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Scherpe, Jens Martin

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IS THERE A "EUROPEAN FAMILY LAW"?

*Jens M Scherpe**

Europe consists of many very different jurisdictions and there is no institution that actually has the legislative power to create family laws for member states of the European Union, let alone Europe as a whole. Therefore, one could assume that no common "European Family Law" exists. However, this article argues that while there of course cannot be a full "European Family Code", some core elements of European Family Law have grown organically through similar social and legal developments, while other core elements have been established by institutional actions as well as court decisions. Together, these core elements represent fragments of a growing body of European Family Law.

I INTRODUCTORY JUSTIFICATION AND THANKS

While being asked to contribute to this publication in honour of Tony was wonderful, I immediately faced a grave predicament, namely that my work in no way overlaps with that of Tony. So, I have to make do with the most tenuous and artificial of connections and will write about European family law, just because Tony very much is part of the European legal family.

That said, I would like to express my sincere gratitude for all the support Tony has given me over the years, beginning with taking a newly appointed and nervous college lecturer to his first dinner at Gonville and Caius College, to showing me the best waterholes in Wellington when I visited. Tony, thank you for everything!

II NO CODE, NO INSTITUTION TO LEGISLATE, THEREFORE NO EUROPEAN FAMILY LAW?

It will not surprise anyone that an academic who has published books entitled "European Family Law"¹ will answer the question of whether there is such a thing with a resounding "yes, of course".

* Professor of Comparative Law, Aalborg University/Denmark; Director, Nordic Centre for Comparative and International Family Law (NorFam); Emeritus Fellow of Gonville and Caius College, University of Cambridge; Extraordinary Professor, University of the Western Cape.

1 Jens M Scherpe *European Family Law* (four volume book set, Edward Elgar, Cheltenham, 2016).

Nor will it surprise anyone who has ever read any academic text that this answer inevitably is followed immediately by an equally forceful "However, ...".

Many of my colleagues, particularly those involved in the teaching and research of European Union law, have suggested to me that pursuing a book project on European Family Law was a complete absurdity, as there was no such thing. I was told repeatedly that there was no body, no institution that actually had the power, legislative or otherwise, to create (or worse, impose) a European Family Law. Ergo, there could be no such thing. In addition, I was told by several colleagues on many occasions that family law is and should remain a purely national matter, as it is too deeply rooted in the social and legal traditions of the respective jurisdictions and is not susceptible at all to harmonisation or unification – or even meaningful comparison.² While these views of course had a point (at least to some extent), I nevertheless disagreed. But perhaps the differing views owed only to a misunderstanding of what European Family Law actually was supposed to be. If my colleagues were referring to a comprehensive European Family Law code,³ then obviously they were right. There is no such thing. But why would a European Family Law require a full codification of family law? Or even a partial one? Indeed, in many European jurisdictions the laws concerning the family are scattered about in various statutes; and even where there is a major national codification, there are always family law provisions in additional statutes. Moreover, much of what unquestioningly is accepted as "European Law" more broadly is contained in various conventions, regulations, directives and also court decisions. Thus, surely the same could and should apply to "European *Family Law*".

III A TAPESTRY OF EUROPEAN FAMILY LAW

The absence of a European Family Law code does not necessarily mean that there is presently no European Family Law at all, nor does the absence of a plethora of common European family law statutes. The reason for this is that the European Family Law with which this contribution is concerned is the result of a number of different factors, created in different ways by institutions and organisations on the one hand, and societal and national legal developments on the other. The former can be called "Institutional European Family Law" (on which see Part III(A) below), the latter "Organic European Family Law" (on which see Part III(B) below).

Admittedly, *this* European Family Law is not comprehensive. On the contrary. It is pointillistic, fragmented and unruly, and covers some areas but not others (both geographically and in substance).

2 Space precludes a discussion of this issue, but see the contributions in Katharina Boele-Woelki (ed) *Perspectives for the Unification of Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003).

3 Which to Sir Gerald Fitzmaurice, one of the dissenting Judges in the seminal decision *Marckx v Belgium* (1979–80) 2 EHRR 14 (ECHR), apparently was something of great concern, when he accused the majority of reading (or rather introducing) "a whole code of family law into Article 8" of the European Convention on Human Rights. On this see Walter Pintens and Jens M Scherpe "The Marckx Case: A 'Whole Code of Family Law?'" in Stephen Gilmore, Jonathan Herring and Rebecca Probert (eds) *Landmark Cases in Family Law* (Hart Publishing, Oxford, 2011) 155.

With most plants, when the first stalks and sprigs rise from the earth, there is not much to see. The same is true for *this* European Family Law, which not only exists but continues to grow, tended by various groups of legal horticulturists who have very different expectations of how and in which way this peculiar sapling should develop. It is unlikely that it will ever grow into a majestic tree, but it certainly seems to be growing nicely.

