The Working Method of the Commission on European Family Law

Katharina Boele-Woelki*

Comparison is an operation in which specific 'objects' are set against each other so that their similarities and differences can be determined, and the causes of these can be traced. The comparative method is the road which leads to these discoveries. Its 'role' consists of putting the comparative process in order to arrange all the steps and procedures in a rational way. Its 'goal' is to create new knowledge.[1]

A. Introduction

It has frequently been argued that the most satisfactory piece of comparative law research is the one that employs teamwork.[2] To date the research by the Commission on European Family Law has been carried out by a team of specialists in the field of comparative family law from twenty-two different jurisdictions. Right from the outset an agreement has been reached that CEFL's main objective is the creation of a set of Principles of European Family Law that are thought to be the most suitable for the harmonisation of family law in Europe. Three years after its establishment the first set of Principles in the field of divorce and maintenance between former spouses was published[3] and presented at a conference. Both the involvement of many researchers and thus many jurisdictions in the CEFL project and the complexity of the research field

---

* Professor of Comparative Law, Private International Law and Family Law at the University of Utrecht. This article was published previously *in* K. Boele-Woelki (Ed.), Common Core and Better Law in European Family Law, European Family Law Series No. 10, 15-38 (2005) and is reprinted with minor editorial modifications with kind permission of the publisher Intersentia-Antwerp.

I am greatly indebted to the Law Faculty of Uppsala University where I was able to prepare this contribution under optimal working conditions. In particular, I am very grateful to my dear friend and colleague Professor Maarit Jänterä-Jareborg for all her care and stimulating discussions. In addition, I would like to thank Dr. Bente Braat, secretary of the CEFL, for always being there when I call for assistance.

[1] D. Kokkini-Iatridou, *Some Methodological Aspects of Comparative Law*, 33 NILR 155 (1986).

[2] D. Kokkini-Iatridou, *id.*, at 148 and A.E. Örücü, *Symbiosis Between Comparative Law and Theory of Law, Limitations of Legal Methodology*, *in* Mededelingen van het Juridisch Insituut No. 16, Erasmus University, Rotterdam, at 17 (1982).

[3] K. Boele-Woelki, *et al.*, Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses (2004).

European Journal of Law Reform, Vol. VI, no. 1/2, pp 119-143.

required clear guidelines[4] regarding the following overall question: How can we achieve our final goal as effectively as possible whereby generally accepted rules regarding how comparative research should be carried out are to be taken into account? Apparently, throughout the last three years this question has been frequently and passionately discussed among CEFL's members,[5] in particular between my colleagues in the Organising Committee.[6] Crystal clear cookery books with uncomplicated recipes that provide information on how to organise and conduct European research which – as in the case of the CEFL – is based on a scientific initiative and which is considered to be a purely academic matter do not exist. Nonetheless, for the CEFL it would have been a waste of time to reinvent the wheel. Several other groups and commissions working in the field of harmonisation of private law in Europe already started their activities many years ago. Obviously, we studied their working methods and learned from their experiences.[7] At this preparatory stage, in particular, we decided not to copy a specific working method applied by one or two of these sister commissions. However, their working methods functioned as an excellent tool of inspiration which we gladly used in establishing our own working method. When comparing the working methods of the different groups and commissions working in the field of harmonisation of private law in Europe it will not come as a surprise that both similarities and differences can be distilled.[8] In this respect it is worth noting, however, that the use of the comparative method[9] should not be confused with the 'methods and techniques' which are used in the comparative process. As Kokkini-Iatridou rightly reminds us, these are only 'means' which may be very different, in order for the goal of the comparative method to be achieved.[10]

---

[4] According to K. Zweigert & H. Kötz, Introduction to Comparative Law 33 (1998), a detailed method cannot be laid down in advance; all one can do is to take a method as a hypothesis and to test its usefulness and practicability against the results of actually working therewith. Even today it would be extremely doubtful whether one could come up with a logical and self-contained methodology of comparative law which had any pretensions of being perfect.

[5] *See in general* I. Schwenzer, *Methodological Aspects of Harmonisation of Family Law*, 6 EJLR 145 (2004); and in particular M. Antokolskaia, *The 'Better Law' Approach and the Harmonisation of Family Law*, 6 EJLR 159 (2004).

[6] *See* on the structure of the CEFL which consists of the Organising Committee (seven members) and the Expert Group (at present 26 members): Boele-Woelki, *et al.*, *supra* note 3, at V.

[7] W. Pintens, *Die Commission on European Family Law, Hintergründe, Gründung, Arbeitsmethode und erste Ergebnisse*, 12 ZEuP 555-556 (2004); W. Pintens, Die Rolle der Wissenschaft bei der Europäisierung des Familienrechts, Festschrift für Erik Jayme 1339-1352 (2004).

[8] *See* for a comparison of the different groups and commissions: E.H. Hondius, *Towards a European Ius Commune: The Current Situation in Other Fields of Private Law*, *id.*, *supra* note 5, at 118-119; Antokolskaia, *supra* note 5, at 163-165. *See also* R. Zimmermann, *Die 'Principles of European Contract Law'*, Teil III, 11 ZEuP 707 (2003); H. Koziol, *Die 'Principles of European Tort Law', der 'European Group on Tort Law'*, 12 ZEuP 234-259 (2004).

[9] Kokkini-Iatridou, *supra* note 1, at 156: "The comparative method does not vary either according to the legal discipline or the branches of law to which it is applied. There is no separate comparative method for international or municipal law, or for public or private law."

[10] Kokkini-Iatridou, *supra* note 1, at 156. According to the Italian comparatist G. Gorla (idem,

This contribution aims to explain CEFL's working method.[11] What precisely has been achieved? How was the comparative research-based drafting of the Principles carried out? Which decisions were taken and upon which considerations are certain choices based? How many steps or stages are to be distinguished?

In short, six steps are to be distinguished: The *first step* is to select the fields of family law most suitable for harmonisation. The *second step* is to draft a questionnaire that embodies the functional approach. The *third step* is to draw up national reports which not only take the law in the books into account, but also the law in practice. The *fourth step* is to collect and to disseminate the comparative material. In addition to the country-by-country reports which are accessible on CEFL's website, an integrated and printed version laid out according to the numbers of the questions has been published. This integrated version provides a rapid overview and a straightforward simultaneous comparison of the different solutions within the national systems. The *fifth step* is to draft the Principles of European Family Law. Proposals are made by the seven members of the Organising Committee which were discussed with the authors of the national reports (the Expert Group). At this stage a decision had to be made between either the 'common core' or the 'better law' approach. The *sixth* and *final step* is to publish the Principles which consist of three parts: firstly, the provisions, secondly, the comparative overviews which refer to the national reports and, thirdly, the comments which elucidate the provisions.

B. Selecting the Fields Most Suitable for Harmonisation

CEFL's activities are intended to produce results that may be used for specific practical purposes. First and foremost, the Principles are addressed towards national legislators which are considering whether to modernise their national family law. Eventually, they can function as a source of inspiration for both the European[12] and international legislator. The choice of the most suitable field of

note 50) "every type of comparative problem has essentially its own methods, devices or techniques resulting from its degree of difficulty."

