

The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law

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Abstract: *This article challenges the widely diffuse view of family law as peripheral to private law. It aims to the de-marginalisation of family legal issues, by showing their ties to the market realm and freedom of contract. In this theoretical framework, the article analyses the process of family law harmonisation in Europe. In particular, it focuses on three steps or aspects in respect to which the presumed peculiarity of family law is proclaimed and reveals, at the same time, its groundlessness: the status/contract dichotomy as a reflection of the family/market divide which seems to influence future developments of the harmonisation of law in Europe; the presumed political character of family law, which represents the leitmotiv in most recent harmonisation projects; and the subsequent strictly national character of family law, which makes EC institutions much more cautious in intervening in these matters than in any other field of private law.*

Introduction

In the past decade the attention given to European law has been increasingly focused on private law, in particular on the law of contract. European law reviews offer a variety of essays on the different questions concerning contract law harmonisation, while several books are dedicated to the big issue of the times: European contract law.

In contrast, scarce consideration is reserved for family law as a subject of harmonisation or unification, so much so that one wonders whether the family *is* by any means a subject of European integration. Recently, even the intense debate about European Civil Code seems to pay no attention to family law. Apparently, family law is still considered to be mainly a matter of national concern. Why?

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Unlike contract law harmonisation, the perspective of harmonisation of family law in Europe is commonly perceived to be a very problematic and/or peculiar question. According to the traditional approach, family law—more than other fields in private law—purports political objectives. It is conceived as a medium of political economy.

In this framework, family law is considered a means of social organisation, belonging neither to the public sphere, nor entirely included in the private one (where the public/private distinction has not been deconstructed or otherwise revised).

For these reasons, some European observers face the question of harmonisation of family law with scepticism: family law régimes show a stronger inclination (than pure patrimonial law) to engage in social engineering. As a result, the harmonisation of family law would limit national sovereignty in strategic fields. Moreover, constitutional constraints are deemed crucial in family law régimes, as family law impinges on the fundamental rights of both individuals and groups. Nevertheless, European family-law systems—as the supporters of harmonisation emphasise—are converging along three main paths or trends: liberty, equality, and secularity. Therefore, European family laws already share the same crucial political goals.

In this context, European family laws are facing a common challenge: the so-called privatisation of family relationships, which features new regulatory perspectives as far as freedom of contract enters into the scene of the family.¹ This development offers new opportunities for re-evaluating the relationship between harmonisation of contract law and harmonisation of family law in Europe.

The aim of this article is to challenge the dominant view, which stresses the ‘uniqueness’ of the family law harmonisation process, as a reflection of the traditional approach, reconstruing the family as a separate realm from the market and from freedom of contract. In part I, through discussion of some crucial issues of contract and family regulation, shared by both patterns of harmonisation, I will question the traditional divide between family law and contract law as fields marked by a kind of *essential* diversity. As a result, it will be shown that, in many aspects, family and contract are firmly tied in the harmonisation process.

In part II, I will address the question of methodology in the process of family law harmonisation. My aim here is to challenge the currently dominant view underpinning the two major approaches to the harmonisation process, showing that both are dealing with a notion of family law as separate and essentially different from the core of private law. In particular, my claim is that family law is not more deeply policy-oriented than other private law fields and that emerging political objectives are neither pervasive nor coherent in any national (family) legal system. Therefore, they are not decisive in determining a presumed intrinsic diversity of family law with respect to ‘pure’ patrimonial law.

In parts III and IV, I will discuss current notions and models of family law emerging from legislation in Member States and Community law. Here the non-harmonisation of family law in Europe reveals its paradoxical effects as it turns into a factor of uncertainty in the implementation of basic gears of European integration, such as free movement provisions. In this framework, European Institutions appear to regard family law and its harmonisation according to the same outdated approach that has been criticised with reference to a part of family law scholarship, with respect to

¹ See papers collected for the ISFL 2003 European Regional Conference, *The Role of self-Determination in the Modernisation of Family Law in Europe*, Tossa de Mar-Girona, 9–10 October 2003, available at: <<http://civil.udg.es/isfl/EuropeanRegionalConference2003>>.

both the problem of national sovereignty in family matters and the maintenance of the traditional market/family divide.

I Common Perspectives in the Harmonisation of Contract Law and Family Law

In their last developments, both harmonisation of contract law and perspectives of harmonisation of family law² in Europe aim toward new achievements which partially overlap. Subsequently, family and contract seem to share a common destiny within the framework of European law. Whilst, on the one hand, European contract law aims to accomplish an ambitious goal: to produce and implement a body of rules that (should be able to) realise *justice* and *fairness* in transactions.³ On the other hand, family law in Europe is progressively re-orienting itself toward a private ordering paradigm, and in so doing it aims to enhance *personal autonomy* and *self-determination* within the family; in the harmonisation perspective this would make family law come close to a market rationale, offering family members the opportunity to regulate their reciprocal duties and obligations through agreements alternative to the legal régime, i.e. by means of freedom of contract.

So, despite a presumed gulf between contract law and family law, these two legal fields share the same perspective within the context of European harmonisation, a perspective focused on the interpretation of the notion of freedom of contract and its limits: To what extent will unfair contracts be unenforceable in Europe? What domestic contracts, alternatives to the legal régime, will be enforced? To what extent will economic or social disparity between the parties, the spouses—for instance—be relevant/irrelevant for the purposes of contractual justice?⁴

Moreover, the merger of family and contract challenges the traditional divide, by questioning their presumed diversity and the respective peculiarities, such as neutrality (mere technical character) of legal rules in contract law and policy-oriented (political) contents in family regulation. In fact, questions about contracts enforceability, as well as about consideration in domestic agreements, are no longer neutral (or merely technical), despite of the supposed *technical* nature of contract law.⁵

The debate on family law harmonisation in Europe not only ignores common developments of family law and market regulation, making the two fields continuously *also* interweave with one other in the process of European integration; it often undervalues even their common roots, as long as the interest of Community institutions in family law topics emerges as a result of free movement provisions and the need to create a common market. The very notion of family itself becomes a legal issue for Community case law⁶ as far as liberties of movement and establishment are extended to

² For a general analysis concerning the harmonisation of family law in Europe see N. Dethloff, 'Europäische Vereinheitlichung des Familienrechts', (2004) 204 AcP, 544.

³ See for example H. Collins, 'The Freedom to Circulate Documents: Regulating Contracts in Europe', (2004) 10 *European Law Journal* 787; M. Hesselink, *The New European Private Law: essays on the future of private law in Europe*. (Kluwer Law International, 2002); see also, Study Group on Social Justice in European Private Law, 'Social Justice in European Private Law: a Manifesto', (2004) 10 *European Law Journal* 653.

⁴ See M. R. Marella, 'The Family Economy v. the Labor Market', in J. Conaghan and K. Rittich (eds), *Labour Law, Work and Family. Critical and Comparative Perspectives* (Oxford University Press, 2005).

⁵ See D. Kennedy, 'The Political Stakes in Merely Technical Issues in Contract Law', (2001) 1 *European Review of Private Law* 7.

⁶ The following judgments are examples of the restrictive notion of *family* adopted by the European Court of Justice and by the Court of First Instance: Case 267/83 *Diatta v Land Berlin* [1985] ECR 567;

workers' family members. In sum, the market and family seem to be strictly tied, both in the past, present, and future, in the European law harmonisation process.

A further step in such a composite process of harmonisation will be the definition of immorality/illegality in European contract law. This is a crucial but also controversial notion, relevant in respect to freedom of contract and the extent to which it can be enforced. Immorality/illegality of contracts is also *not* a strictly technical question. It is influenced by political factors, cultural constraints, etc. Immorality/illegality of contracts involves not only contract law but also family law, as long as enforceability of several kinds of domestic agreements depends on what will be deemed as illegal/immoral contract in European law. For instance: premarital agreements in contemplation of divorce, surrogate motherhood contracts, agreements concerning parental status, agreements concerning sexual performances to spouse or partner and/or third persons, and similar controversial transactions are considered void in some European countries, whilst enforceable in others. Harmonisation of family law in Europe necessarily has to cope with this problem. Whatever the solution to these hard questions, it will define the identity of European family law *and* actual extension of the market and of freedom of contract in Europe.

When we discuss the next steps to be taken in the process of European private law harmonisation, a further genuine *political* question arises: which European nation state model will prevail next time? Especially in Germany, but also in France, *human dignity* seems to be the new frontier in entrenchment of morality/legality in contract law: a modern, fundamental rights-oriented version of the *good mores* clause of the past decades.⁷ Unfortunately, human dignity as a constitutional weapon against commodification of personhood, the human body, and sexuality, turns out to also be a new vehicle for upholding dominant values.⁸

For instance, a recent German statute removed the *sittenwidrig* (immoral) connotation from contracts between prostitutes and their clients.⁹ Some German scholars contrast the legislator's statement by assuming that those contracts collide with the human dignity clause, the violation of which cannot be waved by the ordinary legislation,

Case 59/85 *Netherlands v Reed* [1986] ECR 1283; Case C-249/96 *Grant v South West Trains* [1998] IRLR 165; Case T-264/97 *D and Sweden v Council* [1999] ECR II-1.

⁷ On the interpretation of the human dignity clause by the German Constitutional Court and its enforcement within Community law as a matter of legal transplant see J. Jones, "Common Constitutional Traditions": Can the Meaning of Human Dignity under German Law Guide the European Court of Justice?, (2004) PL 167. With reference to the French debate see P. Martens, 'Encore la dignité humaine: réflexions d'un juge sur la promotion par le juge d'une norme suspecte' in *Le droits de l'homme au seuil du troisième millénaire: mélanges en hommage à Pierre Lambert*, (Bruylant, 2000), p. 561; M. Levinet, 'Dignité contre dignité. L'épilogue de l'affaire du "lancer de nains" devant le Comité des droits de l'homme des Nations Unies', (2003) 55 *Revue Trimestrielle des Droits de l'Homme* 1024 ff.

