



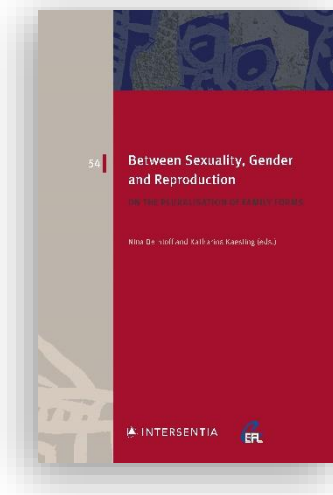
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# DIVERSE LEGAL CULTURES, COMMON CORE? THE CEFL PRINCIPLES OF EUROPEAN FAMILY LAW

Dieter MARTINY

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## 1. CONTEXT OF THE CEFL PRINCIPLES

### 1.1. FIRST APPROACH TO THE SUBJECT

Nearly every day, more or less vigorous confrontations between traditionalists and modernists in family law can be observed in Europe. However, despite all the

diversity among legal cultures, is there a common core in European family law? What is the position of the Principles of European Family Law of the European Commission on Family Law (CEFL)? Some remarks at least can be made on the following issues:

- The context of the CEFL Principles (Section 1)
- The legal system, legal culture, and diversity (Section 2)
- Harmonisation of family law (Section 3)
- A common core and the CEFL (Section 4)

## 1.2. FOCUS OF THE CEFL PRINCIPLES OF EUROPEAN FAMILY LAW

The CEFL is an independent group of family law scholars whose main goal is the creation of Principles of European Family Law that are thought to be most suitable for harmonisation.<sup>1</sup> Over a period of almost two decades, the CEFL has developed and published four trilingual sets of principles covering several fields of family law:<sup>2</sup>

- Divorce and Maintenance Between Former Spouses (2004)
- Parental Responsibilities (2007)
- Property Relations Between Spouses (2013)
- Property, Maintenance and Succession Rights of Couples in de facto Unions (2019)

## 2. LEGAL SYSTEM, LEGAL CULTURE, AND DIVERSITY

### 2.1. LEGAL SYSTEM

In the programme for the conference on which this volume is based, the subject of this chapter is listed in the context of ‘legal systems’. However, it should be assumed that ‘legal culture’ is more than merely a ‘legal system’.<sup>3</sup> One has to

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<sup>1</sup> See K. BOELE-WOELKI, ‘The Commission on European Family Law: Taking Stock after Almost 20 Years’ in K. BOELE-WOELKI and D. MARTINY (eds), *Plurality and Diversity of Family Relations in Europe*, Intersentia, Cambridge 2019, pp. 3–16; W. PINTENS, ‘Principles of European Family Law (PEFL)’ in J. BASEDOW, K.J. HOPT and R. ZIMMERMANN (eds), *The Max Planck Encyclopedia of European Private Law*, vol. 2, Oxford University Press, Oxford 2012, pp. 1329–31.

<sup>2</sup> See K. BOELE-WOELKI, ‘The Impact of the Commission on European Family Law (CEFL) on European Family Law’ in J. SCHERPE (ed), *European Family Law*, vol. 1, Edward Elgar, Cheltenham 2016, pp. 209, 212–27.

<sup>3</sup> See D. NELKEN, ‘Legal Culture’ in J. SMITS (ed), *Elgar Encyclopedia of Comparative Law*, 2nd ed., Edward Elgar, Cheltenham 2012, pp. 480, 486–88.

admit that there are different and broad definitions of legal systems and law. However, within the field of comparative law, legal systems are classified into legal families based, inter alia, on legal techniques, such as codification, the role of case law, and statutory law.<sup>4</sup> For example, civil law systems and common law systems are distinguished. In family law as well, the term 'legal system' is used, although not always with fruitful results, since the emphasis should be more on the individual subjects and their outcomes. Main issues in all legal systems are, inter alia, marriage, parentage, parent and child relationships, and divorce.<sup>5</sup>

