



FACULTY OF LAW
University of Lund

**Master of European Affairs programme,
Law**

Anne Katharina Wozny

Perspectives for Family law in Europe:
A comparison between Principles of European Family law
and the German Civil Code regarding divorce and post-
marital maintenance

Master thesis
10 points

Prof. Michael Bogdan

Contents

SUMMARY	1
PREFACE	3
ABBREVIATIONS	4
1 INTRODUCTION	5
1.1 Purpose	6
1.2 Methodology	7
1.3 Disposition	7
1.4 Delimitation	8
2 SPECIFICITY OF FAMILY LAW IN EUROPE	9
3 DEVELOPMENT OF A EUROPEAN FAMILY LAW	11
3.1 Legal position today	11
3.2 European private international law	12
3.2.1 <i>International Jurisdiction</i>	12
3.2.2 <i>Law of conflict</i>	13
3.2.3 <i>Determination and Application of Foreign Law</i>	14
3.2.4 <i>Changes in the applicable law</i>	14
3.2.5 <i>Conclusion</i>	15
3.3 European Community law	15
3.3.1 <i>Free Movement of people</i>	16
3.3.1.1 Family law rules as restrictions	16
3.3.1.2 Case law	16
3.3.2 <i>Conclusion</i>	17
3.3.3 <i>European Charter of Fundamental Rights</i>	17
3.3.4 <i>European Constitution</i>	18
3.4 Evaluation	18
4 COMPARATIVE RESEARCH	21
4.1 Development of the Principles	21
4.1.1 <i>Setting up the CEFL</i>	21
4.1.2 <i>The choice of subject and drafting methods</i>	22
4.1.2.1 Common core method	22
4.1.2.2 Better law method	22

4.1.3	<i>Nature of the Principles</i>	23
4.2	Similarities and dissimilarities of general Principles regarding divorce	23
4.2.1	<i>Divorce</i>	23
4.2.1.1	Permissability of divorce	23
4.2.1.2	Procedure of divorce	24
4.2.1.3	Types of divorce	25
4.2.2	<i>Provisional result</i>	26
4.3	Special instruments regarding divorce	26
4.3.1	<i>Divorce by mutual consent</i>	27
4.3.1.1	Mutual consent according to Principle 1:4	27
4.3.1.1.1	<i>Reflection period</i>	27
4.3.1.1.2	<i>Content and form of the agreements</i>	27
4.3.1.1.3	<i>Determination of the consequences</i>	28
4.3.1.2	Mutual consent according to German law	29
4.3.1.2.1	§ 1566 I German Civil Code	29
4.3.1.2.2	§ 1565 I German Civil Code	30
4.3.1.2.3	<i>Legal practice</i>	30
4.3.1.3	Conclusion	31
4.3.2	<i>Divorce without consent</i>	31
4.3.2.1	Divorce without consent according to Principle 1:8	31
4.3.2.1.1	<i>Exceptional hardship</i>	32
4.3.2.1.2	<i>Determination of the consequences</i>	32
4.3.2.2	Divorce without consent according to German law	32
4.3.2.2.1	<i>Exceptional hardship</i>	33
4.3.2.2.2	<i>Determination of consequences</i>	34
4.3.2.3	Conclusion	34
4.4	Differences and similarities regarding general Principles of maintenance	35
4.4.1	<i>Maintenance</i>	35
4.4.1.1	Relationship between divorce and maintenance	35
4.4.1.2	Self-sufficiency Principle	35
4.4.1.3	Provisional result	36
4.4.2	<i>Conditions for a maintenance claim</i>	36
4.4.2.1	Conditions for a maintenance claim according to the Principles	36
4.4.2.1.1	<i>Method of maintenance payment</i>	37
4.4.2.1.2	<i>Exceptional hardship</i>	37
4.4.2.2	Conditions for a maintenance claim according to German law	38
4.4.2.2.1	<i>Method of maintenance payment</i>	39
4.4.2.2.2	<i>Exceptional hardship</i>	39

4.4.2.3	Conclusion	39
4.5	Special instruments regarding maintenance	40
4.5.1	<i>Multiplicity of maintenance claims</i>	40
4.5.1.1	Multiplicity according to the Principles	40
4.5.1.2	Multiplicity according to German law	41
4.5.1.3	Conclusion	42
4.5.2	<i>Termination of maintenance obligation</i>	42
4.5.2.1	Termination according to the Principles	42
4.5.2.2	Termination according to German law	43
4.5.2.3	Conclusion	43
4.5.3	<i>Maintenance agreement</i>	43
4.5.3.1	Maintenance agreement according to the Principles	43
4.5.3.2	Maintenance agreement according to German law	44
4.5.3.3	Conclusion	44
4.6	Evaluation	44
5	FINAL REMARKS AND FUTURE PROSPECTS	46
	PRINCIPLES OF EUROPEAN FAMILY LAW	48
	GERMAN LAW PROVISIONS	51
	SCHEMES: DIVORCE	58
	BIBLIOGRAPHY	60

Summary

The ongoing Europeanisation is readily identifiable in our day-to-day life. Particularly in the field of law, the elaboration of a uniform and harmonised European private law is promoted and a truly European legal science is forced. Yet, comparative law and unification of law have concentrated on certain areas, which include mainly commercial law and related areas of civil law.

The main issue of this thesis is to answer how family law fits in the overall process of harmonisation of private law.

Due to so-called cultural constraints and the lack of clarity regarding competences for European institutions to develop one substantial family law, it was until recently remained almost completely outside harmonisation activities.

However, social circumstances for families have turned out to be more similar in the last few years. Divorce rates for example are increasing and so are the number of single parents and reconstituted families within the EU.

That is why even family law has become smoothly an object of comparative law as well as of harmonisation of law. Furthermore, in 2001, an international self-appointed Commission (CEFL) accepts the challenge to deal with this complicated field of law. In December 2004, it presented its first results: „Principles on European Family law regarding divorce and maintenance between former spouses”.

This thesis consists of mainly two parts. The first part explores the development of a European family law until today. For this purpose, investigation on achievements in the field of “private international law of families” and, further, the assessment of implications regarding “the family” within Community law, particularly in the field of free movement of persons, were necessary.

To address only one of numerous problems, which arise out of international divorces today, the analysis shows that the legal situation is neither sufficient in respect of determination of jurisdiction nor conflict-of-law rules. Therefore, a call towards more efficient harmonisation measures remains.

But, harmonisation within family law might only be feasible, if there is an emphasis on what is common to the European legal systems. Especially regarding the still existing national sovereignty in this field of law differences must be placed in perspective rather than be denied. Member States must gain in confidence. An important contribution to this process can be made by academics.

This evaluation leads to the second part of this paper, which contains the comparison between the Principles of the CEFL and German law regarding divorce and maintenance between former spouses. The Principles are not

binding, but should be considered as recommendations to the legislators. So, they enable to investigate if the German system is satisfactorily modern and compatible with the set up standard.

Besides some similarities, the comparison shows discrepancies in many respects. The CEFL favours the consensual divorce by respecting the autonomous will of the spouses. Even maintenance claims are marked by the Principle of self-sufficiency and a clean break. The German legal system is based on the protection of families according to Article 6 German Basic law, which contains not only the guarantee of the marriage but also post-marital solidarity when the marriage is irretrievably broken down.

Consequently, this thesis reasons that if the Principles became substantial law one day within the national systems or even an integral part of one European Civil Code, it would be complicated for German legislators to cope with this task.

Nevertheless, the Principles would be a manifestation of an evolution, which can be recognized increasingly within the German legal practice.

Preface

This paper does not only stand for the end of one year Sweden, but also the completion of my law studies. The last year was an exciting, instructive and incomparable experience, which I do not want to miss. In the course of time, I made some real good friends and hope that our friendship will last even though the distances will boost. I am convinced that everyone agrees if I say that we had a great time.

However, I want to use the opportunity -goodness knows whether I will have a second chance to write a Preface- to say *Thank you*.

Thank you to my parents for not only sponsoring my time here in Lund, but also, and even more important, for their mental support at all times. Daniel! I am at a loss for words, but do you know the survival of the fittest? Never say die! *Thank you* for the last year!

Finally, *thank you* to my Supervisor Michael Bogdan who fostered my autonomous work, but was present whenever I was searching for help.

Lund, May 2005

Abbreviations

BGHZ	Entscheidung des Bundesgerichtshofs in Zivilsachen (Judgement of the German Federal High Court of Justice)
CEFL	Commission on European Family law
EC	Treaty establishing the European Community
ECHR	European Convention of 1950 for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECR	European Court of Human Rights
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory law to the German Civil Code)
E.R.P.L	European Review of private law
E.L.Rev.	European law Review
FamRZ	Zeitschrift für das gesamte Familienrecht (Legal Journal for family law)
IPrax	Praxis des Internationalen Privat- und Verfahrensrechts (Legal Journal for International private law and procedural law)
NJW	Neue Juristische Wochenschrift (Legal Journal)
StAZ	Das Standesamt (The registry office (Legal Journal))
ZeUP	Zeitschrift für europäisches Privatrecht (Legal Journal for European private law)
ZfRV	Zeitschrift für Rechtsvergleichung (Legal Journal for comparative law)
ZPO	Zivilprozessordnung (German Code of civil procedure)

1 Introduction

*“The Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.”*¹

These legendary words about the irresistible tide of European law by Lord Denning could become true even within the field of family law.

Ius commune and Europeanisation have become magic words during the last years.² The ongoing European integration has created a new challenge: the elaboration of a uniform and harmonised European private law is promoted and a truly European legal science is stressed. The past decades have already witnessed a spectacular growth of interest by different study groups and commissions and by now, almost all subjects of private law are, in one way or another, covered by harmonisation activities.³ Traditionally, comparative law and unification of law have concentrated on certain areas. These include mainly commercial law and related areas of civil law. With regard to contract law, for instance, developments both on official and on private level can be recognized.

On official level, an innumerable amount of directives and regulations, communications⁴ as well as case law⁵ occurred. Private efforts are made by the projects of Lando⁶, UNIDROIT⁷ and von Bar⁸ to mention only some of the best known among such projects. Nowadays, the Principles of European Contract law are used gradually as *ratio scripta* of contract law within Member States of the EU.⁹

One may ask how family law fits in the overall process of harmonisation of private law.

Due to so-called cultural constraints, family law was until recently not only remained almost completely outside deliberate harmonisation activities, but also was perceived as the paradigmatic example of a subject which is unsuitable for harmonisation.¹⁰ Academics held family law as far too

¹ Lord Denning, H.P. *Bulmer v. J.Bollinger S.A.*, 1974, 1 Chancery (CH.) 401,418.

² Pintens, *Europeanisation of Family law*, p.3.

³ Hondius, “Towards a European *Ius Commune*. The current situation in other fields of private law”, p. 118-139.

⁴ Communication from the Commission to the Council and the European Parliament on European Contract law of July 11th 2001, COM(2001) 398 definitive; http://europa.eu.int/comm/off/green/index_en.htm (online 05/30/05).

⁵ C-481/99 *Heininger/Bayerische Hypo-und Vereinsbank*; C-168/00 *Leitner/TUI*.

⁶ Zimmermann, *Principles of European Contract Law*, ZEuP 95,731ff (Part I); ZEuP 00, 391ff (Part II).

⁷ <http://www.unidroit.org/english/principles/contracts/main.htm> (online 05/30/05).

⁸ Spier/Haazen, *The European Group on Tort law*, ZEuP 99, 469ff.

⁹ See fn 4; COM (2001) 398.

¹⁰ Zweigert/Kötz, *Alte und neue Aufgaben der Rechtsvergleichung*, JZ 2002, p.259ff.; Antokolskaia, *The Harmonisation of Family law: Old and new Dilemmas*, p.32.

historically, politically and culturally anchored in the societies of the different Member States than other economically related fields of private law.

In addition, also the European Council considered family law as “very heavily influenced by the culture and the tradition of national legal systems, which could create a number of difficulties in the context of harmonisation”.¹¹

However, in the last few years, family law has become smoothly an object of comparative law as well as of harmonisation of law. The principles of equality and non-discrimination adopted by Constitutional Courts¹², but also both European Courts and the Council of Europe have played a prominent role in this development.¹³

Even most of the national governments consider more and more social realities and are primarily concerned with solving comparable problems¹⁴ even if reality is not completely homogeneous.

Nevertheless, forms of family life across Europe are changing substantially. All Member States register a decrease of birth rates in face of an increased life expectancy. The number of marriages is in decline, whereas the number of factual partnerships and extramarital births is rising. Furthermore, divorce rates are increasing and so are the number of single parents and reconstituted families.¹⁵ Thus, the social circumstances are progressively more similar.

In 2001, an international self-appointed Commission¹⁶ accepts the challenge to deal with this complicated field of law. In December 2004, the CEFL presented its first results. Based upon an in-depth and comprehensive comparative research, Principles on European Family law have been drafted in the field of divorce and maintenance between former spouses.

These Principles are purely academic matters without binding factor, notwithstanding, they enable to discuss extensively the arguments for and against Europeanisation of family law and should be seen as first attempt towards the unification of substantive family law.

1.1 Purpose

This thesis observes several aims. The first is to obtain a clear picture of what is the current situation of European family law today.

Where do we stand in the area of harmonisation? In this context, I assess if further harmonisation or even unification is feasible, useful and desirable

¹¹ Council Report on the need to approximate member states' legislation in civil matters of 16th November 2001; <http://www.europarl.eu.int/pleanry/en.html> (online 05/30/05).

¹² Henrich, Familienrechtsreform durch die Verfassungsgerichte, ZfRV 90, 241.

¹³ Pintens, Europeanisation of Family law, p.6.

¹⁴ Dethloff, Arguments for the Unification and Harmonisation of Family law in Europe, p.61.

¹⁵ E.g. Germany: <http://www.destatis.de/presse/deutsch/pm2002/p3000023.htm> (online 05/30/05).

¹⁶ <http://www2.law.uu.nl/priv/cefl/> (online 05/30/05).

although the Europeanization within this field of law still is strongly debated.

The second aim constitutes the centre of this thesis. I examine what harmonisation means for national States, and, what will be on stake for their national jurisdiction if they have to adopt one European law. Here, I make the scenario more concrete through a comparison between the Principles of the CEFL and the German family law system regarding divorce and post-marital maintenance. I scrutinize if German family law is sufficiently modern and compatible with the published Principles.

Due to the non-binding character of the Principles, the comparison can be evidentially only of theoretical interest. However, this topic will gain in importance in future. Currently, the Principles are highly contested under academics, but it is conceivable that they will have an overriding input for the creation of one substantive law.

Bringing together all assessments and results of both parts in a final conclusion, will allow me to provide a well-founded and realistic perspective about family law in the future.

1.2 Methodology

This thesis consists of descriptive, comparative and analytical parts. To achieve the purpose set out above, I examined legal literature as well as European and German legislation and case law. I located my sources by the use of the University libraries in Lund and Berlin, but also by the use of the internet. Here I resort mainly to WebPages of the European Institutions.

Until now, the Principles are not publicly available via internet, but can only be ordered by a Belgian publisher. They contain a small amount of comparative overview, which help to classify its character in the European context.

In respect to the German Civil Code, it is to admit that only the first and the second book are translated into English so far. Family law provisions are part of the fourth book, which is supposed to be translated in autumn 2005. That is the reason why I enclosed them in German.

1.3 Disposition

The following thesis is mainly two-folded. The first part examines the development of a European family law until today. The second part contains the comparison between the Principles of the CEFL and German law regarding divorce and maintenance between former spouses.

I begin this paper by giving an overview about the specificity of family law. With the help of the European history, I scrutinize why family law is culturally embedded.

Against this background, I describe where Europe stands in the area of harmonisation in respect of family law. First, I focus, on the legal position of European international private law until today.

In a second step, I show the influences of the family on community law and demonstrate based on particular judgments the growing importance of Family law on European level. Furthermore, I concentrate on the activities of the Council of Europe.

I conclude this chapter by giving an assessment of the necessity and the usefulness of harmonisation measures, while keeping in mind the delimited competences of the European Union in this field of law.

This result leads me to the fourth chapter that deals with the comparative research between the Principles of the CEFL and the German legal system regarding divorce and maintenance between former spouses. To establish understanding for the subsequent comparison and analysis, I give a framework about the development of the Principles by describing *inter alia* the choice of subject, the drafting methods and the nature of the Principles. Within the comparative study, I will work from general principles to special legal institutions. Hereby, I achieve a smoother approach of the main problems.

Finally, I summarize and evaluate my results. In this context, it seems appropriate to take the conclusions of previous chapters into consideration in order to give a reasonable outlook about the future.

1.4 Delimitation

The field of family law is very complex. Besides marital relationships, *inter alia* rights of children and parental responsibility play an important role. Although the latter ones became also subject to harmonisation matters during the last years and are recurrent aspects of European judgements, I focus on marriage and post-marital maintenance for mainly two reasons.

First, due to the comparison between the Principles by the CEFL and German law regarding divorce and maintenance between former spouses it is consequent to assess the development especially under these aspects. Second, an extension of the topic, in particular within the third chapter, in order to achieve a comprehensive picture goes beyond the scope of this Thesis and is contra-productive to achieve the aspired aims.

2 Specificity of Family Law in Europe

When dealing with family law, it is of importance to keep in mind that it is unlike any other branch of law. Contrary to an often-held view, family law is not merely private law concerning only individuals and their private interests.¹⁷ Instead, it lays also interface between the social and private spheres. No society would have been able to manage life without rules capable of introducing order within human relationships by creating prohibitions and limits. Accordingly, it is not a neutral branch, so that in most countries it belongs at least in parts to the area of public order.¹⁸

Today family law is still characterized by its diversity, deeply rooted in people's history, culture, mentalities and values. Further, philosophies and religions may account to some extent, too. This shows that, family law is the body of flesh and blood and, thus, the nucleus of any society and the hard core of any legal culture.¹⁹

Nevertheless, some academics tend to trifle with this assessment only one-sided and it seems that they are no longer interested in what the cliché really purports.

