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Searching for a common core of family law in Europe
Alessandra Pera

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Methods and goals

Alessandra Pera*

ABSTRACT

In this Article the Author, a member of the group of European investigators involved in the searching process for a Common Core of Family Law in Europe, does not want to present the results of the project, that will be published in a forthcoming volume, but, instead, seeks to distinguish the FLCCP (Family Law Common Core Project) from similar research experiences, such as the CEFL (Commission of European Family Law) one.

In order to highlight these differences, in the first part (paragraphs 1,2,3) the paper describes the goals of the Common Core Project and the methodology it employs, making references to the Cornell's Studies, the Schlesinger's factual approach and the Sacco's formants theory.

In the second part the analysis pinpoints the peculiarities of functionalism and the way the Common Core method re-interprets it on a large scale as a collaborative effort, because of the synergy between the work of the national rapporteurs, the answers obtained through the questionnaires and the group sessions and reports (par. 4).

Further, the Article stresses the different goals of CEFL and FLCCP and argues how these differences concerning also their respective goals and methods affect the research's results and the idea of what the harmonization of family law (if any and possible) might be expression of (par. 5).

* Alessandra Pera is Associate Professor of Comparative Law – University of Palermo – Department of Political Science and International Relations.

In the last part the Author maps an alternative route to the harmonization of European family law, which combines the use of European international private law regulations on family matters, the concepts of private autonomy and Courts rulings, together with doctrine efforts (par. 6).

KEYWORDS

Common Core - Family Law - Method - Factual Approach - International Private Law - Better Rule - Harmonization

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1. Introduction

More than other areas of private law, family law is generally considered to be the expression of social, cultural, ethical and, sometimes, religious models typical of a specific People, of a particular historical and juridical tradition, often associated with a well-defined geographical-territorial basis¹.

This is relevant when discussing the harmonization and standardization² of legal rules with regard to the relationship between single national systems and supranational systems, es-

¹ See, H. Kahn Freund, *Book Review, Legal Transplants*, in *L.Q.R.*, 91, 1975, pp. 292 *et seq.*; for a slightly different approach, see the studies by A. Watson, *Legal Transplants and Law Reform*, in *L.Q.R.*, 92, 1972, pp. 79 *et seq.*; Id., *Comparative Law and Legal Change*, in *Camb. L. J.*, 38, 1978, pp. 313 *et seq.*; Id., *Two-Tier Law, An approach to law making*, in *Int. & Comp. L. Q.*, 27, 1978, pp. 552 *et seq.* For a critical approach to Watson's theories, see R.L. Abel, *Law as lag: Inertia as social theory of law*, in *Mich. L. Rev.*, 80, 1981-2, pp. 785 *et seq.* Among the Italian authors, see R. Sacco, *Introduzione al diritto comparato*, Utet, Turin, 1992, pp. 136 *et seq.*; Id., *Circolazione e mutazione dei modelli giuridici*, in *Digesto delle discipline privatistiche*, Utet, Turin, 1988, n. 6; U. Mattei - P.G. Monateri, *Brief introduction to comparative law*, Cedam, Padova, 1997, p. 38; S. Ferreri, *Assonanze transoceaniche. Tendenze a confronto*, in *Quadrimestre, rivista di diritto privato*, 1993, pp. 179 *et seq.*; M. Lupoi, *Sistemi giuridici comparati. Traccia di un corso*, Esi, Naples, 2001, p. 78.

² In the doctrine, an analysis of the concepts of harmonization, standardization and unification and of the instruments serving the implementation of these processes can be found in G. Benacchio, *Diritto privato della Unione Europea. Fonti, modelli, regole*, Cedam, Padua, 2010, pp. 18-26; S. Ferreri, see the voice *Unificazione, uniformazione*, in *Digesto civ.*, vol. XIX, Utet, Turin, 1999, p. 504; M. Serio, *Sistemi di integrazione giuridica e tecniche di armonizzazione, uniformazione ed unificazione per influenza del diritto comunitario*, in *Contratto e Impresa/Europa*, 2006, pp. 162-176.

pecially in so far as national systems provide for instruments that differ from each other to achieve interests and protect rights that they consider to be worthwhile, in the light of the reference values, which are relative.

The issue of the regime applicable to the family is, today more than ever, connected to the various combinations of personal and patrimonial relationships between subjects of different nationalities or who, in any case, identify the center of their interests in a country other than the one of common citizenship. In these hypotheses, the family nucleus presents elements of connection with more than one legal system, which determines the necessity of providing suitable instruments to solve the issues that can derive from the transnational dimension of the family itself.

Looking at such transnational dimension, the last part of this article maps an alternative route to the harmonization of European family law, which combines the use of European international private law regulations on family matters, the concepts of private autonomy and Courts rulings, together with doctrine efforts.

Over the last twenty years, the EU's legislative activity on family matters has focused on private international law and procedural law. This is due to the developments in the process of the European integration and to the elements of internationality that the relations between private individuals are to assume also within the family.

These are legislative sectorial interventions, channeled through the form of regulations, directly applicable and binding on all the Member States and citizens³.

The choice of using regulation is appropriate, since, given the problems connected with the solution of conflicts of rules, the intervention, in accordance with the principles of subsidiarity and proportionality, can undoubtedly be more effectively if achieved by an EU act, which excludes further State intervention, at the time of implementation.

The aim is to reach the result that the rules laid down in a supranational source of law can be uniformly interpreted and applied at national level⁴. This is functional to the objective of judicial cooperation in civil matters, already enshrined in the Treaty of Amsterdam and in the Lisbon one and directed to the creation of a common European legal framework.

Therefore, in order to guarantee the free movement of persons in this area of freedom, security and justice, it is essential to adopt measures aimed at improving and simplifying certain procedural instruments, the recognition of judicial and extrajudicial decisions in

³ See Article 288(2) TFEU. For the recognition of the direct applicability, please refer to the leading case ECJ, *Orsolina Leonesio v. Ministero dell'Agricoltura e Foreste della Repubblica italiana*, C-93/71, commented by J.A. Winter, in *Common Market Law Review*, 1973, pp. 327-332.

