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Materials de les Tretzenes Jornades de Dret Català a Tossa

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FAMILY LAW - A CHALLENGE FOR EUROPE?

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I. TWO CASES AS AN INTRODUCTION

As an introduction two cases are presented, one of the European Court of Justice and one of the European Court for Human Rights. Both cases are good examples to show how European law is infiltrating family law.

1. The Garcia Avello Case [1]

1.1 *The facts*

Carlos Garcia Avello, a Spanish national, and his Belgian wife, Isabelle Weber, reside in Belgium and have two children, both born in Belgium. The children have dual nationality. Belgian law requires children to take the surname of their father. On their birth certificates, therefore, the children were registered under the name Garcia Avello. In line with Spanish custom, the parents requested the Belgian King to change the surname of their children from Garcia Avello to Garcia Weber. They argued that the current name of the children could lead Spanish people to believe that the children are in fact the siblings of the father and that there is no

[1] ECJ 2 October 2003, FamRZ 2004, 173, note Henrich, Jurisprudence de Liège, Mons et Bruxelles 2004, 380, *Rev. int. DIP* 2004, 184, note LAGARDE, *StAZ* 2004, 40. Hereto De Groot, "Op weg naar een Europees IPR op het gebied van het personenrecht", *WPNR* 2004, 360 ff. and "Op weg naar een Europees IPR op het gebied van het personen- en famlierecht", *NjPR* 2004, 273 ff.; Pintens, "Entwicklungen im belgischen Familien- und Erbrecht", *FamRZ* 2004, 1421 ff.; Quiñones Escamez, "Ciudadanía europea, doble nacionalidad y cambio de los apellidos de los hijos: Autonomía de la voluntad y conflicto positivo entre las nacionalidades de dos estados miembros», *Revista Jurídica de Catalunya* 2004, 203 ff.; Quiñones Escamez, "Derecho comunitario, derechos fundamentales y denegación del cambio de sexo y apellidos : ¿un orden público europeo armonizador?", *Revista de Derecho Comunitario Europeo* 2004, 507 ff.

connection with the mother of the children. Practical difficulties could arise from the children effectively having differing surnames in Belgium and Spain.

The application was denied as being contrary to Belgian practice. Mr. Garcia Avello challenged that refusal before the Belgian *Conseil d'Etat*, the highest administrative court. That court referred a question to the Court of Justice of the EC as to whether the refusal was contrary to Community law, in particular to the principles relating to the citizenship of the European Union and the freedom of movement.

1.2 *The preliminary ruling*

Contrary to the governments of Belgium, Denmark and the Netherlands, the ECJ had the opinion that the matter felt in the ambit of the Treaty, particularly under Art. 17 (Citizenship of the Union).[2] According to this provision, all citizens of the Member States enjoy the privileges conferred to them by the Treaty and have a right to be treated equal unless otherwise mentioned.

The ECJ stressed that the law of names principally rests with the Member States, but pointed out that while enforcing their competence the Member States of course had to comply with Community Law, particularly with the freedom of movement provided for by Art. 18 of the Treaty. The Citizenship of the Union is not meant to influence purely national issues that do not touch Community matters. However, constellations comparable to the case of the Avello family may well become a Community concern in that Mr. Garcia Avello's children are citizens of one Member State and have permanent residence in another Member State where they have actually lived all their lives. This is not changed by the fact that the children also have citizenship of the Member State of permanent residence and that this Member State and its authorities regard this citizenship as the only effective one. According to the ECJ, it is not within the sphere of competence of the Member States to limit the legal effects of the citizenship of another Member State by creating additional requirements for the recognition of that citizenship regarding the freedoms conferred upon the citizens. The provisions of Art. 3 of the Hague Convention on nationality of 1930 invoked by the Belgian government as being the decisive factor for determining Belgian citizenship do not create an obligation to give preference to this citizenship, but create only an option (para. 20-28).

Under these circumstances the ECJ concluded that the children of the plaintiff could rely on their right according to Art. 12 of the Treaty that prohibits discrimination based on nationality. Non-discrimination in terms of the

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[2] On the citizenship of the Union, see Díez-Picazo, "Sobre la ciudadanía europea", *Anuario de derecho civil* 2001, 1355 ff.

established jurisprudence of the ECJ basically means that cases of a factually and legally comparable nature have to be treated equally and that cases of a factually and legally divergent nature do not have to be treated equally. Unequal treatment in this case could only be justified if it was based on objective criteria other than nationality and if the aim pursued by the national legislation was legitimate in relation to the means applied. The ECJ did not follow Belgium's reasoning. It barely touched the main argument that the legislation in question is designed to further the integration of foreigners; the ECJ simply stated that the Belgian law was neither necessary nor conducive to a furthering of integration, seeing that there are differing systems concerning the right to the use of a name in the Member States (para. 29-37).

In conclusion the ECJ stated that the Articles 12 and 17 have to be interpreted in a way to prohibit Member States from dismissing applications regarding name-changes in cases comparable to that of Garcia Avello, where children are living in one Member State with double citizenship (of the Member State of residence and another Member State), if it is the aim of the application to allow the children to be named as provided for by law and tradition of the latter Member State.

