The 'Better Law' Approach and the Harmonisation of Family Law

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A. Introduction

Until recently the main dilemmas concerning the harmonisation of family law were connected to the principal question whether or not such a harmonisation is feasible and desirable.[1] It would be premature to say that a broad consensus already exists in Europe concerning the necessity for family law harmonisation. While the popularity of the idea of such harmonisation has been notably increasing throughout the last decade, the resistance to it has also grown. The establishment of the *Commission on European Family Law (CEFL)*[2] has somewhat shifted the emphasis of the attention from this purely academic debate to more functional issues. Consequently, new, more practical questions have been added to the old ones. One of these questions constitutes the central subject of this paper: the problems surrounding the employment of the so-called 'better law' method while drafting harmonised family law.

In order to delineate these problems I will first reiterate the two main methods of drafting harmonised law: the 'common core' and the 'better law' method, and I will point to the general difficulties related to their application. Then I will provide an overview of the use of these methods by the groups and commissions that already have a great deal of experience in the field of private law harmonisation in Europe. I will try to show what lessons could be drawn from this experience. After that I will explain why I expect that the main problem in the application of the 'better law' method, justifying the choice for the 'better rule', will manifest itself more strongly with the harmonisation of

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[1] *See, for instance,* D. Martiny, *Is Unification of Family Law Feasible or Even Desirable? in* A. Hartkamp *et al.* (Eds.), Towards a European Civil Code 159 (1998); D. Martiny, *Die Möglichkeit der Vereinheitlichung des Familienrechts innerhalb des Europäischen Union*, *in* D. Martiny & N. Witzleb (Eds.), Auf dem Wege zu einem Europäischen Zivilgesetzbuch 177-189 (1999); M. Antokolskaia, I. de Hondt, G. Steenhoff, Een zoektocht naar Europees familierecht, Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking (1999).

[2] Established on 1 September 2002. For more information *see* the website of the CEFL: http://www2.law.uu.nl/priv/cefl.

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family law. I will also consider the possibility to use the shared European notion of family rights in order to facilitate such a justification. Finally, two different strategies for the drafting of *Principles of European Family Law* will be discussed. The first is to draft *common core based Principles* with a low level of modernity and innovation, using the 'common core' method only. The second is to draft non-binding *Principles* based upon the highest standard of modernity achieved in present-day European family law, using the 'better law' method. I will argue in favour of this latter option.

To illustrate my argumentation I will consistently use divorce law as an example, as the grounds for divorce are one of the two subjects chosen by the *CEFL* for the first round of its activities.

B. 'Common Core' and 'Better Law' Methods: What is the Problem?

I. Two Methods

The term 'harmonisation' seems to suggest that the harmonised rules will be derived from existing laws rather than invented by the drafters. This, however, can only be true to a limited extent. While elaborating the rules of harmonised law the drafters basically have three choices. They can make use of a rule that is common for all or most of the relevant jurisdictions; they can select a rule that represents a minority or even only one jurisdiction; or they can formulate a new rule themselves. The use of a common rule denotes the so-called 'common core' method.[3] The choice for a minority rule or the elaboration of a new rule is distinctive of the 'better law' method.

II. The 'Common Core' Method and its Limits

The 'common core' method seems easiest to use, because it makes justifying the choice of a particular rule very simple: the rule has been chosen merely because it represents a majority of the jurisdictions. That is why all drafters always try to 'restate', as far as possible, the already existing common core of the legal solutions to a particular problem. The common rule extracted in this way is then used for elaborating the harmonised law. For example, one can extract the rule that nowadays no European country has fault as the only possible ground for divorce. However, almost no harmonisation activity could be solely based on the 'common core' method. The very need for harmonisation already indicates that not all the rules in the field in question are common;

[3] The term 'common core' method is used in this article without referring to the specific methodology as developed within the Trento project on the Common Core of European Private Law.

otherwise the whole harmonisation exercise would be superfluous. Sometimes the application of the 'common core' method requires one further step. The rules represented in different national laws could be formulated in a technically different way, although pursuing the same functional result. In this case the application of the 'common core' method needs to be combined with the method of functional equivalence. The drafters have to extract the functionally equivalent common rules from the shell of technically different national terms.

However, a common denominator on the level of functional equivalence is also not always found. Sometimes even the opposite is true: functionally different legal phenomena hide behind similar legal concepts. For instance, the divorce laws of both Ireland and Sweden are based upon the concept of no-fault divorce. The use of the same conceptual language suggests similarity between those laws. In reality, however, the Swedish divorce 'on demand' in some instances without a waiting period and without having to disclose the reasons for the divorce, while the Irish divorce, requiring four years of separation and having to convince the court that the marriage has irretrievably broken down. These are the opposite extremes on the scale of varieties in European divorce law. In such cases one could better speak of a functional 'disequivalence' instead of a functional equivalence.

The experience of drafting harmonised private law for Europe has shown that the 'common core' method, extensively used in the elaboration of the American Restatements,[4] can much less be relied upon for drafting the European *Principles.* While the drafters of the American Restatements could in principle restate the common core of the existing case law, the main difference is that the drafters of the Principles "could not do so because of divergences in the laws of the nations even within the European Union itself."[5] It should be added that even if a common core can be found, it does not necessarily represent a satisfactory solution.

Both the aforementioned situations demonstrate the limits of the 'common core' method. In the first case no common core can be extracted at all, because too much diversity exists not only at the level of the technical solutions, but also at the level of functional equivalents. In the second case a common core does exist, but this common denominator lies below the drafters' requirement as to the quality and the modernity of the law they wish to make. The solution in both cases is to move towards the 'better law' method and either to select the 'better' rule among the diverging rules existing in the national jurisdictions, or to engineer a better rule if no existing solution seems satisfactory.

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[4] However, the drafters of the Restatements could also not simply limit themselves to restating the common core. On the use of the 'better law' approach in drafting the American Restatements *see* W. Gray, A. Arbor, *Pluribus Unim: A Bicentennial Report of Unification of Law in the United States*, 50 RabelsZ 119 (1986); A. Rosett, *Unification, Harmonisation, Restatement, Codification and Reform in International Commercial Law*, 40 Am. J. Comp. L. at 689, 693 (1992); R. Hyland, *The American Restatements and the Uniform Commercial Code*, *in* A. Hartkamp *et al.* (Eds.), Towards a European Civil Code 63, 65 (1998).