## 2.2. LEGAL CULTURE

The controversial concept of 'legal culture' is used in many contexts, inter alia, in cross-cultural research, legal sociology, and comparative law.<sup>6</sup> Any attempt to combine the hard-to-define terms of 'legal' or 'law' and 'culture' touches upon the problematic relationship of law and culture, which makes it difficult to come to a convincing result.<sup>7</sup> There are quite different concepts which cannot be analysed here. It may suffice to state that 'law' for comparative and harmonisation purposes encompasses more than legal norms and is meant in an expansive sense. Of interest is law as practised in the society investigated. 'Culture' touches upon the role and practice of law within a society.<sup>8</sup> Under a broad approach, family law is also a part of culture.<sup>9</sup> As debated in detail, 'legal culture' (also) has to do with values, attitudes, and behaviour. It is often difficult to obtain empirical socio-legal material in a particular field for all European jurisdictions. Existing literature and case law reflect only a part of the picture.

<sup>4</sup> See H. KÖTZ, 'Legal Families' in J. BASEDOW, K.J. HOPT and R. ZIMMERMANN (eds), *The Max Planck Encyclopedia of European Private Law*, vol. 2, Oxford University Press, Oxford 2012, pp. 1063–64.

<sup>5</sup> See D. COESTER-WALTJEN, 'Family' in J. BASEDOW, K.J. HOPT and R. ZIMMERMANN (eds), *The Max Planck Encyclopedia of European Private Law*, vol. 1, Oxford University Press, Oxford 2012, pp. 676, 677–78.

<sup>6</sup> See R. COTTERRELL, 'Comparative Law and Legal Culture' in M. REIMANN and R. ZIMMERMANN (eds), *Oxford Handbook of Comparative Law*, 2nd ed., Oxford University Press, Oxford 2019, pp. 710, 724–26; D. NELKEN, 'Comparative Legal Research and Legal Culture: Facts, Approaches, and Values' (2016) 12 *Annual Review of Law and Social Science* 45, 49–52. Cf. also P. MANKOWSKI, *Rechtskultur*, Mohr Siebeck, Tübingen 2016, pp. 378–87, 479–81.

<sup>7</sup> See R. MICHAELS, 'Legal Culture' in J. BASEDOW, K.J. HOPT and R. ZIMMERMANN (eds), *The Max Planck Encyclopedia of European Private Law*, vol. 2, Oxford University Press, Oxford 2012, pp. 1059–62.

<sup>8</sup> On the components of culture, see R. COTTERRELL, above n. 6, pp. 710, 715–18; D. NELKEN, above n. 6, pp. 45, 46–49.

<sup>9</sup> W. GEPHART, 'Family Law as Culture' in K. BOELE-WOELKI, N. DETHLOFF and W. GEPHART (eds), *Family Law and Culture in Europe*, Intersentia, Cambridge 2014, pp. 347, 349–50, 353–54. Cf. also R. MICHAELS, above n. 7, pp. 1059, 1059–60.

### 2.3. DIVERSITY

Diversity means that there are more or less distinct differences between the European legal systems and also their cultures. It can be assumed that the situation is not the same everywhere. It is, however, not easy to assess what kind of differences really exist in the respective fields. Even more problematic is the use of the general term ‘legal culture’ as an explanation for differences.<sup>10</sup>

Sometimes it is asked if one can already talk of a European legal culture.<sup>11</sup> In family law, one could assume that this could develop in respect of the effects of European human rights (e.g. gender equality) and European private international law.

Since the CEFL Principles cover only some parts of family law, hotly debated fields like same-sex unions, transgender persons, and parentage do not do much to disturb the overall picture.

Another aspect which cannot be dealt with here is the implicit assumption of a national legal culture.<sup>12</sup> It must be kept in mind that there are different groups of families within a national society. For example, legal norms and the use of law may play a quite different role for single parents and for couples with a family business.<sup>13</sup> Difficulties as to the enforcement of maintenance obligations regarding absent parents, on the one hand, and the making of matrimonial property agreements, on the other, exemplify such different situations. Migrants having an Islamic background and a different attitude to marriage and gender equality are another example of this dynamic.<sup>14</sup> Formation and dissolution of marriages are only two examples of the tensions with domestic law.

## 3. HARMONISATION OF FAMILY LAW

Harmonisation of national family law meets numerous obstacles.<sup>15</sup> The attitude of the European Union (EU) is ambiguous. On the one hand, there is freedom of

<sup>10</sup> R. MICHAELS, above n. 7, pp. 1059, 1060–61.

