HARMONISATION OF FAMILY LAW IN EUROPE: A HISTORICAL PERSPECTIVE
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A tale of two millennia

MASHA ANTOKOLSKAIA
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 HONDIT, W., STEENHOFF, G., Naar een Europees Familierecht (1999).
Preface

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

ACKNOWLEDGEMENTS ....................................................... vii

PREFACE ................................................................. ix

LIST OF ABBREVIATIONS ........................................... xxvii

**PART I. INTRODUCTION**

CHAPTER 1.
INTRODUCTION ......................................................... 3

  1.1. The Harmonisation of Family Law and the Cultural Constraints Argument ..................................................... 3
  1.2. Trying to Avoid Selection Bias ........................................ 9
      1.2.2. Choice of Fields of Family Law .................................. 10
      1.2.3. Choice of Jurisdictions ........................................... 10
  1.3. Method of Comparative Research ................................... 11
      1.3.1. Law in Context, Law in the Books and Law in Action ....... 11
      1.3.2. Combining Comparative and Historical Research ........... 12
  1.4. General Outline of this Book ....................................... 13

CHAPTER 2.
THE CULTURAL CONSTRAINTS ARGUMENT, CONVERGENCE, AND HARMONISATION: THEORETICAL ASPECTS ....................... 15

  2.1. Introduction ....................................................... 15
  2.2. The Danger of Talking at Cross Purposes. The Conceptual Framework of this Book ........................................... 15
      2.2.1. The Concepts of Convergence, Harmonisation, and Unification as Used in this Book .................................. 16
             Harmonisation embraces unification .......................... 16

Intersentia

xii
## Table of Contents

Different forms of harmonisation and the definition of convergence ........................................ 17
Top-down harmonisation ........................................ 17
Deliberate bottom-up harmonisation ......................... 18
Spontaneous bottom-up harmonisation (convergence) ..... 21

2.2.2. Convergence and Evolution ........................................ 23

2.3. Relativism, Universalism and Pluralism: Harmonisation as Part of the ‘Unfinished Modernity Project’ ........................................ 27

2.3.1. Integrative and Contrastive Comparative Law .................. 27
Looking for sameness or difference? ......................... 27
Historical roots of the integrative and contrastive approaches in comparative law ......................... 28
Philosophical roots of the integrative and the contrastive approach ........................................ 29
Harmonisation of law as a part of the ‘unfinished Modernity project’ ........................................ 32
Post-modernist and Modernity arguments in the current comparative law debates ....................... 33

2.3.2. The Fallacy of the Extremes: The Need to Search for a Middle Way ........................................ 36

2.4. The Cultural Constraints Argument and the Different Theories of the Relation Between Law and Society ........................................ 37

2.4.1. Law as a Mirror of Society: ‘Mirror’ or ‘Deterministic’

Theories of Law ........................................ 39
The ‘strong’ contemporary ‘mirror’ theory of Pierre Legrand: ‘Law-as-culture’ ....................... 39
Weak ‘mirror theories’ of the relation between law and society ........................................ 40

2.4.2. Law as an Insulated System: Theories of the (Relative) Autonomy of Law ........................................ 42
A ‘strong’ theory of the autonomy of law: Watson’s theory of legal transplants ....................... 42
Theories of the relative autonomy of law .................. 45

2.4.3. The Relation Between Law and Society and the Convergence and Harmonisation Debate .................. 46

## PART II. FROM DIVERSITY TO UNIFORMITY: MEDIEVAL CANON LAW – THE IUS COMMUNE OF FAMILY LAW

INTRODUCTION TO PART II ........................................ 51
# Table of Contents

## CHAPTER 3.
**HISTORICAL PRECURSORS OF THE MEDIEVAL UNIFORM FAMILY LAW** ................................................. 55

