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The Europeanisation of International Family Law

N.A. Baarsma

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Preface

This book deals with the Europeanisation of international family law. Over the last decade the European Union has shown increasing interest in the field of international family law. This is not surprising, since the growing mobility of citizens as a result of the free movement of persons has led to a consequential rise of the formation and dissolution of international families. More and more questions of private international law therefore arise.

International family law is an area that is predominantly regulated by national law. Currently the national choice of law rules of the EU Member States are more and more displaced by common European rules, which will thus entail considerable changes. The nature and reasons of the changes brought about by the transition from a national to a supranational choice of law approach are discussed in one particular field of international family law: the termination by dissolution of marriages and marriage-like registered partnerships. The current Dutch and the proposed European choice of law rules on divorce are examined and compared.

Although common European choice of law rules in the field of contractual and non-contractual obligations and maintenance obligations have been established rather smoothly, the establishment of common choice of law rules on divorce has met with a lot of resistance. A long process of negotiation followed, but ultimately the Council had to admit that all possibilities for a compromise on the establishment of a common choice of law on divorce had been exhausted. For the first time in the history of the European Union, the mechanism of enhanced cooperation will be applied.

However, the process of Europeanisation of international family law will most certainly continue. Therefore, the concluding chapter produces a number of recommendations on the development of (a theoretical foundation of) the European system of international family law, starting from the principles and objectives of European law.

Groningen, January 2011 Nynke Baarsma

Contents

List of Abbreviations

Art.	Article(s)
BW	Burgerlijk Wetboek (Civil Code, The Netherlands)
BGB	Bürgerliches Gesetzbuch (Civil Code, Germany)
CEFL	Commission on European Family Law
Cf.,	Compare, Conform
CFI	Court of First Instance
Chap(s)	Chapter(s)
CLAD	Choice of Law Act on Divorce
CLARP	Choice of Law Act on Registered Partnerships
CMLR	Common Market Law Review
COREPER	Comité des représentants permanents
COSAC	Conférence des Organes Spécialisés dans les Affaires Communautaires et Européennes des Parlements de l'Union européenne
diss.	dissertation
EC	European Community (Treaty)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
ed./eds.	editor(s)
e.g.	*exempli gratia* (for example)
EPEC	European Policy Evaluation Consortium
et al.	*et alii* (and others)
et seq	*et sequens* (and further)
EU	European Union
EuR	Europarecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
ff	following
FJR	Tijdschrift voor Familie- en Jeugdrecht
Hof	Gerechtshof (Court of Appeal, The Netherlands)

HR	Hoge Raad der Nederlanden (Supreme Court of The Netherlands)
ICCPR	International Covenant on Civil and Political Rights
ICLQ	International and Comparative Law Quarterly
ibid.	*ibidem* (from the same source)
i.c.	*in casu* (in this case)
i.e.	*id est* (that is)
IFL	International Family Law
IPR	Internationaal Privaatrecht (Private International Law)
IPRax	Praxis des internationalen Privat- und Verfahrensrechts
MJ	Maastricht Journal of European and Comparative Law
MvA	Memorie van Antwoord (Memorandum of Reply)
MvT	Memorie van Toeliching (Explanatory Memorandum)
n.	note
NILR	Netherlands International Law Review
NIPR	Nederlands Tijdschrift voor Internationaal Privaatrecht
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJCM	Nederlands Juristen Comité voor de Mensenrechten
No(s).	Number(s)
NTBR	Nederlands Tijdschrift voor Burgerlijk Recht
NTER	Nederlands Tijdschrift voor Europees Recht
NV	Nota naar Aanleiding van het Verslag (Memorandum in reply to the parliamentary report)
NVvR	Nederlandse Vereniging voor Rechtspraak (Netherlands Association for the Administration of Justice)
NvW	Nota van Wijziging (Memorandum of Amendment)
OJ	Official Journal of the European Communities/European Union
p.	page
PACS	Pacte Civil de Solidarité
para(s)	paragraph(s)
PIL	Private International Law
RabelsZ	Rabels Zeischrift für ausländisches und internationales Privatrecht
Rb.	Rechtbank (Court of First Instance, the Netherlands)
Recueil des Cours	Recueil des Cours de l'Académie de droit international de La Haye
RCDIP	Revue Critique de Droit International Privé
Sect(s).	Section(s)
SEW	Sociaal Economische Wetgeving
spec.	specifically
Stb.	Staatsblad van het Koninkrijk der Nederlanden (Dutch Bulletin of Acts, Orders and Decrees)
Stcrt.	Staatscourant (Dutch Government Gazette)