<sup>11</sup> See R. MICHAELS, above n. 7, pp. 1059, 1061–63; R. COTTERRELL, above n. 6, pp. 710, 713–16; W. GEPHART, above n. 9, pp. 347, 360.

<sup>12</sup> As to the concept of a distinctive national culture, D. NELKEN, above n. 6, pp. 45, 48–49; R. MICHAELS, above n. 7, pp. 1059, 1061.

<sup>13</sup> Cf. R. NIEUWENHUS, *The Situation of Single Parents in the EU*, Policy Department for Citizens' Rights and Constitutional Affairs, Brussels 2020, pp. 34–39.

<sup>14</sup> Cf. K. BOELE-WOELKI, ‘Aux origines de la pensée juridique de la famille européenne’ in E. BERNARD, M. CRESPI, and M. HO-DAC (eds), *La famille dans l'ordre juridique de l'Union européenne*, Larcier, Namur 2020, pp. 33, 37; W. GEPHART, above n. 9, pp. 347, 356–57.

<sup>15</sup> For the harmonisation of law, the attitudes of legal actors such as judges and lawyers tend to represent more the ‘internal legal culture’ whereas access to ‘external legal culture’ is much more difficult, see R. MICHAELS, above n. 7, p. 1059, 1060–61. However, asking stakeholders and conducting empirical studies are also possible in the respective fields.

movement;<sup>16</sup> on the other, there is no EU competence for harmonisation of family law. Even for measures in private international law, competence is restricted. However, the EU Charter of Fundamental Rights has to be observed and there are some substantive standards in different areas of family law recognised by the European Court of Human Rights, based on the European Human Rights Convention.<sup>17</sup> There is also a non-institutional development which has been described notably by Jens Scherpe as an ‘organic movement’.<sup>18</sup> These are national reactions mainly to social influences and developments. In a broader sense, the work of CEFL, a European academic association for family law, belongs to this movement.<sup>19</sup>

## 4. A COMMON CORE AND THE CEFL

### 4.1. METHOD OF THE CEFL

The CEFL has developed a multi-step method, which has been described several times mainly by its president, Katharina Boele-Woelki.<sup>20</sup>

One of the first challenges is to find a field suitable for harmonisation.<sup>21</sup> The second step is to create a detailed questionnaire for the respective field of study.<sup>22</sup> The CEFL in general has tried to seek precise answers for specific issues and questions. The questionnaire describes the problems and must be detailed

<sup>16</sup> See K. BOELE-WOELKI, above n. 14, pp. 33, 36–37.

<sup>17</sup> Particularly Article 8 (Right to respect for private and family life) European Convention on Human Rights; and Article 7 (Respect for private and family life), Article 9 (Right to marry and right to found a family), Article 21 (Non-discrimination), Article 23 (Equality between women and men), and Article 24 (Rights of the child) Charter of Fundamental Rights of the European Union – see K. BOELE-WOELKI, above n. 14, pp. 33, 37.

<sup>18</sup> See J. SCHERPE, ‘Comparative Family Law’ in M. REIMANN and R. ZIMMERMANN (eds), *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford 2019, pp. 1088, 1093–96.

<sup>19</sup> J. SCHERPE, above n. 18, p. 1088, 1093. See for more on convergence and divergence, common ground and diversity, E. ÖRÜCÜ, ‘Convergence and Divergence – Theoretical Issues’ in M. ANTOKOLSKAIA (ed), *Convergence and Divergence of Family Law in Europe*, Intersentia, Antwerp 2007, pp. 25, 28–44; K. BOELE-WOELKI, ‘Zwischen Konvergenz und Divergenz – Die CEFL-Prinzipien zum europäischen Familienrecht’ (2009) 73 *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 241, 250–52.

<sup>20</sup> K. BOELE-WOELKI, ‘The Working Method of the Commission on European Family Law’ in K. BOELE-WOELKI (ed), *Common Core and Better Law in European Family Law*, Intersentia, Antwerp 2005, pp. 15, 17–37; K. BOELE-WOELKI ‘Zwischen Konvergenz und Divergenz – Die CEFL-Prinzipien zum europäischen Familienrecht’ (2009) 73 *RabelsZ* 241, 252–65; K. BOELE-WOELKI, above n. 2, pp. 209, 210–12.

