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Changing Families, Changing Family Law in Europe

Konrad Duden and Denise Wiedemann (eds.)

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CHANGING FAMILIES, CHANGING FAMILY LAW IN EUROPE

European Family Law Series

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

An open access version of this book is also available online, thanks to funding from the Max Planck Institute for Comparative and International Private Law.

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Changing Families, Changing Family Law in Europe

First published in paperback in 2024, ISBN 978-1-83970-380-5
Web PDF edition, 2024

ISBN 978-1-83970-502-1

NUR 822

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

PART VI

CHANGING FAMILIES, CHANGING FAMILY LAW

CONCLUDING REMARKS

Changing Families, Changing Family Law

Konrad Duden and Denise Wiedemann

1. INTRODUCTION

A married, opposite-sex couple that lives with their biological children under the same roof and where the husband is the sole or primary bread-winner – this standard of what a family looks like has for a long time been profoundly eroded. Partnership models other than heterosexual marriage have become more and more common; ways of becoming a parent and raising one's child have multiplied; gender identities outside of the male/female binary are becoming ever more visible. The increased variety of what families in Europe look like does not alter the statistical importance, even dominance, of so-called 'traditional' family models. The pluralization of family models does, however, challenge those family models as normative standards.[1] Many explanations are offered for the de-standardization and pluralization[2] of family models. Prominently, they are associated with growing individual autonomy and a greater tolerance

[1] A.C. Kuijsten, 'Changing Family Patterns in Europe: A Case of Divergence?' (1996) 12 *European Journal of Population* 115, 140.

[2] On the pluralization of families recently see N. Dethloff and K. Kaesling (eds), *Between Sexuality, Gender and Reproduction*, Intersentia, Cambridge 2023.

in society towards family forms and gender identities outside the traditional model.[3]

The previous contributions have addressed a variety of changes in European family life and have shown how the changing family realities have influenced family law in Europe – often creating frictions between the various jurisdictions. This chapter attempts to bring the different threads together. First, it will take stock of changes in the legal recognition of gender identities (see section 2.1), partnership patterns (see section 2.2) and parenthood patterns (see section 2.3). In doing so it will display a fragmented situation across the European continent. In some areas the developments are marked by a clear divergence between western and eastern European jurisdictions. Nevertheless, it would be an oversimplification and a disservice to describe the fragmented legal landscape merely as an East–West divide (see section 3).

As the differences between national family laws challenge the legal certainty and free movement of European families, it is essential to consider how frictions can be overcome in order to support the lives of families in Europe – in particular if they fall outside of traditional understandings of family and gender identity (see section 4).

2. CHANGING FAMILIES

The proliferation of different family models affects various dimensions of family life. Many of those models remain rather close to the traditional model of an opposite-sex couple living with their biological children. Within this framework changes affect, for instance, the roles of the different members within the family, the perceived importance of marriage as part of creating a family, and the use of various techniques of assisted reproduction. These developments alter the lived realities of families and their recognition significantly affects national family laws (see sections 2.2 and 2.3).

2.1. QUEER IDENTITIES, QUEER FAMILIES

Another development, however, challenges more fundamentally the assumptions of who can form a family and which roles different persons can play in creating a family. It is the growing (legal) recognition of different and changing gender identities and of queer, in particular same-sex, partnerships including their joint parenthood. This change will be addressed first, because it impacts both the

[3] A.C. Kuijsten, above n. 1, p. 117; F. Willekens, 'Demographic transitions in Europe and the world', *MPIDR Working Paper* WP 2014-004, March 2014, p. 8 <https://www.demogr.mpg.de/papers/working/wp-2014-004.pdf> accessed 04.01.2023.

changing concepts of partnership and of parenthood, which will be addressed subsequently.

The growing societal acceptance and legal protection of same-sex relationships has been a contributing factor to many of the recent changes to national family laws and forms one of the most visible points of contention between legislators in Europe. The first step in protecting – and not only decriminalizing – same-sex relationships was the creation of registered partnerships. The pioneers in this matter were the Scandinavian countries: the Danish 'breakthrough' in 1989[4] created a 'domino effect' in central Scandinavia und gave rise to new laws on registered partnerships for same-sex couples in the region.[5] After registered partnerships came marriage. In 2001, the Netherlands was the first country to open marriage up to same-sex couples.[6] Belgium and Spain were next in line in 2003 and 2005 respectively.[7] Ever since then, civil union and same-sex marriage have continued to spread country by country. Often registered partnerships were introduced first, and same-sex marriage later. In some countries the opening up of marriage came along with the closing of registered partnerships to new couples (e.g., Germany, Sweden).[8] In other countries, civil unions were kept as an alternative to marriage and were opened to opposite-sex couples (e.g., England and Wales).[9]

While this wave of legally recognizing same-sex couples started in the Nordic countries it has swept across much of Western Europe and also reached other parts of the world, in particular North and South America as well as South Africa, Australia and New Zealand.[10] It has, however, not reached eastern and parts of southern Europe, where resistance to recognizing same-sex couples remains and sometimes seems to be increasing.

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4 Law on registered partnership, law no. 372 of 07.06.1989.

5 Norway in 1993, Sweden in 1994, Iceland in 1996, Finland in 2001: K. Duden, 'Art. 17b EGBGB' in M. Herberger et al. (eds), juris Praxiskommentar BGB, Vol. 6, juris, Saarbrücken 2020, para. 7; J. Rydström, *Odd Couples: A History of Gay Marriage in Scandinavia*, Amsterdam University Press, Amsterdam 2011, pp. 52 et seq.; for a general overview see J.M. Scherpe, 'Formal recognition of adult relationships and legal gender in a comparative perspective' in C. Ashford and A. Maine (eds), *Research Handbook on Gender, Sexuality and the Law*, Edward Elgar Publishing, Cheltenham 2020, pp. 17–31, at pp. 19–22.