TFEU	Treaty on the Functioning of the European Union
Trb.	Tractatenblad (Dutch Bulletin of Treaties)
v.	versus
Vol.	Volume
W.	Weekblad van het Recht
WCE	Wet Conflictenrecht Echtscheiding (See CLAD)
WCGp	Wet Conflictenrecht Geregistreerd Partnerschap (See CLARP)
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie
ZEuP	Zeitschrift für europäisches Privatrecht
ZGB	Zivilgesetzbuch (Civil Code, Switzerland)

Chapter 1
Introduction

The language of love is said to be universal: love brings people together from across the world and is oblivious to boundaries. However, from a legal perspective things are not so straightforward; law is, on the contrary, often strongly bound by borders. Especially when an international marriage breaks down complicated cross-border disputes can arise.

1.1 Research Background

Most people live in the country of which they possess the nationality. In the majority of family law disputes there are therefore no international elements to consider: the dispute is brought before one of the courts of that state and a decision is made on the basis of the substantive laws of that country.

However, the situation is somewhat different when the parties do not live in the same country, do not possess the same nationality or do not possess the nationality of the country in which they live. Throughout the world the substantive family laws vary and it may, consequently, make a great difference to the courts of which country an international family law dispute is brought.

As a result of the existing differences in substantive family law, private international law is of considerable importance. First of all, it decides which state's courts have jurisdiction over a subject-matter. Secondly, private international law determines which law is to be applied. Bearing in mind that, depending on which court is seised, the rules for determining the applicable law can lead to the application of different substantive laws and hence a different outcome of the proceedings, it thirdly has to be ensured that the resulting judgment is nevertheless recognised and enforced in the other states concerned. These three issues are dealt with through private international law. However, each state currently has its own system of private international law, which involves that these systems (may) differ

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greatly.[1] Private international law in Europe has, consequently, been described as 'a jungle that can confuse even Europeans and that an outsider without guidance may easily become lost in.'[2]

Within the European Union, the Member States' courts are faced more and more frequently with cases of international family law. The free movement of persons, one of the fundamental freedoms of the European Union (Article 45 *et seq* TFEU), has resulted in the increased mobility of citizens in the last few decades. The increasing mobility of Union citizens in turn has led to a consequential rise of formation and dissolution of international families. Moreover, in addition to the European integration, globalisation has resulted in the residence of many third country nationals on the territory of the European Union.[3] With these facts in mind, it is foreseeable that the number of cross-border family relationships is only set to rise.[4]

Currently the Member States of the European Union largely autonomously provide for rules on private international law. These national rules of the Member States are yet more and more displaced by common European rules. In the field of private international law the EU is gaining more and more ground: private international law is, so to say, being 'Europeanised'.

Private international law seems to be the instrument *par excellence* to bridge the existing differences in the substantive laws of the Member States: it presupposes the diversity of national laws and attempts to manage that diversity by means of coordination.[5] Within the EU the progressive integration incites to the establishment of a common system of private international law.[6] Furthermore, also the European motto 'united in diversity' requires a system of coordination of the laws of the Member States which is compatible with the free movement of persons,

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[1] On some issues of international family law international conventions have been established by for example. the Hague Conference on Private International Law, the Commission Internationale de l'État Civil and the Council of Europe. See Schulz 2007, pp. 278–279 for an enumeration of the international conventions that have been established in the field of family law. However, as every sovereign state is free to decide whether or not to ratify one or more of these conventions, their application may be fairly limited (cf., the 1978 Hague Convention on Matrimonial Property Regimes, which has 3 contracting states) or even very broad (cf., the 1980 Hague Convention on International Child Abduction, which has 81 contracting states).

[2] See Reimann 1995, p. xxi. However, the situation has gradually changed: by the introduction of the Rome I, Rome II, Brussels I and the Brussels II*bis*-Regulations and the Maintenance Regulation private international law in Europe is becoming more uniform and less of a jungle.

[3] While the definition of globalisation varies depending on the context of analysis, it generally refers to an increasing interaction across national boundaries that affects many aspects of life: economic, social, cultural and political. See: http://www.genderandhealth.ca/en/modules/globalization/globalization_what_is-01.jsp.

