

What comparative family law should entail

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Regardless of whether globalization is to be applauded or condemned, it has had the undeniable effect of bringing more people and cultures together. The result for the family law practitioner is a world of new and challenging legal issues as well as new possibilities prompted by the cross-fertilization of legal ideas.¹

1. Preliminary remarks

The invitation by the editorial board of the Utrecht Law Review to edit this special issue about ‘Current Debates in Family Law around the Globe’ provides an exciting opportunity to reflect on the elements, aspects, dimensions, scope and method of comparative family law.

This introductory contribution consists of four parts. Information about the organization of this special volume and its follow-up as well the selection of the authors are provided in this first section. Subsequently, in the main body of the article, some general ideas as to how comparative family law (methodology) is perceived and what it should entail are presented whereby reference is made to more recent developments in Europe and the United States. Thirdly, information is proffered about the thematic approach of the contributions and the underlying ideas in respect of the selection of the topics that have been addressed by the authors in this issue. Finally, in the concluding section some reflections introduced in the main part of this contribution are taken further.

Sixteen other authors have contributed to this issue. Upon invitation they all showed an immediate and great interest in contributing to the current debates in family law. In addition to renowned legal scholars many authors in the category ‘young, yet advanced’ researchers have been asked to contribute. Repeatedly, they have demonstrated that they are (almost) prepared to take the lead. All contributions were anonymously peer reviewed by other family law experts from many other jurisdictions. Also their comments for improvement and clarification were highly appreciated. It is to this author’s great pleasure that six authors belong to the Utrecht

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¹ See D. Blair & M. Weiner, *Family Law in the World Community, Cases, Materials, and Problems in Comparative and International Family Law, Introduction to the Study of Family Law in the World Community*, 2003, p. 3.

Centre for European Research into Family Law (UCERF).² This special edition of the Utrecht Law Review enables them to showcase the work that goes on within the Centre.

Right from the outset it was this author's initial aspiration that the invited authors should be provided with the opportunity to discuss their contributions with each other in order to get direct feedback from colleagues interested in the field. Besides, face-to-face meetings provide an excellent opportunity to establish or extend one's own personal network. The G.J. Wiarda Institute for Legal Research of Utrecht University, and the Royal Netherlands Academy of Art and Sciences have granted financial support for the organization of an expert meeting in which all authors will participate.³ This is of course highly appreciated. Given the fact that about three weeks before this event takes place the special issue of the Utrecht Law Review will be published all participants will be able to read the contributions of their colleagues in advance many of whom are dealing with the same problem in a different jurisdiction. It is this author's expectation that this will result in an in-depth discussion of the problems and concerns at a high academic level. A summary of the discussion and eventually some recommendations might easily be added to this volume at a later stage given the electronic nature of this journal.

2. Framing comparative family law

This part is dedicated to the question as to how comparative family law could be framed. Which components should it comprise? Are there any general guidelines and trends? Is it possible to draw a roadmap? How can it be outlined without drawing the lines too narrow or even putting it into a straightjacket? In an attempt to answer these questions the following instructive definition of 'framing' has been used as a guideline:

'Framing is the art of presenting an argument by strategically revealing certain information while concealing other information and hopefully presenting the package in a way that is sufficiently beautiful that no one notices (or objects to) the absence.'⁴

2.1. The subject matter

Which issues are addressed by those who discuss comparative family law? In trying to discover answers to this question three recent publications of well established authors in the field of comparative family law have been selected. Firstly, Harry Krause's article in the *Oxford Handbook on Comparative Law* about 'Comparative Family Law';⁵ secondly, Masha Antokolskaia's contribution to the book *Comparative Law: A Handbook*, entitled 'Comparative Family Law: Moving with the Times?'⁶ and thirdly, Mary Ann Glendon's substantive and long awaited introduction to the *International Encyclopedia of Comparative Law* on 'Family Law in a Time of Turbulence'.⁷ At present all three publications belong to the most up-to-date and comprehensive overviews, which at least those who teach comparative family law should be familiar with.

2 For more information about UCERF objectives and activities: <http://www.ucerf.nl>

3 This expert meeting takes place from 27-28 June 2008 in Utrecht. In addition to the authors of this volume several other family experts from The Netherlands and abroad have been invited.

4 Explanation of the objects 'Framing' at the exhibition of Barbara Bloom (8 January – 4 May 2008) at the International Center of Photography, New York. The explanation starts with: 'Framing is frequently an act of cunning. Lawyers succeed by how they "frame the question"; politicians succeed by how they "frame the issue." Detective stories frame clues, novelists frame plots, criminals frame fall guys.' See also the exhibition at the Statens Museum for Kunst, Copenhagen, 'Frames, State of the Art' (8 March – 8 September 2008): 'The frame is what concentrates the focus on something, shows off and demarcates what has a special value or status.'

5 In M. Reimann & R. Zimmermann (eds.), *Oxford Handbook on Comparative Law*, 2006, pp. 1099-1132.

6 In D. Nelken & E. Özücü (eds.), *Comparative Law: A Handbook*, 2007, pp. 241-262.

7 In A. Chloros et al. (eds.), *International Encyclopedia of Comparative Law, Persons and Family*, Vol. 4, 2007, pp. 1-27.

The analysis provided, the trends identified and worries of the authors focus not only on developments in Europe with its great variety of family law systems (Antokolskaia), but also comprise a general, instructive and pointed comparison of the American and European family law systems by taking a mezzo-perspective (Krause), and eventually take into account – as far as this has been possible – all family law systems in the world (Glendon).

Glendon indicates the major social, political and legal trends of family relations during the last three decades by reviewing the topics that since 1971 have been addressed in specific chapters by several comparative family law specialists, being Persons, Formation of Marriage, Interspousal Relations, Creation of Relations of Kinship, Children, Parents and Guardians, Family in Socialist and Post-socialist Countries and Family in Religious and Customary Laws. This review – while brief – is of precious value since the majority of the chapters and some of their parts were finalized more than almost twenty years ago.⁸ From there, she identifies the major issues confronting the family at the dawn of the 21st century. Whereas ideas of individual freedom, equality and women's rights influenced family law in the past, advances in biotechnology and genetic science will influence family law in the future. She concludes that the present legal ordering of the family surveyed in the family volume of the *International Encyclopedia* is composed of the accumulated wisdom, accidents, and inventions of the past. Today, lawmakers in every corner of the world are in the process of adding their own contributions, determining which parts of that inheritance can be usefully developed and which should be reconsidered or rejected.⁹ Truly speaking her closing remark properly emphasizes one of the major functions of comparative family law: a comparative approach is indispensable if we want to learn lessons from the past and the present. Expectedly, Krause supports this view by further pointing to the fact that family laws are unfolding in similar directions: 'For all their very real differences, nations around the world find themselves facing fundamentally similar dilemmas in defining and regulating the modern family. Accordingly, it makes sense to take stock of what has been tried and what has – or has not – worked elsewhere. Comparative family law's days as an unlikely pioneer are over.'¹⁰

Now comes the work of tilling the soil and seeing what will grow. He explains what in the field of comparative family law has been, and is being, done and who is doing it. Further he questions what it means to compare – and how one should compare, and in so doing takes a critical stance towards the 'West' as a monolithic culture.¹¹ Subsequently, he presents the 'Great Debates' of yesterday, today and tomorrow by referring to contrasting examples derived from the family law systems in Europe and the United States. In particular in finding explanations as to why the approaches, solutions and methods are similar or differ, Krause's comparison is highly illuminating. Antokolskaia, finally, focuses on the development of the European family law systems in respect of marriage, divorce and non-marital relationships. In complementing Krause's and Glendon's contributions, she adds a new point of discussion that recently has emerged in Europe: namely the deliberate harmonization of family law to which the activities of the Commission on European Family Law (CEFL) are contributing.¹² She describes this issue as highly controversial whereas the progress of harmonization activities only has made the debate

8 Generally it is to be regretted that it takes the editorial board of the *International Encyclopedia of Comparative Law* on average almost three years to publish the chapters and parts that have been submitted.

9 See Glendon, *supra* note 7, p. 25.

10 See Krause, *supra* note 5, pp. 1099-1132, p. 1101.

11 In particular he warns us (*supra* note 5, p. 11) that if Europeans loudly profess not to understand American (prudish? Victorian?) attitudes regarding sex and the political power of fundamentalist (intolerant?) interpretations of religion, Americans do not understand the Europeans' preoccupation with ideology and their (mostly unpleasant) ethnic/nationalistic history.

12 See K. Boele-Woelki, 'The Principles of European Family Law: its aims and prospects', 2005 *Utrecht Law Review* 2, pp. 160-168.

sharper and could only have started in spite of serious opposition.¹³ Whether this characterization is accurate, however, should definitely not be assessed by someone who is – like this present author – heavily involved in the CEFL activities. At any rate it pinpoints a new development, which was not even conceivable a decade ago.

In exploring the subject matter of comparative family law another issue needs a little further discussion. Frequently, family law courses, for instance, which look beyond national boundaries, combine both comparative family law and international family law.¹⁴ Is it possible to distinguish the one from the other? A brief explanation of both terms might be useful. Usually, comparative family law refers to the comparison of (domestic) substantive and procedural family law rules and norms applicable in two or more particular states or jurisdictions. A whole range of relationships belong to family law: the personal status, name law, formalized (marriage, registered or civil partnership) and non-formalized (cohabitation) relationships, rights and duties of spouses and partners, dissolution of these relationships (divorce and dissolution), property distribution, spousal, partner and child maintenance, parental responsibilities, adoption, domestic violence, assisted conception and reproductive assistance, abortion, assisted suicide, incapacitated (elderly) persons etc. All these family relations might extend beyond national boundaries and the answers to questions such as ‘which court decides?’, ‘which law applies?’ and ‘is a decision of a foreign court or a status obtained abroad to be recognized?’ are provided by private international rules, which might be either of an international, European or national origin. Evidently, the comparison of private international law solutions in family matters also falls under comparative family law.¹⁵

The term ‘international family law’ has two meanings. It entails both the rules for cross-border family relations,¹⁶ on the one hand, and the body of international and (European) instruments and decisions of supranational courts which regulate family relationships, on the other. Sometimes both ‘elements’ are covered which is the case in respect of the Hague Conventions on Private International Law, many of which address cross-border family law issues. Hence, the importance of international family law is dramatically increasing. Recently, it has been sensibly demonstrated that within roughly the last two decades, the global migrations of capital and the vast migrations of labour that have accompanied it, have torn families apart, created new families and radically changed the meaning of family.¹⁷ As a result international family law has evolved and become a subject of its own whereas not that long ago it was merely studied as part of a course on family law or as part of a course on conflicts of law.¹⁸ For some time, globalization has

13 See Antokolskaia, *supra* note 6, p. 258.

14 Teaching material for American law schools is, for instance, provided by Blair & Weiner, *supra* note 1. See for Europe: W. Pintens & K. Vanwinckelen, *Casebook European Family Law*, 2001. This book contains an introduction into the Europeanization of family law and a compilation of a number of cases, annotated with brief references from the European Court of Human Rights, the European Court of Justice and a series of English, French and German judgments that can be considered as representative for the various tendencies in the field of family law in Europe.