⁴ The Member States, in fact, are all recipients of a single legal rule, which is guaranteed uniform interpretation and application through the work of the European Court of Justice and the awareness of national judges and interpreters, and through the principles of supremacy of EU law and interpretation in conformity. On the concepts of unification, harmonization and standardization, see R. Sacco, *Introduzione al diritto comparato*, in *Trattato di Diritto Comparato*, Utet, Turin, 1992, 5 ed., p. 167; *Id.*, *Il problema dell'unificazione del diritto privato europeo*, in *Quaderni Acc. Sc. Torino*, 1996, pp. 3 *et seq.*

civil and commercial matters, the promotion of the compatibility of the rules applicable in the Member States to conflicts of law and jurisdiction⁵.

In this regard, questions that emerge may be represented as concentric circles, which start from an almost ontological plan, linked to the definition of the concept of family, which varies from State to State, and are reduced when, depending on the different assumptions and the different fundamental elements of the concept under consideration, each system outlines and regulates family relations.

The heterogeneity of the European systems in the field of family law and the transnational nature of the social phenomenon of the family recently emerged, however, have raised the issue of the necessity, usefulness or opportunity of approximating national legislations. The literature on the subject has been fundamentally structured along two directions: part of the scholarship shows enthusiastic support for regulatory unification as a functional objective of the European integration⁶; other part of the scholars shows several doubts about the phenomenon, in respect of the preservation of diversity and legal plurality, as a founding value⁷.

There are tensions, indeed, between: the general principles contained in the national Constitutions, formal or material, which guide the rules of domestic law; the general principles of non-constitutional source, which however contribute to shaping the systems; the principles of transnational source enshrined in the agreements between States⁸.

⁵ See Article 81(1) and (2) TFEU. For an analysis of the limits of the EU competence in this area, see C. Kohler, *Lo spazio giudiziario europeo in materia civile e il diritto internazionale privato comunitario*, in P. Picone (ed.), *Diritto internazionale e diritto comunitario*, Cedam, Padua, 2004, pp. 65 *et seq.*

⁶ For an approach that is not maximalist, but in favour of the Europeanization of private law, see E. Stein, *Un nuovo diritto per l'Europa. Uno sguardo d'oltre oceano*, Giuffrè, Milan, 1991.

⁷ Among the most critical, see D. Bradley, *A family law for Europe? Sovereignty, political, economy and legitimation*, in K. Boele Woelky (ed.), *Perspective for the unification and harmonization of family law in Europe*, Intersentia, Oxford-New York, 2003, pp. 65-104; M. Antokolskaia, *The better law approach and the harmonization of family law*, in K. Boele Woelki (ed.), *cit.*, Intersentia, Oxford-New York, 2003, pp. 159-183; M. Jantera-Jareborg, *Unification of international family law in Europe – A critical perspective*, always in K. Boele Woelki (ed.), *cit.*, Intersentia, Oxford-New York, 2003, pp. 194-216; C. McGlynn, *A family law for the European Union*, in J. Shaw (ed.), *Social law and policy*, Oxford University Press, Oxford, 2000, pp. 223 *et seq.*; Id., *The Europeization of family law*, in *CFLQ*, 2001, pp. 35 *et seq.*; S. Ninatti - A. Rovagnati (eds.), *Verso un diritto europeo delle relazioni familiari*, in *Quaderni costituzionali*, 2007, pp. 425-428; S. Patti, *Il "principio famiglia" e la formazione del diritto europeo della famiglia*, in *Famiglia*, 2006, pp. 529-544; Id., *Diritto privato e codificazioni europee*, Giuffrè, Milan, 2007, pp. 231 *et seq.*; Id., *Il diritto di famiglia nei paesi dell'Unione Europea: prospettive di armonizzazione*, in T. Auletta (ed.), *Bilanci e prospettive del diritto di famiglia a trent'anni dalla riforma*, Giuffrè, Milan, 2007, pp. 15 *et seq.*

⁸ On the tension between principles arising from sources of law at different level, see A. Zoppini (ed.), *La concorrenza tra ordinamenti giuridici*, Laterza, Bari-Rome, 2004; A. Plaia (ed.), *La competizione tra ordinamenti giuridici*, Giuffrè, Milan, 2007. On the competition and circulation of models through international private law, in particular in family matters, see M. Tenreiro - D. Ekström, *Unification of private international law of family law matters within the European Union*, in K. Boele Woelki (ed.), *Perspective for the unification and harmonization of family law in Europe*, Intersentia, Oxford-New York, 2003, pp. 364 *et seq.* Having regard to the judicial formant, there are both a HCHR's and a ECJ's huge relevant case law, mainly but not only, on the right to respect for private and family life under art. 7 and the right to marry and found a family under art. 9 of the Charter of Fundamental Rights of the European Union. In particular, on the impact of art. 9 on national legal systems, the tensions between national and super-national levels and the ways in which such rights can be enforced and protected at a municipal level according to the Convention, see, for all, C. McGlynn,

These are sometimes heterogeneous principles, signs of the evolution of family law, which confront legal systems and jurists with the need to identify parameters for re-arranging the traditional dogmatic categories⁹.

Principles can actually be understood as flexible rules, as opposed to rules containing “strict” rules, which can allow the courts to find a more proper solution to the specific case¹⁰.

Constitutional principles, which have had a profound impact on the development of family law in many European systems, are high-ranking rules that express the founding values of a community and are intended to be implemented and protected by lower-ranking rules. The tensions are associated with issues of legal policy and the assessment of the various possible options, but also with questions of interpretation and application connected with the creation of sector-specific rules.

With the idea of investigating such issues, in the last six years the Common Core of European Private Law Project has expanded its field of research also to the area of family law, trying to explore and represent the state of the art of the knowledge reached by scholars with regard to the “duties of care” and “contribution to family needs” in family law.

The cited phrases are the titles of the questionnaires developed by the Family Law Common Core’s group of research. However, it is worth mentioning that the group, under the coordination of Prof. A. Miranda, has decided to start its experience referring to the “contribution to family needs” as its first step and, further, eventually to continue with “duties of care”.

