HARMONISATION OF FAMILY LAW IN EUROPE: A HISTORICAL PERSPECTIVE
EUROPEAN FAMILY LAW SERIES

Published by the Organising Committee of the Commission on European Family Law

Prof. Katharina Boele-Woelki (Utrecht)
Prof. Frédérique Ferrand (Lyon)
Dr. Cristina González Beilfuss (Barcelona)
Prof. Maarit Jänterä-Jareborg (Uppsala)
Prof. Nigel Lowe (Cardiff)
Prof. Dieter Martiny (Frankfurt/Oder)
Prof. Walter Pintens (Leuven)
HARMONISATION OF FAMILY LAW IN EUROPE:
A HISTORICAL PERSPECTIVE

A tale of two millennia

MASHA ANTOKOLSKAIA
Harmonisation of Family Law in Europe: A Historical Perspective
Masha Antokolskaia

© 2006 Intersentia
Antwerpen – Oxford
http://www.intersentia.com

© 2006 M.V. Antokolskaia

D/2006/7849/62
NUR 822 and 828

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.
For my mother
ACKNOWLEDGEMENTS

This research has been made possible by a fellowship from the Royal Netherlands Academy of Arts and Sciences. I am deeply indebted to the Royal Academy for supporting and financing this research. I am also deeply indebted to Katharina Boele-Woelki for granting me the opportunity to resume the thread of my academic activities in The Netherlands at the Molengraaff Institutuut of Private Law of the University of Utrecht. I am very grateful to her for initiating, hosting and supporting this research, and for five years of most pleasant, fruitful and educative collaboration. A research covering such a time span and such a range of jurisdictions would be neither possible nor sensible without the invaluable help of a network of academic colleagues. I am very grateful to all those who assisted me, in particular to the colleagues who read large parts of the manuscript of this book and made helpful remarks and suggestions. Errors and conclusions are mine. Special thanks to Hans Ankum of the University of Amsterdam for commenting on the Chapter on Roman law, as well as Jan Hallebeek and Lieke Coenraad of the Vrije Universiteit Amsterdam and Chris Coppens of the University of Nijmegen for their comment on the historical chapters of this book. I owe a special dept to Katharina Boele-Woelki of the University of Utrecht, Dieter Martiny of the Europa Universität Viadrina (Frankfurt/Oder, Germany), Bente Braat of the University of Utrecht, Frédérique Ferrand of the Université Jean Moulin (Leon, France), David Bradley of the London School of Economics, Maarit Järnterä-Jareborg of the Uppsala University and Tone Sverdrup of the University of Oslo, for their remarks on the sections concerning German, French, English and Nordic law. I also owe much to the thought provoking discussions with Marie-Thérèse Meulders-Klein, University of Louvain de Neuve, Belgium, and with David Bradley. To my husband and colleague Arno Akkermans, who contributed to the coming into being of this book in many different ways, I owe more than words can say. I am also very grateful to the faculty of law of the Vrije Universiteit Amsterdam and to my colleagues there for enabling me to complete this project after I had gotten a chair there. I would like to thank Scott Curry-Sumner for revising my English and my student-assistant Naomi Spalter for helping me with the final technical touches and for her wonderful illustrations. Finally, I would like to thank my mother for her emotional support and my cat Murzik for being a most perfect anti-stress ball during the years that this research was carried out.

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

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

Intersentia
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
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
# 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
Table of Contents

4.3.3. Concubinage in the Carolingian Time: No Strict Monogamy ........................................... 97
4.3.4. Divorce in the Carolingian Time: Indissolubility Preval 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
<table>
<thead>
<tr>
<th>Page</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>170</td>
<td>8.2.3. Protestant Teachings and Legislation on Divorce. Divorce-as-sanction</td>
</tr>
<tr>
<td></td>
<td>The Protestant teaching on divorce</td>
</tr>
<tr>
<td></td>
<td>Implementation of Protestant teaching on divorce into law</td>
</tr>
<tr>
<td></td>
<td>England: a case apart</td>
</tr>
<tr>
<td>172</td>
<td>8.2.4. The Protestant Attitude Towards Concubinage</td>
</tr>
<tr>
<td>177</td>
<td>8.2.5. The Position of Illegitimate Children in Protestant Law</td>
</tr>
<tr>
<td>178</td>
<td>8.3. The Tridentine Reforms of Roman Canon Law: Movement in the Same Direction</td>
</tr>
<tr>
<td>178</td>
<td>8.3.1. Counter-reformation – the Catholic Response</td>
</tr>
<tr>
<td>179</td>
<td>8.3.2. The Tridentine Reforms of Marriage and Divorce</td>
</tr>
<tr>
<td>180</td>
<td>8.4. Orthodox Family Law: Remarkable Similarity</td>
</tr>
<tr>
<td>180</td>
<td>8.4.1. Church Jurisdiction</td>
</tr>
<tr>
<td>181</td>
<td>8.4.2. Orthodox Marriage Law</td>
</tr>
<tr>
<td>182</td>
<td>8.4.3. Orthodox Divorce Law</td>
</tr>
<tr>
<td>182</td>
<td>8.4.4. Concubinage in Orthodox Law</td>
</tr>
<tr>
<td>183</td>
<td>8.4.5. Illegitimate Children in Orthodox Law</td>
</tr>
<tr>
<td>183</td>
<td>8.5. Did the <em>Ius Commune</em> of Family Law Survive the Reformation?</td>
</tr>
<tr>
<td>191</td>
<td>9.1. Enlightenment Ideology on Marriage and the Family</td>
</tr>
<tr>
<td>196</td>
<td>9.2. Implementation of Enlightenment Ideology into Law</td>
</tr>
<tr>
<td>196</td>
<td>9.2.1. An Overview of Sources</td>
</tr>
<tr>
<td>196</td>
<td>9.2.2. Enlightenment Laws on Marriage</td>
</tr>
<tr>
<td>198</td>
<td>9.2.3. Enlightenment Laws on Divorce</td>
</tr>
<tr>
<td>200</td>
<td>9.2.4. Enlightenment Laws on Concubinage</td>
</tr>
<tr>
<td>201</td>
<td>9.2.5. Enlightenment Laws on the Position of Illegitimate Children</td>
</tr>
<tr>
<td>202</td>
<td>9.2.6. Enlightenment Laws on Matrimonial Property</td>
</tr>
<tr>
<td>203</td>
<td>9.3. The Influence of Enlightenment and the Convergence of Family Law</td>
</tr>
<tr>
<td>203</td>
<td>9.3.1. The Commencement of the Conservative-Progressive Discord</td>
</tr>
</tbody>
</table>
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
       Radical family law reforms in agrarian Catholic Portugal .......................................................... 234
       Coordinated modernisation of family law in the Nordic region ................................................. 234
       Radical reforms in the Soviet Union: back to the future ......................................................... 238
       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 lasing 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? ................................................................. 273