In fact, to complete the full picture of specificity of Family law it is necessary to investigate its origins in Europe. Evidently, one cannot dismiss the diversity of Family laws. But, is it really rooted in different legal cultures?

The *ius commune* of family law was the uniform medieval canon family law.²⁰ Many legal concepts like the marriage akin to a sacrament, the indissolubility of marriage or the exclusion of illegitimate children from the family were vested or developed during that time.

Unlike the economically related areas of private law²¹, this *ius commune* was equally shared until the Reformation by the Western European Civil and Common law countries, as well as the Scandinavian region and the catholic eastern European countries²².

With the differentiation within the Church and the Enlightenment, ideological pluralism increased, and it became more and more difficult for the States to justify the canon law concepts that they had inherited. Nonetheless, they were upheld for a considerable period, and much longer than other political and religious dogmas.

¹⁷ Meulders-Klein, Towards a European Civil Code on Family law? Ends and Means, p.108.

¹⁸ E.g. Art. 6 GG of the German Basic law.

¹⁹ Meulders-Klein, Towards a European Civil Code on Family law? Ends and Means, p.109.

²⁰ Antokolskaia, The Harmonisation of Family law: Old and new Dilemmas, p.37.

²¹ Roman law developed constantly in the European Universities since the 12th century.

²² Except of the orthodox Eastern European countries.

Only the 20th century witnessed a wave of revolutionary changes in the field of family law. In Scandinavia and the Soviet Union, family law was rapidly and radically reformed during the first decades. The so-called Nordic-cooperation was progressed and resulted in a coordinated drafting and enacting of legislation allowing divorce on the irretrievable breakdown of marriage.²³

The southern European Countries needed almost the entire century in order to achieve the same level of modernity. Italy, for instance, permitted divorce in 1970, and Malta remains the last European country, which does not allow a full divorce.

However, liberation from the heritage to a person-orientated family law occurred in all European Countries. The driving forces²⁴ were equal, but the process was far from being synchronised.²⁵ There was and still is always a distinction possible between countries in the vanguard and those in the rearguard.

For this reason, the diversity within all countries is mainly a difference in the level of modernity of Family law²⁶. But for all that, it is based on a number of common basic principles.

Consequently, the culturally laden family rules do not seem to be an end in themselves, which means that the “cherished cultural heritage”²⁷ of individual jurisdiction presents high obstacles, but they are not insurmountable for the development of one European Family law.

²³Jäntera-Jareborg, Marriage dissolution and maintenance to a spouse following divorce: Sweden; in Hofer/Schwab/Henrich Beiträge zum Europäischen Familienrecht, Bd.8.

²⁴ E.g. personal freedom, equality aspects

²⁵Antokolskaia, The Harmonisation of Family law: Old and new Dilemmas, p.41.

²⁶ Ibid, 41.

²⁷Dethloff, Arguments for the Unification and Harmonisation of Family law in Europe, p. 63.

3 Development of a European family law

Against the background of the specificity of family law in Europe, the evaluation of the ongoing development within the EU requires an overview of what has been achieved so far.

For this purpose, I focus on the achievements in the field of “private international law of families” and address the problems that result from the diversity of national family laws in cross-border family ties. Furthermore, I assess implications of the “family” within Community law. Here, deference is to pay *inter alia* to the jurisdiction of the ECJ particularly when drawing the conclusion about the necessity and usefulness of further harmonisation measures.

3.1 Legal position today

There are presently no Community provisions on applicable law in divorce, because the Treaty does not provide any legal basis for the development of a substantive family law. This means, the EU is neither competent to unify substantive family law nor currently empowered to legislate by regulation or directive in this field, since the family branch of civil law does not fall under the exclusive or even peripheral jurisdiction of the Community institutions in accordance to Article 3 and 5 of the Treaty.

Furthermore, even if the EU had the competence, the principles of subsidiarity and proportionality should have been respected. This means that where problems can be solved more appropriately through other methods, the EU is not allowed to act.

To date, harmonisation is achieved by spontaneous development whereby case law and legal doctrine played an important part. Evidently, the Council of Europe has also met an important goal with its ECHR, but other similar initiatives are not expected. In fact, the Council of Europe attempts to encourage the Member States to cooperate without compelling them to adopt the uniform laws, which might give rise to internal political and social resistance.²⁸ In this connection, it commissions comparative studies, sets up standing committees of experts, convened international conferences on Family law and publishes recommendations.²⁹

Articles 65 and 67 EC, as revised by the Amsterdam Treaty, provide the legal base for regulating in matters regarding judicial cooperation in commercial and civil law, where they are necessary for the proper functioning of the internal market.

²⁸Meulders-Klein, Towards a European Civil Code on Family law? Ends and Means, p.111.

²⁹See Council of Europe, Directorate General of legal affairs;
http://www.coe.int/T/E/Legal_Affairs/ (online 05/30/05).

The ongoing legislative activities within the EU suggest that this interpretation is a flexible one, since the European Council³⁰ has laid down an explicit connection between Family law and the functioning of the internal market. It came to the conclusion that removing of obstacles and safeguarding the free movement of persons within the European internal market creates interaction between family law and other community rules.³¹ In this context, Council Regulation 1347/2000 (Brussels II)³² on jurisdiction and the recognition and enforcement of judgments in matrimonial matters of parental responsibility for children of both spouses involved in matrimonial proceedings can be recognized as first attempt. It includes rules on jurisdiction and recognition in matrimonial matters, but does not contain rules on applicable law.

Since the 1st of March 2005, Council Regulation 1347/2000 is replaced by Council Regulation 2201/2003 (New Brussels II)³³. In all likelihood, it will effect any changes, because it takes over the rules on matrimonial matters almost unchanged.

Nevertheless, the expectation³⁴ for more regulations, particularly, on rules-of-conflict³⁵ still exists.

3.2 European private international law

Every time, when family ties cross national borders it is necessary to determine which national family law will be applicable. This means a substantial challenge to lawyers who give advice concerning the stipulations of contracts or the likely outcome of legal disputes involving cross-border family situations. The same is relevant for the Courts if they have to decide such lawsuits and for the administrative bodies whose task it is to apply the law.

In litigations in which a foreign element is involved the applicable law is determined by the location where the litigation is to be decided. This is due to the conflict-of-law rules of the forum.

3.2.1 International Jurisdiction

In cross-border litigations, Courts or administrative bodies of several States often have international jurisdiction. This is even the case in areas where

³⁰ The Presidency Conclusions of the Laeken European Council of December 2001.

³¹ Council Report on the need to approximate member states' legislation in civil matters of 16th November 2001; http://www.europarl.eu.int/pleanry/default_en.html (online 05/30/05).

³² <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32000R1347:EN:HTML> (online 05/30/05).

³³ <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML> (online 05/30/05).

³⁴ In particular according to the Vienna Action Plan of 1999 (IPrax 99, p288ff.) and the Draft programme of measures of the Council (2001).

³⁵ Jayme/Kohler, Europäisches Kollisionsrecht 1999, IPrax 99, p401ff; Heß, Die „Europäisierung“ des internationalen Privatrechts durch den Amsterdamer Vertrag. Chancen und Gefahren“, NJW 00, p.23ff.

legal instruments³⁶ already exist to regulate jurisdictions. Thus, also for a divorce and its consequences it is to assume that there is a choice between a large numbers of alternatives with equal jurisdiction.³⁷

In particular, Regulation 2201/2003 brought some improvements on EU-level in matrimonial proceedings. It has set aside exorbitant national rules on jurisdiction and, where correctly applied³⁸, has prevented concurrent divorce proceedings from taking place in different Member States.³⁹

Nevertheless, there are two essential problems when dealing with this new Regulation. First, Article 19 may induce a risk to “rush to Court”. According to the rule on *lis pendens* the application for divorce of one spouse before the other one has done so prevent the Court of another Member State from having jurisdiction. This means that this provision gains the influence of the spouses to obtain a certain result by circumventing the application of a particular divorce law. In this context, it is also worthwhile to mention the second problem. Article 3 of the Regulation implies a substantial danger for *forum shopping*. *Forum shopping* means that parties have the ability to choose the forum that applies the most favoured substantive law. The party, who is able to afford competent legal advice regarding the conflict-of-law rules and the substantive laws of the available flora, takes the advantage since the Courts once they have affirmed their international jurisdiction, will always apply their conflict-of-law rules.

3.2.2 Law of conflict

If the question of jurisdiction has been solved the applicable law is decided by the conflict-of-law rules of the relevant forum. Consequently, the lawyer need to ascertain the conflict-of-law rules of all states, which have potentially jurisdiction.

Different legal instruments determine the conflict-of-law rules. In some areas, there are Hague Conventions signed, such as The Hague Convention on Maintenance⁴⁰, but their applicability is not Europe-wide⁴¹.

In addition, a large variety of autonomous laws-of-conflict exists.⁴² Particularly, there still exists a rift between the principle of domicile on the one hand and the principle of citizenship on the other, even though with the

³⁶E.g. Lugano Convention, Regulation 44/2001 and Regulation 2201/2003.

³⁷ Kohler, Internationales Verfahrensrecht für Ehesachen in der EU: Die Verordnung Brüssel II, NJW 01, p. 10-12.

³⁸ Academics claim the value of this Regulation, which seems to be very limited and the disadvantages outweigh the advantages, e.g. Maarit Jänterä-Jareborg, Nina Dethloff.

³⁹ Jänterä-Jareborg; Unification of International Family Law in Europe- A critical Perspective, p.202.

⁴⁰ Convention of 1973 on the Law applicable on maintenance obligations; of the members of the EU Denmark, Finland, Italy, Luxembourg, Netherlands, Portugal and Spain have ratified this convention.

⁴¹ For the current status on ratification, see the website of The Hague conference on Private International Law, <http://www.hcch.net/e/conventions/index.html>. (online 05/30/05).

⁴² For the different principles underlying the establishment of the connecting factors within the national conflict-of-law regimes see Wagner, Überlegungen zur Vereinheitlichung des Internationalen Privatrechts in Ehesachen in der Europäischen Union, FamRZ 2003, p.803.

principle of citizenship the factor of habitual residence is growing in importance.⁴³

However, if the applicable law is decided, one still needs to establish the relevant provisions. This process can present further difficulties due to significant differences in substantive family law, which cause problems in characterisation and determination.⁴⁴

3.2.3 Determination and Application of Foreign Law

If the applicable law of one State or even several States has been determined, it will be necessary to determine the content of this substantive law. In several jurisdictions, it falls to the Courts to determine the applicable foreign law *ex officio*.⁴⁵

This means the foreign law in question must be applied in the same way as it is in its home country.⁴⁶ Normally lawyers are not qualified through their training to do so and this often leads to the usage of experts' opinions and entails considerable efforts and enormous costs.⁴⁷

Therefore, the fact remains that determination and application of foreign law is fraught with substantial uncertainty. Decisions are difficult to predict, long-term property dispositions impeded.

3.2.4 Changes in the applicable law

The variety of national family systems can also lead to the loss of legal positions or changes in rights or obligations. As described above, the provisions of conflict-of-law rules are in many areas tied to actual domicile or habitual residence.

Here, one can cite the differences in the law governing divorce and its legal consequences as an example, since a relationship that is established in reliance on a particular legal system changes entirely when changing the residence.⁴⁸ This is true for two reasons. First, due to differing laws of conflict and substance, different results arise when family law matters are considered from the position of different legal regimes. Second, when taking up residence in another State also the applicable law will differ.⁴⁹

⁴³ Litigations between spouses with different citizenships must be solved with regard to the habitual residence due to principle of equality, e.g. Art. 14 EGBGB, see Koch /Magnus/Winkler von Mohrenfels, IPR und Rechtsvergleichung, p. 67; Dethloff, Arguments for the Unification and Harmonisation of Family law in Europe, p.44.

⁴⁴ E.g. distribution of property can be a consequence of the law of divorce, the marital law of property or even of maintenance.

⁴⁵ E.g. § 293 ZPO.

⁴⁶ From the German point of view, see also BGH, NJW 91, p. 1491.

⁴⁷ Dethloff, Arguments of Unification and Harmonisation of Family Law in Europe, p.43.

⁴⁸ E.g. necessary duration of the marriage to obtain a divorce.

⁴⁹ E.g. not title for maintenance in cases of divorce by fault.

The result is, that, if persons, couples or families move their domicile or residence to another State than their home state, a change of jurisdiction and so of the applicable law will arise.⁵⁰

Consequently, even where the jurisdictional or conflict-of-law rules have already been unified by the Brussels Regulation or the Hague Convention on Maintenance respectively, there are differences in applicable law, which leads to disharmonies.

3.2.5 Conclusion

The description shows that the legal situation is neither sufficient in respect of determination of jurisdiction nor of conflict-of-law rules. The combination gives rise to a number of problems regarding international divorces.

In the area of family relationships, there is a general interest in the continuity of legal ties. In particular, it does not meet the legitimate expectation of citizens, if their rights vary due to diverging family-law regimes, when changing their residence.

Unified rules on conflict-of-law would ensure internationally uniform decision-making, so that a status, which exists in one State, remains in effect in another.

Such unification leads to an easier determination of the relevant source, but problems associated with the variety of substantive laws would still exist. The current trend to use the residence or domicile as connecting factor might simplify the determination but does not make it obsolete.

This signifies that, even if the conflict-of-law rules are unified, a change in residence can lead to different legal effects to a status or even to a loss of legal position. Problems recur where the connecting factor is not immutable, but where the applicable law is based on the habitual residence.

Possible solution could be the guidance of rulings by the time of inception, so that the status or legal relationship remains in force even though the residence or even the nationality is changed.

3.3 European Community law

Besides harmonisation measures in the field of private international law, pressure is also exerted by the law of the European Community. Neither is there a legal basis for harmonisation of family law nor are there any direct references to “family law” in the legislation of the EU.

However, the ECJ has served as an impetus for harmonisation of law by attributing certain aspects of family law to the freedom of movement.⁵¹

Moreover, it seems appropriate to increase the radius of Community law, and take the European Charter of Fundamental Rights and the planned and highly contested⁵² European Constitution into consideration.

⁵⁰ Even though, if nationality is used as the connecting factor, a change in nationality can lead to another applicable law.

⁵¹ Pintens, *Europeanisation of Family law*, p.20.

3.3.1 Free Movement of people

The freedom of employees protected by Article 39 EC ensures the mobility of those who are working in a dependent position, while the freedom of establishment of Article 43 EC ensures the mobility of those who are self-employed. In addition, Article 18 EC provides a basic freedom of movement and applies to all union citizens independent of any economic activity.

3.3.1.1 Family law rules as restrictions

All freedoms establish a general prohibition on the imposition of restraints. Therefore, broadly speaking, all legal regimes of the Member States must guarantee the exercise of these freedoms,⁵³ which means a citizen must have the unlimited opportunity from leaving their home countries in order to carry out an economic activity in another Member State and remains there. Every limitation constitutes a restriction and is as such in need of justification. A justification is to answer in the affirmative whenever the arising legal differences are suitable, necessary and proportionate in order to fulfil the mandatory requirements in the public interest.⁵⁴

In respect of family law, several questions arise. The first one is whether family law provisions could affect adversely the freedom of movement, secondly, whether restrictions on the basic freedoms can be a result of differences in the family law regimes of Member States, and thirdly, to what extent can the differences of laws prevent or hinder the access to other Member States.

3.3.1.2 Case law

At first sight, the observance of case law by the ECJ might be remarkable, since judgements concerning family issues are linked normally to the European Court of Human Rights⁵⁵. On second thoughts, the lacking competence to enact family law does not mean no judgements in this field of law.

In recent years, the ECJ ruled on family matters by focussing on the basic freedoms and the European citizenship.

Basically, the ECJ takes the view that family law can fall within the ambit of the basic freedoms. It expressively stated that the free movement of people is to be interpreted in the light of the fundamental right to respect for a person's family life, which is protected by Art.8 ECHR.

In the *Konstantinidis* decision, for instance, the ECJ found an indirect discrimination of the freedom of establishment based on citizenship.⁵⁶

Another example is provided by the *Dafeki* case, where the ECJ ruled that

⁵² Especially the Referendum in France on the 29th of Mai 2005 is awaited with suspense and will give the direction for Europe.

⁵³ Craig/de Burca, EU Law, p.702 ; Arndt, Europarecht, p.171f.

⁵⁴ Dethloff, Arguments for the Unification and Harmonisation of Family law in Europe, p.58.

⁵⁵ E.g. Johnston and others v. Ireland, where the Court refused to recognize the right to dissolve a marriage as a right protected under the ECHR 1986, Series A, no 112, paragraph 55.

⁵⁶ C-168/91; ECJ 30.03.93, ECR 1993, I-1191.

the freedom of movement for workers requires the acceptance of documents concerning the legal status.⁵⁷ This means, the freedom of movement is impaired, whenever legal differences between states lead to a loss of status. Furthermore, the loss of status may also be hampered if the legal relationship has entirely different legal effects within the receiving State than it would have in the State of origin.

As a result, the decision to settle down or to pursue an employment in another Member State is influenced by large number of factors. In respect of family law relationships, both serious economic consequences can arise as a result of the loss or the creation of maintenance claims, but also personal impact from changes in parental responsibility.

3.3.2 Conclusion

The effects of the substantial legal differences in many areas of family law are certain and direct enough to inhibit the access of self-employed and employed people to the market of the receiving State. Of course, the greater the differences, the more likely they have restrictive effects.

The judgements of the ECJ play an important role because they contribute to the decrease of discrimination, but the Court cannot be expected to achieve a real breakthrough in the harmonisation process. However, the case law shows how far the implications of EC law are reaching.