⁸ For a critical analysis see B. Jorion, 'La dignité de la personne humaine (ou de la difficile insertion d'une règle morale dans le droit positif)', (1999) *Revue du Droit Public*, 197; J. P. Théron, *Dignité et libertés. Propos sur une jurisprudence contestable* (Mélanges Mourgeon, ed Bruylant 1998). With reference to French case law, see Conseil d'état, Assemblée, 27 Octobre 1995 *Ville d'Aix-en-Provence*, in Dalloz, 1996, jur., 177. For a comparative analysis between European and American law see J. Q. Whitman, 'On Nazi "Honour" and the New European "Dignity"', in C. Joerges and N. S. Ghaleigh (eds), *The Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart, 2003); G. S. Friedman and J. Q. Whitman, 'The European Transformation of Harassment Law: Discrimination versus Dignity', (forthcoming) *Columbia Journal of European Law*. Available at <<http://ssrn.com/abstract=383900>>.

⁹ *Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten* passed by the German parliament on 20 December 2001.

because of its constitutional relevance.¹⁰ However, one might assume that that statute *does* enhance prostitutes' human dignity by enforcing the contract with the client and assuring protection of sex-worker's entitlements. Subsequently, one might conclude that enforcing freedom of contract rather than limiting it *is* a factor of social promotion in this very context.¹¹

Is European law going to accept the German model even in this respect, after submitting to German influence in the interpretation (of the role) of good faith in contract law, and after holding—as happened recently within the von Bar Commission¹²—the German structure (*titulus plus modus acquirendi*) in property transfers?¹³

In summary, harmonisation of contract law, usually described as a site of mere technical choices, turns out to be a strongly policy-oriented process. Moreover, it is a process affecting future developments in family law harmonisation. Would this element, by undermining the theoretical foundation of the family/market divide, support a re-shaping of the relationship between family law and the market in the European integration context?

In the next section I analyse and discuss current methods of harmonising family law in Europe. Within this framework a specific difficulty arises: harmonisation of family law is perceived as extremely problematic and/or peculiar not only for its intrinsic political inclinations, but also as a matter of nation states' sovereignty, which marks again a divide with contract law and its harmonising process.

I will contextualise (and overcome) this question within Olsen's scheme of family/market dichotomy's deconstruction.¹⁴

II The (Supposed) Political Character of Family Law and the Harmonisation Dilemma

The project of harmonising family law is the newest achievement in the framework of European integration. Much development is underway in this field, involving both

¹⁰ See for example H. Hagen, 'Menschenwuerde und gute Sitten. Gedanken zum Prostitutionsgesetz', in *Gedaechtnisschrift fuer Juergen Sonnenschein* (de Gruyter Recht, 2003).

¹¹ See M. R. Marella, 'Autonomia privata e prestazioni sessuali', forthcoming, *Rivista Critica del Diritto Privato*.

¹² The Study Group on a European Civil Code is organized in two different kinds of groups. The day-to-day work is carried by the Working Teams, which have responsibility for research and proposals. The outcomes of the studies undertaken are reproduced in *Position Papers* which are submitted to the Coordinating Group, composed by almost fifty professors from virtually all the EU Member States. For more information about the Study Group, see <<http://www.sgecc.net>>.

¹³ The Working team on Transfer of Movable Property has submitted a paper to the Warsaw meeting of the Coordinating Group (1 June 2004). In particular, Art 201(1), dedicated to requirements for the transfer of ownership, states that 'The transfer of ownership requires a valid . . . obligation to transfer ownership, the transferor's ownership or authority to dispose of the movable at the time ownership is to pass and either delivery or an agreement as to the time ownership is to pass'. Recently, even the European Commission has focused its attention on property law and property transfers. In particular, the Health and Consumer Affairs Directorate-General of the Commission asked Study Group members Christian von Bar and Ulrich Drobning to undertake a 'Study on property law and non contractual liability law as they relate to contract law'. The aim of this analysis is to show how the coexistence of many different private law regimes may impact on the internal market. The draft final report, dated 23 February 2004, is available at:

<http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf>.

¹⁴ F. Olsen, 'The Market and the Family. A Study of Ideology and Legal Reform', (1983) 96 *Harvard Law Review* 1497.

interventions of the European Institutions and professorial initiatives in line with the experience of the Lando Commission in contract law.

On the one hand, an increasing consciousness of Community institutions about the crucial importance of family law has encouraged them to undertake significant initiatives toward harmonisation. Although the European Union has no formal competence in family law and there is no reference to families in the Treaties, since the late 1960s Community law has had a growing impact on families in many ways, starting from the influence of Community's sex equality laws on family models and roles.¹⁵ At the same time, since the 1970s, Article 8 ECHR and the related Court of Justice's case law, have offered a first sample of European family law built around the right of respect for family life, which is formulated in general terms in that article.¹⁶

The increasing need for judicial cooperation among Member States produced in 2000 the European Regulation on Jurisdiction and Recognition of Judgements in Matrimonial Matters (Brussels II)¹⁷, recently replaced by another Regulation (Brussels II *bis*)¹⁸ that provides common rules for recognition and enforcement of national courts decisions relating to marriage annulment, divorce, and parental responsibilities in the Member States. Concurrently, the implementation of free movement provisions raised many questions concerning family law, especially with regard to the notion of *family* and *family member* enacted within the EU. Therefore, the Court of Justice has had to deal with family law as a matter of European integration. Most recently the Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States aims at the understanding of what 'family member' means under EC law, whilst the European Parliament has already intervened in favour of the recognition by European Institutions of the right of homosexuals to create a family.¹⁹

On the other hand, a professorial group has recently appointed itself as a Commission for European Family Law (CEFL) attempting to produce a body of harmonised rules as a part of a future European civil code.²⁰ A proper debate around the

¹⁵ C. McGlynn, 'Families and the European Union Charter of Fundamental Rights: progressive change or entrenching the status quo?', (2001) 26 ELR 582.

¹⁶ K. Boele-Wolki, 'The Road Towards a European Family Law', (1997) 1:1 *Electronic Journal of Comparative Law*. The principle of respect for private and family life is now included in Art 7 of the European Union Charter of Fundamental Rights. As to the Convention case law on Art 8 ECHR, see: *Dudgeon v United Kingdom*, (1981) 4 EHRR 149; *Rees v United Kingdom*, (1986) 9 EHRR 56; *Boughanemi v France*, (1996) 22 EHRR 228; *X, Y and Z v United Kingdom*, (1997) 24 EHRR 143; *Sheffield and Horsham v United Kingdom* [1998] 2 FLR 928. With reference to the Council of Europe and its initiatives concerning family law, see M. Requena, 'Activities of the Council of Europe in the Field of Family Law', (2000) 31 *California Western International Law Journal* 53.

¹⁷ Regulation (EC) No 1347/2000 of May 29, 2000.

¹⁸ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338 23/12/2003 P. 0001–0029.

¹⁹ European Parliament's recommendation to the Commission and the Council of the European Union, adopted with the Resolution of 8/2/1994 on Equal Rights for Homosexuals and Lesbians in the EC, OJ C (1994) 61/40–43.

²⁰ On the CEFL's appointment, structure and objectives see M. Antokolskaia, 'The Harmonisation of Family Law: Old and New Dilemmas', (2003) 1 ERPL, 30. The Commission on European Family Law, established in September 2001, has now produced the 'Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses' presented during the second conference organised by the CEFL: 'Principles of European Family Law: Divorce, Maintenance Between Former Spouses and Parental Responsibilities', 9–11 December 2004, Utrecht University, The Netherlands. Available at:

harmonisation of family law in Europe has risen for the first time with reference to this programme.

The CEFL project purports a simple strategy: to identify a *common core* of rules and solutions for each topic among Member States' family laws and/or to choose the *better law* among them.

For reasons I will explain immediately, the debate growing around these initiatives seems to me highly unsatisfactory. As I have previously observed, there are currently two main, opposing approaches to family law harmonisation in Europe. From one point of view, family law is supposed to be influenced by political factors and cultural constraints that make harmonisation an unattainable goal. In the words of the European Council family law is 'very heavily influenced by the culture and tradition of national (or even religious) legal systems, which could create a number of difficulties in the context of harmonisation'.²¹ Although the whole field of private law is a secular product of tradition and culture, family law is deeply dominated by each single country's peculiarities, therefore restricting the harmonisation process.

On the other hand, supporters of the opposite view claim that there has already been a spontaneous convergence of European systems around some important themes such as: equality of spouses, no-fault divorce, rights of children born out of wedlock, etc. In this framework, even Watson's theory of *Legal Transplants*²² is invoked as a scientific source, in order to explain these patterns of convergence.²³ Instances such as equality between spouses, have been the subject of a legal transplant as they were first enacted in Scandinavian countries and later 'imported' and implemented by other European countries, as a result of similar social change. Accordingly, *differences* between European laws seem to be just a question of time, since developments in the different national systems are analogous in the long term.²⁴

However, both approaches—the sceptical as well as the supportive—share the same premises; both clearly lie in the family/market dichotomy. As Olsen has shown, the family/market opposition is founded on the belief that the two fields are ruled by two

<<http://www2.law.uu.nl/priv/cefl>> (now published in K. Boele-Woelki et al. (eds.) *Principles of European Family Law: Divorce, Maintenance Between Former Spouses and Parental Responsibilities* (Intersentia, 2004). As to the nature of these provisions—which are combined with comments in order to elucidate the rules—even the General Introduction to the Principles declares that, although drafted in a mandatory form, they should be considered just as recommendations to the legislators who could use them as a model for the prospective regulation of these matters.

²¹ Council report on the need to approximate member states' legislation in civil matters, 16 November 2001, 13017/01.

²² See A. Watson, *Legal Transplants, An Approach to Comparative Law*, 1974 (Scottish Academic Press, 1974); *Society and Legal Change* (Scottish Academic Press, 1977).

²³ See M. Antolosaika, 'The Harmonisation of Family Law: Old and New Dilemmas', (2003) 1 ERPL 30. However, Watson's theory of *Legal Transplants*, as well as Rodolfo Sacco's theory of *circolazione dei modelli giuridici* (Sacco, 'Définitions savants et droit appliqué dans les systèmes romanistes', (1965) *Revue Internationale de Droit Comparé*, 1965, 827; 'La circulation des modèles juridiques, Rapport general, Académie internationale de droit comparé, Rapports generaux au XIII congrés international', Montreal 1990, 1992) rests on the idea of non-mutual interference between law and society, whereas the dominant approach among harmonisation supporters is rather a functionalist one, firmly rooted on the icon of the lawyer as a social engineer. On this point see IIA below.