15 See, for example, K. Boele-Woelki & C. González Beilfuss, *Brussels IIbis: Its Impact and Application in the Member States*, 2007.

16 Defined as private international law rules or according to the Anglo-American approach the conflicts of law rules.

17 See B. Stark, ‘When Globalization Hits Home: International Family Law Comes of Age’, 2006 *Vanderbilt Journal of Transnational Law*, pp. 1551-1603, p. 1555: ‘Borders have become more porous, allowing adoptees and mail order brides to join new families and women fleeing domestic violence to escape from old ones. People of different nationalities marry, have children, and divorce, not necessarily in that order. They file suits in their respective home States or third States, demanding support, custody, and property. Otherwise law-abiding parents risk jail when they try to abduct their children from foreign ex-spouses. Local laws alone cannot resolve these matters. Rather, lawyers increasingly draw on a wide range of international treaties, national laws, religious laws, and local traditions.’

18 See Stark, *supra* note 17, p. 1559: ‘Globalization transforms families in three major ways. First, the increase mobility of families, or some family members, reconfigures families. Second, income shifts among different families, and among the individuals within families, alters social relations. Third, globalization transforms culture, and culture changes everything. The transformation of families, in turn, places new demands on international family law.’

primarily been discussed from an economic and a political viewpoint.¹⁹ This development which envisions – among other things – worldwide growth within one united market rather than in separate geographic and political economies, which leads to a greater connectedness of peoples around the world in terms of communication and transportation, which causes cultural homogenization such that more people share similar cultural experiences,²⁰ and which increases the migration of individuals and families,²¹ is also transforming family law,²² as Barbara Stark metaphorically has typified, ‘hits home’.²³ As a result, each domestic family law problem eventually has an international dimension, for instance the human rights and/or the cross-border perspective.²⁴ In addition, the internationally shared or agreed rules and norms are based on comparative family law studies.

In this authors’ experience international family lawyers commonly are aware of the fact that comparative family law is an essential component of international family law,²⁵ whereas those who are more specialized in substantive and procedural family law occasionally might overlook the importance of the private international approach that is chosen in either international or European instruments. The following example may illustrate the interaction between the one and the other.

The child’s right to be heard is a fundamental human right that is laid down in the United Nations Convention on the Rights of the Child (UNCRC). It includes the right to be informed, consulted and grants the child the right to express his or her opinion in all matters concerning him or her. In Europe, this generally accepted principle of hearing the child in disputes over parental responsibilities is, however, frequently not applied in practice. If national legislatures want to improve the child’s position by introducing a rule that lowers the age of the child at which it must be heard from, for example, 12 to 7, a comparative family law study would reveal, at least in respect of European jurisdictions, that in the majority of jurisdictions more relevance is given to the age and maturity of the child in determining whether he or she should be heard,²⁶ rather than set age limits. Moreover, in particular EU Member States should take into account that according to Article 23(b) of the Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibilities (Brussels II *bis*),²⁷ a judgment of a Member State court relating to parental responsibility shall not be recognized if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought. This latter State might have the rule that the hearing of children is decided

19 See generally R. Michaels & N. Jansen, ‘Private Law beyond the State? Europeanization, Globalization, Privatization’, 2006 *American Journal of Comparative Law*, pp. 843- 890.

20 See for an attempt to define globalization: M. Birnhack, ‘Global Copyright, Local Speech’, 2006 *Cardozo Arts and Entertainment Law Journal*, pp. 491-547, pp. 497-498.

21 See also N. Dethloff, ‘Familien- und Erbrecht zwischen nationaler Rechtskultur, Vergemeinschaftung und Internationalität, Perspektiven für die Forschung’, 2007 *Zeitschrift für Europäisches Privatrecht*, pp. 992-1005.

22 See A. Estin & B. Stark, *Global Issues in Family Law*, 2007, pp. 1-6 who explain how the globalization of the family is transforming family law and why it matters to lawyers as well as to their clients.

23 See B. Stark, *International Family Law: An Introduction*, 2005, p. 1.

24 See J. Masson, ‘International Families: Making New Relationships at Home and Away’, in R. Probert (ed.), *Family Life and the Law*, 2007, pp. 181-196. She concludes: ‘The impact of increased travel and migration on families is being recognized with the development of international laws which regulate arrangement and protect the parties, particularly children. However, these have yet to adapt to the challenges which changing families will bring. Whereas laws and practices in Europe are likely to become more similar, there is little to suggest that liberal family laws will be developed in much of the rest of the world. This gulf will make it more difficult to secure the co-operation necessary to cope with the internationalization of family life.’ (p. 196).

25 The crucial question to what extent and according to what framework the European legislator can and should act in the field of international family law has been addressed by leading authors in: J. Meeusen *et al.* (eds.), *International Family Law for the European Union*, 2007.

26 See K. Boele-Woelki *et al.*, *Principles of European Family Law Regarding Parental Responsibilities*, 2007, Principles 3:6 and 3:37, pp. 49-55 and pp. 239-252.

27 Regulation (EC) no. 2201/2003 of 27 November 2003, *OJL* 338/1, 23.12.2003.

on the basis of the child's maturity and the child's ability to assess the issue at hand. Consequently this might be considered as being a fundamental principle which is violated if a specific age limit in the country where the decision is rendered is set.²⁸

More illustrations which demonstrate the interconnectedness between comparative family law and international family law can easily be provided. Those jurisdictions – to provide another example – which currently consider addressing issues of same-sex relationships through legislation might not only compare different same-sex regulatory schemes that since 1989 have been introduced around the world,²⁹ but initially should answer private international law questions such as, are foreign nationals also allowed to enter into the formalized relationship? Will a relationship established abroad be recognized? In addition, human rights instruments and – where applicable – European instruments, communications and resolutions,³⁰ should be taken into account.

Since the subject matter of comparative family law has been more or less delineated the following question immediately arises: How to do comparative family research?

2.2. *The method*

A huge amount of literature on the methods of comparative law is available.³¹ Can something different and substantial be added from a family law perspective? As a starting point it is submitted that generally the same rules, advice and steps apply; the same chances and pitfalls are present, the same problems and challenges are apparent. Irrespective of how we perceive comparative law – as a method or as an autonomous direction in legal research – today it has become a reality; it has acquired a firm standing and won universal application in all legal sciences. In addition, the comparative method does not differ either according to the legal discipline or the branches of law to which it is applied. As a result there is no separate comparative method depending on the nature of the field under research. Hence, a specific comparative family law method which is distinct from the methods in other legal fields does not exist. However, a concise explanation of what the comparative method generally demands might be useful in getting an overall picture of the elements and aspects of comparative family law. This is provided in the subsequent section.³²

2.2.1. *Definition, four steps and preliminary questions*

The commonly accepted definition of the comparative research process applies also through as large a field of learning as comparative family law:

28 According to, for instance, the decision of the Bezirksgericht Wien, 23 February 2006, (4P 14/06y), a Belgian decision on parental responsibilities was not recognized in Austria because the child of six year old was not given any opportunity to be heard: 'Gerade im vorliegenden Fall, wo die Fragestellung sich nicht auf die Frage Vater oder Mutter beschränkt, sondern die Frage "Aufwachsen in Belgien oder Österreich" im Raum steht, erscheint dem Gericht die Nichtbefragung der Minderjährigen als so schwerwiegend, dass die Anerkennung der belgischen Entscheidung versagt wird. Auch kleine Kinder können aufgrund der unterschiedlichen Sprache der Mitmenschen, des Kindergarten- bzw. Schulsystems und der ganzen Eigenheiten eines Landes (Klima, Essen, etc.) schon gut zwischen Ländern unterscheiden. Da das Kind in einem Obsorgeverfahren eigentlich "Subjekt" und nicht "Objekt" der Entscheidung sein sollte, erscheint es dem Gericht notwendig, dass das Kind zu dieser bedeutenden Frage gehört wird.'

29 See K. Boele-Woelki, 'The Legal Recognition of Same-Sex Relationships within the European Union', 2008 *Tulane Law Review* (forthcoming).

30 See, for instance, the European Parliament's resolution which was adopted on 18 January 2006, P6_TA(2006)0018.

31 See R. Michaels, 'The Functional Method of Comparative Law', in M. Reimann & R. Zimmermann (eds.), *Oxford Handbook on Comparative Law*, 2006, pp. 339-382; G. Dannemann, 'Comparative Law: Study of Similarities and Differences', *ibid.*, pp. 383-419 both with further references. See also E. Özücü, 'Methodological Aspects of Comparative Law', 2007 *European Journal of Law Reform*, pp. 29-42.

32 According to K. Zweigert & H. Kötz, *Introduction to Comparative Law*, 1998, p. 33, however, 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.

Comparison is a scholarly process in which specific ‘objects’ of at least two jurisdictions are set against each other in order

- (1) to determine their similarities and differences;
- (2) to explain the causes of the similarities and differences and
- (3) to evaluate the solutions.³³

This definition necessitates the comparative researcher to distinguish between the following four steps.

The *first step* consists of the finding of similarities and differences. In this stage two methodological rules are to be applied. Firstly, the subject matter must be divided into different aspects or part problems. In comparative law the breaking up of the problem into smaller part problems is known as the Cartesian method.³⁴ The division of the subject matter into part-problems is usually done by drafting a list of questions.³⁵ Later, the order of these questions and their respective answers determine the structure of the comparative research report. Secondly, the subject for comparison is to be re-integrated into its own environment by discovering the relationship of the subject with other institutions, norms etc. of the same legal system and by studying and determining the relationship between the subject and its background, whereby legal and non-legal factors might be relevant. If, for instance, assisted reproduction techniques have been chosen as our field of research we have also to take into account the rules governing health insurance, medical law, the law of parentage and human rights.