1.3 *A Critical Analysis*

This decision has vast consequences. The children of Mr. Garcia Avello are given protection under the Treaty despite the fact that they never have made use of the freedoms provided by the Treaty. They were born in Belgium and had lived in Belgium all their lives, regarded as Belgians by the Belgian State and not as foreigners. The ECJ fails to say clearly why the Treaty is deemed applicable.[3] Is it the double citizenship as such or is it the fact that a parent of the children has made use of the freedoms provided for by the Treaty? If the double citizenship is the decisive factor, then the ECJ (indirectly) infringes upon matters for which the Treaty is not applicable. Furthermore the ECJ did not consider the argument of integration of foreigners properly and does not seem to value the increasing importance of the element of integration in private international law, which is why the place of permanent residence rather than nationality is used in modern legislation to determine the applicable law.[4]

However, the direct consequences of the decision appear to be limited. The national authorities will have to respect the ECJ's interpretation of the Art. 12 and 17 in cases similar to that of Garcia Avello. In principle, the registrars of

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[3] Kohler, "Verständigungsschwierigkeiten zwischen europäischem Gemeinschaftrecht und internationalen Privatrecht", *in Festschrift Jayme*, Berlin 2002, 646 ff.

[4] Pintens, *FamRZ* 2004, 1422.

civil status are not bound by this interpretation when they receive a declaration of birth and have to register the name of the child as the decisive provisions of the judgement in closer consideration do not make this conclusion. In second consideration the decision is also here of not only small importance. The ECJ has secured that persons with dual citizenship (one of them that of the forum state) and citizens solely of the forum state cannot systematically be treated alike. The same is true for a systematic application of the law of the foreign state in situations of dual citizenship. A possible solution would seem to be the determination of the applicable law in neutral terms, e.g. by territorial or by closest connection, or - perhaps best of all - by allowing an option.[5] Legal systems making no provision for the rule of closest connection or alternative solutions will be called upon to consider precautions of some kind because parents who at the declaration of birth did not obtain the composition of the child's name in accordance with their national law, will be able to successfully pursue their interests before the European Court of Justice.[6]

2. The Pla and Puncernau Case[7]

2.1 *The Facts*

In the decision Pla and Puncernau vs. Andorra the European Court of Human Rights had to examine for the first time a case of testamentary succession. Former cases did always concern intestate succession law.

Carolina Pujol Oller died leaving behind three children: Francesc-Xavier, Carolina and Sara. She had made a will before a notary in 1939 with a *fideïcomís* under Catalan law, which settled her estate on her son as first beneficiary and as tenant for life. Should he be unable to inherit, the estate was to pass on to his sister, Carolina, and if she was also unable to inherit, it was to pass on to Sara's son, Josep Antoni Serra Pla. The testatrix indicated that Francesc-Xavier, the beneficiary and life tenant under her will, was on his death to transfer the estate to a son or grandson of a lawful and canonical marriage. Should those conditions not be met, the testatrix had stipulated that the children and grandchildren of Carolina and Sara would be entitled to the estate of the *fideïcomís*.

The marriage between Francesc-Xavier and Roser Puncernau Pedro remained without children, but the spouses adopted a child in Spain in 1969, Antoni, in accordance with the procedure for full adoption. In a codicil of 3 July 1995 Francesc-Xavier left the usufruct of the assets he had inherited under his mother's will to his wife and the bare ownership to his adopted son, Antoni. Francesc-Xavier died in 1996.

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[5] Comp. Henrich, *FamRZ* 2004, 173.

[6] Pintens, *FamRZ* 2004, 1422.

[7] ECJ 13 July 2004, *FamRZ* 2004, 1467, note Pintens.

On 17 July 1997 Carolina and Immaculada Serra Areny, great-grandchildren of the testatrix, brought proceedings in the *Tribunal des Batlles* (court of first instance) of Andorra to have the codicil of 3 July 1995 declared null and void due to the fact that Antoni was not born in a lawful and canonical marriage.

Both parties agree that it is the contents of the will that determine the testatrix's intention at the time of the making it (para. 17).

The Civil Court of first instance dismissed the action. The testatrix's intention in the light of the words used is to secure and preserve the estate by keeping it in the settlor's family. The adopted child leaves his family of origin and terminates all legal ties with its family and it acquires inheritance rights in its new family. Full adoption is based on the idea that adoption must replace or imitate biological filiation. Therefore it cannot be said that the testatrix intended to prevent adopted or non-biological children from inheriting her estate. If that had been her intention she would have made express provision for it.

The Court of Appeal revoked the lower court's judgment. It stressed the fact that adoption was practically unknown in Andorra in 1939. Since the nineteenth century it could be regarded as an obsolete institution and, to a certain extent, unnecessary given the institution of *heretament* (agreement, specific to Catalan law, on the succession of a living person) (para. 18 III). According to Spanish law applicable at the time, adoption created a tie between the adoptive parent, the adopted child and his legitimate descendants, but not with the adoptive parent's family (Under Article 174-VII of the Spanish Civil Code). The deed of adoption referred to Catalan legislation with respect to the inheritance rights. This legislation does not permit adoptive children to inherit from their adoptive parents' family. The adopted children of persons on whom an estate was settled by their father or mother were unconnected with the family circle with regard to the beneficiary's ascendants. The purpose of a *fideïcomís* under Catalan law was to keep the family estate in the legitimate family and Catalan legal tradition had always favoured the exclusion of adopted children from such family settlements. Thus, in order to include adopted children in this type of settlement, the testatrix had to express her intention clearly. The expression "*offspring of a lawful and canonical marriage*", which appears in the 1939 will, does not suffice. The law nowadays in force allows adopted children to inherit from their adoptive parents on an intestate succession. This rule cannot be extended to a testate succession, where the main factor is the testator's intention.