[11] Detailed explanations as to the content of the Principles are provided by M. Roth, *Future Divorce Law – Two Types of Divorce*, *in* K. Boele-Woelki (Ed.), Common Core and Better Law in European Family Law, European Family Law Series No. 10, 41-57 (2005); F. Ferrand, *Agreements on Divorce and Maintenance*, *id.*, at 71-82; C. González Beilfuss, *CEFL's Maintenance Principles: The Conditions for Maintenance*, *id.*, at 83-101; G. Shannon, *Clean-break or Long-Term Payment of Maintenance*, *id.*, at 103-117; T. Sverdrup, *Maintenance as a Separate Issue – Relationship Between Maintenance and Matrimonial Property*, *id.*, at 119-134.

[12] To date, it is generally accepted that the European Union has no competence under the EC Treaty to unify or harmonise substantive family and succession law. *See* W. Pintens, *Europeanisation of Family Law*, *in* K. Boele-Woelki (Ed.), Perspectives for the Unification and Harmonisation of Family Law in Europe, at 22 (2003); W. Pintens, *Familienrecht und Personenstand – Perspektiven einer Europäisierung*, StAZ 2004, at 355 and M. Jänterä-Jareborg, *Unification of International Family Law in Europe – A Critical Perspective*, *in* K. Boele-Woelki (Ed.), Perspectives for the Unification and Harmonisation of Family Law in Europe, at 195

family law in order to contribute to the harmonisation of law in Europe has not so far revealed any problems regarding the methodological requirement that it is only possible to compare what is in fact comparable. Instantly, at its inaugural meeting, CEFL's Organising Committee reached an agreement – although it was the subject of extensive discussion – that the first working field would be divorce and spousal maintenance. General investigations into divorce law and the law regarding maintenance between former spouses readily unveiled the fact that the famous *tertium comparationis*, which depends on the presence of common elements, was not at all a matter of concern.[13] Other aspects, however, caused real difficulties. Why should we begin in the field of divorce by including only one of the many divorce consequences? Why not embark on matrimonial property law given the fact that in many jurisdictions the spouses are free to agree on their property relationship?[14] However, after long deliberations CEFL's Organising Committee rejected the idea of commencing its activities in the field of matrimonial property law. The reasons for this were manifold. First of all, in the various European countries three main categories of default systems exist: the community of property, the deferred community of property and the participation system.[15] Comparative research has demonstrated that the differences between these systems are nearly unbridgeable.[16] Consequently, only a few – two or three – models for different matrimonial property regimes can be offered from among which a national legislator can choose.[17] Recommending alternative systems, which could operate in addition

(2003). However, Article 65 of the EC Treaty speaks of measures in the field of judicial cooperation in civil matters having cross-border implications. Due to the fact that no time indication is provided regarding the required cross-border implications the following view can be taken. Each internal relationship which is only connected to one national jurisdiction can – hypothetically – become a cross-border relationshiat In order to guarantee the free movement of persons in Europe the EU Commission should take appropriate steps to avoid a loss of legal position, which, for instance, can arise with a change of residence if the connecting factor is not immutable, but where the applicable law is based on the habitual residence in question. *See* N. Dethloff, *Arguments for the Unification and Harmonisation of Family Law in Europe*, *id.*, note 5, at 37-64 and N. Dethloff, *Europäische Vereinheitlichung des Familienrechts*, AcP 2004, at 544-568. According to this broad interpretation of Article 61 EC Treaty the European Union even could take measures in order to harmonise or unify the substantive family law in Europe. *See* K. Boele-Woelki, *De competentie van de Europese Unie in familiezaken*, FJR 2004, at 289.

[13] If Malta would have been represented in the CEFL the comparability would have been problematic due to the fact that Malta is the only European jurisdiction not to permit divorce.

[14] M. Antokolskaia, *Would the harmonisation of family law in Europe enlarge the gap between the law in the books and the law in action? A discussion of four historical examples of radical family law reform*, 2002 FamPra.ch 261.

[15] Pintens, *Europeanisation of Family Law, supra* note 12, at 9-12.

[16] B. Braat, Indépendance et interdépendance patrimoniales des époux dans le régime légal des droits néerlandais, français et suisse, EFL series No. 6 (2004).

[17] K. Boele-Woelki, *Divorce in Europe: Unification of Private International Law and Harmonisation of Substantive Law*, *in* H.F.G. Lemaire (Ed.), Liber amicorum Ingrid. S. Joppe, at 27 (2002). For proposals see among others A. Verbeke, *Proeve van internationaal huwelijksrecht*, *in* S.C.J.J. Kortmann *et al.* (Eds.), Yin-Yang: Martin Jan Alexander van Mourik Bundel, at 391 (2000).

to national systems, is, however, not considered to belong to CEFL's main objective,[18] though recently the idea of an optional European system of matrimonial property has been revived, this time from the perspective of private international law in particular.[19] Another argument in favour of CEFL's decision not to start its activities in the field of matrimonial property law lies in the complexity and technicality of this particular field of law. Besides, there exist strong relationships with patrimonial and contract law and, moreover, with property law and succession law, fields of law which to date are generally regarded as being indifferent to any form of harmonisation. The choice of divorce and spousal maintenance was primarily based upon the growing convergence of divorce laws in Europe[20] and, in support of this development, the entry into force of the Brussels II Regulation.[21] In view of the latter, it has been unmistakably demonstrated that in the long run the European unification of the rules on jurisdiction, recognition and enforcement of judgments in divorce matters and, in addition, the planned unification of the conflict of law rules on divorce[22] makes it necessary to harmonise the substantive divorce laws in Europe as well.[23] Not only the Brussels II Regulation but, in particular, the broadening of its scope by the Brussels II*bis* Regulation supports CEFL's choice for the second working field, being parental responsibilities. Besides, there are significant and natural links between, on the one hand, the question of divorce and its consequences and, on the other, between the question of parental responsibilities and the financial consequences of divorce. Extensive work has

---

[18] Pintens, *supra* note 7, at 557.

[19] Papers delivered by D. Martiny, *A New Matrimonial Property Regime for Europe*, and by G. Steenhoff, *A Matrimonial Property System for the European Union?,* at the UK-German Judicial Family Law Conference, Cardiff 8-11 September 2004. *See also* C. Werwigk-Hertneck & F. Mauch, *Auf dem Weg zu einem Europäischen Familiengesetzbuch*, 2004 FamRZ, at 574-580.

[20] W. Pintens, *Rechtsvereinheitlichung und Rechtsangleichung im Familienrecht. Eine Rolle für die Europäische Union?*, 6 ZeuP 670 (1998), at 670 and the conclusion by D. Martiny, *Ehescheidung und nachehelicher Unterhalt in Europa*, 8(3) EJCL (2004), at http://www.ejcl.org: "Trotz erheblicher Abweichungen kann man den europäischen Trend mit dem Motto 'einfacher, schneller und effektiver' zusammenfassen." *See also* the magnificent work that was completed in 2002 by a group of eminent Nordic scholars who carried out a comparative study on Danish, Finnish, Norwegian, Icelandic and Swedish law on marriage (which includes divorce) in order to discuss the need for reform and to investigate the possibilities for harmonisation: A. Agell, Nordisk äktenskapsrätt, En jämförande studie av dansk, finsk, isländsk, norsk och svensk rät med diskussion av reformbehov och harmoniseringsmöjligheter (2003).