In the first part of this contribution, with the approval of the Coordinator of the Unit, being no possible to present the results of the research conducted (as it is not feasible yet), it will

Families and the european Union charter of fundamental rights: progressive change or entrenching the status quo?, in *Eur. Law Rev.*, 2001, pp. 582 *et seq.*; H. Stalford, *EU family law: a human rights perspective*, in J. Meeusen - M. Pertegás - G. Straetmans - F. Swennen, (eds.), *International family law for the European Union*, Intersentia, Antwerpen-Oxford, 2007, pp. 101-128; G. Straetmans, *Non economic free movement of european Union citizens and family law matters*, in J. Meeusen - M. Pertegás - G. Straetmans - F. Swennen, (eds.), cited above, pp. 183-238.

⁹ S. Patti, *Il principio famiglia e la formazione del diritto europeo della famiglia*, in *Famiglia*, 2006, p. 531. More generally, on the opportunity to rethink and re-found some “traditional” dogmatic categories, the debate in doctrine has its roots far away, but more recently, P. Legrand, *The same and the different*, in *Comparative legal studies: traditions and transitions*, Cambridge University Press, Cambridge, 2003, pp. 240 *et seq.*; K. Zweigert - H. Kotz, *Introduzione al diritto comparato*, I, Giuffrè, Milan, 1992, p. 37; R.B. Schlesinger, *Comparative law, cases texts, materials*, Mineola, New York, 1998, p. 42. In particular, with reference to human rights and to the rights of the personality, which mostly concern the object of our analysis, see N. LIPARI, *Diritti fondamentali e categorie civilistiche*, in *Riv. dir. civ.*, 1996, p. 417; P. Perlingieri, *La personalità umana nell’ordinamento giuridico*, University of Camerino, Scuola di perfezionamento in diritto civile, Camerino-Naples, 1972, p. 175; ID., *Il diritto civile nel diritto costituzionale*, Esi, Naples, 1991, spec. pp. 12 *et seq.*, 137 *et seq.*, 175 and 189 *et seq.*

¹⁰ In particular P. Perlingieri, *Valori normativi e loro gerarchia. Una precisazione dovuta a Natalino Irti*, in *Rass. Dir. Civ.*, 1999, p. 805, where the Author stresses the importance of principles and values, expressed by norms, as they are able to go through and pervade all the private law institutions. See also, M. Manetti, *Famiglia e Costituzione: le nuove sfide del pluralism morale*, in *Rivista dell’associazione italiana dei costituzionalisti*, 2010, pp. 5-7; V. Tondi delle Mura - M. Carducci - R.G. Rodio (eds.), *Corte Costituzionale e processi di decisione politica*, Giappichelli, Turin, 2005, pp. 139 *et seq.*, pp. 502 *et seq.*, pp. 632 *et seq.*

be, instead, distinguished the FLCCP (Family Law Common Core Project) approach from similar research ones, such as the CEFL (Commission of European Family Law). Indeed, the doctrine has been committed to identifying the principles of a European family law, understood as basic rules, without a high degree of specificity, common to all or most of the European legal systems.

Moreover, pursuing a different objective, other scholars have tried to identify the so-called “better rule”, to regulate family relations, or rather the rule that, in a perspective of social engineering and policy of the law in the future, can represent the “best model”, even if currently widespread only in a few European systems.

In order to make the differences mentioned above as clear as possible, it is then necessary to proceed with the description of the aims of the Common Core Project and the methodology it employs.

2. Common Core Family Law group goals

The research group has investigated the Common Core of European Family Law and, in particular, in this initial phase, limited its work to the duties of maintenance among family members, trying to find out what is already common, if anything, among the different legal systems of the European Union member states. Such systems are different, not only if we think in terms of the contrast between the civil law and the common law experiences, but also if we look among civil law western legal traditions (or sub-traditions), according to the taxonomy one wishes to adopt.

The methodological premises to the FLCC project have been – as well as for the other groups that started working before the family law one (contract, tort, property) – the ones that Schlesinger had identified in the Cornell report¹¹.

All the participants to the Family Law Group agreed on the idea that the common core research is a very promising tool for uncovering deeper analogies hidden by formal differences, in order to trace the mainlines of a reliable map of family law in the European countries. While being aware of the circumstance that this map could be of no meaning for those who are looking forward to a sort of restatement and/or codification of family law (not desirable), at the same time the FLCC group believe that, if reliable, it could be useful for European legislation drafters, for scholars, judges and lawyers, contributing to build a common European legal culture.

¹¹ On Schlesinger project see, R. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, in 51 *Am. J. Int. L.*, 1957, p. 734; A. Farnsworth, *Book Review: Formation of Contracts: A Study of the Common Core of Legal Systems*, in *Columbia L R*, 69, 1969, p. 339; A. Ehrenzweig, *Book Review: Formation of Contracts: A Study of the Common Core of Legal Systems*, in *Cal L R*, 56, 1968, p. 1514; R. Braucher, *Book Review: Formation of Contracts: A Study of the Common Core of Legal Systems*, in *Harvard L R.*, 83, 1970, p. 957.

Using the Common Core's factual approach means starting the analysis from a case study, describing a factual situation and asking for answers by different national rapporteurs. Before answering, sometimes it is needed to re-formulate the questionnaire as long as the question, as expressed at first, does not consider some (factual) points, which are crucial in a certain legal system and not in another: autonomous incomes by each of the parties (personal or coming from a work); the presence of children; the children's age; the situation of the family house... To be clearer, below part of the questionnaire's section on family assets, together with the instructions for the respondent (see footnotes 12-13 is cited).

FAMILY ASSETS¹²

1) Nino and Francesca live together.

Do their own assets remain several of each of them or become joint?

(assets means, for instance, goods, personal property, real property, land, a car, a motorbike, a share, etc.)

1a) Would your answer be different if Nino and Francesca were married?

1b) Are their personal incomes and returns on respective assets included in the personal or in the joint assets?

1c) Would your answers be different if Nino and Francesca were married?

2) Nino and Francesca live together.

Nino buys a set of very expensive golf clubs, but he can't pay the bill and the seller sues him. Can Francesca be required to pay the cohabitant's debt¹³ ?

If yes, why?

If not, why?

2a) Would your answer be different if the money were necessary for medical needs? If yes, why?

2b) Would your answer be different if Nino and Francesca were married? If yes, why?

3) Francesca's father dies and she inherits lots of money and a building in the centre of Palermo. Is the inherited patrimony separate from Nino's assets, or is Nino entitled to claim a right on the estate inherited by Francesca?

