1. Introduction – Is there a European family law?

It will not surprise anyone who picks up the final volume of this book set on European family law to hear that there is no doubt in the mind of the general editor of the book set and author of this volume that there is indeed a European family law. This volume therefore explores what European family law is – and what the future of it may be. To this end, the volume compares and analyses existing laws and court decisions, identifies trends in legislation and jurisprudence, and also forecasts (and in some cases proposes) future developments.¹

As mentioned in the introduction to the book set, many people dispute the existence of a European family law, arguing first and foremost that there is no institution that has the legislative power to actually create such a thing – or even a European ‘Draft Common Frame of Reference’ for family law. That of course is true, although academic initiatives such as the Commission on European Family Law (CEFL) are doing somewhat similar work by creating ‘Principles of Family Law’;² but, of course, these Principles are not binding on anyone and are not intended to be so.

However, the criticism focusing on the lack of an institution empowered to legislate on family law is somewhat misguided; it seems to assume that only a full, or at least partial, codification of family law would ‘qualify’ as European family law. In my view it is not necessary

¹ In doing so, it builds not only on the contributions in Volumes I–III of this book set on European family law but also significantly on my previous publications (referenced somewhat immodestly in the footnotes) and my teaching materials for the courses ‘Comparative Family Law & Policy’, ‘Comparative Family Law’ and ‘European Family Law’ which I have taught/am teaching at the Universities of Cambridge, Leuven, Hong Kong, Pompeu Fabra (Barcelona) and Auckland.

² On which see the chapter by K Boele-Woelki, ‘The Impact of the Commission on European Family Law (CEFL) on European Family Law’, in JM Scherpe (ed.), *European Family Law Volume I: The Impact of Institutions and Organisations on European Family Law*, 209–260 and further references therein.

for the existence of a European family law that that law is comprehensive, 'complete' or embodied in a 'European Code of Family Law' or even individual Acts, Conventions or Regulations. Most of what today is unquestionably classified as 'European law' in many fields is very far from being comprehensive, complete or codified in the narrower sense. On the contrary, most of it is scattered about in various Conventions, Regulations, Directives and, indeed, court decisions³ – but it is nevertheless 'European law'.

The same, although admittedly to a lesser degree, is true for what I see as European family law. There are 'pockets' or 'islands' in which a common European family law has taken hold, as was shown in Volumes I–III of this book set, and as I will elaborate further below.

The second line of criticism usually states that family law is so firmly embedded in the national laws, national legal cultures, national traditions and national societies that a common 'European' family law is nothing but a utopian dream. Again, that may be correct if one takes a narrow view of what European family law is, but as noted above, there are areas in which common positions in the laws have emerged, where institutions have had a significant impact and where something that I would perceive as European family law has developed, sometimes tentatively, sometimes very clearly. To merit the label European family law, these developments do not necessarily have to be completed or have led to the exact same laws or legal solutions in the various jurisdictions. There is room for plurality in what I perceive to be European family law. Indeed, what I see as 'European' family law does not even have to be exclusively European, that is, only existing in Europe – far from it. It would, for example, be patently absurd to require that the equality of men and women in marriage should be a distinct and European development in order for it to be one of the cornerstones of European family law.

So if one assumes – as I do – that there can be such a thing as a European family law, the question arises: where does it come from, what are its sources? The contributions in Volumes I–III of this book set have explored potential sources and looked at national and international developments. Building on this, and taking a broader view, one could divide the sources of European family law into 'institutional' and 'organic' European family law.

The term 'institutional European family law' is meant to cover those areas where there already are binding family law rules, at least for certain major European regions/groups of states such as the Member States of

³ See esp. 2.1 and 2.2.

the European Union or the Contracting States of the European Convention on Human Rights. Here competent bodies such as the European Court of Human Rights, the Court of Justice of the European Union, or the other organs of the European Union, have created family law rules which apply to all Contracting/Member States. This could also be called ‘top down’ European family law, although this would be misleading as the process by which these laws are created is generally very careful and takes into account the existing laws in the jurisdictions concerned. So while it may be ‘top-down’ in the sense that it is imposed by court decision or an institution, it will normally nevertheless be the result of a ‘bottom-up’ development. In any event, this type of European family law, which in some ways is relatively straightforward to identify, will be looked at in Section 2 below.

