinheitlichung und Rechtsangleichung im Familienrecht. Eine Rolle für die Europäische Union?*, 6 Zeitschrift für Europäisches Privatrecht 670-676 (1998); A. Rieg, *L' harmonisation européenne du droit de la famille: mythe ou réalité?*, *in* W. Stoffel & P. Volken (Eds.), Conflits et harmonisation, Liber amicorum Alfred E. von Overbeck 473-499 (1990).

[2] *See also* Boele-Woelki, *supra* note 1, at 7.

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blame comparative law for being trapped in cultural frameworks,[3] for being extremely conservative[4] and for not adequately considering the non-legal framework within which society functions.[5] Although there is quite a bit of truth in this critique, abandoning comparative law altogether would mean throwing the baby out with the bathwater. Instead, especially in family law, we can benefit from these insights by always keeping value questions in mind and by enriching the comparative method with an interdisciplinary approach. I will come back to this suggestion later.

C. Law In Books – Law In Action

It goes without saying that the comparative method cannot confine itself to the law as it is found in books but must also reveal the law as it appears in action.[6] Indeed, in this respect, family law is similar to the law of obligations, the century-old domain of comparative law.[7]

Still, let me give some examples drawn from family law to demonstrate the practical importance of this principle.

As we all know, in most national statutes the notion of fault has lost its importance as a ground for divorce.[8] In some countries, however, it still plays a role when it comes to the consequences of divorce, especially regarding post-divorce spousal support.[9] Let us take, for example, Germany on the one hand and England on the other. According to §1579 No. 6 of the German BGB, post-divorce spousal support can be reduced or even denied if there has been *manifestly gross, one-sided misconduct* on the part of the spouse seeking support. In England, pursuant to Sec. 25 (2) (g) of the MCA,[10] the conduct of the parties, that is fault, is one of several factors that the court must take into

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[3] *See* A. Peters & H. Schwenke, *Comparative Law Beyond Post-Modernism*, 49 International and Comparative Law Quarterly 800, at 802 (2000). For an example of the opening of comparative law to the 'global perspective', *see* I. Edge, (Ed.), Comparative Law in Global Perspective (2000).

[4] E.g. R. Michaels, *Im Westen nichts Neues?, 100 Jahre Pariser Kongress für Rechtsvergleichung – Gedanken anlässlich einer Jubiläumskonferenz in New Orleans*, 66 Rabels Zeitschrift für ausländisches und internationales Privatrecht 97, at 109 (2002).

[5] E.g. P. Legrand, *European Legal Systems are not Converging*, 45 International and Comparative Law Quarterly 60 *et seq.* (1996).

[6] Boele-Woelki, *supra* note 1.

[7] First studies in comparative family law have been published from the 1960s on, *see* W. Müller-Freienfels, Ehe und Recht (1962); P.H. Neuhaus, *Europäisches Familienrecht?: Gedanken zur Rechtsvergleichung und Rechtsvereinheitlichung*, *in* E. von Caemmerer *et al.* (Eds.), Vom deutschen zum europäischen Recht: Festschrift für Hans Dölle, Vol. 2, 419-435 (1963); M. Rheinstein, Marriage Stability, Divorce, and the Law (1972). The International Society of Family Law has been founded as late as in 1973. Concerning the history of comparative law *see* K. Zweigert & H. Kötz, Einführung in die Rechtsvergleichung 1 *et seq.* (1996).

[8] *See* B. Dutoit *et al.*, Le divorce en droit comparé, Vol. 1: Europe (2000).

[9] *See* R. Hinderling, Verschulden und nachehelicher Ehegattenunterhalt: eine rechtsvergleichende Untersuchung zum schweizerischen, US-amerikanischen und deutschen Recht (2001).

[10] Matrimonial Causes Act 1973.

account when deciding upon the financial consequences of divorce. Taken these provisions at face value, one would suppose, that the German courts would consider fault much less frequently than the English courts. But as early as in 1973 the English Court of Appeal[11] decided that a reduction or even denial of a financial provision should only be thought of in case of obvious and gross misconduct – that is, if granting financial relief would be "repugnant to anyone's sense of justice". This formula sounds pretty similar to the wording of the German statute. Can one then suppose that an identical case will be decided alike in the two countries? Not at all. Apparently judges in Germany and England differ considerably in what they consider to be obvious and gross misconduct. Thus there are many German court decisions discussing whether adultery amounts to such misconduct,[12] whereas in England, as in many other Anglo-American legal systems, it almost seems that nothing short of an attempted murder of the obligor spouse will suffice.[13]

One further difference is to be noted: in Germany "obvious and gross misconduct" may only be invoked against the requesting spouse, i.e. in almost all cases the wife,[14] whereas in England and other Anglo-American legal systems it works both ways. It is possible to increase an award if the obligor's behaviour amounted to obvious and gross misconduct, especially in cases of domestic violence by the husband against the wife[15] – cases that in general do not entail any additional financial consequences under German law.