(patrimony is not different from "assets" here they are used like a synonymous; means "the sum or/ and the properties or (and the "substances" and/or the activities, obligations, etc. that may be transmitted to an heir or bequeathed by the law or by last will and testament)

3a) Would your answer be different if Nino and Francesca were married? If yes, why?

4) Nino's mother donates him a house. Is the house considered part of Francesca's assets or not? Is Francesca entitled to claim a right on this house? Can she sell the house?

4a) Would your answer be different if Nino and Francesca were married? If yes, why?

5) Nino is the owner of a company. Can Francesca sell the company?

5a) Would your answer be different if Nino and Francesca were married? If yes, why?

¹² In the asset of the family you may consider: – well-being; – heredity; – succession; – donations; – bank; income/stock option (investments); – pension; – insurance; – personal injury compensation; – compensation of tort.

¹³ Your answer has to consider the following different possibilities: 1) Nino and Francesca both work; 2) Only one of them works; 3) They have similar incomes; 4) They have different incomes. (kind of income, level of income etc...) For example you have to consider if the income is earned or unearned, etc; 5) None of them work; 6) One of them is not able to work; 7) One of them doesn't want to work.

- 6) Francesca buys an “Armani” dress; can Nino sell the dress or destroy it?
6a) Would your answer be different if Nino and Francesca were married? If yes, why?
7) Francesca has a car accident after which she is injured. The person who caused the accident is condemned to pay € 50.000,00 of compensation for damages. Does the compensation form part of Francesca’s own assets or of the joint assets?
7a) Would your answer be different if Nino and Francesca were married? If yes, why?
8) Nino, factory worker, has an accident at work and he loses his right hand. He obtains a compensation of € 500.000,00. Does the compensation form part of Nino’s personal assets or of the joint assets? Is Francesca entitled to claim a right on the compensation?
8a) Would your answer be different if Nino and Francesca were married? If yes, why?
9) Francesca sells the diamond necklace inherited from her mother and she buys a “Picasso” painting. Does the painting form part of Francesca’s own assets or of the joint assets? Can Nino sell the picture?
9a) Would your answer be different if Francesca had inherited the necklace before their relationship?
10) Can Nino and Francesca conclude an agreement in which their joint assets are frozen and can therefore only be used for the family’s needs? Is a particular form of agreement necessary? (“frozen joint assets” means that a part or the whole of assets is not more freely disposable and their use is strictly limited to support the family expenses –like an English “trust for family” for instance)
10a) Should this patrimony be considered separate and independent from the joint one and from their own assets? (“separated and independent patrimony” may be a trust like instrument or similar or alternative instrument)
10b) Nino and Francesca have agreed that the rent of their joint house in London should be used to the payment of the family’s ordinary living costs. Nino, meanwhile, has taken out a mortgage with a bank. Nino does not pay the instalments anymore. Can the bank retaliate by using the income from the joint house?
10c) Would your answers (9-9a-10-10a-10b) be different if Nino and Francesca were married? If yes, please explain why.

Such approach would not hide in any way the existence of different patrimonial regimes on family assets in each legal system, but will also map eventual common practical solutions, despite the letter of a civil code or statute’s rule could provide differently.

In the Common Core perspective, the scenario for the transnational lawyer, who approaches family law of different European legal systems, is the one of a traveler compelled to use a number of different State’s maps, each one containing (quite often) misleading information. The CC method tries to correct those misleading pieces of information, not forcing the actual diverse reality of the law within one single map to attain uniformity, but presenting a complex situation in a reliable way¹⁴.

¹⁴ M. Bussani - U. Mattei, *The Common Core Approach to European Private Law*, in *The Columbia Journal of European Law*, 3, 1997-1998, p. 341.

This approach marks the difference between the FLCC work and other research experiences, which are (expressly or not) pushing in the direction of uniformity or unification of family law. Such attitude distinguishes the FLCC cultural mission from another remarkable attempt, as the CEFL's one, which is devoted to the idea of the *better rule* with an approach of "social and law engineering", that will be explained in the next few pages.

In the CEFL work, each national rapporteur is not guided by the questionnaires factual approach, so she/he is free to analyze the law, resulting from the legislation and/or the case law and scholarly writings. The questionnaire is quite different from the Common Core's one: the questions are general and they never refer to a case, but explicitly mentions dogmatic categories, assuming they are common, as demonstrated by the section of the questionnaire on property regimes between spouses, quoted below¹⁵.

C. MATRIMONIAL PROPERTY REGIMES

C.1. General issues

15. Are spouses entitled to make a contract regarding their matrimonial property regime?

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16. What regime is applicable, using the list below, if spouses have not made a contract (default regime) or are not allowed to make a contract or are not allowed to make a contract with binding effect?

17. Are there other alternative matrimonial property regimes regulated by statute for which spouses can opt besides the default regime (where applicable)?

18. Briefly describe the regimes indicated in the answers to:

1. Question 16

2. Question 17

19. Indicate the frequency of the use made of the regimes (where possible by reference to statistical data) referred to in Questions 16 and 17

C.2. Specific regimes

I. Community of property

I.1. Categories of assets

20. Describe the system. Indicate the different categories of assets involved.

21. What is the legal nature of the different categories of assets, in particular the community?

22. What do the personal assets of each spouse comprise?

23. Is substitution of personal assets (e.g. barter agreement) governed by specific rules? Distinguish where necessary between movables and immovables.

24. Is investment of personal assets governed by specific rules? Distinguish where necessary between movables and immovables

25. What assets does the community comprise? Are there special rules governing the spouses earnings?

26. To which category of assets do pension rights and claims and insurance rights belong?

27. Can a third party stipulate in e.g. a gift or a will to what category of assets a gift or bequest will belong?

¹⁵ The complete text of the questionnaire is available on line at <https://ceflonline.net>.

28. How is the categorisation of personal or community assets proved as between the spouses? Are there rebuttable presumptions of community property?

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29. How is the categorisation of personal or community assets proved as against third parties? Are there rebuttable presumptions of community property? Which debts are personal debts?