[5] A. Hartkamp, *Principles of Contract Law, in* A. Hartkamp *et al.,* (Eds.), Towards a European Civil Code 108 (1998).

III. The 'Better Law' Method and the Problem of Justifying the Choices Made

The application of the 'better law' method is much more complicated than that of the 'common core'. Although the former leaves more room for creative drafting, it invokes the troublesome problem of justifying the choices made. This problem concerns, of course, not only the drafters of harmonised law, but is equally relevant for the drafting of domestic law. The obvious difference is that the drafting of domestic law always involves the national legislature, which has the political authorisation to act on behalf of the population of its country. The drafters in the commissions and groups which are active in the field of harmonisation of European private law on the contrary, are self-appointed, and neither represent their governments, nor have they been appointed by any supranational organisation. So they cannot rely on any political authorisation, and the only source of authority that they can invoke is their academic reputation. That, on the one hand, gives them the freedom to make their choices on the basis of purely academic considerations. On the other hand, this lack of authorisation makes the drafters very susceptible as soon as they dare to choose a particular rule which is not common to the majority of the European countries. How can they justify their choice if they, for example, choose to divorce, based solely on the irretrievable breakdown of marriage? On what grounds should one accept their judgment that this rule is better than, for instance, a mixed system of fault and no-fault grounds for divorce?

C. Practical Experience with the Use of the 'Common Core' and 'Better Law' Methods

In order to foresee what kind of complications could arise from the application of the 'better law' method while drafting harmonised family law, it is helpful to look at the experience built up by the groups and commissions who have already been engaged in the harmonisation of private law in Europe for quite some time.

I. The Working Group for the Preparation of Principles of International Commercial Contracts

The UNIDROIT *Principles of International Commercial Contracts*[6] were, in the words of Bonell, the Chairman of the Working Group: "not intended to unify

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[6] The UNIDROIT Commission on the *Principles of International Commercial Contracts* started its work in 1980. The UNIDROIT *Principles* are designated as non-binding principles, intended to provide general rules for commercial contracts with an international dimension. The scope of the Commission's harmonisation activities is worldwide.

existing national laws, but rather to enunciate common principles and rules to the existing legal systems and to select the solutions that are best adopted to the special requirements of international commercial contracts."[7] However, in spite of this commitment to keep as close as possible to the 'common core' method, some "clearly innovative solutions"[8] appeared to be unavoidable. Bonell summarises this balance between the 'common core' and 'better law' methods by using the terms 'tradition' and 'innovation'.[9] He underlines that the UNIDROIT Principles represent a mixture of both and that only when there are "irreconcilable differences between the various domestic laws"[10] does the 'common core' method fail to be successful, and that the "best solutions" are to be chosen "even if those solutions still represent a minority view."[11] As criteria for the selection of these "best solutions" the "special needs of international trade"[12] are bound to be involved.[13] What those 'special needs' precisely imply is not clarified, but, on the basis of the terminology that Bonell uses, a plausible interpretation could be that the drafters were more concerned with the economic efficiency of the rules than with their ideological connotations.

II. The Lando Commission on European Contract Law

The Lando Commission on European Contract Law[14] is probably the best-known group. Its members made use of the 'common core' and 'better law' methods in a rather similar way. Here too, there was tension between the inclination to remain as close as possible to the common core and the desire for improvement. Lando and Beale confirmed the intention of the drafters to restate the common core of European contract law, but at the same time they stated that "the Principles are also intended to be progressive."[15] Therefore they recommended moving over to a 'better law' method not only in the case of "irreconcilable differences between the various domestic laws,"[16] as the drafters of the UNIDROIT Principles declared to have done, but also when this would provide a "more satisfactory answer than that which is reached by traditional

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[7] M. Bonell, *Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts*, 40 Am. J. Comp. L. 617, at 622 (1992).
[8] *Id*., at 623.
[9] M. Bonell, An International Restatement of Contract Law. The UNIDROIT Principles of International Commercial Contracts 16 (1997).
[10] Bonell, *supra* note 9.
[11] *Id*.
[12] *Id*.
[13] *See also* UNIDROIT, Principles for International Commercial Contracts, at viii (1994).
[14] *The Lando Commission* was set up in 1982. The purpose of the Commission is the development of general provisions intended to be equally applicable to both commercial and non-commercial contracts and to cover international as well as domestic cases. The territorial scope of these Principles is limited to the European Union.
[15] O. Lando & H. Beale, Principles of European Contract Law, at xxii (2000).
[16] Bonell, *supra* note 9, at 17.

legal thinking,"[17] as represented in the national laws. Which criteria they used for measuring this 'progressiveness' was not specified.

III. The European Group on Tort Law

The particular nature of the method used by the European Group on Tort Law[18] is that, compared to the above-mentioned Commissions, it relies less on the 'common core' method and seems to be more ready to find a remedy in the use of 'the better law' method. The initiator of the project, Spier, and another member, Haazen, stated this quite explicitly in their article published in 1999: "[a]n approach that relies *solely* upon 'the common core' is bound to be unsuccessful. First of all, it is precisely because of the divergence in the European law of torts that there is little European tort law capable of being 'restated' as the existing common core."[19] They further remark that: "[a] *common core* of tort law, or of any other part of law, is, however, not necessarily more *modern*."[20] Spier and Haazen describe the Principles on European Tort Law in a similar fashion as Bonell has done with respect to the UNIDROIT Principles,[21] as a mixture of rules selected "for reasons of their being *common* to all or most jurisdictions, and those that were picked as 'best' (whereby it seems reasonable to equate 'modern' with 'best')."[22] Using 'modernity' as a criterion for selecting the best rule, they refrain, however, from any further elaboration of this matter and only acknowledge the complexity of the problem.[23] Economic efficiency is mentioned by Spier and Haazen as an expected result of harmonisation itself,[24] but they are silent as to its suitability as a criterion for the selection of better rules.