<sup>21</sup> K. BOELE-WOELKI, ‘The Working Method of the Commission on European Family Law’ in K. BOELE-WOELKI (ed), *Common Core and Better Law in European Family Law*, Intersentia, Antwerp 2005, pp. 15, 18.

<sup>22</sup> K. BOELE-WOELKI, above n. 21, pp. 15, 21–22.

enough for the different approaches. All relevant aspects – including empirical data, as far as possible – should be covered. In this respect, a functional approach is followed for the underlying questions.<sup>23</sup> The third step is to write national reports that try to reflect not merely the law in the textbooks but rather living law. The next step encompasses the collection and dissemination of the comparative material. The fifth step consists of drafting principles drawn from the national responses to the questionnaire. The sixth and final step is finalising and distributing a version of the principles following discussion with a wider group of experts. The subsequent remarks will concentrate on the achievement of uniformity.

## 4.2. ESTABLISHING A COMMON CORE

The common core approach is used in comparative law. Originally, it was mainly used to show that the solution for a specific problem was generally identical for any jurisdiction despite all differences in legal systems and in legal reasoning,<sup>24</sup> i.e. that behind different legal constructions lie the same values. The common core is one element. In this respect, it is a functional approach.<sup>25</sup> Today, ‘common core’ is often also used for the purpose of providing a foundation for building a common legal culture and contributing to the harmonisation of laws.<sup>26</sup> One can understand a common core in a more general sense, too, namely as a majority solution.

### 4.2.1. *Finding the Common Core*

Despite the fact that diversity and identity are hard to define, legal diversity as such is not an absolute obstacle. It is simply the starting point for efforts to overcome the problem of different solutions to the same problem and reach at least some uniformity. Using comparable concepts is essential. For example, it is the broader concept of ‘parental responsibility’ and not the traditional but narrower term of ‘custody’ that has been adopted in the CEFL Principles.

<sup>23</sup> See K. BOELE-WOELKI, above n. 1, pp. 3, 6.

<sup>24</sup> See A. FROHLICH, ‘The Beginnings of the Common Core Method in Comparative Law’ [13.10.2014] <<https://comparelex.org/2014/10/13/the-beginnings-of-the-common-core-method-in-comparative-law>> accessed 15.12.2021.

<sup>25</sup> Cf. K. BOELE-WOELKI, above n. 1, pp. 3, 6.

<sup>26</sup> See R. ZIMMERMANN, ‘The Significance of the Principles of European Contract Law’ (2020) 28 *European Review of Private Law* (ERPL) 487, 491.

Cf. also, for the Common Core of European Private Law, 18th General Meeting of the Common Core of European Private Law, 22–23 June 2012 <[https://common-core.org/wp-content/uploads/2020/11/Doc18\\_meeting\\_18\\_programme\\_V2.pdf](https://common-core.org/wp-content/uploads/2020/11/Doc18_meeting_18_programme_V2.pdf)> accessed 15.12.2021. Today, there is a whole series of books on principles in different areas of European private law.

When there was a certain solution applied in a majority of the jurisdictions, it was generally followed by the CEFL, but only after a critical evaluation.<sup>27</sup> If no common core could be identified, the CEFL nevertheless tried to establish a principle.<sup>28</sup>

#### 4.2.2. *Limits on the Common Core Approach*

There are some limits on the common core approach. Principles are generally not as precise as statutes, as statutory provisions have many details and implementing provisions. Therefore, particularly for substantive and procedural details, the solution may be left to national law.<sup>29</sup> National structures of political and administrative authorities and the courts have to be respected as far as possible. Today, many issues are also dealt with by special social services, often under public law.