The *second step* is dedicated to the effort of providing an explanation for the similarities and differences that the analysis of the comparison has revealed. Which factors have been influential? A whole range of historical (including the reception of law), social, economic, political, geographic, religious factors might be of relevance, but also conventions and within the European Union the communitarian instruments. What are, however, exactly the similarities and differences? Should the findings also encompass converging and diverging tendencies which the researcher was able to detect and which also need to be elucidated? The answer to this question is positive; however, neither similarities and convergence, on the one hand, nor differences and divergence, on the other, should be used as synonyms.³⁶ They have different meanings. Convergence and divergence indicate a certain development of the law. Speaking of convergence means that certain developments are coming together – they are progressing towards a common goal or developing towards a common result – whereas in the case of divergence the developments are moving away from each other – in other words they are becoming more dissimilar. In addition, convergence and divergence are signalling developments in either this or that direction, whereas similarities and differences merely indicate a factual situation. Generally speaking, the term development is neutral; it can have positive or negative effects, although these connotations allegedly contain a value judgement. As a result, developments can, for instance, either be characterised as leading to expansion, improvement and progress or to restriction, control and

33 This is a slightly modified version of the definition provided by D. Kokkini-Iatridou, ‘Some Methodological Aspects of Comparative Law’, 1986 *Netherlands International Law Review*, p. 155.

34 See R. Descartes, *Discours de la méthode*, 1637, Chapter 2: ‘(...) de diviser chacune des difficultés que j’examinerois, en autant de parcelles qu’il se pourroit, et qu’il seroit requis pour les mieux résoudre.’ ((...) to divide each of the difficulties under examination into as many parts as possible, and as might be necessary for its adequate solution).

35 Examples as to how (extensive) questionnaires in the field of family law can be drafted are provided by the CEFL, see <http://www.law.uu.nl/priv/cefl>

36 According to E. Öricü, *The Engima of Comparative Law*, 2004, p. 34, the cognition of the legal, social and cultural environments in which we live can best be done not just by discovering resemblances between similars or even similarities between differents, but more fundamentally by finding and explaining similarities among differents, and differences and divergences among similars.

constraints. Additionally, it should be stressed that even if national solutions differ, which by the way is always the case, convergence may be attained if the different solutions are pointing in the same direction. For instance, the national legislature allows, to a greater or lesser extent, party autonomy in the field of divorce. The spouses may not only agree that their marriage should be dissolved, but they may also agree on the consequences of the divorce. In that respect, the national law may – to provide another example – require more or less public intervention by the competent authority regarding the consequences of the divorce as far as, in particular, children are concerned. Another example is – illustrated also in this special issue – the increasing number of jurisdictions which have recently introduced new institutions for same-sex relationships which, despite their differences (there are no two identical schemes),³⁷ evidently confirm the modern trend, that in addition to the traditional concept of marriage, other relationships between two persons should be recognised by the law regardless of their gender.³⁸

The *third step* is dedicated to the evaluation of the legal solutions. It is the essential part of the comparative research process. Kokkini-Iatridou convincingly argued that the researcher who has undertaken the comparative study has the duty to provide an evaluative judgment. In her view an assessment of the values inherent in every legal order³⁹ – though in different degrees – and expressed by the legal institutions, legal solutions, and norms of the various legal orders must take place. The question arises whether it really matters that apparently there is no universally accepted hierarchy of values, and thus no objective standard for the evaluation. Consequently, some degree of subjectivity in the evaluation process cannot be avoided.⁴⁰ However, despite the awareness that evaluating solutions and taking positions can never be made without any subjectivity it is at any rate essential to reveal the kind of evaluation criteria which are considered to be decisive for the choices that are made or the solution that is either criticized or favoured.⁴¹ Nonetheless, the researcher should be aware of that the value judgement only has a relative character. It depends on the period in which it was made, the object that was studied and the legal systems that were selected. It permits the comparatist to take part in the legal discourse whereas it enables others to confirm, disapprove or criticize the findings.

The *fourth and final step* consists of the research report and its presentation. Here a choice is to be made – no system requests preference – to present the findings either successively⁴² or simultaneously.⁴³ Also a combination of both ways of presenting is possible; however, this should be justified.

Before, however, commencing upon comparative research, important preliminary steps are to be taken. In particular, the following questions are to be answered: What should be compared? Are the selected objects comparable? What is the aim and objective of the comparative study? Which legal systems will be compared? Why are they selected? Are primary sources available? If not, are secondary sources reliable? Who will do the research, a (national) expert of the selected jurisdiction or a legal scholar who has received his/her education in a different jurisdiction? How are the language skills of the researcher? How much time is available?

37 See the contributions to this special volume.

38 See for other examples, K. Boele-Woelki, 'Building on Convergence and Coping with Divergence in the CEFL Principles on European Family Law', in M. Antokolskaia (ed.), *Convergence and Divergence in European Family Law*, 2007, pp. 253-269.

39 Such as party autonomy, equality of partners, protection of the weaker party, certainty, flexibility, discretion of a competent authority or the free movement of persons (within the EU).

40 See Kokkini-Iatridou, *supra* note 33, p. 191.

41 See Zweigert & Kötz, *supra* note 32, p. 47.

42 According to the successive method an individual report covering all legal aspects for each legal system is provided.

43 According to the simultaneous method a report per legal question containing the answers of the legal systems is provided.

2.2.2. The comparative family law method: some examples

The definition used above of what is comparative law raises the question which kind of research is covered. Do studies which deal with foreign law also fall within the ambit of comparative research? In the following an attempt is made to answer these questions by looking more specifically at comparative family law studies which were undertaken in Europe and the United States. Given the fact that this author has already published extensively about European developments⁴⁴ more attention is given to the development in the latter jurisdiction. A few examples for the different stages of the comparative family law process will be provided whereby the following distinction is made: the usefulness of national reports (descriptive stage), the determination of similarities and differences (analytical stage), the discovery of the reasons that clarify the developments and that allow the classification of the solutions in those which are either similar or different (explanatory stage) and, finally, the assessment of the legal solutions presented and compared (evaluative stage) which parenthetically belongs to the most exciting steps in the comparative research process. Whereas in Europe family law experts decidedly contribute to the comparative methods debate, similar discussions seemingly do not take place in the United States. It should, therefore, be examined why this is the case.

Europe

Noticeably, the discussions concerning the method to be applied when comparing family law rules, solutions and systems surfaced when the CEFL commenced its activities in 2001.⁴⁵ In particular its founders had to establish a clear and efficient method as to how the CEFL could achieve its results which consist of the drafting of Principles of European Family Law.⁴⁶ These Principles are aimed at contributing to the process of harmonizing family law in Europe and they may be used as a framework or model for legislatures and courts alike. CEFL's method has been discussed extensively, not only by those who question its legitimation.⁴⁷ In this author's opinion the CEFL apparently does not need any legitimation, because the comparative research is carried out by legal scholars who only have to meet scientific standards, in particular accuracy. In this respect the family and comparative legal scholars involved in the CEFL have fulfilled the requirements. Apart from this difference in perception, however, the comparative family law method discourse is blooming. In particular in respect of the solutions to be favoured and finally adopted, sparking ideas and arguments⁴⁸ have been proffered. Admittedly, the evaluation depends on the aims and objectives of the comparative research and consequently the selected criteria, guidelines and perspectives may differ. The CEFL, for example, where to date 22 European jurisdictions are represented, opted for both the common core method and the better law approach when evaluating and finally drafting its principles.

44 See K. Boele-Woelki, 'Comparative Research-based Drafting of Principles of European Family Law', in M. Faure *et al.* (eds.), *Towards a European Ius Commune in Legal Education and Research*, 2002, pp. 171-189 and K. Boele-Woelki, 'The Working Method of the Commission on European Family Law', in K. Boele-Woelki (ed.), *Common Core and Better Law in European Family Law*, 2005, pp. 15-38.

45 See W. Pintens, 'Europeanisation of Family Law', in K. Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, 2003, pp. 3-33.

46 See K. Boele-Woelki *et al.*, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, 2004 and Boele-Woelki *et al.*, *supra* note 26.

47 See D. Bradley, 'Family Law', in J. Smits (ed.), *Elgar Encyclopedia of Comparative Law*, 2006, pp. 259-272; M.-Th. Meulders-Klein, 'Towards a Uniform European Family Law? A Political Approach', in M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, pp. 271-281.

48 See in general I. Schwenger, 'Methodological Aspects of Harmonisation of Family Law', *supra* note 45, pp. 143-158 and in particular M. Antokolskaia, 'The "Better Law" Approach and the Harmonisation of Family Law', *ibid.*, pp. 159-182; also published in 2005 *European Journal of Law Reform*, pp. 159-179.

United States

In searching for specific ideas, trends or guidelines for the method to be applied in comparative family law little can be found in the American legal literature while from the outset American lawyers are comparatists. By drawing upon examples and opinions of other states American lawyers always compare. Moreover, by definition family law requires a comparative exercise, since this field of law has developed separately in each state by its own local courts and local legislature: ‘As a result, American family laws vary significantly in both substance and procedure from one state to another.’⁴⁹ Uniform legislation is only available in a few areas which, however, must be enacted at state level.⁵⁰

It is a continuing challenge to be informed and be updated about the family law systems of the 50 states and federal territories. The comparisons of these systems belong to the daily practice of those who teach and do research in family law in the United States. Extremely helpful information is provided by the special volumes of the *Family Law Quarterly* which annually contain a Review of the Year in Family Law consisting of analytical reports, case digests and charts.⁵¹

In the following, three publications are analyzed with the aim to discover the answer to the question as to how American family law experts reflect on and perceive the methodological aspects of comparative family law. These publications caught this author’s interest and were selected because they represent different aims and objectives: an individual study of a legal scholar, a teamwork project and materials for students to study comparative family law.