[21] Council Regulation (EC) 1347/2000, OJ 2000 L160/19 on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses (which entered into force on 1 March 2001). The Brussels II*bis* Regulation replaces the Brussels II Regulation as of 1 March 2005. *See* Council Regulation (EC) 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000, OJ 2003 L 338/1.

[22] *See* the recently published Green Paper on applicable law and jurisdiction in divorce matters, Brussels, 14.3.2005, COM(2005)82 final. *See* R. Wagner, *Überlegungen zur Vereinheitlichung des Internationalen Privatrechts in Ehesachen in der Europäischen Union*, 2003 FamRZ, at 803.

[23] Jänterä-Jareborg, *supra* note 12, at 194-216.

already been carried out in this field[24] by the Council of Europe in its White Paper on Parental Responsibility and Parentage of January 2002,[25] as well as by the Hague Conference on Private International Law in preparing its Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.[26] An overlap with the comparative research already carried out is unavoidable; however, it is advisable not to leave the matters untouched simply because somebody else is busy in that field. CEFL's comparative research based drafting of Principles will turn out to be a different kind of exercise. In any case, a solid comparative insight into the subject will be provided.[27] Finally, the third working field was already selected in March 2003. At the end of 2005 the CEFL will embark on the new forms of cohabitation which include all kinds of formal (e.g. registered partnerships and civil unions) and informal forms of cohabitations except marriage. Although this third working field is to date quite controversial and therefore somewhat complicated,[28] one might argue that the subject of cohabitation is not hemmed in by defined positions; it is still open and free. It could be a good opportunity – and obviously a challenge – to find a European model, at least for non-marital cohabitation which is currently considered to be one of the hottest issues in the field of comparative family law.[29] Above and beyond this, two workshops at the second CEFL conference on informal relationships emphasize the need to consider these concepts without delay. We will contribute to the overall discussion with a European view based on comparative research.

Regarding CEFL's choices with respect to the fields of family law that are thought to be the most suitable for drafting common Principles of European Family Law the following conclusion can be drawn. To date, choices have been made in favour of limited and precisely delineated fields of law. The first and second working fields are interlinked and cover issues which are regulated in all jurisdictions and which, in particular, have often been modernised in the last few decades. In addition, the EU instruments for cross-border relationships in these matters have played a decisive role. Also the first and third working fields

---

[24] A similar comparative study as that in the field of Scandinavian divorce law (*supra* note 20) has recently been completed in the field of parental responsibilities, *see* S. Danielsen, Nordisk børneret II, Forældreansvar, Et sammenlignende studie af dansk, finsk, islandsk, norsk og svensk ret med drøftelser af harmoniseringsmuligheder og reformbehov [Nordic Child Law II, Parental Responsibility, A Comparative Study of Danish, Finnish, Icelandic, Norwegian and Swedish law with Discussions on Harmonisation and the Need for Reform] (2003).

[25] *See* http://www.coe.int.

[26] *See* http://www.hcch.net.

[27] *See* K. Boele-Woelki, *Parental Responsibilities – CEFL's Initial Results*, *in* K. Boele-Woelki (Ed.), Common Core and Better Law in European Family Law, European Family Law Series No. 10, 141-168 (2005).

[28] For an overview *see* K. Boele-Woelki & A. Fuchs, Legal Recognition of Same-Sex Couples in Europe, European Family Law Series No. 1 (2003) and C. Gonzàlez Beilfuss, Parejas de Hecho y Matrimonios del Mismo Sexo en la Unión Europea (2004).

[29] *See* J. Scherpe & N. Yassari (Eds.), Rechtsstellung nichtehelicher Lebensgemeinschaften – Legal Status of Cohabitants (2005).

are interconnected if, with regard to the latter, the break-up of a relationship which in fact causes the most complicated problems will be included. Hence, a systematic approach that covers all aspects of family law has hitherto not been pursued by the CEFL and it is rather doubtful whether this approach will be altered in the near future.

C. Drafting the Questionnaire

After determining the working fields the following step has to be taken. This second step consists of drafting a questionnaire. Generally, a questionnaire is deemed to provide an overview of the similarities and differences between the solutions applied in the different jurisdictions. Setting up and compiling a questionnaire has to cover the legal systems of not only different jurisdictions but which also adhere to different legal families, i.e. the so-called Romanic law family, the Germanic, the Common law and the Scandinavian systems. Therefore the questions are to be formulated as independently of national legal systems as possible. The drafting of questionnaires is very common and international organisations,[30] research groups[31] as well as individual researchers frequently make use of this technique. Apparently, it requires an essential knowledge of the substantive law in different jurisdictions in order to take all kinds of situations and problems into account. In applying the basic methodological principle in comparative research the questionnaires embody the functional approach. Zweigert/Kötz expressed the meaning of functionality very succinctly: "In law the only things which are comparable are those which fulfil the same function."[32] The drafters of the CEFL questionnaires thus posed the questions in purely functional terms without any reference to the concepts of a specific legal system, thus asking what is the underlying problem that a certain legal provision aims to redress.[33] Ignoring the principle of the functional or problem-oriented approach could have resulted in the risk that not all systems would have been covered. Consequently, a great deal of attention has been devoted to drafting two questionnaires which contain 105 questions on the subject of divorce and maintenance between former spouses[34] and 62 questions

[30] The questionnaires in preparation for the Hague Conventions on Private International Law are published together with the national reports, the discussions and the explanatory report in the Actes et Documents. In addition, they are available at the Hague Conference's website, *see* http://www.hcch.net.

[31] The European Group on Tort Law, for instance, also started its activities with the drafting of questionnaires regarding the most important issues of tort law. The questionnaires contain both conceptual questions as well as questions regarding concrete factual patterns, *see* Koziol, *supra* note 8, at 235.

[32] Zweigert & Kötz, *supra* note 4, at 34.

[33] Schwenzer, *supra* note 5, at 146-148.

[34] Accessible on CEFL's website under Working Field 1 and *in* K. Boele-Woelki, B. Braat & I. Sumner, European Family Law in Action, Volume I: Grounds for Divorce, Volume II: Maintenance Between Former Spouses, European Family Law Series Nos. 2 and 3, at XIII-XXIII

regarding parental responsibilities. After a first draft proposal prepared by one of the members of the Organising Committee, it took the Committee, on each occasion, more than two long days to confer, agree and finalise both questionnaires. The questions must, of necessity, be pertinent.[35] They are deemed to reveal a certain knowledge and understanding of the subject matter as it exists in the national jurisdictions and not as it should be according to some ideal standard. They are addressed to family law experts and are to be answered according to their national law. If an agreement has been reached on the content of a questionnaire – if it is therefore final, has been published on the CEFL's website and sent to the experts – any changes and the addition of new questions should be avoided so as not to confuse the whole process. Careful drafting is therefore considered to be essential for the entire process. At this stage, a significant difference between a research team operating in more than twenty jurisdictions and an individual researcher becomes evident. The latter can easily adjust his/her questionnaire any time.