Only if one is aware of such discrepancies in interpretation can one usefully discuss the relevance of fault in post-divorce spousal support.

Let me draw your attention to another feature of family law that illustrates the differences between the law in books and the law in action: court decisions reflect but a very small percentage of family law resolutions. Thus probably in most countries 90 per cent of all divorce proceedings or even more end with a separation or divorce agreement that resolves the financial issues.[16] It is these agreements and not court decisions that determine the life of most divorcees,

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[11] *See Wachtel v. Wachtel* [1973] Fam. 72, [1973] 2 W.L.R. 366.

[12] *See* H.U. Maurer, Commentary on §1579 No. 48, *in* Münchener Kommentar zum Bürgerlichen Gesetzbuch (2000).

[13] England: *see* N. Lowe & G. Douglas, Bromley's Family Law 840 *et seq.* (1998).; United States: *see* American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations, 84 *et seq.* (2002).

[14] This amounts to an indirect or factual discrimination of women, *see* N. Dethloff, *Reform of German Family Law – a Battle against Discrimination*, 3 European Journal of Law Reform 221-241 (2001).

[15] England: *Jones v. Jones* (1976) Fam 8, (1975) 2 W.L.R. 606; Australia: *see e.g.* R. Bailey-Harris, *The Role of Maintenance and Property Orders in Redressing Inequality: Re-Opening the Debate*, 12 Australian Journal of Family Law 3, at 15 *et seq.* (1998).

[16] In Norway, Denmark and Iceland, the spouses can choose in the case of an agreement the procedure of administrative divorce, *see* S. Danielsen, *The Scandinavian Approach: Administrative and Judicial Resolutions of Family Conflicts*, *in* M.-T. Meulders-Klein (Ed.), Familles & Justice 139, at 151 *et seq.* (1997); I. Schwenzer, *Registerscheidung?*, *in* P. Gottwald, E. Jayme, D. Schwab (Eds.), Festschrift für Dieter Henrich 533, at 534 (2000).

although of course they are bargained for in the shadow of the law.[17] If one wants to get a clear picture of the consequences of divorce in a given country, then, one has to examine the reality of such agreements and – going even a bit further – the role of the professions involved in negotiating them.[18]

D. The Functional Approach

In family law as in the classical fields of comparative law, or even more so, the starting point has to be the functional approach.[19] There is little sense in comparing institutions, but it is absolutely necessary to ask what the underlying problem is that a certain legal provision is aimed to redress.

Let me give you one example, the question of pension splitting for husband and wife at divorce, that is the equalisation of pension rights accrued during marriage. Germany pioneered in these fields, expressly providing for pension splitting as early as 1976.[20] It was not until recently that other countries followed suit, for example, the Netherlands in 1995,[21] and England[22] and Switzerland[23] in 2000. Still, even today, there are many legal systems that do not split pensions at divorce, although they all face the same factual problem: the wife who took care of the family and was not employed outside the home (at least not full-time) and therefore accumulated less pension rights than her husband, who worked full-time at higher pay. But focussing only on explicit pension splitting rules would lead to a totally wrong impression. In many legal systems the difference in spouses' pension rights is taken care of by property distribution upon divorce. Pension rights accumulated during the ongoing marriage are regarded as marital property and may thus be divided upon divorce, be it equally or according to the discretion of the court.[24] In still other legal systems differences in accumulated pension rights have to be taken into account in setting post-divorce spousal support awards.[25] This leads us to the conclusion that an overall understanding of how countries deal with the inequality of spouses' work-related retirement accumulations can be achieved only by considering all the economic consequences at divorce: explicit rules on

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[17] R. Mnookin & L. Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale Law Journal 950-997 (1979).

[18] *See e.g.* B. Bastard & L. Cardia-Vonèche, *Inter-Professional Tensions in the Divorce Process in France*, 9 International Journal of Law and the Family 275-285 (1995); J. Eekelaar, M. Maclean, S. Beinart, Family Lawyers. The Divorce Work of Solicitors (2000).

[19] *See* K. Zweigert & H. Kötz, Einführung in die Rechtsvergleichung 33 (1996).

[20] §1587-1587p BGB.

[21] Art. 94 para. 4, 155 BW.