3.1. Introduction .................................................. 55
3.2. Roman Family Law .............................................. 55
  3.2.1. Why Start with Roman Law? .............................. 55
  3.2.2. Marriage in Roman Law: Informal, Secular and Private . 56
  3.2.3. Concubinage in Roman Law: From Benevolent Neutrality to Legal Recognition ................. 61
  3.2.4. Divorce in Roman Law: Easy and Private ............... 64
  3.2.5. Roman Law on Illegitimate Children: No Status at All . 66
  3.2.6. Roman Law on Matrimonial Property: the Dotal System . 68
  3.2.7. No Interest in Unification .............................. 70
3.3. Barbarian Family Law .......................................... 71
  3.3.1. What is ‘Barbarian’ Law? ................................. 71
  3.3.2. Barbarian Law on Marriage: Patriarchal and Formal .... 72
  3.3.3. Concubinage in Barbarian Law: An Accepted Practice .... 74
  3.3.4. Divorce in Barbarian Law: More Easy for Men .......... 75
  3.3.5. Non-marital Children in Barbarian Law: An Intermediate Position ............................. 76
  3.3.6. Barbarian Law on Matrimonial Property .................. 77
3.4. Concluding Remarks ........................................... 81

## CHAPTER 4.
**FORMATION OF THE MEDIEVAL CANON IUS COMMUNE OF FAMILY LAW** .................................................. 83

4.1. Introduction .................................................. 83
4.2. Early Christian Teaching: Paving the Way for Canon Family Law .... 84
  4.2.1. Church Jurisdiction: *Lex Divina* and *Lex Humana* ........ 84
  4.2.2. First Christian Rules on Marriage: Marriage as Second Best ... 86
  4.2.3. Early Church Attitude Towards Concubinage ............... 88
  4.2.4. First Christian Rules on Divorce: Can Christian Marriage Be Dissolved? ..................... 89
  4.2.5. Concluding Remarks ...................................... 92
4.3. The Carolingian Time: A Crucial Moment ........................ 93
  4.3.1. Extension of the Church Jurisdiction ...................... 93
  4.3.2. Modification of the Law on Marriage in the Carolingian Time ..................................... 95

Intersentia xiii
4.3.3. Concubinage in the Carolingian Time: No Strict Monogamy ........................................... 97
4.3.4. Divorce in the Carolingian Time: Indissolubility Prevails in Theory ................................. 98
4.3.5. Illegitimate Children in the Carolingian Time: A Transitory Period .............................. 100
4.3.6. Matrimonial Property Law in the Carolingian Time .................................................... 101

4.4. The High Middle Ages: The *Ius Commune* Completed .................................................. 102
4.4.1. The Victory of the Church over the Worldly Powers ................................................... 102
4.4.2. Church Jurisdiction in Family Matters: All but Exclusive ......................................... 104
4.4.3. Marriage Law in the High Middle Ages: Victory of the Consensual Theory ...................... 106
4.4.4. Concubinage in the High Middle Ages ........................................................................... 110
4.4.5. Divorce in the High Middle Ages: Indissolubility Prevails also in Practice .................... 111
4.4.6. Illegitimacy in the High Middle Ages ............................................................................. 113

CHAPTER 5.
MATRIMONIAL PROPERTY LAW IN THE HIGH MIDDLE AGES: BEYOND THE CANON LAW UNIFICATION ............................................... 115

5.1. Matrimonial Property Law at the Fringes of Canon Law .................................................. 115
5.2. Diversity of Matrimonial Property Regimes ................................................................. 117
5.2.1. Overview of Matrimonial Property Regimes ........................................................... 117
5.2.2. Community Property Systems ......................................................... 118
    Universal community ......................................................................................... 118
    Limited community ......................................................................................... 119
5.2.3. Systems Without Community .............................................................................. 121
    Separation of property with community of administration ...................................... 121
    Dotal system ..................................................................................................... 122
    Common law system ......................................................................................... 123
5.3. Diversity in Tools, Similarity in Function ............................................................... 126