A Institutional European Family Law

"Institutional European Family Law" exists where there are already binding family law rules for some geographical areas of Europe by multilateral treaties, or where some legal communities such as the member states of the European Union or the contracting states of the European Convention on Human Rights have signed up to a specific legal framework, including being bound by the decisions of a supra-national court. Similarly, some organisations have had a unifying effect on European Family Law. While this could also be called "top-down" European Family Law, this would not be entirely accurate as the relevant legal instruments are generally created by taking into account, and building on, the existing laws in the jurisdictions concerned, and thus in a sense they are also the result of a "bottom-up" or "organic" development.

1 European Convention on Human Rights and European Court of Human Rights

The most obvious source of Institutional European Family Law is probably the European Convention on Human Rights (ECHR)⁴ as well as the decisions by the European Court of Human Rights (ECtHR). While decisions of the latter of course only immediately concern a specific contracting state, the decisions generally set, as Wikely has put it, a "floor", a minimum standard, beneath which the laws of the contracting states must not fall.⁵

For present purposes, the most important provisions of the ECHR are arts 8, 12 and 14, although other provisions of course have played a role in shaping family law as well.⁶ Article 8 holds that "everyone has the right to respect for his private and family life", and art 12 states that "men and women of marriageable age have the right to marry and to found a family". In addition, art 14 asserts that:

4 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953) [ECHR], signed and ratified by all European jurisdictions and the European Union except for the Vatican City (which remains an observer) and Russia (denunciation in force since 16 September 2022).

5 Nick Wikely "Same sex couples, family life and child support" (2006) 122 LQR 542 at 544.

6 See for example ECHR, art 1 of Protocol 1 (Protection of property), art 6 (Right to a fair trial), art 9 (Freedom of thought, conscience and religion) and art 3 (Prohibition of torture).

... the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Together, these are the key provisions that have shaped aspects of family laws in many jurisdictions. In the following, three areas are discussed in which the ECtHR has utilised the Convention provisions to create pockets of European Family Law.

Perhaps the starting point for this was the famous *Marckx v Belgium* decision in 1979, which nominally only concerned the legal status of children born out of wedlock in Belgium.⁷ Nevertheless, the decision immediately had a massive impact on the national family laws of all contracting states of the ECHR as it held that children must not be discriminated against because of the marital status (or rather the absence of it) of their parents. Consequently, many European jurisdictions had to change their family laws accordingly.⁸ However, the impact of this decision on European family laws extends far beyond the matter decided upon because in *Marckx* the Court stipulated, for the first time, a *positive* obligation on states to ensure respect for private and family life under art 8, thus rendering all national family laws subject to review by the Court regarding their compliance with the ECHR.⁹ Since then, the Convention and the Court have influenced national European family laws in many, many cases, and in most of these cases shaped these laws and created the "floor", the minimum standards in almost all areas of family law.¹⁰ In doing so, the Court often relies on a consensus amongst the contracting states, or occasionally what it calls a "developing" or "emerging" consensus,¹¹ but always will take stock of how the particular issue in question is addressed not only

7 *Marckx v Belgium*, above n 3.

8 See for example Law Commission of England and Wales *Illegitimacy* (HMSO, Law Com No 118, 1982); Scottish Law Commission *Report on Illegitimacy* (HMSO, Scot Law Com No 82, 1984); Law Commission of England and Wales *Illegitimacy (Second Report)* (HMSO, Law Com No 157, 1986); and Hoge Raad case no 463, 181.1980, *Nederlands Jurisprudentie* 1980, 1460. See also Fritz Sturm "Das Straßburger Marckx-Urteil zum Recht des nichtehelichen Kindes und seine Folgen" *FamRZ* 1982, 1151; Marc Salzberg "The Marckx Case: The Impact on European Jurisprudence of the European Court of Human Rights' 1979 *Marckx* Decision Declaring Belgian Illegitimacy Statutes Violative of the European Convention on Human Rights" (1984) 13 *DJILP* 283; and Caroline J Forder "Legal protection under Article 8 ECHR: *Marckx* and beyond" (1990) 37 *NILR* 162.

9 See Pintens and Scherpe, above n 3; and Walter Pintens and Jens M Scherpe "Die Marckx-Entscheidung des Europäischen Menschenengerichtshofs als Keimzelle eines europäischen Familien- und Erbrechts. Ein Rück- und Ausblick nach fünfunddreißig Jahren" in Norman Witzleb and others (eds) *Festschrift für Dieter Martiny zum 70 Geburtstag* (Mohr Siebeck, Tübingen, 2014) 127.

10 For an overview see Dagmar Coester-Waltjen "The impact of the European Convention on Human Rights and the European Court of Human Rights on European family law" in Jens M Scherpe (ed) *European Family Law Volume I: The Impact of Institutions and Organisations on European Family Law* (Edward Elgar, Cheltenham, 2016) 49.

11 See for example *SH and others v Austria* (2011) 52 EHRR 6 (ECHR), noted critically in Jens M Scherpe "Medically Assisted Procreation: This Margin Needs to Be Appreciated" (2012) 71 *CLJ* 276; and *Goodwin v*

in the law of the contracting state directly involved, but the contracting states generally. The decisions, and the legal rules they create, thus build on this analysis and, while "institutional", have an "organic" root as well.

