Introduction to European family law volume II: The changing concept of 'family' and challenges for domestic family law

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In this second volume the changing concept of 'family' and the current social, political, medical and scientific challenges for domestic family laws are discussed. For this a wide variety of European jurisdiction has been chosen, in order to reflect the considerable legal and societal diversity that still exists within Europe. Hence there are contributions from Eastern and Western jurisdictions, from Northern and Southern jurisdictions; from established Western democracies as well as from jurisdictions that are in many ways rebuilding their legal system after the fall of the iron curtain and the dissolution of the Soviet Union; from jurisdictions which often are perceived to be on the fringes of European developments; and from European Union and non-European Union member states.

The idea behind these 'national reports' is emphatically not to provide a complete account of the domestic family law – that of course would be impossible given the space constraints of this volume – but rather to give the reader an idea of what the major changes and reforms of the last decade(s) have been, and what challenges family law is currently facing, within the respective jurisdictions, and thus to forecast debates and possible future reforms. For this, the contributors were asked to discuss the following:

- 'Horizontal family law', that is, relationships between adults; particularly marriage, divorce, unmarried cohabitation, same-sex relationships

- ‘Vertical family law’, that is, the relationships between adults and children; particularly parentage (including artificial reproductive techniques and surrogacy), parental responsibility/custody, and adoption
- ‘Individual family law’, that is, the status of the individual; particularly the change of legal gender/recognition of one’s preferred gender, and names.

It was expected – and the contributions in this volume indeed show – that while there exist considerable differences between the legal approaches to family law issues adopted within the European jurisdictions, common themes, developments and trends and, arguably, a convergence of family laws, can be identified. These are examined in depth in the fourth volume of the book set (*The Present and Future of European Family Law*, esp. Part 3) and, of course, in the discussion of different family law topics¹ in volume three (*Family Law in a European Perspective*). By taking a comparative, abstract or ‘bird’s eye’ view it is possible to discern what can be called ‘organic European family law’. This term is chosen because of the way these (arguably) European family law elements within the domestic family laws come into being: they are the result of a ‘national growth’; the result of a *mélange* of national societal and legal developments and European influences, the latter including institutional developments (described in volume one of the book set, *The Impact of Institutions and Organisations on European Family Law*); but also the (thankfully increasingly common) result of comparative ‘looks across the borders’. But, needless to say, there often will be no definite proof of such influences as courts and legislatures do not always make their motivations for their actions clear. Hence there continues to be an animated debate about the existence, feasibility and desirability of such ‘European family law’ and indeed the usefulness of comparative analysis. Engaging in this discussion is beyond the scope of this introduction and not the theme of this book set, so the reader is referred to other sources.²

¹ Such as marriage, divorce, cohabitation, same-sex relationships, the financial consequences of divorce, adoption, parentage and surrogacy, parental responsibility, the child’s welfare and family law and older people. It needs to be added that the authors of the third volume for organisational reasons unfortunately did not have access to the contributions of the second volume, although ideally that would have been the case.

² But see, e.g., Masha Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective. A Tale of Two Millennia* (Intersentia, 2006); Masha Antokolskaia, *Convergence and Divergence of Family Law in Europe*

Given that this is a book set on ‘European family law’, it will not come as a surprise that the underlying assumption is that a ‘European family law’ exists, and the comparative approach is undertaken on that basis.