1) One of the most eminent and reflective American comparative family law scholars is Mary Ann Glendon. In her famous book on *The Transformation of Family Law: State and Family in the United States and Western Europe*,⁵² she reminds us that the study of foreign experiences can also be a fertile source of inspiration and ideas. Even when it would not immediately move the comparatist into a new stage of thinking, it nearly always affords a deeper understanding of and a more balanced perspective on one’s own law.⁵³ Specific attention to the method to be applied

49 See L. Wardle & L. Nolan, ‘United States of America’ (latest update 1998), in W. Pintens (ed.), *International Encyclopedia of Laws*, Vol. 4, Family and Succession Law, no. 11, p. 37: ‘Of course, no state has developed its family law entirely independently. However, there are many homogenizing cultural influences in the United States that create a tendency of similarity, if not harmony and consistency. For example, persuasive sister-state judicial opinions, new legislation enacted in other states that proves to be effective or popular, proposals for uniform legislation, programs of federal government providing support and incentives for states to take particular policy position, federal constitutional standards, the national news and entertainment media, and special interests that operate nationally have produced many multi-state and national trends in the family laws of the various states. Due to the homogenizing influences, students and teachers of family law in the United States often – look for and find – trends, and general principles that are shared and prevailing rules and practices (...)’.

50 Adoption of Uniform Acts: Uniform Child Custody Jurisdiction and Enforcement Act (47 states); Uniform Marriage and Divorce Act (8 states); Uniform Premarital Agreement Act (26 states); Uniform Marital Property Act (1 state); Uniform Parentage Act 2000/2002 (7 states); (the 1973 version: 14 states); Uniform Interstate Enforcement of Domestic Violence Protection Orders and the 2001 amendments to the Uniform Interstate Family Support Act (17 jurisdictions); Uniform Mediation Act (9 states). In July 2006, the National Conference of Commissioners on Uniform State Laws adopted two new acts in the family law area: the Uniform Child Abduction Prevention Act and the Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act. See L. Elrod & R. Spector, ‘A Review of the Year in Family Law: ERISA, Jurisdiction, and Third-Party Cases Multiply’, 2007 *Family Law Quarterly*, pp. 545-589, pp. 552-553.

51 For a number of years these overviews have been coordinated and compiled by L. Elrod and R. Spector. See <http://www.abanet.org/family/flq/archives.html>. There was an annual review of adoption law for the first 5 years that the *Family Law Quarterly* was published, starting in 1967. There are reviews of specific areas of family law for a 10 year period, but no real overview like the current overviews. The first ‘Law in the 50’ was published in the *Family Law Quarterly* in 1977 as ‘Divorce Law in the 50 States’. The next one was published in 1979 and then in 1982-83 it became ‘Family Law in the 50 States’.

52 See M. Glendon, *The Transformation of Family Law: State and Family in the United States and Western Europe*, 1989. The predecessor of this book is: *State, Law and Family*, 1977.

53 *Ibid.*, p. 4. See also M. Glendon, ‘Irish Family Law in Comparative Perspective: Can There be Comparative Family Law?’, 1987 *Dublin University Law Review*, pp. 1-20 in which she compared Ireland (which at that time did not allow spouses to obtain a divorce and also forbid abortion) with 20 other Western countries: ‘I believe comparative analysis *can* contribute to current Irish discussions (...) Nevertheless, the types of regulation of divorce and abortion needed, desired, or tolerated by larger, more heterogeneous, urbanized and affluent societies may be highly inappropriate for Ireland.’

or the method that she has used in analyzing, synthesizing and finally presenting her comparative findings are not elaborated. Surprisingly, however, in her review of Glendon's book Inga Markovits assessed the author's approach from a truly methodological perspective.⁵⁴ In her brilliantly drafted evaluation two different methods suggest themselves:

'You can *either* zoom in on the essential patterns you discover, outline the common concerns or convictions running like colored threads through the entire fabric of family law, and use concrete examples only to illustrate overall themes. *Or*, you can describe the developments in different areas of family law, highlight in each area those details which manifest common strands of thinking, and in the end pull these strands together to arrive at a meaningful picture. The *first approach* will require you to articulate your themes at the outset, will allow you to pick and choose your supportive evidence, will encourage theoretical speculation, and thus is likely to produce forceful and consistent results. But it will also tempt you to overstate your case, will make it easier to disregard conflicting evidence, will hide from your readers how you discovered your themes in the first place, and thus will make criticism and disagreement more difficult. The *second approach* will require extensive description, obliging you to spend much time on matters only tangentially related to your search for common patterns of development, will limit occasions for analytical speculation, and will produce more conflicting results. But it will also guard against theoretical overstatements, will put your cards on the table, and will educate readers sufficiently about the field to allow them to make up their own minds.' (emphasis added KBW)

Markovits' characterization of the *first approach* is sound. It is a dangerous endeavour to pick and choose solutions, examples and arguments at random and present them without little structure, but more importantly merely with the intention to promote ideological or political ideas.⁵⁵ Furthermore it is indeed difficult to enter into a discussion about the author's findings, if the study does not indicate the aim of the comparison, if it does not systematically present differences and similarities, if explanations for these are not provided and if the criteria which determine the evaluation are not specified.

Glendon applied the *second approach* which resulted in an excellent analysis and synthesis of mainly four family law systems: England & Wales, France, West Germany and the United States. She already noticed the remarkable change in family life that has taken place in the United States and in Europe in the last three or four decades. Hardly any other field of law has experienced such profound and deep social and demographic changes as family law in this short period of time: an explosion in the divorce rates and extramarital cohabitation and the resulting increase in the number of children born out of wedlock; women joining the paid work force *en masse*, influencing, among other things, parental roles and property relations among partners; and – more recently – the growing social acceptance of same-sex relationships and new techniques of artificial insemination are just a few important features of this development. We are in the middle of a 'silent revolution' in family life, and while these transformations take place, we experience a vast cross-border movement of people.⁵⁶ For those who are seeking information about the

54 See I. Markovits, 'Family Traits', 1990 *Michigan Law Review*, pp. 1734-1758, p. 1735.

55 See L. Wardle, 'Global Perspective on Procreation and Parentage by Assisted Reproduction', 2006 *Capital University Law Review*, pp. 413-464.

56 See K. Boele-Woelki & T. Sverdrup, 'Preface', in: K. Boele-Woelki & T. Sverdrup (eds.), *European Challenges in Contemporary Family Law*, 2008, pp. v-vi.

current state of family law in Europe and the United States it is absolutely advisable to consult more recent publications, but Glendon succeeded in portraying the most striking lines of West European and American family law as they were apparent in the late eighties in a way that could perfectly function as a model for other researchers.

2) An American Restatement on Family Law does not exist; instead in 2000, Principles of the Law on Family Dissolution were finalized under the auspices of the American Law Institute (ALI).⁵⁷ This enormous project which started in the early nineties is aimed at harmonizing certain aspects of family law in the United States⁵⁸ because the wide discretionary power in family disputes has been perceived as causing uncertainty and inequality. According to ALI Chief Reporter Ira Mark Ellman,⁵⁹ ‘alimony, custody, and even property allocation are effectively governed in most states by family law’s version of Rule 1: decide as you see fit. The legislatures and appellate courts leave basic policy choices up to the trial judge deciding each case. Most people think there is something unfair about having the governing legal principles change from judge to judge and from case to case.’

He concluded about a decade ago that rules of largely limitless discretion are common in family law, and that their prevalence is not a good thing, whereas proponents of the discretionary system urged the importance of providing customized justice in each case. Given their extensive experience with family law, the drafters of the ALI Principles had no illusions about the difficulty of their task and they admitted that indeed it would be rather surprising if they really would have got it right. Their more modest hope was that they might nudge the law in a more fruitful direction.⁶⁰ Apparently, all states’ family laws have been taken into account. They were thoroughly analyzed, scrutinized, compared and classified. The black letter text of each principle is followed by comments, illustrations of cases and reporter’s notes which contain references to state legislation, literature and cases. A methodological motivation of or an explanatory introduction into the working method, however, is not provided. When the Principles were finalized in 2000 and published in 2002 the ALI clarified that no state’s law is precisely that of the Principles,⁶¹ instead they ‘can be found in the current law of some states, as well as in that of other countries with a common-law tradition. In seeking to accommodate both important traditional values and the reality of modern conditions, the Institute has borrowed profitably from both domestic and foreign experience.’⁶² Indeed sporadically references are made to the laws of Australia, Canada, England and New Zealand. The ALI Principles of the Law of Family Dissolution contain recommendations as to how the law in this field could be harmonized. They have been praised because of their breadth, depth, and novelty. Six years after their publication little

57 American Law Institute (ALI), *Principles of the Law on Family Dissolution: Analysis and Recommendations, as Adopted and Promulgated by the American Law Institute on May 16, 2000*, 2002. According to its drafters ‘the work is described as “Principles” rather than “Restatement” because ‘Principles’ is the better designation for a project that carefully explores and clarifies the fundamental assumptions – about the best interests of children, fairness to divorcing wives and husbands, and the legitimate economic claims of unmarried partners – upon which the legal rules must rest. Many of these Principles, nevertheless, restate and clarify present law, while others recommend directions for implementation by courts, legislatures, and other appropriate decision makers. The result is a coherent legal framework, sensitive to both the traditional value systems within which most families are formed and the nontraditional realities and expectations of other families, a framework the earlier drafts of which have already begun to influence both courts and legislatures.’ Online available via Lexis (FAMDIS file within the 2NDARY and FAMILY libraries) and via Westlaw in the ALI-FAMDISS database.

58 See R. Fretwell Wilson, ‘The Harmonization of Family Law in the United States’, in Boele-Woelki & Sverdrup (eds.), *supra* note 56, pp. 27-49, p. 34.

59 See I. Ellman, ‘Inventing Family Law’, 1999 *U.C. Davis Law Review*, pp. 855-886, pp. 870-871. Interestingly he mentions child support rules which in his view only exist ‘because they were pushed on the states by Washington lawmakers concerned primarily with their potential value in reducing the federal contribution to welfare payments’ (p. 856).

60 *Ibid.*, p. 872.