Other appeals were denied. Finally the Constitutional Court declared the empara appeal inadmissible because the High Court of Justice did not discriminate, but confined itself to interpreting a testamentary disposition. The discrimination of the adopted child is not a consequence of the judgement, but of the testatrix's intention and the principle of freedom to make testamentary dispositions (para. 58 and 59).

2.2 *The Judgement*

Consequently the adopted child and its mother launched an appeal before the European Court of Human Rights concerning a violation of Article 14 in conjunction with Article 8 ECHR. The ECtHR decided that there was a violation. The Court is of the opinion that the testamentary succession law falls within the scope of Article 8 ECHR. The testatrix's intention and the principle of freedom to make testamentary dispositions are not submitted to any discussion, only the interpretation of the will is (para. 44-57). The Court examines the will and concludes that an exclusion of the adopted child cannot be derived from the testamentary disposition (para. 58).

The ECtHR admits that it is in theory not competent to settle disputes of purely private nature but that it cannot remain passive where a national court's interpretation of a legal act is blatantly inconsistent with the prohibition of discrimination (para. 59). In the present case there is such a blatant inconsistency: the will does not make a distinction between biological and adopted children, an interpretation was not necessary. The interpretation lead to an exclusion of the adopted child for which there was no reasonable justification (para. 60-61). Finally the Court reiterates that the Convention, which is a dynamic text and entails positive obligations for Member States, is to be interpreted in the light of present-day conditions. Thus, as a long period of time elapsed between the writing of the will and the opening of the succession, the judge can not ignore the new social, economic and legal conditions. He must interpret the will in a manner that closely corresponds to domestic law but also to the Convention (para. 62).

2.3 A Critical Analysis

This judgement, that is not yet final and conclusive - an appeal has been filed to the great chamber of the court - is remarkable and peculiar. It is acceptable that the testamentary succession falls within the scope of article 8 ECHR, as also the testamentary freedom is a part of this article and of article 1 of the First Protocol with the convention. Less acceptable is that the Court takes the position of the internal courts and decides along a primitive method of interpretation that the last will does not make a distinction between biological and adopted children and that therefore no interpretation is necessary. The judgement denies the interpretation problems and the available interpretation methods. It is a surpassed point of view that a clear last will does not require interpretation.[8] The course through the different Courts already reveals that the last will was not so clear. In a peculiar way, the Court distinguished the intention of the testator from the interpretation of the last will, while this interpretation needs to appoint a central role to the intention of the testator and needs to search for this intention.

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[8] Pintens, *FamRZ* 2004, 1471.

In his dissenting opinion, judge Bratza justly points out that the ECHR cannot prevent a testator to discriminate between his children, regardless of their descent, nor can the effect of the fundamental rights on family relations prevent or limit the testamentary freedom. The intention of the testator and his testamentary freedom holds a key position in the testamentary succession. Only the statutory portion of the estate can limit this testamentary freedom.

Obviously, the fundamental rights of the ECHR cannot be denied when drafting and interpreting of a last will. A last will in which e.g. a legacy is linked to a condition that limits the freedom to get married or divorced, opposes the fundamental rights from the ECHR. These rare cases however will rather scarcely appear before the Court. They will be suppressed by the internal judicial process.

In the Pla and Puncernau case, no breach of fundamental rights was at hand. The Andorran courts have interpreted a last will and have hereby sought attachment to the presumable intention of the testator. If the testator had explicitly provided in the same result, nobody would have called upon the ECtHR. The testator is free to show favor to one child above the other. The Andorran Court has indirectly reached a decision that the testator could have reached directly.[9]

Finally, the interpretation of a last will cannot be compared with the interpretation of a law or treaty. There is only the intention of the testator to research and it is perfectly defendable that this intention, other than in the case of a law or treaty, is not explained evolutionary but as a product of its age. The last will must be explained given its context. The ECHR does not need to play a part in discovering the meaning of the testator. In extreme cases such as in the above mentioned example of the legacy that restricts the freedom of the legatee, the Treaty can at the very most prevent or limit the execution of the will.[10]

II. The Increasing Influence of European Law on Family Law

1. Case Law

1.1 *Court of Justice*

In many cases, the European Court of Justice has served as an impetus to harmonisation of law by attributing certain aspects of family law to the freedom of movement.[11] In the Konstantinidis case, the Court ruled that national legislation

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[9] Pintens, *FamRZ* 2004, 1471.

[10] Pintens, *FamRZ* 2004, 1471.