3.3.3 European Charter of Fundamental Rights

In December 2000, the programmatic⁵⁸ Charter of Fundamental Rights⁵⁹ was adopted. It claims to be a “re-affirmation” of existing rights established by the ECHR. This means where a provision corresponds to a similar provision in the Convention, the same interpretation must be given, except a more extensive protection is provided.⁶⁰

Nevertheless, to some extent it is a broader created instrument and particularly, provisions concerning the “family” are innovative and relatively detailed. Family related fundamental rights are for example the “right to private and family life” included in Article 7, the “right to marry and to create a family” provided by Article 9 or the “rights of children” according to Article 24. This shows the Union has acknowledged the importance of the family.

Furthermore, families and children are not longer seen merely as “consumers” or appendages to economic actors, but they may be recognised as persons with own rights.⁶¹

⁵⁷ C-148/02; ECJ 02.12.97, ECR 1997, I-6761.

⁵⁸ The Charter is only binding for legal institutions of the EU and the Member States whenever European issues are on stake.

⁵⁹ O.J. 2000, C-364/1 of December 18, 2000.

⁶⁰ McGlynn, Families and the European Union Charter of Fundamental Rights, E.L.Rev. 01, p.591.

⁶¹ Pintens, Familienrecht und Personenstand- Perspektive einer Europäisierung, StAZ, 12/2004, p.344.

Admittedly and most surprising is that the Charter has failed to incorporate the right to dissolve a marriage. The intention is not clear, but the incorporation of such a right would not be superfluous because Malta does not recognize a divorce so far.⁶²

Evidentially, the Charter is not likely to extend the legal base for Community action, but it will extend the interpretative scope of existing Community provisions⁶³ and the Court's power⁶⁴ of coercion.

3.3.4 European Constitution

In June 2004, the European Council agreed upon one European Constitution⁶⁵, and, thus, paved the way for ratification through the Member States. Within the field of substantive family law, the Constitution will not have a great impact due to likewise programmatic basic provisions, which are only binding for European institutions. Citizens are simply allowed to refer to the Constitution concerning interpretation and judicial control. Nevertheless, these provisions do not prevent both European and national Courts to adjust their judgements in respect of the Constitution.

Finally yet importantly, the Constitution will replace Article 65 EC by Article III-269 Constitution for Europe. According to Article 65 EC measures in the field of judicial cooperation are, *inter alia*, only to be taken insofar as necessary for the proper functioning of an internal market. This condition is deleted without substitution.⁶⁶

For the future, it might be suggested that at least the harmonisation within international family law will be extended.

3.4 Evaluation

This Chapter shows that even though the harmonisation process within the field of family law is in the beginning, it is already very complex.

It is important to draw a line between harmonisation in the field of private international law and substantive law whereas, at present, harmonisation is exclusively restricted to the first one.

The assessment above illustrates that these reforms do not resolve satisfactorily major problems in cross-border cases. Instead, the determination of jurisdiction and conflict-of-law rules cannot always prevent a loss of status. Therefore, a call for action remains.

⁶² Antokolskaia, The Harmonisation of Family law: Old and new Dilemmas, E.R.P.L.03, p.36.

⁶³ McGlynn, Families and the European Union Charter of Fundamental Rights, E.L.Rev. 01, p.586.

⁶⁴ This entails additional risk of divergent interpretations between the two European Courts, because Article 52.3 of the Charter allows the ECJ to provide more extensive protection than the ECHR.

⁶⁵ http://europa.eu/constitution/en/1stoc1_en.htm (online 05/30/05).

⁶⁶ Pintens, Familienrecht und Personenstand- Perspektive einer Europäisierung, StAZ 12/2004, p.354.

It is worth asking then if the solution necessitates and desires a harmonisation of substantive law.

In any case, it would represent a great gain: in cross-border relationships, difficulties and costs in the application of law would cease to exist. Free movement would no longer be impaired, which means that people could rely on the continuity of their family relationships when changing their residence. Regarding the high number of divorces within the EU, applicable law in divorce matters affect a significant amount of citizens. In Germany, just to give an example, approximately 30.000 couples with different nationalities submit a divorce order each year.

Consequently, the necessity and desirability cannot be denied from a legal angle.

Nevertheless, the two most significant reservations against the harmonisation of substantive law, the so-called “cultural constraints” argument and the lack of clarity concerning the EUs capacity are further on the agenda.

National States are still afraid of the abandonment of an aspect of national sovereignty. They argue that harmonisation destroys cultural diversity and national identity.

Whereas they accept and see the necessity for harmonisation and even unification in respect of commercial practices and contract law, this adjustment did not reach aspects of family law. They ignore, or at least underplay, the active, contemporary and continuing function of family law as a component of political economy of the European Union. In fact, family law is also of importance for the political economy of national States. Foremost to mention are aspects of marital property which have impact on social security and welfare provision and consequently on taxation.⁶⁷

Of course, some areas of particular sensitivity from political or religious point of view still exist. Questions such as legal recognition of same sex-partnerships or the attitude towards modern medical reproduction techniques are influenced predominately by moral and ethical convictions.⁶⁸ The variety of provisions in these battlefields is very large and thus the harmonisation extremely difficult.

Nevertheless, the Member States concerns miss any founded base and traditional influences on legal policy can be mutable. As seen above, the tradition is not holy and should not be protected at any rate, but rather be a resource to promote a desired regulation of human relations.⁶⁹ Cherishing law as a symbol of culture will inevitably lead to intellectual rigidity and isolate from the benefits of both, comparative law and harmonisation measures.⁷⁰ Moreover, the most convincing criticism so far presented

⁶⁷ Meulders-Klein, Towards a European Civil Code on Family law? Ends and Means, p.116.

⁶⁸ Dethloff, Arguments for the Unification and harmonisation of Family law in Europe, p. 63.

⁶⁹ Meulders-Klein, Towards a European Civil Code on Family law? Ends and Means, p.116.

⁷⁰ Pintens, Europeanisation of Family law, p. 9.

against the “cultural constraints” argument is that some culturally imbedded rules do not coincide with the modern notion of human rights.⁷¹

In line with the Council of Europe it is to admit, that the development of such an area depends on the extent to which the Member States are able to gain confidence in the proper functioning of institutions of other countries. Thus, harmonisation of law might only be feasible if there is an emphasis on what is common to the European legal systems and when the differences are placed in perspective rather than denied.⁷² An important contribution to this process can and must be made by academics.

⁷¹Antokolskaia, *The Harmonisation of Family law: Old and new Dilemmas*, p.44.

⁷² Pintens, *Europeanisation of Family law*, p.29.

4 Comparative Research

The previous chapter clearly shows that harmonisation in the field of family law is running and essential. Therefore, it is necessary to assess further, what is on stake for national family law then.

The Principles of the CEFL offer a first possibility about a desired European standard of family law. In the following comparative study, I scrutinize if German family law would meet the standard set by the CEFL.

To obtain a clear picture about the German family law today, a comparison on two different levels seems appropriate: initially on a general level, and subsequently with regard to the mechanism of certain legal institution.

First of all, I examine the development of the principles in order to clarify their standard and their value.

4.1 Development of the Principles

On September 1st 2001, the CEFL was founded. Its establishment was based on the idea that the available armamentarium of private international law as well as the legislative and judicial activities of the Council of Europe and of the European institutions is not sufficient to reinforce a further harmonisation.⁷³

4.1.1 Setting up the CEFL

The CEFL is, like other harmonisation initiatives, a self-appointed group, composed of academics, neither representing their national government, nor commissioned by any supranational organisation.⁷⁴ Its members cover almost all European Countries, not only EU Member States, but also non Member States like Norway, Switzerland and Russia.

Its main purpose is to study the feasibility of and to initiate practical steps towards a broader harmonisation or even unification of Family law in Europe. In this connection, it wants to provide a strong and very necessary impetus for European countries to consider seriously the problems and possible solutions for reshaping national family law in accordance with the needs and purposes of the emerging “European citizenship”. Hereby, the members of the CEFL put their own conviction into effect that harmonisation is needed in order to realise a true free movement of persons, and that this harmonisation will reinforce the European identity as well as an efficient uniform area of law.⁷⁵

⁷³ Pintens, Europeanisation of family law, p.29.

⁷⁴ Antokolskaia, The Harmonisation of Family law: Old and New Dilemmas, p. 30.

⁷⁵ This idea is not entirely new, since the Nordic countries had succeeded in harmonising certain aspects of their family law.

4.1.2 The choice of subject and drafting methods

The first subjects chosen by the CEFL for its activities are the grounds of divorce and maintenance obligations of former spouses. This choice was based on two decisive factors. First, it is often held that harmonisation has the best chances of success in those branches of law, which are closely connected to property issues.⁷⁶ Second, the selection of divorce fits well with the above-mentioned activities of the European Council and the Commission.⁷⁷

The drafting method adopted by the CEFL is identical with most of the other study groups involved in harmonisation of law.⁷⁸ On a basis of a detailed questionnaire, the CEFL drew up national reports of the law as it stood in 2002. This comparative material enabled the CEFL to create the Principles.

In doing so, the following methodological considerations were taken into account.

4.1.2.1 Common core method

Family law has a close connection to the cultural environment. Therefore, the CEFL considers it best to commence harmonisation from the position of existing law.

It tried to “restate” as far as possible rules, which are functionally common to a significant majority of the legal systems involved. Here, the evaluation of the common core of legal solutions to a particular problem was necessary.⁷⁹

But, the application of this method occasionally needed a further step. Rules can differ in their formulation and their methodology, but still can be equivalent in their function.⁸⁰ This means the common core method needed to be combined with functional equivalence, so that the drafters must reduce technically different national terms to the common denominator.⁸¹

4.1.2.2 Better law method

When the differences between the legal systems are so vast, that there is no possibility to derive common principles, the decision as to which solution should prevail can only be based on an evaluation. This evaluation leads to the application of the better law method and invokes the troublesome problems of justifying the choices made.⁸² Here the CEFL has made certain choices and examined which interests need to be protected. Special attention was made to historic developments, future trends and sociological aspects.⁸³ Evidently, evaluating solutions cannot be achieved without any subjectivity,

⁷⁶ Pintens, *Europeanisation of family law*, p.31.

⁷⁷ Principles, General Introduction, p.4.

⁷⁸ Antokolskaia, *The harmonisation of Family law: Old and New Dilemmas*, p. 32.

⁷⁹ Antokolskaia, *The „better law“ approach and the harmonisation of family law*, p.160.

⁸⁰ Schwenzer, *Methodological aspects of harmonisation of law*, p.143-158.

⁸¹ Antokolskaia, *The „better law“ approach and the harmonisation of family law*, p.160.

⁸² *Ibid*, 161.

⁸³ Principles, General introduction, p.2.

but, on the contrary, they are constitutive part of every comparative research.

4.1.3 Nature of the Principles

Due to the choice of method, one can say that the Principles are inspired by the American Restatements. They are directed towards the legislator and aim to bestow the most suitable means for the harmonisation of family law within Europe. In this context, they should be considered as recommendations and as a model for applicable law.

The Principles are drafted in imperative form, despite they are not binding. They are spelt out in provisions but must be read in conjunction with comments, which elucidate the rules. Often the comments present also comparative information, but they clearly cannot be complete.

Both the structure of the divorce Principles and the structure of the maintenance Principles are contained in three chapters. Regarding divorce, the first chapter sets out general Principles, the second one contains Principles regarding divorce by mutual consent and the last chapter deals with divorce without the consent of one spouse. In respect of maintenance, the first chapter deals with general Principles, the second one contains the conditions for the attribution of Maintenance and the last one covers specific issues, like limitation and termination of maintenance claims.

4.2 Similarities and dissimilarities of general Principles regarding divorce

In the beginning, it is worthwhile to make a general comparison regarding divorce with view of three principles, namely the permission, several types of divorce and the procedure.

4.2.1 Divorce

Divorce can generally be defined as an *ex nunc* dissolution of a valid marriage during the lives of the spouses by a decision of a competent authority for reasons laid down by statute or by procedure prescribed by law.⁸⁴

4.2.1.1 Permissibility of divorce

Principle 1:1 paragraph 1 contains the permission of divorce. Paragraph 2 in this context specifies that divorce does not require any minimum period of marriage.

The permission of divorce as such reflects the common core within Europe. Divorce is permitted⁸⁵ in all Member States, except of Malta. In Germany, § 1564 German Civil Code observes this permission.

The abandonment of specific time requirements is mainly based on two grounds. First, it is not in accordance with the common core in Europe, and

⁸⁴ Principles, Introduction: Divorce in Europe, p.13.

⁸⁵ See fn 56, Johnson v. Ireland.

second, it would not protect the weaker party who wishes to break with his or her spouse as soon as possible.⁸⁶

Furthermore, this Principle is also intended to favour an undemanding procedure for consensual divorce.⁸⁷ This means, that no impediments regarding both the duration of marriage and any separation periods⁸⁸ should be established. The CEFL takes the view, that *dédramatisation* of divorce proceedings can only be achieved if the parties are not hindered by detailed periods, without specific reasons they must be adhered to.

Adversely, concerning the divorce without consent, there seems to be no justification for imposing a minimum duration of marriage as independent requirement.⁸⁹

The legal position in Germany is different. Generally, one cannot deny that no specifically minimum of time to obtain a divorce is mentioned.⁹⁰ But, according to § 1565 II German Civil Code, a minimum period of separation of one year is required, which has the effect of requiring a minimum duration of marriage.

Consequently, already Principle 1:1 paragraph 2 signifies an immense difference in respect of the German divorce system and shall keep in mind for the further assessment.

4.2.1.2 Procedure of divorce

According to Principle 1:2 paragraph 1, law should determine the divorce procedure. This formulation is vague. The only useable information out of this Principle is the emphasis on divorce as a secular matter, which should be governed by a legal process. Procedural rules are not determined additionally, but fall within the competence of the national legislator.⁹¹

Paragraph 2 states that divorce should be granted by a competent authority. The competent authority can be either a judicial or an administrative body that is designated by the State.

In respect of the common core, it is unusual to grant a divorce other than via a judicial process.⁹² Nevertheless, the evaluation of the questionnaires shows that the legal practice in Member States, which insist on a Court process to obtain a divorce, may often be quasi-administrative, namely, where a judge effectively rubber-stamps a consensual agreement.⁹³

That is why the CEFL allows administrative bodies in each case of a consensual divorce and, thus, adopts the practice of some Member States like Denmark and Norway.

Under German law, a valid marriage can only be dissolved by judicial decision upon the petition of one or both of the spouses according to §§ 1561, 1564 German Civil Code. The jurisdiction lies with special family

⁸⁶ Principles, Comment 1:1, p. 19.

⁸⁷ Ibid, 19.

⁸⁸ See Principle 1:4.

⁸⁹ See Principle 1:8.

⁹⁰ German Report, Q.13.

⁹¹ Principles, Comment, 1:2, p.23.

⁹² Ibid, 23.

⁹³ Ibid, 23.

Courts, which comprise almost all family law matters.⁹⁴ The procedural rules differ dependent on whether divorce is by consent or not.⁹⁵

However, the outcome of divorce remains the same. The marriage is dissolved as soon as the order becomes final. The effect is *ex nunc* and the order cannot be appealed.⁹⁶

The transfer of genuine Court competences on administrative bodies in Germany would be difficult to implement. Several arguments strike against this assignment. First, Article 6 German Basic law is to mention that clarifies the special protection of marriage and the family by the state. It constitutes a fundamental norm, i.e. an imperative value, which is to be observed in the entire area of private and public law.

The implications are two-fold: on the one hand, it means, that the state is prohibited from harming and impairing the institutions on marriage and family. On the other hand, the state is under a positive obligation to support both by appropriate means and the active protection from the impairment by other forces.⁹⁷ An assigned authority other than Courts could not be able to rule with this binding mandate.

Additionally, German Courts do not only declare a divorce regardless of its nature. They have to assess every single consensual or non-consensual divorce by keeping Article 6 German Basic law as binding mandate always in mind. The transfer of competences would lead to an amalgamation of competences, which would be contradictory to the German administration of Courts.

Accordingly, the recommended transfer of competences in cases of consensual divorces seems to be incompatible with German family law and in particular with Article 6 of German basic law.

4.2.1.3 Types of divorce

Principle 1:3 deals with different types of divorce and distinguishes only between a divorce with consent and one without. Neither fault nor irretrievable breakdown of the marriage is a ground for divorce under this Principle.

Once the conditions of one of the two categories are fulfilled the divorce should be granted. The reduction of divorce to only two categories is intended to reach a greater simplification. The CEFL states that listing of enumerable situations is contra-productive, because all described circumstances are rather questions of conditions for divorce or their consequences than a justification for a multitude of divorce forms.⁹⁸

Furthermore, a distinction between a marriage with or without children seems not appropriate in the view of the CEFL since the existence of children is not an indicator of the termination of the marriage, but an impact on the consequences of the divorce.⁹⁹

⁹⁴ § 23 Nr.2-10 GVG; § 621 I S.1 ZPO.

⁹⁵ Schwab, Familienrecht, § 36, No. 293 ff.

⁹⁶ German Report, Q.10.

⁹⁷ Gottwald/Schwab/Büttner, Family&Succession Law in Germany, p. 43.

⁹⁸ Principles, Comment 1:3, p.25

⁹⁹ Ibid, 26.

German law of divorce adheres to the following general structure.¹⁰⁰ Basically, the German legal system accepts only one ground for divorce. It follows the principle of irretrievable marital breakdown. According to the definition provided in § 1565 I German Civil Code a marriage fails if the marital community of the spouses no longer exists and there is no expectation that the spouses will restore it. This breakdown does not relate mainly to the cohabitation of the spouses, but refers to an inner attitude.¹⁰¹ Therefore, the Court has to analyse the state of the marriage alongside giving a prediction about the chances of reconciliation. To avoid the Court prying extensively into the inner workings of the family¹⁰², the Code provides in § 1566 two conclusive presumptions for the failure of marriage. Finally, the principle of irretrievable breakdown is limited by three expectations in § 1565 II respective § 1568 German Civil Code.

In respect of a consensual divorce, § 1566 I German Civil Code is decisive. According to this provision, the failure of the marriage is presumed if the spouses have been separated for one year and both spouses petition for divorce or the opposing spouse consents to the divorce.