Finally, in our opinion the instant electronic publication of CEFL's questionnaire on its website is valuable at least in two respects: Firstly, the necessary progress of CEFL's activities, which, to date, have been significantly funded under EC research programmes, is highlighted. Secondly, all researchers who, for instance, would like to carry out similar research into jurisdictions not represented in the CEFL may make use of the questionnaire. At least one gains an impression as to how a questionnaire can be drafted.

D. Drawing Up the National Reports

In contrast to several other groups and commissions, CEFL's Organising Committee has deliberately chosen to involve experienced family law specialists in order to answer the questionnaires according to their own national laws. Along with the detailed questionnaires these experts have been asked to establish the national reports in accordance with some detailed instructions, most of which are of a technical nature.[36]

(2003).

[35] Every questionnaire starts with an introduction to the historical background and a look into the future.

[36] Exclude private international law questions; Be as precise as possible in answering the questions; Preferably refer to provisions in statutes and case law if and when necessary; Avoid lengthy discussions in legal doctrine; Refer not only to the law in the books but also to the law in action; Follow the questionnaire and include the questions in your report; Answer each question separately; Avoid cross-references; Follow the attached guidelines as to how to cite articles, books and case law; Include the relevant provisions in an annex and provide a translation if available (preferably in English, German or French); Limit your report to a maximum of 50 (regarding the first reports on divorce and maintenance between former spouses) and 30 (regarding the second reports on parental responsibilities) pages (print size 10, with 1.5 line spacing) respectively; Ensure – if possible – the linguistic revision of your report if English is not your mother tongue.

The most important instruction concerns the request to take the law in action into account. Palmer[37] recently correctly noted that each legal system may prescribe its list of official sources, but this list, which is only designed to bind judges and courts internally, does not necessarily bind a comparatist. The practical importance of the law as it appears in action also holds true in the field of family law.[38] We wanted to discover not only what practitioners are actually doing with the legal rules, but how far it is possible for the expert to establish the law in action as opposed to the law in the books. Here, we have to acknowledge that there are limits, though, theoretically, there are no stumbling blocks to the pursuit for information about the legal rules, and only the practical constraints, imposed by a sense of relevance, available time and limited resources, will apply.[39]

Answering a questionnaire is a demanding task.[40] It requires knowledge about the relevant statutes, case law and academic discussions. This knowledge needs to be presented according to the generally accepted academic standards and needs to be submitted within a seven-month period.[41] In particular, the time constraints and the fact that most of the authors are not writing in their mother tongue[42] should not be underestimated. Reference is to be made to the sources of law. A simple 'Yes' or 'No' will not take us any further. We need to know why an answer is in the affirmative or negative. For that reason, a few draft reports were returned to the authors with a request to provide the necessary information and references. In addition, one should also keep in mind that a national report is written for those who, in principle, are not familiar with the particular jurisdiction. Sometimes, supplementary explanations concerning, for instance, typical institutions[43] or recent phenomena[44] must be included in order to avoid cryptically drafted answers which can only be understood by insiders, that is lawyers from the same jurisdiction. In short, compiling a national report calls for a great deal of sensitivity towards the addressee who generally has a different legal background. At any rate, regarding CEFL's national reports the

---

[37] V.V. Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, *in* Global Jurist Frontiers 2004, at 27; also published *in* Société de Législation Comparée, De Tous Horizons, Mélanges Xavier Blanc-Jouvan 129-157 (2004).

[38] Demonstrated by Schwenzer, *supra* note 5, at 144-146.

[39] Palmer, *supra* note 37, at 27.

[40] Many experts chose to make use of co-authors. These co-authors, however, do not belong to the CEFL Expert Grouat *See* on the structure of the CEFL, K. Boele-Woelki *et al.*, *supra* note 3, at V-VII.

[41] The period for the first report lasted from 22 January 2002 until 16 September 2002, the period for the second report from 5 April 2004 until 15 November 2004.

[42] CEFL's working language is English.

[43] The *prestation compensatoire*, for instance, which combines elements of matrimonial property law and maintenance law is a typical institution in French law, which needs to be explained in detail, *see* F. Ferrand, *French report*, Q 62 *in* Boele-Woelki/Braat/Sumner, *supra* note 34, at 91-92.

[44] The Dutch lightning divorce, for instance, belongs to this category. *See* K. Boele-Woelki, O. Cherednychenk &L. Coenraad, *Dutch Report*, Q 7, *in* Boele-Woelki, Braat & Sumner, *supra* note 34, at 124-126.

standard has been set. The experiences gained in drawing up the first reports and their comparisons are definitely of great value for the forthcoming reports.

Finally, it should be mentioned that the members of the Organising Committee also drafted national reports in order to gain a better insight into the subject-matter and to experience the difficulties involved in answering the questionnaire which, in their opinion, contained the most pertinent questions.

E. Collection and Dissemination of the Comparative Material

The fourth step in CEFL's working method is purely technical. However, this step is to be considered as being of tremendous importance. Two ways of dissemination have been chosen. First, the electronic publication of all national reports together with the relevant legal provisions on CEFL's website. The collected national reports provide a unique insight into various European family laws and modern trends. They are based on the law as it stood in 2002 with regard to divorce and maintenance between former spouses[45] and on the law as it stood in 2004 with regard to parental responsibilities. Electronic publication is simple, quick and cheap. However it requires, like printed publications, editing and, of course, linguistic revision. We have learnt that this is a time-consuming and costly activity. However, electronic publishing has several advantages: the national reports can be completed with the relevant legal provisions which, in some cases, are rather lengthy. The direct accessibility of the legal provisions facilitates an easy check of the primary sources in the given jurisdiction. In addition, the national reports are accessible worldwide and we have noticed that this opportunity has been frequently used.[46] The third advantage of electronic publication lies in the possibility to update the national reports easily and quickly. Nevertheless, the very recent revision of divorce law in France, for instance, which came into force on 1 January 2005,[47] or the new Spanish bill on divorce law[48] are not included in the respective national reports presently accessible on CEFL's website. Thus far, the updating of the comparative material has not been a matter of primary concern. In the long run, however, we have to seriously consider how to organise the updating of the comparative information. Its value will otherwise diminish or even become lost.[49] In addition to the country-by-country reports which altogether extend to more than a 1,000 pages, two integrated and printed versions laid out according to the numbers of

[45] *See* for references to already existing comparative studies in the field of divorce and maintenance, Martiny, *supra* note 20 , in particular notes 4-8.

[46] A 'Google search' using the terms divorce and maintenance in combination with the jurisdiction on which one is seeking information immediately leads to the CEFL national reports.

[47] F. Ferrand, *Aktuelles zum Familienrecht in Frankreich*, 2004 FamRZ, at 1423-1425; C. Dadomo, *The Current Reform of French Law of Divorce*, 2004 IFL, at 218-225.

[48] Anteproyecto de Ley por el se modifica el Código Civil en materia de separación y divorcio.