A good example of how the ECtHR sets the "floor" is the decision *Goodwin v United Kingdom*, concerning the right to be recognised in one's preferred gender, ie the possibility of changing one's legal gender from the one allocated at birth.¹² The decision is the result of a long line of cases¹³ and therefore also dispels criticisms that the ECtHR is acting too hastily and aggressively in imposing its views – in fact, the development in this particular area arguably shows the opposite, as for a long time the Court was very mindful of respecting the contracting states' social and legal traditions until this simply no longer was tenable from a human rights point of view. In *Goodwin* (and the parallel case of *I v United Kingdom*),¹⁴ the Grand Chamber held that while there was no consensus amongst contracting states on the matter, there was a clear and continuing trend, and that there were no longer any significant factors of public interest that would outweigh the interest of the persons concerned to be legally recognised in their preferred gender (protected by the right to respect for private life, art 8) and to marry under that gender (protected by the right to marry and found a family, art 12). In doing so, the ECtHR established that in all contracting states there must therefore be the possibility of changing one's legal gender and marrying in it, making this a common basis for European Family Law.¹⁵

Similarly, in the equally politically sensitive field of recognition of same-sex relationships, it was only after many decisions on issues of sexual orientation that the ECtHR ultimately found that same-

United Kingdom Grand Chamber, ECHR 28957/95, 11 July 2002 at [85]. On this latter case and issue see also Jens M Scherpe *The past, present and future of European Family Law* (Edward Elgar, Cheltenham, 2016) at 14 and following, and 119 and following.

12 *Goodwin v United Kingdom*, above n 11.

13 Beginning in 1980 with *van Oosterwijck v Belgium* ECHR 7654/76, 6 November 1980, followed by, inter alia, *Rees v United Kingdom* ECHR 9532/81, 17 October 1986; *Cossey v United Kingdom* ECHR 10843/84, 27 September 1990; *X, Y and Z v United Kingdom* Grand Chamber, ECHR 21830/93, 22 April 1997; and *Sheffield and Horsham v United Kingdom* Grand Chamber, ECHR 22985/93 and 23390/94, 30 July 1998.

14 *I v United Kingdom* Grand Chamber, ECHR 25680/94, 11 July 2002 (decided on the same day as *Goodwin v United Kingdom*, above n 11).

15 However, the Court did not go beyond that and stipulate which legal requirements must be fulfilled by the individual for this, since that was not the issue in the case. This therefore had to be dealt with by national legislation (eg in the United Kingdom's case by the Gender Recognition Act 2004 (UK)) and subsequent litigation. See for example *L v Lithuania* ECHR 27527/03, 11 September 2007; *Schlumpf v Switzerland* ECHR 29002/06, 8 January 2009; *Hämäläinen v Finland* Grand Chamber, ECHR 37359/09, 16 July 2014; *YY v Turkey* ECHR 14793/08, 10 March 2015; *AP, Garçon and Nicot v France* ECHR 79885/12, 52471/13 and 52596/13, 6 April 2017; *YT v Bulgaria* ECHR 41701/16, 9 July 2020; *X and Y v Romania* ECHR 2145/16 and 20607/16, 19 January 2021; and *AD and others v Georgia* ECHR 57864/17, 79087/17 and 55353/19, 1 December 2022.

sex couples have rights as *couples*.¹⁶ In *Schalk and Kopf v Austria*, the Court found that art 12 (which expressly states that "men and women" have the right to marry) cannot "in all circumstances be limited to marriage between two persons of the opposite sex" and it consequently could not "be said that Article 12 is inapplicable to the applicants' complaint".¹⁷ However, still mindful of the sensitivity of the matter, the Court then went on to say that as "matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State" and that there therefore was no violation of art 12.¹⁸

... marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society ...

While this may have been disappointing for some, the decision nevertheless is remarkable because the Court not only had no issue with the matter falling within the ambit of art 12 in principle, but it went on to hold that same-sex couples are protected by the right to respect of family life under art 8.¹⁹

... the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.

With this, the ECtHR created another firm pillar of European Family Law, namely that same-sex couples have the right to be recognised in principle, and that any differential treatment compared to other couples will require "particularly serious" justifications, as otherwise it would fall foul of art 14 in conjunction with art 8. Hence there is a clear mandate for the contracting states concerning the legal recognition of same-sex couples, and withholding legal rights and duties from them will be increasingly difficult.²⁰ Thus, the non-discrimination of same-sex couples is now firmly entrenched in and part of European Family Law.

16 For an overview see Paul Johnson *Homosexuality and the European Court of Human Rights* (Routledge, Abingdon-on-Thames, 2012); Jens M Scherpe "From 'Odious Crime' to Family Life – Same-sex Couples and the ECHR" in Alain Verbeke and others (eds) *Confronting the Frontiers of Family and Succession Law – Liber amicorum Walter Pintens* (Intersentia, Antwerp, 2012) 1225; and Jens M Scherpe "Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights" (2013) 10 *The Equal Rights Review* 83.

17 *Schalk and Kopf v Austria* (2011) 53 EHRR 20 (ECHR) at 61, noted by Jens M Scherpe "Same-sex Couples have Family Life" (2010) 69 CLJ 463.