Consequently, the German law of divorce appears as a combination of irretrievable breakdown and divorce by consent. Better saying, this system forms a sub-group of irretrievable breakdown.¹⁰³

Admittedly, divorce by consent is not recognized as a sole ground of divorce by wording and systematic of the German civil code, although this is an ongoing debate between academics.¹⁰⁴

4.2.2 Provisional result

The abstract comparison of general principles shows remarkable differences to the system of divorce according to German law. This makes a further and deeper investigation necessary, whether this result can be maintained or whether these appearances are deceptive.

4.3 Special instruments regarding divorce

Due to the distinction of the Principles between a divorce with consent and one without, it seems appropriate to follow this characteristic for the comparison.

¹⁰⁰ German Report, Q.4, but see also the supplemented scheme.

¹⁰¹ BGHZ 72,107; Schwab, Handbuch des Scheidungsrechts, Part II, Nr.11-41.

¹⁰² BGH FamRZ, 79, 285; Schwab, Familienrecht, § 37, p.143.

¹⁰³ Schwab, Handbuch des Scheidungsrechts, Part II, No.74.

¹⁰⁴ Some academics argue that the legal institute of a conclusive presumption is formally a detour, but provides substantively a second ground for divorce. See: Dethloff, Die einverständliche Scheidung, p. 139; Habscheid, Festschrift Bosch, p.365.

4.3.1 Divorce by mutual consent

4.3.1.1 Mutual consent according to Principle 1:4

Principle 1:4 clarifies Principle 1:3 and determines mutual consent as one autonomous ground for divorce. The growing recognition of the freedom of the spouses to terminate their marriage and being encouraged to find a solution themselves as to the consequence of divorce are arguments for the establishments of a separate type of divorce.¹⁰⁵

Mutual consent is therefore not treated as irretrievable breakdown. Divorce should be permitted only for the reason of a mutual consent; no other reasons are necessary. Furthermore, this principle abstains from a separation period. Indeed, there are some reasons, which speak for a separation period. First, it can be seen as a way to realize that the mutual consent is for real and avoids any hasty decisions. Second, it could provide as a measure for protecting the family and the institution of the marriage in general and the weaker party respective children in particular.

But, this principle favours predominately the mutual consent. This means, the consensus is to of overriding importance. A separation period does not fit with the free and clear will of the corresponding spouses for any time at all.

4.3.1.1.1 Reflection period

Principle 1:5 is particularly established to take into account the various arguments that are put forward for a cooling-off period.

Thus, it provides an exemption of the general provision 1:4 and shows that a quick divorce by mutual consent should not be permitted if the spouses have not agreed upon circumstances according to Principle 1:6 or if they have children¹⁰⁶ less than 16 years.

From the Comment, it is obvious that the CEFL wants to facilitate the spouses agreement on the consequences of the divorce by setting up the reflection period of different lengths. A period of three respective sixth months does not constitute a major obstacle, but makes the divorce by mutual consent even more attractive by forcing the spouses to agree upon all consequences.¹⁰⁷

4.3.1.1.2 Content and form of the agreements

The Principles deal with the consent in respect of divorce and the consequences thereof as two separate issues. Whereas Principle 1:4 only deals with the consent, Principle 1.5 provides conditions for the agreement regarding the consequences.

The Comment does not show any conditions for the consent agreement. In fact, in cases of a joint application the expression of an initial consent is

¹⁰⁵ Principles, Comment 1:5, p.35.

¹⁰⁶ A definition of children is not provided, but the notion of children is therefore a national concept; Germany: BVerfGE 64, S.97, NJW 64, p.1563.

¹⁰⁷ Principles, Comment 1:5,p.35.

sufficient.¹⁰⁸ A positive act should be necessary in cases of consent by an application of one spouse with the acceptance of another spouse whereas the not contesting of the application for the dissolution of the marriage is not sufficient.¹⁰⁹

The terminology, which is used concerning the consequence agreement, is used in a very broad sense, and whether or not this agreement is binding is a question of national law.¹¹⁰ However, it should contain an agreement concerning their parental responsibility¹¹¹ where necessary¹¹², division or reallocation of property¹¹³, and the spousal maintenance¹¹⁴. Finally, it should be in written form.

4.3.1.1.3 Determination of the consequences

Principle 1:7 paragraph 1 states the determination of the consequences for the children as mentioned in Principle 1:6 (c) and (d) by the competent authority. Thereby, it should consider the agreement in so far as it is consistent with the best interest for the child. Nevertheless, the decision lies within the competent authority. This competence shows up odd since parental responsibility is normally decided by an autonomous procedure as long as the parents did not agree on a joint procedure.

Regarding Paragraph 2 the authority should at least scrutinize the agreement with regard to property and spousal maintenance. The question to what extend scrutiny is to be restricted is a matter of balancing values and interests. Hereby, easy and public access to divorce, the autonomy of the spouse and the protection of the weakest spouse should be considered.¹¹⁵

According to Paragraph 3, the competent authority should determine the consequences of the divorce as in a case of non-consensual divorce.

This means, that even where a spouse cannot agree or can only partially agree on the consequences of the divorce the possibility for a consensual divorce is open. Thus, it widens the scope for a consensual divorce and shows the fully preference of the CEFL to the consensual divorce.

At any rate, scrutiny can also frustrate consensual divorce and therefore the belief that spouses are adults and that nobody can tell them what their best interests are is predominately.¹¹⁶

Finally, this Principle attracts attention with respect to the Brussels Regulations. The determination of consequences according to Principle 1:7 could be incompatible with the Brussels Regulations since the Courts are

¹⁰⁸ Principles, Comment 1 :4, p.30.

¹⁰⁹ Ibid, 30.

¹¹⁰ See the terminology „should be agreed“.

¹¹¹ The expression has been chosen for two reasons: 1) this is the modern concept used (Reg.2201/2003; Reg.1347/2000); 2) the notion is wide enough to cover the several meaning present in the national systems and in particular notions, custody, residence and contact.

¹¹² In many Jurisdictions certain aspects of parental responsibility remains the same after divorce.

¹¹³ The national systems very often have different views on property issues; therefore, the Principles do not give any details and can be defined in a broad or a strict sense.

¹¹⁴ The spouses are free to decide whether one of them will have to pay maintenance.

¹¹⁵ Principles, Comment 1:7, p. 49.

¹¹⁶ Ibid, p. 49.

not empowered to rule in matters, which have arisen with the divorce without any agreement¹¹⁷ made by the spouses.

4.3.1.2 Mutual consent according to German law

As assessed above, mutual consent is not explicitly recognized as a sole ground for divorce in German law. Divorce is only based on the ground of irretrievable breakdown. Nevertheless, the consensus between the spouses plays a specific role within the German system, which makes it necessary to investigate if the dogmatic classification complies with the legal practice.

4.3.1.2.1 § 1566 I German Civil Code

§1566 I German Civil Code regards consent only as proof for or indicator that the marriage has irretrievably broken down according to § 1565 I German Civil Code.

Moreover, the spouses must live separately for one year. They live in a state of separation when household community between them ends and one of the spouses manifestly refuses to restore it because he or she rejects conjugal community.¹¹⁸ Thus, the legal term of separation is to affirm if there is a physical separation at will and the spouses intend to reject the conjugal community.¹¹⁹

As a result, the failure of the marriage is presumed whenever mutual consent and factual separation of one year are on hand.

Procedural-related, a consensual divorce may be sought in a twofold way, either both spouses apply jointly for divorce order, or the spouses joins the application which has already been made by the other party through an expressive declaration.¹²⁰

But it is of importance, that both ways cannot be seen as an act of disposal by the spouses. The consensus is created only as a matter of fact, rather than justifying the divorce.

This construction is only reasonable with respect of Article 6 German Basic law. It puts the state under the positive obligation to protect the marriage as legal institution.¹²¹ The contractual disposition by the spouses would be contrary to the function of Article 6 German Basic Law.

Consensual divorce within German law according to §§1565I, 1566 I German Civil Code is even more hampered by the additional condition of § 630 ZPO. An application for a divorce will only be successful if the spouses have agreed on maintenance in relation to each other and their children as well as on the family home and any household effects.¹²² Moreover, a declaration by the spouses is needed in which they declare not to seek court orders relating to parental care and contact because they have agreed on the topics or that such applications will be made jointly.¹²³ This agreement

¹¹⁷ See e.g. Article 23 Brussels I, Art. 12 Brussels II Regulation.

¹¹⁸ See § 1567 German Civil Code.

¹¹⁹ Gernhuber/Coster-Waltjen, Lehrbuch des Familienrechts, § 27 VII.

¹²⁰ OLG Stuttgart NJW 79, 662; OLG Zweibrücken FamRZ 90, 59.

¹²¹ Gottwald/Schwab/Büttner, Family&Succession Law in Germany, p.43.

¹²² German Report, Q 19, p.16.

¹²³ German Report, Q 19, p.16.

relating to the effects of a marriage will be scrutinized by the Family law court¹²⁴ and will not be accepted if it is evidently invalid according to § 630 II ZPO. Thus, the agreement is a second restriction on the spousal authority to dispose on their marriage.

4.3.1.2.2 § 1565 I German Civil Code

A consensual divorce is also possible according to § 1565 I German Civil Code as such. The fact, that § 1565 I German Civil Code is the basic provision for every divorce cannot be valued as suspension in respect of a consensual divorce, as long as the conditions provided by § 1565 I are set.¹²⁵ Consequently, it must be proved whether the marriage has failed, which means that the marital community no longer exists.

As described above, the Family Court must determine the failure. Herby, the spouses carries out the burden of proof.¹²⁶ This is a difficulty in contrast to the consensual divorce according to §§ 1565 I, 1566 I German Civil Code, which is based on a conclusive presumption.

However, a relief of divorce could be reached, if § 1565 I German Civil Code does not call for the factual separation period of one year as § 1566 I does. Actually, the factual separation period can be dismissed by § 1565 II German Civil Code, if this provision is applicable for consensual divorces pursuant to § 1565 I.

According to § 1565 II German Civil Code, the marriage may only be dissolved if the continuation of the marriage would result in unreasonable hardship to the petitioner owing to causes attributable to the other spouse.¹²⁷

It is interpreted predominately as obstacle to reach a divorce. Intended purpose is the guarantee of marriage as institution in respect of Article 6 German Basic Law. Overhasty decisions should be evaded.

The blocking period of § 1565 II German Civil Code therefore must also be applicable in cases of consensual divorces. This is even more consequent with view of the preparatory work, which attempts to avoid easy-reached consensual divorces by applying only § 1565 I German Civil Code.¹²⁸

4.3.1.2.3 Legal practice

Despite the fact that consensual divorce is not recognized solely within German family law, the assessment shows that the system provides actually two possibilities to achieve a consensual divorce. In legal terms and according to prevailing case law, both possibilities do not support the consensual divorce as such, and impose a heavy burden of proof.

But, the legal practice differs from the dogmatic construction. Nowadays, a divorce according to § 1565 I German Civil Code can be reached even without analysing the failure of the marriage. Here, the consensus between

¹²⁴ In general, the Court is not authorized to scrutinize any agreements which the spouses may have reached, exception: parental care and equalisation of accrued gains.

¹²⁵ OLG Köln, FamRZ 78, 25; Schwab FamRZ 76, 491.

¹²⁶ Dethloff, Die einverständliche Scheidung, p. 128.

¹²⁷ German Report, Q.4, p.4.

¹²⁸ Dethloff, Die einverständliche Scheidung, p. 129.

the spouses leads practically to the presumptive conclusion that is according to law only favoured in §1566 I.

This means, the only difference remains with the agreement relating to effects of a marriage, because a divorce according to § 1565 I German Civil Code includes the freedom, but not the bondage to an agreement relating to the effects of a marriage. In this respect, the willingness to apply § 1565 I German Civil Code is much higher than §1566 I German Civil Code.

Thus, to avoid this difference, within the legal practice an unrestricted competence for the spouses to dispose about divorce has emerged.¹²⁹ The only matter of facts to achieve this divorce *praeter legem* is the consensus between the spouses.¹³⁰ Often, this involves an undemanding procedure and a decline of costs.¹³¹

4.3.1.3 Conclusion

The German legal system regarding mutual consent differs from the proposed Principles by the CEFL. Consensual divorce serves first priority whereas the German legal system tries to avoid any acts of disposal with respect of the divorce as such. Even, when the legal practice in Germany shows the necessity and possibility of accepting consensus of the spouses as sole ground of divorce and, thus, justifies the decision of the CEFL, a systematic change is due to Article 6 German Basic Law implausible.

4.3.2 Divorce without consent

4.3.2.1 Divorce without consent according to Principle 1:8

In cases of divorce without consent, divorce should be permitted if the spouses lived factual separated for one year.¹³²

The elimination of references to fault or irretrievable breakdown avoids any undesirable investigation into the state marriage by the competent authority.¹³³ In particular, with respect of irretrievable breakdown the Principles embrace a better law rather than the common core approach.

The separation period of one-year is recommended because it would provide a sufficiently length from which it can be reasonably deduced that the marriage has no future. The legal term of factual separation is defined no further, but it contains the idea that marital life between the spouses must have ended, or one spouse believes that the marriage has broken down.¹³⁴ So, in general, if the criterion of Principle 1:8 is satisfied, divorce should be granted regardless of its circumstances.

¹²⁹ Müller-Alten, Ehescheidung und Scheidungsverträge, S.51f.; Dethloff, Die einverständliche Scheidung, p.139.

¹³⁰ Nowadays, 90 % of consensual agreements are accomplished according to § 1565 I German Civil Code instead of § 1566 I German Civil Code.

¹³¹ Dethloff, Die einverständliche Scheidung, p.141.

¹³² The model of Scandinavia is contrary and does not require a reflection period.

¹³³ Principles, Comment 1:7, p.55.

¹³⁴ Ibid, 55; it is neither necessary for the spouses to live in separate dwellings, nor means living in separate dwellings the end of marital life.

4.3.2.1.1 Exceptional hardship

If the spouses have not been factually separated for one year, the competent authority may grant the divorce in cases of exceptional hardship. The CEFL does not see any reasons to opt for a list of facts, because the comparative overview shows that the Member States interpret hardship clauses not very strictly by focussing only on several optional cases.¹³⁵

But, in any case, the hardship should be exceptional. This means only cases, which render the continuation of the marriage unbearable, should be taken into account. What is decisive is the effect upon the petitioner.

4.3.2.1.2 Determination of the consequences

In addition, the provisions about non-consensual divorce deal with the determination of the consequences. Principle 1:10 provides for the competent authority to determine both consequences for the children and the spouses, and economic consequences. It provides only some guidelines, and recognizes in the same way as Principle 1:7 for consensual divorces the great diversity of national solutions.

Paragraph 1 follows the same wording as Principle 1:7. The term “economic consequences” mentioned in paragraph 2 is broad and includes the division or reallocation of property and spousal maintenance.¹³⁶ Other economic consequences are the adjustment of pension rights and the matrimonial home. But, it is up to national law to decide whether a regulation of these issues already occurs on the occasion of divorce proceedings.¹³⁷

Furthermore, both paragraphs relate to any admissible agreement made between the spouses, which is to be taken into account from the competent authority. Any agreements can be helpful with respect of the consequences at stake, the content of the agreement and with respect of the date when the agreement is made.¹³⁸

Consequently, even in cases of non-consensual divorce, any autonomous act should be considered to determine as often as possible in the interest of the spouses.

4.3.2.2 Divorce without consent according to German law

As seen above, the German law system only recognizes the irretrievable breakdown as ground for a divorce. A distinction between a consensual and a contested divorce in this respect is not made.

But, not only consensus between the spouses, but also contested divorce plays its role within the structure of family law.

Starting point is again § 1565 I German Civil Code. A Marriage fails if the marital community of the spouses no longer exists and there can be no expectation that the spouses will restore it. The failure must be expressly declared by the Courts, which means that the Court must be convinced that

¹³⁵ Principles, Comment 1:9, p.58.

¹³⁶ See Principle 1:6(c), (d) and Principle 1:7 (2), (3).

¹³⁷ Principles, Comment 1:10, p.65.

¹³⁸ Ibid, 65.

the actual marriage has failed. Generally, this involves also a factual time of separation for at least one year.¹³⁹

Factual separation in this sense is to be defined according to § 1567 German Civil Code. Here, the separation has to be intended by at least one of the spouses.¹⁴⁰ Involuntary separation will not suffice, except where an intention is manifest from other circumstances.

Moreover, § 1566 II German Civil Code provides an irrebutable presumption of a breakdown, whenever the spouses are separated for three years.¹⁴¹

4.3.2.2.1 Exceptional hardship

The German legal system provides three so-called hardship-clauses. Normally, a divorce is only possible where the spouses have been separated for at least one year. If the spouses have been separated for less than one year, the marriage may only be dissolved if the continuation of the marriage would result in unreasonable hardship to the petitioner owing to causes attributable to the other spouses.

Among such factors, which have been recognized by the Courts, major marital offences play a significant role. This means fault may come into play as well.¹⁴² In particular, § 1565 II German Civil Code is directed against basic values of human interaction and respect, misdemeanour, severe verbal abuse and excessive use of alcohol.¹⁴³ The approach of marital fidelity does not confirm a clear line until now.¹⁴⁴

Conversely, the German Civil Code provides also two hardship-clauses, which prevent a divorce from being awarded at all. Spirit and purpose of the law is to maintain a failed marriage in respect to its social function.¹⁴⁵ According to § 1568 first alternative German Civil Code, a marriage shall not be severed also when it has failed, if and as long as the maintenance of the marriage is a necessary exception for special reasons in the interest of minor children arisen of the marriage.

According to the second alternative, due to the interest of the petitioner circumstances must appear that justify an exception. It does not prevent a divorce for all time, as a new application can be made whenever circumstances have been changed.¹⁴⁶

In respect of the practical value of these provisions, it is to say that the exceptions are not absolute, but they do not play a significant role in

¹³⁹ See reverse § 1565 II German Civil Code.