IV. The Commission on European Family Law

The newly established Commission on European Family Law has already devoted some attention to the problem of combining the 'common core' and 'better law' methods. The Organising Committee of the *CEFL* has decided that the main goal should be to distil common rules. However, there will be cases where the *CEFL* will have to propose alternative solutions and will decide to elaborate innovative 'better law'.[25]

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[17] O. Lando & H. Beale, Principles of European Contract Law, at xxii (2000).
[18] The European Group on Tort Law, aimed at the harmonisation of the law of torts, started its activity in 1992. The Principles of Tort Law are not intended to be a binding instrument. The scope is limited to a number of European jurisdictions.
[19] J. Spier, The European Group on Tort Law, A Civil Code for Europe 62 (2002).
[20] J. Spier & O. Haazen, *The European Group on Tort Law ('Tilburg Group') and the European Principles of Tort Law*, 7 ZEuP 480 (1999).
[21] Bonell, *supra* note 9, at 14.
[22] Spier & Haazen, *supra* note 20, at 480.
[23] Spier & Haazen, *supra* note 20, at 481.
[24] Spier & Haazen, *supra* note 20, at 486.
[25] K. Boele-Woelki, *Comparative Research Based Drafting of Principles of European Family*

V. Hiding Behind 'Technical Choices'

The preceding sketch shows that all the commissions and groups which are engaged in drafting *Principles* of European private law, without exception employ the 'common core' method as well as the 'better law' method. Yet, most of them do not elaborate on the problem of justification and present their choices as being merely technical[26] and not as ideology-laden ones. However, the vision of the economically related areas of private law as 'technical' was recently persuasively contested.[27] It was also observed that "those projects end up by advocating seemingly neutral ideas which have so far confined them within the narrow limits of areas of law in which no open value choices are, or seem to be, made (mainly contract law)."[28] In practice all the groups and commissions have implicitly made the ideological choices inherent in the 'better law' method, but their participants have been understandably reticent in openly acknowledging this fact.

D. Family Law: the Same Problems but to a Greater Extent

The major difficulty inherent in the drafting of *Principles* for family law seems to be caused not by the different nature of the problem of justification but by the much greater extent thereof.

I. The Scarcity of a Common Core

First, it is widely acknowledged that, in spite of far-reaching convergence, the differences between the various European countries with respect to family law are still very significant and therefore the common core is less obvious than in the economically related area of private law. The law on divorce is quite a good example in this respect. If we define 'common core' very rigidly, it will mean that a common core can only be established to the extent that a certain rule exists in all the European countries. In this case the search for a common core for the law on the dissolution of marriage will not be successful, since a right to obtain a full divorce is not common for all the European counties: this right does not exist in Malta. If we define 'common core' more loosely, we will find

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Law, *in* M. Faure *et al.* (Eds.), Towards a European Ius Commune in Legal Education and Research, (Ius Commune Europaeum) 180 (2002).

[26] Zweigert and Kötz present private law, with the exception of such value-laden areas as family and succession law, as "relatively unpolitical". K. Zweigert & H. Kötz, An Introduction to Comparative Law 40 (1998).

[27] Kennedy argues that all relevant choices, even in the 'technical' fields like contract law, are always ideology-laden. D. Kennedy, A Critique of Adjudication (fin de siècle) (1997).

[28] M. Bussani, *'Integrative' Comparative Law Enterprises and the Inner Stratification of Legal Systems*, 1 ERPL 91 (2000).

countries with divorce based solely on the irretrievable breakdown of marriage (like the Netherlands, Russia, Sweden, England and Wales, Ireland etc.) and countries with mixed grounds for divorce (like Belgium, France, Austria, Poland etc.).

A further analysis of the first group shows that it is also far from homogenous. This group includes countries where the breakdown of the marriage, in some instances, no longer needs to be proven: if the spouses state that their marriage has broken down, the competent state officials have to take this for granted. Those countries (like, for instance, Russia, Sweden, the Netherlands) have in fact left the concept of the irretrievable breakdown of marriage largely behind. Divorce on the ground of the irretrievable breakdown of the marriage has *de facto* basically become divorce 'on demand'. In other countries (for instance Italy, Ireland, Spain, England and Wales) proving the irretrievable breakdown is still of vital importance, as otherwise the court is empowered to dismiss a divorce application.[29] In several of these countries the irretrievable breakdown can only be proven with the existence of certain formal conditions defined by law (for example: separation of a certain duration,[30] a conviction for certain crimes, non-consummation etc). In other countries the judge is free in his or her estimation of all the presented evidence. Some other countries, like for instance England and Wales, although they call their divorce ground 'irretrievable breakdown of marriage', in fact have a mixed system, as the conditions necessary for establishing the irretrievable breakdown include such fault grounds as adultery or unreasonable behaviour.

This superficial overview can illustrate that it is hard to find much true common core even among those countries that formally base their divorce law on the irretrievable breakdown of marriage. The lack of a common core will force the drafters of harmonised law much more often to leave aside the 'common core' method and to employ the 'better law' method.

II. More Ideology-Laden Choices

Secondly, the ideological dimension of family law is far more explicit than in the 'technical' areas of private law, and therefore it is out of the question to maintain that the drafters in choosing their 'better law' are merely involved in technicalities and not in the making of ideology-laden choices. This makes the need to explicitly justify policy decisions much more prominent. As almost every choice in family law is connected to the adherence to ideological commitments, the drafters inevitably will have to take sides in a highly politicised discourse.

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[29] For instance, Irish law explicitly states that: "The court must be satisfied that there is no reasonable prospect of a reconciliation between the spouses", Section 5 (1) (b) of the Family (Divorce) Act of 1996.

[30] In some countries this has to be of considerable length, for instance in Ireland four years, in Italy three years.

At this point I will, for the time being, leave aside the 'better law method', and make some suppositions concerning the roots of the strong ideological dimension of family law.

E. The Ideological Dimension of Family Law

The variety of rules in the so-called technical areas of private law can sometimes be explained by the fact that in different countries diverging technical solutions were made in order to solve the same problems and to achieve the same goals. In so far as the goals are the same, it is possible to use the quasi-neutral criterion of efficiency for selecting the best solution to achieve them.[31] However, even in the economically related areas of private law the same goals are not always pursued. It is widely acknowledged that many differences between the various solutions, for example with respect to consumer protection, are more than mere technical differences.