[22] Welfare Reform and Pensions Act 1999.

[23] Art. 122-124 CC.

[24] E.g. in Sweden: Chapter 10, §3 para. 3 Marriage Act. United States: American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2002), §4.08 sec. 1 (a).

[25] E.g. in France: Art. 272 CC.

pension splitting, matrimonial property law in general, and spousal support, at least.

Yet another family law example may be mentioned here. The possibility of premarital contracts to regulate the economic consequences of divorce is currently a hotly debated topic.[26] A country's treatment of the issue can be fully understood only against the background of its matrimonial property and spousal support regimes. Even if one finds that spouses are free to agree upon a regime of separate property, it is possible that a country's courts may provide relief outside family law that circumvents the agreement, yet avoids any overt control of its contents. Well known is, for example, the longstanding tradition of Anglo-American courts, which make use of trust doctrines when family law does not provide suitable remedy.[27] In other countries fictitious employment contracts or partnerships are popular tools to compensate wives who helped build up their partners' businesses and find themselves without any legal title to the proceeds when it comes to divorce.[28]

These examples may suffice to illustrate the functional comparative method and how it applies in the field of family law.

E. Converging Tendencies

Once we have come this far and are able to analyse the underlying problematic fact patterns and identify their solutions, however disguised they may be, we will find quite a number of converging tendencies in European family law.[29] As early as the 1970s a German author labelled this trend "Uniform Law Through Evolution."[30] Because these legal changes only reflect socio-demographic developments in familial behaviour, let me recall the major changes that have taken place in Western industrialised states during recent decades.

The most salient feature is the rise in the divorce rate. Since the 1970s, it has more than doubled nearly everywhere.[31] In many countries, the probability of divorce has now reached 40 to 50 per cent. In Scandinavia, however, a certain

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[26] *See* M. Courvoisier, Voreheliche und eheliche Scheidungsfolgenvereinbarungen – Zulässigkeit und Gültigkeitsvoraussetzungen (2002); I. Schwenzer, *Richterliche Kontrolle von Unterhaltsvereinbarungen zwischen Ehegatten*, 5 Zeitschrift für Europäisches Privatrecht 863-873 (1997).

[27] *See e.g.* S.M. Cretney, *Family Law* 144 *et seq.* (2000).

[28] *See* I. Schwenzer, *Restitution of Benefits in Family Relationships*, International Encyclopedia of Comparative Law, Vol. X: Restitution – Unjust Enrichment and Negotiorum Gestio, Chapter 12, at 27 *et seq.* (1997).

[29] The most prominent voice dismissing the convergence thesis is P. Legrand, *European Systems are not Converging*, 45 International and Comparative Law Quarterly 52-81 (1996).

[30] G. Luther, *Einheitsrecht durch Evolution im Eherecht und im Recht der eheähnlichen Gemeinschaf*, 45 Rabels Zeitschrift für ausländisches und internationales Privatrecht 253-267 (1981).

[31] *See* Council of Europe, Recent Demographic Developments in Europe, at T2.5 (1998); S.B. Kamerman & A.J. Kahn, Family Change and Family Policies in Great Britain, Canada, New Zealand, and the United States (1997).

stagnation at this high level has been observed since the 1980s, indicating that the saturation point might now have been reached. The high number of divorces brings about manifold further developments. These are, on one hand, the rapid increase of children living in stepfamilies and, on the other, the growing number of single-parent families. This is closely linked to the phenomenon described as the feminisation of poverty.[32] Indeed, studies of poverty have shown that in many countries divorce constitutes a much higher risk factor for women than for men[33] and that women living alone with children are especially touched by poverty.[34]

Other features are the increase in age at first marriage and the general decrease in marriages. Taking the example of France, this means that today only approximately 56 per cent of all women below the age of 50 have ever married, compared to approximately 92 per cent of all women of this age group who had married at least once in 1970.[35]

Simultaneously, cohabitation has increased in all countries, in some places dramatically indeed. In the Scandinavian countries, cohabitation can be considered an actual alternative to marriage, whereas in many other countries non-marital unions are of shorter duration and frequently are formalised when children are born.[36]

A general decline in fertility rates can also be observed. Since about 1965, the reproduction rate of the population has fallen to a below-replacement level in all developed countries.[37] On the other hand, the number of out-of-wedlock births has increased dramatically in recent decades. In some countries, namely in Scandinavia, it has reached a level between 50 and 65 per cent.[38]

These demographic developments have nevertheless not occurred to the same extent or at the same pace in all European countries.[39] Large differences remain, with Scandinavian countries at one extreme and the Latin countries and Ireland at the other.[40]

Family law could not and has not stayed unresponsive to these profound socio-demographic changes. As Martiny once wrote: "[t]he basic issues [have

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[32] In the great majority of the states of the European Union, women are more at risk of poverty than men, *see* Eurostat, The Life of Women and Men in Europe 99 (2002).