²⁴ Note how the same patterns and strategies as in contract law harmonisation reproduce themselves in the family law context: the Germans and the Dutch are in a pole position in supporting the importance and urgency of family law harmonisation, the British resist the process, scholars from other European countries, such as Spain or Italy, advocate the harmonising process, although playing an ancillary role. That is: just joining harmonisation initiatives, they never promote or lead.

different and opposite paradigms, construing them as separate, non-communicative realms: the family ruled by the solidarity principle, the market based on individualism.²⁵ As a result, regulating family is rather a public than a private affair, whereas the market is the realm of freedom of contract, that is: of private ordering. Family—unlike the market—is presumed to require a strong, constant, state intervention. Therefore, family law accomplishes political goals, whereas freedom of contract fulfils nothing but the will of the parties. As a further consequence, contract law rules, unlike family regulation, are just outcomes of *mere technical* choices. The dichotomy, however, can be deconstructed and overcome by highlighting that both family and the market have been alternatively regulated throughout the last two centuries by the same paradigms: state intervention and *laissez faire*. The opposition then reveals its ideological ground, as does the irreducible distance between a mere technical contract law and a policy-oriented family law.

If European legal theory is still reluctant to consider private law as a regulatory tool and a means of satisfying the interests of states; if it still resists the idea—for instance—that contract law can be used for resource redistribution and for market regulation,²⁶ family law scholarship seems to cherish the traditional view even more intensely. Both of the opposing dominant approaches to family law harmonisation perceive family law as external to the core of private law. Both assume that the family has a stronger political inspiration than other private law fields, though. With a difference. The sceptical approach assumes that the deeply policy-oriented character of family law makes the different political trends of Member States incompatible,²⁷ while the opposite approach appraises different Member States family laws as converging toward the same political goals.²⁸

I would question both views as somewhat oversimplifying the case, first because both treat family law as isolated in the European integration process, and second because both ascribe to national family laws an internal political coherence.

My claim is that family law régimes in Europe are too multifaceted and incoherent within themselves to be simply defined as converging or not converging, nor progressive or conservative (a widely diffused mode of evaluating family law régimes).

A About Convergence

In favour of convergence, it has been noted that family law topics that had been a matter of struggle and political concerns in the past decades, such as equality between spouses

²⁵ *Op. cit.* note 10 *supra*.

²⁶ H. Muir, 'Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy', (2003) 7:3 *Electronic Journal of Comparative Law*. Available at: <<http://www.ejcl.org/ejcl/73/art73-4.html>>.

²⁷ D. Bradley, *A Family Law for Europe? Sovereignty, Political Economy and Legitimation*, in Boele-Woelki, K. (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, 2003), 65; Id., 'Convergence in Family Law: Mirrors, Transplants and Political Economy', (2001) *Oxford University Comparative Law Forum* 2, originally published in (1999) 6 *Maastricht Journal of European and Comparative Law* 127–150.

²⁸ K. Boele-Woelki, 'The Road Towards a European Family Law', (1997) 1:1 *Electronic Journal of Comparative Law*; D. Martiny, 'Is Unification of Family Law Feasible or Even Desirable?', in A. Hartkamp *et al.* (eds), *Towards a European Civil Code* (2nd edn, Kluwer, 1998) ch. 10 at 170; I. Schwenzer, *Methodological Aspects of Harmonisation of Family Law*, in K. Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, 2003), 143; M. Antolosaika, 'The Harmonisation of Family Law: Old and New Dilemmas', (2003) 1 *ERPL*, 30.

and no-fault divorce, with time lost their ideological connotation and were accepted in almost all European systems. A kind of spontaneous harmonisation through convergence succeeded unquestionably in all these fields: identical or equivalent legal solutions have been adopted all over Europe in response to the same or analogous social developments, above all women's emancipation and access to work.

On this basis, a part of family law scholarship supports a *common core* approach to European harmonisation. This way of tackling the question of European family law goes far beyond ideas found in both Watson and Sacco's theories of a mutual exchange among legal systems as a consequence of non-mutual interference between law and society: within these theories convergence and even legal transplants work on the premise that private law structures are largely independent from social structures and social struggles.²⁹ Here the search for a European common core in family law postulates a common political evolution in the national regulations of family matters. Within this view, convergence is eminently a political phenomenon, although it has relevant consequences at a mere technical level. On the contrary, with reference to other private law fields, convergence is presented as a *purely legal* phenomenon, as a technical question, as long as factors of such an approximation process are identified in similar (mere technical) rules rather than in common political trends.³⁰ From the point of view of comparative legal theory, the search for a common core in family law does not in fact follow an *internal* path, as in Sacco's and Watson's view; rather it ends up in the quest for functional equivalents,³¹ where the common core is finally identified with something *external* to legal systems themselves, with common social goals that legal systems aim toward.

Even within a functionalist discourse, however, similarities should not be emphasised and differences not roughly simplified. It has been observed that family law does not present the traditional common law/civil law opposition, as until the Protestant Reformation, family relationships were regulated all over Europe by canon law.³² However, the English marital property régime is clearly a consequence of real estate law, which is peculiarly English and rooted in the structures of the feudal system—rules invented for nobles and wealthy people, which were then extended to everyone.³³ Neither has it a European common origin, nor does it share with other European countries the current tendency toward equality of spouses.

Furthermore, a basic convergence around a general topic, such as the legal recognition of unmarried couples, does not exclude profound differences among Member States about policies pursued and substantive rules actually enforced. So, the Swedish and the Hungarian³⁴ rules providing an automatic extension of marital régime to stable

²⁹ See P. G. Monateri, *The 'Weak Law': Contaminations and Legal Cultures, Italian National Reports to the XVth International Congress of Comparative Law*, 1998, 83.

³⁰ For a typical example of the comparative analysis of formation of contract: see M. Graziadei, 'Il diritto comparato, la storia del diritto e l'olismo nello studio delle culture giuridiche', (1999) 3 *Rivista Critica del Diritto Privato*, 337.

³¹ See M. Antolosaia, *The Search for a Common Core of European Divorce Law: State Intervention v. Spouses Autonomy*. Available at: <<http://civil.udg.es/isfl/EuropeanRegionalConference2003>>.

³² R. Van Caenegem, *European Law in the Past and Future* (Cambridge University Press, 2002).

³³ D. Bradley, 'Convergence in Family Law: Mirrors, Transplants and Political Economy', (2001) Oxford University Comparative Law Forum 2, originally published in (1999) 6 *Maastricht Journal of European and Comparative Law* 127–150.

³⁴ A. Koros, *Self-determination and Protection of the Family—Two Aspects to be Reconciled in the Conception of a New Hungarian Family Law Book*. Available at <<http://civil.udg.es/isfl/EuropeanRegionalConference2003>>. In an analogy to marriage, Hungarian law

unions (see below) deeply differs from Dutch registered partnership and from the French PACS,³⁵ basically inspired by a private ordering of partners' reciprocal rights and obligations.³⁶

Thus, heterogeneity is inevitably a question to be dealt with. In this respect, a part of family law scholarship engaged in the harmonisation project relies on a *better law* approach.

B About Progressive/Conservative Attitudes

The better law approach embraces the idea that some European legal systems show a more progressive attitude in regulating certain family law topics, than others do. This view is usually presented as non-antagonist to the common core idea, as *progressive* legislators would be capable of anticipating policy tendencies that *conservative* legal systems will later follow. In other words, *progressive* legal systems would just start an irresistible process of convergence. A typical example of such a course is the enforcement of equality of spouses in Scandinavian legal systems: here Sweden and Norway played the role of path breakers many years before than other European legal systems reoriented themselves along this path.

My claim here is that any single European family law shows progressive developments but also unexpected regressions. If we consider two main topics through which we should be able to assert the progressive/conservative character of a family legal régime or, at least, to check its internal coherence, marriage defence/de-institutionalisation and gender issues, we will find out how puzzling the resulting overview is.

For example, Belgian law recognises same-sex marriage, but for a long time kept a discriminatory regulation of parental rights and obligations toward children born out of wedlock.³⁷ English law denies matrimonial capacity to transsexuals (there are religious origins to this rule),³⁸ while in Italy (usually pointed out as heavily influenced by

recognises many rights of unmarried cohabitants (such as a pension for the widow, or the widower, and preferential rates in acquisition of dwellings), but this does not structure any type of registered partnership, either for same-sex partners or for heterosexual couples.

³⁵ See *Regards civilistes sur la loi du 15 novembre 1999 relative au concubinage et au pacte civil de solidarité*, (LGDJ, 2002); for a comparison between the Dutch registered partnership model and French PACS, see also D. Bradley, 'Regulation of Unmarried Cohabitation in West-European Jurisdictions—Determinants of Legal Policy', (2001) 15 *International Journal of Law, Policy and the Family* 22, 35.

³⁶ S. C. Forder, *Civil Law Aspects of emerging forms of registered partnerships*, Paper to Fifth European Conference on Family Law, The Hague 1999; M. R. Marella, 'Il diritto di famiglia fra status e contratto. Il caso delle convivenze non fondate sul matrimonio', in F. Grillini and M. R. Marella (eds), *Stare insieme. I regimi giuridici della convivenza fra status e contratto* (Jovene, 2001), 3; M. Bonini-Baraldi, 'Variations on the Theme of Status, Contract and Sexuality: an Italian Perspective on the circulation of models', in K. Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, 2003), 300.

³⁷ The European Court of Human Rights determined a deep change in this field: in *Marckx* [1979] 2 EHRR 330, the Court stated that the distinct treatment of marriage children and children born out of wedlock was a violation of Art 8 and 14 ECHR. The subsequent Belgian reform of parent-child law (*Belgisch Staatsblad*, 27 May 1987) refers to this case as a base of the new legislation. For more about Belgian affiliation law see H. Willekens, 'Explaining Two Hundred Years of Family Law in Western Europe', in H. Willekens (ed.), *Het gezinrecht in de sociale wetenschappen*, (Vuga uitgeverij B. V, 1997), 59.