In family law not only the positive law, but also the very goals to be achieved, are frequently different and sometimes even opposite to each other. A good example thereof is provided by David Bradley, who has compared the objectives of the divorce reform in Sweden in 1973 and those of the failed attempt to dispense with the covered fault grounds in the divorce law of England and Wales.[32] The purpose of the Swedish reform was to make divorce as easy as possible. It was clearly stated that "legislation should not under any circumstances force a person to continue to live under a marriage from which he wishes to free himself."[33] In contrast, the objectives of the English Family Reform Act of 1996 were "supporting the institution of marriage, saving marriages and saving cost."[34] Obviously, if the goal is to make divorce more easily available, the measures that are the most efficient for attaining this objective will be quite different from those that are necessary for "saving marriages." Therefore in family law, before one can investigate the most efficient way to attain a certain goal, one will have to make a choice between controversial goals, represented in various national jurisdictions.

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[31] For a critical analysis thereof *see* U. Mattei, Comparative Law and Economics 101-121 (1996). Mattei's conclusion that "law is not the product of the will of a lawmaker [but] the outcome of a competitive process between legal formants" (*id*., at 120) seems not to apply to family law. This is because the development of legal rules in family law is hardly influenced by factors such as competition and the need to strive towards efficiency, but is rather strongly influenced by the political and ideological preferences of the legislators, judges and other lawmakers and adjudicators of the law.

[32] D. Bradley, *Convergence in Family Law: Mirrors, Transplants and Political Economy*, 6 MJ, at 135-136 (1999).

[33] Ministry of Justice of Sweden, Abstract of Protocol on Justice Department Matter, at 7 (1969).

[34] Bradley, *supra* note 32, at 136.

I. The Ideological Connotation of the 'Cultural Constraints' Argument

Why is the situation in family law not like the situation in the economically related areas of private law? The differences between the various systems of family law and the underlying family ideology are often presented as reflecting different national cultures. Because "family law concepts are especially open to influence by moral, religious, political and psychological factors; family law tends to become introverted because historical, racial, social and religious considerations differ according to country and produce different family law systems."[35] This perception of the differences between family laws as part of the unique and cherished national cultural heritage has formed the essence of a cultural constraints argument, widely employed against the harmonisation of family law.[36] The cultural constraints argument gives rise to at least three questions: what are the origins of the diversity of family law in Europe? are the divergent family laws and the underlying ideologies really the unique products of the development of the particular national cultures? and does the whole population of each European country share one and the same family culture?

II. The Origins of Diversity. The *ius commune* of Family Law

If one looks at the current multicolour pallet of family laws in Europe, one could hardly imagine that this diversity did not always exist. However, around a millennium ago, the whole of the Occident had one and the same law on marriage and divorce and some related issues. The *ius commune* of family law, in contrast to other fields of private law, was not Roman law as rediscovered in the Middle Ages and developed in the European universities since the 12th century,[37] but the uniform medieval canon family law. Unlike the economically-related areas of private law, this *ius commune* was equally shared by the Western European civil and common law countries and by the Scandinavian region and the Eastern European countries with a Catholic tradition. This only changed with the Reformation. The Orthodox Eastern European countries were, strictly speaking, never part of this *ius commune.*

This *ius commune* took shape in the framework of the first attempt to unify family law that occurred in Europe.[38] This unification represented the final point

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[35] W. Müller-Freienfels, *The Unification of Family Law,* 16 Am. J. Comp. L., at 175 (1968-1969).
[36] On this argument *see, for instance*, G. de Oliveira, *A European Family Law? Play it again, and again Europe!*, *in* A Civil Code for Europe 127 (2002); M. Hohnerlein, *Konturen eines einheitlichen europäischen Familien- und Kindschaftsrecht – die Rolle der Europäischen Menschenrechtskonvention*, 4 European Legal Forum 252 (2000).
[37] *See* R. Zimmermann, *Roman Law and European Legal Unity*, *in* A. Hartkamp *et al.* (Eds.), Towards a European Civil Code 21-32 (1998).
[38] The unification process evolved slowly through the centuries, before accelerating at the time of the reforms of Pope Gregory VII and it was almost complete by the end of the 12th century. However, the final point was only reached in the 16th century at the Council of Trent.

in the gradual replacement of the wide spectrum of pre-Christian marriage and divorce law, characterised by its informal rules as to the formation of marriage, easy divorce, tolerance towards concubinage and the acceptance of illegitimate children, by an entirely new set of uniform canon law rules. Many legal concepts (marriage as a sacrament, the indissolubility of marriage, strict monogamy and the exclusion of illegitimate children from the family) which were influential in some parts of Europe until deep into the 20th century, were vested or developed during that time.

The uniformity of canon marriage and divorce law only lasted until the Reformation. The roots of the current diversity therefore lie in the regulations of the different Protestant Churches and the secular laws of the advancing national states. But the end of uniformity did not mean the end of the dominance of the ecclesiastical concepts of the Middle Ages. Although the Protestant countries rejected the sacral character of marriage and the principle of its indissolubility, most of the canon heritage survived. As Glendon puts it: "secular government simply took over much of the ready-made set of the canon law."[39] With the differentiation within the Church and the Enlightenment, ideological pluralism increased, and it became increasingly difficult for the state to justify the canon law concepts, which it had inherited. Nonetheless, they were upheld for a considerable period of time, much longer than other medieval political and religious dogmas. Subject to serious discussion for the first time during the Enlightenment and the French Revolution, they again ruled almost uncontested for a long time thereafter. They remained an inseparable part of the status quo. They only came under serious fire towards the end of the 19th century. The 20th century witnessed a wave of revolutionary changes in the field of family law. In the Scandinavian countries and the Soviet Union family law was rapidly and radically reformed during the first decades thereof. During the first two decades of the 20th century the progress of the so-called Nordic co-operation[40] resulted in the co-ordinated drafting and enactment of legislation allowing divorce on the ground of the irretrievable breakdown of marriage.[41] In Russia no-fault divorce – the easiest in Europe at that time – was introduced immediately after the Bolshevik Revolution of 1917.[42] The Southern European countries needed almost the entire century in order to achieve the same level of modernity: divorce in Italy was only introduced in 1970, in Ireland in 1996 and Malta remains the last European country not to allow a full divorce. The remainder of Europe fell somewhere in between.[43]

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[39] M. A. Glendon, The Transformation of Family Law 31 (1989).