18 *Schalk and Kopf v Austria*, above n 17, at 62.

19 At 94.

20 Not unexpectedly, this provided the basis for further litigation. See for example *Vallianatos and others v Greece* Grand Chamber, ECHR 29381/09 and 32684/09, 7 November 2013, noted by Rob George "Civil Partnerships, Sexual Orientation and Family Life" (2014) 73 CLJ 260; *Oliari and others v Italy* ECHR

2 *European Union and the Court of Justice of the European Union*

As already mentioned, the European Union nominally does not have any legislative competence in the field of family law as such and thus this technically remains the sole domain of the national legislatures. However, many of the legislative acts of the European Union, and indeed the various treaties that have created the European Union, have an impact on families and family laws. The main driving forces are the principles of equality and non-discrimination (also embodied in arts 20 and 21 of the Charter of Fundamental Rights of the European Union), the free movement of workers and the legal competences with regard to cross-border issues through private international law instruments.

An example of how equality/non-discrimination laws have an impact in family law is the case law of the Court of Justice regarding the treatment of same-sex relationships. In *Maruko v Versorgungsanstalt der deutschen Bühnen*, the surviving partner of a (same-sex) registered partnership²¹ had been denied a survivor's pension in Germany as the law only extended these benefits to spouses (marriage not being available to same-sex couples at the time).²² The Court held that – provided that the couples were in comparable situations²³ – this would amount to direct discrimination within the meaning of the applicable Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Even though the member states were free to legislate on adult relationships (and especially marriage) in principle, they were obliged to do so without discrimination.²⁴ In *Römer v Freie und Hansestadt Hamburg*, the Court decided along similar lines, holding that receiving a lower supplementary pension benefit because the

18766/11 and 36030/11, 21 July 2015; *Orlandi and others v Italy* ECHR 26431/12, 26742/12, 44057/12 and 60088/12, 14 December 2017; and *Fedotova and others v Russia* Grand Chamber, ECHR 40792/10, 30538/14 and 43439/14, 17 January 2023.

- 21 The *eingetragene Lebensgemeinschaft* was the functional equivalent to marriage for same-sex couples only. On this see Jens M Scherpe "The Legal Status of Same-sex Relationships in Germany" in Jürgen Basedow, Uwe Kischel and Ulrich Sieber (eds) *German National Reports to the 18th International Congress of Comparative Law* (Mohr Siebeck, Tübingen, 2010) 75; and Jens M Scherpe "A Comparative View on Registered Partnerships and Formal Family Recognition Beyond Marriage" (2019) 6 JICL 273.
- 22 Case C-267/06 *Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-175. See also Geert De Baere and Kathleen Gutman "The impact of the European Union and the European Court of Justice on European Family Law" in Jens M Scherpe (ed) *European Family Law Volume I: The Impact of Institutions and Organisations on European Family Law* (Edward Elgar, Cheltenham, 2016) 5 at 39 and following.
- 23 Subsequently the Court found that they were: *Verwaltungsgericht München* 1.6.2006 – M 2 K 05.1595.
- 24 See also Colm O'Conneide *The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC* (European Commission: Directorate-General for Justice, November 2012); and Kimberly Liu and Colm O'Conneide *The ongoing evolution of the case-law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC* (European Commission: Directorate-General for Justice and Consumers, November 2019).

applicant had been in a registered partnership rather than a marriage was direct discrimination and thus a violation of the Directive.²⁵

While pensions and comparable benefits may not be at the core of family law, the fact that such benefits need to be granted without discrimination and therefore are potentially available to family constructs not yet recognised by national laws (or recognised differently) effectively mandates the recognition of such family constructs, at least to a certain extent.

The same can be seen from decisions regarding the free movement of workers. For example, in the ground-breaking decision *Coman, Hamilton and Asociația Accept v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, the Court decided that the term "spouse" within the meaning of the provisions of EU law on freedom of residence for EU citizens and their family members includes spouses of the same sex.²⁶ Perhaps best summarised in the press release by the Court of Justice, this meant that although:²⁷

... the Member States have the freedom whether or not to authorise marriage between persons of the same sex, they may not obstruct the freedom of residence of an EU citizen by refusing to grant his same-sex spouse, a national of a country that is not an EU Member State, a derived right of residence in their territory.

Again, this decision only concerns an area on the fringes of family law, namely residence laws, and it does not, as such, mandate that national family laws allow same-sex marriages. However, after *Coman*, same-sex marriage involving at least one EU citizen must be recognised by every EU member state to which the spouses move for the purposes of family reunification rights, ie residency. While the decision technically is confined to a narrow area of law, it is obvious that it will have a fundamental impact on family laws in the long term if same-sex relationships must be accepted for some purposes and, as outlined above, without discrimination.²⁸

The influence of EU law extends not only to relationships between adults (horizontal relationships) but also to relationships between parents and their children (vertical relationships). European Commission President von der Leyen said in her State of the Union speech in 2020 that

25 Case C-147/08 *Römer v Freie und Hansestadt Hamburg* [2011] ECR I-3645.

26 Case C-673/16 *Coman, Hamilton and Asociația Accept v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* ECLI:EU:C:2018:385.