³⁸ But see now, in a statement originated by the restriction enacted in English law, the overruling decision of the European Court of Human Rights in *Christine Goodwin v the United Kingdom* [2002] 28957 ECHR 583. In *Goodwin* the applicant, a transsexual British national, alleged the violation of Art 12 ECHR by the United Kingdom, whose law inconsistently permits one's sexual identity transfer, even supports it

the Roman Catholic Church especially in family matters) transsexuals can marry (heterosexual partners) and adopt children (when married to a person of the opposite sex). However, English law does not prohibit the practice of surrogacy, and recent case law shows a gradual opening towards the enforceability of surrogacy arrangements,³⁹ whilst Italian law forbids even artificial insemination with donor's sperm.⁴⁰

All of the above mentioned rules deal with the nature and role of marriage as an institution. All of them involve (and shape) the relationship between marriage and reproduction and its legal consequences: paternity, above all. But within the same national legislation, one rule assumes and construes reproduction as inherently linked to marriage as an institution, whilst the other aims to cut off such an institutional bond.

With regard to discrimination based on gender and/or sexual orientation, it can be seen that the Netherlands was the first European country to override discrimination against same-sex couples by admitting same-sex marriage. Nevertheless, Dutch case law is discriminatory with regard to a housewife's work and entitlements,⁴¹ as the black letter rule of marital property separation, when elected by spouses or partners, prevails on a fair evaluation of the woman's actual commitment to the wealth of the family. Thus, equality concerns, which are embodied in the former context, are mistaken in the latter.

Meaningful examples of vagueness and incoherence in legislators' moves against gender discrimination within the family are offered by Scandinavian legal systems, normally mentioned as the most progressive in Europe, and therefore identified as a *natural* target for a better law approach.

In discussing this topic, I wish to highlight the ambivalence in Swedish legislator's strategies of tackling the so-called *difference dilemma*. Swedish marriage and divorce reform in the 1970s explicitly aimed toward equality and self-sufficiency of women. An active labour market policy for women, together with the erosion of traditional family roles, was enacted by reducing to a minimum the financial support obligations on divorce.⁴² Whether or not this can be considered a successful policy from the point of

financially, by providing the required medical and surgery treatments through the public health service, furthermore permits the transsexual's female partner to have access to the practice of artificial insemination, but then denies marital capacity to transsexuals because the institution of marriage includes the aim of reproduction. The Court superseded its previous findings and upheld the appellant's claim, concluding that there had been a violation of Art 8 and 12 ECHR. Two years later, in the *K.B.* decision (Case C-117/01 *KB v National Health Service Pension Agency and another*, 7 January 2004), the European Court of Justice joined the ECHR's new tendency, by assessing the incompatibility with Art 141 of the Treaty of some consequences of the denial of matrimonial capacity to transsexuals, namely the impossibility for the transsexual to be entitled to the survivor's pension because of lack of a lawful marriage with his/her partner.

³⁹ The Surrogacy Arrangements Act 1985 prohibits surrogacy arrangements made on a commercial basis. The Human Fertilisation and Embryology Act 1990 introduces a distinction between commercial surrogacy arrangements, which are ineffective, and charges for expenses paid by the surrogate mother for having a baby, which are permitted. In a recent case (*Re C: Application by Mr. and Mrs. X*; 2002 EWHC 157 [Fam]) the court recognised parental rights to the biological parents in consequence of a surrogacy practice, although the amount agreed by the parties did not correspond to actual expenses borne by the surrogate mother. The decision is interpreted as a gradual revision of the traditional boundaries to contractualisation: see H. Collins, *The Law of Contracts* (Butterworths, 2003), 107.

⁴⁰ Art 4(3) Legge 19 febbraio 2004, n. 40, 'Norme in materia di procreazione assistita'.

⁴¹ See G. Van de Burght, *Shortcomings of the Legislator of a Self Proclaimed Progressive Country*. Available at <<http://civil.udg.es/isfl/EuropeanRegionalConference2003>>.

⁴² D. Bradley, 'A Family Law for Europe? Sovereignty, Political Economy and Legitimation', in K. Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, 2003), 65.

view of the empowerment of women, it certainly suggests new meaning and social roles for marriage. In other words: if many provisions, such as those providing financial support on divorce, are rooted on evidence of social and economic disparity between spouses, the Swedish legal reform promotes a radical cultural and social change by electing a *formal equality* perspective.

Some years later, with the Cohabitees (Joint) Homes Act 1987, Swedish legislation seems to adopt a fairly different policy, extending marital obligations and entitlements on marital property to unmarried couples in consideration of a stable union or in the presence of children. Here Swedish law patently pursues *substantive equality* within the couple; hence the statute provides legal protection to the *weaker* partner, exerting a clear paternalistic intervention upon familial relationships.

Nevertheless, opposite strategies continue to coexist, offering further examples of Swedish paternalism/non-paternalism ambivalence in dealing with gender inequality. By enacting a social policy that complements family law, Finland introduced a home care allowance in the 1980s, whereas Sweden refused this measure, as it reinforces inequality. Still, Swedish family law, as compared to English law, is supposed to rely on a strong faith in the regulatory role of the State. Nevertheless, the English Law Commission rejected the Swedish model of divorce 'on demand' as 'it represents the abdication of the State from any responsibility for determining whether a divorce should be granted'.

C *A Tentative Conclusion*

The incoherence conclusively emerging from the legislation of Member States undermines the internal rationality of both of the major ways of tackling family law harmonisation. In fact, what political philosophy, what cultural constraints would prevent European family legal régimes from converging? A paternalistic, state-oriented mentality? The dominance of a formal equality approach? The *sceptical* approach should be able to offer definite answers to these questions in order to prove its scientific legitimacy.

On the other hand, around what pattern of gender equality, around what conception of state intervention/non intervention, around what level of secularity, are European legal systems converging? Supporters of harmonisation should be able to identify *the* target among competing conceptions of equality, liberty, secularity, and so on, in promoting the edification of European family law. In addition, in the latter context, are the *common core* approach and/or the *better law* strategy capable of keeping the promise of harmonisation?

It has been noted that family law rules in most European countries are located on a continuum from religious motives, the heritage of canon law, to secular rationalism.⁴³ I would suggest that we could even imagine a continuum between formal and substantive equality, as well as between paternalism and self-determination. However, it is important to acknowledge that the continuum has no chronological meaning or order; it does not describe a linear evolution of any legal system. On the contrary, concurrent

⁴³ D. Bradley, *A Family Law for Europe? Sovereignty, Political Economy and Legitimation*, in K. Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, 2003), 65.

legal provisions ruling complementary family topics can take different directions, each aiming toward the opposite pole.⁴⁴

This is a strong argument against the adoption of a better law strategy: What defines what the better law is? What conception of modernity, of progressivism? A paternalistic/egalitarian one? A liberal one? The one emphasising self-responsibility?

Let us consider the following case. Gender equality concerns influence divorce and alimony law in all European countries. However, strategies are disparate. According to German law, for instance, gender equality is realised (also) through freedom of contract; subsequently, prospective spouses can conclude valid premarital support waivers in contemplation of divorce: in the name of formal equality between the spouses, no concern for wives or spouses in need of support is worth of consideration. In contrast, Italian law holds agreements of this tenor void because they are deemed disruptive of spouses' equality, as they would threaten the weaker party's chances to negotiate, so undermining her right to defence in the perspective of divorce. Both models are enacted in different European legislations, both motivated by egalitarian reasons. Therefore, the option between them in the light of a *better law* choice cannot simply rely on a labelling operation, according to which one should rather choose the freedom of contract solution because enhancing self-determination in family law matters, and refuse the latter model, as the product of an old fashioned, paternalistic approach to family law and related gender issues. At the operational level, both models in fact present unpredicted implications. Thus, the German Constitutional Court has recently stated that a prenuptial agreement that would severely affect the future financial position of the one spouse does not enhance self-determination, rather it is to be interpreted as an act of hetero-determination, that is: of subjection to the other party. As a result, German courts cannot understand freedom of contract as a medium for gender equality, as far as its enforcement is detached from justice concerns. On the other hand, an attentive analysis of Italian case law shows that plaintiffs are often husbands, made worse off by agreements that more than the legal régime itself favour the non-wealthy spouse. Contracts in contemplation of divorce therefore turn out to be more likely to have fairer distributive effects for the weaker party than the egalitarian policy pursued by Italian legislation through mandatory rules on support obligations. What the better law is in reference to the question of financial support after divorce should be cautiously scrutinised under varying circumstances and in connection with the complexity of the originating legal system. This would entail a thoughtful enquiry not only of case law and legislation, but also of judges' mentality, of the welfare system where that legal solution impinges on, of what social strata that solution does affect/worsen/enhance.

From this perspective, any strategy—such as the 'better law' strategy—that conceives family law as a closed system, as a body of rules separated from patrimonial law and social security, as an *island* floating in the market realm (untouched by market rules and dynamics), appears inherently misleading.

At the same time, uncertainty about real consistency and dynamics of convergence suggests that (also) family law harmonisation should not rely on a 'common core' strategy. As noted above, a generic convergence around a general issue does not necessarily imply converging rules, nor even analogous policies. Convergence around no-fault

⁴⁴ According to the scheme sketched by Du. Kennedy, 'Form and Substance in Private Law Adjudication', 89 (1976) *Harvard Law Review* 1685.

divorce, for instance, did not produce significant convergence about legal consequences of divorce itself. With reference to financial support obligations, a complex variety of solutions took place: As a result, financial support can be waived in some countries, while it is subject to a mandatory régime in others, so that one can properly talk of a regulatory convergence in neither technical nor functional terms. In fact, very different views of women's emancipation inside and outside of the family emerge from the diversity of divorce régimes within Europe: The Swedish case as opposed to protective (paternalistic) regulations is emblematic of this phenomenon.

A similar conclusion can be viewed in connection with the question of child custody after divorce. Although the joint custody model is spreading throughout Europe, competing conceptions of gender equality within the family underpin the adoption of the same legal solution: joint custody is widely interpreted as the epitome of women's liberation, whereas its opponents reject it as a tool given to divorced husbands to control a former wife's way of life⁴⁵—a control that can eventually result in reducing the financial support the husband is obliged to give.