[4] Cf., Dethloff 2003, pp. 37–39.

[5] See *inter alia* Kreuzer 2001, p. 98; Remien 2001, p. 63; Fallon/Francq 2004, p. 266.

[6] Cf., De Vareilles-Sommières 1998, pp. 136–137: '*dans la conception qui prévaut actuellement de l'Europe communautaire, un renforcement de l'intégration de l'ordre communautaire implique un renforcement de la coordination des ordres des États-Membres, autrement dit que plus de Communauté appelle plus de droit international privé*.'

goods, services and capitals within the European Union.[7] Private international law respects the existing diversities between the laws of the Member States and solves possible conflicts between them.[8] The respect for the diversity of national systems is the leading principle of the European integration in the field of justice.[9]

The European legislative activities in the field of family law that are 'under construction' are, 'in the political rhetoric of the European Union', claimed to be essential for integration in Europe and aim to stimulate the free movement of EU citizens throughout the Union.[10] It is presumed that the existing differences in family law among the Member States of the EU are an obstacle for the free movement of persons. Citizens refrain from moving from one Member State to another if they fear that it might affect their family status and rights.[11] The establishment of a European system of international family law is considered to be necessary so as to overcome this obstacle. The Treaty on the Functioning of the European Union provides for the competence of the EU legislature in the field of judicial cooperation in civil matters (Article 81 TFEU).

Unification of European international family law would be superfluous if sufficient uniform substantive family law would already exist. However, currently no such law exists. It is, moreover, not to be expected that a uniform substantive family law will soon come about.[12]

In 1998 the Study Group on the European Civil Code was set up with the aim of drafting a binding European Civil Code. Family law has nevertheless been excluded from the scope of this Code.[13]

Many regard family law as a field of law that is unsuitable for international unification: family law is based on social and cultural norms and values that vary too much from one legal system to another.[14] It is a field of law that requires considerable sensitivity and care. The deeply rooted nature of family law within

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[7] In 2004, the motto was included in the failed European Constitution (Article I-8 on the EU's symbols) and it now appears on official EU websites.

[8] See equally Poillot-Peruzzetto 2005, p. 33.

[9] Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen, COM(2009) 262 final, p. 11. See also Article 4(2) EU-Treaty, which purports to respect 'the national identities of the Member States'. See further *infra* Sect. 8.4.2.2.

[10] Cf., Jänterä-Jareborg 2003, p. 194.

[11] See Tenreiro/Ekström 2003, p. 187.

[12] Cf., Fallon 1998, p. 400: '*L'heure n'est certainement pas à une unification des règles matérielles sur le mariage, le divorce ou la filiation*.'

[13] See Von Bar 2001, spec. pp. 130–131; Hesselink 2006.

[14] Cf., De Oliviera 2000. Draft Council report on the need to approximate Member States' legislation in civil matters of 29 October 2001, adopted on 16 November 2001, Document No. 13017/01 JUSTCIV 129, p. 3, where the Council states that family law is 'very heavily influenced by the culture and traditions of national (or even regional) legal systems, which could create a number of difficulties in the context of harmonisation'. However, others have strongly opposed this 'cultural constraints argument'; see e.g. Antokolskaia 2009.

the Member States is a primary difficulty for the European Union in this area of law and, as will be shown below, in the area of private international law as well.

Although there seems to be a growing support for harmonisation of substantive family law within the EU, such harmonisation is hardly feasible. Despite the 'European Principles of Family Law'[15] and the other academic initiatives[16] that have been developed, there is no denying that still many differences in substantive family law exist.[17] Furthermore, there is as yet no legal basis for harmonisation of substantive family law, as the EU lacks competence in this respect.[18] But also politically speaking, far-reaching harmonisation — let alone unification — of substantive family law is not (yet) feasible at the European level. In this study, it has consequently been presupposed that irrespective of whether the harmonisation or unification of substantive family law in the European Union is desirable, it is evidently not feasible.

As seen above, the European Union's motto is 'united in diversity'; this goal requires the respect of the multiplicity of legal norms in Europe. Uniform private international law rules are therefore the ultimate solution: such rules respect the existing diversities in the laws of the Member States and they solve possible conflicts between them.[19]

Is the establishment of a European system of private international law then to be seen as an interim measure, to provide an intermediate level of ordering, with the view that it will ultimately lead to a substantive unification of law?[20]

Although it cannot be excluded that the unified private international law may very well play a transitory role, its importance should neither be overlooked nor undermined.[21] With the harmonisation or unification of substantive family law

[15] In September 2001 the Commission on European Family Law (CEFL) was established, see: http://www.ceflonline.net/. The CEFL has so far developed principles regarding divorce and maintenance between former spouses and regarding parental responsibilities. Principles regarding property relations between spouses are currently being prepared.