61 See on the nature of the Principles the Chief Reporters Foreword, *supra* note 57.

62 Press release dated May 15, 2002; see www.ali.org/pr051502.htm

has happened at the harmonization front though. To date, they have not been adopted in any state; however judges frequently rely on the Principles for guidance whereby ALIs prestige might also play a major role. As Robin Fretwell Wilson expresses: ‘They have begun to filter into American law.’⁶³ It may very well be that the Principles will find their way more rapidly into case law but will not be enacted into statutory law. Since the subject matter of the Principles is considered to be of enormous significance – they address divorce, custody, child and spousal support, property division, agreements and domestic partnerships – leading intellectuals in family law recently meticulously examined their content.⁶⁴ The overall conclusion based on the majority of the contributions is a critical one; many characterize the ALI Principles as a failed effort of law reform.⁶⁵

3) In their magnificent and voluminous compilation of cases, materials and problems in comparative and international family law entitled *Family Law in the World Community*⁶⁶ Marianne Blair and Merle Weiner specifically address the question: What is Comparative Family Law? They do not provide a specific answer, but illustrate the needs of comparative family law by framing the problem with the famous *Marckx v. Belgium* case which was decided by the European Court of Human Rights in 1979. Additionally, they refer to John C. Reitz’s article on *How to Do Comparative Law*⁶⁷ which offers nine principles about comparative law scholarship and the closely allied field of foreign law.⁶⁸ These principles make no distinction between comparative studies and the study of foreign law, they address without any logical order different stages which the comparatist experiences, and they necessitate neither an attempt to explain differences and similarities, nor an evaluation of the legal solutions studied. The outsider who

63 See the reference provided in the following footnote.

64 See R. Fretwell Wilson (ed.), *Reconceiving the Family, Critique on the American Law Institute’s Principles of the Law of Family Dissolution*, 2006. See the Editor’s Introduction, pp. 2-3. A similar study has been undertaken in respect of the CEFL Principles regarding Divorce and Maintenance between Former Spouses by E. Örtücü & J. Mair (eds.), *Juxtaposing Legal Systems and the Principles of European Family Law on Divorce and Maintenance*, 2007. They empirically tested whether they are indeed acceptable and/or regarded as an improvement on existing national laws.

65 See e.g. D. Westfall, ‘Unprincipled Family Dissolution: The ALI’s Recommendations for Division of Property’, in: Fretwell Wilson, *supra* note 64, pp. 176-194, p. 193.

66 See Blair & Weiner, *supra* note 1. The book consists of more than 1200 pages.

67 See J. Reitz, ‘How to Do Comparative Law’, 1998 *American Journal of Comparative Law*, pp. 617-635.

68 These principles are:

1. Comparative law involves drawing explicit comparisons, and most non-comparative foreign law writing could be strengthened by being made explicitly comparative.
2. The comparative method consists in focusing careful attention on the similarities and differences among the legal systems being compared, but in assessing the significance of differences the comparatist needs to take account of the possibility of functional equivalence.
3. The process of comparison is particularly suited to lead to conclusions about (a) distinctive characteristics of each individual legal systems and/or (b) commonalities concerning how law deals with the particular subject under study.
4. One of the benefits of comparative analysis is its tendency to push the analysis to broader levels of abstraction through its investigation into functional equivalence.
5. The comparative method has the potential to lead to even more interesting analysis by inviting the comparatist to give reasons for the similarities and differences among legal systems or to analyze their significance for the cultures under study.
6. In establishing what the law is in each jurisdiction under study, comparative law (and, for that matter, studies of foreign law, as well) should (a) be concerned to describe the normal conceptual world of the lawyers, (b) take into consideration all the sources upon which a lawyer in that legal system might base her opinion as to what the law is, and (c) take into consideration the gap between the law on the books and the law in action, as well as (d) important gaps in available knowledge about either the law on the books or the law in action.
7. Comparative and foreign law scholarship both require strong linguistic skills and maybe even the skills of anthropological field study in order to collect information about foreign legal systems at first hand, but it is also reasonable for the comparative scholar without the necessary linguistic skills or in-country experience to rely on secondary literature in languages the comparatist can read, subject to the usual caution about using secondary literature.
8. Comparative law scholarship should be organized in a way that emphasizes explicit comparison.
9. Comparative studies should be undertaken in a spirit of respect for the other.

might criticize other solutions is, however, encouraged to show respect and is reminded of being careful.⁶⁹

At any rate, in Blair and Weiner's Casebook guidance is provided to those who intentionally study international family law and family systems of different jurisdictions, whereby insight is provided into predominately contrasting solutions which are available in different parts of the world regarding many family law issues. The authors distinguish numerous potential benefits to engaging in comparative legal analysis, such as fostering open mindedness, providing ideas for improvement of one's own law, assisting in crafting international legal solutions, advising about foreign family law in case of cross-border relationships and advocating a specific solution.⁷⁰ Distinctively they state that 'comparative law has not been used much to harmonize family law'⁷¹ nor 'do (they) expect students to become proficient in harmonizing the law, assuming such harmonization is a beneficial process in the family law area.'⁷² From a European point of view mainly the first statement is mistaken in view of the many international instruments of international and European organizations that have unified and harmonized certain fields of family law – many of them have been prepared by comparative studies – and particularly in view of the harmonization projects of family and succession law in Scandinavia.⁷³ In addition, the current activities of the Commission on European Family Law, which results are aimed at contributing to either spontaneous or deliberate harmonization of family law, illustrate the opposite.

Although the three examples derived from the American family law literature totally differ from each other as regards their aims and objectives, they exemplify that relatively little reflection is given to the method to be applied in comparative family law. This can be explained by the fact that the American family lawyer is educated in developing a comparative instinct. This may sound contradictory since comparing is one way of finding the law. A justification or explanation as how to do it is not deemed to be necessary; on the contrary it is the common approach to be applied. The exploration of non-American jurisdictions is more or less done in the same spirit. Seemingly, no distinction is made between interstate and out-of-state comparisons. In respect of the latter, however, comparisons with jurisdictions with a common-law background are preferred, at least in the harmonization-through-principles-project of the ALI. In contrast, the Casebook provides mainly opposing and contrasting solutions from jurisdictions where cases and writings of legal scholars are available in the English language.

2.3. The usefulness of national reports

Being concerned with comparative law and undertaking research into foreign law is not synonymous. Comparative research is not carried out in the case where this author, for instance, who received her legal education in Germany, writes about Dutch law in the English language even if the trouble is made to try and understand the readers' way of thinking and imagine the breadth of their knowledge.⁷⁴ No matter how systematically it is executed, research cannot be described

69 From a methodological point of view it might be interesting to compare Reitz's principles with the earlier provided definition, which also requires that during the comparative research process different steps are to be taken.

70 See Blair & Weiner, *supra* note 1.

71 *Ibid.* They explicitly refer to two contributions delivered at the Centennial World Congress on Comparative Law which took place in 2000 in New Orleans: D.S. Clark, 'Nothing New in 2000? Comparative Law in 1900 and Today', 2001 *Tulane Law Review*, pp. 871-909 and X. Blanc-Jouvan, 'Closing Remarks', 2001 *Tulane Law Review*, pp. 1235-1244.

72 See Blair & Weiner, *supra* note 1, p. 6.

73 See P. Lødrup, 'The Reharmonisation of Nordic Family Law', in Boele-Woelki & Sverdrup (eds.), *supra* note 56, pp. 17-26; I. Lund-Andersen, 'Approximation of Nordic Family Law within the Framework of Nordic Cooperation', in Antokolskaia (ed.), *supra* note 38, pp. 51-61; J. Scherpe, 'The Nordic Countries in the Vanguard of European Family Law', in *Scandinavian Studies in Law Volume 50, What is Scandinavian Law? – Social Private Law*, 2007, pp. 265-287.

74 See Kokkini-Iatridou, *supra* note 33, p. 157.

as being ‘comparative research’ if it does not compare ‘objects’ of at least two different jurisdictions. Logically, it cannot provide an ‘explanation’ of similarities and differences and an evaluation of different solutions is not possible. Presenting one’s own (family) law in a different language is, however, often done in the form of national reports.⁷⁵ These contributions, which fall under the category of *Auslandsrechtskunde* are, however, extremely valuable in order to gain vital information about foreign (family) law solutions. Many national reports about family law are available. They are repeatedly drafted under the auspices of, for instance, the International Academy of Comparative Law,⁷⁶ the International Society of Family Law,⁷⁷ the Commission on European Family Law⁷⁸ and the bi-annual conferences in Regensburg on European Family Law.⁷⁹ These national reports are written for those who, in principle, are not familiar with a particular jurisdiction. Consequently, elliptical presentations are to be avoided. Sometimes, supplementary explanations concerning, for instance, typical institutions or recent phenomena⁸⁰ must be included in order to avoid cryptically drafted exposés which can only be understood by 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. It is to be regretted that in the future at least in The Netherlands, national reports on Dutch law written in another language will not be valued anymore as academic publications,⁸¹ whereas they require extensive research and a good presentation. In particular, these kinds of publications contribute to the legal market of solutions which provides the tool for any further development of the law at the national, European and international level. For projects which are aimed at harmonizing or unifying the law, national reports constitute the building blocks.

Another interesting example which demonstrates the usefulness of national reports has been carried out by young legal scholars. It concerns the research project of 37 students of Yale University, New Haven. Between July 2004 and December 2005 they compiled information and resources on how children’s voices are heard in child protective proceedings in the 194 signatories to the United Nations Convention on the Rights of a Child and in the United States.⁸² Their study focused on how different countries’ practices relate to Article 12 of the UNCRC, which guarantees children’s right to express views freely in all matters concerning them, and particularly to be heard in all judicial and administrative proceedings that concern them. To that end they provided not only national reports for each jurisdiction, but also comparative charts.⁸³

75 All contributions belonging to this special issue fall under this category except Antokolskaia’s article and this introductory contribution.

76 See, for instance, the compilation of the latest national reports on the family law topic to the 17th Congress of Comparative Law by the general rapporteur I. Schwenzer, *Tensions between Legal, Biological and Social Conceptions of Parentage*, 2007.

77 The books also contain an annual review of International Family Law: Conventions of the UN, Council of Europe, Hague Conference on Private International Law, European Union and case law of the European Court of Human Rights. More information about ISFLs publications is available at www.law2.byu.edu/isfl/publications.php

78 22 national reports on divorce, maintenance between former spouses and parental responsibilities are available at: www.law.uu.nl/priv/cefl

79 See D. Schwab & D. Henrich (eds.), *Entwicklungen des europäischen Kindschaftsrechts*, 1994; *Der Schutz der Familienwohnung in europäischen Rechtsordnungen*, 1995; *Familiäre Solidarität- die Begründung und die Grenzen der Unterhaltspflicht unter Verwandten im europäischen Vergleich*, 1997; *Eheliche Gemeinschaft, Partnerschaft und Vermögen im europäischen Vergleich*, 1999; *Familienerbrecht und Testierfreiheit im europäischen Vergleich*, 2001; S. Hofer *et al.* (eds.) *Scheidung und nachehelicher Unterhalt im europäischen Vergleich*, 2003; *From Status to Contract? Die Bedeutung des Vertrages im europäischen Vergleich*, 2005; A. Spickhoff *et al.* (eds.), *Streit um die Abstammung – ein europäischer Vergleich*, 2007. All volumes are published by Gieseking Verlag.