From the point of view of methodological correctness, in addition, one ought to establish what *the* rules are, what *the* exceptions are, and separate sharply the rule from the exception for each legal issue and each European legal system, in order to identify a framework of converging rules providing comparable solutions to same problems.

A tentative conclusion can be drawn. Both the *common core* and the *better law* strategies are arbitrary in principle and should be resisted. Nevertheless, harmonisation of family law is a necessary step toward European integration and must be achieved. The idea that family law, as well as property,⁴⁶ is a realm of national sovereignty has been superseded by facts. Market integration cannot further develop and coexist with a non-harmonised family law, because market and the family are interdependent, as the enforcement of free movement provisions has clearly shown.

Family law harmonisation should rather move from a political agenda, which overcome the traditional dichotomy status/contract as an issue of the outdated family/market opposition, and confront the definition of the legal notion of family as a focal, inescapable topic in European law.

D Objectives and Methods of the Harmonisation Process According to a Different Approach: the Status/Contract Divide and the Call for Redistribution Analysis

I would like to here offer an example of objectives and methods of family law harmonisation according to an alternative approach.

a) Objectives. In the next few years, the harmonisation process will unquestionably confront two critical issues, each focusing on the relationship between self-determination and status. On the one hand, in many European systems family breakdown has experienced new legal solutions more familiar to a market rationale than to the typical

⁴⁵ The latter point of view is supported for instance by several feminist legal scholars in Italy: see comments to the 30 May 2001 statutory draft on the subject offered by L. Gianformaggio (pointing out that joint custody represents an attempt to overhaul the inexorable crisis of the husband's role as the sole breadwinner), T. Pitch and C. Berti, available at: <<http://www.giudit.it/documentiline>>.

⁴⁶ See D. Caruso, 'Private Law and Public Stakes in European Integration: The Case of Property', (2004) 10 *European Law Journal* 751–765.

architecture of the status in the last decades. Agreements between spouses in contemplation of divorce are but one example of this tendency. On the other hand, a new call for status is promoting and modelling most relevant developments in legislation in Member States. In many European countries, *de facto* unions have been regulated in an analogy to marriage, according to a legal régime, based on familial status' recognition. What direction will European family law take in respect to this new, controversial dynamics between market rationales and family archetypes? The traditional view, centred on the status/contract opposition, reveals its inadequacy in mastering the ongoing change. Within a renewed theoretical background, where such an opposition has been deconstructed, both status and freedom of contract will be assumed as valuable techniques, whose outcomes have to be proved in accordance to the political goals that European family law is expected to achieve. This would imply an attentive evaluation of what social groups any legal solution would empower/weaken both in financial and social terms. In other words, the search for the principles of European family law should primarily consider which distributive effects a certain legal rule would produce, which social model would be enhanced, rather than focus on a theoretically *better*, more progressive solution.

For instance, the emerging status-oriented trend does not take into account sound perplexities and critiques about the counter-effect that status technique can produce, as long as it tends to reinforce social roles and stereotypes. The feminist critique of the family has denounced the patriarchal, hierarchical structure of the family as a social and legal institution. Marriage has been identified as a source of gender subordination, since it ascribes rigid roles and unequal positions to women and men. Within this framework, strict marriage-like regulations of unmarried couples have been criticised because they are likely to reproduce and spread the same pattern of inequality throughout society.

Today the problem of same-sex marriage recognition—at stake in some European countries⁴⁷—puts the question of the current function of status ascription under a new light: if inequality in the family has been considered a direct consequence of the heterosexuality paradigm, what would the social meaning of marriage be in respect to same-sex couples? Does it still resist as a factor of hierarchy and inequality in the organisation of society, or will it succeed in breaking-up the pattern of discrimination and be transformed from within?⁴⁸

⁴⁷ The Spanish government finally passed the new law legalising same-sex marriages on 30 June 2005. Parliament voted in favour of the new legislation by 187 votes in favour, 147 against, and 4 abstentions. The new law gives same-sex couples the right to wed, adopt children, and inherit each other's property, making their legal status the same as that of heterosexual couples. With the final approval of the law on 2 July—including royal assent and publication in an official government registry—Spain becomes the third European country to grant full recognition to gay marriage, after the Netherlands and Belgium.

⁴⁸ Undoubtedly, the status technique is seen in this framework as a double tie with the rights discourse (and its limits): same-sex marriage is actually claimed as the source of diverse welfare benefits, but, at the same time, it epitomises equality and dignity for homosexuals, in accordance with an increasing rights rhetoric that is mounting in the European context thanks to the European Charter and the ECHR case law. A further question arises. The inclusion of same-sex couples in the (legal notion of the) family necessarily corresponds to new exclusions: what groups/couples are the next ones to be included in the family paradigm? See below, part III.

Alternatively, a freedom of contract approach to family matters can be considered unsatisfactory for the purposes of social justice, as long as it could worsen the position of spouses or partners with less bargaining power and market and/or marriage opportunities.⁴⁹ Nevertheless, state regulation can be unsatisfactory as well. Financial support after divorce, for instance, is normally provided by national legislation in the light of substantive equality, aiming at an equal distribution of familial wealth after divorce. Do legal régimes fulfil this objective? As feminist critique has pointed out, most of them do not consider wives' investments in human capital as matter of wealth redistribution. Can bargaining (in the shadow of the law), as an alternative, make the weaker spouse better off?

Hence, the reception of a market rationale needs to be verified according to a distributive analysis and in comparison to correspondent legal régimes. At the same time, status-friendly policies should reach a fair balance between liberty and equality, self-determination and social justice.

b) Methods. In sum, the complexity of familial status/contract dialectics requires us to look at family law harmonisation through a wider lens, far beyond 'traditional' family law institutions and rules. An attentive comparative enquiry of the different legal experiences can be of great impact here. According to the traditional view, family relationships are utterly ruled on a status basis. In particular, marriage entitles spouses and children to rights and benefits by means of familial status. This is the case in financial support during marriage and after divorce, child custody, marital property, etc. The increasing social acceptance of unmarried couples in most European countries has raised the question: whether to provide a legal regulation akin to marriage, or leave domestic unions entirely to the realm of self-determination, eventually to the sphere of freedom of contract. Interestingly the traditional common/civil law divide seems here to strike back; the former is considered to a certain extent to be market oriented and individualist, the latter rather status oriented and solidarity-like. Evidence (or the appearance) of such a difference can be found rightly in legal regulation of unmarried couples' rights and obligations within the two legal families.

Let us compare English law to Scandinavian law with respect to this topic. Scandinavian family law relies upon strong welfare measures. English law seems not to share the same faith in state intervention in the family. Consequently, English law does not provide any form of recognition or regulation of unmarried couples. On the contrary, Sweden provides a mandatory régime enacted in consideration of the existence of a stable union. Some other countries such as Hungary, and local laws such as those of Catalonia and Aragon in Spain, regulate unmarried couples according to the same pattern.

Can we label English law—according to a 'pure' market rationale—as individualist, Swedish (Hungarian, Catalanian, etc.) law—according to the traditional view of the family as the realm of solidarity—as altruistic? In fact, equity remedies enforced by English courts in order to protect the 'weaker' partner, such as proprietary estoppel or constructive trust, afford legal entitlements on 'marital' property not dissimilar to Swedish statutory law. However, the protection of the non-owner partner is rather

⁴⁹ See M. R. Marella, 'The Family Economy vs. the Labour Market (or Housework as a Legal Issue)', J. Conahan and K. Rittich, *Labour Law, Work and Family. Critical and Comparative Perspectives* (Oxford University Press, 2005).

grounded on a fairness basis than on gender equality concerns, in particular on the breach of a promise made by the wealthy partner, while the protection of the weaker partner does not come *per se* into the consideration of the courts. Thus, differently from the Swedish family-oriented rationale, the English solution adopts a market-like justification, although it achieves similar outcomes.⁵⁰

This is the case for overriding the status/contract divide in family law matters. As comparative analysis shows, status and contract do not necessarily diverge in their outcomes, nor rely on conflicting rationales. On the contrary, both represent valuable alternatives to attaining a regulatory order that cannot be defined in principle altruistic or individualistic.

From the perspective of family law harmonisation, moreover, such differences/similarities in the regulation of unmarried couples can be regarded as a significant pattern of spontaneous convergence of European legal systems around the same objectives of pluralism in family relationships and social justice. But significantly, the kind of 'common core' envisaged here goes far beyond what is usually intended as 'family law', 'family regulation', and their traditional paradigms.⁵¹

However, the core question is not to preserve, emphasise, or just deny family law peculiarities in the harmonisation process, but rather to sketch out a political path for family law harmonisation, as well as for other patterns of European private law. This goal can be achieved only by acknowledging the political weight of *any* legal rule—family law rules and *pure* patrimonial law—as revealed through its distributional effects and its social impact.⁵² In my opinion, the connection of family law to freedom of contract is extremely helpful in visualising this methodological perspective.

The family as a legal institution grants benefits and entitlements to family members; in so doing it also endorses specific cultural models and social values. The enforcement of the so-called living-together agreements, for instance, entails by means of freedom of contract a kind of *legal* recognition of unmarried couples, avoiding, at the same time, prescribing a cultural model in accordance with dominant values. Unquestion-

⁵⁰ See M. R. Marella, *Il diritto di famiglia fra status e contratto. Il caso delle convivenze non fondate sul matrimonio*, in F. Grillini and M. R. Marella (eds), *Stare insieme. I regimi giuridici della convivenza fra status e contratto* (Jovene, 2001), 3; see also M. Bonini-Baraldi, *Variations on the Theme of Status, Contract and Sexuality: an Italian Perspective on the Circulation of Models*, in K. Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, 2003), 300.

⁵¹ As I pointed out above, supporters of family law harmonisation emphasise convergence that can be envisaged as such at a functional level, whilst they tend to underestimate policy specificities as well as differences in the technical solutions enacted by domestic laws. Hence, a functionalist analysis of unmarried couples regulation in England, Sweden, Hungary, and Catalonia, would suggest that different law régimes aim toward the same distributive measures through different patterns, not differently from what happens in reference to patrimonial consequences of divorce, where the German rule of pension splitting, for instance, is likely to achieve the same effects in terms of resource redistribution as maintenance obligations after divorce or different arrangements enacted in other legal systems. See L. Schwenzer, 'Methodological Aspects of Harmonisation of Family Law', in K. Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003) at 143, for support of the functionalist approach. Subsequently, harmonisation of family law can be dealt with just as a question of *technical* legal rules, not different from what is widely believed about pure patrimonial law and its European unification. Where is family law's specificity, after all?