6 Wet van 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet openstelling huwelijk), Staatsblad 2001, 9.

7 Belgium: Wet tot openstelling van het huwelijk voor personen van hetzelfde geslacht en tot wijziging van een aantal bepalingen van het Burgerlijk Wetboek, Belgisch Staatsblad 2003, 9880; Spain: Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio, Boletín Oficial del Estado 2005 no. 157, p. 23632.

8 K. Duden, 'Vor §1 LPartG' in F.J. Säcker et al. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Vol. 9, C.H. Beck, Munich 2022, para. 15; E. Goossens, 'One Trend, a Patchwork of Laws. An Exploration of Why Cohabitation Law is so Different throughout the Western World' (2021) 1 *International Journal of Law, Policy and the Family* 1, 5.

9 E. Goossens, above n. 8, p. 5.

10 K. Duden, above n. 5, para. 11; J.M. Scherpe, above n. 5, pp. 19–22.

Another development in the growing protection of the rights of LGBTQ+ persons relates to the recognition of gender identities outside of the male/female binary as well as changing gender identities. Gender identity affects, first, the individual person themself. As will be underscored subsequently, changing concepts of gender also indirectly affect the concept of family and of the roles of family members to a fundamental degree.

The legal recognition of different gender identities in Europe shows a disparate picture. The right of transgender persons to change their legal gender has been recognized by various States for a significant time.[11] It also has the backing of the jurisprudence of the European Court of Human Rights (ECtHR), who considered in *Goodwin* that it violated Article 8 of the European Convention on Human Rights (ECHR) to refuse a transgender person legal recognition through a change of the gender entry in their birth certificate.[12]

Less common and arguably more controversial among different jurisdictions than the recognition of transgender identities is the recognition of persons who identify outside of the male/female gender binary. Some countries, such as Germany, Denmark or the Netherlands, have introduced measures to recognize gender identities other than male and female.[13] This is, however, a relatively recent and cautious development. As of mid-2022, only Iceland allows for a full non-binary 'neutral recognition of gender' based on self-determination.[14]

The often explorative nature of developments in this area can be seen in the case of Germany. As a first step, in 2013, the German legislator enabled public registrars to leave open the gender entry in birth certificates or to delete a previous entry of male or female later on.[15] This effectively opened a third legal gender category apart from male and female. In 2017, the German Federal Constitutional Court decided that a positive gender entry was necessary and that it was not enough to leave the gender entry blank.[16] This decision led to the introduction of 'diverse' as a new permissible gender entry in 2018.[17]

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11 See as an early example the German Transsexuellengesetz (Law of transsexual persons), 10.09.1980, Bundesgesetzblatt 1980 I, 1654.

12 *Goodwin and I. v. United Kingdom*, No. 28957/95, ECHR 2002-VI; cf. S. Duffy, 'Gender Identity: A Comparative European Perspective' (in this volume), pp. 137–155, at p. 142.

13 S. Duffy, above n. 12, p. 151.

14 S. Duffy, above n. 12, p. 150.

15 Art. 1 no. 6 Gesetz zur Änderung personenstandsrechtlicher Vorschriften (Law on the Amendment of Provisions of the Law on the Personal Statute), 07.05.2013, Bundesgesetzblatt 2013 I, 1122.

16 German Federal Constitutional Court 10.10.2017, 1 BvR 2019/16, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 147, 1 = NJW 2017, 3643.

17 Art. 1 no. 2 Gesetz zur Änderung der in das Geburtenregister einzutragenden Angaben (Law on the Amendment of the Information to be entered into the Birth Register), 18.12.2018, Bundesgesetzblatt 2018 I, 2635.

Now, the current government has announced plans to enact a new law on gender identities which is supposed to be based on self-identification.[18]

Like the recognition of same-sex partnership and parenthood, the liberalization of gender recognition is often met with opposition. Some countries strongly oppose this trend and want to reinforce the immutability of the gender assigned at birth. However, opposition also seems to be increasing in some of the countries which have previously liberalized gender recognition laws.[19]

2.2. MARRIAGE AND PARTNERSHIPS

The married opposite-sex couple was once the only socially and, at least in some jurisdictions, also the only legally permissible framework for relationships.[20] However, in the last decades, the picture of what relationships – and even marriage – look like has diversified. Three changes are at the forefront: the rise of non-marital cohabitation, the increase in divorce, and the ongoing struggle for equal rights of the parties within a marriage.

Over time, the dominance of marriage as the standard form for relationships has declined. It no longer has a monopoly for cohabitation and reproduction. Marriage rates have decreased[21] – even though marriage still remains a widespread and, indeed, the most common form of creating a family in Europe.[22] In relation to the total population, the crude marriage rate in Europe[23]

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18 See, e.g., J.O. Flindt, *Gewagte Fortschritte im Familien- und Personenstandsrecht? Reformvorhaben im Koalitionsvertrag*, Das Standesamt, 2022, 66, 71.

19 S. Duffy, above n. 12, pp. 153 et seq.

20 For an overview of the criminalization of extramarital sex and cohabitation in Europe see M. Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective*, Intersentia, Cambridge 2006, pp. 177, 200, 367 et seq.; D. Bradley, 'Regulation of unmarried cohabitation in west-European jurisdictions – determinants of legal policy' (2021) 15 *International Journal of Law, Policy and the Family* 22 et seq.

21 J. Miles, 'Financial relief between cohabitants on separation: options for European jurisdictions' in K. Boele-Woelki and T. Sverdrup (eds), *European Challenges in Contemporary Family Law*, Intersentia, Cambridge 2008, pp. 269–87, at p. 270; L.S. Oláh, 'Changing families in the European Union: trends and policy implications', Analytical paper, prepared for the United Nations Expert Group Meeting: *Family policy development: achievements and challenges*, New York, May 14–15, 2015, <https://www.un.org/esa/socdev/family/docs/egm15/Olahpaper.pdf> accessed 22.02.2023.

22 In 2011, almost three quarters (71.2 per cent) of all families were composed of married couples. In contrast, registered partnerships, consensual unions and lone parent families accounted for just over one quarter (28.8 per cent), Eurostat, People in the EU – statistics on household and family structures, <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=%20People_in_the_EU_%E2%80%93_statistics_on_household_and_family_structures&oldid=375234#Marriage> accessed 27.02.2023.