[40] Nordic cooperation exemplifies the most successful attempt at the harmonisation of family law in Europe. On the course of this cooperation, *see* R. David, *The International Unification of Private Law*, *in* International Encyclopaedia of Comparative Law, Vol. 2, at 181-185 (1971).

[41] T. Schmidt, *The Scandinavian Law of Procedure in Matrimonial Causes*, *in* J. Eekelaar & N. Katz *(*Eds*.)*, The Resolution of Family Conflicts 80 (1984).

[42] *See* M. Antokolskaia, *De ontwikkeling van het Russische familierecht vanaf de Bolsjewistische revolutie: een poging tot verklaring*, 70 Tijdschrift voor Rechtsgeschiedenis 137-151 (2002).

[43] This of course is a rather simplistic sketch of a more complicated situation. Eastern European law was not modern in all respects. Portugal was the first country where radical reform, albeit not

The essence of this reformation of family law was to leave behind the surviving concepts introduced into family law at the time of the medieval canon unification. This reformation was generally promoted by the liberal-progressive wing and opposed by the conservatives. Thus in the 19th and 20th centuries family law issues frequently appeared in the middle of progressive-conservative debate.[44] Liberation from the medieval heritage occurred in all European countries without exception but in some countries it is not entirely complete even today. As I pointed out elsewhere,[45] the driving forces and the direction were the same everywhere, but the process was far from synchronised in the different countries. From the beginning of the 20th century onwards, a rather clear distinction can be made between countries in the vanguard and those in the rearguard. These differences can be linked to the dissimilar balance of power between progressive and conservative political forces in European countries, different religious backgrounds and other factors.[46] These differences that colour the map of current European family laws, are directly linked to the difference in the timing of the modernisation of family law.

The point I am trying to make is that the infamous diversity of family laws in Europe is mainly the result of the difference in the level of modernity of the family laws in various countries in Europe. The family law situation in each country is, on the one hand, not unique because almost every country is passing the same stages in its development on the way towards modernising family law. On the other hand, this situation is unique in the sense that it is coloured by particularities of the development (speed; intensity) particular to each country. Using this analysis, I would predict that the countries with less modern family law will reach the current level of the vanguard countries in due time.

However, this prediction hardly calls for the harmonisation of family law. First, by the time the rearguard will have reached the current level of the vanguard, the vanguard countries will probably already be far above this level and the diversity will persist. Zeno could ask whether or not Achilles could overtake a tortoise, but he would probably agree that a tortoise could hardly ever overtake Achilles. Secondly, no one can say to, for instance, Ireland "sooner or later you will have the same divorce law as Sweden now does, so why lose time, why not introduce a modern harmonised family law right

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long-lasting, had taken place. In some other countries the modernity of family law differed significantly from one particular institution to the other.

[44] For instance, equality of women, civil marriage and liberal divorce had been perceived as matters of the highest political priority since the second half of the 19th century and the first decade of the 20th century.

[45] M. Antokolskaia, *Development of Family Law in Western and Eastern Europe: Common Origins, Common Driving Forces, Common Tendencies*, 28 Journal of Family History 52-69 (2003).

[46] For the attempts at explanation *see* H. Willekens, *Explaining Two Hundred Years of Family Law in Western Europe*, *in* H. Willekens (Ed.), Het Gezinsrecht in de Sociale Wetenschappen, 59-95 (1997).

away?" It is quite obvious that "moral and political reforms must be initiated from within each culture"[47] and cannot be forced from outside.

III. The Conservative – Progressive Divide in Europe

The conservative-progressive discourse colours not only the differences in the modernity of family law in various European countries, but also the distinctions in the appreciation of family law situations in each particular country. In family law, cultural differences do not only lie along state borders but are present in every particular European country. I am not even referring to the growing multiculturalism resulting from immigration from non-European countries. What I mean is that even the innate population in each particular European country is split into various different 'cultures', reflected in corresponding ideologies. The 'culture' of an urban family of highly educated young professionals differs significantly from the 'culture' of a rural family of middle-aged traditional farmers in any European country, be it Ireland, Sweden, Malta or the Netherlands. The modernity of family patterns and family culture differs greatly from one social environment to another. Rothenbacher concisely labelled this phenomenon "the contemporaneity of the noncontemporaneous."[48] Each country has of course a predominant culture, which is generally the culture of the majority of the population or the *élite dirigeante.*[49] This predominant culture is usually reflected in the pertinent family laws. Following this reasoning, one can suggest the existence of a progressive-conservative divide in Europe, based on the presence of a conservative and a progressive pan-European ideology of family morals. Each of those ideologies has its own rank and file in each European country. Sometimes this is a majority, sometimes a tiny stratum. The countries with modern family laws also have a population group with a conservative family 'culture' and the countries with conservative family laws always have population groups that represent the most modern views on family life. The members of the affiliated cultural groups understand each other across borders, often looking abroad to support their ideas, and they repeatedly call on the European courts to adjudicate their confrontations with their compatriot opponents. This allows the suggestion that the ideas of Pierre Legrand, one of the best known adepts of law as an emanation of culture, who perceives the

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[47] W. Holleman, The Human Rights Movement. Western Values and Theological Perspectives 211 (1987).

[48] F. Rothenbacher, *Social Change in Europe and its Impact on Family Structures*, *in* J. Eekelaar & N. Thandabutu (Eds.), The Changing Family. International Perspectives on the Family and Family Law 21 (1998).

[49] I am indebted to E. Örücü for this term. *See* her Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition. Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking 86 (1999).

'cultureness' of law only from a national perspective,[50] or from the perspective of the common law/civil law dichotomy,[51] are not entirely valid for family law.

