

COMMON MARKET LAW REVIEW

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Jens Scherpe (Ed.), *European Family Law, Vols. I-IV*. Cheltenham: Edward Elgar Publishing, 2016. 1408 pages. ISBN: 978 1 78536 298 9. GBP 350.

This set of books constitutes a gigantic and remarkable project in the areas of European and comparative family law. Volumes I–III are compilations edited by Scherpe and Volume IV is a concluding monograph by him. The whole set should be seen as one piece. The first three volumes assemble works by an impressive number of distinguished European family law academics, the fourth is a thoroughly researched assessment of the first three in combination with an outlook on where future challenges lie. Europe is not limited to the EU Member States but includes the States of the Council of Europe and the International Commission on Civil Status (ICCS – CIEC).

The books are impressive for their high quality analysis and depth and density of information. Every library of an academic interested in European or international family law should contain this set, because it is particularly enjoyable and easy to work with and effectively guides the reader through the different and very complex topics of family law and different domestic approaches without losing the overview. The author achieves this through the clear and strict arrangement of topics: all volumes and, if it makes sense, all chapters are streamlined following that same arrangement. The structure is the following: first, legal questions concerning relationships between people of the same generation are discussed (marriage, civil unions, cohabitation etc.), second, relationships between people of two different generations (parents and children, adoption, elder law) and, finally, legal questions only involving an individual person (gender and name law). Furthermore, the continuous use of this structure helps to create, while reading, step-by-step a picture of family law in Europe – a diverse and fragmented picture, but who says that pictures have to be clear and smooth?

Volume I (“The Impact of Institutions and Organizations”) looks at the frame of family law in Europe which influences the national legal systems from the “outside”. First, international instruments and institutions in family law, i.e. EU law (Ch. 1, de Baere and Gutman), the ECHR (Ch. 2, Coester-Waltjen), the Council of Europe (Ch. 3, Lowe), the ICCS or CIEC (Ch. 4, Pintens) and the Hague Conventions on Family Law (Ch. 5, Baker and Groff) and their shaping of domestic laws are described. Then the volume considers less obvious instruments of harmonization: “soft law” approaches by the Commission on European Family Law (CEFL) (Ch. 6, Boele-Woelki) and “indirect” influences on the harmonization of family law via private international law in the EU regulations (Ch. 7, Martiny). Finally, as an unexpected completion, the last chapter looks at both the legal and cultural frameworks, focusing on the interaction between religion and European family law (Ch. 8, Mair). The author shows how Christianity and Canon law shaped and to some degree still shape family law and family concepts in Europe and how this common basis might explain to some degree the sceptical view many legal systems have on other notions of religious (especially Islamic) law. The chapters are highly recommended to read, not only to get a comprehensive overview but also a deeper understanding of the subjects. The quality of the analysis and its up-to-datedness provide a useful source of inspiration.

The second and third volumes have a comparative focus. They constitute the core of the whole project and cover a broad spectrum of jurisdictions and questions of family law. The aforementioned structure and the combination of both volumes avoid the shortcomings or difficulties many volumes on comparative law face: Volume II contains country reports on the family law systems from “within”, i.e. the national perspective. The list of countries is long and not limited to the Western European countries (Benelux, England and Wales, France, Germany, Greece, Hungary, Ireland, Italy, the Nordic Countries, Russia, Scotland, Slovak Republic, Slovenia, Spain, Switzerland and Turkey). Each report follows the aforesaid structure. All articles deliberately limit themselves to the central points and conclude with a short outlook and an overview of further literature. Hence, each report in itself is a valuable source to start research into domestic law. But it is also a useful tool for academics or students familiar with the subjects to undertake a deeper research. The clear structure also facilitates to compare the treatment of concrete questions in different countries and still allows a basic understanding of

the legal context they are embedded in. Volume I adopts an “outside” perspective, Volume II focuses on the “inside” of each legal system, and Volume III looks at the domestic systems from “above”. Again, the book follows the structure of the whole set, i.e. first couples, then different generations, then individuals. Several scholars expand on concrete topics regarded as specifically significant (e.g. Sörgerd on Marriage, Trimmings/Beaumont on Surrogacy, Ferrer-Riba on Parental responsibility, Herring on Elder law). They build on information from country reports and go deeper into the substantive analysis of the issue. Hence, Volume III focuses on the topic first and only in a second step evaluates whether or to what extent certain patterns or common foundations exist in Europe. The combination of both points of view in the two volumes allows for effective means to start research on a new topic and to also elaborate on existing knowledge. Volume II impresses with the number of country reports not limited to the “usual suspects”. In a second edition, which hopefully will be prepared in the future, Volume III could also bring together more authors from other countries. A comparison from the point of view of Eastern EU countries or third countries on European law would have been fascinating to read. But of course, that is easier said than done and is merely wishful thinking.