13.1. A New Concept of Marriage ........................................... 273

13.2. Gradual Movement Forwards: England, France, and Germany ...... 276
  13.2.1. England and Wales: Influence of the Established Church ..... 276
           Secularisation and de-ideologisation of the law
           of marriage ............................................. 276
           Capacity to marry ...................................... 279
           Equality of the spouses .......................... 280
           Concluding remarks .............................. 281
  13.2.2. France: Liberté, Égalité, Laïcité .............................. 282
           Secularisation and de-ideologisation of the law
           of marriage ............................................. 282
           Capacity to marry ...................................... 283
           Equality of the spouses .......................... 284
  13.2.3. (West) Germany: Marriage Under Protection of the
           Constitution ........................................... 285
           Secularisation and de-ideologisation of the law
           of marriage ............................................. 285
           Capacity to marry ...................................... 287
           Equality of the spouses .......................... 288

13.3. Entering the ‘Zone of Horror’: Sweden and the Netherlands ......... 288
  13.3.1. Sweden: Breaking with Tradition ............................. 288
           Secularisation and de-ideologisation of the law
           of marriage ............................................. 288
           Capacity to marry ...................................... 290
           Equality of the spouses .......................... 291

  13.3.2. The Netherlands: Allowing Same-Sex Couples into the
           Temple of Marriage .................................... 291
           Secularisation and de-ideologisation of the law
           of marriage ............................................. 291
           Capacity to marry ...................................... 292
           Equality of spouses ................................ 298

  13.4.1. De-ideologisation of the Law of Marriage ................... 298
  13.4.2. Secularisation of the Law of Marriage ....................... 301
  13.4.3. Capacity to Marry ........................................ 304
  13.4.4. Equalisation of the Rights of Spouses ....................... 310
  13.4.5. Concluding Remarks ....................................... 311
# 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 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

Intersentia
Table of Contents

Norway follows .................................. 407
Sweden joins ..................................... 408
Iceland adopts the same model ................. 412
Finland: the same model with notable restrictions .... 412

15.7.3. The Netherlands: Same- and Different-Sex Couples Under the Same Roof ....................................... 413
15.7.4. Germany: Protection of Same-Sex Couples Versus the Special Protection of Marriage ................. 418
15.7.5. Spread of the Partnership 'Nordic' Style in Europe: A Recent Success Story of Legal Transplantation .......... 423

15.8. Model 7: The Ultimate Solution: Same-Sex Marriage ............... 424

15.9. Harmonising Effect of European Human Rights Law ............... 425
15.9.2. Protection of Unmarried Cohabitation in EU Law ........... 429
15.9.3. European Human Rights Law Has Almost No Harmonising Effect ................................... 434

15.10. Convergence or Divergence of Cohabitation Laws? ................. 435
15.10.1. Diversity of National Regulations of Same- and Opposite-Sex Cohabitation .......................... 435
15.10.2. Regulation of Non-Institutionalised Opposite-Sex Cohabitation: Less Political, but Highly Diverse ............ 436
15.10.3. Institutionalised Non-Marital Opposite-Sex Cohabitation: No Consensus ............................. 437
15.10.4. Same-Sex Cohabitation: In the Midst of the Conservative-Progressive Discord .............................. 438

CHAPTER 16.
ILLEGITIMATE CHILDREN: FROM DISCRIMINATION TO EQUALITY
AN EXAMPLE OF SUCCESSFUL HARMONISATION ........................ 443

16.1. From Stigma to Full Social Acceptance .................................. 443
16.2. European Human Rights Law as a Driving Force of Modernisation .... 445
16.3. Change of National Laws: Overall Equalisation of Marital and Extramarital Children .............................. 448
16.4. Far-reaching Harmonisation, but Diversity Remains ................. 450
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

Intersentia
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

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>BIBLIOGRAPHY</td>
<td>517</td>
</tr>
<tr>
<td>TABLE OF CASES</td>
<td>561</td>
</tr>
</tbody>
</table>
# LIST OF ABBREVIATIONS

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

Intersentia
List of Abbreviations

e.g. exempli gratia (for example)
et al. et alii (and others)
etc. et cetera (and the others)
EU European Union
EWCA 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. Ulpien
Univ. University
v. versus
vol/vols volume/volumes

xxviii Intersentia