CONVERGENCE AND DIVERGENCE OF FAMILY LAW IN EUROPE
CONVERGENCE AND DIVERGENCE OF FAMILY LAW IN EUROPE

Masha Antokolskaia
Editor

intersentia
Antwerpen – Oxford
Convergence and Divergence of Family Law in Europe
Masha Antokolskaia (ed.)

© 2007 Intersentia and Masha Antokolskaia
Antwerpen – Oxford / Amsterdam
http://www.intersentia.com

D/2007/7849/28
NUR 822

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.
LIST OF AUTHORS

Prof. Masha Antokolskaia
Professor of Civil and Family Law at the VU University Amsterdam

Prof. Katharina Boele-Woelki
Professor of Private International, Comparative and Family Law at the University of Utrecht; Chair of the Commission on European Family Law

Dr. Bente Braat
Lecturer-researcher at the University of Utrecht

Prof. Miquel Martin-Casals
Professor of Civil Law and director of the Observatory of European and Comparative Private Law University of Girona

Prof. Caroline Forder
Professor of Family Property Law at the University of Antwerp

Dr. Olga Khazova
Associate Professor at the Institute of State and Law within the Russian Academy of Sciences

Prof. Ingrid Lund-Andersen
Associate Professor of Family Law at the University of Aarhus

Prof. Marie-Thérèse Meulders-Klein
Professor Emeritus of Family law at the University of Louvain-la-Neuve; Past President of the International Society of Family Law; Titular Member of the International Academy of Comparative Law; D.H. of the University of Uppsala (Sweden)

Prof. Esin Örücü
Professorial Research Fellow and Professor Emeritus of Comparative Law at the University of Glasgow; Professor Emeritus of Comparative law at the Erasmus University Rotterdam
List of Authors

Mr. Kees Saarloos  
Junior Researcher at the University of Maastricht  

Prof. Ingeborg Schweizer  
Professor of Private Law at the University of Basel  

Prof. Frederik Swennen  
Professor of Family Law at the University of Antwerp  

Dr. Velina Todorova  
Associate Professor of Family Law at University of Plovdiv  

Prof. Bea Verschraegen  
Professor of Law at the Law Faculty of the University of Vienna; Head of the Department of Comparative Law, Harmonised Law and Private International Law
# TABLE OF CONTENTS

LIST OF AUTHORS ..................................................................................... v

INTRODUCTION
Masha Antokolskaia .............................................................................. 1

PART I. THE CONVERGENCE AND DIVERGENCE DEBATE:
A NEVERENDING STORY?

HARMONISATION OF FAMILY LAW IN EUROPE:
A HISTORICAL PERSPECTIVE
Masha Antokolskaia .............................................................................. 11

1. Introduction ..................................................................................... 11
2. Tendency Towards Convergence and Tendency Towards Modernisation . 11
3. Have Family Laws Been Converging in the Past? ............................. 15
   3.1. Selection of Period is Crucial .............................................. 15
   3.2. Has There Been Convergence of the Laws on Marriage? ........... 17
   3.3. Has There Been Convergence of the Laws on Divorce? ............. 18
   3.4. Has There Been Convergence of the Laws on Extramarital
       Cohabitation? ............................................................... 18
   3.5. Has There Been Convergence of the Laws Governing Position
       of Extramarital Children? ........................................... 19
   3.6. Has There Been Convergence of the Laws Governing Matrimonial
       Property? ....................................................................... 19
   3.7. Conclusion .......................................................................... 21
4. Are Family Laws Converging at Present? ...................................... 21
   4.1. Would the Rearguard Ever Reach the Vanguard? ...................... 21
   4.2. The End of History of Family Law? ...................................... 22
# Table of Contents