CHAPTER 6.
MEDIVAL CANON *IUS COMMUNE* OF FAMILY LAW: CONTINUANCE AND RADICAL CHANGE ............................................ 129

6.1. The Scope of the Change ..................................................................................... 129
  6.2.1. The Gap Between the Law in the Books and the Law in Action ........................................... 135
  6.2.2. How the Discrepancy Was Ended ....................... 139

CHAPTER 7.
THE MEDIEVAL IUS COMMUNE OF FAMILY LAW AND THE CURRENT HARMONISATION DEBATE ......................... 141

  7.1. Introduction ................................................. 141
  7.2. Family Ius Commune Different from the Rest of Private Law? ....................................................... 143
    7.2.1. Two Parts of Medieval Ius Commune ................. 143
    7.2.2. Deliberate Unification Versus Spontaneous Harmonisation ............................................. 146
    7.2.3. Different Level of ‘Communality’ ...................... 147
    7.2.4. Different Territorial Scope ............................ 150
  7.3. Concluding Remarks .......................................... 153

PART III. MODERN TIMES – FROM UNIFORMITY TO THE CURRENT DIVERSITY. Similar developments: difference in timing, resemblance in substance

INTRODUCTION TO PART III ..................................... 161

CHAPTER 8.
DEVELOPMENT OF FAMILY LAW IN THE TIMES OF THE PROTESTANT REFORMATION ........................................ 167

  8.1. Introduction: The Breaking of the Uniformity of the Medieval Canon Law ............................................. 167
  8.2. The Protestant Doctrine of Marriage and Divorce ................. 168
    8.2.1. Church Jurisdiction. Hesitant Secularisation of Marriage and Divorce Law .............................. 168
    8.2.2. Protestant Doctrine and Legislation of Marriage ............................................. 169
           The Protestant teaching on marriage ..................... 169
Implementation of Protestant doctrine of marriage into law ........................................ 170

8.2.3. Protestant Teachings and Legislation on Divorce.
  Divorce-as-sanction ........................................ 172
  The Protestant teaching on divorce .................... 172
  Implementation of Protestant teaching on divorce
  into law ................................................... 174
  England: a case apart ..................................... 176

8.2.4. The Protestant Attitude Towards Concubinage ................. 177

8.2.5. The Position of Illegitimate Children in Protestant Law ....... 177

8.3. The Tridentine Reforms of Roman Canon Law: Movement in
the Same Direction .......................................... 178
  8.3.1. Counter-reformation – the Catholic Response ............. 178
  8.3.2. The Tridentine Reforms of Marriage and Divorce .......... 179

8.4. Orthodox Family Law: Remarkable Similarity ...................... 180
  8.4.1. Church Jurisdiction .................................. 180
  8.4.2. Orthodox Marriage Law ............................... 181
  8.4.3. Orthodox Divorce Law ............................... 182
  8.4.4. Concubinage in Orthodox Law ......................... 182
  8.4.5. Illegitimate Children in Orthodox Law ................... 183

8.5. Did the *Ius Commune* of Family Law Survive the Reformation? .... 183


CHAPTER 9.  
THE ENLIGHTENMENT: THE CRADLE OF THE MODERN IDEAS
ON MARRIAGE AND THE FAMILY ............................... 191

9.1. Enlightenment Ideology on Marriage and the Family .............. 191

9.2. Implementation of Enlightenment Ideology into Law .............. 196
  9.2.1. An Overview of Sources ............................... 196
  9.2.2. Enlightenment Laws on Marriage ........................ 196
  9.2.3. Enlightenment Laws on Divorce ........................ 198
  9.2.4. Enlightenment Laws on Concubinage ...................... 200
  9.2.5. Enlightenment Laws on the Position of Illegitimate
         Children ............................................. 201
  9.2.6. Enlightenment Laws on Matrimonial Property .............. 202

9.3. The Influence of Enlightenment and the Convergence of Family Law .. 203
  9.3.1. The Commencement of the Conservative-Progressive
         Discord .............................................. 203
9.3.2. Unification of French Law and the Harmonising Effect of the Export of the *Code Civil* .......................... 205

