

Reprinted from

**PERSPECTIVES FOR THE
UNIFICATION AND HARMONISATION
OF FAMILY LAW IN EUROPE**

Edited by

KATHARINA BOELE-WOELKI

Intersentia
Antwerp – Oxford – New York

METHODOLOGICAL ASPECTS OF HARMONISATION OF FAMILY LAW

INGEBORG SCHWENZER*

1. 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.

* The author is grateful to Professor Dr. h.c. Carol Bruch (University of California, Davis, US) for a critical reading of the manuscript as well as to lic. iur. Michelle Cottier MA (Basel) for her valuable research assistance.

¹ The more recent literature is predominantly optimistic: ANTOKOLSKAIA, MARIA V., “Would the Harmonisation of Family Law Enlarge the Gap between the Law in the Books and the Law in Action?”, *Die Praxis des Familienrechts (FamPra.ch)* 2002, 261-292; BOELE-WOELKI, KATHARINA, “The Road Towards a European Family Law”, *Electronic Journal of Comparative Law*, Vol. 1.1 November 1997; MARTINY, DIETER, “Is Unification of Family Law Feasible or Even Desirable?”, in: HARTKAMP, ARTHUR *et al.* (eds.), *Towards a European Civil Code*, 2nd ed., The Hague etc. 1998, 151-171; PINTENS, WALTER/VANWINGKELEN, KOEN, *Casebook European Family Law*, Leuven 2001, 15; PINTENS, WALTER, “Rechtsvereinheitlichung und Rechtsangleichung im Familienrecht. Eine Rolle für die Europäische Union?”, *Zeitschrift für Europäisches Privatrecht* 1998, 670-676; RIEG, ALFRED, “L’harmonisation européenne du droit de la famille: mythe ou réalité?”, in: STOFFEL, WALTER A./VOLKEN, PAUL (eds.), *Conflicts et harmonisation, Liber amicorum Alfred E. von Overbeck*, Fribourg/CH 1990, 473-499.

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 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 Appeal¹¹ 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

⁸ See DUTOIT, BERNARD *et al.*, *Le divorce en droit comparé. Vol. 1: Europe*, Geneva 2000.

⁹ See HINDERLING, REGULA, *Verschulden und nachehelicher Ehegattenunterhalt: eine rechtsvergleichende Untersuchung zum schweizerischen, US-amerikanischen und deutschen Recht*, Basel 2001.

¹⁰ Matrimonial Causes Act 1973.

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

¹² See MAURER, HANS ULRICH, commentary on § 1579 No. 48, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th ed., Munich 2000 ff.

¹³ England: see LOWE, NIGEL/DOUGLAS, GILLIAN, *Bromley’s Family Law*, 9th ed., London/Edinburgh/Dublin 1998, 840f.; United States: see AMERICAN LAW INSTITUTE, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, Newark/San Francisco 2002, 84 f.

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

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 England²² and Switzerland²³ 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 lesser 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 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

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*, Newark/San Francisco 2002, § 4.08 sec. 1 (a).

²⁵ *E.g.* in France: Art. 272 CC.

²⁶ See COURVOISIER, MAURICE, *Voreheliche und eheliche Scheidungsfolgenvereinbarungen – Zulässigkeit und Gültigkeitsvoraussetzungen*, Basel 2002; SCHWENZER, INGEBORG, "Richterliche Kontrolle von Unterhaltsvereinbarungen zwischen Ehegatten", *Zeitschrift für Europäisches Privatrecht* 1997, 863-873.

poverty.³² Indeed, studies of poverty have shown that in many countries divorce constitutes a much higher risk factor for women than for men³³ 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

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*, 2002 edition, 99.

³³ See for Switzerland: LEU, ROBERT E./BURRI, STEFAN/PRIESTER, TOM, *Lebensqualität und Armut in der Schweiz*, Berne 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, *The life of women and men in Europe*, 2002 edition, 100.

³⁵ See COUNCIL OF EUROPE, *Recent demographic developments in Europe*, Strasbourg 1998, T2.2.

³⁶ "Kindorientierte Eheschliessung", see NAVE-HERZ, ROSMARIE, "Familiale Veränderungen seit 1950", *Zeitschrift für Sozialisationsforschung und Erziehungswissenschaft* 4 (1984), 45-63.

³⁷ See ROTHENBACHER, FRANZ, "Social Change in Europe and its Impact on Family Structures", in: EEKELAAR, JOHN/NHLAPO, THANDABANTU (eds.), *The Changing Family*, Oxford (UK) 1998, 3, 5.

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, *Recent demographic developments in Europe*, Strasbourg 1998, T 3.2.

³⁹ ROTHENBACHER uses the term "the contemporaneity of the non-contemporaneous" to describe this phenomenon: ROTHENBACHER, FRANZ, "Social Change in Europe and its Impact on Family Structures", in: EEKELAAR, JOHN/NHLAPO, THANDABANTU (eds.), *The Changing Family*, Oxford (UK) 1998, 3, 21.

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.