⁵² For a thoughtful analysis of the redistributive impact of legal rules (with reference to antidiscrimination law within the EU) see D. Caruso, 'Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives', (2003) 44 *Harvard International Law Journal*, 331.

ably, freedom of contract in family matters reveals here its *political* role in the way it moves towards self-determination. To some extent, freedom of contract represents a libertarian option, whereas the call for status emerging from recent developments in national legislations runs the risk of reinforcing social and cultural hierarchies. Thus, a *non family-like* regulation of certain family relationships should be considered as a possible solution in harmonising family law in Europe.

At the same time, the harmonisation process should confront the question of resources redistribution, in family law *as well as* in market relationships: just like contract law, family regulation reveals a *political* core underneath the distributive effects of its legal rules. Within any convergence move among Member States legislations, family law harmonisation needs to assess legal solutions' worthiness at a redistribution level. This is the case for an accurate comparison between legal régimes and freedom of contract with respect to cohabitation arrangements and the regulation of financial support after divorce.

III The Legal Definition of the Family as an Issue of Welfare Regulation and Private Law

In the background of the harmonisation debate's framework, the effects of *non-harmonisation* of family law in Europe emerge as significant hurdles to European integration. As previously pointed out, in the beginning of the European integration process, Community Institutions did not pay any attention to family legal issues, considering them a subject for each Member State's sovereignty. In accordance with the traditional view, Brussels Institutions deemed family law—unlike contract law—as external to the market integration process. However, as a result of free movement and establishment provisions, EC law implementation required a definition of the *family*, in order to extend welfare benefits and basic rights and liberties to workers' family members. In short, the family, whether or not identified as the married couple, turns out to be the medium for welfare endowments, a dispenser of social benefits rather than the mere source of rights and obligations towards other family members. In the EC context, not differently from the Member States level, being a family member means *also* being entitled toward the State, public administration, the society, and the public sphere.

Therefore, the concept of family as a legal and social institution is of crucial significance in the accomplishment of the European integration process. At the same time, its definition and meaning are linked to the welfare politics the EC will accomplish, more precisely, to the role the EC will bequeath (or maintain) to public welfare policies, as private law harmonisation moves forward.

However, the definition of a legal notion of family at the EC level would not lose its political content because of nation states' retreat from a welfare politics in favour of the European (market) integration. In any case, family membership grants social benefits in terms of: lower expenses for health insurance, of pension plans at work, of property rights (such as: extension of the benefit of the homestead protection to one's spouse and children; automatic rights to inherit the property of a deceased spouse who does not leave a will; the equitable division of marital property on divorce),⁵³ etc. The Massachusetts experience of same-sex marriage explains exactly this. One of the crucial

⁵³ There are also benefits not directly tied to property rights, such as the presumption of legitimacy and parentage of children born into a married couple, the application of predictable rules of child custody, visitation, support, and removal out-of-state when married parents divorce.

points in the Supreme Court's decision⁵⁴ is that continuing to deny validity to same-sex marriage would turn into an ongoing violation of the equality principle with respect to children's rights especially, as the law denies to children born in a same-sex family those rights and benefits—like the enacted approval that still attends the status of being a marital child, the advantages that attend the presumption of one's parentage—that it grants to children born inside the heterosexual wedlock. At the level of contractual practice, the Supreme Court's decision has encouraged insurance companies to offer fairer health insurance terms to same-sex (married) couples.

Notwithstanding the retreat/absence of the state from the welfare terrain, the role of marriage as the epitome of what family *is* under law, is still of great significance in the social context, as far as it entitles spouses and their children to fair contractual terms, etc., toward third parties. In this framework, we can observe a form of evolution in the meaning of the familial status, where the status itself merges with contract law and contractual relationships.

On the other hand, the definition of what family *is*, of whom is inside/outside the family, is embedded in the recognition of fundamental rights and liberties, like the right to family privacy, or the right to family reunification, for instance. In many circumstances, the inclusion/exclusion pattern, which is emblematic of the rights discourse, overlaps the inclusion/exclusion from the view of family as a legal institution.

Thus, the *political* meaning of a prospective notion of the family in EC law is twofold, dealing with welfare policies, on the one hand, and with the rights discourse, on the other. Surprisingly, the European context presents a great divergence between the national level and the Community level with respect to the legal *notion* of family that both national courts *and* Community case law enforce. Therefore, non-harmonisation of family law in Europe shows its paradoxical effects at two different levels. First, most Member States' laws enforce a much broader notion of family, including unmarried couples, registered (same-sex or heterosexual) partnerships, and other kinds of domestic arrangements, resulting in individuals and families finding a lower degree of protection at the EC level than in their homeland. The problem of dissonance between the two regulatory levels arises especially for same-sex couples, in reference to which the Court of Justice has shown a clear preclusion, refusing to extend EC free movement provisions to non-working homosexual partners. The recent Directive 38/2004 has only partially amended this situation.

Second, the legal notion of family varies from country to country, which makes mobility of non-traditional families throughout Europe extremely problematic. For instance, Dutch law recognises same-sex marriage, whereas the Italian system refuses to regulate unmarried couples: now, what happens if a Dutch same-sex married couple moves to Italy? And what happens if a same-sex Italian couple gets married in The Netherlands and makes a claim for recognition *as a family* in Italy? Heterogeneity in family regulations produces dramatic inconsistencies in individuals' legal status from country to country. Therefore, the lack of a harmonised family notion turns out to be the source of severe discrimination among European citizens.

In the next section, I will outline a brief survey of what legal notions of family are currently adopted in Europe, starting from recent developments in national regulations of unmarried and same-sex couples, then I will summarise old and new trends in EC

⁵⁴ *Hillary Goodridge and others vs. Department of Public Health and another*, 440 Mass. 309, 798, N.E. 2d 941 (2003).

case law *and* legislation. Lastly, I will analyse the possibilities of different models' circulation within legal systems through conflicts of law regulation.

IV The (Supposed) National Character of Family Law and the Problem of the Migrant Family

A National Legislations and Family Models—the Way towards Pluralism

The legislations of several Member States regulate heterosexual and same-sex⁵⁵ cohabitations according to a status model (same-sex marriage, registered partnerships, joint home cohabitation) or a combination of the status model with freedom of contract (the French PACS, its Belgian proxy, Registered Partnerships themselves to some extent). In addition, all over Western Europe, national courts hold domestic contracts between cohabitantes as enforceable, thus giving a kind of legal recognition to unmarried couples.

In all of these countries (covering the major part of European territory) family law has embraced a pluralist rationale, according to this (heterosexual) marriage is no longer paramount in defining the legal notion of family. This phenomenon, together with biotechnological progress (i.e. assisted fertilisation techniques) and recent developments in adoption regulations, challenges the traditional family model in its crucial elements: heterosexuality, bi-parental paradigm, and nuclear family model. Heterosexuality is no longer the rule for either married or for unmarried couples, since registered partnerships and same-sex marriage are expanding among Member States. Several legislations admit single parent adoption, whilst some Member States, such as Denmark, Sweden, and The Netherlands, have recently conceded adoption rights to same-sex couples. In the European countries where fertilisation with donor sperm and/or surrogacy contracts are allowed, persons with parental claims toward the same child can easily be more than two; these circumstances, together with the emerging phenomenon of the so-called reconstructed families, brings the model of the nuclear family to its demise,⁵⁶ challenging, at the same time, the bi-parental paradigm.

As a result, the traditional, hetero-patriarchal rationale is disrupted from both outside and within the legitimate family model. On the one hand, marriage has been superseded as the (legal) epitome of the family: it is no longer the unique font of legal recognition of domestic arrangements, nor is it the essential source of reciprocal rights and duties within the family; in several cases one can adopt a minor without being married or without being in a couple at all. On the other hand, marriage seems to maintain its function as a major factor in the organisation of society, although it now plays a different role and shows different features: Therefore one could assume—as the Supreme Court of Massachusetts put it—that extending marriage to same-sex couples equals taking marriage seriously! This very point seems to be the authentic foundation of recent marriage reforms in The Netherlands, Belgium, and Spain.

⁵⁵ For an analysis of the different national laws on same-sex partnerships and their interaction with EU law see M. Bell, 'Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union', (2004) 5 *European Review of Private Law*, 613.

⁵⁶ See, for example, *Act 19/1998 of 28th of December regarding Cohabitation Situations For Mutual Assistance* approved by the Parliament of Catalonia (Spain). This act concerns cohabitation arrangements among two or more people living together for reasons of solidarity or mutual assistance, such as, for example, students, young and old people.

B EC Law

At the Community-law level, however, the notion of family thus far enforced by the European Courts has been extremely narrow. Unlike the laws of most Member States, EC case law generally maintains the traditional model of the nuclear family based on marriage *and* biology. For purposes of free movement within the EU boundaries, cohabitants, same-sex couples, and potentially divorcees have been constantly excluded from the range of the privileged European migrant family.⁵⁷ More specifically, unmarried couples are not protected as *family* with reference to free movement provisions.⁵⁸ Even in the ECHR case law the cohabiting relationship is protected as *family life* under Article 8 ECHR as long as it can be closely assimilated to marriage. Same-sex couples have been excluded from the current notion of family, both in the Court of Justice interpretation of free movement provisions, as well as in the concept of family life as protected by Article 8 ECHR.⁵⁹ Recently, the Court of Justice confronted the question of a possible comparison of (a Swedish) registered partnership to marriage. Assuming marriage as the exclusive basis of the legitimate family in the vast majority of EU member States, the Court of Justice denied that registered partners, although legally recognised in their country of origin, could be considered as having an equivalent status as spouses for the purposes of the here concerned EC staff law.⁶⁰ The core argument in the Court of Justice reasoning is to be found in the fact that marriage, in the definition generally accepted by the Member States, means a union of two persons of the opposite sex.⁶¹

Besides, the identification of heterosexual marriage with the core of the EC law family is so firm that divorce seems to cancel the familial status that marriage has bestowed.⁶² On the other hand, parental relationships are identified exclusively on a biological basis, in spite of emotional bonds and social responsibilities.