[16] See e.g. Schwenzer and Dimsey 2006. See also Killerby 1996, noticing some harmonising tendencies particularly arising from the European Convention on Human Rights.

[17] See on the unification or harmonisation of substantive family law in general *inter alia* Boele-Woelki 1997; Antokolskaia et al. 1999. In this context it seems worth noting that even in federal states, such as the USA, the need to harmonise substantive family law has never arisen; see Baratta 2005.

[18] Cf., the following statement in the Discussion Paper of the Informal Justice and Home Affairs Council of 14–16 January 2007 held in Dresden, p. 1: 'Harmonising the provisions of substantive family and succession law is not an option, because the requisite legal foundation in the EC Treaty is lacking. This would not be desirable anyway: The diverse values inherent in national family and succession law represent a key aspect of Europe's cultural diversity.' See further Pintens 2003, p. 22; Dethloff 2004, p. 565.

[19] See Thue 2007, p. 95. See also Muir Watt 2005, p. 9.

[20] See Koch 1995. See also Van Erp 2002.

[21] Cf., Curry-Sumner 2005, p. 533.

evidently still many years away — suppose that it will ever come about — cross-border family relationships require legal certainty right now. Such certainty can to a large extent be achieved through uniform private international law rules.

Even though the unification of international family law is not such a vexed question as the unification of substantive family law, it still is a very sensitive subject, politically as well as legally.[22] The Member States are zealous for the protection of their competences and conceptions on family and on family law.

The Europeanisation of international family law thus poses a great challenge for the EU legislature, who has to find a fair and just way of dealing with international family matters across Europe. The European legislature can by no means trespass upon the roots, heritage and valuable traditions of the separate Member States.

1.2 Demarcation of Research

It is clear that international family law will be Europeanised. According to the Hague Programme, instruments in the field of family law including divorce, maintenance and matrimonial property should be completed by the year 2011.[23] With the Maintenance Regulation and the Hague Protocol determining the law applicable to maintenance obligations, the Brussels II*ter*-Proposal and the Green Paper in the field of matrimonial property the establishment of such a common system is more and more taking shape. Besides, issues such as personal status, names and adoption have been mentioned as future areas of Union action in the field of private international law.[24]

For an area that is currently predominantly regulated by national law, Europeanisation will in all probability entail considerable changes. This research examines the nature and reasons of these changes in one particular field of international family law: the termination by dissolution of marriages and marriage-like registered partnerships. Divorce is the first field of family law in which the European legislature made attempts to unify the choice of law: in July 2006 the European Commission proposed the introduction of common choice of law rules on divorce. In order to assess the methodological consequences of the change from a national to a supranational choice of law approach, the Dutch choice of law rules on divorce and on the termination of registered partnerships will be compared to the proposed European choice of law rules on divorce contained in the Brussels

[22] Substantive law and private international law are often to a large extent interrelated: if the substantive law supports a certain policy, this policy is often reflected in the choice of law rules as well. See on this interconnection in general *inter alia* Siehr 1973; De Boer 1993.

[23] The Hague Programme, p. 13. However, the objectives set out in the Hague Programme seem to be too ambitious; it is not to be expected that the mentioned instruments are completed in 2011.

[24] See Communication from the Commission to the Council and the European Parliament establishing for the period 2007–2013 a framework programme on Fundamental Rights and Justice, COM(2005) 122 final, p. 67.

II*ter*-Proposal. The aim of studying this subject-matter in a comparative way is to unravel and to analyse the differences and similarities between these two choices of law systems. As far as there are differences between these systems, why do the European choice of law rules differ from national ones? Can such differentiation be justified and explained in light of specific European aims and objectives?

Subsequently, the aim is to determine whether and to what extent the establishment of a supranational European system of international family law alters — or should alter — the traditional choice of law methodology underlying the national systems of international family law. A number of directions as regards the methodology of European international family law at large are deduced from the European attempt to unify the choice of law on divorce. This study consequently results in a look into the future with respect to the methodological aspects of the European system of international family law that is being established as a whole.