Volume IV (“The Present and Future of European Family Law”) concludes this impressive project. The volume analyses in detail several developments leading to the status quo of European family law. Scherpe (here as author) builds on the analysis of the first three volumes and uses the knowledge assembled there to dig deeper into the subjects he regards as presenting the biggest challenges for European family law. After reading the book, the direction in which European family law should move remains uncertain. However, perhaps the future of the EU and Europe in general is something in constant and uncertain change without a clear vision or direction for the future. Thus, the cautious outlook the book offers is more realistic and all one should ask for.

The author divides the book into two parts. He distinguishes two sources or “motors” behind the development of a common European family law. The first “motor” he calls “institutional”, and the second “organic”. The former refers to influences “from the outside” dealt with in Volume I. The latter refers to parallel developments based in similar social patterns or developments in different European countries. Those two “motors” are intertwined and influence each other, as the institutional basis can nudge the organic growth towards certain developments. The book draws the picture of how the case law of the ECtHR developed and shaped family law. The author shows how the relevant case law of the ECtHR and ECJ refined family law concepts continuously and how the approach of interpretation shifted from restrictive to dynamic and progressive by a more comparative (is a certain right already recognized in most Member States of the ECHR?) and empirical approach (is there an emerging consensus in society regarding certain family structures?) (pp. 20–31). The detailed description is worth the read: the core cases are presented comprehensively, especially the abolition of different treatments between legitimate and illegitimate children (*Marckx v. Belgium*, 6833/74), the development of rights of transgender persons (and others) to live and be recognized according to their sexual identity (*van Oosterwight v. Belgium* 7654/79; *Rees v. UK* 9532/82; *Goodwin v. UK*, 28957/95, *inter alia*) and the concept of “family” and “marriage” regarding same-sex couples. The picture the author draws is more inclusive than many other works, as he does not only focus on the most famous cases (*Schalk & Kopf v. Austria*; *Vallianatos et al. v. Greece*, 29381/09 & 32684/09 and *Oliari et al. v. Italy*, 18766/77) but also “smaller” cases which had been declared inadmissible by the ECtHR (*van Oosterwijk v. Belgium*, 7654/76; *Courten v. UK*, 4479/06). The fact that the author sometimes switches perspective and shows the reception of those decisions in some of the Member States, mainly the UK (pp. 22–3), also adds value. Afterwards, the author shifts to the case law of the ECJ and its “spill-over” effects into national law, especially regarding different domestic and private international law rules on names and the possible impediment of the free movement of citizens. The author touches upon the question whether the decisions (esp. *Garcia Avello*, *Grunkin Paul* etc.) have to be extended to all family law rights or status acquired under the law of one Member State (pp. 31–6). This issue is one of the most difficult questions in the current EU law discussion regarding cross-border family law cases. There are different solutions under discussion, and all have their

flaws and their advantages, either on the practical or the legal or the political side. Harmonization of conflict of laws might be an answer, or harmonization of domestic law, or even a procedural solution, such as a system of mutual recognition. Finally, the author sums up the effects of the Commission on European Family Law (CEFL) and the International Commission on Civil Status (ICCS-CIEC) and the effect of harmonization in private international law (EU and the Hague Conference Instruments) (pp. 36–9).