¹⁴⁰ German Report, Q. 16 (b), p.15.

¹⁴¹ German Report, Q.4, p.4.

¹⁴² So, one may say, that within the non-fault based divorce the idea of fault is still of some relevance, see German Report, Q.12, p.10.

¹⁴³ E.g. KG Berlin, FamRZ 85, 1066; OLG Frankfurt/Main FamRZ 78, 115; OLG Stuttgart FamRZ 77, 807.

¹⁴⁴ Indeed, most Courts agree, in particular, when it is obvious that the offending spouse has no further intention to continue the marriage; see Schwab, Handbuch des Scheidungsrechts, Part II No.61-65.

¹⁴⁵ Schwab, Familienrecht, § 37, p.146.

¹⁴⁶ German Report, Q.12, p. 13.

practice.¹⁴⁷ In either case, the Court is only allowed to recognize any exceptional circumstances if they are brought forward by the spouses.¹⁴⁸

4.3.2.2 Determination of consequences

Generally, consequences out of a divorce are large. Its provisions are more or less randomly distributed within the German Civil code.

But, many of them are based on a joint procedure with the divorce. § 623 ZPO tries to avoid an accumulation of several Court proceedings and their potential negative and disruptive effects on the spouses¹⁴⁹, and stipulates focussing only on main consequences. Parental responsibility for instance, is always a joint procedure whereas agreements on residence, contact rights and non-residential parents are separated. Also, maintenance after and before divorce are objects of the joint procedure. Difficult, to assess are property issues, which can be part of divorce proceedings or not. The statutory matrimonial property regime¹⁵⁰ for example is part of the joint procedure. In respect of pension sharing, there are special Regulations for the adjustment of social security rights. As a rule the Court will institute proceedings relating to the equalisation of accrued gains ex officio (§ 623 I s.3 ZPO).

4.3.2.3 Conclusion

The sole ground of irretrievable breakdown within the German law system leads to differences again. The CEFL creates Principles that only distinguish between consensual and contested divorce. In cases of contested divorce, the Principles provide a factual separation period of one year. The same period must be upheld at least under the German system. It is one basic condition for each divorce order.

However, the main difference compared to the Principles might be the further investigation into the state of marriage in order to declare that the marriage has failed.

Once again, the Principles respect the autonomous will of the spouses and avoid prying into the state of marriage from the beginning. The German system provides the conclusive presumption, but in case of a contested divorce, it comes into play after the long period of three years of factual separation.

Regarding the hardship clause, it is to say, that the Principles follow up the legal practice. The fact, that national Courts investigate marriage on individual circumstances shows, that the optional list of hardships, does not seem to be appropriate and useful.

Finally, the Principle concerning the determination of consequences does not provide any basis for a comparison due to the fact, that its content

¹⁴⁷ Schwab, Familienrecht, § 37, p. 148.

¹⁴⁸ § 616 III ZPO.

¹⁴⁹ German Report, Q.19, p.16.

¹⁵⁰ The statutory matrimonial property regime is despite its misleading designation of “community of surplus”, rather a separation of property than a community, which provides an equalization of property after the marriage comes to an end (§§ 1363 ff. German Civil Code).

provides only guidelines for the national legislators whereas the exact termination falls to them.

4.4 Differences and similarities regarding general Principles of maintenance

4.4.1 Maintenance

Post-marital maintenance is an economic consequence of divorce and a reaction to the situation of the ex-spouses. The existence and the extent of a maintenance claim depends of an assessment of the competent authority as to whether and to what extent the creditor spouse deserves to be protected.¹⁵¹

4.4.1.1 Relationship between divorce and maintenance

The first Principle of the second part deals with the relationship between maintenance and divorce. It reflects the common core and provides for a single maintenance regime regardless of the type of divorce. This is also consistent in the light of the divorce Principles, which only decide between consensual or non-consensual divorce and under which fault or marital offences are irrelevant.

Within the German system, fault or possible marital offences are no conditions for granting a divorce order either. Instead, the ground for divorce remains the irretrievable breakdown of the marriage, while special causes attributable to the other spouse only facilitate the inquiry into the state of marriage as the German Federal Court¹⁵² pointed out.

Nevertheless, the consequences are in principle always the same.¹⁵³ There is only one single maintenance regime. The behaviour of the debtor may only have an influence insofar as it created reasonable expectations on the part of the claimant, which were later not fulfilled.¹⁵⁴

As a result, the German law system is parallel to the general Principle by the CEFL.

4.4.1.2 Self-sufficiency Principle

In general, each spouse should provide for his or her own support after divorce. By articulating this self-sufficiency rule, Principle 2:2 mirrors the de-facto position, which was surveyed in almost all jurisdictions, but not expressly fixed everywhere.¹⁵⁵

On the one hand, the Principle reflects the modern tendency and promotes the independence of spouses following their divorce. On the other hand, the CEFL is also aware of the fact that the reality of the spouses position must be taken into consideration as well. This means, the Principle must be read

¹⁵¹ Principles, Introduction Maintenance, p. 69.

¹⁵² BGH FamRZ 81, 127,129.

¹⁵³ Schwab, Familienrecht, p.160.

¹⁵⁴ German Report, Q.65, p.30.

¹⁵⁵ Principles, Comment 2:2, p.77.

with other Principles and must be exceptional whenever the spouse is unable to provide completely or partly for his or her own needs or whenever it would lead to a marital detriment.¹⁵⁶

In Germany, a statutorily self-sufficiency Principle is spelt out in § 1569 and § 1577 German Civil Code.

But, if one spouse is unable to provide for his or her maintenance, he or she is entitled to claim maintenance from the other spouse. The basis for this obligation is the rule of either the lasting “marriage created need” or the “post-marital solidarity” of the spouses, which is widely accepted by the Courts and the legal doctrine.¹⁵⁷ Obviously, both rules are not only equivalent, but can also operate contradictory.¹⁵⁸

However, crucial will be the balance of both within individual circumstances in respect of the protection of the family according to Article 6 German Basic law.

4.4.1.3 Provisional result

On first sights, the German provisions are in accordance with the compiled Principles. Even the Principle of self-sufficiency is already a statute within the German Civil Code.

But on second thoughts, the favoured independence of the spouses after divorce by the CEFL, can clash with the fundamental rule of post-marital solidarity recognized within the German Civil Code. Nevertheless, the CEFL earmarks exceptions of self-sufficiency as well, so, it remains to be seen, how it will explain this contradiction.

4.4.2 Conditions for a maintenance claim

4.4.2.1 Conditions for a maintenance claim according to the Principles

Starting-point for assessing the existence of a maintenance obligation is the degree of self-sufficiency. If one of the spouses is not able to maintain his or her needs, the following Principles should be taken into consideration. According to Principle 2:3, maintenance after divorce should be dependent upon the creditor spouse having insufficient resources to meet his or her needs and the debtor spouse’s ability to satisfy those needs. Thus, this Principle provides clear, rational and simple conditions upon maintenance should be fundamentally based.

In determining the creditor spouse’s needs and the debtors spouse’s ability to satisfy such needs, special account should be taken of each spouse’s income and their assets.¹⁵⁹ Any financial resources are income, which is to be understood in a broad sense from all available sources and includes both capital assets and property.¹⁶⁰

¹⁵⁶ Principles, Comment 2:2, p.78.

¹⁵⁷ BVerfGE 57, 361ff; BVerfGE 92, FamRZ 92, 1283; Schwab, Handbuch des Familienrechts, Part IV, No.6ff.

¹⁵⁸ Palandt/ Brudermüller, Bürgerliches Gesetzbuch, § 1569, No. 4.

¹⁵⁹ Principles, Comment 2:3, p.80.

¹⁶⁰ Ibid, 80.

On the contrary, needs contain any reasonable living expense. A more precise list of factors, which can affect the needs and the ability to satisfy such needs, is set out in Principle 2:4.¹⁶¹ This list is only enumerative and determines factors like employment ability, age, health, care of children, duration of the marriage and the standard of living. Concerning the last factor, it is to say that a certain standard of living enjoyed by the spouses first serves as an indicator of their economic circumstances. However, one should keep in mind that it is often unrealistic to maintain the same standard of living.¹⁶²

Over and above, the competent authority may consider all other important, prevailing circumstances, since this list is not exhaustive.¹⁶³

4.4.2.1.1 Method of maintenance payment

Additionally, the Principles deal with the method of paying maintenance between former spouses. In this respect, Principle 2:5 provides some guidelines, because most of the legal systems do not have written rules according to the CEFL.¹⁶⁴

The first paragraph establishes that maintenance should be paid at regular intervals and in advance. This corresponds to the common core within Europe.

The second paragraph recommends that the competent authority may order a lump sum payment upon request of either or both spouses taking into account the circumstances of the case. Lump sum payments are possible in most European jurisdictions, but paragraph two goes even beyond the common core as far as it established that either party could request it.¹⁶⁵

This means more precisely that even the debtor spouse is entitled to ask the Court to approve such a payment. According to the CEFL, this is reasonable because not only the wishes and circumstances of the creditor spouse merit respect, but also those of the debtor spouse who by requesting a lump sum payment may wish to put an end to the relationship with his or her former spouse. Consequently, the CEFL favours the clean-break doctrine.

4.4.2.1.2 Exceptional hardship

Principle 2:6 recommends that in cases of exceptional hardship to the debtor spouse, the competent authority may deny, limit or terminate maintenance because of the creditor spouse's conduct. This means that not every form of misconduct during marriage and after divorce can be taken into account, but only extreme cases like domestic violence or financial conduct.¹⁶⁶ Due to the relaxed interpretation of hardship-clauses by the national states, the CEFL sees no reasons to opt for a limited list of factors.

¹⁶¹ Principles, Comment 2:4, p.82.

¹⁶² Ibid, 94.

¹⁶³ Ibid, 82.

¹⁶⁴ Ibid, 84.

¹⁶⁵ Principles, Comment 2:5, p.99.

¹⁶⁶ Principles, Comment 2:6, p.103.

4.4.2.2 Conditions for a maintenance claim according to German law

Generally, two essential conditions must be fulfilled in order to form a basis for a successful maintenance claim.

First, there must be a claimant's lack of own means according to § 1577 German Civil Code, which requires that the claimant is not able to maintain himself or herself from his or her own income and assets, irrespective of the original assets¹⁶⁷. Second, it is also necessary that the debtor is able to pay maintenance.

On condition that the above-mentioned general circumstances are fulfilled, one of the legal provisions in §§ 1570 to 1576 German Civil Code must be satisfied. In these provisions, the German Civil Code lists a number of situations that justify the granting of maintenance whereas each of them provides an independent basis for maintenance.¹⁶⁸ In any case, the lack of means must exist during the period for which maintenance is alleged.¹⁶⁹ However, maintenance can be claimed *inter alia* in cases of childcare¹⁷⁰, age, sickness or infirmity.

In respect of employment, it is to say, that maintenance can be asserted until appropriate employment is found. Even if the income from a suitable employment is not sufficient for full support, the claimant can demand the difference between his or her income and the full maintenance according to § 1573 II German Civil Code.

Finally, maintenance can also be claimed on the ground of equity according to § 1576 German Civil Code, but serious reasons may not be taken into account merely because they result in the failure of the marriage.¹⁷¹ This means that the provision is generally of a subsidiary nature and forms a catchall element.

The amount of the maintenance awarded is determined according to the so-called "marital circumstances". "Marital circumstances" are closely related to the standard of living during the marriage and are determined rather by the actual and available income of the spouses¹⁷² as the spending habits of the divorced couple. There is no specific model for calculating maintenance prescribed by law and no general minimum amount of money.¹⁷³ Instead, guidelines and tables are established by different Courts, which provide a standardised system of calculation.¹⁷⁴

¹⁶⁷ In respect of need as such, it is irrelevant whether the lack of means has been caused by the marriage or not.

¹⁶⁸ Schwab, Handbuch des Scheidungsrechts, Part IV, No.6.

¹⁶⁹ German Report, Q. 66, p.31.

¹⁷⁰ If there is only one child the Federal Supreme Court recognized that the caring spouse is not obliged to work before the children start school, see BGH, FamRZ 95, 291.

¹⁷¹ German Report, Q. 64, p.29.

¹⁷² BGH FamRZ 92, 1045.

¹⁷³ BGH FamRZ 95, 346.

¹⁷⁴ E.g. so-called Düsseldorf table, which is also accepted by the Federal Supreme Court; <http://www.olg-duesseldorf.nrw.de/service/ddorftab/ddorftab3/intro.htm>. (online 05.30.05).

4.4.2.2.1 Method of maintenance payment

Generally, maintenance after divorce is paid in periodical payments each month in advance according to § 1585 I German Civil Code since it reflects the way in which debtors usually collect their income¹⁷⁵. In cases of exceptional need maintenance may be paid when the need arises according to § 1585 b I, III German Civil Code.

The Code does not describe a lump sum payment. But, it can be imposed by a Court order. The claimant may request a capital settlement instead of periodical payment, whenever there is a serious reason for doing so, and the debtor is not inequitably burdened.¹⁷⁶

In legal practice, lump sum payments are relatively rare and there must be a serious and extraordinary reason for it.¹⁷⁷ In any case, the debtor is not entitled to make a lump sum payment against the will of the person entitled to maintenance.

4.4.2.2.2 Exceptional hardship

The existence of the maintenance obligation is independent of any form of behaviour. However, according to “the negative hardship clause” of § 1579 German Civil Code maintenance can be denied, reduced or granted only for a limited period if it would be grossly unfair to claim maintenance.¹⁷⁸

To determine when gross inequity is to be assumed § 1579 German Civil Code lists six specific grounds and one general clause. The payment of maintenance may be inequitable *inter alia* if the marriage was of short duration¹⁷⁹, the person entitled is guilty of a crime, the claimant wilfully caused his own destitution or disregarded important property assets of the debtor, serious misconduct¹⁸⁰ or if there are some other serious grounds that are as grave as the grounds mentioned above. To quote an example if the claimant cohabits with a new partner after divorce and they are not entered into a new marriage in order to safeguard the maintenance claim.¹⁸¹

The legal practice shows that the mere fulfilment of one of the clauses is not sufficient for its application as such. In fact, only the valuation of individual circumstances confirms whether and to what extent a maintenance claim would be grossly inequitable.¹⁸²

4.4.2.3 Conclusion

Centre for assessing the existence of a maintenance obligation is the degree of self-sufficiency of the creditor. Whenever the claimant lacks of own means and the financial capacity of the debtor spouse is in the affirmative, a maintenance claim is conceivable.

¹⁷⁵ Principles, Comparative overview 2:5, p.96.

¹⁷⁶ German Report, Q. 75, p. 36.

¹⁷⁷ Recognized as serious are e.g., where the claimant wants to establish his or her own business or plans to emigrate.

¹⁷⁸ Schwab, Familienrecht, § 39, p. 176.

¹⁷⁹ Short duration means a marriage for under two or three years.

¹⁸⁰ Serious matrimonial offences.

¹⁸¹ Schwab, Familienrecht, § 39, p.179, BGH FamRZ 89, 487.

¹⁸² Schwab, Familienrecht, § 39, p.177.

The determination of claims for maintenance should be achieved by taken into consideration various above-mentioned circumstances. The comparison shows, that both systems rely on same conditions and even concentrate on almost identical criteria.

Dissimilarities become obvious by fixing the method of maintenance payment. Indeed, both systems require generally a regular payment but, the order of lump sum payment shows differences. First, this order is recognized in German legal practice but neither make Courts constantly use of this legal instrument nor is it prescribed by law.

Second, the debtor is not entitled to make the payment against the will of the former spouse. This reflects the current situation in Germany where the law does not follow the doctrine of the clean-break, but recognizes the spouses continuing responsibility for each other even after divorce. The creditor should rely on the monthly payment in order to organize his or her life.

Finally, the German system recognizes that the post-marital duty often places severe financial restrictions on the *obligee*. Therefore, it establishes a hardship-clause by creating a list of specific grounds. Both, the legal practice in Germany and the catchall element according to § 1579 No.7 German Civil law make obvious that Principle 2:6 follows the tendency by focussing on individual circumstances instead of establishing a whole list of factors.

As a result, the conditions for the attribution of maintenance set up by the CEFL shows differences, but apart from the order of lump sum, they are marginal for the legal practice.

4.5 Special instruments regarding maintenance

Therefore, it is consistent to ask, whether this parallelism can be drawn also with regard to special instruments regarding maintenance. Specific attention should be directed towards the multiplicity of maintenance claims, its termination and the assessment of existing maintenance agreements.

4.5.1 Multiplicity of maintenance claims

Divorce often entails post-marital maintenance and other maintenance obligations at the same time, in particular whenever children are involved. This signifies that rules are necessary according to which the competent authority should give priority to certain maintenance claims.

4.5.1.1 Multiplicity according to the Principles

In Principle 2:7 the CEFL recommends some basic issues with respect of multiplicity of maintenance claims against the debtor spouse. In determining the debtor's spouse ability to satisfy the needs of the creditor spouse, the competent authority should give priority to any maintenance claim of a minor child of the debtor spouse and, further, take into account any obligation of the debtor spouse to maintain a new spouse. Priority in this

sense means that, first, the debtor's spouse financial capacity to satisfy the needs must be given.¹⁸³

With respect to children, the CEFL argues, that a child who has not come into the age of is particularly needy and, therefore, should rank ahead of the claim of a divorced spouse.¹⁸⁴ The notion child has to be defined as in Principle 2:4.