### CHAPTER 10.  
**THE NINETEENTH CENTURY: FAMILY LAW IN THE MIDDLE OF THE CONSERVATIVE-PROGRESSIVE DISCORD** .......................... 209

10.1. Struggle Between Two Ideologies ............................. 209
  10.1.1. Conservative Family Ideology .......................... 209
  10.1.2. Progressive Family Ideology ............................ 212

10.2. Legislative Change: The 'Conservative Modernisation' of Family Law ............................. 215
  10.2.1. The Proliferation of Civil Marriage in the Nineteenth Century ............................. 215
  10.2.2. The Nineteenth Century Law of Divorce ............................. 217
  10.2.3. The Position of Illegitimate Children in the Nineteenth Century: No Significant Change ............................. 221
  10.2.4. The Nineteenth Century Matrimonial Property Law ............................. 224

10.3. Convergence and Divergence: Similar Ideas, Different Balances of Power ............................. 227
  10.3.1. The Conservative Unification in the New National States: Some Observations ............................. 228
  10.3.2. Convergence/Divergence on the Level of Positive Law ............................. 230
  10.3.3. Convergence/Divergence on the Level of Ideology ............................. 232

### CHAPTER 11.  
**THE TWENTIETH CENTURY UNTIL THE SIXTIES** ............................. 233

11.1. Introduction ............................. 233

11.2. The Radical Reforms at the Beginning of the Century ............................. 233
  11.2.1. Content of the Reforms ............................. 234
  11.2.1.1. Radical family law reforms in agrarian Catholic Portugal ............................. 234
  11.2.1.2. Coordinated modernisation of family law in the Nordic region ............................. 234
  11.2.1.3. Radical reforms in the Soviet Union: back to the future ............................. 238
  11.2.1.4. Turkey westernises family law: a remarkable example of successful legal transplantation ............................. 241
11.2.2. Do Radical Instrumentalist Reforms Necessarily Lead to a Gap Between the Law in the Books and the Law in Action? ........................................... 242
   The Nordic region: success in almost every aspect .......... 243
   The role of elites in Portugal, Turkey and the Soviet Union ........................................... 244
   Portugal: not just a leftist experiment .................. 245
   Turkey: to a success through lasting discord ............. 245
   The Soviet Union: progressive family legislation by means of oppression ............................. 246
   Cultural and other constraints revisited ................... 248

11.3. Family Law During the Interbellum, World War II, and After the War .............................. 249
   11.3.1. Correlation Between the Political Colour of the Regimes and Their Family Policy ............. 249
   11.3.2. Law in the Books versus Law in Action: Divorce by Collusion .................................. 255
   11.3.3. After World War II: The Final Days of the Traditional Family ................................ 256

PART IV. CURRENT FAMILY LAW: SWEEPING MODERNISATION. Breakthrough of uniformity or self-reproducing diversity?

CHAPTER 12. THE BACKGROUND OF THE REFORMS ........................................... 261

   12.1. Introduction ............................................... 261
   12.1.1. Radical Changes in Family Patterns ................. 261
   12.1.2. The Influence of Human Rights Law .................. 262
           European Convention on Human Rights: Article 8 – ‘A whole code of family law’ .................. 262
           European Union protection of family related human rights ........................................ 264
   12.2. Two Waves of Reforms .................................... 265
   12.2.1. The Radical 1960s and 1970s .......................... 265
           The eventual triumph of Enlightenment ideas .......... 265
           Modernisation affects the churches ..................... 266
           The progressive/conservative discord remains .......... 269
   12.2.2. The New-Conservative Wave: The 1980s and Beyond ...... 269
# CHAPTER 13.