On the other hand, what will be called ‘organic European family law’ in this contribution is much more difficult to identify. The term is meant to comprise those parts of national family laws that have ‘grown’ in the sense that they are the result of societal developments. These laws sometimes have even ‘grown together’ or at least grown in similar ways, and thus have resulted in something that might be called ‘European’. Due to the way it came about, this type of European family law could also be called ‘bottom-up’ European family law. There has been plenty of debate on whether there is a convergence of family laws in Europe and whether harmonisation is feasible or desirable; this discussion cannot be repeated here;⁴ the views in this debate essentially depend on how widely one

⁴ But see e.g. M Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective. A Tale of Two Millennia* (Intersentia 2006); M Antokolskaia, *Convergence and Divergence of Family Law in Europe* (Intersentia 2007); W Pintens, *Towards a Ius Commune in European Family and Succession Law?* (Intersentia 2012); D Martiny, ‘Europäisches Familienrecht – Utopie oder Notwendigkeit?’, (1995) 59 *RabelsZ* 419 ff.; D Martiny, ‘Is Unification of Family Law Feasible or Even Desirable?’, in A Hartkamp et al (eds), *Towards A European Civil Code* (4th edn, Kluwer 2010) 440 ff.; D Martiny, ‘Die Möglichkeit der Vereinheitlichung des Familienrechts innerhalb der Europäischen Union’, in D Martiny and N Witzleb (eds), *Auf dem Wege zu einem europäischen Zivilgesetzbuch* (Springer 1999) 177–89; D Martiny, ‘The Harmonisation of Family Law in the European Community. Pro and Contra’, in M Faure, J Smits and H Schneider (eds), *Towards a European Ius Commune in Legal Education and Research* (Intersentia 2002); W Pintens, ‘Grundgedanken und Perspektiven einer Europäisierung des Familien- und Erbrechts’, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2003, 330 ff; W Pintens, ‘Europeanisation of Family Law’, in K Boele-Woelki (ed.), *Perspectives for the Unification of Harmonisation of Family Law in Europe* (Intersentia 2003) 3–34; N Dethloff, ‘Arguments

casts the net. For example, if one looks at the financial consequences of divorce in detail, there certainly is an enormous divergence within the European jurisdictions; but if one looks at certain underlying common

for and against the Unification and Harmonisation of Family Law in Europe', in Boele-Woelki (this note) 35–64; D Bradley, 'A Family Law for Europe? Sovereignty, Political Economy and Legitimation', in Boele-Woelki (this note) 65–104; M-T Meulders-Klein, 'Towards a European Civil Code on Family Law? Ends and Means', in Boele-Woelki (this note) 105–17; I Schwenzer, 'Methodological Aspects of Harmonisation of Family Law', in Boele-Woelki (this note) 143–58; M Antokolskaia, 'The "Better Law" Approach and Harmonisation of Family Law', in Boele-Woelki (this note) 159–82; C McGlynn, 'Challenging the European harmonisation of Family Law: Perspectives on "the Family"', in Boele-Woelki (this note) 217–38; E Öricü, 'A Family Law for Europe: Necessary, Feasible, Desirable?', in Boele-Woelki (this note) 551–70; ; N Dethloff, 'Europäische Vereinheitlichung des Familienrechts', 204 (2004) *Archiv für die civilistische Praxis* 544–68; N Dethloff, 'Familien- und Erbrecht zwischen nationaler Rechtskultur, Vergemeinschaftung und Internationalität – Perspektiven für die Forschung', *Zeitschrift für Europäisches Privatrecht* 2007, 992–1005; W Pintens, 'Familienrecht und Personenstand: Perspektiven einer Europäisierung', *StAZ* 2004/290–2; W Pintens, 'Die Rolle der Wissenschaft bei der Europäisierung des Familienrechts, in H-P Mansel et al (eds), *Festschrift für Erik Jayme* (Sellier 2004) 1339–52; I Schwenzer, *Model Family Code – From a Global Perspective* (Intersentia 2006); M Jänterä-Jareborg, 'Europeanization of Law: Harmonization or Fragmentation – A Family Law Approach', *Tidskrift utgiven av Juridiska Föreningen i Finland (JFT)* 2010, 514 ff; H Krause, 'Comparative Family Law: Past Traditions Battle Future Trends – and Vice Versa', in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 1099–29; I Schwenzer, 'Die Europäisierung des Familienrechts', in T Sutter-Somm and A K. Schnyder (eds), *Festgabe für Franz Hasenböhler* (Schulthess 2004) 25–42; D Bradley, 'Convergence in Family Law: Mirrors, Transplants and Political Economy' (1999) 6 *Maastricht Journal of European and Comparative Law* 127–50; D Bradley, 'Family Law' in J Smits (ed.), *Elgar Encyclopaedia of Comparative Law* (Edward Elgar 2006) 259–72; D Bradley, 'Comparative Law, Family Law and Common Law', (2003) 23 *Oxford Journal of Legal Studies* 127–46; P Vlaarding-erbroek, 'Trends in the Development of Family Law in Europe – Comparative Perspectives', in F-X Kaufmann et al (eds), *Family Life and Family Policies in Europe* (Vol. 2, Oxford University Press 2002) 120 ff; W Pintens, 'Materielles Familienrecht in Europa – Rechtseinheit oder -vielfalt?', in R Freitag, S Leible, H Sippel and Ulrike Wanitzek (eds); *Internationales Familienrecht für das 21. Jahrhundert* (Sellier 2006) 137 ff; C McGlynn, *Families and the European Union* (Cambridge University Press 2006); M Antokolskaia, 'Human Rights as a Basis for the Harmonisation of Family Law?', in P Lødrup and E Modvar (eds), *Family Life and Human Rights* (Gyldendal 2004) 29 ff.; A Büchler, 'Jenseits des ganz normalen Chaos des Familienrechts', in A Büchler and M Müller-Chen (eds),