30. Which debts are community debts?

31. On which assets can the creditor recover personal debts?

32. On which assets can the creditor recover community debts?

1.2. Administration of assets

33. How are personal assets administered?

34. How are the community assets administered?

35. Can one spouse mandate the other to administer the community assets and/or his or her personal assets? Are there important acts concerning personal assets or community assets (e.g. significant gifts, disposal of the matrimonial/family home or other immovable property) that require the consent of the other spouse?

36. Are there special rules for the administration of professional assets?

37. Is there a duty for one spouse to provide information to the other about the administration of the community assets?

38. How are disputes between spouses concerning the administration of personal or community assets resolved?

39. What are the possible consequences when a spouse violates the rules governing the administration of personal and community assets? What are the possible consequences in other cases of maladministration of the assets?

40. What are the possible consequences if a spouse is incapable of administering

1. his or her personal assets

2. community assets

After the single respondent answered the questionnaire, the group, through a comparative effort, search for the *better model*, in terms of general principles, thought to be used at a super-national level in the attempt of harmonizing family law in Europe. Such approach has been strongly criticized by David Bradley, who has stressed that “*behind the rhetoric of the better law and an area of freedom, security and justice, harmonization of family law is a political exercise and should be recognized as such*”¹⁶ and that quite often this exercise has been translated in the election of a national model (mainly the Netherlands and the Scandinavian ones) as the best among the others, to be implemented at a super-national level¹⁷.

¹⁶ Cfr. D. Bradley, *A family law for Europe? Sovereignty, political, economy and legitimation*, in K. Boele Woelki (ed.), *Perspective for the unification and harmonisation of family law in Europe*, Intersentia, Oxford-New York, 2003, p. 103.

¹⁷ Such approach has been justified, according to CEFL's line, under the argument that “*differences that colour the map of the current European family laws are directly linked to the difference in the timing of this modernisation of family law (...) the infamous diversity of family laws within Europe is mainly a difference in the level of modernity of the family laws in various countries in Europe*”. See M. Antoloskaia, *The better law approach and the harmonisation of family law*, in K. Boele Woelki (ed.), *cited above*, Intersentia, Oxford-New York, 2003, p. 160.

Whereas, the Common core attitude is to look at cultural diversity in the law as a value itself, even though it does not have to be necessary translated into a preservationist approach¹⁸.

The FLCC group tried to flyover the rhetoric of a municipal formulation of the legal rule, quite often based on unexplained assumptions, which could be misleading in catching the real state of the art, as a result that overplays the differences may suggested. At the same time, the comparative analysis has shown that, both the rhetoric and the actual results must be considered in order to draft a reliable map as, sometimes, rhetorical differences may end up affecting the applied dimension of the law.

For example, for many decades the art. 5, para. 6, of the Italian Divorce Act (L. 898/1970) has been interpreted in the sense that the *quantum* of the maintenance obligation should be parameterized according to the couple's life style during marriage, in the sense that the weak spouse, after the divorce would have been beneficiary of money or of other benefits that should guaranty her/him the life style enjoyed during the marriage. In 2015 a decision of the Constitutional Court¹⁹ has stated that the letter of the article is coherent with the Constitution, but, in its legal reasoning and arguing, has stressed the importance of other elements previously ignored by the interpreters. The previous legal reasoning was built on a sort of synecdoche²⁰, as the interpreter used only one of the elements resulting from the letter of the provision to decide the *an* and the *quantum* of the maintenance obligation. According to the social and economic changes in society, but in presence of the same letter of the article, the Court decided that the matrimonial life style should be considered together with other elements. In other words, the different economic condition between the obliged person and the beneficiary, is not any more the necessary and sufficient prerequisite to create a maintenance obligation. The circumstances that must be considered in order to decide on the *an* and the *quantum* are: the different capacity of perceiving independent incomes from work or from personal property (movable or immovable goods for rent); the ability and capability of the beneficiary to work and to find a work; and many others. This more complex evaluation has been shaped by the Constitutional

¹⁸ See again M. Bussani - U. Mattei, *The Common Core Approach to European Private Law*, in 3 *The Columbia Journal of European Law*, 1997-1998, p. 341. For a preservationist approach, see D. Bradley, cited above, in K. Boele Woelki (ed.), *Perspective for the unification and harmonisation of family law in Europe*, Intersentia, Oxford-New York, 2003; and M. Martiny, *Is Unification of family law feasible or even desirable?*, in AA. VV., *Towards a European Civil Code*, The Hague, London-Boston, 1998, pp. 150 *et seq.*

¹⁹ Corte Cost., 11 February 2015, n. 11, in *Famiglia e diritto*, 2015, pp. 537 *et seq.*, with a comment by E. Al Mureden, *Assegno divorzile, parametro del tenore di vita e principio di autoresponsabilità*. The Constitutional Court agreed with a position already expressed in few decisions by Cass. SS.UU., 29 November 1990, n. 11490, in *Foro It.*, 1991, c. 67, with a comment by R. Quadri, *Assegno di divorzio: la mediazione delle sezioni unite*; Cass. Civ., 27 September 2002, n. 14004, in *Famiglia e diritto*, 2003, p. 14.

²⁰ On the use of synecdoche by legislators and judges, on the misleading effects of such rhetorical figure, see P.G. Monateri, *La sinecdoche. Formule e regole nel diritto delle obbligazioni e dei contratti*, Giuffrè, Milan, 1984. On legal narrative and on the use of figure of speech in judicial interpretation, see J. Gaakeer, *Iudex translator: the reign of finitude*, in P.G. Monateri (ed.), *Methods of comparative law*, Edward Elgar Pub., Cheltenham-Northampton, 2013, pp. 252-269.

Court in order to enforce the general principle of self-responsibility of the parties (new jurisprudential doctrine), according to which every member of the couple (during and after marriage) should do as much as possible to be independent and responsible. Such rhetoric has been used in order to avoid the unfair behavior, wide spread in the praxis, of some “weak parties” who count on high-maintenance benefits, deliberately living on the counterpart shoulders with a parasitic attitude.

3. Common Core Family Law group method

Generally speaking, the Common Core Project moves from two methodological premises: the Cornell Studies directed by Rudolf Schlesinger and the legal formant’s theory by Rodolfo Sacco.

