

THE REFORM OF FAMILY LAW IN EUROPE

THE REFORM OF FAMILY LAW IN EUROPE

(The Equality of the Spouses—Divorce—Illegitimate children)

A SEMINAR OF THE UNIVERSITY INSTITUTE OF LUXEMBOURG

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PREFACE

In the last few years European Family Law has undergone considerable changes. Although in the past law reform was slow, since 1969 the impetus for reform has gathered momentum. It is no exaggeration to say that the changes that have occurred in Europe in the last six or seven years have radically altered the very concept of the family in Europe. As a distinguished scholar and former editor of the Family Law volume of the International Encyclopaedia of Comparative Law, Professor Max Rheinstein, has put it: 'These transformations are not fully completed anywhere. They have gone farthest in the countries of highest industrialization and in those of socialist rule. But they have set in wherever industrialization has obtained a foothold. The degree of 'modernization' of family law may indeed be used as an index of a society's degree of Westernization.'¹ Yet, such is the force of traditional patterns of thought that, although we are aware of distinct changes in various legal systems, the underlying and implied assumption is that family law can still move within the traditional framework. This is not surprising for, until comparatively recently at least family law was not thought of as a suitable subject of unification. It was claimed that there is a peculiar and distinct element which derives from the mores and innermost beliefs of each people, from a sort of family *Volksgeist* that renders impossible the approximation or unification of family law.

Nevertheless, the overwhelming evidence now available suggests that these ideas and beliefs must be radically revised. As far back as 1968 I wrote: 'Although it can be argued that the law of persons is intensely individualistic and therefore less amenable to unification, I must confess that I have become increasingly disenchanted with this view. It seems that, whatever the strength of local habits in the past, certain leading ideas are clearly emerging which may be called patterns of a future European law.'² For if we leave the rest of 'Western' or 'industrialised' societies apart, it may be argued that a distinct movement of reform has emerged within Europe which is converging toward a uniform model of family life and therefore of family law. This has been caused not only by more rapid and extensive travel and communication, but also by the setting up of inter-European political, economic and cultural links which increasingly appear to develop a pattern of a European family life. It has further been encouraged by a peaceful migration of large numbers of workers from one part of Europe to another in search of an improved standard of living. Such a migration may have sociological consequences which may be difficult to estimate at present. It is by no means free from cultural shocks which are felt not only by the migrant workers and their families, but also by those who are indirectly affected in the home country of each worker.

1. *International Encyclopaedia of Comparative Law*, 'Persons and Family', Vol. IV, 1-6, pp. 6-7.
2. 'Principle, Reason and Policy in the Development of European Law', 17 *Int. Comp. Law Quart.* (1968), pp. 849, 853.

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In these circumstances it has appeared opportune to take stock of the stage of family law in Europe today: not by looking at the whole field of family law, but by focussing attention upon three aspects of family law which appear to be mostly affected by contemporary movements. These three aspects are: the equality of the spouses, divorce and the legal status of illegitimate children. Around these topics a group of scholars was gathered, on the occasion of a Seminar held at the International University Institute of Luxembourg, which was also attended by over eighty participants not only from Europe but from as far afield as South America. As will be seen from the table of contents, each scholar has dealt with these topics in this book from his national point of view; but the book also includes some general chapters which attempt to cut across national boundaries and raise questions which are important in all legal systems.

The picture that emerges is a composite one, but three different trends are clearly suggested. The first is the strong trend of uniformity of treatment. Thus, there seems to be general agreement on principles, e.g. that in European family law there should be greater equality between the spouses, that divorce should no longer provide for penalties for erring spouses but a remedy for difficult human situations; last, that there should be no discrimination based upon illegitimate status.

The second trend is one of divergence, for it is by no means an easy exercise to put these principles into effect. Opinions (and legal systems) may vary as to how to balance the conflicting interests of children with the respect of the equality and freedom of each spouse to decide upon his future way of life. Standpoints may also differ as to how to remove the stigma of illegitimacy from the statute book without removing the special protection generally extended to the legitimate family. It is not surprising, as these divergences show, that we can obtain no clear and unambiguous answers and that the potions concocted by each legal system contain the same ingredients but in different proportions. What is surprising is that, in the open society in which we live, less advantage has generally been taken, where there is agreement on principles, to regulate individual solutions in a uniform European manner. Thus in divorce, for instance, most systems dissolve marriage when the spouses have lived separately for a number of years. But hardly any effort seems to have been made to agree on a uniform solution on how long the period of separation ought to be. Equally, various legal systems find it difficult to work out a generally acceptable and uniform view of the rights and duties of minors born outside marriage.

The third trend clearly relates to the regulation of the illegitimate family. It poses, perhaps, a fundamental question: if the disadvantages of an illicit relation disappear, or—to put it another way—if the advantages of lawful marriage disappear—is there no danger that marriage, unless prompted by a religious motive, will rapidly, if it has not already, become redundant and obsolete? Should we not, in other words, ask ourselves the question whether marriage is really necessary and, if the answer is a negative one, have we not thrown the proverbial baby away with the bathwater?

It is clearly too early to establish any final conclusions on these matters. Indeed, it can strongly be argued that final conclusions in this field are neither possible nor desirable. For society and the family in society are in a constant state of flux. In the sophisticated European society in which we live, changes occur with astonishing rapidity. This does not help to solve the problems of the legislator

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who must 'fix' the law for the immediate future at least. If the Luxembourg Seminar has not found any definite answers, it is hoped that this book provides at least a useful collection of information and ideas to permit a rational examination of Family Law in our time.

As Editor I wish to thank the contributors not only for their active participation in the Seminar, but also for their supply of a typescript. I also wish to thank the International University Institute of Luxembourg for its far-sighted initiative in organising a Seminar on Family Law, as well as for its help in making this publication possible. Thanks are also due to the individual participants of the Seminar, whose active interest and lively discussions have shown that the new generation of young lawyers lacks neither courage and ideas nor seriousness of purpose. Last, but not least, I wish to thank the Publishers for their support in the production of this volume.

A. G. CHLOROS