But, the Principle does not state precisely what it understood by a "minor". By all means children who still attend school when reaching the age majority should be treated as minor children.¹⁸⁵ Finally, this Principle relates to both maintenance claims of minor children living with the debtor spouse or not.¹⁸⁶

According to the second part of the Principle, obligations to maintain a new spouse have to be observed, too. The divorced spouse's claim for maintenance should be ranked equally to the maintenance claim of a new spouse whereas the relationship between claims of other relatives is left to national law.¹⁸⁷

4.5.1.2 Multiplicity according to German law

Within German Law, there exists not only several rules about the priority of maintenance claims, but also about the priority of maintenance obligations. Thus, the legal order of priority is complex. Here, it is sufficient to focus only on maintenance claims as far as the content of Principle 2:7 is reaching. Basically, full maintenance of the claimant with the higher priority must be covered first before the lower-ranking claimant can obtain maintenance.¹⁸⁸ This is important in order to provide the creditors confidence in the payment for his or her own support.¹⁸⁹

Generally, under-age children or young persons under 21 years and still at school, the spouses and a divorced spouse are on equal footing according to § 1609 II German Civil Code.

This means between the former respective the new spouse, on the one hand, and the children on the other hand, there is an sameness in rank, whereas the divorced spouse takes precedence over the new spouse according to § 1582 I German Civil Code. This so-called "relative priority" between the spouses leads to contradictory results since equality of rank and priority at the same time is logically impossible.¹⁹⁰

But, the Federal Supreme Court ruled that children have the same rank as the divorced parents with respect to the new spouse of the maintenance debtor.¹⁹¹ Consequently, the priority of the maintenance claims of under-age children and the former spouse prevails. On the contrary, in cases where the child has reached the majority the divorced spouse takes precedence over

¹⁸³ Principles, Comment 2:7, p.109.

¹⁸⁴ Ibid, 110.

¹⁸⁵ Ibid, 110.

¹⁸⁶ Ibid, 110.

¹⁸⁷ Relatives of the debtor and the claim of the creditor spouse and vice versa.

¹⁸⁸ BGH FamRZ 88, 705.

¹⁸⁹ German Report, Q. 91, p.45.

¹⁹⁰ German Report, Q. 93, p.47.

¹⁹¹ BGH BGHZ 88, 104, 158.

the child and the other relatives according to § 1582 II, 1609 II German Civil law.

4.5.1.3 Conclusion

Principle 2:7 covers only some of the cases of multiplicity of claims against the debtor spouse. It focuses mainly on the maintenance claims of children and new spouses. The comparison shows dissimilarities.

First, the CEFL gives priority to the needy minor. Germany provides generally a system where minor children and former spouses are equally ranked. The commentaries by the CEFL explain that the ex-spouse, especially a mother caring for minor children, can also be worthy of special protection. Obviously, the recommended Principle is not exclusive in this context. Nevertheless, it points up again the importance to favour the special needs of children.

With respect to the relationship between former and new spouse, both are equally ranked. Within the German system, the former spouse prevails over the new spouse, which is attributing the post-marriage solidarity. This attitude clashes once more with the opinion of the CEFL, which desires a clean-break between the former spouses.

4.5.2 Termination of maintenance obligation

Both, the CEFL and the German system focus on different approaches concerning the function of post-marital maintenance, it seems appropriate then, to assess them also with respect to the termination of maintenance obligations.

4.5.2.1 Termination according to the Principles

Generally, the competent authority should grant maintenance for a limited period. Deviation is reasonable only in exceptional cases. The limitation in time can be regulated by statute, based on a decision of the competent authority or agreed by the spouses themselves.¹⁹²

Thus, the CEFL takes the view that responsibility is taken by entering into a marriage and implies a duty to contribute to the other party¹⁹³, but it is normally not justified to exist without limits after the end of marital bonds. Besides the limitation in time, Principle 2:9 deals with other reasons for the termination of maintenance obligations.

According to paragraph 1, the obligation should cease, too, if the creditor spouse remarries or establishes a long-time relationship. Principle 2:9 is formulated by using the wording “should cease”, which means that the maintenance can either be terminated *ex lege* or upon request.¹⁹⁴ The increasing number of long-term relationships justifies putting them on the same level with formal relationships.¹⁹⁵

¹⁹² Principles, Comment 2:8, p.114.

¹⁹³ Ibid, 114.

¹⁹⁴ Principles, Comment 2:9, p.123; “upon request”: here the CEFL favours the so-called Swedish model.

¹⁹⁵ Thus, also the problem of creditors intentionally not entering into a marriage or registered partnership in order to sustain the original maintenance claim is solved. Despite

Furthermore, paragraph 2 denies a revival of maintenance claims. It reflects the common core¹⁹⁶ and gives preference to the protection of the debtor spouse for two reasons. First, it creates no responsibility for the break up of the new relationship. Second, he or she may rely on the cessation of the maintenance obligation in order to be free to commit him or herself to other persons and to take up other responsibilities. Finally, the claim of maintenance is considered as personal one, which means in the case of death there is no longer the need of maintenance.

4.5.2.2 Termination according to German law

According to the Federal Supreme Court,¹⁹⁷ maintenance may be awarded lifelong. Therefore, a lifelong obligation is the general rule.¹⁹⁸

The termination of the claim is an exception of the rule. § 1586 I German Civil Codes provides the termination of the maintenance claim upon the claimant's remarriage or entering into a registered partnership. Generally, this termination is final, but, according to § 1586a German Civil Code it can revive if divorced spouse enters into a new marriage and this marriage is dissolved.¹⁹⁹

Furthermore, the obligation to provide maintenance does not even end upon the death of the debtor. § 1586b German Civil Code provides that it passes on to his or her heirs as a liability of the estate. The heir is liable up the amount equal to the compulsory portion that would have paid if there had been no divorce.²⁰⁰

4.5.2.3 Conclusion

This comparison shows again the different notions underlying the recommendations of the CEFL and the German system regarding maintenance. The CEFL favours the doctrine of a clean-break whereas the German system retains the marital responsibility even after divorce. This approach goes a long way up to the death of the debtor and passes on to his or her heirs.

4.5.3 Maintenance agreement

Based on the fact, that marriage is also a private legal institute, spouses should have the opportunity to agree upon certain legal consequences, *inter alia* post-marital maintenance.

4.5.3.1 Maintenance agreement according to the Principles

According to the CEFL, the possible content of the spousal agreement after divorce should be broad. Principle 2:10 provides several adjustable issues

the fact that registered partnerships are not explicitly mentioned, they are to be regarded similar to a marriage and therefore must have the same effect.

¹⁹⁶ Principles, Comparative overview 2:9, p. 121.

¹⁹⁷ BGH NJW 99, 1630.

¹⁹⁸ The need of the claimant and the financial capacity of the debtor presupposed.

¹⁹⁹ Then maintenance can be claimed referring to childcare for instance.

²⁰⁰ German Report, Q. 101.

like the extent, the performance, the duration and the termination of the maintenance obligation as well as the possible renouncement of the claim of maintenance.

Paragraph 2 determines that such an agreement should be in writing in order to guarantee the seriousness of the agreement and the use as evidence.²⁰¹

Moreover, it will enable the competent authority to scrutinize its content and its validity according to paragraph 3. The legal term “validity” has a broad sense. Therefore, in substance, the task is to safeguard the most important interests of the children and of the spouse to whom the agreement may be detrimental.²⁰²

4.5.3.2 Maintenance agreement according to German law

Under German law, the spouses are also free to arrange the financial consequences of their divorces themselves. According to § 1585c German Civil Code the spouses may conclude agreements as to the maintenance obligations for the period after divorce.²⁰³ Neither is a prescribed form intended nor is any approval by the competent Court necessary according to § 1585c German Civil Code.

Nevertheless, any agreement is limited by the ground of inequity (§ 242 German Civil Code) or the infringement of good morals (§ 138 German Civil Code)²⁰⁴, though, e.g. the agreement will be void if it is against public policy or if it exploits the inexperience or the distressed psychological situation of the other party.²⁰⁵

4.5.3.3 Conclusion

Both, the Principles but also the German system provides for a spousal agreement regarding maintenance. The CEFL earmarks the form for the agreement as well. This makes sense under the above-mentioned arguments. Within the German system, the missing conditions for the form of the agreement are sometimes criticized because it does not protect the needy and weaker party.

In respect of the validity, it is noticeable that both refer to the same kind of catalogue. Again, the CEFL ranks the interest of the children very high. The German system measures the validity by resorting on the general principles founded in §§ 138, 242 German Civil Code. *Inter alia*, these provisions protect the interests of the children as well.

4.6 Evaluation

Besides some similarities, the comparison shows discrepancies in many respects.

²⁰¹ Principles, Comment 2:10, p. 132.

²⁰² Ibid, 132.

²⁰³ German Report, Q. 103, p. 52.

²⁰⁴ Palandt/Brudermüller, BGB, § 1585c, No. 2.

²⁰⁵ Gottwald/Schwab/Büttner, Family & Succession Law in Germany, Part II, p.64.

Concerning divorce, the differentiation between consensual and contested divorce as sole grounds for divorce is unfamiliar to the German system, which follows the irretrievable breakdown.

The CEFL favours the consensual divorce by respecting the autonomous will of the spouses and conceding any acts of disposal. Furthermore, it abstains from a general separation period and avoids any investigation in the state of marriage. Finally, it recommends that even competent authorities should be allowed to grant a divorce order. The contested divorce plays a subordinated rule. Generally, it provides a factual separation time of one year, which can be less in cases of exceptional hardship.

The legal practice in Germany shows that the recommendations by the CEFL are not purely idealistic, but reflect partially the current situation. Nevertheless, Article 6 German Basic Law is the decisive factor, which would lead to severe problems if Germany adopted these Principles.

The same applies for post-marriage maintenance claims. The CEFL sets up the self-sufficiency Principle as overriding notion. The contradiction between this Principle and the existence of a maintenance claim is solved by the limitation of maintenance, the existence of lump sum payments and the ranking of claims.

The German system provides a statute for self-sufficiency of former spouses, but it clashes with the notion of post-marriage solidarity, which is indicated for example by a long-life responsibility of the former spouses according to the interpretation of Article 6 German Basic Law.

In the context of maintenance claims, it is worthwhile to mention a new legal draft by the German Government.²⁰⁶ The proposal of the Minister of Justice in the beginning of May 2005 is remarkable for several reasons. First, it lays down the possibility for the Courts to not only limit a maintenance claim in time, but also restrict its amount. Second, it gives priority to the needy minor when dealing with several claims. Until now, the claims are equally ranked.

Obviously, this draft approaches the Principles. Its further development remains to be seen.

However, as a result, it is to say, that the desired European standard set up by the CEFL differs from the German legal system. If these Principles became substantial law within the national systems or even an integral part of one European Civil Code, it would be complicated for German legislators to cope with this task. Particularly, the current interpretation of Article 6 German basic law is contradictory in many aspects.

Nevertheless, the Principles would be a manifestation of an evolution, which can be recognized increasingly within the German legal practice.

²⁰⁶ <http://www.bundesregierung.de/Politikthemen/Justiz-und-Recht-.465.828335/artikel/Kinder-bekommen-Vorrang-beim-U.htm> (online 05/05/10).

5 Final remarks and future prospects

The establishment of the CEFL will be premature for many. Some will consider the Principles as utopian or too radical, but law must be seen primarily as an instrument to regulate human relationships and not as a purpose in itself. Strictly speaking, precisely this thesis has shown the necessity and usefulness to regulate these kinds of human relationships.

However, ideas and points of view expand quickly. The Commissions in other fields of private law, for instance, has suffered mockery in the beginning, but obtained great acceptance during the last years.²⁰⁷

The initiators of the CEFL thought that the time was ripe to take this initiative and the first results published in such a relative short time are promising.

The CEFL cannot rely on political authorisation. The only source of authority that it can invoke is its academic reputation. On the one hand, this gives its members the freedom to make their choices on purely academic consideration. On the other hand, the drafters are very susceptible if they vote for a particular rule, which is not common to the majority of the European Countries. As seen above, the published Principles contain a considerable amount of better law, which must be justified. Particularly this might be the major problem in the future.

Since family law is clearly a constituent of our culture, the acceptance of the Principles as first model or a source of inspiration for the Member States will take several decades.

Acceptance can only be reached if moral reforms are initiated from within every state and cannot be forced from outside. The Member States must realize that a harmonisation does not lead to a loss of cultural identity. But, at present, the argument, that it is sensible for Malta or Ireland to accept a permissive divorce law, which is built upon a Scandinavian Model right now, because they will reach this stage in future anyway, does not need much comment.²⁰⁸

Admittedly, the differences in family-law regimes lead currently only to problems in cross-border family ties. It is worth asking then if it would be possible to create a single uniform substantive law for European cases until the Member States are outright for substantial harmonisation in terms of unification.

In this context, a proposal of Mrs. Prof. Nina Dethloff, Rheinische Friedrich-Wilhelms-University, Bonn, Germany, attracts attention. She

²⁰⁷ Pintens, *Europeanisation of Family law*, p.33.

²⁰⁸ Antokolskaia, *The Harmonisation of Family law: Old and New Dilemmas*, p. 45.

recommends to create a substantial law only for cross-border situations, in which the “European marriage”²⁰⁹ is conceived as a new legal institution. Spouses, whose relationship has cross-border implications due to their habitual residence or their national identity, should have the opportunity to choose the “European marriage” and enjoy the same legal treatment within the EU.

On the one hand, such a project is demanding, but on the other hand, it can be pressed ahead faster. National systems will remain unaffected and so there is less power of persuasion.

Even the European Council and the European Commission has called its attention to this proposal. In November 2004, the European Council requested the European Commission to present a Green Paper on conflict-of-law rules regarding divorce (Rome III).²¹⁰ Thereupon, the European Commission presented its paper in March 2005. Until September 2005, experts and other interested parties are invited to submit their opinions and experiences.²¹¹ A subsequent hearing will shed light on feasible instruments to solve problems, which arise under the current legal situation.

In my opinion, this attempt appears like a necessary interim solution in order to respond immediately on problems, which result of the growing number of cross-border family ties.

All harmonisation measures, which has been achieved so far in international private law paired with the desirability and the usefulness of harmonisation measures in substantial law lead to the conclusion that the European law runs also in the outstanding branch of Family law.

Its outflows are presently not foreseeable and highly dependent on the Member States, but to tie in with the citation of Lord Denning, this development cannot hold back. Besides all other activities and attempts of the European institutions, also the work of CEFL laid the foundations to ensure that one day harmonisation in form of unification might encompass family law.

²⁰⁹ <http://www.heute.de/ZDFheute/inhalt/23/0,3672,2288823,00.html> (online 05/19/04).

²¹⁰ European Council, November 2004, The Hague Programme.

²¹¹ <http://www.heute.de/ZDFheute/inhalt/23/0,3672,2288823,00.html> (online 05/19/04).

Principles of European Family Law

Part I: Divorce

Chapter I: General Principles

Principle 1:1 Permission of divorce

- (1) The law should permit divorce
- (2) No duration of the marriage should be required

Principle 1:2 Procedure by law and competent authority

- (1) The divorce procedure should be determined by law
- (2) Divorce should be granted by the competent authority which can either be a judicial or an administrative body

Principle 1:3 Types of divorce

The law should permit both divorce by mutual consent and divorce without consent of one of the spouses.

Chapter II: Divorce by mutual consent

Principle 1:4 Mutual consent

- (1) Divorce should be permitted upon the basis of the spouse's mutual consent. No period of factual separation should be required.
- (2) Mutual consent is to be understood as an agreement between the spouses that their marriage should be dissolved.
- (3) This agreement may be expressed either by a joint application of the spouses or by an application by one spouse with the acceptance of the other spouse.

Principle 1:5 Reflection period

- (1) If, at the commencement of the divorce proceedings, the spouses have children under the age of sixteen years and they have agreed upon all the consequences of the divorce as defined by Principle 1:6, a three-month period of reflection shall be required. If they have not agreed upon all the consequences, then a six-month period shall be required.
- (2) If, at the commencement of the divorce proceedings, the spouses have no children under the age of sixteen years and they have agreed upon all the consequences of the divorce as defined by principle 1:6 (c) and (d), no period of reflection shall be required.
- (3) No period of reflection shall be required, if, at the commencement of the divorce proceedings, the spouses have been factually separated for six months.

Principle 1:6 Content and form of the agreement

- (1) The consequences upon which the spouse should have reached an agreement are:
 - (a) their parental responsibilities, where necessary, including the residence of and the contact arrangements for the children,
 - (b) child maintenance, where necessary
 - (c) the division or reallocation of property, and
 - (d) spousal maintenance
- (2) Such an agreement should be in writing.

Principle 1:7 Determination of the consequences

- (1) In all cases the competent authority should determine the consequences for the children mentioned in principle 1:6 (a) and (b), but any admissible agreement of the spouses should be taken into account insofar as it is consistent with the best interests of the child.

(2) The competent authority should at least scrutinize the validity of the agreement on the matters mentioned in Principle 1:6 (c) and (d).

(3) If the spouses have not made an agreement or reached only a partial agreement on the matters mentioned in Principle 1:6 (c) and (d), the competent authority may determine these consequences.

Chapter III: Divorce without consent of one of the spouses

Principle 1:8 Factual separation

The divorce should be permitted without consent of one of the spouses if they have been factually separated for one year.

Principle 1:9 Exceptional hardship for the petitioner

In cases of exceptional hardship to the petitioner the competent authority may grant a divorce where the spouses have not been factually separated for one year.

Principle 1:10 Determination of the consequences

(1) Where necessary, the competent authority should determine:

(a) parental responsibility, including residence and contact arrangements for the children, and

(b) child maintenance

Any admissible agreement of the spouses should be taken into account insofar as it is consistent with the best interests of the child

(2) On or after granting the divorce the competent authority may determine the economic consequences for the spouse taking into account any admissible agreement made between them.

Part II: Maintenance between former spouses

Chapter I: General principles

Principle 2:1 Relationship between divorce and maintenance

Maintenance between former spouses should be subject to the same rules regardless of the type of divorce.

Principle 2:2 Self-sufficiency

Subject to the following principles, each spouse should provide for his or her own support after divorce.

Chapter II: Conditions for the attribution of maintenance

Principle 2.3 Conditions for maintenance

Maintenance after divorce should be dependant upon the creditor spouse having insufficient resources to meet his or her needs and the debtor spouse's ability to satisfy those needs.