[33] *See* for Switzerland: R.E. Leu, S. Burri, T. Priester, Lebensqualität und Armut in der Schweiz (1997).

[34] In most countries of the European Union, over 40% of all women living alone with a child had an income below 60 % of the median in 1997, *see* Eurostat, *supra* note 32, at 100.

[35] *See* Council of Europe, Recent Demographic Developments in Europe, at T2.2 (1998).

[36] 'Kindorientierte Eheschliessung', *see* R. Nave-Herz, *Familiale Veränderungen seit 1950*, 4 Zeitschrift für Sozialisationsforschung und Erziehungswissenschaft 45-63 (1984).

[37] *See* F. Rothenbacher, *Social Change in Europe and its Impact on Family Structures*, *in* J. Eekelaar, T. Nhlapo (Eds.), The Changing Family 3, at 5 (1998).

[38] Norway 48,6 per cent in 1997; Denmark 46,3 per cent in 1996; Iceland 65,2 per cent in 1997: Council of Europe, *supra* note 35, at T 3.2.

[39] Rothenbacher uses the term "the contemporaneity of the non-contemporaneous" to describe this phenomenon; Rothenbacher, *supra* note 37, at 21.

[40] *See* F. Höpflinger, *Haushalts- und Familienstrukturen im intereuropäischen Vergleich*, *in* S. Hradil, S. Immerfall (Eds.), Die westeuropäischen Gesellschaften im Vergleich 97-138 (1997).

been] resolved."[41] International Conventions, such as the European Convention on Human Rights[42] and the UN Convention on the Rights of the Child, have contributed a lot in settling central questions.[43]

Converging tendencies can be found in the substantive law of divorce. In almost all countries marital breakdown is if not the only, at least the central ground for divorce, and notions of fault have been largely banned.[44] Even the consequences of divorce in most parts of Europe no longer depend upon fault.[45] Discrimination against illegitimate children has been abolished in most countries.[46] Formal equality between the spouses has also been implemented.[47] There is widespread consensus that the person who renders the homemaker's services and therefore refrains from gainful employment has a right to participate in the wealth accumulated during marriage, including pensions.[48] The last few years even show a converging tendency to provide a legal institution for same-sex partners.[49]

But all these are mere tendencies, and it would be premature to think that one can build uniform rules on these tendencies.

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[41] D. Martiny, *Is Unification of Family Law Feasible or Even Desirable?*, *in* A. Hartkamp *et al.* (Eds.), Towards a European Civil Code 151, at 164 (1998).

[42] The latest example for the impact of the ECHR are the judgements of the European Court of Human Rights in the cases *Goodwin v. UK* and *I. v. UK* (11 July 2002) introducing the right of transsexuals to marry. The judgement of *Marckx v. Belgium* (13 June 1979) had a comparable impact concerning the equality of children born out of wedlock with children born to married parents, *see* W. Pintens & K. Vanwinckelen, Casebook European Family Law 16 *et seq.* (2001).

[43] *See* P. Vlaardingerbroek, *Trends in the Development of Family Law in Europe – Comparative Perspectives*, *in* F.-X. Kaufmann *et al.* (Eds.), Family Life and Family Policies in Europe, Vol. 2, 120 *et seq.* (2002).; C. McGlynn, *The Europeanisation of Family Law*, 13 Child and Family Law Quarterly 35-49 (2001); M. Killerby, *The Council of Europe's Contribution to Family Law (Past, Present and Future)*, *in* N. Lowe, G. Douglas (Eds.), Families Across Frontiers 13-25 (1996).

[44] In some countries fault remains a ground for divorce among others, most importantly France (Art. 242 CC, Art. 243 CC), Belgium (Art. 229 CC, Art. 231 CC), Austria (§49 Ehegesetz), England (Sec. 1 (2) (a)-(c) MCA 1973).

[45] An exception is Belgium, where fault excludes the right to maintenance after divorce (Art. 301 §1 CC).

[46] In the Netherlands and Belgium, the *Marckx-case* (13 June 1979, ECHR (1979) Series A, No. 31) has given an important impulse to the reform in favour of illegitimate children; *see* W. Pintens, K. Vanwinckelen, Casebook European Family Law 18 *et seq.* (2001).