27 Court of Justice of the European Union "The term 'spouse' within the meaning of the provisions of EU law on freedom of residence for EU citizens and their family members includes spouses of the same sex" (press release, 5 June 2018).

28 See Alina Tryfonidou "The ECJ recognises the Right of Same-Sex Spouses to move freely between EU Member States: the *Coman* ruling" (2019) 44 E L Rev 663; and Amanda Spalding "Where next After *Coman*?" (2019) 21 EJML 117.

"[i]f you are parent in one country, you are parent in every country".²⁹ Following on from that, the European Commission presented a Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood.³⁰ This is also part of the key action in the EU Strategy on the Rights of the Child,³¹ and also of the EU's LGBTIQ Equality Strategy.³² The ultimate aim simply is as the Commission President put it: a family recognised as such in one EU country will be a family everywhere in the EU. While the recognition of parenthood for so-called non-traditional families is met with resistance,³³ and the acceptance of the proposed regulation is therefore not very likely given that unanimity is required according to art 81(3) of the Treaty on the Functioning of the European Union,³⁴ the direction of travel is set. This is also shown by recent decisions like *VMA v Stolichna Obshtina, Rayon 'Pancharevo'*³⁵ and *Rzecznik Praw Obywatelskich v KS and others*,³⁶ which made clear that family ties established in another EU member state between a child and their parents must also be recognised in order to allow for the free movement of workers and their families, at least to some extent, when the parents are a same-sex couple.³⁷

3 *The Commission on European Family Law and other institutions*

Other institutions, such as the Hague Conference, the International Commission on Civil Status (ICCS) and the Council of Europe, have created elements of European Family Law in similar ways

29 Ursula von der Leyen, President of the European Commission "Building the World We Want to Live in: A Union of Vitality in a World of Fragility" (State of the Union Address, 2020).

30 *Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood* (European Commission, COM(2022) 695, 7 December 2022).

31 *EU Strategy on the Rights of the Child* (European Commission, COM(2021) 142, 24 March 2021).

32 *Union of Equality: LGBTIQ Equality Strategy 2020–2025* (European Commission, COM(2020) 698, 12 November 2020).

33 Arguably the discussion on recognition of same-sex relationships is "weaponised" in some countries to further other political means and ostensibly to further a "national identity". See Velina Todorova "Gender Wars in Bulgaria" in Jens M Scherpe and Stephen Gilmore (eds) *Family Matters – Essays in Honour of John Eekelaar* (Intersentia, Cambridge, 2022) 245; and Laima Vaige *Cross-Border Recognition of Formalized Same-Sex Relationships* (Intersentia, Cambridge, 2022).

34 Treaty on the Functioning of the European Union (signed 25 March 1957, entered into force 1 January 1958), art 81: "measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament".

35 Case C 490/20 *VMA v Stolichna Obshtina, Rayon 'Pancharevo'* ECLI:EU:C:2021:1008.

36 Case C-2/21 *Rzecznik Praw Obywatelskich v KS and others* ECLI:EU:C:2022:502.

37 See Alina Tryfonidou "EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?" (2019) 38 YEL 220.

as just outlined above, but space precludes a more detailed discussion for this contribution.³⁸ However, one other particular group deserves special mention, namely the academic initiative of the Commission on European Family Law (CEFL). The CEFL was established on 1 September 2001 and consists of distinguished experts in the fields of family and comparative law.³⁹ Chaired by Katharina Boele-Woelki, the group has created several sets of "Principles of European Family Law" based on extensive comparative work.⁴⁰ These Principles are primarily an academic exercise and do not aspire to be implemented in full. Rather, they are intended as non-binding Principles to offer guidance to or be a reference point for jurisdictions that contemplate law reform, and have been quite successful in that capacity.⁴¹ For example, the Portuguese and Norwegian legislatures in 2008 modelled some of their child law provisions on CEFL Principles,⁴² as did the rules on parental responsibility contained in the Czech Civil Code in 2014.⁴³ Therefore, while not a formal and intergovernmental institution, the CEFL has had, and continues to have, a significant impact on the development of European family laws through their work. As their Principles are based on comparative research, and where possible aim to reflect the core of national family laws, they arguably are not "pure" Institutional European Family Law but contain elements of Organic European Family Law as well.

38 On the impact of these institutions see Nigel Lowe "The Impact of the Council of Europe on European Family Law" in Jens M Scherpe (ed) *European Family Law Volume I: The Impact of Institutions and Organisations on European Family Law* (Edward Elgar, Cheltenham, 2016) 95; Walter Pintens "The impact of the International Commission on Civil Status (ICCS) on European family law" in Jens M Scherpe (ed) *European Family Law Volume I: The Impact of Institutions and Organisations on European Family Law* (Edward Elgar, Cheltenham, 2016) 124; and Hannah Baker and Maja Groff "The impact of the Hague Conventions on European family law" in Jens M Scherpe (ed) *European Family Law Volume I: The Impact of Institutions and Organisations on European Family Law* (Edward Elgar, Cheltenham, 2016) 143.