The innovative tool introduced by Schlesinger in the 1960s was the “factual approach questionnaire”: the instrument through which Schlesinger formulated questions that should be intended in the same way by each respondent from every different legal system and, through which he obtained comparable answers, that were considered to be self-sufficient and able to describe the most detailed rules.

To ensure reliability, the questionnaire was formulated by presenting a case, asking the respondents about the results that would be reached, without referring to dogmatic taxonomies and doctrinal systems. The questions were prepared and modified many times according to the respondents’ indications, as the CCFLP ones, in order to take into account any significant circumstance in each legal system analyzed, to be sure that these circumstances would be considered in - and therefore comparable with - the analysis of every other system.

This method, quite often, gave rise to a highly different image of the law circulating in every single country, sometimes overpassing, sometimes diverging from the models coming out from scholarly writings (monographs, handbooks or casebooks). Thus, the special feature of the tool, as conceived, drove participants to think explicitly about the circumstances that matter, by forcing them to answer identically formulated questions²¹. By this way, it is possible to answer without referring necessarily to a dogmatic category or a peculiar institution proper of a single legal system.

Having regard to the questions presented in the previous paragraph, what comes out from the answers, is the way in which – in each legal system – people manage “the duties of cash” inside the family. In the subsequent and more specific questions, the respondent goes through the detailed solution, that could vary in the presence or absence of certain circumstances: the parties were both economically autonomous or not, they have personal

²¹ M. Bussani - U. Mattei, *The Common Core Approach to European Private Law*, cit. above, p. 344.

income or not, the children were living with them or not, and so on... In fact, the questionnaire contains many sub-questions, such as, for example, “would your first answer be different if Nino and Francesca are, respectively, a doctor working at the hospital and a housewife with no personal income”?

What can be learned from Schlesinger’s experience, as from the CCFLP’s work, is that often the circumstances that operate explicitly and officially in one system might be officially ignored or considered as irrelevant in another one. And yet, in that other system, they work secretly, so that there could be gaps between the formulation of the rule and its application by the courts.

This last issue drives the analysis to the second methodological premise: Sacco’s theory²², which suggests that in order to know what the law is, it is necessary to analyze the complex relationship between the “legal formants” of a system. Those are all the formative components that make any given rule of law: statutes (acts), general propositions, particular definitions, reasons, holdings, etc. They are not necessarily consistent with each other within every system. Quite often, in fact, they are conflicting and competing with each other.

In order to trace a reliable map, it is important to find out all these formants, understanding how courts have decided, but also grasping the influences the judges are subject to.

For example, in the Italian legal system, for many decades pre-matrimonial agreements had been forbidden, because, under art. 160 cod. civ., the spouses cannot disregard or waive rights and duties coming from marriage. Among these rights and duties, also maintenance obligations after divorce (art. 5, L. 898/1970 – Divorce Act) can be included, which are not at the parties’ disposal and cannot be the object of a pre-matrimonial agreement, as they affect also personal statuses²³.

But the *Corte di Cassazione*, in 2012²⁴, with an innovative interpretation of the rules concerned, has recognized the validity of a pre-matrimonial agreement, where parties have conveyed that, in the event of a future failure of marriage, the wife will have transferred to the husband the property of one of her immovable goods, as the reimbursement of the money payed by him, during the marriage, in order to refurbish the family house, which was also property of the wife. The Court has resorted to the use of general principles such as the parties’ private autonomy, under art. 1322 cod. civ., and other contractual law rules

²² R. Sacco, *Legal formants. A dynamic approach to comparative law*, in 39 *American Journal of Comparative Law*, 1991, I, pp. 1-34; R. Sacco, *Legal formants. A dynamic approach to comparative law*, in 39 *American Journal of Comparative Law*, 1991, II, pp. 343-401.

²³ *Ex multis*, Cass. Civ., 11 June 1981, n. 3777, in *Foro it.*, 1982, I, c. 184; Cass. Civ., 5 December 1981, n. 6461, in *Rep. Giu. It.*, 1081, under *Matrimonio*, n. 196; Cass. Civ., 4 June 1992, n. 6857, in *Corr. Giur.*, 1992, p. 866, with a comment by V. Carbone, *Assegno di divorzio dall’invalidità della rinuncia preventiva all’indisponibilità assoluta*. All these decisions and many others have stated that all pre-nuptial agreements are void and unenforceable because illegal by statute and/or on grounds of public policy, such as art. 160 cod. civ. and art. 5 of the Divorce Act.

²⁴ Cfr. Cass. Civ., 21 December 2012, n. 23713, commented by A. Pera, *Il rapporto coniugale tra status e contratto negli ordinamenti italiano ed inglese*, in *Rivista critica di diritto privato*, 2, 2014, pp. 251-272.

to overpass the above mentioned prohibition. Grasping the influences, the Court is subject to, it could be find out that the judge, who materially had written the decision was an academic, before becoming a judge, who had studied and researched on pre-matrimonial agreement in common law systems and who had already expressed the need for a systematic interpretation of such family law rules in the light of the contractual law ones²⁵. So the education, personal skills and career of the judge have affected patently the way to interpret the law and to give concrete shape to the legal system.

These phenomena could have various routes: they may occur because scholars have given broad support to a doctrinal innovation, but they can also depend on the selective procedure of judges or on their education and traineeship. For example, a judge appointed from an academic position will tend to put more stress on scholars' opinions than a judge who has always practiced law as an old barrister.

The Sacco's theory on legal formants goes beyond the traditional distinction between enacted law (statutes, codes, legislation), case law (jurisprudence), and scholarly writings (doctrine).

As demonstrated by the Italian case law on adoption by homosexual couples, the text of a statute (L. 120/2016 on "unioni civili") can influence decisions, even when judicial precedents have disregarded it, because there is always the possibility that courts will reconsider the literal interpretation of the statutory provision²⁶.

In the CCFLP meetings it has merged also that statutes or code provisions in a legal system can be literally the same in another system, but can be applied differently (for example,

²⁵ In particular, see the judge studies, when he was an academic, M. Dogliotti, *Separazione e divorzio. Il dato normativo: I problemi interpretativi*, Giappichelli, Turin, 1995, p. 234.