[11] See Fallon, "Droit familial et droit des Communautés européennes», *Revue trimestrielle du droit familial* 1998, 375 ff.; Pintens, «Von Konstantinidis bis Grant. Europa und das Familienrecht», *ZEuP* 1998, 843 ff.; Pintens, Familienrecht und Personenstand – Perspektiven einer Europäisierung, *StAZ* 2004, 353 ff; Zeyringer, „Der Einfluß europäischen Rechts auf das österreichische Personenstandsrecht", Östa 1999, 10 ff.

obliging a Greek national to use, in his profession, a written form of his name resulting from its transliteration is incompatible with the right of establishment guaranteed by Art. 52 (now 43) of the EC Treaty if that written form distorts the pronunciation and if such distortion creates a risk of confusion as to the person's identity among his potential clientele.[12] Another example is provided by the Dafeki case where the freedom of movement for workers requires that the authorities and courts of a Member State must accept certificates concerning personal status issued by the competent authorities of another Member State unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question.[13] In the P. case, the Court criticised the discharge of a transsexual employee, who underwent a gender reassignment, as a contravention to the European Directive No. 76/207 of 9 February 1976[14] on the equal treatment of men and women in working conditions. The Court declared itself in favour of an expansive interpretation of this directive, whereby sexual discrimination is not limited to that between men and women but, rather, includes all discrimination on grounds of sex.

These decisions of the Court are very important, as they contribute to the reduction of discrimination and administrative impediments. However, the Court cannot be expected to greatly contribute to a real breakthrough in the field of harmonisation of law. This is exemplified by the Grant case,[15] where the Court decided that a railway company is not obliged to provide the same travel concessions to homosexual partners as to heterosexual partners of its staff members. The Court stated that, given the present state of the law within the EU member states, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between two persons of opposite sex. Further, the Court asserted that the principle of equality prohibits discrimination based on the sex of a person but not on a person's sexual orientation. The Court left it to the Council, which, in the light of the Treaty of Amsterdam, is allowed by Art. 13 of the EC Treaty to take appropriate action to eliminate such discrimination. In the case of D. and the

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[12] ECJ 3 March 1993 (Konstantinidis/Stadt Altensteig), *ECR* 1993, I-1991, *CMLR* 1994, 395, note Lawson, *ERPL* 1995, 483, note Gaurier, Schockweiler, Loiseau, *Rev.trim.D.H.* 1994, note Flauss, *ZEuP* 1995, 89, note Pintens. See also Basedow, „Konstantinidis v. Bangemann – oder die Familie im Europäischen Gemeinschaftsrecht", *ZEuP* 1994, 197 ff.; De Groot, "Het Hof van Justitie van de Europese Gemeenschappen waagt zich op het gebied van het namenrecht", *WPNR* 1994, 855 ff.

[13] ECJ 2 December 1997 (Dafeki/Landesversicherungsanstalt Württemberg), *ECR* 1997, I-6761, *R.C.D.I.P.* 1998, 239, note Droz.

[14] ECJ 4 April 1996 (P./S. and Cornwall County Council), *ECR* 1996, I-2143.

[15] ECJ 17 December 1998 (Grant/South-West Trains Ltd.), *ECR* 1998, I-636, *EuZW* 1998, 212, note Szczekalla.

Kingdom of Sweden v. Council of the European Union, the Court has for the first time dealt with a registered partnership.[16] The Council rejected an application by a staff member who lived in a registered partnership with a partner of the same sex, in order to obtain the household allowance provided for married couples in the Staff Regulations of Officials of the European Communities. The Court stated that statutory arrangements for registered partnership are very diverse and are regarded in the Member States as being distinct from marriage, so that the Community judiciary cannot interpret Staff Regulations in such a way that registered partnerships are treated the same way as marriage. The Court placed its hope on Art. 13 of the EC Treaty and left the initiative to the Community legislator.[17]

Although the negative decisions do not constitute a breakthrough, they do have practical consequences. The Grant decision created such a stir in Britain that the concerned railway company, in spite of a favourable decision, abolished its discriminatory provisions. The D. decision has also had practical effects. The Commission accepted in the line of the decision that Dutch gay-marriage falls under the concept of marriage as mentioned in the Staff Regulations.[18] This in turn, however, leads to another discrimination. If the national legislature has adopted a far-reaching regulation for the rights of same-sex couples, hereby calling this regulation "marriage", then one can enjoy the privileges of the Staff Regulations. If, however, the national legislator designates the same regulation a "registered partnership", then those privileges are not applicable. The proposal for the new staff regulations provide the same treatment of all registered partnerships. All partners will enjoy the same privileges. There is a major condition: the privileges are only granted when the law does not allow the partners to marry![19]

These decisions and their consequences show that there is a need for developing a family concept on the basis of equality between the sexes. In addition the Garcia Avello case shows that important concepts such as the European citizenship and their implications cannot be left to the courts but

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[16] ECJ 31 May 2001 (D. and the Kingdom of Sweden/Council of Ministers), *ECR* 2002, I-4319 *FamRZ* 2001, 1053. Hereto Jakob, "Die eingetragene Lebenspartnerschaft im Europarecht", *FamRZ* 2002, 505 ff. with further references.

[17] Comp. Mcglynn, "The Europeanisation of family law", *C.F.L.Q.* 2001, 48.

[18] Answer Kinnock of 15 October 2001 in the European Parliament on Question P-2438/01, OJ C 93E of 18 April 2002. See hereto Jessurun d'Oliveira, "De Europese Commissie erkent het Nederlands huwelijk. Nederlands relatierecht en de Europese Unie", *NJB* 2001, 2035 ff. The administration department of the European Parliament had another opinion. See D'Oliveira, "Het homohuwelijk en de Europese Unie", *NJB* 2002, 973.

[19] Proposal for a new Council Regulation (No. 2002/0100 CNS).

need at first sight the intervention of the legislation. If we want to avoid this intervention, it will be the task of the legal doctrine to develop this concept.