**‘DEATH OF MARRIAGE’ OR SEARCH FOR A NEW CONCEPT OF MARRIAGE?**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>13.1.</td>
<td>A New Concept of Marriage</td>
<td>273</td>
</tr>
<tr>
<td>13.2.</td>
<td>Gradual Movement Forwards: England, France, and Germany</td>
<td>276</td>
</tr>
<tr>
<td>13.2.1.</td>
<td>England and Wales: Influence of the Established Church</td>
<td>276</td>
</tr>
<tr>
<td></td>
<td>Secularisation and de-ideologisation of the law of marriage</td>
<td>276</td>
</tr>
<tr>
<td></td>
<td>Capacity to marry</td>
<td>279</td>
</tr>
<tr>
<td></td>
<td>Equality of the spouses</td>
<td>280</td>
</tr>
<tr>
<td></td>
<td>Concluding remarks</td>
<td>281</td>
</tr>
<tr>
<td>13.2.2.</td>
<td>France: Liberté, Égalité, Laïcité</td>
<td>282</td>
</tr>
<tr>
<td></td>
<td>Secularisation and de-ideologisation of the law of marriage</td>
<td>282</td>
</tr>
<tr>
<td></td>
<td>Capacity to marry</td>
<td>283</td>
</tr>
<tr>
<td></td>
<td>Equality of the spouses</td>
<td>284</td>
</tr>
<tr>
<td>13.2.3.</td>
<td>(West) Germany: Marriage Under Protection of the Constitution</td>
<td>285</td>
</tr>
<tr>
<td></td>
<td>Secularisation and de-ideologisation of the law of marriage</td>
<td>285</td>
</tr>
<tr>
<td></td>
<td>Capacity to marry</td>
<td>287</td>
</tr>
<tr>
<td></td>
<td>Equality of the spouses</td>
<td>288</td>
</tr>
<tr>
<td>13.3.</td>
<td>Entering the ‘Zone of Horror’: Sweden and the Netherlands</td>
<td>288</td>
</tr>
<tr>
<td>13.3.1.</td>
<td>Sweden: Breaking with Tradition</td>
<td>288</td>
</tr>
<tr>
<td></td>
<td>Secularisation and de-ideologisation of the law of marriage</td>
<td>288</td>
</tr>
<tr>
<td></td>
<td>Capacity to marry</td>
<td>290</td>
</tr>
<tr>
<td></td>
<td>Equality of the spouses</td>
<td>291</td>
</tr>
<tr>
<td>13.3.2.</td>
<td>The Netherlands: Allowing Same-Sex Couples into the Temple of Marriage</td>
<td>291</td>
</tr>
<tr>
<td></td>
<td>Secularisation and de-ideologisation of the law of marriage</td>
<td>291</td>
</tr>
<tr>
<td></td>
<td>Capacity to marry</td>
<td>292</td>
</tr>
<tr>
<td></td>
<td>Equality of spouses</td>
<td>298</td>
</tr>
<tr>
<td>13.4.1.</td>
<td>De-ideologisation of the Law of Marriage</td>
<td>298</td>
</tr>
<tr>
<td>13.4.2.</td>
<td>Secularisation of the Law of Marriage</td>
<td>301</td>
</tr>
<tr>
<td>13.4.3.</td>
<td>Capacity to Marry</td>
<td>304</td>
</tr>
<tr>
<td>13.4.4.</td>
<td>Equalisation of the Rights of Spouses</td>
<td>310</td>
</tr>
<tr>
<td>13.4.5.</td>
<td>Concluding Remarks</td>
<td>311</td>
</tr>
</tbody>
</table>
CHAPTER 14.
DIVORCE: HAS THE NO-FAULT REVOLUTION BROUGHT CONVERGENCE CLOSER? ................................. 313