[47] *See* D. Henrich & D. Schwab (Eds.), Eheliche Gemeinschaft, Partnerschaft und Vermögen im europäischen Vergleich (1999).

[48] *See* D. Henrich, *Vermögensregelung bei Trennung und Scheidung im europäischen Vergleich*, 2000 Zeitschrift für das gesamte Familienrecht 6 *et seq.*

[49] *See* M. Coester, *Same-Sex Relationships: A Comparative Assessment of Legal Developments Across Europe*, 2002 Die Praxis des Familienrechts (FamPra.ch) 748-764; D. Jakob, *Die eingetragene Lebenspartnerschaft im Europarecht*, 2002 Zeitschrift für das gesamte Familienrecht 501-508; *see also* the contributions in 3 European Journal of Law Reform (2001), Special Issue on Family Law.

F. Different Codification Techniques

The differences between the legal systems are already present when it comes to codification techniques. Due to historical developments, we find significant differences between the common law and the continental legal systems.

In the common law tradition, there are fewer rules for relationships in intact family. Instead the law focuses on conflict situations.[50] In contrast, the continental systems tend to set up abstract rights and duties for intact family,[51] although it is perfectly clear for continental lawyers, too, that they come into play only when the personal relationship is no longer functioning. The differences in practice are, accordingly, not as big as they may initially seem.

Another salient characteristic of common law statutes is their use of legal definitions,[52] something unknown to continental statutes. When developing uniform rules that are to be applied by persons from different legal backgrounds who may associate different meanings to a term, such legal definitions might prove extremely helpful.

Let me call your attention to a third point on which national family law statutes differ considerably. It is the amount of discretion given to the courts. Take the financial consequences of divorce, for example, one of the central concerns of contemporary divorce law. As I already mentioned, according to English law the court may make financial orders, having regard to a number of factors, which permits case-by-case analysis. The leading cases of *White v. White*,[53] *Cowan v. Cowan*[54] and *Lambert v. Lambert*[55] have produced some long awaited guidelines[56] but a great deal of discretion is still left to the courts.[57] A rather similar situation can be found in the Scandinavian countries.[58] Once again, however, the continental legal systems show a different picture. As far as matrimonial property regimes are concerned, they all employ hard and fast rules,[59] defining exactly what goods have to be taken into account, at what time

[50] K. Scheiwe, Kinderkosten und Sorgearbeit im Recht 330 (1999).

[51] Examples are norms concerning the duties of the spouses: Netherlands: Art. 81 and 83 para. 1 BW; France: Art. 212 and Art. 215 para. 1 CC; Sweden: Chapter 1, §2 Marriage Act; Belgium: Art. 213 CC.

[52] *See e.g.* England: sec. 3 (meaning of 'parental responsibility'), sec. 8 (definition of residence, contact and other orders with respect for children) Children Act 1989.

[53] [2001] 1 All ER 1, [2000] 2 FLR 981.

[54] [2001] EWCA Civ 679, [2001] 2 FLR 192.

[55] [2002] EWCA Civ 1685, [2003] 1 FLR 139.

[56] *See* J. Eekelaar, *The Politics of Pragmatism: Family Law Reform in England and Wales*, 3 European Journal of Law Reform 297, at 304 (2001); D. Hodson, M. Green, N. de Souza, *Lambert – Shutting Pandora's Box*, 2003 Fam Law 37-45.

[57] *See also* J. Dewar, *Reducing Discretion in Family Law*, *in* J. Eekelaar, T. Nhlapo (Eds.), The Changing Family. Family Forms & Family Law 231-250 (1998).

[58] The Scandinavian laws contain rules to avoid 'unreasonable results' in the application of the principle of equal division of property, *see* A. Agell, *Is there One System of Family Law in the Nordic Countries?*, 3 European Journal of Law Reform 313, at 327 (2001).

[59] *See* D. Henrich, *Vermögensregelung bei Trennung und Scheidung im europäischen Vergleich*, 2000 Zeitschrift für das gesamte Familienrecht 6-12; A. Agell, *The Division of Property Upon*

the respective properties have to be evaluated, and what the share of each spouse will be. As to spousal support, although many continental legislators also defer to the discretion of the court,[60] there are other approaches as well. Take, for example, German law. In the German Civil Code seven provisions regulate in detail when support is to be ordered by the court.[61] In practice so-called maintenance guidelines[62] are issued by the appellate courts that specify the amount of support due in a given case down to Euro and Cent.