The research is confined to the question of which state's law should be applied in a cross-border case by the competent court, i.e. the choice of law.

As already observed above, the field of private international law deals with three kinds of questions. First is the question of *jurisdiction*: which state's courts are competent to rule on a certain case? Second is the question of *choice of law*: which state's law is applicable to a certain case? Third is the question of *recognition and enforcement* of foreign judgments: under what circumstances can foreign judgments rendered by the courts of another state be recognised and enforced? Although these three questions are (strongly) interrelated,[25] the main focus of this study lies on the choice of law; the issues of jurisdiction and recognition and enforcement will be discussed only where the circumstances so require.

1.3 Terminology

The term 'Europeanisation' refers to the replacement of national legal provisions by those originating from the European Union.[26] Since the Treaty of Amsterdam the field of private international law is increasingly being Europeanised: Article 65 EC-Treaty (now: Article 81 TFEU) granted the Community institutions the competence to establish measures on private international law. The Europeanisation of private international law thus refers to the emergence and development at the European level of distinct instruments containing specific European private international law rules.

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[25] See e.g. Eyl 1965.

[26] Another term is 'communitarisation', referring to the replacement of national legal provisions by Community law. However, the Treaty of Lisbon, which entered into force on 1 December 2009, has abolished the European Community. Using the term communitarisation is, therefore, currently less accurate. Cf., Von Hoffmann 1998, p. 15 and Pocar 2000, pp. 873–884.

The term 'international family law' has two meanings. It involves, on the one hand, the rules for cross-border family relations — the private international law rules — and, on the other hand, the body of international and European instruments and decisions of supranational courts which regulate family relationships.[27] In this study the former meaning of international family law has been taken as a basis; where the private international law rules in family matters are concerned.

As marriage and (registered) partnership are matters of national substantive law, this field is very diverse, that is to say, there are a number of types of family union that can be defined as such. In 2003 Siehr devoted an inquiry into the different types of family unions that nowadays exist, which revealed nine different types:

1. traditional marriage of opposite-sex partners,
2. "covenant marriage" according to the law of some States of the United States,
3. same-sex marriages such as those introduced in the Netherlands and Belgium,
4. registered partnerships of same-sex partners such as those introduced in the Scandinavian countries and in Germany,
5. registered partnerships of opposite-sex partners as introduced by the French PACS,
6. contractual partnerships of same-sex partners as introduced by the French PACS,
7. contractual partnerships of opposite-sex partners as introduced by the French PACS,
8. factual partnerships of opposite-sex partners such as those recognised in Slovenia and Croatia, as well as in South America as '*uniónes de hecho*'.
9. factual partnerships of same-sex partners such as those recognised in France as '*concubinage*' or in the United States.[28]

Although the last two types of family union defined (the factual partnerships) fall fully outside the scope of this study, this classification shows the broad range of types of family union. In this book, the term marriage refers to the union between two persons of a different sex or of the same sex that creates kinship. The term registered partnership refers to a registered, non-marital relationship between two persons (of a different or of the same sex) that is similar to marriage.

The comparison between the Dutch and the European choice of law rules in the field of family law concentrates on those on the dissolution of marriage and marriage-like registered partnerships.

Divorce is defined as the dissolution of the matrimonial bonds; hence, it refers to the legal method through which spouses change their legal (civil) status from married to single. This same definition applies to the termination of a registered partnership. In both cases the parties are free either to remarry or to re-enter into a registered partnership.

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[27] Cf., Boele-Woelki 2008b, p. 4.

[28] Siehr 2003, p. 421. See equally Waaldijk 2005.

In July 2006, the Commission proposed to amend the Brussels II*bis*-Regulation *inter alia* by introducing common choice of law rules on divorce. The proposed amendment of the Brussels II*bis*-Regulation is often referred to as the Rome III-project.

However, Boele-Woelki rightly argued that this change of the name of the Brussels II*bis*-Regulation is striking in two respects.[29] Firstly, the introduction of choice of law rules within the scope of the instrument is seemingly of such great importance and significance as to justify the change of its name. Secondly, up until now, the designation 'Rome' has been used for instruments which only contained choice of law rules, whereas 'Brussels' indicated that only procedural issues were being addressed, such as jurisdiction, recognition and enforcement. Consequently, neither Rome III nor Brussels II*ter* would correctly indicate the Regulation's content.