(Intersentia 2007); Walter Pintens, *Towards a Ius Commune in European Family and Succession Law?* (Intersentia 2012); Dieter Martiny, ‘Europäisches Familienrecht – Utopie oder Notwendigkeit?’, (1995) 59 *RabelsZ* 419 ff; Dieter Martiny, ‘Is unification of family law feasible or even desirable?’, in Arthur Hartkamp et al (eds), *Towards A European Civil Code* (4th edn, Kluwer 2010), pp. 440 ff.; Dieter Martiny, ‘Die Möglichkeit der Vereinheitlichung des Familienrechts innerhalb der Europäischen Union’, in Dieter Martiny and Norman Witzleb (eds), *Auf dem Wege zu einem europäischen Zivilgesetzbuch* (Springer 1999), 177–89; Dieter Martiny, ‘The harmonisation of family law in the European Community. Pro and contra’, in Michael Faure, Jan Smits and Hildegard Schneider (eds), *Towards a European Ius Commune in Legal Education and Research* (Intersentia 2002); Walter Pintens, ‘Grundgedanken und Perspektiven einer Europäisierung des Familien- und Erbrechts’, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2003, 330 ff; Walter Pintens, ‘Europeanisation of Family Law’, in Katharina Boele-Woelki (ed.), *Perspectives for the Unification of Harmonisation of Family Law in Europe* (Intersentia 2003) 3–34; Nina Dethloff, ‘Arguments for and against the unification and harmonisation of family law in Europe’, in Boele-Woelki (above), 35–64; David Bradley, ‘A family law for Europe? Sovereignty, political economy and legitimation’, in Boele-Woelki (above) 65–104; Marie-Thérèse Meulders-Klein, ‘Towards a European civil code on family law? Ends and means’, in: Boele-Woelki (above) 105–17; Ingeborg Schwenzer, ‘Methodological aspects of harmonisation of family law’, in Boele-Woelki (above) 143–58; Masha Antokolskaia, ‘The “better law” approach and harmonisation of family law’, in Boele-Woelki (above) 159–82; Clare McGlynn, ‘Challenging the European harmonisation of family law: Perspectives on “the family”’, in Boele-Woelki (above) 217–38; Esin Örcü, ‘A family law for Europe: necessary, feasible, desirable?’, in Boele-Woelki (above) 551–70; ; Nina Dethloff, ‘Europäische Vereinheitlichung des Familienrechts’, 204 (2004) *Archiv für die civilistische Praxis* 544–68; Nina Dethloff, ‘Familien- und Erbrecht zwischen nationaler Rechtskultur, Vergemeinschaftung und Internationalität – Perspektiven für die Forschung’, *Zeitschrift für Europäisches Privatrecht* 2007, 992–1005; Walter Pintens, ‘Familienrecht und Personenstand: Perspektiven einer Europäisierung’, *StAZ* 2004/290-292; Walter Pintens, ‘Die Rolle der Wissenschaft bei der Europäisierung des Familienrechts, in Hein-Peter Mansel et al (eds), *Festschrift für Erik Jayme* (Sellier 2004) 1339–52; Ingeborg Schwenzer, *Model Family Code – From a Global Perspective* (Intersentia 2006); Maarit Jänträ-Jareborg, ‘Europeanization of Law: Harmonization or Fragmentation – A Family Law Approach’, *Tidskrift utgiven av Juridiska Föreningen i Finland (JFT)* 2010, 514 ff; Harry Krause, ‘Comparative family law: Past traditions battle future trends – and vice versa’, in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 1099–129; Ingeborg Schwenzer, ‘Die

While this of course is vulnerable to the challenge that the result has been decided upon before the analysis undertaken, as well as the ‘if you look long enough you will always find what you are looking for’ argument, there nevertheless appears to be sufficient proof, which is drawn together in Volume IV,³ that there is not merely an ‘institutional European family law’ (discussed in the first volume of the book set) but indeed that there is also an ‘organic European family law’.

Europäisierung des Familienrechts’, in Thomas Sutter-Somm and Anton K. Schnyder (eds), *Festgabe für Franz Hasenböhler* (Schulthess 2004) 25–42; David Bradley, ‘Convergence in family law: mirrors, transplants and political economy’ (1999) 6 *Maastricht Journal of European and Comparative Law* 127–50; David Bradley, ‘Family law’ in Jan Smits (ed.), *Elgar Encyclopaedia of Comparative Law* (Edward Elgar 2006) 259–72; David Bradley, ‘Comparative Law, Family Law and Common Law’, (2003) 23 *Oxford Journal of Legal Studies* 127–46; Paul Vlaardingerbroek, ‘Trends in the Development of Family Law in Europe – Comparative Perspectives’, in Franz-Xaver Kaufmann et al (eds), *Family Life and Family Policies in Europe* (Vol 2, Oxford University Press 2002) 120 ff; Walter Pintens, ‘Materielles Familienrecht in Europa – Rechtseinheit oder -vielfalt?’, in Robert Freitag, Stefan Leible, Harald Sippel and Ulrike Wanitzek (eds), *Internationales Familienrecht für das 21. Jahrhundert* (Sellier 2006) 137 ff; Clare McGlynn, *Families and the European Union* (Cambridge University Press 2006); Masha Antokolskaia, ‘Human rights as a basis for the harmonisation of family law?’, in Peter Lødrup and Eva Modvar (eds), *Family Life and Human Rights* (Gyldendal 2004) 29 ff; Andrea Büchler, ‘Jenseits des ganz normalen Chaos des Familienrechts’, in Andrea Büchler and Markus Müller-Chen (eds), *Private Law: National, Global, Comparative, Festschrift für Ingeborg Schwenzer zum 60. Geburtstag* (Stämpfli Verlag/Intersentia 2012) 285–304; Paul Heinrich Neuhaus, ‘Europäisches Familienrecht? Gedanken zur Rechtsvergleichung und Rechtsvereinheitlichung’, in Ernst von Caemmerer et al (eds), *Vom deutschen zum Europäischen Recht. Festschrift für Hans Dölle* (Vol 2, Mohr Siebeck 1963) 419 ff; Dagmar Coester-Waltjen, ‘Human rights and the harmonization of family law in Europe’, in Katharina Boele-Woelki and Tone Sverdrup (eds), *European Challenges in Contemporary Family Law* (Intersentia 2008) 3–16; Peter Lødrup, ‘The reharmonisation of Nordic family law’, in Boele-Woelki and Sverdrup (above) 17–26; Masha Antokolskaia, ‘Harmonisation of substantive family law in Europe: myths and reality’, [2010] CFLQ 397–421.

³ Jens M Scherpe, *The Present and Future of European Family Law* (European Family Law Volume IV), esp. Part 3.