Conference report

Family Law and Culture in Europe. New Developments, Challenges and Opportunities

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The diversity of family law as a societal challenge

Family law is a legal domain that faces particularly high pressure to react to dynamic social reality. A cursory glance at the development of family forms in Europe already reveals a pluralization of ways of life that can hardly be grasped with the guiding principle of the modern conservative small family or other established models that emerged in Germany or other European states after World War II. Single mothers, same sex couples, non-exclusive relationships, numerous variants of the so often discussed "patchwork family" and new means of reproduction reaching up to the use of "surrogate mothers" – these are all expressions of a diversity of family forms in which changed general socio-economic conditions, but also changed values come into play. The prospect of reaching normative consensus seems slim. After all, guiding principles of family are closely tied to controversial conceptions of how to live a good life, personal autonomy, gender roles and often even collective identity. These notions are therefore bound to become the object of conflicts, which are also carried out in public. At the same time, the binding nature and pressure to conform established guiding principles carry is indeed still maintained in many social contexts, and the national family law norms do, in fact, reflect traditional, cultural and, not least, religious conceptions in many regards.

Principles of harmonization

In order to intensely discuss the numerous challenges arising from this culturally-based complex of European Family Law, Nina Dethloff, Director of the Institute for German, European and International Family Law at the University of Bonn, along with the Käte

Hamburger Centre for Advanced Study "Law as Culture" invited international academics and experts to a conference in Bonn, which also represented the fifth conference of the *Commission on European Family Law* (CEFL). This assembly of European legal experts has elaborated practical suggestions for reform towards a harmonization of the diverse national family law regimes in order to ensure more transparency and legal certainty – particularly in view of increasing cross-border relationships. This time, Katharina Boele-Woelki (Utrecht), chairwoman of the Commission and co-organizer of the conference, along with her colleagues Nigel Lowe (Cardiff), Dieter Martiny (Hamburg) and Frédérique Ferrand (Lyon) presented a 57 point catalogue of principles for the regulation of property matters between spouses that highlights both the general rights and obligations, as well as introduces concrete models of marital property law – a catalogue that, despite some criticism of its details, was met with much praise by the participants in the discussion.

The search for equitable solutions

The conference clearly showed that the issue is not merely a technical one of legal harmonization, but one of fundamental questions of justice and equity. Barbara Dauner-Lieb (Cologne), for instance, mentioned the example of a woman who was in charge of

important representative tasks in her husband's company that could, however, not be directly measured in pecuniary terms and for which she received no direct compensation. If the principle of separation of property were applied, the wife would be left with nothing after divorce. Josep Ferrer Riba (Barcelona) commented that the notion of solidarity was somewhat underdeveloped in the CEFL. Katharina Boele-Woelki, however, once again explicitly pointed out that the proposed rules only represented suggestions that were not legally enforceable. Dieter Martiny added that no book of principles could fairly address every individual case.

Nevertheless, no list of principles can completely avoid the question regarding its normative force. Ferrer Riba remarked that any harmonization policy would have to deal with legal-cultural regimes that are not easy to change. Werner Gephart, Director of the Käte Hamburger Centre for Advanced Study "Law as Culture" addressed the fundamental question of the principle behind the principles: How were these principles generated, and on what basis can a commission of experts such as the CEFL expect to count on the willingness of the very heterogeneous European legal community to follow them?

Werner Gephart welcomes the speakers at the Käte Hamburger Centre for Advanced Study "Law as Culture"

On the status of non-formalized partnerships

During the further course of the conference, issues that recently have become central objects of family law were addressed. Law is particularly challenged by how to deal with non-formalized partnerships, i.e. couples, who decide not to marry and therefore are not covered by the protective provisions

governing marriages. As soon as such couples form an economic or social unit, Tone Sverdrup (Oslo) remarked, fair and equitable rules are needed in case of separation or death of the partner, particularly if the partnership has produced children. Whereas Sverdrup presented a comparative analysis of legal provisions in Scandinavian countries, Anne Barlow (Exeter) provided an overview of regulations in force in common law countries. As 30% of children are now born out of wedlock there by now, the question of how well family law lives up to the needs of these citizens was a very urgent one. Barlow noted that politicians were generally wary of pushing reform, for fear of being suspected of meddling with the special status of marriage. It is notable, she continued, that the Scottish minister of justice defended the 2006 *cohabitation act* by invoking traditional, conservative values, indicating that according to his interpretation of the act, the new legal recognition of non-married couples primarily served the interest of the child. This social-political and legal construction of the "best interest of the child" repeatedly became the focus of discussion throughout the conference. Barlow further pointed out the extraordinary fact that staunchly catholic Ireland opted for a moderate recognition of "cohabitation" in 2010, whereas England and Wales did not accord such couples any specific legal status yet. The danger, she continued, not only resides in a problematic differential legal treatment within the United Kingdom, but also in the risk of heterosexual non-marital ways of life receiving less legal protection than homosexual partnerships. Barlow did not acknowledge the objection that heterosexual partners had the option to marry, as many couples rejected marriage on principle.