6. 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

⁴⁸ See HENRICH, DIETER, "Vermögensregelung bei Trennung und Scheidung im europäischen Vergleich", *Zeitschrift für das gesamte Familienrecht* 2000, 6 f.

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

⁵⁰ SCHEIWE, KIRSTEN, *Kinderkosten und Sorgearbeit im Recht*, Frankfurt/M 1999, 330.

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.

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 Dissolution⁶⁵ worked out by the American Law Institute and published recently now expressly define what marital property is,⁶⁶ what share each spouse will get⁶⁷ 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

7. 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 laypersons.⁷¹ Likewise it is highly important whether a country provides for family courts⁷² and a specialised bar⁷³ or whether

⁶³ See concerning contract law KÖTZ, HEIN, "Alte und neue Aufgaben der Rechtsvergleichung", *Juristen Zeitung* 57 (2002), 257, 259.

⁶⁴ SCHEIWE, KIRSTEN, *Kinderkosten und Sorgearbeit im Recht*, Frankfurt/M 1999, 365; MNOOKIN, ROBERT H./KORNHAUSER, LEWIS, "Bargaining in the Shadow of the Law: The Case of Divorce", *Yale Law Journal* 88 (1979), 950, 977 ff.

⁶⁵ AMERICAN LAW INSTITUTE, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, Newark/San Francisco 2002 (in the following: 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 f.

⁷⁰ See the contributions in: MEULDERS-KLEIN, MARIE-THÉRÈSE (ed.), *Familles & Justice*, Bruxelles 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. SCHWAB, DIETER, "Le droit de la famille et la justice en Allemagne", in: MEULDERS-KLEIN, MARIE-THÉRÈSE (ed.), *Familles & Justice*, Bruxelles 1997, 105, 108; DE SOUSA, MACHADO ALEXANDRE,

work during the ongoing family⁷⁹ – as it seems to be more and more the case in Scandinavia⁸⁰ – 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.

⁷⁹ As to the beneficial effects of fathers' participation in family work see e.g. HERLTH, ALOIS, "The New Fathers: What Does it Mean for Children, Marriage and for Family Policy?", in: KAUFMANN, FRANZ-XAVER *et al.* (eds.), *Family Life and Family Policies in Europe*, Vol. 2, Oxford 2002, 299-320.

⁸⁰ See BJÖRNBERG, ULLA, "Family orientation among men", in: DREW, EILEEN/EMEREK, RUTH/MAHON, EVELYN (eds.), *Women, Work and the Family in Europe*, London/New York 1998, 200-207.

⁸¹ See GIOVANNINI, DINO, "Are fathers changing?", in: DREW, EILEEN/EMEREK, RUTH/MAHON, EVELYN (eds.), *Women, Work and the Family in Europe*, London/New York 1998, 191-199.

⁸² See e.g. KAUFMANN, FRANZ-XAVER, "Politics and Policies towards the Family in Europe: A Framework and an Inquiry into their Differences and Convergences", in: KAUFMANN, FRANZ-XAVER *et al.* (eds.), *Family Life and Family Policies in Europe*, Vol. 2, Oxford 2002, 419-490; PFENNING, ASTRID/BAHLE, THOMAS (eds.), *Families and Family Policies in Europe*, Frankfurt/M 2000; COMMAILLE, JACQUES/DE SINGLY, FRANÇOIS (eds.), *The European Family*, Dordrecht/Boston/London 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 FUX, BEAT, "Which Models of the Family are Encouraged or Discouraged by Different Family Policies?" in: KAUFMANN, FRANZ-XAVER *et al.* (eds.), *Family Life and Family Policies in Europe*, Vol. 2, Oxford 2002, 363, 385 ff.

⁸³ See already KAHN-FREUND, OTTO, "On uses and misuses of comparative law", *Modern Law Review* 37 (1974), 1, 27, quoted in BRADLEY, DAVID, "Convergence in Family Law: Mirrors, Transplants and Political Economy", *Maastricht Journal of European and Comparative Law* 6 (1999), 127, 129.

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 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.

⁹¹ For the history of gender inequality in family law see e.g. DÖLEMEYER, BARBARA, "Frau und Familie im Privatrecht des 19. Jahrhunderts", in: GERHARD, UTE (ed.), *Frauen in der Geschichte des Rechts*, Munich 1997, 633 ff.

⁹² See DETHLOFF, NINA, "Reform of German Family Law – a Battle against Discrimination", *European Journal of Law Reform* 3 (2001), 221-241; SCHEIWE, KIRSTEN, *Kinderkosten und Sorgearbeit im Recht*, Frankfurt/M 1999, especially 327 ff.

⁹³ See KÜNZLER, JAN, "Paths Towards a Modernization of Gender Relations, Policies and Family Building", in: KAUFMANN, FRANZ-XAVER *et al.* (eds.), *Family Life and Family Policies in Europe*, Vol. 2, Oxford 2002, 252-298.

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 BASEDOW, JÜRGEN, "Konstantinidis v. Bangemann oder die Familie im Europäischen Gemeinschaftsrecht", *Zeitschrift für Europäisches Privatrecht* 1994, 197-199.

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