14.1. Introduction ............................................................. 313
14.2. Non-compromised Reforms: Introducing Divorce on Demand in
Sweden and Russia ........................................................... 315
  14.2.1. Sweden: Divorce as a Personal Right ............................ 315
  14.2.2. Russia: De-facto Divorce on Demand ............................. 317
14.3. In the Ban of Compromise: England, France and Germany ....... 320
  14.3.1. England: An Unworkable Compromise. A Story of
          a Failed Reform .................................................. 320
          Two reforms, two compromises .................................. 320
          The 1969 divorce reform ........................................... 321
          The stillborn 1996 Family Law Act ................................. 324
  14.3.2. France: Compromise or Consensus? Divorce à la
          Carte Survives all Reforms ........................................ 329
          The 1975 reform: introducing divorce à la carte ............... 329
          Failure of no-fault bills. Retaining divorce à la carte ........ 334
  14.3.3. Germany: A Pragmatic Compromise ............................ 339
14.4. From Indissolubility to Divorce: Spain, Portugal, Italy and Ireland .... 341
  14.4.1. Portugal and Spain: Reintroduction of Divorce After the
          Fall of Dictatorship .................................................. 342
          Portugal .................................................................. 342
          Spain ....................................................................... 342
  14.4.2. Italy: Divorce Law as a Symbol of Liberty and Progress .... 343
  14.4.3. Ireland: Shifting Paradigms of National Identity ............. 347
14.5. The Breakthrough of Convergence or the Continuance of
      Diversity? .................................................................... 352
  14.5.1. What's in a Name? Beyond the Fault – No-fault
          Dichotomy ................................................................. 352
  14.5.2. The Harmonising Impact of International Human
          Rights Instruments ....................................................... 357
  14.5.3. Convergence of Divorce Law? ...................................... 359
  14.5.4. The Harmonizing Potential of the CEFL principles on
          Divorce ................................................................... 361
CHAPTER 15.
NON-MARITAL COHABITATION: FROM OUTLAW TO
FUNCTIONAL ALTERNATIVE FOR MARRIAGE .......................... 367

15.1. Those Who Will Not Marry and Those Who Can Not Marry:
Two Different Categories Under the Same Label .................... 367
  15.1.1. Social and Ideological Change: Simultaneous Existence
         of Different Historical Stages ............................. 367
  15.1.2. Legal Response to Social Change: A Great Range of
         Difference ........................................... 369
  15.1.3. A Working Scheme of Legal Models for the Regulation
         of Non-Marital Cohabitation ............................. 373

15.2. Model 1: No Regulation of Cohabitation ........................ 374

15.3. Model 2: The Piecemeal Amendment of Existing Laws ......... 377

15.4. Model 3: Specific Regulation Providing Minimal Protection to
De-facto Cohabitation: Between Paternalism and Autonomy ........ 378
  15.4.1. Introduction ......................................... 378
  15.4.2. Sweden, Norway: Regulation of De-facto Cohabitation
          with the Possibility to Opt Out ............................ 380
          Sweden .......................................... 380
          Norway .......................................... 381
          Other Nordic countries do not follow .................. 382
  15.4.3. Forgotten Vanguard: Former Yugoslavia and Hungary ...... 383

15.5. Model 4: Specific Legislation Providing Limited Protection to
Cohabitees that Have Concluded a Cohabitation Contract ........... 386

15.6. Model 5: Specific Legislation Providing Limited Protection of
Cohabitation That Falls Somewhere Between Contract and Status .... 387
  15.6.1. The Worst of Two Worlds ............................... 387
  15.6.2. The French PACS: ‘Neither a Union nor a Contract’ ...... 388
  15.6.3. The Belgian Statutory Cohabitation: Equally Suitable for
          a Same-sex Couple as for ‘a Priest and His Maid’ ......... 394
  15.6.4. The Laws of the Spanish Autonomous Communities:
          the Benefits of Creative Differentiation .................... 397
  15.6.5. Transitory Legislation? .............................. 400
  15.6.6. Relevance to the Convergence Debate .................... 402