Principle 2:4 Determining claims for maintenance

In determining a claim for maintenance, account should be taken in particular of factors such as:

The spouses employment ability, age and health

The care of children

The division of duties during the marriage

The duration of the marriage

The standard of living during the marriage and

Any new marriage or long-term relationship.

Principle 2:5 Method of maintenance provision

(1) Maintenance should be provided at regular intervals and in advance.

(2) The competent authority may order a lump sum payment upon request of either or both spouses taking into account the circumstances of the case.

Principle 2:6 Exceptional hardship to the debtor spouse

In cases of exceptional hardship to the debtor spouse the competent authority may deny, limit or terminate maintenance because of the creditor spouse's conduct.

Chapter III: Specific issues

Principle 2:7 Multiplicity of maintenance claims

In determining the debtor spouse's ability to satisfy the needs of the creditor spouse, the competent authority should

- (a) give priority to any maintenance claim of a minor child of the debtor spouse,
- (b) take into account any obligation of the debtor spouse to maintain a new spouse.

Principle 2:8 Limitation of time

The competent authority should grant maintenance for a limited period, but exceptionally may do so without a time limit

Principle 2:9 Termination of the maintenance obligation

- (1) The maintenance obligation should cease if the creditor spouse remarries or establishes a long-term relationship.
- (2) After its cessation according to paragraph 1 the maintenance obligation does not revive if the new marriage or long-term relationship ends
- (3) The maintenance obligation should cease upon the death of either the creditor or the debtor spouse.

Principle 2:10 Maintenance agreement

- (1) Spouses should be permitted to make an agreement about maintenance after divorce. The agreement may concern the extent, performance, duration and termination of the maintenance obligation and the possible renouncement of the claim of maintenance
- (2) Such an agreement should be in writing
- (3) Notwithstanding paragraph 1, the competent authority should at least scrutinize the validity of the maintenance agreement.

German Law Provisions

I. German Basic Law²¹²

Article 6 Marriage and the family; children born outside of marriage

(1) Marriage and the family shall enjoy the special protection of the state.

(2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.

(3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.

(4) Every mother shall be entitled to the protection and care of the community.

(5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.

II. German Civil Code (Excerpts)²¹³

...

Titel 7 Scheidung der Ehe

Untertitel 1 Scheidungsgründe

§ 1564 Scheidung durch Urteil

Eine Ehe kann nur durch gerichtliches Urteil auf Antrag eines oder beider Ehegatten geschieden werden. Die Ehe ist mit der Rechtskraft des Urteils aufgelöst. Die Voraussetzungen, unter denen die Scheidung begehrt werden kann, ergeben sich aus den folgenden Vorschriften.

§ 1565 Scheitern der Ehe

(1) Eine Ehe kann geschieden werden, wenn sie gescheitert ist. Die Ehe ist gescheitert, wenn die Lebensgemeinschaft der Ehegatten nicht mehr besteht und nicht erwartet werden kann, dass die Ehegatten sie wiederherstellen.

(2) Leben die Ehegatten noch nicht ein Jahr getrennt, so kann die Ehe nur geschieden werden, wenn die Fortsetzung der Ehe für den Antragsteller aus Gründen, die in der Person des anderen Ehegatten liegen, eine unzumutbare Härte darstellen würde.

§ 1566 Vermutung für das Scheitern

(1) Es wird unwiderlegbar vermutet, dass die Ehe gescheitert ist, wenn die Ehegatten seit einem Jahr getrennt leben und beide Ehegatten die Scheidung beantragen oder der Antragsgegner der Scheidung zustimmt.

(2) Es wird unwiderlegbar vermutet, dass die Ehe gescheitert ist, wenn die Ehegatten seit drei Jahren getrennt leben.

²¹² <http://www.iuscomp.org/gla/statutes/GG.htm#6>

²¹³ <http://bundesrecht.juris.de/bundesrecht/bgb/>

§ 1567 Getrenntleben

(1) Die Ehegatten leben getrennt, wenn zwischen ihnen keine häusliche Gemeinschaft besteht und ein Ehegatte sie erkennbar nicht herstellen will, weil er die eheliche Lebensgemeinschaft ablehnt. Die häusliche Gemeinschaft besteht auch dann nicht mehr, wenn die Ehegatten innerhalb der ehelichen Wohnung getrennt leben.

(2) Ein Zusammenleben über kürzere Zeit, das der Versöhnung der Ehegatten dienen soll, unterbricht oder hemmt die in § 1566 bestimmten Fristen nicht.

§ 1568 Härteklausele

(1) Die Ehe soll nicht geschieden werden, obwohl sie gescheitert ist, wenn und solange die Aufrechterhaltung der Ehe im Interesse der aus der Ehe hervorgegangenen minderjährigen Kinder aus besonderen Gründen ausnahmsweise notwendig ist oder wenn und solange die Scheidung für den Antragsgegner, der sie ablehnt, auf Grund außergewöhnlicher Umstände eine so schwere Härte darstellen würde, dass die Aufrechterhaltung der Ehe auch unter Berücksichtigung der Belange des Antragstellers ausnahmsweise geboten erscheint.

(2) (weggefallen)

Untertitel 2 Unterhalt des geschiedenen Ehegatten

Kapitel 1 Grundsatz

§ 1569 Abschließende Regelung

Kann ein Ehegatte nach der Scheidung nicht selbst für seinen Unterhalt sorgen, so hat er gegen den anderen Ehegatten einen Anspruch auf Unterhalt nach den folgenden Vorschriften.

Kapitel 2 Unterhaltsberechtigung

§ 1570 Unterhalt wegen Betreuung eines Kindes

Ein geschiedener Ehegatte kann von dem anderen Unterhalt verlangen, solange und soweit von ihm wegen der Pflege oder Erziehung eines gemeinschaftlichen Kindes eine Erwerbstätigkeit nicht erwartet werden kann.

§ 1571 Unterhalt wegen Alters

Ein geschiedener Ehegatte kann von dem anderen Unterhalt verlangen, soweit von ihm im Zeitpunkt

1. der Scheidung,
2. der Beendigung der Pflege oder Erziehung eines gemeinschaftlichen Kindes
oder
3. des Wegfalls der Voraussetzungen für einen Unterhaltsanspruch nach den §§ 1572 und 1573

wegen seines Alters eine Erwerbstätigkeit nicht mehr erwartet werden kann.

§ 1572 Unterhalt wegen Krankheit oder Gebrechen

Ein geschiedener Ehegatte kann von dem anderen Unterhalt verlangen, solange und soweit von ihm vom Zeitpunkt

1. der Scheidung,
 2. der Beendigung der Pflege oder Erziehung eines gemeinschaftlichen Kindes,
 3. der Beendigung der Ausbildung, Fortbildung oder Umschulung oder
 4. des Wegfalls der Voraussetzungen für einen Unterhaltsanspruch nach § 1573
- an wegen Krankheit oder anderer Gebrechen oder Schwäche seiner körperlichen oder geistigen Kräfte eine Erwerbstätigkeit nicht erwartet werden kann.

§ 1573 Unterhalt wegen Erwerbslosigkeit und Aufstockungsunterhalt

(1) Soweit ein geschiedener Ehegatte keinen Unterhaltsanspruch nach den §§ 1570 bis 1572 hat, kann er gleichwohl Unterhalt verlangen, solange und soweit er nach der Scheidung keine angemessene Erwerbstätigkeit zu finden vermag.

(2) Reichen die Einkünfte aus einer angemessenen Erwerbstätigkeit zum vollen

Unterhalt (§ 1578) nicht aus, kann er, soweit er nicht bereits einen Unterhaltsanspruch nach den §§ 1570 bis 1572 hat, den Unterschiedsbetrag zwischen den Einkünften und dem vollen Unterhalt verlangen.

(3) Absätze 1 und 2 gelten entsprechend, wenn Unterhalt nach den §§ 1570 bis 1572, 1575 zu gewähren war, die Voraussetzungen dieser Vorschriften aber entfallen sind.

(4) Der geschiedene Ehegatte kann auch dann Unterhalt verlangen, wenn die Einkünfte aus einer angemessenen Erwerbstätigkeit wegfallen, weil es ihm trotz seiner Bemühungen nicht gelungen war, den Unterhalt durch die Erwerbstätigkeit nach der Scheidung nachhaltig zu sichern. War es ihm gelungen, den Unterhalt teilweise nachhaltig zu sichern, so kann er den Unterschiedsbetrag zwischen dem nachhaltig gesicherten und dem vollen Unterhalt verlangen.

(5) Die Unterhaltsansprüche nach Absatz 1 bis 4 können zeitlich begrenzt werden, soweit insbesondere unter Berücksichtigung der Dauer der Ehe sowie der Gestaltung von Haushaltsführung und Erwerbstätigkeit ein zeitlich unbegrenzter Unterhaltsanspruch unbillig wäre; dies gilt in der Regel nicht, wenn der Unterhaltsberechtigte nicht nur vorübergehend ein gemeinschaftliches Kind allein oder überwiegend betreut hat oder betreut. Die Zeit der Kindesbetreuung steht der Ehedauer gleich.

§ 1574 Angemessene Erwerbstätigkeit

(1) Der geschiedene Ehegatte braucht nur eine ihm angemessene Erwerbstätigkeit auszuüben.

(2) Angemessen ist eine Erwerbstätigkeit, die der Ausbildung, den Fähigkeiten, dem Lebensalter und dem Gesundheitszustand des geschiedenen Ehegatten sowie den ehelichen Lebensverhältnissen entspricht; bei den ehelichen Lebensverhältnissen sind die Dauer der Ehe und die Dauer der Pflege oder Erziehung eines gemeinschaftlichen Kindes zu berücksichtigen.

(3) Soweit es zur Aufnahme einer angemessenen Erwerbstätigkeit erforderlich ist, obliegt es dem geschiedenen Ehegatten, sich ausbilden, fortbilden oder umschulen zu lassen, wenn ein erfolgreicher Abschluss der Ausbildung zu erwarten ist.

§ 1575 Ausbildung, Fortbildung oder Umschulung

(1) Ein geschiedener Ehegatte, der in Erwartung der Ehe oder während der Ehe eine Schul- oder Berufsausbildung nicht aufgenommen oder abgebrochen hat, kann von dem anderen Ehegatten Unterhalt verlangen, wenn er diese oder eine entsprechende Ausbildung sobald wie möglich aufnimmt, um eine angemessene Erwerbstätigkeit, die den Unterhalt nachhaltig sichert, zu erlangen und der erfolgreiche Abschluss der Ausbildung zu erwarten ist. Der Anspruch besteht längstens für die Zeit, in der eine solche Ausbildung im Allgemeinen abgeschlossen wird; dabei sind ehebedingte Verzögerungen der Ausbildung zu berücksichtigen.

(2) Entsprechendes gilt, wenn sich der geschiedene Ehegatte fortbilden oder umschulen lässt, um Nachteile auszugleichen, die durch die Ehe eingetreten sind.

(3) Verlangt der geschiedene Ehegatte nach Beendigung der Ausbildung, Fortbildung oder Umschulung Unterhalt nach § 1573, so bleibt bei der Bestimmung der ihm angemessenen Erwerbstätigkeit (§ 1574 Abs. 2) der erreichte höhere Ausbildungsstand außer Betracht.

§ 1576 Unterhalt aus Billigkeitsgründen

Ein geschiedener Ehegatte kann von dem anderen Unterhalt verlangen, soweit und solange von ihm aus sonstigen schwerwiegenden Gründen eine Erwerbstätigkeit nicht erwartet werden kann und die Versagung von Unterhalt unter Berücksichtigung der Belange beider Ehegatten grob unbillig wäre. Schwerwiegende Gründe dürfen nicht allein deswegen berücksichtigt werden, weil sie zum Scheitern der Ehe geführt haben.

§ 1577 Bedürftigkeit

(1) Der geschiedene Ehegatte kann den Unterhalt nach den §§ 1570 bis 1573, 1575 und 1576 nicht verlangen, solange und soweit er sich aus seinen Einkünften und seinem Vermögen selbst unterhalten kann.

(2) Einkünfte sind nicht anzurechnen, soweit der Verpflichtete nicht den vollen Unterhalt (§ 1578) leistet. Einkünfte, die den vollen Unterhalt übersteigen, sind insoweit anzurechnen, als dies unter Berücksichtigung der beiderseitigen wirtschaftlichen Verhältnisse der Billigkeit entspricht.

(3) Den Stamm des Vermögens braucht der Berechtigte nicht zu verwerten, soweit die Verwertung unwirtschaftlich oder unter Berücksichtigung der beiderseitigen wirtschaftlichen Verhältnisse unbillig wäre.

(4) War zum Zeitpunkt der Ehescheidung zu erwarten, dass der Unterhalt des Berechtigten aus seinem Vermögen nachhaltig gesichert sein würde, fällt das Vermögen aber später weg, so besteht kein Anspruch auf Unterhalt. Dies gilt nicht, wenn im Zeitpunkt des Vermögenswegfalls von dem Ehegatten wegen der Pflege oder Erziehung eines gemeinsamen Kindes eine Erwerbstätigkeit nicht erwartet werden kann.

§ 1578 Maß des Unterhalts

(1) Das Maß des Unterhalts bestimmt sich nach den ehelichen Lebensverhältnissen. Die Bemessung des Unterhaltsanspruchs nach den ehelichen Lebensverhältnissen kann zeitlich begrenzt und danach auf den angemessenen Lebensbedarf abgestellt werden, soweit insbesondere unter Berücksichtigung der Dauer der Ehe sowie der Gestaltung von Haushaltsführung und Erwerbstätigkeit eine zeitlich unbegrenzte Bemessung nach Satz 1 unbillig wäre; dies gilt in der Regel nicht, wenn der Unterhaltsberechtigte nicht nur vorübergehend ein gemeinschaftliches Kind allein oder überwiegend betreut hat oder betreut. Die Zeit der Kindesbetreuung steht der Ehedauer gleich. Der Unterhalt umfasst den gesamten Lebensbedarf.

(2) Zum Lebensbedarf gehören auch die Kosten einer angemessenen Versicherung für den Fall der Krankheit und der Pflegebedürftigkeit sowie die Kosten einer Schul- oder Berufsausbildung, einer Fortbildung oder einer Umschulung nach den §§ 1574, 1575.

(3) Hat der geschiedene Ehegatte einen Unterhaltsanspruch nach den §§ 1570 bis 1573 oder § 1576, so gehören zum Lebensbedarf auch die Kosten einer angemessenen Versicherung für den Fall des Alters sowie der verminderte Erwerbsfähigkeit.

§ 1579 Beschränkung oder Wegfall der Verpflichtung

Ein Unterhaltsanspruch ist zu versagen, herabzusetzen oder zeitlich zu begrenzen, soweit die Inanspruchnahme des Verpflichteten auch unter Wahrung der Belange eines dem Berechtigten zur Pflege oder Erziehung anvertrauten gemeinschaftlichen Kindes grob unbillig wäre, weil

1. die Ehe von kurzer Dauer war; der Ehedauer steht die Zeit gleich, in welcher der Berechtigte wegen der Pflege oder Erziehung eines gemeinschaftlichen Kindes nach § 1570 Unterhalt verlangen konnte,
2. der Berechtigte sich eines Verbrechens oder eines schweren vorsätzlichen Vergehens gegen den Verpflichteten oder einen nahen Angehörigen des Verpflichteten schuldig gemacht hat,
3. der Berechtigte seine Bedürftigkeit mutwillig herbeigeführt hat,
4. der Berechtigte sich über schwerwiegende Vermögensinteressen des Verpflichteten mutwillig hinweggesetzt hat,
5. der Berechtigte vor der Trennung längere Zeit hindurch seine Pflicht, zum Familienunterhalt beizutragen, gröblich verletzt hat,
6. dem Berechtigten ein offensichtlich schwerwiegendes, eindeutig bei ihm liegendes Fehlverhalten gegen den Verpflichteten zur Last fällt oder
7. ein anderer Grund vorliegt, der ebenso schwer wiegt wie die in den Nummern 1 bis 6 aufgeführten Gründe.

...

Kapitel 3 Leistungsfähigkeit und Rangfolge

§ 1581 Leistungsfähigkeit

Ist der Verpflichtete nach seinen Erwerbs- und Vermögensverhältnissen unter Berücksichtigung seiner sonstigen Verpflichtungen außerstande, ohne Gefährdung des eigenen angemessenen Unterhalts dem Berechtigten Unterhalt zu gewähren, so braucht er

nur insoweit Unterhalt zu leisten, als es mit Rücksicht auf die Bedürfnisse und die Erwerbs- und Vermögensverhältnisse der geschiedenen Ehegatten der Billigkeit entspricht. Den Stamm des Vermögens braucht er nicht zu verwerten, soweit die Verwertung unwirtschaftlich oder unter Berücksichtigung der beiderseitigen wirtschaftlichen Verhältnisse unbillig wäre.

§ 1582 Rangverhältnisse mehrerer Unterhaltsbedürftiger

(1) Bei Ermittlung des Unterhalts des geschiedenen Ehegatten geht im Falle des § 1581 der geschiedene Ehegatte einem neuen Ehegatten vor, wenn dieser nicht bei entsprechender Anwendung der §§ 1569 bis 1574, § 1576 und des § 1577 Abs. 1 unterhaltsberechtigt wäre. Hätte der neue Ehegatte nach diesen Vorschriften einen Unterhaltsanspruch, geht ihm der geschiedene Ehegatte gleichwohl vor, wenn er nach § 1570 oder nach § 1576 unterhaltsberechtigt ist oder die Ehe mit dem geschiedenen Ehegatten von langer Dauer war. Der Ehedauer steht die Zeit gleich, in der ein Ehegatte wegen der Pflege oder Erziehung eines gemeinschaftlichen Kindes nach § 1570 unterhaltsberechtigt war.

(2) § 1609 bleibt im Übrigen unberührt.

§ 1583 Einfluss des Güterstands

Lebt der Verpflichtete im Falle der Wiederheirat mit seinem neuen Ehegatten im Güterstand der Gütergemeinschaft, so ist § 1604 entsprechend anzuwenden.