## CONVERGENCE AND DIVERGENCE: THEORETICAL ISSUES

**Esin Örür** ............................................................... 25

1. Introduction ........................................................... 25
2. Theories of Convergence and Divergence from the Vantage Point of a Comparatist .......................................................... 28
   2.1. Introduction ...................................................... 28
   2.2. Contamination .................................................. 31
   2.3. Diffusion ........................................................ 32
   2.4. Derivation ....................................................... 33
   2.5. Transposition ................................................... 33
   2.6. Appropriation of Common Laws ............................... 34
   2.7. ‘Family Tree’ Model and ‘Wave Theory’ .................... 35
3. Original and Ongoing Convergence .................................. 37
4. Paths of Convergence ................................................ 43
5. An Example Straddling Two Worlds ................................ 45
6. Concluding Remarks .................................................. 46

## PART II. FROM DIVERSITY TO SIMILARITY: REGIONAL TENDENCIES

### APPROXIMATION OF NORDIC FAMILY LAW WITHIN THE FRAMEWORK OF NORDIC COOPERATION

**Ingrid Lund-Andersen** .................................................. 51

1. Introduction ........................................................... 51
2. Demographics .......................................................... 51
3. Nordic Legal Cooperation – A Short History ....................... 52
4. Examples .............................................................. 56
5. Conclusion ............................................................. 60

### FAMILY LAW OF SPANISH AUTONOMIES: FOLLOWING A SIMILAR PATTERN?

**Miquel Martín-Casals** .................................................. 63

1. Family Law Within the Context of Non-Unified Civil Law in Spain .... 63
2. The Introduction of Family Mediation and of a Scheme for Opposite- and Same-Sex Couples by the Autonomous Communities ............ 65
   2.1. Initial Idleness of the Spanish Legislature and Catalan Activism .... 65
# Table of Contents

## 2.2. Family Mediation Acts

2.2.1. Main Characteristics of the Acts of the Autonomous Communities ........................................ 67
2.2.2. The State’s Proposal on Mediation .......................................................... 69
2.2.3. Practical Results .................................................. 70

## 2.2. Opposite-Sex and Same-Sex Partnerships Acts

2.3.1. Main Characteristics of the Acts of the Autonomous Communities ........................................ 71
2.3.2. Practical Results .................................................. 74
2.3.3. The State’s Silence and New Catalan Activism: What’s Coming Next? ........................................ 75

## THE ACCESSION OF BULGARIA TO THE EUROPEAN UNION: A PATH TO THE HARMONISATION OF FAMILY LAW?

**Velina Todorova** .............................................................. 79

1. Introduction .......................................................... 79
2. The Policy of ‘Conditionality’ As a Means to the ‘Top-Down’ Harmonisation of Bulgarian Family Law .......................................................... 81
   2.1. The ‘Acquis’ Conditionality .................................................. 82
   2.2. Democratic Conditionality .................................................. 86
4. Political Factors ‘for’ or ‘Against’ Convergence of Family Law in Bulgaria .......................................................... 89
5. The Child Care Reform and the New Family Law .................................................. 92
6. Conclusion .......................................................... 94

## FAMILY LAW IN THE FORMER SOVIET UNION: MORE DIFFERENCES OR MORE IN COMMON?

**Olga A. Khazova** .............................................................. 97

1. The Background .......................................................... 97
3. Peculiarities of Some of the Laws .......................................................... 103
   3.1. Marriage .......................................................... 103
   3.2. Divorce and Separation .......................................................... 106
   3.3. Property Issues and Spousal Maintenance .......................................................... 110
### Table of Contents

4. Cohabitation .................................................. 115  
5. Concluding Remarks ........................................... 116

**PART III. CONVERGENCE AND DIVERGENCE IN SPECIFIC FIELDS OF FAMILY LAW**

**O TEMPORA, O MORES! THE EVOLVING MARRIAGE CONCEPT AND THE IMPEDIMENTS TO MARRIAGE**  
FREDERIK SWENNE ·· 121

1. Previously in Family Law ........................................ 121  
2. Convergence with Intervals: The Impediments to Marriage on the Ground of Kinship and Affinity (by Adoption) ............................. 125  
   2.1. Analysis .................................................. 125  
   2.2. Overview ................................................ 131  
3. Convergence in Disguise: A Short Intermezzo on Polygamy .......... 135  
4. Temporary Divergence: Same-Gender Marriage ..................... 137  
5. The Weakest Link .............................................. 143