Biological and social parenthood and the best interest of the child

The debate on currently discussed conceptions of parenthood clearly revealed that family roles can no longer be perceived as given by nature. The increased fluctuation of partnerships implies that the role of parenthood can no longer be naturally derived from the genesis of children. Other people can also take on the social role of father or mother for non-biological children. While this is no new development, the legal determination of parenthood is complicated by the increasing number of cases of assisted reproduction, where children are created not only by means of artificial insemination, but even with the help of so-called "surrogate mothers" – even though this practice is illegal in many European countries. This development carries with it not just deep ethical, but also legal questions that have resulted in quite differing national-cultural answers, as Christine Budzikiewicz (Cologne) illustrated. Whereas with artificial insemination, the biological fathers are usually not legally considered to be fathers (even though even in this case courts have recently had to deal with cases in which the right of children to learn their father's identity had to be balanced against the latter's right to anonymity), the variance for surrogate-mothers is much greater. In some countries, the biological mother is also the legal one and the couple that 'commissioned' the child has the possibility of adoption. In other cases, all three persons involved can be legally recognized as parents – as solution often justified with the best interest of the child. Even more complex and – for the children – more dramatic are those cases in which surrogate motherhood is illegal such as in France or Germany – and the legal status of children born in such a way needs to be negotiated. Here, once again, it became very clear that the questions at stake are not just technical ones of legal harmonization, but deeply ethical issues. To the extent that the granting

or balancing of fundamental rights is at issue, there is at least potential for conflict with legislation by national courts and the European Court of Human Rights.

The meaning of cultural conflicts arising due to migration

Marie-Claire Foblets (Halle) examined the conflict-laden contact of European legal conceptions with non-European cultures with the example of transnational family structures in Europe – an issue that was also discussed by several workshops with young academics that were integrated into the conference program. In principle, substantive family law is determined by national legal orders. When spouses have different nationalities, are dual nationals, or jointly immigrated in a country, however, the question of applicable law can be settled on the basis of private international law. Which law is applied is primarily determined based on habitual residence in some European countries, whereas in others the country of origin is the connecting factor, and in many cases also the law of the country chosen by the country. In quite a few instances, this can result in a couple resident in Europe being subjected to provisions of non-European law – even though legal recognition of such judgments is only granted in Europe under the proviso that it is not at odds with *ordre public*, i.e. national and European fundamental rights and principles.

Foblets told of her research on the presence of Moroccan couples in Europe that cannot

be generalized. Some couples deliberately handle family affairs according to European rules of civil law, whereas others turn to the religiously-inspired law of their home country. Such a choice can be motivated by deeply seated faith in the sacredness of religious legal concepts, but can likewise be motivated by the search for the most favorable law (forum shopping). Foblets therefore made particular mention of the advantages and disadvantages of the Moroccan family code of 2004. While, on the one hand, it can be described as fairly

progressive compared to family law regimes in other Islamic societies, judges have a problematic amount of leeway with which they can interpret the laws *contra legem.* For instance, even though marrying off minors is illegal, judges are at liberty to allow such a practice based on the interest of the youths. Consequently, many underage girls, particularly in rural regions, factually do not enjoy the protection of the law, but are victims of traditional patriarchic conceptions of family. When recognition of such legal actions is debated in Europe then, next to questions of normative reconcilability with the *lex fori*, another level of cultural conflict is often revealed, particularly in divorce cases, whenever it is unclear from the Moroccan judgments on what basis they have been made. Foblets attributed this to a low social valuation of written law that ultimately serves as a reference point to a distinctive cultural style of legal reasoning.

Family law as culture

In his closing remarks, Werner Gephart also remarked that increased streams of migration and other effects of globalization increase the likelihood of legal-cultural conflicts. He stressed, however, that culture needs to be taken seriously as an important imprint on law: "Culture matters", he emphasized, and therefore two distinct arguments need to be differentiated in the debate on cultural constraints to harmonization: Recognition of the fact that family law, too, is embedded in cultural contexts and national traditions, but also that this does not inevitably lead to a logic of unbridgeable cultural differences. The sociological-cultural scientific perspective adopted by Gephart could in several ways be traced back to Emile Durkheim, who, for methodological and didactical reasons, accorded a central position to family structures in his theory of social change and the genesis of social forms of solidarity. Gephart further illustrated how the research program pursued

by the Käte Hamburger Centre for Advanced Study "Law as Culture" could contribute to an analysis of family law resting on the bedrock of culture. For instance, insights into the symbolic and ritual elements that differ between legal cultures in the field of family law open up a multi-dimensional concept of law and show how mere normative regulation is insufficient in achieving harmonization. Further, religiously-informed family law orders reveal conceptions that are constitutive to identity, avoid any attempts of reprogramming and, as is the case for Islamic law, confront European legal culture as its Other. The goal should generally be to focus not just on dogmatic, written family law, but also to take living law into account, as notably expressed in cultural representations such as TV series and analogue or virtual variants of family albums. The conference thus closed with a plea for an expanded perspective of law that had already been alluded to in several previous lectures. European law can only be updated in its own, specific way of normative rationality. From the outside, however, it can be observed as a socially influential and politically explosive cultural technique that cannot be fully captured by its normative constitution.

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