1.2 *European Court of Human Rights*

The European Court of Human Rights has served as a catalyst for harmonisation through its decisions and judgements, which have given a rough sketch of European family law.[20] The right to respect for private and family life as laid down in Art. 8 of the ECHR has been of great importance in this regard. The Marckx case[21] has had a controlling influence on affiliation law, especially on the establishment of affiliation *ex parte materna* and the abolition of hereditary discriminations. Several decisions protect the relationship between father and child, even when paternity has not been established. In the Keegan case, the Court ruled that a mother cannot give her child up for adoption without informing the biological father and involving him in the proceedings.[22] In the case of placement of children in foster homes, several decisions have restricted interferences by public authorities and emphasised that any measures implementing a public care decision should always be consistent with the ultimate aim of possibly reuniting the family. Such measures are to be terminated as soon as circumstances permit[23]. With regard to the hereditary rights of children born out of wedlock, the Marckx, Inze[24] and Mazurek[25] cases have eliminated nearly all discrimination[26].

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[20] See Hohnerlein, "Konturen eines einheitlichen europäischen Familien- und Kindschaftsrechts. Die Rolle der Europäischen Menschenrechtskonvention", *Eur. Legal Forum* 2000, 252 ff.; Kuchinke, „*Über die Notwendigkeit, ein gemeineuropäisches Familien- un Erbrecht zu schaffen*", in Festschrift Söllner, Munich 2000, 592 ff.; Senaeve, „Van Marckx tot Vermeire. 12 ½ jaar rechtspraak van het Straatsburgse Hof", *FJR* 1991, 195 ff., 224 ff. and 244 ff.; Verschraegen, Council of Europe, in Pintens (ed.), „*Family and Succession Law*", in Blanpain (ed.), *Encyclopaedia of Laws*, Deventer/Boston (loose-leaf edition), 23 ff.

[21] ECtHR 13 June 1979 (Marckx/Belgium), Series A, No. 31, FamRZ 1979, 903, *EuGRZ* 1979, 454, *NJW* 1979, 2449. Hereto Jayme, „Europäische Menschenrechtskonvention und deutsches Nichtehelichenrecht", *NJW* 1979, 2425 ff.; Pintens, „Menschenrechtskonvention und Privatrecht – Auswirkungen in Belgien", *RabelsZ* 1999, 702 ff.; Rigaux, „La loi condamnée", *Journal des Tribunaux* 1979, 5113 ff.; Sturm, „Das Straßburger Marckx-Urteil zum Recht des nichtehelichen Kindes und seine Folgen", *FamRZ* 1982, 1150 ff.; VOSS, „Belgien: Kindschaft praeter und contra legem", *IPRax* 1986, 120 ff.

[22] ECtHR 25 May 1994 (Keegan/Ireland), Series A, No. 290. Hereto Rudolf, "Zur Rechtstellung des Vaters eines nichtehelichen Kindes nach der EMRK", *EuGRZ* 1995, 110 ff.; O'Donnel, "The unmarried father and the right to family life: Keegan v. Ireland", *MJ* 1995, 72 ff.

[23] E.g. ECtHR 24 March 1988 (Olsson/Sweden – No. 1), Series A, No. 130, § 81.

[24] ECtHR 29 October 1987 (Inze/Austria), Series A, No. 126, *ÖJZ* 1988, 177.

[25] ECtHR 1 February 2000 (Mazurek/France) Reports 2000-II 23, Dr.fam. 2000, 20, note De Lamy, *FamRZ* 2000, note Vanwinckelen. The Court has rejected to examine a violation of Art. 8 ECHR. See the dissenting opinion of the judges Loucaide and

Despite all these developments, the European Court of Human Rights will likely have less influence on the approximation of the legal systems in the future due to the fact that the major discriminations in the fields of family and, especially, succession law have been eliminated. Thus, it is debatable whether the Court will maintain its pioneering role. In view of the increasing number of Member States and their different opinions regarding human rights, the Court, in general, will probably limit itself to maintaining minimum standards.

Moreover, during last years there is no consistence between the judgements of the Court. In quite a lot of cases the Court is not maintaining his pioneering role and allows the Member States a large margin of appreciation as in the Fretté case[27]. Here the Court stated that the Convention was not violated by the refusal of an adoption on the grounds of the adoptant's homosexuality. The appreciation of the interest of the child is left to the Member State. In other cases the Court is severe and leaves no margin at all as in the Pla and Puncernau case (supra I.2).

2. Legislation

2.1 *European Union*

Basically, the European Union has no competence regarding the unification of family and succession law.[28] The Treaty of Amsterdam has not altered this fact. The Council may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, as set out in Art. 13 of the EC Treaty. The approximation of the laws of Member States is only a task for the European Community when it is required for the functioning of the common market. The provisions laid down in Art. 94 and 95 of the EC Treaty on the approximation of laws are not applicable. Even when using a broad interpretation of the goals of the European Community, there are only

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Tulkens. Hereto Gouttenoire-Cornut/Sudre, "L'incompatibilité de la réduction de la vocation successorale de l'enfant adultérin à la Convention EDH «, *J.C.P.* 2000 II, No. 10286, 647-648.

[26] Hereto Pintens, „Grundgedanken und Perspektiven einer Europäisierung des Familien- und Erbrechts", *FamRZ* 2003, 331 ff.