15.7. Model 6: Registered Partnership Legislation: Providing a Status
Almost Equal to That of Spouses. The ‘Separate but Equal’ Approach . 402
  15.7.1. Introduction ....................................... 402
  15.7.2. Partnership Nordic Style: Resembling Marriage in All
          but Name ............................................. 404
          Denmark pioneers ....................................... 404
<table>
<thead>
<tr>
<th>Chapter 15: CoHabitation</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>15.7.3. The Netherlands: Same- and Different-Sex Couples Under the Same Roof</td>
<td>413</td>
</tr>
<tr>
<td>15.7.4. Germany: Protection of Same-Sex Couples Versus the Special Protection of Marriage</td>
<td>418</td>
</tr>
<tr>
<td>15.7.5. Spread of the Partnership 'Nordic' Style in Europe: A Recent Success Story of Legal Transplantation</td>
<td>423</td>
</tr>
<tr>
<td>15.8. Model 7: The Ultimate Solution: Same-Sex Marriage</td>
<td>424</td>
</tr>
<tr>
<td>15.9. Harmonising Effect of European Human Rights Law</td>
<td>425</td>
</tr>
<tr>
<td>15.9.1. Protection of Unmarried Cohabitation Under the European Convention on Human Rights</td>
<td>425</td>
</tr>
<tr>
<td>15.9.2. Protection of Unmarried Cohabitation in EU Law</td>
<td>429</td>
</tr>
<tr>
<td>15.9.3. European Human Rights Law Has Almost No Harmonising Effect</td>
<td>434</td>
</tr>
<tr>
<td>15.10. Convergence or Divergence of Cohabitation Laws?</td>
<td>435</td>
</tr>
<tr>
<td>15.10.1. Diversity of National Regulations of Same- and Opposite-Sex Cohabitation</td>
<td>435</td>
</tr>
<tr>
<td>15.10.2. Regulation of Non-Institutionalised Opposite-Sex Cohabitation: Less Political, but Highly Diverse</td>
<td>436</td>
</tr>
<tr>
<td>15.10.3. Institutionalised Non-Marital Opposite-Sex Cohabitation: No Consensus</td>
<td>437</td>
</tr>
<tr>
<td>15.10.4. Same-Sex Cohabitation: In the Midst of the Conservative-Progressive Discord</td>
<td>438</td>
</tr>
</tbody>
</table>

**CHAPTER 16.**

**ILLEGITIMATE CHILDREN: FROM DISCRIMINATION TO EQUALITY AN EXAMPLE OF SUCCESSFUL HARMONISATION**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>16.1. From Stigma to Full Social Acceptance</td>
<td>443</td>
</tr>
<tr>
<td>16.2. European Human Rights Law as a Driving Force of Modernisation</td>
<td>445</td>
</tr>
<tr>
<td>16.3. Change of National Laws: Overall Equalisation of Marital and Extramarital Children</td>
<td>448</td>
</tr>
<tr>
<td>16.4. Far-reaching Harmonisation, but Diversity Remains</td>
<td>450</td>
</tr>
</tbody>
</table>
CHAPTER 17.
MATRIMONIAL PROPERTY LAW ................................. 455

17.1. ‘The New Family and the New Property’ ...................... 455
17.2. Limited Community of Property Systems ...................... 456
  17.2.1. France: Community of Acquests .......................... 456
  17.2.2. Italy: From Separation of Property to Limited Community
          of Property ........................................... 458
  17.2.3. Other Western-European Countries with Community
          of Property Regimes ................................. 459
  17.2.4. Limited Community Systems in Eastern Europe .......... 460
17.3. Deferred Community of Property Systems ..................... 461
  17.3.1. Nordic Deferred Community Systems ..................... 462
  17.3.2. The German ‘Community of Surplus’ ................... 465
  17.3.3. Other Countries with Deferred Community of Property .... 466
17.4. The Separation of Property Systems .......................... 467
  17.4.1. England and Wales ................................... 467
17.5. Convergence of Matrimonial Property Law? .................... 471
  17.5.1. Different Opinions Regarding the Existence of
          Convergence .......................................... 471
  17.5.2. Comparison on the Functional Level: Comparing
          Functional Solutions ................................. 473
          Matrimonial property law is less political. More
          consensus on the objectives of reforms .................. 473
          Recent examples of functional comparison ............ 474
          Formal and de-facto equality of the spouses .......... 475
          Solidarity versus autonomy ............................ 476
          Concluding remarks ................................... 480
  17.5.3. Comparison on the Formal Level: Comparing Legal
          Techniques, Concepts and Rules ........................ 480
          No common past, no shared conceptual language ....... 480
          Similar functional results via different legal techniques . 481
  17.5.4. Conclusion: Much Functional Common Core, Little
          Convergence of Legal Techniques, Concepts and Rules .... 482
PART V. CONCLUSION