F. Shared Notion of Family Rights and Justifying the 'Better Law'

I. Additional Need for Political Legitimation

The suggested link between the level of modernity of family law and the appreciation thereof with the conservative-progressive divide means that many decisions concerning the 'better' family law rule for harmonised family law will involve an ideology-laden choice. In making this choice the drafters of the harmonised law will necessarily have to take sides in the progressive-conservative discourse and make value judgments in respect of the choices made by the national legislators. Under these circumstances the self-appointed drafters will be likely to search for all support that they can discern in the practices of the recognized European institutions. The most obvious option for the justification of 'better rules' for harmonised family law is to use the shared European notion of human rights relating to the family. This is a relatively safe road to follow, because this shared notion as vested in the European Convention on Human Rights and developed in the related case law of the European Court of Human Rights, the European Court of Justice and in the recent European Charter of Fundamental Rights of the European Union, could provide certain and acknowledged reference points to justify the policy-laden choices of the drafters of harmonised family law.

II. The European Courts are also Searching for Justification

But the drafters might be rather disappointed when following this road. The case law of the ECHR and the ECJ shows that both courts often also seek legitimation for their value judgements in the common core: the European 'consensus' or the 'common European standard'. The literal texts of all three articles of the European Convention on Human Rights relating to family rights: 8 (protection of family life), 12 (right to marry and to found a family) and 14 (prohibition of discrimination) do not always provide relief. Thus the ECHR, in deciding cases, has to go beyond the literal text and to interpret it "in the light of present-day conditions."[52] The same applies to the practice of the ECJ. The long road towards the recognition of EU capacity in respect of human rights[53] and

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[50] He speaks in this sense of the 'Frenchness' of French law. P. Legrand, Fragments on Law-as-Culture 5 (1999).
[51] P. Legrand, Fragments on Law-as-Culture 64 (1999).
[52] *Marckx v. Belgium,* Judgement of 13 June 1979, ECHR (1979) Series A, No. 31, para. 41.
[53] *See, for instance,* P. Alston (Ed.), The EU and Human Rights 9-11 (1999); A. Von Bogdandy,

especially those relating to family law, and the subjection of the protection of the family to the economic goals of the Union, casts its shadow on the development of EU policy regarding family rights.[54] The ECJ is also restrained by the subsidiarity principle and often seeks additional authorisation in the consensus argument.[55] Since the political mandates of the ECHR and the ECJ remain within the margins of the European Convention, and EU legislation respectively, they need additional sources of authorisation every time they employ an extensive or even contra legem interpretation. Seeking such authorisation, both courts generally refer to the consensus or the "common European standard" among the Contracting States.[56] However, an overall consensus or common core almost never exists, otherwise the very case would never appear before the court. The Courts have to decide cases in a Europe divided into conservative-progressive family ideologies,[57] and the composition of the judges, representing the Contracting States, also reflects this divide. Both factors oblige the Courts to be cautious in using their power.

III. *Johnston v. Ireland*: No Right to Divorce

Searching for political legitimation sometimes results in a rather low level of protection. My choice for the consistent use of divorce law as an illustration throughout this article leads us to a rather discouraging example. In divorce law the level of the shared notion of protection of family rights seems to be as low as the lowest common denominator. A good illustration of the scale of the political tension under which the European Courts have to pursue their goals is provided by one of the classic family law ECHR cases: *Johnston and others v. Ireland*.[58] As is well known, in the *Johnston* case an Irishman, who many years before had obtained a judicial separation from his first wife, challenged the Irish law that did not permit full divorce and remarriage.[59] Some four days before the final deliberation in the *Johnston* case, the overwhelming majority of the Irish population rejected divorce in a referendum. Therefore the absence of divorce

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The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union, 37 Common Market Law Review 1317 (2000).

[54] N. Neuwahl & A. Rosas, The European Union and Human Rights 221-230 (1995); C. McGlynn, *A Family Law for the European Union*, *in* J. Shaw (Ed.), Social Law and Policy in an Evolving European Union 229-232 (2000).

[55] On the use of this argument *see, for example*, McGlynn, *supra* note 54, at 226.

[56] G. Carozza, *Propter Honoris Respectum: Uses and Misuses of Comparative Law in International Human Rights: Some Reflections of the Jurisprudence of the European Court of Human Rights*, 73 Notre Dame L. Rev. 1217, at 1231-1232 (1998).

[57] In the *Handyside case* the ECHR has acknowledged that "it is not possible to find in the domestic laws of the various Contracting States a uniform European conception of morals." *Handyside v. the United Kingdom* Judgement of 7 December 1976, ECHR (1976) Series A, No. 24, para. 48.

[58] *Johnston and others v. Ireland*. Decision of 18 December 1986, ECHR (1986) Series A, No. 112.

[59] *Id*.

had just acquired the highest political legitimation.[60] There was also virtually no chance that the Irish government would acquiesce to an intervention by the ECHR. The Court faced a difficult political dilemma. It finally refused to provide a dynamic interpretation of Article 12. Instead, the Court referred to the *travaux préparatoires* of the Convention, in order to argue that the omission of the right to dissolve a marriage was deliberate.[61] The Court stated, without any reference to the relevant laws of the Member States, that "having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case." Remarkable indeed, considering that at that moment only two member States – the defendant Ireland and Malta – had not introduced full divorce, thus the 'great majority' of the states did share a consensus upon this matter. Accordingly, the ECHR proclaimed divorce law to be "the area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention."[62] As a result, the Court refused to recognise the right to dissolve a marriage as a right protected under the ECHR. Ireland finally introduced divorce in 1996, but the *Johnston* case has never been overruled, as this issue was never brought before a European court again. Malta still has no full divorce.

The right to divorce is, of course, quite an extreme example. Because family rights are developed by the ECHR on an unsystematic case-by-case basis, the level of protection that is actually attained in various fields of family law is also quite uneven. It varies from the lowest common denominator in respect of divorce (it is quite plausible that *Johnston* would now be decided differently, however) to one of a high degree, as in the most recent cases with respect to the rights of post-operative transsexuals.[63] However, the average of a "narrow and traditional" concept of the family as developed in ECHR case law was rightly summarised by McGlynn.[64]

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[60] P. Mahoney has stressed that "the Court (and the Commission) should be careful not to allow that machinery to be used so as to enable disappointed opponents of some policy to obtain a victory in Strasbourg that they have been unable to obtain in the elective and democratic forum in their own country." *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 19 Human Rights Law Journal 1, at 3 (1998).