[27] ECtHR 26 February 2002, EHRC 2002, 259 note Janssen/Gerards, *FamRZ* 2003, 149, Jurisprudence de Liège, Mons et Bruxelles 2002, 752, note Martens.

[28] See Fallon, "Droit familial et droit des Communautés européennes", *Revue trimestrielle du droit familial* 1998, 361 ff.; Hamilton/Perry (ed.), *Family Law in Europe*, 2nd edition, London 2002; Mcglynn, "*A Family Law for the European Union?*", in Shaw (ed.), Social Law and Policy in an Evolving European Union, Oxford 2000, 223 ff. and "The Europeanisation of family law", *C.F.L.Q.* 2001, 36; Pintens "Europeanisation of family law" in Boele-Woelki, *Perspectives for the Unification and Harmonisation of Family Law*, Antwerp 2003, 22; Verbeke/Leleu, "Harmonisation of the Law of Succession in Europe", in Hartkamp et al. (ed.), *Towards a European Civil Code*, 2nd edition, Nijmegen/The Hague 1998, 181 ff.

a few rules of family and succession law, which directly affect the functioning of the common market, despite the fact that succession law has some economic relevance.[29] The transfer of judicial co-operation in civil matters from the so-called third pillar (co-operation in judicial and legal matters) to the first pillar (community law)[30] does not push the unification of substantive family law much further. Even though Art. 65 of the EC Treaty does not contain a comprehensive enumeration, one could deduce from the measures enumerated in this article as well as from the caption of Title IV of the EC Treaty that its application is restricted to international family law only.[31] Based on the example of the Brussels II Regulation,[32] which is already replaced by the Brussels IIa regulation,[33] covering parental authority and visiting rights in all cases,[34] one can, pursuant

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[29] E.g. one could link up with company law and corporate law. Hereto Leipold, "Europa und das Erbrecht", in *Festschrift Söllner*, Munich 2000, 650; Tillmann, „Zur Entwicklung eines europäischen Zivilrechts", in *Festschrift Oppenhoff*, Munich 1985, 503.

[30] Hereto Besse, "Die justizielle Zusammenarbeit in Zivilsachen nach dem Vertrag von Amsterdam und das EuGVÜ", *ZEuP* 1999, 106 ff.; Jayme/Kohler, „Europäisches Kollisionsrecht 1997 – Vergemeinschaftung durch "Säulenwechsel"?", *IPRax* 1997, 385 ff.

[31] Comp. Basedow, "Das BGB im künftigen europäischen Privatrecht: Der hybride Kodex. Systemsuche zwischen nationaler Kodifikation und Rechtsangleichung", *AcP* 2000, 477.

[32] OJ L 160, 30 June 2000, 19. This regulation has come into force on 1 March 2001, thus replacing the so-called Brussels II Convention of 28 May 1998 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters (OJ C 221, 7 June 1998).

[33] Council Regulation (EC) No 2201/2003 of 27 November 2003, OJ L 338, 23 December 2003. The regulation entered into force on 1 August 2004 and shall apply from 1 March 2005 (Art. 72 Brussels IIa).

[34] Hereto Beaumont/Moir, „Brussels Convention II: A new instrument in family matters for the European Union or the European Community?", *Eur.L.R.* 1995, 268 ff.; Boele-Woelki, „Brüssel II: Die Verordnung über die Zuständigkeit und die Anerkennung von Entscheidungen in Ehesachen", *ZfRV* 2001, 121 ff.; Everall/Nicholls, „Brussels I and II – The Impact on Family Law", *Fam Law* 2002, 674 ff.; Helms, „Die Anerkennung ausländischer Entscheidungen im Europäischen Eheverfahrensrecht", *FamRZ* 2001, 257 ff. and „Internationales Verfahrensrecht für Familiensachen in der Europäischen Union", *FamRZ* 2002, 1593 ff.; Jänterä-Jareborg, „Marriage Dissolution in an integrated Europe: The 1998 European Union Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (Brussels II Convention)", in Šarčevičć/Volken, *Yearbook of Private International Law 1999*, 1 ff.; Kohler, „Internationales Verfahrensrecht für Ehesachen in der europäischen Union: Die Verordnung „Brüssel II", *NJW* 2001, 10 ff. and „Status als Ware: Bemerkungen zur europäischen Verordnung über das internationale Verfahrensrecht für Ehesachen", in Mansel (ed.), *Vergemeinschaftung des Europäischen Kollisionsrecht*, Cologne 2001, 41 ff. and „Libre circulation du divorce? Observations sur le règlement communautaire concernant les procédures en matière matrimoniale", in *Estudos Magelhães Collaço*, I, Coimbra 2002, 232 ff.; Pirrung, „Europäische justizielle Zusammenarbeit in Zivilsachen – insbesondere das neue Scheidungsübereinkommen", *ZEuP* 1999, 834 ff.; Solomon, „Brüssel IIa" – Die neuen europäischen Regeln zum

to the Vienna Action Plan,[35] the Programme of Measures of the Council[36] and the last communication,[37] expect further regulations.[38] Regulations on recognition and enforcement and on the applicable law in divorce cases, marital property law and succession law are planned.[39]

Recently the European Union has abandoned its previous restraint. With the adoption of the Charter of Fundamental Rights of 7 December 2000,[40] which is of a mainly programmed aimed nature[41] and reaffirms the rights as they result from the European Convention for the Protection of Human Rights and Fundamental Freedoms and from constitutional traditions, with some enlargement, the Union has acknowledged the importance of the family.