²⁶ The judges' law making has been evident before the entering into force of the Act on *Unioni civili* (2016), as demonstrated by Cass. civ., 22 June 2016, n. 12962, in *Dir. Fam. Pers.*, 4, 2016, p. 1014; Trib. Min. Roma, 30 July 2014 n. 299, in *Nuova Giur. Civ. Comm.*, I, 2015, pp. 109 *et seq.*, with a note by J. Long, *L'adozione in casi particolari del figlio del partner dello stesso sesso*; for a different opinion, see the comments by R. Carrano - M. Ponzani, *L'adozione del minore da parte del convivente omosessuale tra interesse del minore e riconoscimento giuridico di famiglie omogenitoriali*, in *Dir. Fam.*, 2014, pp. 1550 *et seq.* The decision has been confirmed by App. Roma, Sez. Min., 23 December 2015, in *Dir. Fam. Pers.*, 3, 2016, p. 806, with a note by S. Menichetti. On the crossing adoption by each single member of the homosexual couple, who applies for the adoption of their respective children, see App. Napoli, 30 March 2016, in www.dirittoejustizia.it, which has recognised legal effects in Italy to a French court decisions on *plena* adoption. Against these solutions and with a restrictive interpretative attitude, see Trib. Min. Piemonte e Valle d'Aosta, 11 September 2015, n. 258 e n. 259, in *Nuova Giur. Civ. Comm.*, I, 2016, pp. 205 *et seq.*, with a note by A. Nocco, *L'adozione del figlio di convivente dello stesso sesso: due sentenze contro una lettura "eversiva" dell'art. 44, let. d), L. n. 184/1983*. After the enactment of the 2016's statute, the Courts have, in some cases, overpassed or set aside the provision, which excludes the applicability of the norms on (full) adoption to homosexual couples, interpreting in a creative way the rules on adoption in particular cases. In a case of a homosexual couple married abroad, in particular cases the eligibility for the adoption has been recognized to the spouse of the biological parent. The reasoning of the court was based on and referred to the social relevance of the parenthood by "habits and repute", as perceived for years by the minor child and both the spouses, which is a "doctrinal creature"; see Tribunale di Bologna, 4 January 2018, reported in *Guida al Diritto*, 18, 2018, pp. 60-65. See also Corte Cost., 7 April 2016, n. 76, on the compatibility of a judgement of the Spanish Court – concerning a stepchild adoption by the female partner of the child's mother – with the Italian legal system, commented by E. Bilotti, *Riconoscimento in Italia di un provvedimento di stepchild adoption: la Corte Costituzionale ritiene inammissibile la questione di legittimità costituzionale degli art 35 e 36 della legge 184/1983*, in *Dir. civ. contemporaneo*, 2016.

having regard to the personal capacity of the conceived child, but not born, in France, Germany and in Italy). On the other hand, provisions or general definitions in two systems can differ, while operative rules are the same, so that there are gaps between the rule as enunciated and the rule as applied (a good example is that of statutory providing legal patrimonial regimes between the spouses in Germany, the Netherlands, France and Italy). The CCFL experience was oriented in order to find out a meaningful understanding of what the legal formants are and how they relate to each other through a continuous dialogue, in order to ascertain the factors that affect those solutions and to trace a reliable map. The attempt was to find out the weight that interpretative practices (grounded on scholarly writings, on legal debates stirred by previous judicial decisions, etc.) have in shaping the actual outcomes of *family needs* in family law, taking in mind that scholarly writings sometimes can be rhetorical, especially when values and fundamental rights are involved in (as in family law matters). In some civil law countries, for example, general statements insist that marriage is founded on consent, while the operative rules require not only consent but also a celebration with peculiar formal elements, agreements on the patrimonial regime and many other features pertaining the object of the agreement and the parties' requisites (for example, somewhere the different sex of the spouses)²⁷. Hence, there are gaps between the law in the books and the law in action.

Such methodological approach helps in discovering and underlining the differences between the rule stated by the court and the one that is actually applied, between the judge's statement of the rule and the holding of the case, identifying the relevant facts, which lead the court to a certain outcome.

Within a single legal system, the legal rule is not unique and univocal, because courts can find a certain legal rule, different in part or at all from the scholar's one or from the literal meaning of the statutes. Going deeper in the analysis, each formant itself can be dystonic, so that the rule described in the headnotes of a court's ruling can be inconsistent with the actual *rationale* of the decision, or the definition given by an article of a code can be incoherent with the detailed rules contained in the code itself.

²⁷ Sometimes such differences are the result of ancient heritages and in some others are the product of different and more recent policy's choices. For an historical perspective and overview, see J. Goody, *The development of the family and marriage in Europe*, Cambridge University Press, London, 1983; Id., *The European Family*, Wiley-Blackwell, Oxford, 2000. For a comparative synchronic overview, see P. Vlaardingerbroek, *Trends in the development of family law in Europe. Comparative perspectives*, in F.X. Kaufmann et al (eds.), *Family life and family policies in Europe: Problems and issues in comparative perspective*, vol. II, Oxford University Press, 2002, pp. 120-148; F.X. Kaufmann, *Politics and policies towards the family in Europe: a framework and an inquiry into their differences and convergences*, in F.X. Kaufmann et al. (eds.), above cited, vol. II, Oxford University Press, London-New York, 2002, pp. 419-488; J.M. Scherpe (ed.), *European family law, vol. III, Family law in a European perspective*, E. Elgar Pubbl., Cheltenham-Northampton, 2016. In this last volume, in particular, see the contributions by C. Sorgejerd, *Marriage in a European perspective*, pp. 3-40; and by M. Antokolskaia, *Divorce law in a European perspective*, pp. 41-81.

In such circumstances the factual approach has become essential in order to understand how formants do work²⁸, not only, in order to organize a case law analysis, but with the thicker goal of considering each formant a source of the law, competing with all the other sources to catch and detect the effective and practiced rule, that we want to describe in our map.

4. The Common Core method and functionalism

In order to address the issue regarding the CEFL method and work as clearly as possible, it is appropriate to dwell briefly on the distinction between the notion of functionalism and the methodology of the common core.

Functionalism is founded on the premise that legal systems face similar problems for which they may take different measures yet to reach similar results in the end. The common core method suggests that legal systems despite their *prima facie* diversity share a common core. So, both methods are based on the idea that legal systems are not entirely unique but have their elements of sharing.