23 The figures refer to the EU Member States plus the United Kingdom.

fell from 7.9 to 4.3 per 1000 inhabitants between 1964 and 2019[24] – a decrease of almost 50 per cent.[25] The decrease of marriage rates, however, does not mean that people refrain from relationships generally. Rather, this trend has been linked to an increasing propensity towards non-marital cohabitation.[26] This is exemplified by the fact that non-marital child-bearing has increased all over Europe.[27]

Non-marital cohabitation, however, is a heterogeneous phenomenon.[28] Couples cohabit for diverse reasons. Many couples live together before they get married. They understand living together as a trial period to see if they are suited for marriage.[29] Other couples cohabit instead of getting married. This cohabitation instead of marriage is often associated with strong socioeconomic development and higher levels of female education as well as labour force participation:[30] Women with higher levels of education in many cases choose to live in de facto unions because their growing individual autonomy and a greater overall tolerance towards family forms outside of the traditional marriage allows them to organize their lives in a self-determined way. Cohabitation instead of marriage can, however, also be connected to poverty and social exclusion.[31]

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24 Eurostat, 'Crude marriage and divorce rates, 1964–2020' <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics#Fewer_marriages.2C_fewer_divordiv> accessed 27.02.2023; Eurostat, 'People in the EU – statistics on household and family structures' <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=%20People_in_the_EU_%E2%80%93_statistics_on_household_and_family_structures&oldid=375234#Marriage> accessed 27.02.2023: 1.4 million marriages were concluded in Europe in 2020, while the corresponding figure back in 1964 had been 3.4 million.

25 A further substantial decrease between 2019 (4.3 per 1000 persons) and 2020 (3.2 per 1000 persons) is interpreted as an effect of the Covid-19 pandemic see Eurostat, 'Crude marriage and divorce rates, 1964–2020' <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics#Fewer_marriages.2C_fewer_divordiv> accessed 27.02.2023.

26 M. Covre-Sussai, 'Cohabitation and human development in Latin America and developed countries' (2014) 40 *International Journal of Sociology of the Family* 153, 154; L.S. Oláh, above n. 21, p. 4.

27 L.S. Oláh, above n. 21, p. 3; N. Dethloff and K. Kaesling, 'From Marriage to Family' in N. Dethloff and K. Kaesling (eds), *Between Sexuality, Gender and Reproduction*, Intersentia, Cambridge 2023, pp. 1–22, at p. 2. In 2020, the proportion of births outside of marriage was estimated at 41.9 per cent, see Eurostat, 'Live birth outside marriage, 1964–2020' <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics#Fewer_marriages.2C_fewer_divordiv> accessed 27.02.2023.

28 E. Goossens, above n. 8, pp. 3–9; L.S. Oláh, above n. 21, p. 5; for an overview of European systems see K. Boele-Woelki, C. Mol and E. van Gelder (eds), *European Family Law in Action*, *Vol. V: Informal Relationships*, Intersentia, Cambridge 2015, pp. 13 et seq.

29 E. Goossens, above n. 8, p. 14; A.C. Kuijsten, above n. 1, p. 119.

30 M. Covre-Sussai, above n. 26, p. 154; T. Sobotka and C. Berghammer, 'Demography of family change in Europe' in N.F. Schneider and M. Kreyenfeld (eds), *Research Handbook on the Sociology of the Family*, Edward Elgar, Cheltenham, 2021, pp. 162–86, at p. 163.

31 M. Covre-Sussai, above n. 26, p. 154; B. Perelli-Harris, W. Sigle-Rushton, M. Kreyenfeld, T. Lappegård, R. Keizer and C. Berghammer, 'The Educational Gradient

Sociologists interpret this correlation as a 'pattern of disadvantage', which means that poorer segments of the population would not be able to afford a wedding or are unable to produce the necessary documents.[32]

This variety of reasons why couples and which couples do not get married makes it difficult to attach legal consequences to cohabitation. Different jurisdictions have therefore taken different approaches in addressing such couples. A first group of countries has no specific and comprehensive statutory regulation for cohabitation. Conversely, some European jurisdictions have introduced default regimes for cohabitation. If partners live together for a certain period of time or have children together legal consequences are attributed to their relationship. A registration or partnership contract is not necessary. Legal consequences automatically take effect by law if certain criteria are fulfilled. Other States have introduced opt-in regimes. Legal consequences will only be attributed to those couples who register their relationship. Where countries attach consequences to cohabitation – be it through default or through opt-in regimes – the rules applied to those couples often mirror the consequences attached to marriage.[33] However, alternative models that move away from marriage centrism might better reflect the realities of non-marital cohabitation.[34]

Besides the declining importance of marriage, also the stability of marriages has decreased. Divorce rates have been increasing in the EU for a long time.[35] Between 1965 and 2020, they have essentially doubled. In 1964, the divorce rate stood at 0.8 divorces per 1000 inhabitants, compared to a rate of 1.6 divorces per 1000 inhabitants in 2020.[36] Many European legal systems have addressed the growing demand for divorce, first, by relaxing the substantive divorce requirements and, second, by making divorce more accessible by way of decreasing or even eliminating judicial supervision of divorce.[37] Instead of

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of Childbearing within Cohabitation in Europe' (2010) 36 *Population and Development Review* 775, 797; T. Sobotka and C. Berghammer, above n. 30, p. 163.

32 B. Perelli-Harris, W. Sigle-Rushton, M. Kreyenfeld, T. Lappegård, R. Keizer and C. Berghammer, above n. 31, p. 777.

33 E. Goossens, 'New Models for Family Solidarity between Unmarried Partners' (in this volume), pp. 59–72, at p. 60.

34 For the presentation of two alternative models see E. Goossens, above n. 33, pp. 61 et seq.

35 A.C. Kuijsten, above n. 1, p. 120; L.S. Oláh, above n. 21, p. 5; T. Sobotka and C. Berghammer, above n. 30, p. 170.

36 Eurostat, Crude divorce rate, 1964–2020, <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics#Fewer_marriages.2C_fewer_divordiv> accessed 27.02.2023; Eurostat, People in the EU – statistics on household and family structures, <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=%20People_in_the_EU_%E2%80%93_statistics_on_household_and_family_structures&oldid=375234#Marriage> accessed 27.02.2023.