[49] Obviously extra time and money are needed to realise this plan.

the questions thereby followed.[50] These integrated versions provide a quick overview and a straightforward simultaneous comparison of the different solutions within the national systems.[51] They form the very foundation for the next step to be taken, the drafting of the Principles of European Family Law.

F. Drafting the Principles of European Family Law

The drafting of the Principles of European Family Law (PEFL) was the most exciting step to be taken. How did we achieve the final result? Which steps were taken in between? How did we divide the preparatory work? On what considerations did we base our final choices? Which approaches are to be distinguished? This bundle of questions cannot be answered instantaneously. They need to be categorised. I will first focus on the more practical aspects, then I will touch upon the close connection between Principles, comparative overviews and comments and, finally, I will comment on or, more accurately, make an attempt to explain how and when a choice between the 'common core' approach and the 'better law' approach was made. All the explanations given will in fact refer to the Principles regarding divorce and spousal maintenance.

I. Selection of the Subjects and Some Practical Aspects

The 105 questions making up the first questionnaire only led to the formulation of twenty Principles in total, most of which, however, consist of more than one paragraph. The total number of paragraphs reveals that we dealt with approximately 35 aspects. Apparently, a choice was made regarding the aspects of divorce and spousal maintenance, which in our view should be dealt with and, moreover, could be laid down in a Principle. The whole drafting process consists of a systematic analysis of the similarities and differences, of dividing solutions into different categories and, finally, of discussing the pros and cons regarding the proposals made, both within the Organising Committee and the Expert Group. Unanimity on all aspects of the final version could evidently not be reached. However, there was broad agreement on the basic elements of the first set of Principles. Besides, dissenting opinions are not mentioned in the

[50] Boele-Woelki, Braat & Sumner, *supra* note 34.

[51] The Scottish legislature already has used CEFL's work as a source for arguing for the amendment of the current law on divorce. On 7 February 2005, the Family Law (Scotland) Bill Grounds for Divorce was submitted to the Scottish Parliament which would, *inter alia*, amend the grounds for divorce in Scotland so as to reduce the current five year separation period to two and the two year separation period to one. Furthermore desertion would also be removed as a ground for divorce. The Bill also aims to amend the law regarding maintenance, parental responsibilities and parental rights, as well as cohabitation. It therefore provides yet further support to the choice of the CEFL to work on these three topics first. The relevant Scottish Parliament Information Centre Briefing which is compiled for the benefit of the Members of the Parliament frequently refers to the CEFL national reports on the grounds for divorce. *See* http://www.scottish.parliament.uk/business/research/briefings-05/sb05-22.pdf.

comments.[52] Right from the outset the Organising Committee rejected the use of a voting system.

1. Divorce

We started in the field of divorce[53] and initially – even before we had received the national reports – we identified the following subjects. First of all, we raised the question whether domestic law should permit divorce and whether there should be any defences to divorce. Secondly, we thought that we should deal with the grounds for divorce. On what basis should a divorce be granted? Should we only opt for a no-fault-based divorce? Should we choose a sole ground or multiple grounds for divorce based on mutual consent, irretrievable breakdown and separation as grounds for divorce? Thirdly, we asked whether divorce should be a judicial and/or an administrative process. Fourthly, the question of a specific time-limit for divorce was raised as well, i.e. whether there should be a period of reflection. In addition to these subjects we questioned whether one could obtain a divorce without an agreement or a decision on the consequences (a so-called package-deal). Furthermore, we considered state responsibilities in the divorce process (legal aid) and even the notion of mediation.

In retrospect this first list of subjects was indisputably to be considered as both traditional with regard to, for instance, the grounds of divorce as well as being too ambitious if we think of the divorce process, legal aid and mediation. However, we only became aware of this at a much later stage. After we had received the national reports we instantly narrowed our ambitions to some extent. We decided that all members of the Organising Committee[54] should make a comparison of the national reports, draft a Principle and explain why the proposed rule should be adopted with regard to one of the following subjects:

1. Should the law permit divorce by consent?
2. Should divorce by consent be an autonomous ground or should it be a sub-form of divorce based on irretrievable breakdown?
3. Should the marriage be of a certain duration?
4. Should a period of separation be required before filing the divorce papers?
5. Which procedure is required (appearance in court, conciliation, information, mediation)?
6. Do the spouses need to reach an agreement (or should it be left open) on all the consequences of the divorce or can the competent authority determine those consequences (subjects, before divorce, during divorce)?

---

[52] Only with regard to two aspects do the Comments to the Principles disclose the fact that lengthy discussions had taken place, see Preamble, Comment 1 and Principle 1:8, Comment 3. Detailed minutes were taken of both meetings with the Expert Group in March 2003 and March 2004 which, however, are for internal use only.

[53] It turned out to be impossible to deal with both subjects at the same time.

[54] Who, precisely, has prepared which subject is not considered to be relevant.

7. Should the competent authority scrutinise the agreement?
8. What is meant by 'consent'?

The subjects upon which each of us, at the outset, had to distil the similarities and differences in the twenty-two jurisdictions at that moment in time still did not completely mirror the final version of the Principles.[55] However, the drafting stage was finally reached and during several meetings[56] we intensively argued and evidently compromised on the proposals which we eventually adopted. It turned out to be difficult – we never had the illusion that it would be an easy task – to derive a single set of Principles from as many as twenty-two legal systems, which to some extent differ greatly.[57] When we finally presented the first draft of the Divorce Principles to the Expert Group in March 2003 we received three different kinds of comments: firstly, minor corrections regarding the content of the comparative overviews;[58] secondly, complete agreement as to the overall structure of the Principles consisting of provisions, comparative overviews and comments and, thirdly and most importantly, support as well as criticism regarding the content of the Principles.[59] The discussions were intense and many arguments in favour of a less traditional approach were very convincing.[60] Consequently, the Organising Committee reconsidered the Divorce Principles and made some major changes. The present Divorce Principles no longer speak of grounds for divorce. Instead we opted for two types of divorce, namely divorce by mutual consent and divorce without the consent of one of the spouses. In the latter case a factual separation between the spouses is required. As a result, the irretrievable breakdown of the marriage as a

[55] The ten Divorce Principles are contained in three Chapters. The first Chapter sets out the General Principles: Permission of Divorce (Principle 1:1), Procedure by Law and Competent Authority (Principle 1:2), and Types of Divorce (Principle 1:3). The second Chapter contains the Principles regarding Divorce by Mutual Consent: Mutual Consent (Principle 1:4), Reflection Period (Principle 1:5), Content and Form of the Agreement (Principle 1:6) and Determination of the Consequences (Principle 1:7). The third Chapter deals with Divorce without the Consent of one of the Spouses and contains three Principles: Factual Separation (Principle 1:8), Exceptional Hardship to the Petitioner (Principle 1:9) and Determination of the Consequences (Principle 1:10). *See also* K. Boele-Woelki (Ed.), Common Core and Better Law in European Family Law, European Family Law Series No. 10, 66-69 (2005).

[56] Information on the meetings is provided in the Preface of the PEFL book, *see* Boele-Woelki *et al.*, *supra* note 3, at VII-VIII.