**CONVERGENCE AND DIVERGENCE IN THE LAW ON SAME-SEX PARTNERSHIPS**  
INGEBORG SCHWENZER ·· 145

1. Introduction .................................................. 145  
2. Legal Parentage and Medically-Assisted Procreation ................. 148  
3. Adoption ..................................................... 150  
4. Parental Responsibility .......................................... 154  
5. Contact ....................................................... 156  
6. Summary ..................................................... 157

**MOVING TO THE SAME DESTINATION? RECENT TRENDS IN THE LAW OF DIVORCE**  
BEA VERSCHRAEGEN ·· 159

1. Introduction .................................................. 159  
2. Rapid Divorce, Judicial Supervision and Clean-Break Versus Continuing Responsibility .................................................. 159

Intersentia
3. Assessment .................................................... 161
4. Policy Matters ................................................. 163
5. Summary ..................................................... 166

THE ESTABLISHMENT OF PARENTHOOD: A STORY OF SUCCESSFUL CONVERGENCE?
CAROLINE FORDER and Kees SAARLOOS ............................. 169

Introduction ...................................................... 169
1. National Laws on Legal Affiliation: How Do They Differ? ............. 170
  1.1. A Model for the Comparison of National Laws on Legal Affiliation 170
  1.2. Grounds for Legal Affiliation .............................. 171
    1.2.1. Grounds for Legal Maternity ......................... 172
      1.2.1.1. Childbirth .................................. 172
      1.2.1.2. Apparent Status or Possession d’État ............ 174
      1.2.1.3. The Relationship Between Genetic Affiliation and Apparent Status Under French Law ..... 175
    1.2.2. Grounds for Legal Paternity ........................... 176
      1.2.2.1. Genetic Affiliation ........................... 177
      1.2.2.2. Intention ................................... 177
        a. Definition of the Field of Application of Intention As a Ground for Legal Affiliation ... 179
        b. Differences Between National Provisions on the Consequences of Assisted Reproduction ... 182
    1.2.3. Grounds for Legal Parenthood – Overview .............. 185
  1.3. Establishment and Annulment of Legal Parenthood ............. 185
    1.3.1. Establishment of Parenthood – Four Methods ........... 186
      1.3.1.1. Ex Lege Existence of Parenthood ............... 186
      1.3.1.2. Establishment of Parenthood by Means of Administrative Action .................. 191
      1.3.1.3. Judicial Establishment of Parenthood .......... 194
        a. Exceptions to the Grounds of Legal Affiliation ... 194
        b. Locus Standi ....................................... 196
        c. Statutory Periods of Limitation ................. 197
      1.3.1.4. Annulment of Parenthood ..................... 198
        a. Judicial Annulment of Legal Parenthood .......... 199
        b. Restrictions on Judicial Annulment of Paternity Under Dutch Law .................. 200
        c. Judicial Annulment of Legal Parenthood and Apparent Status ....................... 201
Table of Contents

d. Locus Standi ............................. 202

e. Statutory Periods of Limitation .............. 205

f. Administrative Annulment of Parenthood .... 207

1.4. Evidence and Legal Parenthood .................. 209

1.4.1. Evidence and Ex Lege Existence of Parenthood .......... 209

1.4.2. DNA Evidence in Court Proceedings on (Legal) Affiliation 212

2. The European Court of Human Rights and National Laws of Parenthood ................................................... 218