37 N. Dethloff and K. Kaesling, above n. 27, p. 3; B. Verschraegen, 'Moving to the same destination? Recent trends in the law of divorce' in M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe*, Intersentia, Cambridge 2007, pp. 159–67, at

courts, increasingly the dissolution of marriages is administered by notaries, civil registries or public prosecutors.[38] Such non-judicial divorces are not completely private but are less cumbersome and less invasive than a court intervention. The level of intervention, however, varies considerably among different States.

The decreasing stability of marriage and also the above-mentioned increase of non-marital child-bearing leads to an increase of children living with only one of their parents or in reconstituted families or stepfamilies.[39] Custody disputes, which may often ensue, are difficult to solve, in particular where the parents do not intend to live in the same state. In this context, the growing ease of cross-border movement has added to increasing cases of child abduction.[40] The 1980 Hague Convention on International Child Abduction attempts to draw the difficult balance between a prompt return of the child to his or her country of habitual residence and exceptions to the return, especially in cases involving domestic and family violence.[41]

A third societal change not only affects the importance of marriage as an institution but also the concept of what a marriage constitutes and who can enter into a marriage. The growing number of European countries which have permitted same-sex marriages has already been mentioned.[42] Another instance of these changes is the growing consensus that marriage is an institution that only adults can and should enter into. The mean age at first marriage has increased in European societies; most Europeans nowadays delay marriage until after the age of 30.[43] On the legislative side, many legislators have increased the legal marriage age during the last decades.[44] Child marriages contracted under non-European law are often not recognized. While the reasons behind combatting early marriages are important, the non-recognition of these marriages in

p. 160; for a comparative overview see A. Dutta, D. Schwab, D. Henrich, P. Gottwald and M. Löhnig, *Scheidung ohne Gericht? – Neue Entwicklungen im europäischen Scheidungsrecht*, Verlag Ernst und Werner Gieseking, Bielefeld 2017.

38 P. Quinzá Redondo, 'The Recognition of Non-Judicial Divorces in Europe: Where there is a Will, there is a Way' (in this volume), pp. 23–38, at p. 28.

39 N. Dethloff and K. Kaesling, above n. 27, p. 3; L.S. Oláh, above n. 21, p. 5.

40 O. Momoh, 'The Challenges of the Hague Convention on International Child Abduction: Cases involving Domestic and Family Violence' (in this volume), pp. 217–39, at pp. 218 et seq.

41 O. Momoh, above n. 40, pp. 219 et seq.

42 Above, 2.1., cf. J.M. Lorenzo Villaverde, 'Same-sex Couples and EU Private International Law after the *Coman* Case' (in this volume), pp. 157–76, at p. 160.

43 T. Sobotka and C. Berghammer, above n. 30, p. 166; L.S. Oláh, above n. 21, p. 4; for the statistical figures see Eurostat, People in the EU – statistics on household and family structures, <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=%20People_in_the_EU_%E2%80%93_statistics_on_household_and_family_structures&oldid=375234#Marriage> accessed 27.02.2023.

44 N. Yassari and R. Michaels, 'Die Frühehe im Rechtsvergleich: Praxis, Sachrecht, Kollisionsrecht' in N. Yassari and R. Michaels, *Die Frühehe im Recht*, Mohr Siebeck, Tübingen 2021, pp. 17–98, at p. 47.

migration settings can create situations which cause harm to the girls and women that it is meant to protect.[45]

Within marriages, traditional roles for married men and women have become less pervasive. An instance of this can be seen in the female presence in the labour market. This development has influenced legal regulations on post-divorce maintenance and pension splitting as well as the dissolution of the marital home. An analysis of the emancipatory potential of different family laws reveals that in particular post-divorce maintenance might have a negative effect on both spouses' autonomy.[46] Moreover, post-divorce support can be perceived as internalizing societal problems, namely a still remaining gendered division of labour and a gendered division and devaluation of care work.[47]

Lastly, alongside the departure from patriarchal family concepts and the empowerment of women, the legal protection of vulnerable persons subject to domestic violence has gained importance. Various instruments have been adopted at European and international level.[48] European and international instruments often distinguish domestic violence from violence against women because domestic violence and violence against women overlap only partially.[49] However, a strict separation could conceal the fact that domestic violence is also related to the structural issues of violence against women, i.e., remaining inequalities and traditional perceptions of men and women.[50]

2.3. CHILDBEARING AND PARENTHOOD

Changes in family realities have also affected childbearing and parenthood. These changes result on the one hand from changing relationship patterns, family models and gender identities. On the other hand, evolving techniques of assisted reproduction have fundamentally changed how families can be created. These changes have affected the law of parenthood and discussions about its reform.

One suggestion that has arisen is to open up parenthood to more than two persons.[51] Such a change could address the needs of patchwork families,

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45 T.L. Wærstad, 'Human Rights Protection in Family Reunification Law and the Recognition of Child Marriages' (in this volume), pp. 3–22, at pp. 5 et seq.

46 C. Voithofer, 'Emancipatory Potential of Maintenance and Matrimonial Property after Divorce: Reflections Based on the Concept of Relational Autonomy' (in this volume), pp. 39–57, at p. 57.

47 C. Voithofer, above n. 46, p. 57.

48 L. Vaigė, 'Violence as National Heritage? The EU and COE Strategies on Violence against Women and Domestic Violence' (in this volume), pp. 241–262, at pp. 243 et seq.