### 4.3. COMMON CORE AND BETTER LAW

In drafting the Principles, the CEFL has applied both the common core method as well as a better law approach.<sup>30</sup>

#### 4.3.1. *Better Law*

The CEFL Principles not only reiterate the status quo of the law but also try, like restatements and other principle projects,<sup>31</sup> to promote a certain development. The ‘better law’ is preferred. Identifying that best solution requires – as with the final evaluation in classical comparative law – a careful consideration in each individual case and the task is rarely completely unassailable.<sup>32</sup>

In rare cases, the better law approach has been adopted even in the face of a clear common core, for example, in the case of a parent’s death. In most legal orders, the responsibilities of the deceased parent with sole parental responsibilities are then attributed to the surviving parent, sometimes without

<sup>27</sup> K. BOELE-WOELKI, above n. 21, pp. 15, 31–37; K. BOELE-WOELKI, ‘Zwischen Konvergenz und Divergenz – Die CEFL-Prinzipien zum europäischen Familienrecht’ (2009) 73 *RabelsZ* 241, 260–65.

<sup>28</sup> See K. BOELE-WOELKI, ‘Zwischen Konvergenz und Divergenz – Die CEFL-Prinzipien zum europäischen Familienrecht’ (2009) 73 *RabelsZ* 241, 259.

<sup>29</sup> K. BOELE-WOELKI, above n. 21, pp. 15, 32.

<sup>30</sup> K. BOELE-WOELKI, above n. 21, pp. 15, 31–37.

<sup>31</sup> See R. MICHAELS, ‘Restatements’ in J. BASEDOW, K.J. HOPT and R. ZIMMERMANN (eds), *The Max Planck Encyclopedia of European Private Law*, vol. 2, Oxford University Press, Oxford 2012, pp. 1464, 1466.

<sup>32</sup> Cf. for the problems in contract law, R. ZIMMERMANN, above n. 26, pp. 487, 492–95.



further state intervention. However, this does not happen automatically under the CEFL Principles. In the interest of the child, a decision by the competent authority is necessary.<sup>33</sup>

It is not only national law that serves as a basis for the common core. Some basic values, such as gender equality and a certain respect for party autonomy, are already stated as fundamental in the preface of the CEFL Principles.

#### 4.3.2. *Changes*

While existing national rules are important for the CEFL Principles, legal changes and reform movements are also of significance. This provides some flexibility but also sometimes reveals the limits of drafting new principles based on existing law.<sup>34</sup>

The traditional argument that deep-rooted cultural constraints are an obstacle to harmonisation has lost much of its strength.<sup>35</sup> It is, however, not easy to take into account a societal trend towards sometimes rapid changes.<sup>36</sup> When preparing the Divorce Principles of 2004, national reports showed a common core whereby an irretrievable breakdown of the marriage was required prior to a divorce. However, after discussion with the CEFL experts, this common core was not reflected in the CEFL Principle. Rather, in line with legal and societal developments, the CEFL Principles foresee a separation period of only one year as a better solution.<sup>37</sup> Today, with the decreasing importance of status and religion for family law,<sup>38</sup> the movement in the direction of a 'dejudicialisation' of divorce has also accelerated. Non-judicial divorces have been introduced, for example, in Italy in 2014 and in France in 2016.<sup>39</sup> A private divorce, available to couples without children, in the form of a notarial or even private instrument

<sup>33</sup> See K. BOELE-WOELKI et al., *Principles of European Family Law Regarding Parental Responsibilities*, Intersentia, Cambridge 2007, Principle 3:31(2) comment 3.

<sup>34</sup> See for legal culture and legal change, R. COTTERRELL, above n. 6, pp. 710, 718–20.

<sup>35</sup> See already M. ANTOKOLSKAIA, 'Family Law and National Culture – Arguing Against the Cultural Constraints Argument' in K. BOELE-WOELKI (ed), *Debates in Family Law Around the Globe at the Dawn of the 21st Century*, Intersentia, Antwerp 2009, pp. 37–48.

<sup>36</sup> See K. BOELE-WOELKI, above n. 14, pp. 33, 38–41.

<sup>37</sup> See K. BOELE-WOELKI et al., *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, Intersentia, Antwerp 2004, Principle 1:8 comment 3 and p. 55; K. BOELE-WOELKI, 'Zwischen Konvergenz und Divergenz – Die CEFL-Prinzipien zum europäischen Familienrecht' (2009) 73 *RebelsZ* 241, 247–48.