39 For details on the group and their work see Commission on European Family Law "Welcome to CEFL" <www.ceflonline.net>.

40 See Katharina Boele-Woelki "The impact of the Commission on European Family Law (CEFL) on European family law" in Jens M Scherpe (ed) *European Family Law Volume I: The Impact of Institutions and Organisations on European Family Law* (Edward Elgar, Cheltenham, 2016) 209.

41 At 227. See also Katharina Boele-Woelki "Zwischen Konvergenz und Divergenz: Die CEFL Prinzipien zum Europäischen Familienrecht" (2009) 73 *Rabels Zeitschrift für internationales und ausländisches Privatrecht* 241; and Walter Pintens *Towards a Ius Commune in European Family and Succession Law? A Plea for More Harmonisation through Comparative Law* (Intersentia, Antwerp, 2012).

42 See Guilherme De Oliveira "Changes Going on in Portuguese Family Law" *FamRZ* 2008, 1712; and Tone Sverdrup "Norway: Equal Parenthood: Recent Reforms in Child Custody Cases" in Bill Atkin (ed) *The International Survey of Family Law 2011* (Jordan Publishing, Bristol, 2011) 303.

43 Zdeňka Králíčková "New Family Law in the Czech Republic" in Bill Atkin (ed) *The International Survey of Family Law 2014* (Jordan Publishing, Bristol, 2014) 71; and Zdeňka Králíčková "Changes in Czech Family Law in Light of the Principles of European Family Law" (2021) 1 *Law, Identity and Values* 85.

4 *The direct and indirect creation of European Family Law*

As the above has shown, institutions are creating European Family Law in direct and indirect ways. While undoubtedly there are significant tensions within the EU and Europe more broadly regarding developments in family law, and especially the recognition of same-sex couples and their families,⁴⁴ both the European human rights framework and the EU legal framework are establishing "floors", ie minimum legal requirements that must be fulfilled for families and thus by family laws, creating a foundation for European Family Law. Other institutions also contribute, somewhat more indirectly, through the drafting of principles, recommendations, guidelines and private international law conventions. Indeed, in the European and especially the EU context, it is often through private international instruments that, as Dieter Martiny has noted, "at least a considerable factual pressure particularly in the fields of child law and marriage law" is put on jurisdictions which take a more traditional view of families and family law,⁴⁵ and:⁴⁶

Domestic rules, having an element of discrimination within them, face increasing pressure to justify themselves, and at the same time, the recognition rules of both the fundamental freedoms and the Council regulations favour an ongoing and gradual liberalisation.

This liberalisation, although admittedly not universally welcomed,⁴⁷ then represents a core of European Family Law.

B Organic European Family Law

"Organic European Family Law" is comprised of elements of national family laws that have "grown", ie developed, in similar ways as a result of and reaction to similar societal developments. These laws thus are true "bottom-up" European Family Law. Of course, there remains huge diversity amongst the national family laws in Europe. However, if one focuses on the broader principles rather than the details, in many areas a common core can be found which therefore has created elements of a European Family Law. These elements obviously are not exclusively European, as similar legal developments will have taken place in individual jurisdictions or regions outside Europe, but of course they do not have to be in order to "qualify" as European Family Law. In the following, some areas have been chosen to serve as examples of Organic European Family Law.

44 Jens M Scherpe "Marriage and the Family" in Luigi Corrias and Ronald Tinevelt (eds) *European Ways of Life: Legal and Philosophical Perspectives* (Edward Elgar, Cheltenham, 2023) (forthcoming).

45 Dieter Martiny "The impact of the EU private international law instruments on European family law" in Jens M Scherpe (ed) *European Family Law Volume I: The Impact of Institutions and Organisations on European Family Law* (Edward Elgar, Cheltenham, 2016) 261 at 292.

46 At 292.

47 See the references in n 33 above.

1 Marriage

While historically in Europe marriage very much followed the doctrine that through marriage "one man and one woman become one", and that "one" legally and socially was very much dominated by the man, there has thankfully been a move (admittedly not yet complete) away from this, and towards (legal) equality of spouses in marriage – at least nominally.⁴⁸ Aided by constitutional and human rights mandates, the European jurisdictions have worked towards making marriage a union of equals. Yet, given the social realities in most (or even all) European jurisdictions,⁴⁹ it would be illusional (and indeed delusional) to claim that there is gender equality in marriage across Europe. Nonetheless, the general equality of spouses before the law is one of the fundamental principles of European Family Law. One of the latest jurisdictions to arrive at this conclusion was England and Wales in 2000, when by judicial decision the general equality of spouses in the area of matrimonial property was introduced in *White v White*.⁵⁰

But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party ...

What is expressed in this passage, namely that spouses should in principle be treated equally with regard to the division of matrimonial property (however defined), today is a central element of the law in almost all jurisdictions in Europe. The only exception appears to be Greece,⁵¹ where there is merely a presumption that a spouse contributed one-third to the assets of the other spouse and therefore is only entitled to this third, unless they can rebut this presumption and show a greater contribution.⁵² While Greek law nominally does not base the differential treatment of spouses on

48 See Caroline Sörgjerd "Marriage in a European Perspective" in Jens M Scherpe (ed) *European Family Law Volume III: Family Law in a European Perspective* (Edward Elgar, Cheltenham, 2016) 3.

