

**HARMONISATION OF
FAMILY LAW IN EUROPE:
A HISTORICAL PERSPECTIVE**

EUROPEAN FAMILY LAW SERIES

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A tale of two millennia

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For my mother

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Masha Antokolskaia

PREFACE

The idea of this study first crossed my mind when I was asked to contribute to a report on the perspectives of the harmonisation of family law in Europe for the Netherlands Comparative Law Association.¹ I was challenged by the idea of exploring the main objection to family law harmonisation, the so-called ‘cultural constraints argument’. This argument suggests that it is principally impossible to harmonise family law because the family laws of the different European countries are deeply embedded in their unique national cultures and history. The cultural constraints argument gives rise to two main questions. The first question, whether family law has converged in the past and currently converges in the present, is in principle a historical-empirical one. The other question, whether convergence and the deliberate harmonisation of family law are possible at all, also seems empirical at first sight, but an analysis of the debate on this issue will reveal that the essence of the discord is on the theoretical, rather than the empirical level.

The main purpose of this book is to suggest answers to these two questions through the analysis of convergence and divergence tendencies and the historical instances of deliberate harmonisation in the field of marriage, unmarried cohabitation, divorce, the position of extramarital children, and matrimonial property, in the majority of Europe throughout the last two millennia. In spite of the long span of time and the large geographical and institutional areas covered, this book has a rather limited scope. It does not deal with most of the issues involved in the contemporary debate surrounding the deliberate harmonisation of family law in Europe; such as whether such harmonisation is necessary or desirable, what methods should be employed to achieve it, which fields should be chosen, whether the EU has competence to harmonise family law, and so on. Save a single exception, neither does this book deal with the activities of the Commission on European Family Law (CEFL). The research for this book had already started before the CEFL was established in 2001. My inspiration for this research became all the stronger when, in 2001, I became a member of the CEFL Expert Group. This made me a ‘participating observer’ and allowed me to look into the ‘harmonisation kitchen’. However, this study neither follows the patterns of the CEFL’s work, nor comments on it. While the CEFL is primarily focussed on drafting activities – elaborating *Principles of European Family*

¹ ANTOKOLSKAIA, M., DE HONDT, W., STEENHOFF, G., *Naar een Europees Familierecht* (1999).

| Preface

Law – the research presented in this book is entirely devoted to historical and theoretical issues.

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LIST OF ABBREVIATIONS

†	died
1 Cor.	1 st Epistle of Saint Paul to the Corinthians
A.D.	<i>Anno Domini</i>
ABGB	<i>Allgemeines Bürgerliches Gesetzbuch</i> (Austria)
ALP	<i>Allgemeines Landrecht für die Preussischen Staaten</i>
App	Appendix
Art/Arts	Article/Articles
B.C.	Before Christ
BGB	<i>Bürgerliches Gesetzbuch</i> (Germany)
Bull. civ.	<i>Bulletin des arrêts de la Cour de Cassation</i> (France)
BverfG	<i>Bundesverfassungsgericht</i> (Germany)
c.	<i>circa</i>
Cass. Belg.	<i>Cour de Cassation/Hof van Cassatie</i> (Belgium)
Cass. Civ. 2	<i>Cour de Cassation, Deuxième chambre civile</i> (Supreme Court, France)
Cass. Fr.	<i>Cour de Cassation</i> (Supreme Court France)
Cass. Soc.	<i>Cour de Cassation, chambre sociale</i> (Supreme Court, France)
CC	<i>Code Civil</i> (France)
CEFL	Commission on European Family Law
CFI	Court of First Instance (European Union)
Chamber	<i>la Chambre des Représentants de Belgique/de Belgische Kamer van volksvertegenwoordigers</i> (Belgium)
ch/chs	chapter/chapters
COM	European Commission documents (European Union)
D.	<i>Digeste</i>
Dir.	Directive
ECHR, ECtHR	European Court of Human Rights
ECHR	European Convention for Human Rights and Fundamental Freedoms
ECJ	European Court of Justice (European Union)
EComHR	European Commission of Human Rights
ed/eds	editor/editors
edn/edns	edition/editions

List of Abbreviations

e.g.	<i>exempli gratia</i> (for example)
et al.	<i>et alii</i> (and others)
etc.	<i>et cetera</i> (and the others)
EU	European Union
EWCA Civ	Court of Appeal (Civil Division), England and Wales
FCR	<i>Butterworths Family Court Reports</i> , England and Wales
ff	folios following (following pages)
FLR	<i>Family Law Reports</i> (England and Wales)
Fr.	France/French
HR	<i>Hoge Raad</i> (Supreme Court, The Netherlands)
Ibid.	<i>ibidem</i> (from the same source)
i.e.	<i>id est</i> (that is; in other words)
Iul.	Julien
LPartG	<i>Lebenspartnerschaftsgesetz</i> (Germany)
Luke	Gospel of Saint Luke
Mark	Gospel of Saint Mark
Matt.	Gospel of Saint Matthew
L.R. 1	Law Reports (1st series) (England and Wales)
MP	Member of Parliament
NJ	<i>Nederlandse Jurisprudentie</i> (The Netherlands)
NJW	<i>Neue Juristischen Wochenschrift</i> (Germany)
no	number
No	Number (of an Act)
nr./nrs	number/numbers
O.J.	<i>Official Journal of European Communities</i>
p./pp.	Page/pages
PACS	<i>Pacte civil de solidarité</i>
para/paras	paragraph/paragraphs
PIC	<i>Pacte d'Intérêt Commun</i>
sec.	section
SOU	<i>Statens Offentliga Utredningar</i> (Sweden)
St.	Saint
sub-s/sub-ss	sub-section/sub-sections
supp/supps	supplement/supplements
trans	translated, translation
Ulp.	Ulpian
Univ.	University
v.	versus
vol/vols	volume/volumes