[57] D. Martiny, *Divorce and Maintenance Between Former Spouses – Initial Results of the Commission on European Family Law*, *in* K. Boele-Woelki (Ed.), Perspectives for the Unification and Harmonisation of Family Law in Europe 529-550 (2003), and Martiny, *supra* note 20.

[58] Regarding several jurisdictions additional information and clarification were provided.

[59] Nigel Lowe succinctly expressed the overall impression of the Organising Committee after the first two-days meeting with the entire Expert Group with the meaningful expression: "We survived!"

[60] *See* Principle 1:8 Comment 3, *supra* note 3, at 53: "The members of the Expert Group critically assessed the first draft of the Divorce Principles which contained the irretrievable breakdown of the marriage as a basis for divorce. Factual separation alone should be considered sufficient upon which to base divorce since irretrievable breakdown is a meaningless additional hurdle."

ground for divorce was no longer sustained.[61] Moreover, we completely departed from the original structure of our questionnaire where a distinction was made between sole and multiple grounds for divorce systems. From a non-participant's perspective this observation is probably less striking than for those who were responsible for drafting both the questionnaire and the Principles. After a second 'reading' of the revised Divorce Principles at the next meeting with the Expert Group in March 2004, which in contrast to the first draft were by then completed with comparative overviews and comments with regard to all the Principles, further minor changes were made. These lengthy discussions were also extremely fruitful and led to an improvement in and a better understanding and clarification of the Divorce Principles, in particular concerning the comparative overviews and the comments. Additional arguments were put forward in support of the choices that were made. For the sake of clarity, the number of Principles (twelve) was reduced to ten by merging some rules, thus creating more paragraphs in several Principles.

2. Maintenance Between Former Spouses

While reconsidering the Divorce Part, we started at the same time, namely in April 2003, to draft the second part of the PEFL in the field of maintenance between former spouses. Within the Organising Committee we followed the same procedure consisting of the preparation of comparative overviews, proposals for Principles and explanatory comments. This time, however, (and this is my very personal opinion) much more attention was paid to the comparative overviews. The subjects initially selected are almost identical to the subjects which were dealt with in the final version of the Maintenance Principles.[62] We instantly agreed on the necessity to write an introduction to the question of whether maintenance should be a separate issue as well as whether we should distinguish between the types of maintenance claims. Regarding the subjects to be dealt with in a Principle we selected the following issues:

1. Individual self-sufficiency
2. General conditions for maintenance
3. Obligation and means of third parties
4. Special conditions for maintenance (list of criteria)
5. Hardship clause

[61] Pintens, *supra*, note 7, at 560: "Hier hat die progressivere Lösung mancher nordischer Rechtssysteme sich als zukunftsweisend durchgesetzt."

[62] The ten Principles regarding Maintenance Between Former Spouses (Part 2) are contained in three Chapters. The first Chapter sets out two General Principles: Relationship Between Maintenance and Divorce (Principle 2:1) and Self Sufficiency (Principle 2:2). The second Chapter contains the Conditions for the Attribution of Maintenance: Conditions for Maintenance (Principle 2:3), Determining Claims for Maintenance (Principle 2:4), Method of Maintenance Provision (Principle 2:5) and Exceptional Hardship to the Debtor Spouse (Principle 2:6). The third Chapter covers Specific Issues: Multiplicity of Maintenance Claims (Principle 2:7), Limitation in Time (Principle 2:8), Termination of the Maintenance Obligation (Principle 2:9) and Maintenance Agreement (Principle 2:10).

6. Method of calculating maintenance[63]
7. Method of payment (periodical payments, payment in kind, lump sum)
8. Priority of maintenance claims
9. Limitation and ending of the maintenance obligation
10. Limited time-period
11. Maintenance agreement
12. Scrutiny of the agreement.

In contrast to the preparation of the Divorce Principles by five persons, on this occasion, the preparation of the maintenance issues could – due to the enlargement of the Organising Committee – be distributed among seven members. For that reason we already met in October 2003 in order to discuss and draft each Principle one by one. In addition, all comparative overviews were checked and the comments were assessed, altered and finalised. In March 2004, at the second meeting of the Expert Group, we received the same kinds of comments as to the Divorce Principles. Once more we experienced that the exchange of ideas and the reciprocal criticisms were of great value. We took all the remarks and proposals into account as far as possible, adjusted the Maintenance Principles accordingly and sent the second draft to all the members of the Expert Group. Due to financial reasons and time constraints it was not possible to organise a second 'reading' in the form of a face-to-face discussion. Meanwhile, however, in May 2004 the Organising Committee had decided that a joint publication of both sets of Principles was to be preferred. Different arguments were finally decisively in favour of this decision.[64] The written comments and remarks by the experts were taken into account as far as possible and on that note the Maintenance Principles could be finalized.

II. The Interrelationship Between the Principles, Comparative Overviews and Comments

The PEFL consist of three parts: the Principles themselves in the form of provisions, the comparative overviews and the comments. These three parts belong together. One part cannot be read without the other two parts. Both the comparative overviews and the comments are part and parcel of the Principles

[63] We never intended, however, to draft a detailed calculation system. The conditions for maintenance could only be established in general terms.

[64] Firstly, if we would only have published the Divorce Principles and could have discussed the revised draft of the Maintenance Principles at our next Expert Group meeting, which was planned to take place in Uppsala in December 2005, the latter would not have been published before the beginning of 2006. In our view, this would have been too late. Secondly, if we only had published the Divorce Principles which had been reduced to ten Principles, the academic world would have considered this to be a somewhat meagre result. Thirdly, we needed to duly inform the participants at the second CEFL Conference, which took place in December 2004, where both sets of Principles played a central role. Finally, a more pragmatic reason was that, also from the publisher's perspective, a joint publication was considered to be more attractive.

as a whole.[65] This approach has been adopted by many groups and commissions and is inspired by the American Restatements.[66] The comparative overviews extensively refer to the national reports.[67] An effort is made to expose the variations in the underlying rules themselves and to make explicit comparisons between the jurisdictions. The fact that the comparisons are demonstrated renders the Principles attractive to legislators who are considering whether their national family law should be modernised.[68] Every provision adopted by the CEFL in most cases represents a choice for a single rule from among the options presented by the different systems. Together with the comments they reveal and explain why a particular Principle was selected and drafted. They provide a guide to the policy considerations behind the choices. They are in a sense the dominant features of the drafters, suggesting which is 'the best', the more 'functional' or the more 'efficient' rule. At least we tried to discover the origins of a Principle. It must be acknowledged, however, that part of the whole comparative thought process, in particular the evaluation of the offered solutions, is concealed in unreported deliberations and side-issues. We were trying to seek as much transparency as possible, while intuition was obviously avoided. Taking the interrelationship between the three parts of the Principles into account implies that the text of a Principle should not be used without having consulted the respective comparative overview and comment in order to comprehend its specific meaning.