49 Just mentioning the persisting gender pay gap and the continuing unequal division of childcare should suffice to make this point, but of course the social-systemic issues extend well beyond that.

50 *White v White* [2001] 1 AC 596 (HL) at [24].

51 See Eleni Zervogianni "The Changing Concept of 'Family' and Challenges for Family Law in Greece" in Jens M Scherpe (ed) *European Family Law Volume II: The Changing Concept of 'Family' and Challenges for Domestic Family Law* (Edward Elgar, Cheltenham, 2016) 86 at 90.

52 Which of course the homemaker/spouse with the lower income very rarely will be able to do.

gender, the social reality of course is that Greek law disproportionately disadvantages women compared to a presumption of equal sharing.

As regards equal sharing, the justification for this approach in the 21st century was put most succinctly by Lord Nicholls of Birkenhead in another seminal decision in England, *Miller v Miller; McFarlane v McFarlane*:⁵³

This "equal sharing" principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. ... The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary.

While true equality between spouses in social reality is still to be achieved, that spouses in principle are equal with regard to the division of property in the event of divorce undoubtedly (and despite the one exception) can be regarded as a defining element of European Family Law.

2 Divorce

Except for the Vatican City, all European jurisdictions now allow divorce, with Malta being the last to introduce it in 2011. The history of divorce in Europe has been mapped expertly by Masha Antokolskaia in her work,⁵⁴ which shows the general trend to "move away from the Roman Catholic doctrines of marriage" and state intervention towards greater freedom and autonomy for spouses.⁵⁵ Today not a single European jurisdiction remains in which divorce can solely be based on the fault of one party, meaning that the philosophical basis of divorce as a sanction for a matrimonial offence and the "moral guidance" of this basis for the dissolution of a marriage has been left behind.⁵⁶ Instead, European jurisdictions have accepted that divorces are a part of human life and instead of trying to "prevent" them through restricted laws, have moved towards substantive and procedural avenues which aim to bring the "dead shell" of a marriage to an end effectively and fairly. This is reflected in

53 *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [16].

54 Masha Antokolskaia *Harmonisation of Family Law in Europe: A Historical Perspective: A Tale of Two Millennia* (Intersentia, Antwerp, 2006); Masha Antokolskaia "Divorce in a European perspective" in Jens M Scherpe (ed) *European Family Law Volume III: Family Law in a European Perspective* (Edward Elgar, Cheltenham, 2016) 41; Masha Antokolskaia "The Search for a Common Core of Divorce Law: State Intervention v Spouses' Autonomy" in Miguel Martín-Casals and Jordi Ribot (eds) *The Role of Self-determination in the Modernisation of Family Law in Europe* (Edicions A Petició, Girona, 2006) 33; and Masha Antokolskaia "Convergence and divergence of divorce laws in Europe" (2006) 18 CFLQ 307.

55 Roderick Philipps *Putting Asunder: A History of Divorce in Western Society* (Cambridge University Press, Cambridge, 1988) at 27.

56 See especially Antokolskaia "The Search for a Common Core of Divorce Law: State Intervention v Spouses' Autonomy", above n 54, at 34.

many of the recent reforms in divorce law and procedure,⁵⁷ as well as the CEFL Principles of European Family Law.⁵⁸ Hence a common European Family Law strand now is that the state has mostly withdrawn from stipulating requirements for divorce that go beyond proving the breakdown of the marriage,⁵⁹ and the law is generally focused on regulating the consequences of divorce rather than divorce itself.

3 *From custody and parental rights towards parental responsibility*

That child law is to be guided by and subject to the principle of the best interests of the child today is thoroughly embedded in the national family laws of Europe, in the jurisprudence of the ECtHR⁶⁰ and, of course, in international conventions such as the United Nations Convention on the Rights of the Child (UNCRC).⁶¹ There has been a fundamental shift in the area of child law from being rather adult-centric towards becoming appropriately child-centric.⁶² This can be observed, for example, in the law on what is most appropriately termed "parental responsibility", but in many European jurisdictions was (and in many still is) called "custody", "parental authority", "parental rights" or "parental care". Even though the laws in substance have often moved towards being more child-centric, the older terminology still highlights how the laws were mainly focused on putting the parents in charge. But what can be seen in Europe is that in more modern legislation European jurisdictions

57 For example, in England and Wales (introduced by the Divorce, Dissolution and Separation Act 2020 (UK), on which see Jens M Scherpe "Neues Scheidungsrecht in England und Wales" FamRZ 2021, 1435), Spain (see for example Albert Lamarca Marquès "The changing concept of 'family' and challenges for family law in Spain and Catalonia" in Jens M Scherpe (ed) *European Family Law Volume II: The Changing Concept of 'Family' and Challenges for Domestic Family Law* (Edward Elgar, Cheltenham, 2016) 289) and Italy (see for example Maria Giovanna Cubeddu Wiedemann "The changing concept of 'family' and challenges for family law in Italy" in Jens M Scherpe (ed) *European Family Law Volume II: The Changing Concept of 'Family' and Challenges for Domestic Family Law* (Edward Elgar, Cheltenham, 2016) 160).

