

MODEL FAMILY CODE

FROM A GLOBAL PERSPECTIVE

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PREFACE

In extensive areas of private law, namely in the law of obligations, endeavours to comprehensively harmonize and unify different legal systems, if not on a global scale, at least Europe-wide, were already commenced in the second half of the twentieth century. For a long time, however, family law has proved resistant to the challenges of internationalization, if not globalization. Until the 1970s, even comparative law in the field of family law was looked upon with suspicion, as this area of law was regarded as being deeply entrenched in distinctive national character. It was not until the Commission on European Family Law was founded in 2001, initiated and chaired by Professor Dr. Katharina Boele-Woelki (University of Utrecht), that the idea of unification, at least harmonization, of family law in Europe, gained momentum.¹ The Commission currently consists of 26 experts representing 22 countries. Up until now, the Commission on European Family Law has elaborated and published Principles on questions of Divorce and Maintenance Between Former Spouses,² a further set will soon be published concerning Parental Responsibilities. As a member of the Expert Group of the Commission on European Family Law, I have been able to profit greatly from the invigorating discussions, which has provided me with the impetus and stimulus to refine my own thoughts on this area.

This Model Family Code, however, should be clearly distinguished from the invaluable work of the Commission on European Family Law. Therefore, it should not be seen as a competing endeavour, but rather as a complementary work, supplementing the important discussion on the harmonization of family law with additional viewpoints. Firstly, the Model Family Code is elaborated from a global, rather than a European perspective. In many cases, it was explicitly inspired by solutions offered under Canadian, Australian and New Zealand legal systems, which may sometimes sound utterly revolutionary, especially to continental lawyers, whose family law sometimes remains deeply rooted in Roman law. Secondly, a Model Code means going beyond the common core of all solutions in the search for the best solution. At the same time, the Model Family Code enabled the possibility to remove all discrepancies persisting in national family laws due to different historical levels of – somewhat patchwork – development, and to create a wholly autonomous and consistent system of family law based on modern solutions. Finally, the Model Family Code has attempted to address all aspects of

¹ <http://www2.law.uu.nl/priv/cefl/>.

² BOELE-WOELKI et al., Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses, Antwerp/Oxford 2004.

Partnerships and of Parents and Children, which constitute the core areas of any family law. Certainly, it is not yet complete; the law of guardianship, including issues of adult protection, as well as family law proceedings and the organization of family courts, have not yet been addressed and shall be dealt with in a later publication.

The Model Family Code offers a mere framework for discussion, a skeleton to be “fleshed out” by national legislators. This enables different family policies and family realities, for example, state family support, availability of public care for children, or employment rates, as well as cultural influences and different value systems, to be incorporated and given appropriate weight. The same holds true for differences in the structures of state administration of justice and bureaucracy. Therefore, the Model Family Code is characterized by general clauses, leaving the details to regulation by national lawmaking entities and the discretion of the courts. The same applies to references in the Model Family Code to the “competent authority”; this is to be replaced as national terminology dictates.

The Model Family Code expressly seeks to utilize new terminology, such as “intentional parentage”, “partnership” to refer to any kind of union, “*responsabilité parentale*”, and “post-partnership solidarity” devoid of any connection with spousal support or alimony, thereby consciously departing from the myriad of national legal terms, which are burdened with historical connotations and whose meanings are shaped and influenced by the respective national legal system. This must be kept in mind when reading this Model Family Code, and the trap of associating terms with their understanding under a particular national legal system should be avoided.

The Model Family Code is not footnoted. Firstly, such an endeavour encompassing almost all areas of family law in so many legal systems just would not have been feasible and, secondly, this would not have fitted this form of publication. Instead, we decided to annex a list of statutes and publications from the states that our work on this Model Family Code mostly relied on.

I am greatly indebted to Mariel Dimsey, LL.M., Lawyer (NSW, Australia), whose collaboration enabled me to produce this Model Family Code. She not only thoroughly researched and gathered the legal materials from all over the world, but also formulated this Model Family Code together with me. Her active mind and quick criticism was always a challenge and further helped me to refine my ideas. It was a pleasure working with her and we had lots of fun.

I am also deeply indebted to my dear colleague and friend Professor Dr. Katharina Boele-Woelki and the Organising Committee of the Commission on European Family Law for the possibility to publish this book in The European Family Law series.

Finally, many thanks go to the translators of the black letter rules, Professor Miriam Anderson (Barcelona, Spain) and Caroline Pellerin-Rugliano, *Attaché Temporaire d'Enseignement et de Recherche* and Julien Rey, *Attaché Temporaire d'Enseignement et de Recherche* (Lyon, France). They not only translated the black letter rules, but made most valuable comments to the whole work. Last but not least I would like to thank my good friend, Professor Dr. Gerd Bruder Müller, for his critical and inspiring discussion of an earlier draft.

Basel, August 2006
Ingeborg Schwenzer

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