III. 'Common Core' and/or 'Better Law'?

The legal institutions, legal solutions, and norms of the various legal orders express the hierarchy of values inherent in every legal order, though in different degrees. In the final drafting of the Principles an assessment of these values (an evaluation) has to take place. Apparently, there is no universally accepted hierarchy of values, and thus no objective standard for the evaluation. Some degree of subjectivity in the evaluation process cannot be avoided, but does this really matter?[69] At CEFL's inaugural conference in December 2002 extensive discussions took place concerning the most effective method for harmonising family law in Europe.[70] Should the harmonisation only be common core-based or is the use of the better law method indispensable in order to achieve positive results that represent the highest standard of modernity?[71] During the PEFL drafting process it became apparent that, to a certain extent, it is not obligatory

[65] *See* on the nature of the Principles: Boele-Woelki *et al.*, *supra* note 3, at 3.
[66] *See* in the field of contract law: E. Ioriatti, *A Methodological Approach for a European Restatement of Contract Law*, 3(3) Global Jurist Topics (2003), Article 4.
[67] Both parts of the PEFL contain 1076 footnotes in total.
[68] Spanish colleagues, for instance, have already been asked to provide a comparative overview of the divorce laws in Europe in order to inform the Ministry of Justice as to whether the recent divorce bill (*supra* note 48) would be in agreement with the European developments.
[69] Kokkini-Iatridou, *supra* note 1, at 191.
[70] Schwenzer, *supra* note 5, at 143-158 and Antokolskaia, *supra* note 5, at 159-182.
[71] Antokolskaia, *supra*, note 5, at 180-182.

to make a choice between one thing and another. Also a combination of both methods has been applied.

After comparing the national solutions, several approaches were taken. If it was possible to elaborate a common core for a significant majority of the legal systems, we could have followed this solution. However, should we take it for granted that this common core reflects the best solution? Certainly not. We would have been accused of short-sightedness if we had not evaluated the common solutions. Hence, the comparative process does not consist of a simple adding up or deletion of the answers given in the national systems. In some cases this evaluation led us to the final conclusion that the common core should be followed – in these cases the common core thus reflects the best solution; in other cases, however, we deviated from the common core and choose the better law approach instead. In those areas where it is not possible to derive general applied solutions, the decision as to which solution should prevail (the better law) is obviously also to be based on an evaluation. In addition, in both cases where on the one hand, it is possible to indicate a common core and on the other, it is impossible to do so, we came to the conclusion that certain questions should not be dealt with in the CEFL Principles and that they should therefore be left to national law. This applies, for instance, to all procedural issues and notions such as children or long-term relationships.[72] Regarding the different subjects which were selected on the basis of the comparative material, the following five different approaches are to be differentiated:

1. The common core was found and selected as the best solution.[73]
2. The common core was found, but a better solution was selected.[74]
3. The common core was found, but the solution was left to national law.
4. No common core was found and the best solution was selected.
5. No common core was found and the solution was left to national law.

All five approaches invoke the necessity of justifying the choices that were made. Nonetheless, both the second and fourth approaches which reflect the best or better law method definitely require more arguments based on certain values than in the case of the other three approaches. During the whole drafting process we were aware of the fact that evaluating solutions and taking positions can never be made without any subjectivity. Despite this awareness it is necessary to reveal the kind of criteria which are considered to be decisive for the choices that were made.[75] To that end, the Principles are preceded by a Preamble which includes both generally acknowledged considerations and commonly felt desires. In addition, some specific considerations (e.g. consen-

[72] The qualification of certain issues as belonging to procedural law, which is outside the scope of the Principles, was not always an easy task however.

[73] The common core and the selected solution are thus identical.

[74] The common core and the selected (better) solution can be compared.

[75] According to Zweigert/Kötz, *supra* note 4, at 47, the comparatist must be explicit as to the solutions s/he favours.

sual divorce should be favoured) were a reason for the adopted choices and preferences. Also practical evidence and the immediate sense of appropriateness[76] played a role. The respective evaluation criteria are laid down in the comments of each Principle.

In both tables below an attempt is made to disclose which approach was chosen with regard to which aspect.

Table 1: Principles Regarding Divorce

Principles	**1. Common core was found and selected as the best solution**	**2. Common core was found, but a better solution was selected**	**3. Common core was found, but the solution was left to national law**	**4. No common core was found and the best solution was selected**	**5. No common core was found and the solution was left to national law**
P 1:1(1)	• Permission of divorce				
P 1:1(2)		• No minimum duration of marriage			
P 1:2(1)	• Legal process				
P 1:2(2)			• Competent authority • Moment of dissolution of the marriage		
P 1:3				• Two types of divorce	
P 1:4(1)	• Mutual consent	• No separation period required			
P 1:4(2)				• No agreement on the consequences required	

[76] Zweigert & Kötz, *supra* note 4, at 33 consider these criteria as often the only ultimate ones when it comes to determining which of the various solutions is the best.

Table 1: Principles Regarding Divorce (continued)

Principles	1. Common core was found and selected as the best solution	2. Common core was found, but a better solution was selected	3. Common core was found, but the solution was left to national law	4. No common core was found and the best solution was selected	5. No common core was found and the solution was left to national law
P 1:6(1)				• Content of the divorce agreement	• Binding nature of the agreement • Motions of parental responsibility, children, child maintenance and the division or reallocation of property
P 1:6(2)				• Written form	
P 1:7(1)	• Determination of the consequences regarding children				
P 1:7(2)	• Full scrutiny of agreements regarding children • Restricted scrutiny of agreements regarding spouses				
P 1:7 (3)					• Determination of the economic consequences for the spouses
P 1:8	• Period of separation • Meaning of separation	• Only separation required			

Table 1: Principles Regarding Divorce (continued)

Principles	1. Common core was found and selected as the best solution	2. Common core was found, but a better solution was selected	3. Common core was found, but the solution was left to national law	4. No common core was found and the best solution was selected	5. No common core was found and the solution was left to national law
P 1:9	• Exceptional hardship				
P 1:10(1)	• Determination of the consequences regarding children				
P 1:10(2)					• Determination of the economic consequences for the spouses

Table 2: Principles Regarding Maintenance Between Former Spouses

Principles	1. Common core was found and selected as the best solution	2. Common core was found, but a better solution was selected	3. Common core was found, but the solution was left to national law	4. No common core was found and the best solution was selected	5. No common core was found and the solution was left to national law
P 2:1	• Single maintenance regime				
P 2:2	• Self-sufficiency				
P 2:3	• Need and ability	• Retention of a certain amount by the debtor		• Income and assets to be taken into account	• Standardisation of maintenance calculation

Table 2: Principles Regarding Maintenance Between Former Spouses (continued)

Principles	**1. Common core was found and selected as the best solution**	**2. Common core was found, but a better solution was selected**	**3. Common core was found, but the solution was left to national law**	**4. No common core was found and the best solution was selected**	**5. No common core was found and the solution was left to national law**
P 2:4	• Spouses' age, health and employment ability • Care of children • Division of duties during the marriage • New marriage of the debtor spouse			• Standard of living during the marriage • New long-term relationship of the debtor spouse	• Notion of children • Relevance of premarital cohabitation • Modification of a maintenance order
P 2:5	• Advanced, monetary, periodical and lump-sum payments	• Lump-sum payment at the request of one of the spouses			
P 2:6	• Exceptional hardship • No list of limited factors				
P 2:7	• Priority of the claim by children of the debtor spouse • Same ranking of the divorced spouse and new spouse				• Relationship between claims of the divorced spouse and other relatives