49 L. Vaigė, above n. 48, pp. 244, 248.

50 L. Vaigė, above n. 48, p. 244.

51 D. Lima, 'Three Models for Regulating Multiple Parenthood: A Comparative Perspective' (in this volume), pp. 95–111, at pp. 97 et seq.

but also of persons who co-parent independent of a romantic relationship. For instance, a same-sex couple of two women could have a child with a male friend and co-parent afterwards. While the idea of multiple parenthood is still a theoretical debate within Europe, some jurisdictions in the United States and Canada recognize the parenthood of more than two persons.[52]

A second challenge to the concept of parenthood is the parenthood of trans persons, most prominently the pregnancy of trans men, i.e., child-bearing by persons who were assigned female at birth but later changed the gender entry to male.[53] The traditional laws of filiation do not offer flexibility for such cases of 'seahorse fatherhood'. According to the Roman law principle of *mater semper certa est*, the person who gives birth to the child is identified as the mother and not as the father.[54] In most cases, trans men are therefore entered into the birth certificate as mothers – sometimes even with their female birth name. They are legally men, but in the law of filiation they remain women. This approach is often criticized – not least because it forces trans parents to continually declare themselves as trans since the birth certificate does not match their current legal gender and gender presentation. To address this criticism, a small but growing number of European jurisdictions have adjusted their legal regulations and recognize trans parents in their current gender.[55]

A development which has had a broad effect on very different family models are the advances in technologies of medically assisted reproduction.[56] In opposite-sex couples the use of such techniques correlates with the rise in the mean age of women at birth of their first child.[57] For same-sex couples, however, the need for technologies of assisted reproduction is self-evident. Lesbian couples need recourse to a sperm donor – be it privately or through an official sperm bank. In some European countries this option is legally available, thus making it relatively easy for a woman in a lesbian partnership to bear a child there.[58] Even if the two women have jointly agreed to have a child through assisted reproduction, it is more difficult, however, for the women to become the legal parents of the child. Some countries grant motherhood to both women, at least if they are married.[59] However, many countries demand that the woman

52 D. Lima, above n. 51, pp. 101 et seq.

53 A. Margaria, 'Trans(forming) Fatherhood? European Approaches to Regulating "Seahorse Fatherhood"' (in this volume), pp. 177–91, at pp. 177 et seq.

54 A. Margaria, above n. 53, pp. 178 et seq.

55 A. Margaria, above n. 53, pp. 186 et seq.

56 K.A. Rokas, 'Surrogacy and Assisted Reproduction as a Challenge for Family and for Private International Law Methodology' (in this volume), pp. 75–94.

57 For this development see A.C. Kuijsten, above n. 1, p. 122; T. Sobotka and C. Berghammer, above n. 30, p. 172.

58 Cf. K.A. Rokas, above n. 56, p. 81.

59 UK: Sec. 42 et seq. Human Fertilisation and Embryology Act 2008; France: Art. 342-11 French Civil Code; Belgium: Art. 325/2 old Belgian Civil Code; Austria: §144 para. 2 Austrian

who is not the birth mother adopts the child, even if she is married to the birth mother.[60]

For a male same-sex couple to have a child who is genetically related to one of the fathers, a surrogate mother is necessary – unless the couple plans to co-parent with the birth mother. The same can be true for opposite-sex couples if the female partner is not able to bear a child herself. In such a case, surrogacy can be a way to create a family where the child might be related at least to one of the intended parents. While surrogacy is prohibited in many countries across Europe, many couples – same-sex, but also opposite-sex – go abroad to commission a surrogate there. Afterwards, their home jurisdiction will be faced with the question whether to grant legal parenthood to the intended parents, even if surrogacy is prohibited in that country. In many cases, the parenthood of the intended parents will eventually be recognized by the home jurisdiction. In some cases filiation can be established through recognition of a foreign court decision or through applying a foreign parenthood law. If no court decision exists or if the applicable law sees the surrogate mother and her husband (if she is married) as the legal parents it will be necessary for one or both of the intended parents to adopt the child in order to establish a parent-child relationship.[61] An adoption can also be necessary – both in the case of the parenthood of intended parents after surrogacy and of co-motherhood of two women – if their respective parenthood is considered as an infringement of the public policy of the state where the family lives.[62]

The prospective parents in such family models are therefore often forced to undergo adoption proceedings in order to create a legal parent-child relationship with a child who is already living in their household and whom they might already be caring for. In such cases adoption serves a twofold purpose. On the one hand, it creates a legal family that is not envisaged by the normal workings of family law. On the other hand, the formalized adoption procedure includes the examination of the fitness of the potential parents and serves as a safety net which is meant to control in every individual case that the best interest of the child is not harmed by the creation of a family outside of the legal norm.

This use of adoption can also, however, be seen as a discrimination against certain families and children. The detour through adoption can be time consuming, costly and can contain administrative supervision which is very

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Civil Code; cf. also Austrian Constitutional Court 30.06.2022, G 230/2021-20, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2002, 1486; for an overview see J. Ferrer-Riba, 'Multiparentality and New Structures of Family Relationship' in E.-S. Zehelein, A. Carosso and A. Rosende-Pérez, *Family in Crisis*, transcript Verlag, 2020, pp. 59–77, at p. 70.

60 E.g., Germany: see the gendered reference to 'woman' and 'man' in the regulation of parenthood in Sec. 1591 et seq. German Civil Code.

61 K.A. Rokas, above n. 56, pp. 78 et seq.

62 K.A. Rokas, above n. 56, pp. 78 et seq.

invasive upon the privacy of the family affected (e.g., waiting or trial periods, age requirements, marriage).[63] This can be particularly frustrating and humiliating for the potential parents, because in these cases, the adoption is often a formality, with the result predetermined. It is hard to imagine that an adoption would be denied – and in consequence the child would be taken from the family – in a case where the child already lives with the perspective adoptive parents as a social family and where often one of the parents is even already the legal parent.[64] In these cases, adoption serves more as an obstacle which complicates, but does not stop the creation of families that the law does not approve of.