[61] *Johnston and others v. Ireland*, *supra* note 58, at paras. 52-53.

[62] *Id*., at para. 55.

[63] *See, for example,* the recent cases *Goodwin v. the United Kingdom* and *I. v. the United Kingdom*, where the ECHR finally acknowledged that the refusal to provide legal recognition to the new gender identity of post-operative transsexuals violates both Art. 8 and Art.12 of the Convention. *See* respectively *Goodwin v. the United Kingdom*, Decision of 11 July 2002, and *I. v. the United Kingdom*, Decision of 11 July 2002, http:/hudoc.echr.coe.int/hudoc.

[64] C. McGlynn, *Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo?*, 26 European Law Review 587-593 (2001).

IV. European Charter: Still No Right to Divorce

The Charter of Fundamental Rights of the European Union[65] is important for our inquiry because it is alleged to represent "a fully up-to-date *Ius Commune Europaeum* of human rights protection in Europe."[66] The purpose of the Charter is "to strengthen the protection of fundamental rights in the light of the changes in society, social progress and scientific and technological developments by making those rights more visible in the Charter." Therefore, in contrast to the more than 52-year old Convention upon which it is built, the Charter could reasonably be expected to reflect the current level of the existing shared notion of family rights. At least with respect to family rights, however, almost all of these expectations have remained unjustified.

Article 7 of the Charter has the same wording and scope as the corresponding Article 8 of the ECHR.[67] According to Article 53 of the Charter, if the articles of the Charter coincide with those of the ECHR, they should be given the same interpretation. That means that they should also be interpreted in light of the case law of the ECHR.[68] However, if Community law provides more extensive protection, the Charter should be interpreted in the light of this law.[69] That means that the level of protection may not drop below the level of protection guaranteed by the ECHR and the relevant case law, but it may be higher. Surprisingly enough, Article 9, the counterpart to Article 12 of the ECHR, also contains no right to dissolve a marriage. We do not know whether this was a deliberate omission or simply an oversight. Anyhow, the introduction of this right would not have been superfluous, because Malta has recently joined the EU and still does not provide this right.

The aforementioned example shows that the Charter, at least in relation to family rights, is largely based on the same 'common ground' as the case law of both courts.[70] The European institutions have hardly gone any further than the vague text of the Convention, and have not even sufficiently reflected the achievements of the case law of the European courts. That might have happened not because of unwillingness.[71] A more plausible reason could be the same conservative-progressive divide that has so often precluded both European Courts from going beyond the common ground. Because of this divide a higher level may simply not have been politically feasible. It is probably still to some extent true that "the Community, when attempting to draw a list of human

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[65] OJ 2000 C 364/1.
[66] *The EU Charter of the Fundamental Rights – Some Reflections on its External Dimension, Editorial*, 1 MJ 3 (2001).
[67] M. Gijzen, *The Charter: A Milestone for Social Protection in Europe?*, 1 MJ 57 (2001).
[68] F. Lenaerts & E. de Smijter, *A 'Bill of Rights' for the European Union*, 38 Common Market Law Review 296 (2001).
[69] For more on this issue *see* Gijzen, *supra* note 67, at 54.
[70] McGlynn, *supra* note 64, at 598.
[71] The unsuitability of the minimalist approach to the development of EU human rights protection law is clearly shown by N. Neuwahl & A. Rosas, The European Union and Human Rights 58-63 (1995).

rights, would necessarily take a minimalist approach and be able to agree only on the lowest common denominator of such rights."[72]

V. The Shared Notion of Family Rights Provides no Relief

It is quite clear that, in spite of all the advantages of invoking the shared notion of family rights for the justification of 'better law' choices, there remains a serious obstacle along this road. The problem is that certain rights cannot acquire the status of human rights that are recognised throughout the Union, precisely because of differing ideas about them in Europe. Both the ECHR and the ECJ repeatedly refer to the 'common ground' when acknowledging the existence of a certain right. The European Charter has not changed this picture to any great extent. Therefore the drafters of harmonised law, when trying to evoke the shared vision of human rights in order to justify their choices, will very soon find themselves moving in a kind of vicious circle. They have to select or create 'better rules', because there is too little common core to build upon. In order to justify the 'better rule' they invoke the shared notion of human rights, but the judicial institutions responsible for delineating such a notion often go no further than the common core. In this way they return to where they have started.

Apart from the downplaying influence of the consensus argument, the conventional level of the protection of family rights is almost never the highest among the Contracting States, because the Convention only guarantees the minimum level of protection and creates a kind of 'floor', below which Contracting States cannot drop. Meanwhile, "the differences above this 'floor' may still exist without injuring anyone's human rights."[73] The same is true for Community law.[74]

My conclusion is that the level of modernity of human rights-based *Principles* would be unsatisfactorily low. The drafters of the *Principles* should of course invoke the shared notion of human rights in every case when Community law or the case law of the ECHR reaches a sufficient level, but this might not often be the case.

G. Harmonisation As a Movement Towards More Modern Family Law?

Does the impossibility of finding any solid external source for justifying the choice of 'better' rules for harmonised family law make the harmonisation of family law impossible? I do not think so. First, it remains possible to try to

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[72] Neuwahl & Rosas, *supra* note 71, at 16.
[73] N. Johnson, *Recent Developments: the Breadth of Family Law Review Under the European Convention on Human Rights*, 36 Harv. Int'l L.J. 513 (1995).
[74] Neuwahl & Rosas, *supra* note71, at 247.

avoid the problems connected with the use of the 'better law' method and to attempt to build the *Principles* on the common core only. Second, there is the more ambitious but promising alternative to face the challenges of the 'better law' method and to employ it while elaborating the *Principles*. This would be a very complicated enterprise, vitally dependent upon whether or not it will be feasible to make credible value judgments in respect of various family law rules and concepts, and to convincingly justify the selection of the 'better' ones.