Which of the two paths should a uniform or harmonised law follow when it comes to the financial consequences of divorce? Blanket clauses that give much leeway to judges might receive wide approval. But that is at the same time their biggest shortcoming. As blanket clauses permit broad differences in interpretation, nothing would have to change, and every national court could go on adjudicating much as under its prior national rule.[63] There is yet another strong argument against blanket clauses for financial matters: in the bargaining context they work against the economically weaker party, who settles for less than under hard and fast rules.[64] This is why the Principles of the Law of Family Dissolution[65] worked out by the American Law Institute and published recently now expressly define what marital property is,[66] what share each spouse will get[67] and how post-divorce spousal support is to be calculated.[68] The Principles even recommend the employment of mathematical formula for some of these purposes.[69]

Divorce From a European Perspective, *in* J. Pousson-Petit (Ed.), Droit comparé des personnes et de la famille – Liber amicorum Marie-Thérèse Meulders-Klein 1-20 (1998); *see also* the contributions *in* D. Henrich & D. Schwab (Eds.), Eheliche Gemeinschaft, Partnerschaft und Vermögen im europäischen Vergleich (1999).

[60] *See* France: Art. 272 CC; Switzerland: Art. 125 CC.

[61] §1570-1576 BGB.

[62] Most influential are the Düsseldorf guidelines (*Düsseldorfer Tabelle*), the version of 1 January 2002 is published in 2001 Zeitschrift für das gesamte Familienrecht 810 *et seq.* or on www.famrz.de.

[63] *See* concerning contract law H. Kötz, *Alte und neue Aufgaben der Rechtsvergleichung*, 57 Juristen Zeitung 257, at 259 (2002).

[64] K. Scheiwe, Kinderkosten und Sorgearbeit im Recht 365 (1999); R.H. Mnookin, L. Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale Law Journal 950, at 977 *et seq.* (1979).

[65] American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations 2002 (hereinafter ALI Principles).

[66] §4.03-4.08 ALI Principles.

[67] §4.09-4.12 ALI Principles.

[68] Chapter 5 ALI Principles.

[69] *E.g.* §5.04 ALI Principles recommends to establish a rule that applies "a specified percentage to the difference between the incomes the spouses are expected to have after dissolution.". This percentage is called the durational factor because it increases with the marriage's duration, *see* ALI Principles, 816 *et seq.*

G. Divergences Due to Different Structures of Administration of Justice and the Law of Procedure

Major differences between legal systems exist regarding the structures of administration of justice.[70] This may have a strong effect on substantive law. Thus, for example, the level of protection afforded to the weaker party by a requirement that a marriage contract be notarised depends upon the relevant law for notaries. Are notaries members of the legal profession or not; are they obliged to counsel the parties or do they simply authenticate the signatures on a written agreement? The effectiveness of the law of child protection also differs according to whether youth authorities are filled by professionals or lay-persons.[71] Likewise it is highly important whether a country provides for family courts[72] and a specialised bar[73] or whether judges may even be laypersons[74] and whether legal counsel is provided and required in family law matters.[75] Finally the level and the frequency of mediation, as well as the professions of persons who practise it,[76] influence family law in action.

H. Divergences Due to Different Family Policies and Family Realities

Having reached this stage of analysis, we can tackle the substantially differing solutions among several national legal systems. How do we react, for example, once we discover that in one country parents owe support to their adult children who are still students, but in another country support obligations are due only for minor children? The explanation for this limitation can possibly be found in publicly funded scholarships that young adults can benefit from. Yet another example: if a legal system does not at all provide pension sharing at divorce, this need not mean, that women are left without means for their old age. It may instead be that women in that country do not need pension splitting or other

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[70] *See* the contributions *in* M.-T. Meulders-Klein (Ed.), Familles & Justice (1997).

[71] Switzerland for example knows a system of local child protection authorities with high lay participation, whereas France has a system of professional 'juge des mineurs'.

[72] Examples are the specialised family courts in Germany, Portugal or Spain, *see e.g.* D. Schwab, *Le droit de la famille et la justice en Allemagne*, *in* M.-T. Meulders-Klein (Ed.), Familles & Justice 105, at 108 (1997); M.A. de Sousa, Portugal, *in* C. Hamilton, A. Perry (Eds.), Family Law in Europe 521, at 523 (2002); E. Roca, Spain, *in id.*, 587, at 590.

[73] *See* J. Eekelaar, M. Maclean, S. Beinart, Family Lawyers. The Divorce Work of Solicitors (2000).

[74] An example is the family proceedings court in England and Wales, *see* C. Hamilton, *England & Wales*, *in* C. Hamilton, A. Perry (Eds.), Family Law in Europe 97 (2002).

[75] *E.g.* §78 of the German Law on civil procedure (Zivilprozessordnung) states a requirement to be represented by a lawyer in divorce and related matters before the family courts.