Throughout this book the proposed amendment of the Brussels II*bis*-Regulation will be referred to as the Brussels II*ter*-Proposal.[30] Although the mentioned confusion that can arise considering the usual reference of 'Brussels' to procedural issues of private international is to be endorsed, this designation is the best reflection of the content of the regulation. The amendment concerns the Brussels II*bis*-Regulation: the common choice of law rules on divorce are proposed to be inserted into it.

1.4 Outline

This study can roughly be divided into three parts.

The first part, consisting of Chapters 2 and 3, contains a comprehensive overview and discussion of the national — i.e. the Dutch — dimension of the study. In Chapter 2 the Dutch choice of law rules on divorce will be discussed. In 1981 the Dutch Choice of Law Act on Divorce entered into force. Article 1 of this Act provides for an answer to the question of which law applies from Dutch perspective to an international divorce.

Subsequently, the Dutch choice of law rules on the termination of registered partnerships will be discussed in Chapter 3. These rules are included in the Dutch Choice of Law Act on Registered Partnerships. The choice of law rules on the termination of registered partnerships are of a more recent date than the ones on divorce. This logically follows from the fact that the concept of registered partnership is a relatively new institution, which was introduced in Dutch law in 1998. The Dutch Choice of Law Act on Registered Partnerships provides for the law applicable to the termination of registered partnerships in Articles 22 and 23.

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[29] Boele-Woelki 2008a, p. 783.

[30] See equally De Boer 2008, p. 323.

The second part of this study, consisting of Chapters 4–6, is devoted to the European dimension of the research so far as it concerns the two chosen subfields divorce and termination of registered partnerships. Chapter 4 will elaborate on the evolution of international family law in the European Union: since the entry into force of the Treaty of Amsterdam in 1999 the development of European rules of international family law has moved rapidly. The EU legislature's competence to enact measures in the field of international family law in general and the question whether the European Union is specifically competent to enact common choice of law rules on divorce will be examined.

Chapter 5 will subsequently analyse the proposed European choice of law rules on divorce. In July 2006 the European Commission has proposed the introduction of common choice of law rules on divorce, the Brussels II*ter*-Proposal. The objectives and the content of this proposal will be analysed thoroughly.

The EU Member States have not exactly received the Brussels II*ter*-Proposal with open arms. On the contrary, some Member States have strongly opposed the introduction of a common choice of law on divorce. This opposition has ultimately led to the failure to reach an agreement on the issue. Chapter 6 will deal with the reasons behind this failure and possible alternatives will be reviewed. In March 2010, the Commission decided to move forward with one of the alternatives: a proposal implementing enhanced cooperation in the area of the choice of law on divorce was presented.[31]

Finally the third part, consisting of Chapters 7 and 8, provides for a (prelude to a) coordinating overview of European international family law.

Chapter 7 contains a comparative study of the two choice of law systems that have been analysed in the preceding chapters. The similarities and differences between the Dutch and the European system will be disclosed and explained as much as possible. This comparison pursues a dual aim: firstly it will be helpful to answer the question whether from the attempt to unify the European choice of law on divorce some more general directions can be deduced as regards the principles and methods of European international family law at large. Secondly, as the Netherlands was one of the opponents of the Brussels II*ter*-Proposal, the comparison will also attempt to answer the question whether the Dutch government has rightly opposed the introduction of the common choice of law on divorce.

In Chapter 8 the future of the Europeanisation of international family law will be discussed. From the analysis of the preceding chapters on the failure to reach a compromise on the Brussels II*ter*-Proposal lessons will be drawn for future projects. From these lessons some guidelines for the future unification of issues of international family law will be tried to be derived. Furthermore, the analysis will seek to instigate the development of a proper EU methodology of a coherent system of European international family law.

[31] Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L343/10.

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Chapter 2
The Dutch Choice of Law Rules on Divorce

2.1 Introduction

Despite the existence of the fundamental right to marry (Article 12 ECHR), there is no fundamental right to divorce. The European Court of Human Rights has held that such a right to divorce cannot be derived from the fundamental right to marry.[1] Therefore, each country can determine autonomously whether a marriage can be dissolved, and if so on what grounds.

Currently there are only a few legal systems in the world in which the concept of divorce is unknown.[2] In the vast majority of states the opportunity to dissolve a marriage is provided for. However, significant differences exist between the states' divorce laws concerning the grounds for divorce.