In addition to this potentially discriminatory nature, the detour through adoption can be counter-productive and might hurt rather than help the person who it is meant to be protected: the child. The duration of adoption proceedings puts the welfare of the child in danger. If the intended parents separate and discontinue the adoption proceeding the child can be left without a second legal parent or sometimes without any[65] legal parent within reach.[66] A reform of parenthood might therefore be a more convincing way to address the needs and realities of diverse families.[67]

3. AN EAST–WEST DIVIDE?

All European countries share the general trend of de-standardization and pluralization of identities and families.[68] While non-marital cohabitation, cohabitation without children, and lone parenthood are increasing and households become smaller, the percentage of traditional families – i.e., a married opposite-sex couple with children – declining.[69] However, the extent of and the pace at which the family patterns are changing differs significantly across Europe.[70]

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63 C. von Bary, 'When Filiation Fails: Adoption as a Fallback Mechanism for Modern Family Forms?' (in this volume), pp. 113–33, at pp. 123 et seq.

64 See however the unusual facts underlying *Paradiso and Campanelli v. Italy*, 24 January 2017, No. 25358/12.

65 The home jurisdiction of the intended parents might consider other persons to be the legal parents – e.g., the surrogate mother and her husband. However, these persons might not be within reach and might not be considered as parents in their respective home jurisdiction.

66 C. von Bary, above n. 63, p. 123.

67 C. von Bary, above n. 63, p. 132.

68 T. Fokkema and A.C. Liefbroer, 'Trends in living arrangements in Europe: Convergence or divergence?' (2008) 19 *Demographic Research* 1351, 1408 et seq.; A.C. Kuijsten, above n. 1, p. 123; T. Sobotka and C. Berghammer, above n. 30, p. 168 (on cohabitation).

69 For household studies see T. Fokkema and A.C. Liefbroer, above n. 68, p. 1409.

70 A. Nussberger and C. Van de Graaf, 'Pluralisation of family forms in the jurisprudence of the European Court of Human Rights' in N. Dethloff and K. Kaesling (eds), *Between Sexuality, Gender and Reproduction*, Intersentia, Cambridge 2023, pp. 111–32, at p. 112.

First, even in respect of general trends, States move at a different pace.[71] Already in the 1990s, those differences brought Kuijsten to the conclusion that 'the Swedish variant of pluralization of family-life forms, the most extreme of all in terms of emergence of "new household types" and decline of the traditional family sector, does not necessarily predict the future situation in other countries'.[72] Moreover, trends might look the same in different countries but they are sometimes connected to different underlying reasons. For example, the decline of the importance of marriage is not everywhere the result of growing individual autonomy and overall tolerance of non-traditional family concepts. As already explained, the propensity towards cohabitation may also be explained as a 'pattern of disadvantage'. This is true in particular in Central Eastern Europe, where the diminishing marriage rates can be connected to growing economic uncertainty.[73]

Second, some trends have been more pronounced or even remained limited to specific parts of Europe.[74] Most prominently, a rift has opened up between western and eastern Europe on matters relating to queer families and identities.[75] Tolerance and acceptance towards LGBTQ+ persons has increased considerably in Western Europe whereas politics, society and culture in most Eastern European countries continue to have negative perceptions.[76] The legal regulation reflects those differences. Progress for the protection of gender identities has been made in many European States but in Eastern European States, in particular, a considerable backlash against the rights of LGBTQ+ persons can be witnessed.[77] The *Coman* and *Pancharevo* cases by the Court of Justice of the European Union (CJEU) can be read as emblematic of the divide in the EU between countries with policies that are favourable to LGBTQ+ persons and countries with policies that are ignorant or even hostile towards them.[78]

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71 For the slower spread of cohabitation in Eastern Europe see, e.g., T. Sobotka and C. Berghammer, above n. 30, p. 165.

72 A.C. Kuijsten, above n. 1, p. 139.

73 L.S. Oláh, above n. 21, p. 4.

74 See Fokkema and Liefbroer who concluded that 'differences in living arrangements across Europe might have grown larger in the last fifteen to twenty years. Large differences in living arrangements remain along geographical divides'. T. Fokkema and A.C. Liefbroer, above n. 68, p. 1409.

75 A. Nussberger and C. Van de Graaf, above n. 70, pp. 112 et seq., 129; K. Stojanovski, B, Kotevska, N. Milevska, A.P. Mancheva and J. Bauermeister, 'It Is One, Big Loneliness for Me: the Influences of Politics and Society on Men Who Have Sex with Men and Transwomen in Macedonia' (2015) 12 *Sexuality Research and Social Policy* 115 et seq.

76 For Poland see M. Bucholc, 'Conditions for LGBTIQ* Families in Poland' in N. Dethloff and K. Kaesling (eds), *Between Sexuality, Gender and Reproduction*, Intersentia, Cambridge 2023, pp. 155–72; for Hungary see K. Kaesling, 'Rainbow Families on Social Media' Poland' in N. Dethloff and K. Kaesling (eds), *Between Sexuality, Gender and Reproduction*, Intersentia, Cambridge 2023, pp. 227–52, at p. 246.

77 S. Duffy, above n. 12, pp. 153 et seq.

78 J.M. Lorenzo Villaverde, above n. 42, p. 160.

Furthermore, an East–West divide has been asserted in this volume for cases of child protection. An analysis of cross-border child protection cases between Finland and Central-Eastern European states, including Russia, reveals that concepts and practices of child protection vary considerably between those states.[79] One reason might be that state intervention is distrusted because of the legacies of the Soviet ideology of collective childcare and upbringing in line with public interests. Therefore, care orders issued against parents of Eastern European or Russian background or the out-of-home placements of their children are viewed as contrary to the best interests of the child.[80]

A final example of geographic divisions – this time relating in large part to countries outside of the EU – affects the Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention). Certain countries, most prominently Turkey, but also certain EU Member States are very critical of the Convention.[81] They argue, in particular, that – unlike the Convention suggests – gender roles are not socially constructed but result from natural characteristics of men and women.[82]

As will be discussed subsequently, these differences between Eastern and Western European perceptions of gender identity and family have a tremendous symbolic and political importance and undermine efforts to harmonize (international) family law within Europe. Nevertheless, these differences should not be exaggerated, so as not to deepen the existing rifts even further.[83] Whereas this volume is mindful of differences in certain areas of family law it does not focus on an East–West dichotomy. Rather than overemphasizing differences between European States, several chapters of this volume have analysed different ways of bridging gaps between the different family laws.