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internationalen Verfahrensrecht in Fragen der elterlichen Verantwortung", *FamRZ* 2004, 1409 ff.; Spellenberg, „*Der Anwendungsbereich der EheVGO ("Brüssel II") in Statussachen*", in Festschrfit Schumann, Tübingen 2001, 423 ff. and „Anerkennung eherechtlicher Entscheidungen nach der EheGVO*", ZZPInt* 2001, 109 ff. and „*Die Zuständigkeit für Eheklagen nach der EheGVO*", in Festschrift Geimer, Munich 2002, 1257 ff.

[35] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice of 3 December 1998, OJ C 19, 23 January 1999 (also published in IPRax 1999, 288 ff.)

[36] Draft programme of the Council of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters of 15 January 2001, OJ C 12.

[37] Communication from the Commission to the Council and the European Parliament, 2 June 2004, COM(2004) 401 final.

[38] Hereto Boele-Woelki, "De toekomst van het IPR na het Verdrag van Amsterdam", in Privaatrecht en gros. Opstellen aangeboden aan prof. mr. F. Willem Grosheide, Antwerp/Groningen 2000, 355 ff., especially 368-369; De Boer, "Brussel II: een eerste stap naar een communautair IPR", *FJR* 1999, 244 ff.; HESS, "Die "Europäisierung" des internationalen Privatrechts durch den Amsterdamer Vertrag. Chancen und Gefahren", *NJW* 2000, 23 ff.; Jayme/Kohler, "Europäisches Kollisionsrecht 1999. Die Abendstunde der Staatsverträge", *IPRax* 1999, 401 ff.; Jayme, "Zum Jahrtausendwechsel. Das Kollisionsrecht zwischen Postmoderne und Futurismus", *IPRax* 2000, 165 ff.; Kohler, "Interrogations sur les sources du droit international privé européen après le traité d'Amsterdam", *R.C.D.I.P.* 1999, 1 ff. and "Auf dem Weg zu einem europäischen Justizraum für das Familien- und Erbrecht", *FamRZ* 2002, 709 ff.

[39] Clarkson, "Brussels III – Matrimonial Property European Style", *Fam Law* 2002, 683 ff.; Trezza, "Il progetto "Roma III": Versoo uno strumento comunitario in material di divorzio", *Famila* 2001, 221ff.

[40] OJ C 364, 18 December 2000, 1. Hereto in general Di Fabio, "Eine europäische Charta. Auf dem Weg zur Unionsverfassung", *JZ* 2000, 737 ff.; Carlier/De Schutter (ed.), *La Charte des droits fondamentaux de l'Union européenne. Son apport à la protection des droits de l'homme en Europe. Hommage à Silvio Marcus Helmons*, Brussels 2002; Ruscello „La famiglia tra diritto interno e normativa comunitaria", *Familia*, 2001, 697 ff.; Schröder, «Wirkungen der Grundrechtscharta in der europäischen Rechtsordnung», *JZ* 2002, 849 ff.

[41] But obligatory for the institutions and bodies of the Union and to the member states only when they are implementing Union law (Art. 51).

Whereas the actions of the Union first of all concerned family policy as a part of social policy, fundamental rights related to family law are inserted in the Charter, e.g. the right to respect for private and family life (Art. 7), the rights of the child (Art. 24) and the rights of the elderly (Art. 25). Article 21 prohibits discrimination, expressly including discrimination on the ground of sexual orientation.[42] The citizens of the European Union are no longer being seen as consumers, but as persons with their own rights. This does not imply that the Union now disposes of a legal basis related to family law, but that existing rules can be interpreted in a broader sense.[43]

The presidency conclusions of the Laeken European Council of 14-15 December 2001 point out that efforts to resolve the problems arising from differences between legal systems should continue,[44] and the harmonisation of family law is expressly mentioned as an example.[45]

An important legislative achievement is the European Constitution, of which the draft was adopted by the Convention on 13 June 2003 and reached by the European Council in Thessaloniki on 20 June 2003. With the agreement on the European Constitution at the Government conference on 18 June 2004 in Brussels, the path to ratification by the member states has been opened. In the area of material family law, the Constitution will initially not be very meaningful. As in the Charter, the fundamental rights named in the Constitution will merely be declaratory. They will only be binding for EU-Institutions and for the member states at the execution of the law of the Union (Art. II-51-52). In court the citizen can only call upon the fundamental rights for the interpretation and legality control of EU-law, in order to answer to English but also to Dutch objections against a "*le gouvernement des juges*" (Art. II-52 No. 5). However, this will not prevent both the Court of Justice and the national courts to orient themselves more broadly towards the Constitution.

Moreover, the Constitution is not without importance for international family law. Article 65 of the EU Treaty has tied the measures within the reach of the judicial cooperation in civil matters to the condition that they can only be taken

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[42] Hereto Sumner, "The Charter of Fundamental Rights of the EU and Sexual Orientation", *IFL* 2002, 156, esp. 161-162.

[43] Mcglynn, "Families and the European Union Charter of Fundamental Rights: progressive change or entrenching the status quo?", *E.L.Rev.* 2001, 586; Stalford, "Concepts of family under EU law - Lessons from the ECHR", *IJLPF* 2002, 411 ff.