Arising from the growing number of cross-border relationships and the large number of foreigners residing in the Netherlands, Dutch courts are often faced with international divorce cases.

The term 'international divorce' refers to the situation in which the separating spouses are of different nationalities, live in different countries or live in a country of which they are not nationals.[3] The dissolution of a marriage of two foreigners, of a Dutch and a foreign party and of a Dutch party and a party with a double nationality falls within the scope of this definition. Moreover, the case of a Dutch couple residing abroad meets the criteria of this definition. If a Dutch court is faced with an international divorce, which law should it apply?

[1] ECtHR 18 December 1986, *Johnston and Others* v. *Ireland*, Application No. 9697/82.

[2] E.g. Malta, the Philippines and Vatican City.

[3] Definition of the European Commission; see Impact Assessment on Divorce, p. 4.

N.A. Baarsma, *The Europeanisation of International Family Law*,
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The 1902 Hague Convention on Divorce was the first international instrument in this field.[4] However, this Convention is no longer in force.[5]

Currently there is no multilateral convention in force in the field of the applicable law to divorce. In the absence of an international convention in this field, each state can provide for its own rules on the law applicable to divorce.

This chapter concentrates on the current Dutch choice of law rules on the dissolution of a marriage. After a discussion on the foundation of the rules and the underlying rationale behind them (Section 2.2), the structure of the Dutch choice of law rules and their content will be considered at length (Sections 2.3–2.5). The chapter ends with a discussion of the bottlenecks of the current regulation and with a view to its amendment as it is proposed in the Dutch Proposal on Private International Law of September 2009 (Section 2.6). The proposed choice of law rules on divorce differ greatly from the current ones. In order to properly value the changes that are proposed, the current situation will firstly be set forth.

2.2 The Dutch Choice of Law Act on Divorce

2.2.1 Development of the Choice of Law on Divorce

For many years the application of foreign law to divorce in the Netherlands was taboo: divorce related to 'public policy and good morals'. Therefore, a Dutch court could only apply Dutch law to divorce.[6] In the 1970s, as a result of increasing opposition from lower courts and legal doctrine,[7] the Hoge Raad allowed for the application of foreign law to divorce. This new trend was inspired by the

[4] The Hague Convention of 12 June 1902 relating to the Settlement of the Conflict of Laws and Jurisdictions as regards to Divorce and Separation. According to this Convention the divorce could only be granted if the national law of the spouses and the law of the country where the divorce was petitioned would allow for divorce.

[5] The following countries were party to the 1902 Hague Divorce Convention: Belgium, France, Germany, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Sweden, and Switzerland.

[6] HR 13 December 1907, *Boon* v. *Schmidt*, *W.* 8636. Moreover, the application of Dutch law to divorces of Dutch spouses was also based on Article 6 of the General Provisions Act (*Wet houdende algemeene bepalingen der wetgeving van het Koninkrijk*, Act of 15 May 1829, *Stcrt.* 1829, No. 28). This provision stipulates that the law concerning the rights, status and compentence of persons are binding on the Dutch, even when they are residing abroad. The Dutch courts also had to apply Dutch law to the divorce of a Dutch couple residing abroad, which had become completely estranged from the Dutch society. See further on this issue Wendels 1983, pp. 46–47.

[7] See Dubbink 1956, pp. 199–208, pointing out the changing attitude of lower courts towards the exclusive application of Dutch law. See also Wendels 1983, p. 47 ff.

Rivière-decision of the French *Cour de Cassation*, in which it provided for a three-folded cascade rule. According to this rule an international divorce is in principle governed by the law of the country of the parties' common nationality; in the absence of a common nationality, by the law of the parties' common place of residence; and in the absence of a common place of residence, by the *lex fori*.[8]

Initially, the Hoge Raad rather hesitatingly stated that the application of any other law than Dutch law was 'not excluded' and that the application of the common national law was 'possible'.[9] Subsequently, in 1977 the Hoge Raad adopted the *Rivière*-system.[10]

Article 1 of the Dutch Choice of Law Act on Divorce is the conclusion of this jurisprudential development. This Act is in force as of 10 April 1981.[11] The realisation of the CLAD was connected with the ratification of the Luxembourg Convention on the recognition of decisions concerning marriage and the Hague Convention on the recognition of divorce and legal separation.[12] The CLAD does not only provide choice of law rules, but also rules on the recognition of foreign decisions on divorces and of repudiation (Articles 2 and 3).