Afterwards, the book begins the “organic” and mainly comparative part, which mirrors Volumes II and III. The author comes to the conclusion that a common core of European family law is hard to find. Here, a stronger bridge to Chapter 8 of Volume I (religion and family law) might have been interesting. The common values Scherpe determines are mainly that European countries allow the concept of divorce, excluding Vatican State, and gender equality is of high value (pp. 56–61, 67–68). The differences, at least between some groups of States, dominate the picture: for instance, the treatment of same-sex unions, non-marital unions, factual relationships and transgender or intersexual persons vary widely from country to country, in approach and in outcome (pp. 42–51). This is true even for basic concepts protected by international instruments, such as “family” or “best interest of the child”, within all States as important notions. Nevertheless, their contents vary widely from country to country. So, the status quo of European family law can be described by its high degree of diversity. The comparison also shows that a grouping of countries is possible (p. 51). Thus, conceivably, the significant notion of European family law is that of bundled diversity. For a comparatist, that is a very valuable finding to make a further comparison. For somebody working in European law, it gives hope that, for all differences, there is still enough common ground to build on.

Subsequently, the author focuses on some topics of crucial importance in the nearby future, i.e. parentage or parenthood. A growing number of possibilities in artificial reproductive technology (ART), i.e. surrogacy or a treatment of mitochondria donation resulting in a child with three genetic parents (pp. 100–101), challenge the traditional concepts of parenthood and parentage. The author carefully analyses the possibility to change the current national concepts, usually requiring a conjunction between parentage, parenthood and parental responsibility. He proposes to extend parental responsibility rights to persons not acquiring parenthood (pp. 107–109). This is only possible by splitting the legal situation of “parents” into three legal positions, namely parentage, parenthood and parental responsibility. These three positions can, and in typical cases will, be united in one person, the parent. Parentage is understood by the author as a position reflecting the genetic link but not necessarily leading to parental rights and duties – something parenthood is concerned with. Parental responsibility includes a bundle of rights which are usually connected with parenthood. The threefold approach leaves room for the possibility to distribute these three positions to more than one person and allows more flexibility in modern family constellations, such as patchwork families or cases of adoption, but also cases where reproductive medicine has led to the situation that genetic and intended parent differ (pp. 112–114). So, at least some aspects of parental responsibilities can be distributed to more than those claiming parenthood (pp. 114–148), for example to those having the genetic link. The author draws these ideas from UK scholars and statutes recognizing multiple parenthood in California (USA) and British Columbia (CA). The idea presented is probably one of the few feasible solutions for the future and the book is certainly thought-provoking in this regard. In a possible next edition, perhaps some countries may implement this approach and can provide further insight into how parental responsibility should be distributed in problematic cases.

Another field for future work is the area of gender determination and recognition, especially regarding transgender or intersex persons. Initially, the ECtHR left a wide margin of appreciation to the Member States. The ECtHR, nevertheless, developed the right of an individual to live legally under the gender s/he prefers. The author shows the tendency in several States to recognize the legal gender according to the self-understanding of the individual. He characterizes it as a question of private international law to “recognize” (or “accept”) the legal gender of a person. He finds citizenship an unfeasible connecting factor, which does not adequately deal with the human rights of the individual involved (pp. 120–123). Even though

the book does not deal primarily with private international law, I had hoped the author would discuss alternatives to a conflict-of-laws solution. He seems to find that that instrument is generally unsuitable, so, for example, one might think about introducing a recognition proceeding of a foreign gender registration, or a mere acceptance of foreign registrations (as in Malta exists since 2015), or a substantive law approach. Finally the author touches upon the subject of intersexuality and the growing awareness that the binary gender system (female/male) which exists in many family law concepts (“mother”, “father”, “husband”, “wife” etc.) is not sufficient to embrace all individuals. The author proposes to abolish the distinction and replace those concepts with neutral ones (“spouses”, “parent” etc.) (pp. 127–133). Again, the book provides food for thought as the proposal to abolish a legal gender at all is tempting, but I have doubts about an “all or nothing” approach. Can we really give up a gender distinction in anti-discrimination law as long as there is actual gender discrimination? Nonetheless, the idea to scrutinize whether and in how far the gender distinction in law is really necessary, is one that should inspire every modern legislator.

Every academic working in the field of European family law should have this set of books at hand for consultation on almost all issues in family law that are in current discussion. It provides an effective overview of the subjects covered, either for a comparative or a substantive analysis, and to know where to dig deeper. The editor’s skills in organizing the work and pinpointing the most relevant issues make the book set unique. The last volume gives a comprehensive overview over the status quo, stimulates thoughts on several topics and shows that there are still many battles to fight. Legal academia can be thankful for the work and its efforts to produce such a valuable, thoughtfully organized, well-researched and thought-provoking tool.

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