[76] *See* Conseil de l' Europe, La médiation familiale en Europe: actes, 4e Conférence européenne sur le droit de la famille, 1er-2 octobre 1998 (2000).

financial provisions because they have very high employment rates accompanied by public care for children and/or state guaranteed income.[77] Or it is even conceivable that kinship relations and family networks still function so well that women are not left in poverty.[78]

This leads us to differences in family realities. When it comes to joint custody for children after divorce established as a rule, it makes a big difference whether fathers take a truly active role in children and family work during the ongoing family[79] – as it seems to be more and more the case in Scandinavia[80] – or not, as in Southern Europe, where patriarchal patterns still dominate.[81]

As these examples demonstrate, to get an overall picture of working family law is possible only if we include research on other areas of law that are elements of national family policies such as social law, labour law and tax law. European countries encompass a wide variety of family policies, ranging from Sweden that supports families with the declared aim of reaching gender equality, to Switzerland that defines family as a private matter without need of public support.[82] Having this in mind, it is more or less a question of technicalities how to reconcile the different areas of law concerned. Likewise, before we start harmonising or even unifying family law, we need insights from sociology of law, family sociology and psychology.[83] Indeed, this interdisciplinary exchange is indispensable.

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[77] This is the case in Scandinavia, *see* A. Leira, *The Modernisation of Motherhood*, *in* E. Drew, R. Emerek, E. Mahon (Eds.), Women, Work and the Family in Europe 159, at 168 (1998).

[78] This is the case in Southern Europe, *see* L. Flaquer, *Is there a Southern European Model of Family Policy? in* A. Pfenning, T. Bahle (Eds.), Families and Family Policies in Europe 15-33 (2000).

[79] As to the beneficial effects of fathers' participation in family work *see e.g.* A. Herlth, *The New Fathers: What Does it Mean for Children, Marriage and for Family Policy?*, *in* F.-X. Kaufmann *et al.* (Eds.), Family Life and Family Policies in Europe, Vol. 2, 299-322 (2002).

[80] *See* U. Björnberg, *Family Orientation Among Men*, *in* E. Drew, R. Emerek, E. Mahon (Eds.), Women, Work and the Family in Europe 200-207 (1998).

[81] *See* D. Giovannini, *Are Fathers Changing?*, *in* E. Drew, R. Emerek, E. Mahon (Eds.), Women, Work and the Family in Europe 191-199 (1998).

[82] *See e.g.* F.-X. Kaufmann, *Politics and Policies Towards the Family in Europe: A Framework and an Inquiry into their Differences and Convergences*, *in* F.-X. Kaufmann *et al.* (Eds.), Family Life and Family Policies in Europe, Vol. 2, 419-490 (2002); A. Pfenning, T. Bahle (Eds.), Families and Family Policies in Europe (2000); J. Commaille, F. de Singly (Eds.), The European Family (1997); Fux distinguishes the following family policy regimes: the etatistic family policy aims at supporting gender equality and providing benefits for a variety of living arrangements (e.g. Sweden). The familialistic family policy aims at balancing the income situation between parents and stimulating reproductive behaviour (e.g. France). The individualistic family policy defines family as a private matter (e.g. Switzerland); *see* B. Fux, *Which Models of the Family are Encouraged or Discouraged by Different Family Policies? in* F.-X. Kaufmann *et al.* (Eds.), Family Life and Family Policies in Europe, Vol. 2, 363, at 385 *et seq.* (2002).

[83] *See* already O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 Modern Law Review 1, at 27 (1974), quoted *in* D. Bradley, *Convergence in Family Law: Mirrors, Transplants and Political Economy*, 6 Maastricht Journal of European and Comparative Law 127, at 129 (1999).

I. Divergences Due to Different Value Systems

Finally, most of the divergences in national family laws and family policy can only be attributed to different value systems.[84] Why does one country rely upon post-divorce and kinship support duties, for example, while another provides public support?[85] Why are there still so many countries that do not provide adequate rules for the breakdown of non-marital unions?[86] Why are there still differences in parentage law for children born within and outside of wedlock?[87] Why are premarital agreements scrutinised by courts in one country, but not in others?[88] I could go on putting such questions endlessly.

Certainly all depends on the relevant value system. But what are the crucial issues that determine so many outcomes in family law as well as in the surrounding areas linked to family policy?

In my opinion three basic points determine the orientation of all national family laws: the importance of marriage as a basis of family law, gender issues, and the conceptual dualism of private and public spheres.