Table 2: Principles Regarding Maintenance Between Former Spouses (continued)

Principles	1. Common core was found and selected as the best solution	2. Common core was found, but a better solution was selected	3. Common core was found, but the solution was left to national law	4. No common core was found and the best solution was selected	5. No common core was found and the solution was left to national law
P 2:8	• Maintenance for a limited period of time				
P 2:9 (1)	• Termination in the case of marriage or long- term relationship of the creditor spouse	• Equation of formal and informal relationships	• Ex-lege termination or upon request		• Notion of long-term relationship
P 2:9(2)	• No revival of the maintenance claim				
P 2:9(3)	• Automatic termination in the case of the death of the debtor spouse				
P 2:10 (1)	• Freedom of agreement • Content of the agreement and renouncement				• Moment of the agreement • Consequences renouncing the agreement
P 2:10(2)	• Form of the agreement				
P 2:10(3)	• Scrutinising the validity of the agreement		• Notion of validity of the agreement		• Scrutiny and interpretation of the agreement • Moment of scrutiny • Modification of the maintenance agreement

Summing up the different subjects listed under the different approaches should be handled with care[77] and the interpretation of both tables requires a great deal of reticence. For instance, in the Principles regarding divorce the requirement of a separation period only in the case of a non-consensual divorce[78] (second approach) is of much greater relevance than the determination of the economic consequences for the spouses which should be left to national law[79] (fifth approach). Another example which is taken from the list under the second approach of the Principles regarding maintenance between former spouses demonstrates that the possibility for either spouse to request a lump-sum payment[80] is probably less difficult to introduce into national systems than the proposed equal treatment of a formal and informal relationship of the debtor spouse which leads to the termination of the maintenance obligation.[81] Many more examples that illustrate the difference in relevance and importance can be given. Yet again, simply adding together the listed subjects under each approach and a comparison of the figures does not reveal very much. A detailed analysis is therefore indispensable. However, both tables at least show that with regard to many aspects a common core was found and that this common core is considered to be the best solution. Convergence in both fields of law has been proven.

Finally, the question should be raised whether the CEFL has already paid attention to the changes which the Principles would bring to the national laws they are designed to replace. Was it possible to specify how much each law had contributed? In addition, how far would each law be affected? The general absence of these kinds of investigations and explanations can be justified by a lack of time. An exception was made, however, with regard to the one-year separation period which Principle 1:8 determines in the case of a non-consensual divorce due to the fact that the irretrievable breakdown of the marriage has been discarded.[82] Generally, it should be mentioned, however, that during our discussions an argument in favour or against a certain solution was regularly supported by conclusions such as: "This would never be accepted in my jurisdiction" or "This is in accordance with the solution adopted in my country." Sometimes, it was difficult to distance oneself from one's own legal background and to find a balance between, on the one hand, feeling responsible for or representing national solutions and, on the other, thinking from a European perspective. In the end the latter prevailed.[83] Hence, regarding the "implementation issue" I would be inclined to suggest that obviously not only

[77] With respect to Principle 1:6(1), for instance, four different notions are listed under the fifth approach.
[78] Principle 1:8.
[79] Principle 1:7(3).
[80] Principle 2:5.
[81] Principle 2:9(1).
[82] Principle 1:8 Comment 2-4, in PEFL book, *supra* note 3, at 53.
[83] Pintens, *supra* note 7, at 560: "Es zeigt, dass es den Experten gelungen ist, Abstand von ihren eigenen Rechtssystemen zu gewinnen und dass die Verwurzlung des Familienrechts in der Kultur und die Angst vor Kulturverlust sich in Grenzen halten."

CEFL members are able to investigate whether the proposed Principles are acceptable in the(ir) national system(s) in Europe. In order to obtain a probably more objective assessment, outside observers should embark on this venture. Finally, on a more global scale, a comparison between the PEFL and the Principles of the Law of Family Dissolution which were established by the American Law Institute in 2002[84] should be pursued.[85]

G. Publication of the Principles on European Family Law

The last step is the publication of CEFL's final results in the field of divorce and spousal maintenance. It has already been emphasised that the (first) Principles of European Family Law book(s) can be consulted as a guide for reference in the covered fields. However, due to the comprehensive comparative overviews they should always be read in conjunction with the national reports. We would not have been able to establish the PEFL book without the two integrated versions of the national reports. All three publications belong together[86] and as a package deal they represent the first step towards a European Restatement of Family Law.[87] One could even go one step further. The CEFL Principles do not only restate the family laws in Europe but contribute to the coming into existence of a factual European family law.[88]

A final remark concerns the languages used. The three languages in which the Principles have been drafted at the same time are equally authentic. The Dutch, Spanish and Swedish translations were added at a later stage. This choice is based on the language skills of the members of CEFL's Organising Committee. Translations in other languages are most welcome and will be published on CEFL's website. However, one should always take into account that without consulting the relevant comparative overviews, the comments and even the national reports – which are all drafted in English – misunderstandings are likely to occur.

---

[84] Principles of the Law of Family Dissolution: Analysis and Recommendations, American Law Institute, 2002.

[85] T. Glennon, *An American Perspective on the Debate over the Harmonisation or Unification of Family Law in Europe, Book Review of Perspectives on the Unification and Harmonisation of Family Law in Europe*, 2004 Family Law Quarterly 209.

[86] They thus provide more than only a good comparative law survey, *see* in this sense Antokolskaia, *supra* note 5, at 182

[87] K. Boele-Woelki, *Naar een Europees Restatement voor familierecht*, 2004 FJR, at 249-256.

[88] The Common Frame of Reference (COM (2004) 651 final, 11.10.2004, http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm) aims at the improvement of the legislation and the coherence of the existing and future EC law in the area of contract law. *See* D. Staudenmayer, *The Way Forward in European Contract Law*, ERPL 2005, at 95-104.

H. Conclusion

In the foregoing an attempt was made to explain the working method of the self-appointed Commission on European Family Law which has no ties with any government and does not professionally belong to any interest group. Generally speaking, there is a sliding scale of methods and the best approach will always be adapted along the lines of the specific purposes of the research, the subjective abilities of the research team and, last but not least, the affordability of the costs.[89] Zweigert & Kötz remind us that even today the right method must largely be discovered by gradual trial and error.[90] Did we nevertheless choose the right method or at least the right direction? The time has come to obtain a critical assessment from outside observers concerning CEFL's results to date.[91] When carrying out such an assessment one should bear in mind that we tried to find a balance between delving into the subject in depth, demonstrating the comparisons, having sufficient room for discussion between the experts, explaining why a certain Principle has been adopted and finalising the first set of Principles within a reasonable period of time.

[89] Palmer, *supra* note 37, at 29.
[90] Zweigert & Kötz, *supra* note 4, at 33.
[91] A. Agell, *The Underlying Principles of Consensual Divorce*, *in* K. Boele-Woelki (Ed.), Common Core and Better Law in European Family Law, European Family Law Series No. 10, 59-66 (2005).