CHAPTER 18.
CONCLUSION ................................................................. 487

18.1. Introduction .......................................................... 487

18.2. Convergence Past and Present .................................... 488
  18.2.1. Movement Towards Modernisation and Movement
         Towards Convergence: The Importance of a Clear
         Distinction .................................................. 488
  18.2.2. Have Family Laws Been Converging? ..................... 492
         Marriage ....................................................... 493
         Divorce ....................................................... 494
         Extramarital cohabitation ............................... 495
         Position of extramarital children ..................... 495
         Matrimonial property ..................................... 495
         Conclusion .................................................. 497
  18.2.3. Are Family Laws Converging at Present? ................. 497
         The paradox of Zeno – yet the other way around ........ 497
         The end of history of family law? ....................... 498
  18.2.4. Convergence and the Cultural Constraints Argument ...... 500

18.3. Is Family Law Imbedded in Unique National Culture? .......... 501
  18.3.1. Introduction ................................................ 501
  18.3.2. Are National Family Cultures Internally Homogeneous? .... 502
  18.3.3. The Pan-European Character of National Conservative
         and Progressive 'Subcultures' ............................. 505
  18.3.4. Legal Culture ............................................. 506
         Introduction ................................................ 506
         What is legal culture? Deep and surface levels of
         legal cultures .............................................. 506
         The legal cultures of common and civil law .......... 507
         Conclusion ................................................ 509
  18.3.5. Is There a Common European Family Culture? ........... 510
  18.3.6. Conclusion ................................................. 511

18.4. Implications for the Deliberate Harmonisation of Family Law .... 512
APPENDICES

BIBLIOGRAPHY .................................................. 517

TABLE OF CASES .................................................. 561
LIST OF ABBREVIATIONS

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

Intersentia
List of Abbreviations

- **e.g.** exempli gratia (for example)
- **et al.** et ali (and others)
- **etc.** et cetera (and the others)
- **EU** European Union
- **EUWCA Civ** Court of Appeal (Civil Division), England and Wales
- **FCR** Butterworths Family Court Reports, England and Wales
- **ff** folios following (following pages)
- **FLR** Family Law Reports (England and Wales)
- **Fr.** France/French
- **HR** Hoge Raad (Supreme Court, The Netherlands)
- **Ibid.** ibidem (from the same source)
- **i.e.** id est (that is; in other words)
- **Iul.** Julien
- **LPartG** Lebenspartnerschaftsgesetz (Germany)
- **Mark** Gospel of Saint Mark
- **Matt.** Gospel of Saint Matthew
- **L.R. I** Law Reports (1st series) (England and Wales)
- **MP** Member of Parliament
- **NJ** Nederlandse Jurisprudentie (The Netherlands)
- **NJW** Neue Juristischen Wochenschrift (Germany)
- **no** number
- **No** Number (of an Act)
- **nr./nrs** number/numbers
- **O.J.** Official Journal of European Communities
- **p./pp.** Page/pages
- **PACS** Pacte civil de solidarité
- **para/paras** paragraph/paragraphs
- **PIC** Pacte d’Intérêt Commun
- **sec.** section
- **SOU** Statens Offentliga Utredningar (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