4. ADDRESSING DIVERGENCES

The divergences between family laws in Europe, which were highlighted above, can have far reaching effects on those living in Europe. If families or individuals move across borders the recognition of their family ties and gender identity can be called into question. The differences between family laws can lead to the

79 S. Mustasaari, 'Challenges of Cross-Border Child Protection between Eastern and Western Europe' (in this volume), pp. 195–216, at p. 206.

80 S. Mustasaari, above n. 79, p. 208.

81 L. Vaigė, above n. 48, pp. 245, 251.

82 L. Vaigė, above n. 48, p. 245.

83 P. Ayoub and D. Paternotte, 'Europe and LGBT Rights: A Conflicted Relationship' in M.J. Bosia, S.M. McEvoy and M. Rahman (eds), *The Oxford Handbook of Global LGBT and Sexual Diversity Politics*, OUP, Oxford 2019, pp. 153–67, at p. 160.

outcome that a status relationship exists in one State, but not in another.[84] The threat of losing a legal status by crossing a border can keep the persons affected from crossing the border in the first place. If the intended move is between different EU Member States such a deterrence can undermine a core promise of the Union: the free movement of EU citizens as guaranteed under Article 21 of the Treaty on the Functioning of the European Union (TFEU). It is therefore imperative to consider how families and individuals can move across borders without changes to their legal status.

Various ways are conceivable in which the parties could be protected from the negative effects of regulatory divergences. A first, rather theoretical approach would be to harmonize or unify substantive family law. A prominent effort in this regard are the Principles of European Family Law that have been developed by the Commission on European Family Law (CEFL). These cover a wide range of topics reaching from divorce and maintenance between former spouses, parental responsibilities, and property relations between spouses, to property, maintenance and succession rights of couples in de facto unions.[85] While this effort is only an academic one, it might, nevertheless, be a source of inspiration for European legislators in the future.[86]

More politically feasible than a harmonization of substantive family law are measures aimed at avoiding limping relationships through a harmonization or unification of private international law and the law of international civil procedure. After all, these are the areas of law that are classically concerned with the avoidance of limping legal relationships. While there are now a number of EU Regulations on private international law and the law of international civil procedure, efforts to harmonize or unify international family law have been much less successful than unification efforts in other areas of private international law and international civil procedure.

In contrast to other forms of cooperation, measures in family law require unanimity in the Council.[87] However, such unanimity among Member States has been very hard to achieve. With the exception of the Brussels II bis and II ter Regulations, EU measures in international family law have all been enacted

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84 A. Wysocka-Bar, 'A Look into the Future: The Harmonization of Substantive Family Law in Europe' (in this volume), pp. 317–335, at pp. 318 et seq.

85 K. Boele-Woelki et al., *Principles of European Family Law Regarding Property, Maintenance And Succession Rights of Couples in De Facto Unions*, Intersentia, Cambridge 2019; K. Boele-Woelki and D. Martiny, *Principles of European Family Law Regarding Property Relations Between Spouses*, Intersentia, Cambridge 2013; K. Boele-Woelki et al., *Principles of European Family Law Regarding Parental Responsibilities*, Intersentia, Cambridge 2007; K. Boele-Woelki et al., *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, Intersentia, Cambridge 2004.

86 A. Wysocka-Bar, above n. 84, p. 323.

87 Art. 81(3) TFEU.

through enhanced cooperation – the EU Regulation on the law applicable to divorce and legal separation ('Rome III Regulation') was even the first legislative act ever to be enacted through enhanced cooperation.[88] This role as a historical precedent again shows the particular political salience of family law and the divergences between national laws in this area.

Apart from Ireland and Denmark, which have a special status regarding the EU judicial cooperation in civil matters, the following States are outside the EU Regulations on property consequences of marriage and registered partnerships: Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Romania.[89] Poland and Slovakia are also outside the Rome III Regulation.[90] However, the need for enhanced cooperation was not exclusively the result of the reservations of these more conservative Member States. Conversely, Sweden, which also did not take part in the Rome III Regulation, was apprehensive of that Regulation's impact on the applicability of Sweden's liberal divorce laws.[91] Unfortunately, but unsurprisingly, the Member States that tend to be at the political ends of the regulatory spectrum in family law did not participate in the unification efforts. Thus, it is precisely in relation to those States where the risk of a limping legal relationship is particularly great that the existing EU international family law is least likely to help.

The participation of only some EU Member States in the unification of international family law is one of the reasons for a fragmentation of private international law[92] and the law of international civil procedure[93] in family matters which further exacerbates the problems for cross-border families. Overcoming negative consequences of fragmentation and incoherencies within international family law is therefore viewed as an important task – for legislators, but also for courts.[94]

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88 For the historical background of the Rome III Regulation see A. Fiorini, 'Harmonizing the Law Applicable to Divorce and Legal Separation – Enhanced Cooperation as the Way Forward?' (2010) 59 *The International and Comparative Law Quarterly* 1143, 1144; for the enhanced cooperation in the Regulations on matrimonial property regimes and property consequences of registered partnerships see A. Wysocka-Bar, 'Enhanced cooperation in property matters in the EU and non-participating Member States' (2019) 20 *ERA Forum* 187.

89 Recital 11; A. Wysocka-Bar, above n. 84, p. 329.

90 Participating countries are: Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain.

91 A. Fiorini, above n. 88, p. 1144.

92 M. Csöndes, 'A Fragmented Private International Family Law: Interactions and Intersections of International, European and National Norms' (in this volume), pp. 265–281, at p. 272.

93 R. Legendre, 'Recognition and Enforcement in International Family Law: A Legal Patchwork or Systems Made to Measure?' (in this volume), pp. 283–97, at pp. 285 et seq.