The reason of such restrictions lies in the acceptance of a *minimum common factor* rationale, according to which Member States cannot be forced to provide a status or regulation that they are unwilling to provide. In several cases the Court of Justice has refused to adopt a *family member* notion that was judged controversial with respect of the complexity of Member States' legislations and legal policies. As a result: (a) *some* nationals of Member States are not entitled to be respected throughout the Community for the civil status they enjoy in their own Member State; (b) non-married partners refrain from moving to other Member States where their status is not accepted, notwithstanding the free movement principle.⁶³

⁵⁷ See H. Stalford, *Regulating family life in post-Amsterdam Europe*, (2003) 1 ELR.

⁵⁸ Case 59/85 *Netherlands v Reed* [1986] ECR 1283. The case probably represents the application of the *minimum common factor* rationale in family law matters. The Court of Justice refuses to recognise the quality of *family member* of the cohabiting partner as an issue of national sovereignty, but upholds the appellant's claim on the basis of the prohibition of any discrimination on grounds of nationality (Art 12 EC).

⁵⁹ Some evidence of a change in *Salgueiro da Silva Mouta*, application 33290/96 (1 December 1998).

⁶⁰ Case T-264/97 *D and Kingdom of Sweden v Council of the European Union* [1999] ECR II-1, decided on 31 May 2001. For critical remarks on the case see M. Bogdan, 'Registered Partnerships and EC Law', in K. Boele-Woelki and Fuchs (eds), *Legal Recognition of Same-Sex Couples in Europe*, (Intersentia, 2003), 171.

⁶¹ As the Court of Justice puts it: 'Community notions of marriage and partnership exclusively address a relationship founded on civil marriage in the traditional sense of the term'.

⁶² C. McGlynn, 'Families and the European Union Charter of Fundamental Rights: progressive change or entrenching the status quo?', (2001) 26 ELR, 582.

⁶³ With reference to the above mentioned *D* case see Bogdan, *op. cit.* note 62 *supra*.

The same rationale has prevailed in the drafting of the European Union Charter of Fundamental Rights (Article 9) and, unfortunately, has not been disregarded in two recently approved directives involving the notion of *family member*.⁶⁴

Article 9 ascribes to each single national legislator the exclusive competence in regulating (hence in *defining*) marriage and the right to found a family. In so doing, the Charter entrenches the Community law *status quo*. Therefore, this provision appeared extremely disappointing to anybody who expected recognition of same-sex and unmarried couples at the EU level. However this outcome was to be expected. As Article 9 of the European Charter and Court of Justice case law highlight, the EC institutions, unlike the most part of family law scholarship, persist in embracing an outdated approach to family law, according to which legal regulation of family matters must be reserved to national sovereignty, as subject of political economy, local traditions, and cultural constraints. Both the politics of the minimum common factor pursued by the Court of Justice and the statement of the Charter rely precisely on this advice. Thus the most important pronouncement of the European Union about politics and legal status of the family in Europe excludes family law itself from the pattern of European integration. In consideration of slight differences still persisting among the different legal systems, European institutions and above all the European Constitution still perceive this subject as a matter of national sensitivity. And in so doing, they ignore those converging developments in Member States legislations, that make the family in the European context a much more complex and multifaceted reality but, at the same time, a much-less disharmonic picture than the constitutional statement suggests. In particular, from the point of view of the legal notion of the family currently enacted, all European countries (even my own, though slowly), as pointed out above, tend toward a pluralistic model. Therefore the existent legal framework has enabled the European Charter to enounce a principle in this direction. However, the obsolete approach to family law as subject of national specific concerns has prevailed.

In contrast, no comparable carefulness has been reserved with regard to the integrity of the different national legal traditions or to the internal coherence of each legal system with reference to the harmonisation of the market legal structures. One can observe that hypotheses of strict liability have been forcedly introduced into Member States laws in the light of a harmonised legal régime of product liability,⁶⁵ without substantial concerns for the wholeness of respective legal traditions.⁶⁶

⁶⁴ The Directive on Family Reunification, approved on 22 September 2003, does not refrain from imposing the conventional notion of nuclear family also to third-country nationals with polygamous marital ties. At the discretion of the Member State, in accordance with the conception of family law as subject of Member State sovereignty, the unmarried partner can be admitted as *family member*. The Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (38/2004/EC, approved on 29 April 2004) is the outcome of a long elaboration process in the course of which the notion of family member was matter of controversies and consequently of broad or restrictive interpretations. On its itinerary see M. Bonini-Baraldi, 'Variations on the Theme of Status, Contract and Sexuality', in K. Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, 2003) at 300. The final product is a bad compromise rooted in the most outdated approach to family law. See below, IVC and IVD.

⁶⁵ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210 07/08/1985, 29–33.

⁶⁶ This is true also with respect of professorial initiatives of private law harmonisation. Within the von Bar Commission, the German model of property transfer has been recently adopted as *the* European law of property transfer. Even if nobody ignored the philosophical origins of the French régime of mere

But the approach entrenched in the European Charter and formerly adopted by the Court of Justice evokes a second remark. As with the most significant part of European family law scholarship, European institutions embrace an idea of family law harmonisation that is directly moulded on the traditional family/market divide. This viewpoint prevents them from realising that the lack of a legal régime of recognition for unmarried couples in the legislations of some Member States does not necessarily denote a stigma on non-traditional families. As has been illustrated, legal recognition of unmarried couples can lie in freedom of contract or, more generally, in private ordering arrangements. My comparison of the Swedish legal régime of cohabitation to English law aimed precisely at showing that equitable remedies grant to the non-wealthy partner the same entitlements as the Swedish mandatory régime, even though the former works outside of a family rationale. The enforcement of domestic contracts between cohabitantes confers legal recognition to unmarried couples in those legal systems where the state legislation does not provide a status-like régime for them. Moreover, even where such a regulation is lacking, legislations sometimes confer legal recognition through disparate provisions that endow distinct entitlements to unmarried partners in consideration of a stable union.

Therefore, a constitutional statement in favour of pluralism in the legal conception of the family would have sounded as an acknowledgement of the ongoing change throughout European law rather than as an assault to Member States sovereignty. Thus, Article 9 has been widely interpreted as the sign of a suspicious attitude prevailing within the EU institutions. Hence, the Charter has not only been felt as disappointing, it has even been accused of producing a patent regression in this field.

However, another interpretation has been proposed, in the light of which the broad formulation of Article 9 aims to acknowledge as legitimate all kinds of family that national legislations regulate.⁶⁷ Under Article 9, it would be no longer possible to discriminate, for instance, between a married couple and a registered partnership as long as their Member State law recognises both as families. Therefore, Article 9 would represent the normative basis for implementing that ‘country-of-origin principle’ with regard to civil status, which the Court of Justice has hitherto neglected.⁶⁸ From this perspective, it would allow free movement of different national régimes and models within Europe, eventually enhancing pluralism in family law. Although I believe this should not be definitely excluded as the feasible effect of a prospective Charter’s

consensual transfer and its crucial role in the edification of the legal systems belonging to the French area of influence, the Commission decided to abandon such an important legacy in the historical development of the whole civil law tradition. Moreover an analogous tendency can be observed in the ECJ case law, in reference to legal topics related to the market realm. A first example is offered by the recent orientation adopted by the ECJ in company law (Case C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR 1459; Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] ECR 9919; Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art* [2003] ECR 10155), where the harmonisation practice is patently abandoned in favour of the different technique of competition among national legal systems. Here the idea is certainly not to save the integrity of national legal systems, nor to preserve the sovereignty of Member States. Second, the Court of Justice does not hesitate to set aside or limit national provisions concerning positive actions endorsed by Member States legislations in order to fill the gap between genders in the labour market, although they certainly reflect policy-oriented decisions by Member States. See D. Caruso, ‘Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives’, note 52 *supra*.

⁶⁷ S. Rodotà, ‘Presentazione’, in F. Grillini and M. R. Marella (eds), *Stare insieme. I regimi giuridici della convivenza tra status e contratto* (Jovene, 2001), XIII ff.

⁶⁸ See notes 55 and 56 *supra*.

implementation, it seems to me that the *progressive* potentiality of such a provision should not be overestimated, as I will now illustrate.

C Private International Law Rules (Conflict of Laws)

The problem I will confront in this section deals with the way the national level gets connected to the European level, that is: How the above described two opposed levels of regulation—same-sex marriage, registered partnership, PACS, and the like, on the one hand, and the traditional nuclear family based on marriage and biology, on the other—can match and communicate with one another? Moreover: how can free movement provisions harmonise with legal diversity among Member States in matrimonial matters?

No EC law, no international conventions on conflict of laws, no Court of Justice and Court of Human Rights case law, are available for this purpose. Within the framework of the creation of an area of freedom, justice, and security, with the aim to enhance judicial cooperation among Member States (Articles 61 ff EC Treaty, Title IV) the European Regulation on Jurisdiction and Recognition of Judgements in Matrimonial Matters (Brussels II bis)⁶⁹ provides uniform rules for the recognition and enforcement of national judgements relating to divorce, separation, marriage annulment, and parental responsibilities. According to the previously described general viewpoint, however, in this case EC law also strictly refers only to marriage. Therefore this body of rules does not in any way concern unmarried or same-sex couples (nor parental responsibility towards step-children). Thus, legal institutions such as registered partnerships are excluded, as they are not contemplated by the Regulation. In addition, even same-sex marriage is not covered, because it does not correspond to the common understanding of marriage as a community of partners of different sexes, which is purported in the vast majority of EU Member States.

The recently approved Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (38/2004/EC) embraces the usual minimum common factor rationale as far as the civil status of (unmarried) family member can be enjoyed only with regard to registered partnerships, and only if the host Member State law reserves the same legal treatment to registered partners as to the married couple. Therefore, non-traditional (i.e. same-sex) families can move freely as such only in a restricted area.