2.1. Parenthood: Natural Reproduction and Assisted Reproduction . 218

2.2. Natural Reproduction and Legal Parenthood .................. 219

2.2.1. The Child-Mother Relationship ....................... 220

2.2.2. The Child-Father Relationship ........................ 221

2.2.2.1. The Presence or Absence of a Biological Link Between the Man and the Child ....................... 222

2.2.2.2. The Social Relationship Between the Mother and Father or Between the Father and the Child ... 222

2.2.2.3. Presence or Absence of a Conflict of Interest Regarding the Establishment of Parenthood ...... 224

2.2.3. Legal Recognition of Family Life: The Criteria ............ 226

2.2.4. Private Life and Legal Parenthood ...................... 227

2.2.5. The Significance of the European Court’s Attention for the Presence or Absence of a Conflict of Interest ...... 231

2.3. Assisted Reproduction ................................. 231

2.4. Assisted Reproduction: The Criteria ....................... 233

3. Convergence or Divergence? .............................. 233

MATRIMONIAL PROPERTY LAW: DIVERSITY OF FORMS, EQUIVALENCE IN SUBSTANCE?
BENTE BRAAT .................................................. 237

1. Introduction ............................................. 237

2. Diversity of Forms Regulating the Property of Spouses .......... 239

2.1. Matrimonial Property or no Matrimonial Property Regime?
That is the Question ....................................... 239


2.2.1. Community or no Community During the Marriage ...... 240

2.2.2. Management of Property ............................. 240

2.2.3. Creditor’s Rights ................................. 241

2.2.4. Distribution of Property upon Dissolution .................. 242

3. Equivalence in Substance ................................ 243

xii

Intersentia
# 3.1. The Gap Between England and the Rest of the EU Isn’t That Big After All ......................................... 243

# 3.2. The Colours of the Patchwork Aren’t That Different After All ....................................................... 244
   3.2.1. Community or no Community During Marriage ................. 244
   3.2.2. Management of Property .............................................. 244
   3.2.3. Creditor’s Rights ....................................................... 245
   3.2.4. Distribution of Property upon Dissolution ................... 245

# 4. An Optional Matrimonial Property Regime for Europe ................................................................. 245
   4.1. The Basis: Common Core and Better Law Regarding Matrimonial Property Law ........................................ 247
       4.1.1. First Step: Looking for the Common Core of European Matrimonial Property Law ........................................ 247
       4.1.2. Second Step: Common Core is Not Enough, European Couples Need a Better Law ........................................ 247
           4.1.2.1. Use of the Dutch Guidelines for a Default Regime ........ 247
           4.1.2.2. Europeanisation of the Dutch Guidelines ............... 248
   4.2. Starting Point for a European Optional Matrimonial Property Regime ............................................................. 249

---

### PART IV: CONVERGENCE AND DIVERGENCE: PRACTICAL AND POLITICAL ASPECTS

**BUILDING ON CONVERGENCE AND COPING WITH DIVERGENCE IN THE CEFL PRINCIPLES OF EUROPEAN FAMILY LAW**

KATHARINA BOELE-WOELKI .................................................. 253

1. Introduction ................................................................. 253
2. Remarks on the Terminology Used .................................... 254
   2.1. Convergence and Divergence and Similarities and Differences .... 254
   2.2. Common Core and Better Law ............................................. 256
   2.3. Unification and Harmonisation ........................................... 258
3. International and Regional Organisations and the CEFL: A Brief Comparison of Their Working Methods ...................... 259
4. CEFL’s Six Steps and Five Approaches ..................................... 261
   4.1. Coping with Divergence .................................................. 263
   4.2. Building on Convergence .................................................. 265
5. Final Remarks ............................................................... 267
TOWARDS A UNIFORM EUROPEAN FAMILY LAW?
A POLITICAL APPROACH. GENERAL CONCLUSIONS

MARIE-THÉRÈSE MEULDERS-KLEIN ................................. 271

1. Introduction .................................................. 271
2. Specificity of Family Law ...................................... 272
3. Europeanisation of Family Laws .............................. 275
4. The Council of Europe ......................................... 275
5. The European Union ........................................... 278
6. The Common Core or the Better Law? ......................... 279
7. Conclusion .................................................... 280