<sup>38</sup> See S. CRETNEY, 'Breaking the Shackles of Culture and Religion in the Field of Divorce' in K. BOELE-WOELKI (ed), *Common Core and Better Law in European Family Law*, Intersentia, Antwerp 2005, pp. 3–12; P. MANKOWSKI, above n. 6, pp. 24–28, 205–11. However, against neglecting the 'religious factor', see W. GEPHART, above n. 9, pp. 347, 354–56.

<sup>39</sup> See for Italy: Legge 10.11.2014, n. 162: Introduction of two non-judicial divorce procedures (divorce by consent); France: Loi n° 2016-1547 du 18.11.2016: Introduction of non-judicial divorce (Article 229-1 to 229-4 Civil Code).

has become a more common model for divorce by mutual consent. Also, different family forms, particularly same-sex relationships, have led to new developments. This developing landscape, together with techniques of artificial reproduction, has led to new solutions for parentage.<sup>40</sup> Same-sex relationships provoke innovations for which simple equal treatment is not possible.<sup>41</sup> An example is the introduction of co-motherhood for the lesbian partner of the birth mother.

#### 4.3.3. *Acceptance of Differences*

An example of the acceptance of divergent approaches can be found in matrimonial property law. In the Principles of European Family Law Regarding Property Relations Between Spouses, the CEFL has developed an all-inclusive set of rules for two different matrimonial property regimes: participation in acquisitions based on separate property, and a community of acquisitions.<sup>42</sup> Both regimes have been put on equal footing.<sup>43</sup>

### 4.4. AFTER ESTABLISHMENT OF THE PRINCIPLES

#### 4.4.1. *Post-Principles Stage*

Since their establishment, the Principles have been able to contribute to an informed academic and political debate.<sup>44</sup> The Principles, expressed in the form of provisions, can be read in conjunction with the supplementary comparative overviews and comments, which explain the rules and offer comparative information. The Principles often serve as an inspiration for lawmakers. They may be used as a frame of reference, particularly for national<sup>45</sup> but also for European and international legislators. However, only the contours of a future European family law are visible today.<sup>46</sup>

<sup>40</sup> Cf. A. DUTTA (ed), *Künstliche Fortpflanzung und europäisches Familienrecht*, Gieseking, Bielefeld 2015.

<sup>41</sup> Cf. K. BOELE-WOELKI and A. FUCHS (eds), *Same-Sex Relationships and Beyond – Gender Matters in the EU*, 3rd ed., Intersentia, Antwerp 2017.

<sup>42</sup> See J. SCHERPE, ‘The Financial Consequences of Divorce in a European Perspective’ in J. SCHERPE (ed), *European Family Law, Family Law in a European Perspective*, vol. 3, Edward Elgar, Cheltenham 2016, pp. 146, 179–86.

<sup>43</sup> These issues have also been addressed by including two common chapters on the general rights and duties of spouses and on marital property agreements, which are to be applied regardless of which of the regimes applies.

<sup>44</sup> See K. BOELE-WOELKI, above n. 2, pp. 209, 227–29; K. BOELE-WOELKI, above n. 14, pp. 33, 50–51.

<sup>45</sup> See the examples of K. BOELE-WOELKI, above n. 14, pp. 33, 48–49.

<sup>46</sup> See K. BOELE-WOELKI, above n. 14, pp. 33, 51–55.

#### 4.4.2. *Future Developments*

The family law of today exhibits many reforms, albeit with many facets, occurring at different speeds, and with different solutions in the various legal systems. It is also clear that the Principles cannot be valid for all eternity. New developments and trends must be monitored and taken into account. At the moment, the CEFL is in the midst of an updating process to record new developments in the jurisdictions under investigation.

## 5. CONCLUSION

The CEFL Principles have never pretended to reflect the whole of the more or less divergent cluster of European legal cultures. Their effort to largely establish a common core for European family law was a very important, but not their only goal. To the extent possible, there was a conscious effort not to limit the inquiry to legal norms, case law, and academic thought; and a ‘better law’ approach was sometimes used as well. An enormous amount of work has been invested to establish the ‘common core’ and to achieve well-balanced modern answers. Because of this, the Principles’ solutions and the collected comparative material have been useful not only for reform purposes in different European jurisdictions but also for research. In this respect, they can play an important role in the ongoing reform process in the – formerly often rigidly perceived – field of family law.