80 For examples about the French *prestation compensatoire* and the Dutch *lightning divorce*, see Boele-Woelki, *supra* note 44, p. 24.

81 In contrast to specialist publications which are considered to be less important. See R. van Gestel *et al.*, ‘Rechtswetenschappelijke artikelen’, 2007 *Nederlands Juristenblad*, pp. 1448-1461. To the present author’s opinion national reports should be assessed on a case-by-case basis, as either being specialist or academic publications.

82 The project includes in total 250 different jurisdictions.

83 See Representing Children Worldwide, <http://www.law.yale.edu/rcw>. See also about ‘The Child’s Voice in Legal Proceedings’, A. Griffith, *Working for Justice: Comparative Reflections on Family Law*, Inaugural Lecture University of Edinburgh, 30 January 2007, http://www.law.ed.ac.uk/file_download/series/7_inaugurallectureofprofessorannegriffiths.pdf

3. Current debates in family law around the globe

As indicated above (§2.1) family law covers many subjects. For this special issue a selection has been made of three topics that have currently provoked passionate discussion. Legislative measures are taken, judicial decisions vary also within a jurisdiction, and arguments in legal literature are exchanged. By way of introduction family law issues of today are put into a historical and a more methodological perspective. The latter is provided in this contribution.

3.1. *The issues of today in perspective*

The second contribution of this special issue addresses the ‘cultural constraints argument’ which according to a few legal scholars prevents both spontaneous and deliberate harmonization of family law. Is family law indeed embedded in unique national (legal) culture? What lessons can be learnt from the past? Due to her pioneering study on the harmonization of family law in Europe in which she takes a historical approach dating back approximately 200 years,⁸⁴ Masha Antokolskaia⁸⁵ has been the predestinated author for this contribution. She concludes that today the assumption that family laws are embedded in unique and unchangeable national cultures cannot be maintained. History illustrates that in respect of family law, unique national cultures do not exist, but that it is possible to distinguish between a pan-European conservative and a pan-European progressive culture in which political factors determine the evolution of family law. As a result the ‘cultural constraints argument’ is beyond redemption. National family laws are determined by fluid political factors, rather than relatively consistent cultural factors. The question arises whether this conclusion characterizing the family law systems in Europe,⁸⁶ also applies to, for instance, the great variety of family law systems in the United States where self-determination and individual freedom are highly valued features of the American culture. These ideals are frequently expressed by politicians and applied by State Governments and are also reflected in family law. Looking at family law in the United States reveals a very colourful picture which to a certain extent is dependent on and determined by either progressive or conservative political forces.⁸⁷ David Bradley in his review of the book *Cross Currents* – edited by American and English family experts⁸⁸ –, which contains the tentative prediction that English family law may follow American developments, wonders why developed countries – not least those with common legal traditions – vary in their response to social change when comparing family law. He too finally reaches the conclusion that the answer lies in the differences in political culture and objectives that have determined the response to issues such as transsexualism, legal recognition of same-sex couples, marriage formalities and divorce law.⁸⁹

The following three sections address the selected issues which belong to today’s family law discourse around the globe. Most of them fall under the category national report whereas others

84 See M. Antokolskaia, *Harmonisation of Family Law in Europe - A Historical Perspective*, 2006.

85 See M. Antokolskaia, ‘Family law and national culture – Arguing against the cultural constraints argument’, 2008 *Utrecht Law Review*, no.2, pp. 25-34.

86 See also S. Cretney, ‘Breaking the Shackles of Culture and Religion in the Field of Divorce?’, in Boele-Woelki (ed.), *supra* note 44, pp. 3-14: ‘(...) the ‘shackles’ restricting our freedom to divorce law and its reform are no longer primarily those of religion and culture; they are those of psychology of individuals and groups.’ (p. 14).

87 See also Wardle & Nolan, *supra* note 49, p. 38: ‘Notwithstanding many homogenizing influences the various family laws of the American states remain remarkably diverse in policy and practice. Family law is a prime example of the ‘different laboratories’ idea of how federalism usually generates solutions to social problems much more quickly, how it preserves valuable cultural pluralism much more effectively and how it fosters individual liberty much more than do centralized forms of governments.’

88 See S. Katz *et al.* (eds.), *Cross Currents: Family Law and Policy in the United States and England*, 2000.

89 See D. Bradley, ‘Comparative Law, Family Law and Common Law’, 2003 *Oxford Journal of Legal Studies*, pp. 127-146, pp. 145-146.

– like Christina Jeppesen de Boer’s,⁹⁰ Ian and Scott Curry-Sumner’s⁹¹ and Richard Blauwhoff’s⁹² contributions – took more than one jurisdiction into account. Based upon the provided information deriving from various jurisdictions the comparison can take place.

3.2. (Compulsory) arrangements regarding children

Whereas in predominately Western family law systems in the case of a divorce or a separation up until about twenty years ago parental responsibilities were usually only granted to one of the parents, the conviction has steadily gained ground that neither divorce nor a separation between the parents should affect the joint exercise of parental responsibilities. Hence joint parental responsibilities on the part of the spouses automatically continue after divorce or separation.⁹³ Consequently, the exercise of parental responsibilities as such is not affected by the fact that the marriage or other formal relationship of the holders of parental responsibilities has been dissolved or annulled or that they have legally or factually separated. When the parents do not live together they have to jointly decide on the residence of the child. Increasingly the child resides with both parents on an alternate basis. Joint parental responsibilities, now common, require that the parents communicate and make important decisions concerning their children together. One of the possible consequences following an alternating residence of the child is the issue of relocation which limits the geographic mobility of residential parents.⁹⁴ The overall questions are: Which factors should be relevant in order to evaluate whether an alternating residence is in the best interest of the child and whether relocation should be permitted? Answers to these pressing problems are provided by Anna Singer⁹⁵ for Sweden, Frédérique Granet⁹⁶ for France,⁹⁷ Theresa Glennon⁹⁸ for the United States of America and Christina Jeppesen de Boer for Denmark and The Netherlands.⁹⁹ A variety of solutions and results have been presented and seemingly uncertainty and unpredictability play centre stage when these highly sensitive kinds of disputes are to be decided. In this context the Principles regarding Parental Responsibilities of the CEFL may be used as a frame of reference. They also address both alternating residence and relocation.¹⁰⁰ CEFLs solutions are innovative due to the fact that legislation is exceptional and judicial decisions differ to a great extent.¹⁰¹ Admittedly, only by empirical testing in a number of legal systems, however, it can be demonstrated whether the Principles are acceptable and/or an improvement on existing laws.

90 C. Jeppesen de Boer, ‘Parental relocation – Free movement rights and joint parenting’, 2008 *Utrecht Law Review*, no. 2, pp. 73-82.

91 See I. Curry-Sumner & S. Curry-Sumner, ‘Is the union civil? – Same-sex marriages, civil unions, domestic partnerships and reciprocal benefits in the USA’, 2008 *Utrecht Law Review*, no. 2, pp. 236-278.

92 See R. Blauwhoff, ‘Tracing down the historical development of the legal concept of the right to know one’s origins – Has “to know or not to know” ever been the legal question?’, 2008 *Utrecht Law Review*, no. 2, pp. 99-116.

93 See also C. Jeppesen de Boer, *Joint Parental Authority, A Comparative Legal Study on the Continuation of Joint Parental Authority after Divorce and the Breakup of a Relationship in Dutch and Danish Law and the CEFL Principles*, 2008.

94 See Th. Glennon, ‘Mobility and the Post-Divorce Family: Resolution of Relocation disputes in the U.S.’, in Boele-Woelki (ed.), *supra* note 44, pp. 193-215.

95 See A. Singer, ‘Active parenting or Solomon’s justice? – Alternating residence in Sweden for children with separated parents’, 2008 *Utrecht Law Review*, no. 2, pp. 35-47.

96 See F. Granet, ‘Alternating residence and relocation – A view from France’, 2008 *Utrecht Law Review*, no. 2, pp. 48-54.

97 See also L. Talarico, ‘The *Coparentalité* in French Law’, in Boele-Woelki (ed.), *supra* note 44, pp. 217-223.

98 See Th. Glennon, ‘Divided parents, shared children – Conflicting approaches to relocation disputes in the USA’, 2008 *Utrecht Law Review*, no. 2, pp. 55-72.

99 Legal and sociological research under the supervision of this author and professor Tanja van der Lippe (Sociology, Utrecht University) which also involves Dutch law has been selected as one of the twenty-three research projects that from 2008 onwards will be undertaken within the framework of Utrecht’s multidisciplinary research program ‘Family Matters’. Its predecessor entitled ‘Changing patterns of interdependence and solidarity in family relations’ started in 2003.

100 See Boele-Woelki *et al.*, *supra* note 26, Principles 3:20 and 3:21.

101 See K. Boele-Woelki, ‘The CEFL Principles Regarding Parental Responsibilities: Predominance of the Common Core’, in Boele-Woelki & Sverdrup (eds.), *supra* note 56, pp. 63-91.

3.3. Registration schemes for same-sex couples: new jurisdictions

For more than a decade the legal recognition of same-sex relationships has gained considerable attention around the globe.¹⁰² The substantive discussion about whether to permit same-sex couples to formalize their relationship is one of the most contested issues which becomes even more disputed and complicated in the case of cross-border situations due to the fact that the private international law approaches in respect of same-sex relationships differ to a large extent.¹⁰³ The contributions of this part of the volume belong to the so-called ‘new jurisdictions’.¹⁰⁴ They recently introduced a new institution and/or opened marriage for same-sex couples.¹⁰⁵ Pierre de Vos¹⁰⁶ and Orsolya Szeibert-Erdős¹⁰⁷ inform us about the choices and experiences of the South African and Hungarian legislature respectively. In contrast to these two jurisdictions the American landscape analyzed by Ian and Scott Curry-Sumner¹⁰⁸ looks totally different. Here we are confronted with a variety of approaches and regulations such as the federal Defense of Marriage Act (DOMA) of 1996, the mini-DOMAs of 41 states, different same-sex relationship schemes in the form of marriage (only a few) or civil unions and domestic partnerships acts which are available in a few states. They all differ considerably, although uniform patterns are perhaps discernible. Most importantly the officials and courts of the different states do not know whether and how they should recognize same-sex relationships that have been concluded out-of-state not to speak of those established in a foreign jurisdiction. The courts in New York recently decided that same-sex marriages concluded in Canada are to be recognized in the state of New York in the absence of legislation to the contrary,¹⁰⁹ in other words, no rule prohibits residents of New York to enter into marriage in a jurisdiction where it is permitted. However, this is only *one* of the many different approaches within the United States, where the conflict of laws issue has been overlooked to a very large extent.