[44] Comp. the Tampere European Council of 15-16 October 1999, which already stressed that "in a genuine European Area of Justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States" (Nr. 28 of the presidency conclusions).

[45] Nr. 45 of the presidency conclusions.

in so far as they are beneficial to the smooth functioning of the internal market. In the practice of Council and Commission, this condition did not carry too much weight. Regulations on international marital and divorce law are without question very useful in the European Union, whether they are really beneficial to the smooth functioning of the internal market is disputable though. In the new Article III-170 of the Constitution, that replaces Article 65 of the EU Treaty, this condition has been deleted with no replacement. Therefore it is conceivable, that private international law – and along with it the international family law – will appear even more in the centre of activities of the Council and Commission and that a true unified conflict law will be developed.

In all these developments, two stages are to be recognized. The first stage with Brussels II consists of an expansion of Brussels I to marital and child affairs and remains limited to the unification of competence, recognition and enforcement. Brussels III will follow the same purpose and will expand Brussels I to marital property law and succession law. The second stage is already more ambitious and exceeds by far the international judicial law with among others an international divorce law, it wants to interfere in the core of private international law and works out a European conflict law. When one is of the opinion that a unified international judicial law is not sufficient and that a unified conflict law is necessary, in order to fight forum shopping, then there will possibly come a third stage. Here one recognizes also that a unified conflict law does not suffice in order to prevent forum shopping and the call for a harmonized and even unified material family law will become louder. Nowadays however, the European Union is not competent in this matter.

2.2 Council of Europe

The Council has met an important goal with its European Convention for the Protection of Human Rights and Fundamental Freedoms as well as certain other conventions,[46] but other major initiatives should not be expected. Rather than promoting unification of law by international conventions, the Council is seeking to stimulate harmonisation through recommendations of the Consultative Assembly and resolutions of the European Ministers of Justice as well as through scientific meetings.[47]

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[46] E.g. the Luxemburg European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 20 May 1980, *ETS* No. 105.

[47] See Killerby, "*Family Law in Europe. Standards set by the member States of the Council of Europe*", in Liber Amicorum Meulders-Klein, Brussels 1998, 351 ff.; Schrama, "De Raad van Europa en het familierecht", *FJR* 1998, 54 ff.; Verschraegen, "Council of Europe", in Pintens (ed.), *Family and Succession Law*, Deventer/Boston 1997, 11 ff.

III. HARMONISATION: A CHALLENGE FOR EUROPE !

The Council of Europe and even the Court of Human Rights will play a minor role in the further development of European family law. It is clear that the European Union will have a more important role.

The Court of Justice uses the freedom of the Treaty to enter into the field of family law. This will lead to casual and fragmentary reforms of international family law and perhaps also of material family law.

Family law has progressively gained in importance in Community law. The elimination of obstacles to the freedom of movement within the European internal market as well as the warranty of this freedom of movement, which has become more important because of the increasing number of changes of domicile, inevitably lead to interactions between family law and the Community's fields of activity.

Should this development be welcomed? The fact that the European Union engages into family law, cannot simply be rejected. The probable unavailability of an ideal rule of competence is the smaller problem, as rules can be made. Instead, one has first to ask whether the European Community is an organisation with the ideal prerequisites and premises to promote harmonisation and unification of family law. Economic views, free movement, realisation of an internal market… this are perhaps not the best starting points. To put it in *Kohler*'s words: "*Status als Ware*"[48] or family law as product of an economic market.[49] In this case, there is a risk that family law will be downgraded to an auxiliary science of economic law, only serving to realise the economic goals of the Community. Second, the Council makes it a little too easy for itself, as it sees the convergence of substantive law as a possibility to gain confidence in the proper functioning of institutions of the Member States. This requires a lot more. Unification of law, which has been established in back rooms without sufficient participation of the European Parliament and perhaps even of the national parliaments, lacks democratic legitimation.[50] Unification of law, which has been established without sufficient scientific cooperation, leads to a reduction of quality. A great deal still

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[48] Kohler, "Status als Ware: Bemerkungen zur europäischen Verordnung über das internationale Verfahrensrecht für Ehesachen", in Mansel (ed.), *Vergemeinschaftung des Europäischen Kollisionsrecht*, Cologne 2001, 41 ff.

[49] Pintens, "Europeanisation of family law" in Boele-Woelki, *Perspectives for the Unification and Harmonisation of Family Law*, Antwerp 2003, 28.

[50] Pintens, "Europeanisation of family law" in Boele-Woelki, *Perspectives for the Unification and Harmoniosation of Family Law*, Antwerp 2003, 28.

has to be realised in the judiciary. A real uniform area of law can only function if the education and training of judges reaches a similar level in each Member State. As long as this is not the case, confidence in the proper functioning of the institutions of the Member States is not likely to occur. Thus, there is still a lot of work to be done.

The conclusion can be reached that (i) an institutional unification of substantive family law still has a long journey to go and that unification is currently not advisable, (ii) at first a long phase of spontaneous approximation of laws is necessary and (iii) this harmonisation of family law will in a first stage be a task for research and education. An intense scientific discussion is necessary.[51] Harmonisation of law will only be successful once there is emphasis on what is common to the European legal systems and when the differences are placed in perspective rather than denied, thus creating a European consciousness. This can only be reached through education and the evolution of legal science.

(This contribution has been closed in September 2004.)

[51] Kohler, *FamRZ* 2002, 713.