The first central question is whether and if so to what extent family law is still firmly based on marriage. Many rules can only be explained as attempts to protect the institution of marriage despite the contrary needs of parties who are involved.[89] In this context, form is often more important than substance. Surely, there has been a constant process of deinstitutionalisation of family relationships in all countries during recent decades,[90] fuelled in part by the ever-growing importance of human rights. But major differences between countries still exist.

The second crucial issue is the gender aspect of family law. It is true that all norms directly discriminating against women have been banned from family law statutes.[91] Thus formal equal rights have been widely achieved. The remaining task is to track down subtle cases of indirect discrimination and

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[84] *See* M. Antokolskaia, *Family Values and Harmonisation of Family Law*, *in* M. Maclean (Ed.), Family Law and Family Values (forthcoming).

[85] The latter is especially the case in Scandinavia, *see* D. Bradley, Family Law and Political Culture 259 (1996).

[86] *See* J. Rubellin-Devichi, Des concubinages dans le monde (1990).

[87] Differences especially concern the establishment and contestation of paternity, *see* I. Schwenzer, *Empfiehlt es sich, das Kindschaftsrecht neu zu regeln?*, Gutachten für den 59. Deutschen Juristentag – Hannover 1992, at 21 *et seq.* (1992).

[88] *See* I. Schwenzer, *Richterliche Kontrolle von Unterhaltsvereinbarungen zwischen Ehegatten*, 6 Zeitschrift für Europäisches Privatrecht 863-873 (1997).

[89] Examples are the still existing differences in parentage law between children born within and outside of wedlock or the spouses' obligation to choose a common family name.

[90] *See* H. Willekens, *Long-term Developments in Family Law in Western Europe: an Explanation*, *in* J. Eekelaar, T. Nhlapo (Eds.), The Changing Family 47, at 55 *et seq.* (1998).

[91] For the history of gender inequality in family law *see e.g.* B. Dölemeyer, *Frau und Familie im Privatrecht des 19. Jahrhunderts*, *in* U. Gerhard (Ed.), Frauen in der Geschichte des Rechts 633 *et seq.* (1997).

achieve substantially equal opportunities, taking into account existing social inequalities.[92] Sensitivity to this goal still differs greatly among countries.[93]

The third key question is closely linked to the first and the second: it centres on the conceptual dualism of private and public spheres. Are the tasks of bringing up children and caring for those who are not able to earn their own living by gainful employment private in nature? Or are enabling and motivating women to re-enter the workforce (by providing day care and the like) or encouraging men to engage in childrearing by granting generous father's leave public tasks?[94] Is the exclusion of all financial adjustments upon divorce in a premarital contract or a separation agreement a private affair?[95] How about domestic violence in the ongoing relationship?

All these examples demonstrate that deinstitutionalisation of family relationships and growing awareness of gender issues in family law go hand in hand with the family moving more and more to the public sphere. The aim of family law, in my opinion, is on the one hand not to hinder people in their quest for individually satisfying family structures and, on the other hand, to protect the interests of the vulnerable when individuals fail in that quest.

J. Conclusion

Let me come to a close. I have taken you on the mental journey that I believe must undergrid the unifying process in family law. I have had to omit very important questions, such as, what kind of instrument are we aiming at – a convention, a directive, a model law, principles or guidelines? But I did so deliberately. Because I think the utmost importance has to be given to the process of unification itself. First, we must employ the well-known comparative law approach; next, we need to undertake an interdisciplinary discussion; and, finally, we have to sit together and resolve important values issues. Only then can we start drafting. The challenges entail quite a few methodological problems – but I am convinced that we can shoulder them.

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[92] *See* N. Dethloff, *Reform of German Family Law – a Battle against Discrimination*, 3 European Journal of Law Reform 221-241 (2001); K. Scheiwe, Kinderkosten und Sorgearbeit im Recht (1999), especially at 327 *et seq.*

[93] *See* J. Künzler, *Paths Towards a Modernization of Gender Relations, Policies and Family Building, in* F.-X. Kaufmann *et al.* (Eds.), Family Life and Family Policies in Europe, Vol. 2, 252-298 (2002).

[94] Basedow underlines the link between the equality of women and men in the workplace according to European Community law and equality in family law, *see* J. Basedow, *Konstantinidis v. Bangemann oder die Familie im Europäischen Gemeinschaftsrecht*, 2 Zeitschrift für Europäisches Privatrecht 197-199 (1994).

[95] *See* the important decision of the German *Bundesverfassungsgericht*, BVerfG, 1 BvR 12/92 of 6.2.2001, 31 (*see* www.bundesverfassungsgericht.de).