On the other hand, the politics of the *minimum common factor*, that both the Court of Justice and Court of Human Rights effectively pursue, have up to now prevented national regulations of non-traditional families from being taken into account in the light of free movement provisions. As shown above, Court of Justice and Court of Human Rights case law has constantly enforced a restrictive notion of the family. For the same reason it also seems unlikely that the Court of Justice will be willing to enforce Article 13 EC as a normative device against discrimination of non-traditional families, in order to endorse freedom of movement and establishment for them concretely. Last but not least, the tenor of the new directive will probably not encourage the Court of Justice to a much broader conceptualisation of the family.

⁶⁹ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23/12/2003 P. 0001–0029.

Therefore the solution has still to be found in the conflict of laws rules of any single Member State. Conflict or choice of law rules is encountered when a national court has to enforce a rule or statute that pertains to a different legal system. Thus, conflict or choice of law rules are expected to solve problems such as those arising, for instance, when two Swedish registered partners living in another Member State, whose law does not endorse their status, who disagree about their personal or patrimonial relations as a *family*. The first question arising for a local court would be: are the two litigants tied by a legal relationship of any kind? For a non-traditional family to be recognised as a legitimate family in a country other than the originating legal system there generally are substantial and formal requirements to be fulfilled. Furthermore, the non-traditional family's features should not be against those legal principles that the host country identifies as public policy. When both of these requirements are satisfied, the local court would in this case decide the question according to the Swedish law of registered partnerships. This is a concrete way of permitting non-traditional families to circulate within the European legal *system*. At the same time it is also an indirect manner to check Member States permeability to pluralism in family law.

a) Same-sex marriage. Recognition of same-sex marriages obtained abroad depends first of all on the fulfilment of formal and substantial requirements. If such requirements are satisfied, public policy test could counter the recognition of a foreign same-sex marriage. Let us consider the case of a same-sex couple married in Belgium who moved to Great Britain before the enforcement of the Civil Partnership Act of 2004.⁷⁰ Would that marriage be judged unconscionable so that it offended the English court conscience? Traditionally public policy arguments in England have aimed at protection of monogamy and of genuine consent, therefore recognition has constantly been denied to polygamous and bigamous marriages as well as to forced or arranged marriages (invalid also under a *prima facie* validity test). In the past, the compatibility of a foreign union to English law was assessed on the basis of the Christian conception of marriage (*Hyde v Hyde*, 1866). Nowadays courts are unwilling to envisage in this a valid criterion.⁷¹ Whether or not same-sex marriage is socially and culturally desirable, traditional public policy arguments cannot be applied to this case. On the other hand it is difficult to imagine upon what policy basis recognition of a marriage obtained in a modern liberal democracy such as Belgium, Spain, or The Netherlands, that satisfies the crucial tests of formal and essential validity, would be denied.

Article 9 of the European Charter of Fundamental Rights and Liberties could offer a solution as long as its reference to the legislations of Member States can be interpreted in accordance with the free movement principle as recognition of national policies in matrimonial matters. This solution necessarily requires the mandatory character of the Charter, now included in the Constitutional Treaty sealed on 29 October 2004 in Rome. So far there have not been any cases of same-sex marriages to be recognised in another Member State.

⁷⁰ Civil Partnership Act 2002 (2004 Chapter 33) provides legal recognition and regulation of same-sex couples only. Registration will start from December 2005. Before the Act's approval by Parliament, English law did not provide marriage for same-sex couples, nor regulated other forms of legal recognition.

⁷¹ See J. Murphy, 'The Recognition of Same-sex Families in Britain: The Role of Private International Law', (2002) 16 *IJLP&F* 181.

An Italian gay couple got married in The Netherlands (having established their residence there) and asked the recognition of their marriage in Italy. The Italian municipality⁷² denied this, assuming that same-sex marriage is against the public policy. This would be the case for the enforcement of Article 9 of the Charter according to the interpretation illustrated above.

b) Registered partnerships. The case of partnerships registered abroad appears puzzling from the point of view of private international law. First, the label ‘registered partnership’ (RP) can be misleading as RP regulations vary sensibly from country to country.⁷³ Second, RP undoubtedly follows the status model, as opposed to the contract model; as a status-oriented union alternative to marriage the RP is unfamiliar to those European legal systems such as Italy, Ireland, and Spain (till the last developments. But see local laws like those of Catalonia, Aragon, Navarre) that do not implement it. For recognition purposes could these countries regard foreign registered partners as spouses? In this case, would courts demand the same formal and substantial requirements as for marriage? Would they do this even if the nation state regulating RP differentiates the RP legal régime from the marital one?⁷⁴ Difficulties arising from such a puzzling framework suggest the adoption of a strategy of *judicial minimalism*.⁷⁵ An appropriate foundation for implementing a recognition policy on a case-by-case basis could be offered by the family life and private life protection clause of Article 8 ECHR, supposing that national courts would interpret ECHR provisions more progressively than the Court of Human Rights itself has thus far done. In this framework, courts should afford recognition only for limited purposes on an *ad hoc* basis; at the same time they should grant the same limited recognition to any migrant couple, in so doing, avoiding problems caused by different régimes from country to country, and averting accusation of unequal treatment.⁷⁶ A careful consideration of the adverse effects of non recognition is recommended, as registered partnerships and similar forms of legal recognition for unmarried couples are becoming more and more common throughout Europe even as a product of *matrimonial shopping*. As a matter of fact, several State Members enacting registered partnership regulations require only residence (and not citizenship) of at least one partner. In the case of German law (*Lebenspartnerschaft*) the discipline is more liberal, so that also non-residents can register their partnership in Germany.

⁷² Comune di Latina. Recently, also the Local Court (Tribunale Latina – decreto 31 maggio-10 giugno 2005, n. 3, in D&G-Diritto e Giustizia, 2005, n. 30, 36) used the public policy argument in order to deny recognition to their marriage in Italy.

⁷³ In the past in countries like Germany, that did not have this legal institution, it had been discussed whether courts had to enforce by analogy conflict rules on family law or rather conflicts rules on contracts. Today, the German law of *Lebensgemeinschaft* includes a public policy clause in consideration of conflict of laws cases, according to which the German standards are applicable to all RPs, regardless of the place of registration or the nationality of the partners. See K. Thorn, ‘The German Conflict of Laws Rules on Registered Partnerships’, in K. Boele-Woelki and Fuchs (eds), *Legal Recognition of Same-Sex Couples in Europe* (Intersentia, 2003), 159.

⁷⁴ This is the case in The Netherlands, providing two different legal régimes also for same-sex couples with respect of marriage (Dutch Civil Code, Book 1, Title 5, art. 30—1 April 2001) and Registered Partnership (Dutch Civil Code, Book 1, Title 5a, art. 80a ff.—1 January 1998). Important differences between the two legal régimes can be found, for instance, with reference to the termination of the relationship.

⁷⁵ See Murphy, *op. cit.* note 39 *supra*.

⁷⁶ See Murphy, *op. cit.* note 39 *supra*.

c) *The French PACS*. This is presumably the least problematic form of regulation from a private international law point of view. PACS is technically an agreement between the parties so it can be easily interpreted as a foreign contract. Its effects cannot be denied according to private international law rules. However, some aspects of the PACS are still tricky. On the one hand it is questionable how to enforce the patrimonial régime of the pacsé couple against third parties. As a question of privity of contract, this is an inherent difficulty of the PACS régime itself rather than a specific problem of private international law. On the other hand, the PACS is conceived as a mixture of contract and status, of private ordering, and state intervention, for it not only exerts its effects between the parties, but also has several welfare effects for the couple and consequences under taxation law and labour law, that cannot be included among the ordinary contractual effects. Entitlements deriving from the status-like core of PACS can barely be asked for in another Member State, as far as the PACS is enforced abroad *as a contract*.

This is the reason why the French solution might appear less appealing in the light of matrimonial shopping. Not only does the PACS regulation requires the French citizenship of at least one partner, but, and this is the main problem, in a non-harmonised context, the PACS essence as a contract loses its symbolic strength when enforced abroad. In fact the PACS, much more than North European Registered Partnerships, is of difficult *translation* as form of legal recognition of non traditional families: two gay men (one being Italian) were pacsé at the French embassy in Rome; they then asked legal recognition as family in Italy. On what grounds?

d) *Same-sex adoptive couples*. Here a disjunctive reading of Article 8 ECHR tends to prevail: the partners of the couple individually enjoy the right to respect of private life, even with reference to their relationship to the child. However the welfare and the best interest of the child, necessarily plays a paramount role: it is difficult to envisage an outcome other than recognition as a family.

D Conclusion

The difficulties are still remarkable with regard to free movement of non-traditional families within the EU territory. The lack of a harmonised legal notion of the family in Europe makes the overall picture extremely puzzling, free movement provisions at the EC law level do not match with Member States legal regulations of unmarried and same-sex couples, and conflict of laws rules are called on to play a role that really harmonisation should play.

Within this framework, the Directive for a European Parliament and Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States runs the risk of turning into a lost chance: by allowing free circulation of some national family models and regulations toward some Member States, it epitomises the outdated minimum common factor rationale of Article 9 ECHR, denying any possible 'optimistic' or progressive interpretation of it. From its tenor we cannot even draw the conclusion that the legal notion of the family in Europe now comprehends Registered Partnerships, as this can be said only with strict reference to those national laws that already provide this status. But Member States sovereignty is safe at last!

Therefore, I do not think we can conclude that the directive approval enacts a significant progress toward family pluralism in Europe. In fact the very question in the

background is still: does such a directive truly enhance the rights and liberties of gays and lesbians? And: how about those European citizens, such as Italian citizens, whose national law does not provide any legal status or regulation for same-sex couples? Their situation will not be *openly* affected in any way by the directive. However the disparity among different national regulations of non-traditional families would be certainly increased—at least at a symbolic level—by a legal régime that permits them to move freely only within some Member States, but does not promote their equal treatment within all of the EU.

Although theoretically the directive approval represents a first step forward a broader conception of the family in Europe, it is nevertheless the outcome of an outdated, *minimal* approach. It does not fill the gap between the EC level and Member States' laws, between freedom of movement and the plurality of family legal régimes in Europe. Is *this* harmonisation desirable? Is it consistent with the idea of the European Union as an 'area of freedom, justice and security'?

Once again, harmonisation of private law has embodied the occasion for backward, mystifying ideas of legal development to strike back. This has been stated many times in relation to contract or tort law. More than ever it seems to be also true for many aspects in family law.

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