Article 1 of the Choice of Law Act on Divorce stipulates:

1. Whether dissolution of a marriage or judicial separation may be petitioned or demanded, and if so on what grounds, is determined:
   a. when the parties have a common national law, by that law;
   b. when there is no common national law, by the law of the country in which the parties have their habitual residence;
   c. when the parties have no common national law, and no habitual residence in the same country, by Dutch law.
2. For the purposes of the preceding paragraph, the parties shall be considered to have no common national law, if one of them manifestly lacks a real societal connection with the country of the common nationality. In that case the common national law shall nevertheless be applied if a choice for that law was made jointly by the parties or such a choice remains uncontested by one of the parties.
3. If a party possesses the nationality of more than one country, his or her national law shall be understood to be the law of that country of which he or she possesses the nationality and with which, taking into account all the circumstances, he or she has the closest connections.

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[8] Cour de Cassation 17 April 1953, *RCDIP* 1953, p. 412.

[9] See HR 23 February 1973, *NJ* 1973, 366; and HR 28 November 1975, *NJ* 1976, 547.

[10] HR 27 May 1977, *NJ* 1977, 600. See also HR 4 May 1979, *NJ* 1979, 547. In 1979 the Hoge Raad introduced the 'authenticity test' in order to determine the existence of a real societal connection, see HR 9 February 1979, *NJ* 1979, 546. See further on the authenticity test *infra* Sect. 2.4.2.1.

[11] Act of 25 March 1981, *Stb.* 1981, No. 166, containing a regulation of the choice of law rules on the dissolution of the marriage and on legal separation and the recognition thereof, *Wet conflictenrecht echtscheiding*. Hereinafter abbreviated to 'CLAD'.

[12] Convention of 8 September 1967 on the Recognition of Decisions relating to the Marriage Bond, *Trb.* 1979, 130 ('Luxembourg Convention') and the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, *Trb.* 1979, 131 ('Hague Convention').

4. Notwithstanding the preceding paragraphs, Dutch law shall be applied if the parties jointly chose such a law or such choice by one of the parties remains uncontested.[13]

Although placed in the final section of Article 1 CLAD, its principal rule is the *professio iuris* for Dutch law. Pursuant to Article 1(4), the spouses can choose for the application of Dutch law, even if they do not possess the Dutch nationality.

If the spouses have not made a *professio iuris*, there are various options. The connecting factors are hierarchical, meaning that if the court is unable to apply the first it will turn to the next. If the spouses have a common nationality, their common national law is applied. If, however, one of the spouses lacks any actual social ties to the country of common nationality, e.g. because he or she has already lived and worked abroad for a number of years, the common national law is not applied, as it does not reflect a close connection. In such a case, the parties are considered to have no common national law on the basis of Article 1(2) CLAD. If the spouses do not have a common nationality, the law of their common habitual residence is applied. If the spouses do not have a common nationality, and have no common habitual residence either, the divorce is governed by Dutch law.

2.2.2 Scope of Application: Same-Sex Marriages

Since 1 April 2001, Dutch law opened up the institution of civil marriage to same-sex couples: marriage is no longer restricted to persons of a different sex.[14] As the Choice of Law Act on Divorce had already entered into force in 1981, the dissolution of same-sex marriages has not been taken into consideration while drawing up the rules concerning the applicable law to divorce. Therefore, the question arises whether the term 'marriage' in the sense of Article 1 CLAD also includes the marriage of two persons of the same sex.

The Dutch Standing Committee on Private International Law has answered this question affirmatively. The Committee underlines that Dutch substantive law recognises only one type of marriage: that between two adult partners of which the relative sex is irrelevant. It would be contrary to the general principle that characterisation takes place according to the legal concepts of the law of the forum, if the new Dutch legal concept of marriage would be excluded from the CLAD, or if a distinction would be made within the CLAD between same-sex couples and couples of a different sex. Such treatment would probably also violate Article 1 of the Dutch Constitution and possibly Articles 8, 12 and 14 ECHR and Article 26 ICCPR.[15]

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[13] Translation by Sumner and Warendorf 2003, p. 232.

[14] Act on the Opening of Marriage to same-sex couples of 21 December 2000, *Stb.* 2001, No. 9. Article 1:30 BW determines that two persons of a different or of the same sex can enter into a marriage.

[15] Staatscommissie 2001, para 8, p. 15.