58 Commission on European Family Law *Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses* at "Principle 1:4" (mutual consent) and "Principle 1:8" (divorce without consent in case of separation for one year).

59 Although admittedly many very different approaches are taken in Europe when it comes to proving this irretrievable breakdown, ranging from requiring very substantial proof to separation periods being sufficient, or even a simple declaration: see the references in n 54 above.

60 This has consistently been the basis for decisions of the European Court of Human Rights: see for example *YC v United Kingdom* ECHR 4547/10, 13 March 2012; and *Johansen v Norway* ECHR 17383/90, 7 August 1996.

61 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 3(1).

62 See for example on the law of adoption Claire Fenton-Glynn "Adoption in a European perspective" in Jens M Scherpe (ed) *European Family Law Volume III: Family Law in a European Perspective* (Edward Elgar, Cheltenham, 2016) 311.

are also shifting towards the more child-focused term "parental responsibility".⁶³ Similarly, the Hague Conference on Private International Law⁶⁴ and the European Commission⁶⁵ use the term parental responsibility, and Scots law,⁶⁶ the Council of Europe⁶⁷ and the CEFL⁶⁸ use the plural form, parental responsibilities (which some languages, such as German or French, cannot actually accommodate).⁶⁹ Interestingly, in several of the jurisdictions where the new terminology was introduced, the substantive law did not necessarily change that much, but it nevertheless, as Kenneth McK Norrie has put it, signifies a "fundamental shift in attitudes towards the nature of the parent-child relationship".⁷⁰ Hence, by making responsibility rather than rights the centrepiece of the legislation, the jurisdictions which have done so make it quite clear that the disputes are not about the right *to/over* a child but rather responsibility *for* a child. This appears to be a developing trend which hopefully will solidify (if not necessarily always in name, certainly in substance) into a central element of European Family Law.

IV THE FUTURE OF EUROPEAN FAMILY LAW

This contribution has shown that there are some areas in which something that can – and should – be deemed a European Family Law exists. Given the absence of a body with a legislative mandate for family law for all of Europe, this European Family Law grows organically when common approaches by the European jurisdictions emerge, or is created by institutions, either directly or indirectly. Therefore, by necessity, this European Family Law is fragmented, and there of course

63 See for example the Children Act 1989 (UK); the Catalan Civil Code, arts 233-8, 235-2.2 and 236-1; the Danish *forældreansvarsloven* (Lovbekendtgørelse nr 1073 of 20 November 2012. On the switch in terminology in Denmark, see Jens M Scherpe "Das neue dänische Gesetz über elterliche Verantwortung" FamRZ 2007, 1495); and the Norwegian *Lov om barn og foreldre (barnelova)*, Lov nr 5 of 6 March 1981, as amended. See especially ch 5, § 30 and following).

64 See for example Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (opened for signature 19 October 1996, entered into force 1 January 2002).

65 See for example Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1.

66 Children (Scotland) Act 1995.

67 Committee of Experts on Family Law *Report on Principles concerning the Establishment and Legal Consequences of Parentage (the White Paper)* (Council of Europe, CJ-FA (2006) 4 e, 23 October 2006).

68 Katharina Boele-Woelki and others *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia, Antwerp, 2007) at 281 and following.

69 As pointed out correctly by Boele-Woelki and others, above n 68, at 31.

70 Kenneth McK Norrie "The changing concept of 'family' and challenges for family law in Scotland" in Jens M Scherpe (ed) *European Family Law Volume II: The Changing Concept of 'Family' and Challenges for Domestic Family Law* (Edward Elgar, Cheltenham, 2016) 235 at 242.

remains room for diversity and plurality in the European family laws. Indeed, in some areas – such as the recognition of same-sex relationships generally and same-sex marriages more specifically – the polarities perhaps are greater than ever,⁷¹ with several European jurisdictions even amending their constitutions to prevent their future Parliaments from opening up marriage to same-sex couples by a simple majority.⁷² But diversity in some areas does not preclude a European Family Law in others; nor does the absence of complete convergence of family laws indicate that there is no European Family Law developing. By its very nature, European Family Law will mostly only be found in common general principles (which need not extend to all jurisdictions) or in very specific points of law. But it is also clear that societal changes and the changing nature of families, adult relationships and parent-child relationships, as well as issues of individual status, will need addressing by all European legislatures sooner or later, and that national legal developments will be supplemented or prompted by institutional influences from the EU (including the Court of Justice) and the European Court of Human Rights. Therefore, there is no doubt that what are currently isolated little islands of European Family Law will continue to collect sediments, solidify and grow to become larger islands and perhaps, ultimately and in the very distant future, even a continent.

71 See for example Scherpe, above n 44.

72 See for example Constitution of Bulgaria, art 46; Constitution of Lithuania, art 28; Constitution of Poland, art 18; Constitution of the Republic of Latvia, art 110; Constitution of Serbia, art 62; Constitution of Hungary, art L; Constitution of Croatia, art 62(2); and Constitution of Slovakia, art 41.