94 R. Legendre, above n. 93, pp. 294 et seq; M. Csöndes, above n. 92, p. 266.

Another remedy against limping legal relationships could be to give greater consideration to party autonomy in international family law.[95] Currently, party autonomy is granted mainly in EU Regulations on whose subject matters there is a certain minimum agreement of the EU Member States in substantive law.[96] In contrast, party autonomy does not seem to be a way forward in areas with significant national diversity in substantive law. Additional obstacles to party autonomy in international family law include the fear that party autonomy can be harmful to the protection of vulnerable family members, who might agree to a choice of law, because they are not aware of the disadvantages it can cause them or because they are in a dependent position where they cannot oppose the choice. Even if party autonomy was given more room, judges could undermine the parties' choice by refusing to recognize choice-of-law-clauses because the chosen foreign law conflicts with their domestic understanding of public policy[97] – a threat which is, however, not specific to the application of a foreign law based on a choice of law. Quite the contrary, different perceptions of public policy generally pose a particularly pervasive obstacle to the elimination of limping relationships in family law, which persists even where private international law measures have been adopted between Member States. Here again, the salience of and weight given to different perceptions of family life becomes apparent.

A final avenue that can protect families from limping relationships is the intervention of courts, in particular the ECtHR and the CJEU. Their jurisprudence has already established certain guidelines for families in Europe.

Protection by the ECtHR could affect almost all of Europe and is not limited to the EU. The court has already issued a variety of decisions addressing the loss of a status or status relationship because of a border crossing as a potential violation of Article 8(1) ('right to respect for private and family life') and Article 12 ECHR ('right to marry and to found a family'). The case-law has addressed, inter alia, the recognition of same-sex marriages[98] and of parent-child relationships where the children were born by a surrogate mother.[99] However, the harmonization potential of the ECtHR's case-law is rather restrained. This is because the danger of limping legal relationships affects precisely those types of families and gender identities in relation to which the laws and the underlying socio-political values of the different Contracting States are particularly different. This discord between

95 M. Brosch, 'Party Autonomy in International Family Law: Choice of Law and Choice of Court as a Solution to the Challenges of Cross-Border Families' (in this volume), pp. 299–315, at p. 299 et seq.

96 Cf. M. Brosch, above n. 95, pp. 314 et seq.

97 M. Brosch, above n. 95, p. 314.

98 See A. Nussberger and C. Van de Graaf, above n. 70, pp. 114 et seq.

99 K.A. Rokas, above n. 56, pp. 78 et seq.; A. Wysocka-Bar, above n. 84, p. 331; also see A. Nussberger and C. Van de Graaf, above n. 70, pp. 120 et seq.

the legal systems leads the ECtHR to grant the Contracting States a wide margin of appreciation in applying the ECHR. The demands of the Court are therefore rather restrained. Nevertheless, as the examples mentioned above show, the ECtHR has an important role to play. Even if the Court does not take the role of a pioneer for the protection of rare family forms and gender identities, it helps by ensuring a uniform minimum standard.[100]

The CJEU's case-law could reach further. First, the institutional framework within the EU gives the CJEU more influence than the ECtHR. Second, limping relationships can infringe one of the EU's fundamental freedoms: the free movement of persons.[101] As this freedom relates to cross-border situations, the CJEU can directly address the specific infringement that exists because of limping legal relationships created by border crossings.

In its case-law, the CJEU has a long line of jurisprudence on the infringement of fundamental freedoms because of limping legal relationships, which started in the area of company law.[102] When first addressing family law, the CJEU held that it was an infringement of the free movement of Union citizens if they lose their name when they cross the border.[103] In the ground breaking *Coman* and *Pancharevo* cases,[104] the CJEU applied this jurisprudence to the areas of partnership and parenthood. Thus, Member States are obliged – for the purposes of free movement – to recognize same-sex partnerships and parenthood legally established in another Member State.

The reach of this case-law is not yet clear. It can be argued that, albeit the Court's ruling concerned the inclusion of same-sex marriages within the term 'spouse' only for free movement purposes, it has to be transferred to other uses of that term. In particular, this could mean that the existing Regulations on international family law now have to be applied to same-sex couples as well – at least if the respective regulation does not expressly refer to national marriage laws.[105] Same-sex couples would thus profit from the unification achieved for the protection of opposite-sex couples.

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100 A. Wysocka-Bar, above n. 84, pp. 331 et seq.; sceptical in view of the ideological East–West divide and the different views on where the minimum lies A. Nussberger and C. Van de Graaf, above n. 70, pp. 129, 132.

101 A. Wysocka-Bar, above n. 84, pp. 324 et seq.

102 Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, ECLI:EU:C:1999:126; Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, ECLI:EU:C:2002:632; Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, ECLI:EU:C:2003:512.

103 Case C-353/06, *Stefan Grunkin and Dorothee Regina Paul*, ECLI:EU:C:2008:559.

104 Case C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, ECLI:EU:C:2018:385; see J.M. Lorenzo Villaverde, above n. 42, p. 159; Case C-490/20, *V.M.A. v. Stolichna obshtina, rayon 'Pancharevo'*, ECLI:EU:C:2021:1008, §23, see A. Wysocka-Bar, above n. 84, pp. 324 et seq.

105 J.M. Lorenzo Villaverde, above n. 42, pp. 170 et seq.

Even if one does not attribute such a broad scope to the *Coman* and *Pancharevo* cases, the potential of the CJEU's case-law in protecting European families should not be underestimated. The case-law addresses directly only cases of international mobility – the normative basis is after all the free movement of EU citizens. However, the CJEU's case-law might have a further reaching indirect effect. The case-law can carry legal situations in family law from one Member State into the entire EU and pierce the borders between national family laws. If the mobility of families within the EU continues to increase, the number of such cases will also increase. Over time, foreign family law institutions may appear less unusual. This familiarization could contribute to a slow change in public debate and opinion and could prepare subsequent changes in substantive family law. Until then, it is of paramount importance to be mindful of the different perceptions of how family and gender are understood across Europe while at the same time working to secure the protection of the individuals affected. Apart from legislation and court intervention a more humble approach to achieve this is through academic dialogue that includes all parts of Europe. This volume attempts to engage a younger group of European scholars in such dialogue.