What about the other three jurisdictions that have been selected for this part? Italy, comprehensively analyzed by Matteo Bonini Baraldi,¹¹⁰ where bills to introduce a same-sex registration scheme have been submitted to parliament; Portugal, extensively investigated by Rosa Martins,¹¹¹ where a request of a same-sex couple to enter into marriage currently is under revision of the constitutional court and finally, Israel, critically scrutinized by Talia Einhorn,¹¹² where the Supreme Court has ordered to enter a same-sex marriage concluded abroad into the population registry, whereas under Israeli substantive law same-sex couples cannot obtain a

102 See I. Curry-Sumner, *All's Well that Ends Registered? The Substantive and Private International Law Aspects of Non-marital Registered Relationships in Europe. A Comparison of the Laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom*, 2005 and I. Curry-Sumner, ‘European Recognition of Same-Sex Relationships: We Need Action Now!’, 2008 *International Family Law* (forthcoming).

103 See Boele-Woelki, *supra* note 29 and I. Schwenzer, ‘Convergence and Divergence in the Law of Same-sex Partnerships’ in Antokolskaia (ed.), *supra* note 38, pp. 145-157.

104 In contrast the following jurisdictions can be indicated as ‘old jurisdictions’: Andorra, two provinces of Argentina (Buenos Aires City and Río Negro), one state in Australia (Tasmania), Belgium, one region in Brazil (Rio Grande do Sol), Canada, Czech Republic, Denmark, Finland, France, Germany, Iceland, Luxemburg, The Netherlands, New Zealand, Norway, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. In these jurisdictions same-sex couples are permitted to either conclude a marriage and/or a registered partnership. Regarding the latter, however, the rights and obligations of the partners differ.

105 Only Uruguay where since January 2008 same-sex partners can also register their partnership is not represented.

106 See P. De Vos, ‘A judicial revolution? – The court-led achievement of same-sex marriage in South Africa’, 2008 *Utrecht Law Review*, no. 2, pp. 162-174.

107 See O. Szeibert-Erdős, ‘Same-sex partners in Hungary – Cohabitation and registered partnership’, 2008 *Utrecht Law Review*, no. 2, pp. 212-221.

108 See Curry-Sumner & Curry-Sumner, *supra* note 91.

109 2008 WL 275138 (N.Y.A.D. 4 Dept., 42 Employee Benefits Cas. 2692, 2008 N.Y. Slip Op. 00909, Supreme Court, Appellate Division, Fourth Department, New York, Patricia MARTINEZ v. COUNTY OF MONROE, Feb. 1, 2008 and BETH R. v. DONNA M., No. 350284/07, N.Y. State Supreme Court Justice Laura E. Drager, N.Y. County of Feb. 25, 2008.

110 See M. Bonini Baraldi, ‘Family vs solidarity – Recent epiphanies of the Italian reductionist anomaly in the debate on *de facto* couples’, 2008 *Utrecht Law Review*, no. 2, pp. 175-193.

111 See R. Martins, ‘Same-sex partnerships in Portugal: from *de facto* to *de jure*?’, 2008 *Utrecht Law Review*, no. 2, pp. 194-211.

112 See T. Einhorn, ‘Same-sex family unions in Israeli law’, 2008 *Utrecht Law Review*, no. 2, pp. 222-235.

marital status? However, does such a registration in Israel also imply recognition? Have the ‘new jurisdictions’ learned or are they learning any lessons from the ‘old jurisdictions’ or did they reinvent the wheel? Which role, if any, has comparative law in this area played?

3.4. The effectiveness of the *pater est* rule

The tensions between legal, biological and social conceptions of parentage which currently belong to the most interesting questions in family law have been addressed at the 17th World Conference on Comparative Law in 2006 by Ingeborg Schwenzer as general rapporteur and 16 national rapporteurs.¹¹³ The four contributions to this special volume specifically focus on the *pater est* rule.

Who is the father of the child? According to the *pater est* rule it is the man to whom the mother is married at the time of the child’s birth. He shall be regarded as the legal father of the child. This worldwide acknowledged presumption applies to all children born within marriage. Presumably, many children still grow up together with their parents with whom they are genetically, intentionally and legally related. However, the married (nuclear) family is gradually losing its dominant position as the traditional family form and as a result family structures have changed considerably. The contributions falling under this section address the following three developments which at present are challenging the effectiveness of the *pater est* rule. Firstly, the increasing number of children who are born in informal relationships (Wendy Schrama¹¹⁴), secondly, assisted conception (Machteld Vonk¹¹⁵ and Nancy Maxwell¹¹⁶) and thirdly the right to know one’s genetic parentage (Richard Blauwhoff). In respect of informal relationships which in view of their function are similar to formalized relationships, it is essential to indicate the underlying principles of the law of parentage. Seemingly, at least in Dutch society, there is little awareness among cohabiting couples that the child who is born into such an informal relationship needs to be recognized in order to establish a legal link between the begetter and the child. From the Dutch law perspective Schrama analyzes three elements of parentage: the meaning of procreational responsibility, the right to have two parents and legal certainty. The crucial question is whether it is possible to extend the *pater est* rule to informal relationships. Obviously where parents have not formalized their relationship it is more difficult to presume that the male partner was the begetter of the child, but Schrama¹¹⁷ finally succeeds in drawing a roadmap as to how the gap may be bridged between formal and functional relationships.

When it comes to assisted conception we have – in respect of the *pater est* rule – to distinguish between unknown and known sperm donors. Does the sperm donor have any rights? If so, which rights? Does the distinction between known and unknown donors make a difference? How does he obtain these rights? Should merely visitation rights be granted? Are the birth mother and the sperm donor free to contract about his position? Is an oral agreement sufficient or should it be in writing? Even if an agreement is made what is the value of it? Can it be set aside, should it be executed? Can you dispose on parentage? Does each of the parties have the right to dissolve the contract? Will courts take an agreement into account when a dispute arises? Which role does the female partner play who lives with the birth mother in a formalized or informal relationship?

113 See Schwenzer, *supra* note 76.

114 See W. Schrama, ‘Family function over family form in the law on parentage? – The legal position of children born in informal relationships’, 2008 *Utrecht Law Review*, no. 2, pp. 83-98.

115 See M. Vonk, ‘The role of formalised and non-formalised intentions in legal parent-child relationships in Dutch law’, 2008 *Utrecht Law Review*, no. 2, pp. 117-134.

116 See N. Maxwell, ‘The Kansas case of *K.M.H.* – US law concerning the legal status of known sperm donors’, 2008 *Utrecht Law Review*, no. 2, pp. 135-161.

117 See Schrama, *supra* note 114.

What happens if the lesbian couple splits? Should a known sperm donor be allowed to assert parentage rights against the wishes of an ‘unmarried’ woman also in cases where lesbian couples were trying to create a family?

All these questions have been extensively addressed by Vonk¹¹⁸ and Maxwell¹¹⁹ by investigating Dutch law¹²⁰ and the law of the United States. In respect of the latter jurisdictions the recent *Kansas case* is highly illustrative. The mother asserted she did not intend for the sperm donor to have a parental relationship with the child whereas the sperm donor claimed he assumed, or the parties agreed, he would be the child’s father and have certain parental rights concerning the child born of the assisted insemination by donor (AID). If a dispute is to be decided, the following aspects are of essential importance. Which intention did the birth mother and the known sperm donor have? Further, how can this intention be proved? Moreover, which role, if any, does a (written) agreement play?

Currently, statute law and case law of the jurisdictions that are presented by Vonk and Maxwell do not provide clear-cut solutions and one should also bear in mind that each case is different and complex. Certain striking parallels, however, can be discerned. Before the assisted conception takes place all persons are more or less ‘in agreement’, although during this period the perceptions already differ and often both the birth mother and the known sperm donor ‘avoid the subject’. During the pregnancy, but at least when the child is born and during his or her early childhood things change. The birth mother slowly but surely withdraws whereas the donor immediately or steadily claims more rights. The problem whether or not agreements should be enforceable touches upon ethical and moral values. Nevertheless – as Vonk¹²¹ recommends – drafting such an agreement may at any rate help all parties involved to envisage the consequences of the adventure that they are embarking upon. And at a later stage also mediation might be useful.

In many countries in Europe¹²² anonymous sperm donation is not permitted because children should be able to obtain information about their biological fathers. The right to know one’s genetic parentage has been addressed by Blauwhoff.¹²³ He presents an analysis of the problem by analyzing the case-law of the European Court of Human Rights. He goes on to focus on recent German law reform that became effective on 1st April 2008. As the first country in the world, Germany has introduced a ‘purely informational paternity procedure’, which the Federal Constitutional Court requested in 2007.¹²⁴ The new law recognizes the legal father’s right to have his biological fatherhood ascertained, a claim enforceable against the child and the mother, and if necessary, with the use of the required physical compulsion to conduct a DNA test. Indisputably, this new procedure contributes to the debate about the (in)effectiveness of the *pater est* rule.

118 See Vonk, *supra* note 115.

119 See Maxwell, *supra* note 116.

120 See also M. Vonk, *Children and their Parents, A Comparative Study of the Legal Position of Children with Regard to their Intentional and Biological Parents in English and Dutch Law*, 2007.

121 See Vonk, *supra* note 115.

122 Identification of the donor by the child should be possible in, for instance, Austria, Finland, Italy, The Netherlands, Norway, the United Kingdom, Sweden and Switzerland.

123 See Blauwhoff, *supra* note 92.

124 See M. Wellenhofer, ‘Das neue Gesetz zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren’, 2008 *Neue Juristische Wochenschrift*, pp. 1185-1189.

4. Closing remarks

This contribution to the special issue on ‘Current Debates in Family Law around the Globe’ consists of two main parts. The last part (§3) provides an introduction into the topics addressed by the authors of the other 15 articles. The first part (§2) which is aimed at framing comparative family law constitutes the heart core of this exposé. As a result these concluding remarks essentially focus on some of the thoughts reflected there, whereby two aspects instantly come into sight. First the scope of comparative family law, which should also include its international dimension, and second the attempt to get hold of and compare the European and the American approaches in comparative family law. Which meaning has comparative family law for comparatists from both sides of the Atlantic?