principles – for instance, the (at least nominal) equality of husband and wife (or husband and husband or wife and wife, as the case may be), then there is a ‘common core’ that can be identified and that therefore may well deserve the label European family law.⁵ Needless to say, this is an enormously complex task, and it will be – fragmentarily – undertaken in Section 3 below by looking at common approaches in horizontal (the legal relationships between adults), vertical (the legal relationships between adults and children) and individual (law concerning the name and gender identity of a person) family law.⁶ Obviously what is referred to as ‘institutional European family law’ in this volume will have a significant impact on the organic growth of national family laws; generally the work of the institutions discussed in Volume I of the book set and their non-binding recommendations, principles so on will have found its way into the national family laws in many shapes and forms, giving the national laws a ‘European’ flavour. Still, it needs to be said that ‘organic European family law’ is much less definable and defined than ‘institutional European family law’.

Private Law: National, Global, Comparative, Festschrift für Ingeborg Schwenzer zum 60. Geburtstag (Stämpfli Verlag/Intersentia 2012) 285–304; PH Neuhaus, ‘Europäisches Familienrecht? Gedanken zur Rechtsvergleichung und Rechtsverheitlichung’, in E von Caemmerer et al (eds), *Vom deutschen zum Europäischen Recht. Festschrift für Hans Dölle* (vol 2, Mohr Siebeck 1963) 419 ff.; D Coester-Waltjen, ‘Human Rights and the Harmonization of Family Law in Europe’, in K Boele-Woelki and T Sverdrup (eds), *European Challenges in Contemporary Family Law* (Intersentia 2008) 3–16; P Lødrup, ‘The Reharmonisation of Nordic Family Law’, in Boele-Woelki and Sverdrup (this note) 17–26; Masha Antokolskaia, ‘Harmonisation of Substantive Family Law in Europe: Myths and Reality’, [2010] *Child and Family Law Quarterly* 397–421. On the influence of religion in particular see J Mair, ‘The Impact of Religion on European Family Law’, in JM Scherpe (ed.), *European Family Law Volume I: The Impact of Institutions and Organisations on European Family Law*, 294–327.

⁵ See e.g. JM Scherpe, ‘The Financial Consequences of Divorce in a European Perspective’, in JM Scherpe (ed.), *European Family Law Volume III: Family Law in a European Perspective*, 146–208 and ‘Marital Agreements and Private Autonomy in Comparative Perspective’, in JM Scherpe, *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing 2012) 443–518.

⁶ What is referred to here as ‘individual family law’ in some jurisdictions is perceived as the law of persons or the law of personal status and thus categorised as outside of family law in the narrower sense. However, because of its close connection and impact on family law in general, it needs to be included here.