I. Common Core-Based Principles

The first option is to try to escape the whole problem of justifying 'better law' and to build the *Principles* upon the thin layer of a common core already existing between various European jurisdictions plus the achievements of the case law of both European Courts. If we interpret the 'common core' not too strictly, then in respect of divorce we could disregard Malta and even *Johnston*, and acknowledge that there is a common ground to include the right of divorce in such *Principles*. Further, there is a sufficient *common core* for certain minimum requirements, for instance that fault should not be the exclusive ground for divorce; that a 'guilty' spouse should not be precluded from applying for divorce; that matrimonial fault should not automatically lead to the loss of custody of minor children; and so on. Such *Principles* could even serve as a model for binding EU law, because they would hardly introduce anything new. At the same time, in light of recent and future enlargement of the EU, they would certainly not be useless. For Malta for instance, such binding law would mean that it would have to introduce divorce in order to comply with EU law. Such *common core-based Principles* would in fact only do what the European Charter failed to accomplish in respect of family law. They would define the lowest level of protection, below which the EU members would not be allowed to go, while they would remain completely free to ensure a higher level of protection in their domestic laws. Later on, both European Courts might carefully try to raise the standard of minimum protection little by little.

In spite of all the advantages of common core-based harmonisation, the problem described above remains: certain rights cannot acquire the status of human rights that are recognised throughout the Union because of the differing ideas about them in Europe. The consequences seem to be that the level of modernity of *common core-based Principles* would be quite low. The fact that there was not enough consensus even to make the European Charter a binding instrument clearly shows that the promotion of *common core-based Principles* would still be an extremely difficult task.

II. 'Better Law' Principles

The second, more demanding, option is to elaborate the *Principles* using the 'better law' method. This implies that the drafters are prepared to take sides and to express value judgements. They have to dare to pronounce openly why they,

for instance, prefer the Swedish permissive divorce law to the restrictive Irish one or *vice versa*. As the situation in family law in Europe is typified by the progressive-conservative discord, there could be as many visions of what is the 'better' family law, as there are nuances within the spectrum of this discourse. In theory, a truly conservative drafting group may also wish to design and promote *Principles* built upon the most conservative solutions represented in the European jurisdictions. However, *Principles* that would try to turn back the hand of time would probably have very little chance to be taken seriously.

My personal preference would be to draft non-binding *Principles* based upon the highest standard of modernity achieved in present-day European family law. Such *Principles* would clearly go beyond the level of the shared European notion of human rights. Although a certain amount of subjectivity would be inevitable in the drafting, some methods could diminish the risk of estimations based purely on the personal preferences of the drafters. Putting the various existing family law solutions into a historical perspective would provide the necessary guidance for assessing the level of modernity of different solutions and to identify the most modern ones.

An objective argument in favour of high-standard *Principles* seems to be the fact that modern would-be *Principles* are generally more permissive and would therefore leave the more conservative groups within the population with the freedom to follow their own pattern of behaviour.[75] For instance, if one finds divorce unacceptable due to one's religious convictions, a law permitting divorce does not force anyone to dissolve a marriage. Even if one has divorced one's spouse, one could abstain from remarrying out of respect for the indissolubility of marriage. *Principles* built upon a conservative 'culture' would, on the contrary, necessarily be rather restrictive. Conservative family law always tends to subject the population groups representing the minority 'cultures' to the restrictions of that law, although they do not share its underlying convictions.[76] Therefore these minorities often have the feeling that their minority rights are being infringed upon in an undemocratic manner. That is the main objective advantage of permissive law over restrictive law in the context of ideological controversy. This is the most important reason why the *Principles* of European family law should be progressive and possibly absorb the most modern solu-

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[75] Conservative-minded persons could of course have ideological difficulties in accepting a progressive law, even if it does not touch them directly. For instance, one well-known Dutch family law professor was so discontent with the prospect of same-sex couples being able to enter into a marriage, that he declared his intention to dissolve his own happy marriage in the Netherlands in order to recelebrate it immediately in another country that does not have the possibility for homosexual couples to marry.

[76] A good example is the first Irish divorce referendum of 1986, when 63.5% of the voters voted against the introduction of divorce and 36.5% voted in favour. (C. James, *Ireland Welcomes Divorce: The 1995 Irish Divorce Referendum and The Family (Divorce) Act of 1996*, 8 *Duke* Journal of Comparative & International Law (1997). As divorce is not compulsory, the result of the referendum meant that the majority of the Irish population denied the minority the right to dissolve their marriage, and imposed its view even upon the non-Catholic part of the population (about 8%), which did not share the Catholic notion of the indissolubility of marriage.

tions achieved in various European countries. Therefore I feel a great deal of sympathy for McGlynn's assumption that harmonised family law has to be *'utopian' and 'libertarian'*.[77]

H. Concluding Remarks

My conclusions are that the use of the 'better law' method is just about inevitable in elaborating harmonised family law. At the same time, almost no objective criteria can be found in order to justify the choice as to why the drafters consider the rule that they have selected to be the 'better' one. As the diversity of family laws in Europe is politically and ideologically coloured, any possible justification would be subjective, depending on the convictions of the drafters. The conservative-progressive discord among the European countries, but also within every particular country, means that whatever *Principles* would be drafted, they would never answer the expectation of every country within Europe and every section of the population within each country. But neither do domestic family laws.

Under these circumstances I would be inclined to accept the challenges of the 'better law' method and to draft non-binding *Principles* based on the highest standard of modernity. Obviously, in this approach the non-binding nature of the *Principles* would be crucial. Any attempt to 'emancipate' citizens against their will would be paternalistic, disrespectful and doomed to failure in any democratic society. I am in no way advocating a kind of crusade aiming to enforce libertarian *Principles* of family law upon the European population. The task of the *Principles* should merely be to highlight and to make more transparent the achievements in the legal solutions for family law problems, which have already been attained in different parts of Europe or have been elaborated by the drafters. At most they would give the promoters of the modernisation of domestic family laws some additional moral support. Modern *Principles*, and the extensive comparative research on which they would be based, could save the national governments, the courts and the European institutions a great deal of time and money. Because such *Principles* would not be intended to be binding, and would be deemed to serve only as models, they would be no more of a threat to the national cultures and national sovereignty than a good comparative law survey.

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[77] McGlynn, *supra* note 54, at 241.