4.1. Comparative family law includes international family law

Since the beginning of the 21st century several comparative family law projects and publications have been completed within Europe and the United States. Most of the projects that have been briefly discussed in this contribution apply an integrated approach of family law including both the comparative and international perspective.¹²⁵ Hence, comparative family law is blooming.¹²⁶ Since globalization is not only restricted to economic and political relationships, but literally ‘hits home’ it has become indispensable to look beyond national boundaries and to take international developments into account. In particular the comparative perspective not only provides a window into other jurisdictions, but exposes the often unquestioned assumptions of one’s own law,¹²⁷ whereas the international perspective expresses the commonly shared values and norms which in many areas of family law have been accepted as guiding principles. The increasing number of cross-border relationships, finally, amount to challenges in respect of certainty and predictability. Will these goals more effectively be achieved if the private international law rules are unified? In this author’s opinion an affirmative answer can be given. Currently, we are witnessing rapid legislative activities at the European level in respect of cross-border family matters¹²⁸ whereas at the global level the Hague Conference for Private International Law plays an active and naturally the central role in this process. Its international family law conventions belong to the most important and successful achievements in the field of the unification of law. Their application in practice is supported by bi-annual Conferences on Cross-Frontier Family Law Issues – co-organized by the Hague Conference¹²⁹ – at which judges and experts exchange their experiences and address their problems. These meetings lead to a better understanding of each other’s rules and procedures and comparative family law and international family law are literally intertwined. For the enhanced functioning of the conventional rules in each country this exchange

125 This approach has been applied by Blair & Weiner, *supra* note 1 and Stark, *supra* note 23 in their books. See also the CEFL Principles on European Family Law Regarding Parental Responsibilities, *supra* note 26, which took all relevant international and European instruments in the field of parental responsibilities into account. They significantly influenced the final result.

126 See the increasing number of publications listed at CEFLs website: <http://www.law.uu.nl/priv/cefl> and since the establishment of the European Family Law series in March 2003, for instance, 22 books have been published. They include comparative legal studies and materials as well as studies on the effects of international and European law making within the national legal systems in Europe.

127 See Stark, *supra* note 23, p. 1.

128 The uniform conflicts of law rules for maintenance and divorce proposed by the European Commission in 2005 and 2006, however, have their drawbacks. See Th. De Boer, ‘The Second Revision of the Brussels II Regulation: Jurisdiction and Applicable Law’, in Boele-Woelki & Sverdrup (eds.) *supra* note 56, pp. 321-341 and M. Hellner, ‘The Maintenance Regulation: a Critical Assessment of the Commission’s Proposal’, *ibid.*, pp. 343-378. See further M. Jänterä-Jareborg, ‘Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe’, in J. Basedow & H. Baum & Y. Nishitani (eds.), *Japanese and European Private International Law in Comparative Perspective*, 2008, pp. 317-343 and V. Lazić, ‘Recent Developments in Harmonizing ‘European Private International Law’ in Family Matters’, 2008 *European Journal of Law Reform*, pp. 75-96.

129 In 2004 and 2006 these conferences took place in Malta. See <http://www.hcch.net> under news and events.

of views is of vital importance and this example of good practice should be taken over by the European Union Member States in respect of their cross-border family law instruments.

4.2. Harmonization: why and how?

During the last decade the question whether and how substantive family law should be harmonized has been frequently posed in Europe. The answers vary. In this debate one should bear in mind that the EU Member States transferred their competence to legislate cross-border family matters to the European legislature,¹³⁰ but retained their competence in the field of substantive family law. It is to be expected that in the long run the dissimilarities among the EU family law systems, on the one hand, and the communitarian uniform private international law rules regulating family matters, on the other, will cause frictions, such as forum shopping, which may only be smoothed if the differences become less pronounced.

In Europe, a supranational legislative body that suggests model laws or adopts uniform acts in order to harmonize the family law systems does not exist. This is left to academic initiatives, whereas national courts and legislatures decide about the rules to be applied and adopted. The situation is entirely different in the United States, where the American Law Institute and the National Conference of Commissioners on Uniform State Laws are well-established and respected rule-making bodies. It is however, up to the States themselves to decide whether or not in whole or in part to adopt their Principles or Uniform Acts. In addition, not only the formal adoption of certain Uniform Laws has a harmonizing effect. The Uniform Marriage and Divorce Act (UMDA), for instance, was not widely adopted by the state legislatures, yet the wave of state legislatures adopting the concepts accepted and codified in this act had a significant impact on the trends within US family law.¹³¹ Maybe this past history of the UMDA portends any sort of attempt at harmonizing family law in the United States. A comprehensive project dealing with general principles of family law historically has not been doing well in whole-scale adoption, but discrete Uniform Acts, such as the Uniform Parentage Act, have been far more successful. Is this because the general substantive principles of family law have, for so long, been seen as state-specific and that US family lawyers have existed with these differences without ‘a second thought’? Are US family lawyers so comfortable with the comparative analysis of the substantive differences that they don’t see the need for harmonization? If this is the case, does this account for the lack of a comparative methodology¹³² and their propensity to look for differences rather than similarities? It is also interesting that the Federal Government must ‘force’ the harmonization in the area of child custody jurisdiction, interstate compacts on adoption and the enforcement of child/spousal maintenance in order for harmonization to occur. It is the threat of the loss of federal funds that seems to be the driving force in any harmonization in the United States.

4.3. Comparative research projects covering Europe and the United States

It is striking to note that extensive comparative research projects that cover both European and American jurisdictions are – as far as this author was able to verify – relatively exceptional. Here, American legal scholars are taking the lead. Krause’s article in the *Oxford Handbook on Comparative Law* (2006) and Glendon’s book (1989) and her introduction to the Person and

130 See S. Bariatti, *La famiglia nel diritto internazionale private comunitario, L'Italia e la vita giuridica internazionale*, 2007 and A. Malatesta & F. Pocar & S. Bariatti (eds.), *The External Dimension of EC Private International Law in Family and Succession Matters*, Studi e pubblicazioni della Rivista di diritto internazionale privato e processuale, 2008.

131 See N. Maxwell, ‘Unification and Harmonization of Family Law Principles: The United States Experience’, in Boele-Woelki (ed.), *supra* note 44, pp. 249-267.

132 Why develop a methodology if the goal, harmonization, is not valued?

Family Volume of the *International Encyclopedia of Comparative Law* (2003) represent the main exceptions. To these examples the contributions to the book edited by Sanford Katz, John Eekelaar and Mavis Maclean on *Cross Currents: Family Law and Policy in the United States and England*¹³³ can be added as well as the Utrecht dissertation of 1998 which addresses *The Influence of the European Convention of Human Rights on Dutch Family Law and the Influence of the United States Constitution on American Family Law*.¹³⁴ From the American perspective other common-law systems are usually selected when it comes to the comparison of solutions whereas from the European perspective it might be a little threatening that essentially ‘American family law’ does not exist, instead more than 50 different jurisdictions have to be taken into account. The latter is a complicated and time-consuming factor which might prevent European family lawyers to include the family systems of the United States in their comparative research.¹³⁵

4.4. ALI and CEFL Principles

At the level of common principles and their potential harmonizing effect, however, the above mentioned concerns are of less importance. It might be challenging to contrast the ALI Principles of Law of Family Dissolution with the CEFL Principles regarding Divorce, Spousal Maintenance and Parental Responsibilities. They are comparable. Such a project could, for instance, include a case-oriented comparison, inquiring into how the cases provided in the illustrations of the ALI Principles would be solved if tried according to the CEFL Principles. Apart from this, the objectives of both projects differ. The ALI Principles are aimed at reforming the law. States are free to adopt (part of) these solutions. Family law in the United States primarily develops on case to case basis, as one of the main characteristics of the common law system. Hence, in the absence of extensive statutory legislation of all family law issues US courts easily can – if necessary – refer to and apply the solutions suggested by the ALI, which is a highly renowned and respected law-making body. In contrast, an institution such as the ALI does not exist in Europe. It is up to legal scholars to initiate and propose models that might be useful in the harmonization of the law process. These frames of reference – they are also available for the law of obligations¹³⁶ – are primarily addressed towards national, European and international legislatures in their potential quest to reform a specific area of the law. In respect of those issues, however, which, for instance, in many jurisdictions are not (yet) regulated by statute, such as the alternating residence of the child after the breakup of the relationship of the parents or the request of one of the parents to relocate with the child in case parental responsibility is held jointly, national courts in Europe might be inspired by the solutions proposed in the CEFL Principles.¹³⁷ In order to find and further develop the law they provide guidance.

4.5. How foreign family law should be approached

A final general remark should be made in respect of the ‘dos and don’ts’ in comparing different family law systems, in particular how foreign solutions should be approached. In this respect it

133 Katz *et al.*, *supra* note 88.

134 G. Kleijkamp, *Family life and family interests: a comparative study of the influence of the European Convention of Human Rights on Dutch family law and the influence of the United States Constitution on American family law*, 1999.

135 But see N. Maxwell & C. Forder, ‘The Inadequacies in US and Dutch Adoption Law to Establish Same-Sex Couples as Legal Parents: A Call for Recognizing Intentional Parenthood’, 2004 *Family Law Quarterly*, pp. 623-662.

136 This process already started in the mid seventies of the previous century. See Study Group on a European Civil Code Former Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Law*, 2008 and European Group on Tort Law, *Principles of European Tort Law*, 2005.

137 See the recent decision of the Dutch Supreme Court, Hoge Raad 25 April 2008, LJN BC5901 where the Advocate General referred to Principle 3:21 of the CEFL Principles on Parental Responsibilities.

has been submitted that ‘comparative analysis of family laws requires an *acknowledgement of difference*. It has limited application to the function envisaged by Zweigert and Kötz that “the law student will understand his own law better ... [and develop] the critical standards which might lead to its improvement”’ (emphasis KBW).¹³⁸ This advice should not be overvalued. Allegedly, differences can always be detected, but they should not only be categorized as conflicting, incompatible or irreconcilable but might – in view of the final result – also be classified as being almost alike, bridgeable and inspiring. In venturing comparative family law narrow-mindedness and prejudice are to be avoided. Instead openness, neutrality, curiosity and flexibility are required.

¹³⁸ See D. Bradley, ‘Comparative Law, Family Law and Common Law, Review Article’, 2003 *Oxford Journal of Legal Studies*, pp. 123-146, p. 145.