§ 1584 Rangverhältnisse mehrerer Unterhaltsverpflichteter

Der unterhaltspflichtige geschiedene Ehegatte haftet vor den Verwandten des Berechtigten. Soweit jedoch der Verpflichtete nicht leistungsfähig ist, haften die Verwandten vor dem geschiedenen Ehegatten. § 1607 Abs. 2 und 4 gilt entsprechend.

Kapitel 4 Gestaltung des Unterhaltsanspruchs

§ 1585 Art der Unterhaltsgewährung

(1) Der laufende Unterhalt ist durch Zahlung einer Geldrente zu gewähren. Die Rente ist monatlich im Voraus zu entrichten. Der Verpflichtete schuldet den vollen Monatsbetrag auch dann, wenn der Unterhaltsanspruch im Laufe des Monats durch Wiederheirat oder Tod des Berechtigten erlischt.

(2) Statt der Rente kann der Berechtigte eine Abfindung in Kapital verlangen, wenn ein wichtiger Grund vorliegt und der Verpflichtete dadurch nicht unbillig belastet.

§ 1585a Sicherheitsleistung

(1) Der Verpflichtete hat auf Verlangen Sicherheit zu leisten. Die Verpflichtung, Sicherheit zu leisten, entfällt, wenn kein Grund zu der Annahme besteht, dass die Unterhaltsleistung gefährdet ist oder wenn der Verpflichtete durch die Sicherheitsleistung unbillig belastet würde. Der Betrag, für den Sicherheit zu leisten ist, soll den einfachen Jahresbetrag der Unterhaltsrente nicht übersteigen, sofern nicht nach den besonderen Umständen des Falles eine höhere Sicherheitsleistung

§ 1585b Unterhalt für die Vergangenheit

(1) Wegen eines Sonderbedarfs (§ 1613 Abs. 2) kann der Berechtigte Unterhalt für die Vergangenheit verlangen.

(2) Im Übrigen kann der Berechtigte für die Vergangenheit Erfüllung oder Schadensersatz wegen Nichterfüllung erst von der Zeit an fordern, in der der Unterhaltspflichtige in Verzug gekommen oder der Unterhaltsanspruch rechtshängig geworden ist.

(3) Für eine mehr als ein Jahr vor der Rechtshängigkeit liegende Zeit kann Erfüllung oder Schadensersatz wegen Nichterfüllung nur verlangt werden, wenn anzunehmen ist, dass der Verpflichtete sich der Leistung absichtlich entzogen hat.

§ 1585c Vereinbarungen über den Unterhalt

Die Ehegatten können über die Unterhaltspflicht für die Zeit nach der Scheidung Vereinbarungen treffen.

Kapitel 5 Ende des Unterhaltsanspruchs

§ 1586 Wiederverheiratung, Begründung einer Lebenspartnerschaft oder Tod des Berechtigten

(1) Der Unterhaltsanspruch erlischt mit der Wiederheirat, der Begründung einer Lebenspartnerschaft oder dem Tod des Berechtigten.

(2) Ansprüche auf Erfüllung oder Schadensersatz wegen Nichterfüllung für die Vergangenheit bleiben bestehen. Das Gleiche gilt für den Anspruch auf den zur Zeit der Wiederheirat, der Begründung einer Lebenspartnerschaft oder des Todes fälligen Monatsbetrag.

§ 1586a Wiederaufleben des Unterhaltsanspruchs

(1) Geht ein geschiedener Ehegatte eine neue Ehe oder Lebenspartnerschaft ein und wird die Ehe oder Lebenspartnerschaft wieder aufgelöst, so kann er von dem früheren Ehegatten Unterhalt nach § 1570 verlangen, wenn er ein Kind aus der früheren Ehe oder Lebenspartnerschaft zu pflegen oder zu erziehen hat. Ist die Pflege oder Erziehung beendet, so kann er Unterhalt nach den §§ 1571 bis 1573, 1575 verlangen.

(2) Der Ehegatte der später aufgelösten Ehe haftet vor dem Ehegatten der früher aufgelösten Ehe. Satz 1 findet auf Lebenspartnerschaften entsprechende Anwendung.

§ 1586b Kein Erlöschen bei Tod des Verpflichteten

(1) Mit dem Tod des Verpflichteten geht die Unterhaltspflicht auf den Erben als Nachlassverbindlichkeit über. Die Beschränkungen nach § 1581 fallen weg. Der Erbe haftet jedoch nicht über einen Betrag hinaus, der dem Pflichtteil entspricht, welchen dem Berechtigten zustände, wenn die Ehe nicht geschieden worden wäre.

(2) Für die Berechnung des Pflichtteils bleiben Besonderheiten auf Grund des Güterstands, in dem die geschiedenen Ehegatten gelebt haben, außer Betracht.

...

Titel 3 Unterhaltspflicht

...

§ 1609 Rangverhältnisse mehrerer Bedürftiger

(1) Sind mehrere Bedürftige vorhanden und ist der Unterhaltspflichtige außerstande, allen Unterhalt zu gewähren, so gehen die Kinder im Sinne des § 1603 Abs. 2 den anderen Kindern, die Kinder den übrigen Abkömmlingen, die Abkömmlinge den Verwandten der aufsteigenden Linie und unter den Verwandten der aufsteigenden Linie die näheren den entfernteren vor.

(2) Der Ehegatte steht den Kindern im Sinne des § 1603 Abs. 2 gleich; er geht anderen Kindern und den übrigen Verwandten vor. Ist die Ehe geschieden oder aufgehoben, so geht der unterhaltsberechtigten Ehegatte den anderen Kindern im Sinne des Satzes 1 sowie den übrigen Verwandten des Unterhaltspflichtigen vor.

III. German Code of Civil Procedure (Excerpts) ²¹⁴

...

§ 623 Verbund von Scheidungs- und Folgesachen

(1) Soweit in Familiensachen des § 621 Abs. 1 Nr. 5 bis 9 und Abs. 2 Satz 1 Nr. 4 eine Entscheidung für den Fall der Scheidung zu treffen ist und von einem Ehegatten rechtzeitig begehrt wird, ist hierüber gleichzeitig und zusammen mit der Scheidungssache zu verhandeln und, sofern dem Scheidungsantrag stattgegeben wird, zu entscheiden (Folgesachen). Wird bei einer Familiensache des § 621 Abs. 1 Nr. 5 und 8 und Abs. 2 Satz 1 Nr. 4 ein Dritter Verfahrensbeteiligter, so wird diese Familiensache abgetrennt. Für die

²¹⁴<http://bundesrecht.juris.de/bundesrecht/bgb/>

Durchführung des Versorgungsausgleichs in den Fällen des § 1587b des Bürgerlichen Gesetzbuchs bedarf es keines Antrags.

(2) Folgesachen sind auch rechtzeitig von einem Ehegatten anhängig gemachte Familiensachen nach

1. § 621 Abs. 2 Satz 1 Nr. 1 im Fall eines Antrags nach § 1671 Abs. 1 des Bürgerlichen Gesetzbuchs,

2. § 621 Abs. 2 Satz 1 Nr. 2, soweit deren Gegenstand der Umgang eines Ehegatten mit einem gemeinschaftlichen Kind oder einem Kind des anderen Ehegatten ist, und

3. § 621 Abs. 2 Satz 1 Nr. 3.

Auf Antrag eines Ehegatten trennt das Gericht eine Folgesache nach den Nummern 1 bis 3 von der Scheidungssache ab. Ein Antrag auf Abtrennung einer Folgesache nach Nummer 1 kann mit einem Antrag auf Abtrennung einer Folgesache nach § 621 Abs. 1 Nr. 5 und Abs. 2 Satz 1 Nr. 4 verbunden werden. Im Fall der Abtrennung wird die Folgesache als selbständige Familiensache fortgeführt; § 626 Abs. 2 Satz 2 gilt entsprechend.

(3) Folgesachen sind auch rechtzeitig eingeleitete Verfahren betreffend die Übertragung der elterlichen Sorge oder eines Teils der elterlichen Sorge wegen Gefährdung des Kindeswohls auf einen Elternteil, einen Vormund oder einen Pfleger. Das Gericht kann anordnen, daß ein Verfahren nach Satz 1 von der Scheidungssache abgetrennt wird. Absatz 2 Satz 3 gilt entsprechend.

(4) Das Verfahren muß bis zum Schluß der mündlichen Verhandlung erster Instanz in der Scheidungssache anhängig gemacht oder eingeleitet sein. Satz 1 gilt entsprechend, wenn die Scheidungssache nach § 629b an das Gericht des ersten Rechtszuges zurückverwiesen ist.

(5) Die vorstehenden Vorschriften gelten auch für Verfahren der in den Absätzen 1 bis 3 genannten Art, die nach § 621 Abs. 3 an das Gericht der Ehesache übergeleitet worden sind. In den Fällen des Absatzes 1 gilt dies nur, soweit eine Entscheidung für den Fall der Scheidung zu treffen ist.

...

§ 630 Einverständliche Scheidung

(1) Für das Verfahren auf Scheidung nach § 1565 Abs. 1 in Verbindung mit § 1566 des Bürgerlichen Gesetzbuchs muss die Antragschrift des Ehegatten auch enthalten:

1. die Mitteilung, daß der andere Ehegatte der Scheidung zustimmen oder in gleicher Weise die Scheidung beantragen wird;

2. entweder übereinstimmende Erklärungen der Ehegatten, daß Anträge zur Übertragung der elterlichen Sorge oder eines Teils der elterlichen Sorge für die Kinder auf einen Elternteil und zur Regelung des Umgangs der Eltern mit den Kindern nicht gestellt werden, weil sich die Ehegatten über das Fortbestehen der Sorge und über den Umgang einig sind, oder, soweit

eine gerichtliche Regelung erfolgen soll, die entsprechenden Anträge und jeweils die Zustimmung des anderen Ehegatten hierzu;

3. die Einigung der Ehegatten über die Regelung der Unterhaltspflicht gegenüber einem Kind, die durch die Ehe begründete gesetzliche Unterhaltspflicht sowie die Rechtsverhältnisse an der Ehewohnung und am Hausrat.

(2) Die Zustimmung zur Scheidung kann bis zum Schluß der mündlichen Verhandlung, auf die das Urteil ergeht, widerrufen werden. Die Zustimmung und der Widerruf können zu Protokoll der Geschäftsstelle oder in der mündlichen Verhandlung zur Niederschrift des Gerichts erklärt werden.

(3) Das Gericht soll dem Scheidungsantrag erst stattgeben, wenn die Ehegatten über die in Absatz 1 Nr. 3 bezeichneten Gegenstände einen vollstreckbaren Schuldtitel herbeigeführt haben.

Schemes: Divorce

I. Scheme: Principles

Separation period	Conditions for divorce Consensual	Conditions for divorce Contested
No separation period	-consensus between the spouses -reflection period (Principles 1:5) 1) when children are involved; 2) no agreement upon all consequences Conditions of § 1565 II German Civil Code	
Less than 1 year		-exceptional hardship for the petitioner (Principle 1:9)
1 year		-factual separation (Principle 1:8)

II. Scheme: German Civil Code²¹⁵

Separation period	Conditions for divorce Consensual	Conditions for divorce Contested
Less than one year	<ul style="list-style-type: none"> -Failure of the marriage (=irretrievable breakdown) -Conditions of § 1565 II German Civil Code -divorce can be denied (§ 1568 Alt. 2 German Civil Code) 	<ul style="list-style-type: none"> -Failure of the marriage (=irretrievable breakdown) -Conditions of § 1565 II German Civil Code -divorce can be denied (§ 1568 Alt. 1 and 2 German Civil Code)
1 to 3 years	<ul style="list-style-type: none"> -Conclusive presumption that the marriage has failed (§ 1566 I German Civil Code) -no further inquiry by the Court - divorce can be denied (§ 1568 Alt. 2 German Civil Code) 	<ul style="list-style-type: none"> -the Court must be convinced that the actual marriage has been failed (§ 1565 I German Civil Code) -divorce can be denied (§ 1568 Alt. 1 and 2 German Civil Code)
3 years and more	<ul style="list-style-type: none"> -Conclusive presumption that the marriage has been failed (§ 1566 II German Civil Code) -divorce can be denied (§ 1568 Alt. 2 German Civil Code) 	<ul style="list-style-type: none"> -Conclusive presumption that the marriage has been failed (§ 1566 II German Civil Code) -divorce can be denied (§ 1568 Alt. 1 and 2 German Civil Code)

²¹⁵ The differentiation between consensual and contested divorce was made knowingly in order to achieve a comparability even though they are no sole grounds for divorce in Germany.

Bibliography

Books

Arndt, Hans-Wolfgang
Europarecht
Sixth Edition
Heidelberg, Germany, 2003

Boele-Woelki, Katharina (Editor) and others
Perspectives for the Unification and Harmonisation of Family Law in Europe, Vol. 4

List of used contributions:

Pintens, Walter; Europeanisation of Family Law, page 3-29

Dethloff, Nina; Arguments for the Unification and Harmonisation of Family law in Europe, page 37-64

Meulders-Klein, Marie-Therese; Towards a European Civil Code on Family law? Means and Ends, page 105-116

Hondius, Ewoud; Towards a European Ius Commune: The current situation in other fields of Private Law, page 118-134

Schwenzer, Ingeborg; Methodological Aspects of Harmonisation of Family law, page 143-158

Antolskaia, Masha; The “better law” approach and the Harmonisation of Family Law, page 159-181

Jänterä-Jareborg, Maarit; Unification of International Family law in Europe- a critical perspective, page 194-214

First Edition
Antwerp, Belgium, 2003

Boele-Woelki, Katharina (Editor) and others
Principles of European Family Law regarding divorce and maintenance between former spouses, Vol. 7

First Edition
Antwerp, Belgium, 2004

Craig, Paul; De Burca, Grainne
EU Law ; Text, Cases and Materials
Third Edition
Oxford, England, 2003

Gernhuber, Joachim; Coester-Waltjen, Dagmar
Lehrbuch des Familienrechts

Fourth Edition
München, Germany, 1994

Gottwald, Peter; Schwab, Dieter; Büttner, Eva
Family & Succession Law in Germany
First Edition
München, Germany, 2001

Hofer, Sybille; Schwab, Dieter; Henrich, Dieter
Scheidung und nachehelicher Unterhalt im europäischen Vergleich
Beiträge zum europäischen Familienrecht, Vol.8
First Edition
Bielefeld, Germany, 2003

Koch, Harald; Magnus, Ulrich; Winkler v. Mohrenfels, Peter
IPR und Rechtsvergleichung
Third Edition
München, Germany, 2004

Kuchinke, Kurt
Festschrift für Alfred Söllner
Europas universale rechtsordnungspolitische Aufgabe im Recht des dritten
Jahrtausends (Köbler, Gerhard (Editor) and others)
“Über die Notwendigkeit ein gemein-europäisches Familien- und Erbrecht
zu schaffen”
München, Germany, 2000

Palandt, Otto (Editor) and others
Bürgerliches Gesetzbuch
Commentary
Sixtyfirst Edition
München, Germany, 2002

Pintens, Walter
Festschrift für Erik Jayme, Vol.2 (Mansel, Heinz-Peter (Editor) and
others)
„Die Rolle der Wissenschaft bei der Europäisierung des Familienrechts“
München, Germany, 2004

Schwab, Dieter
Familienrecht
Eleventh Edition

München, Germany, 2001

Schwab, Dieter
Handbuch des Scheidungsrechts
Fifth Edition
München, Germany, 2004

Articles

Antokolskaia, Masha The Harmonisation of Family law: Old and New Dilemmas
In European Review of Private Law 1-2003,
Page 28ff

Henrich, Dieter Familienrechtsreform durch die Familiengerichte
In Zeitschrift für Rechtsvergleichung 1990
Page 241f.

Heß, Burkhard Die „Europäisierung“ des internationalen
Privatrechts durch den Amsterdamer Vertrag.
Chancen und Gefahren“,
In Neue Juristische Wochenschrift 2000,
Page 23ff.

Jayme, Eric
Kohler, Christian Europäisches Kollisionsrecht 1999,
In Praxis für Internationales Verfahrensrecht 99
Page 401ff.

Kohler, Christian Internationales Verfahrenrecht für Ehesachen in
der EU: Die Verordnung Brüssel II,
In Neue Juristische Wochenschrift 2001,
Page 10ff

Kötz, Hein Alte und neue Aufgaben der Rechtsvergleichung
In Juristische Zeitung 2002
Page 253f.

- McGlynn, Clare** Families and the European Union Charter of Fundamental Rights: progressive change or entrenching the status quo
In European Law Review 26-2001,
Page 583ff
- Pintens, Walter** Familienrecht und Personenstand-Perspektiven einer Europäisierung
In Das Ständesamt 12-2004
Page 353ff
- Wagner, Rolf** Überlegungen zur Vereinheitlichung des Internationalen Privatrechts in Ehesachen in der Europäischen Union
In Zeitschrift für das gesamte Familienrecht
Page 803ff
- Zimmermann, Reinhard** Principles on European Contract Law (Part I)
In Zeitschrift für Europäisches Privatrecht 1995
Page 731f.
- Principles on European Contract Law (Part II)
In Zeitschrift für Europäisches Privatrecht 2000
Page 391f.

Dissertation

- Dethloff, Nina** Die einverständliche Scheidung
Eine rechtsvergleichende und rechtshistorische Untersuchung zu Umfang und Grenzen der Privatautonomie im Scheidungsrecht
München, Germany, 1994

Other materials

Communication from the Commission to the Council and the European Parliament on European Contract Law of July 11th 2001, COM (2001) 398

Council Report on the need to approximate Member State's legislation in civil matters of November 16th 2001

Green Paper on applicable law and jurisdiction in divorce matters presented by the Commission, COM (2005) 82

Grounds for divorce and maintenance between former spouses, German Report, Prof. Martiny; Prof. Schwab, October 2002