If we look at the way comparative studies are performed, both methods are quite similar. At a first step, a functionalist approach starts from the statement of the problem in functional terms; while the Common Core one starts with questionnaires, so with questions and hypotheticals. At a second step, functionalism requires an objective presentation of solution by each legal system examined; while common core's participants work on individual reports by country experts (national rapporteurs), answering questions. At a third step functionalism asks for comparison, while the common core approach looks forward to the discussion of the individual reports, sometimes modifying or adjusting the questionnaires, requiring new answers. At a fourth step the functionalist approach evaluates the results from a strict functional perspective; whereas the common core method asks for a general report, pointing out differences and commonalities²⁹.

²⁸ R. Sacco, *Legal formants: A dynamic approach to comparative law*, *The American Journal of Comparative Law*, II, 39, 1991, pp. 343-401; Id., *Circolazione e mutazione dei modelli giuridici*, *Digesto civ.* II, Turin, 365 *et seq.*; Id., *Formante*, *Digesto civ.* IV, Turin, 438 *et seq.*; A. Watson, *From legal transplants to legal formants*, in *American Law Journal of Comparative Law*, 43, 1995, pp. 469 *et seq.*; P.G. Monateri - R. Sacco, *Legal formants*, in P. NEWMAN (ed.), *The new Pelgrave dictionary of economics and the law*, vol. 2, MacMillan, London, 1998, pp. 531 *et seq.*; P.G. Monateri, *Legal formants and competitive models: understanding comparative law from legal process to critique in cross-system legal analysis*, University of Turin, School of law, Papers, 2008, electronic copy available at <http://ssrn.com/abstract=1317302>, 5.

²⁹ On functionalism and comparative law, see R. Michaels, *The Functional method of comparative law*, in *Duke Law School Legal Studies*, research paper n. 87, November 2005, available on line at <http://ssrn.com/abstract=939826>; J. Husa - J. Smits, *A dialogue on comparative functionalism*, in *Maastricht Journal of European and Comparative Law*, 18, 2011, electronic copy available at <http://ssrn.com/abstract=1965933>; P.G. Monateri, *Methods in comparative law: an intellectual overview*, in P.G. Monateri (ed.), *Methods of comparative law*, Edward Elgar Pub., Cheltenham-Northampton, 2013, pp. 7-24, an electronic version is available at http://papers.ssrn.com/sol3/paper.cfm?abstract_id=2151819; J. Gordley, *The functional method*, in P.G. Monateri (ed.), cited above, Edward Elgar Pub., Cheltenham-Northampton, 2013, pp. 107-

We can say that these approaches have many common premises and goals, even though the common core method has its specificities in the questionnaires and the seminar discussion. Generally speaking, we can say that the Common Core of European Private Law can be considered an experience, where a functional analysis is performed on a large scale as a collaborative effort.

5. The Commission of European family law

The goals and the methodological approach of the Commission on European Family Law (CEFL) are to some extents far from what it has been exposed above.

The Commission, established in September 2001 in Utrecht³⁰, is made up of experts in family law and comparative law, from all the Member States of the European Union and other European countries.

The primary objective of the CEFL is to provide, on a theoretical and practical level, for the harmonization of family law in Europe. The objective should be achieved in the following way:

- Preparation of a report on the current state of comparative research concerning the harmonization of family law in the individual European States;
- mutual exchange of experiences and coordination of future research activities;
- identification of a common basis for the resolution of the different legal problems, through a comparative analysis of the European legal systems;
- determination of the role played by (potential) future EU Member States in the process of harmonizing family law.

119. On functionalism and on the way in which it has been reconsidered through the factual approach, see M. Grazia-dei, *The functionalism Heritage*, in P. Legrand - R. Munday (eds.), *Comparative legal studies: Traditions and transitions*, Cambridge, 2003, pp. 100 *et seq.* On the necessity to over pass the formula of the *praesumptio similitudinis*, which is not enough to ensure a reliable map of similarities and divergences, as, instead, thought by K. Zweigert-H. Kotz, *Introduzione al diritto comparato*, vol. I, Giuffrè, Milan, 1988, p. 44, see U. Mattei - T. Ruskola - A. Gidi, *Schlesinger's comparative law*, VIII ed., New York, 2009, p. 70. For an analysis on the links between the textual approach and the functional approach, see V. Curran, *Cultural immersion, difference and categories in U.S. Comparative Law*, in *Am. J. Comp. L.*, 46, 1998, pp. 43 and 60. On the Common Core approach's peculiarities, see M. Bussani - U. Mattei, *Making European Law. Essay on the "Common Core"*, Trento, 2000; M. Bussani - U. Mattei, *The Common Core Approach to European Private Law*, in *The Columbia Journal of European Law*, 3, 1997-1998, pp. 338 *et seq.*; V. Grosswald, *On the shoulders of Schlesinger: The Trento Common Core of European Private Law*, in *European Review of Private Law*, 1, 2003, pp. 66-88. On the differences and commonalities between functionalism and common core approach, see A. Frohlich, *Is the Common Core Method a Variation of Functionalism?*, available at <https://comparelex.org/2014/10/24/is-the-common-core-method-a-variation-of-functionalism/>; with a critical position on the common core's experience, see G. Frankenberg, *How to do projects with comparative law: notes of an expedition to the Common Core*, in P.G. Monateri (ed.), cit., Edward Elgar Pub., Cheltenham-Northampton, 2013, pp. 120-143.

³⁰ The manifesto is represented by the collective volume, K. Boele Woelki (ed.), *Perspective for the unification and harmonization of family law in Europe*, Intersentia, Oxford-New York, 2003.

The main outcome expected from the Commission is the formulation of principles of European family law, which seems particularly appropriate for the harmonization of family law in Europe, especially (but not only) when international, transnational elements are involved in the relationships under consideration.

*«General principles of European family law are being considered for various purposes. Firstly, they may function as a source of inspiration for national and international legislators. A second function is for a European family law to act as an alternative/subsidiary law, which is applicable in the case of a legal relationship having foreign elements and where the national law indicated by the conflict law cannot be discovered by the court. A third function is that suggested by De Groot: the use of an optional European family law in international legal relationships instead of resorting to national law. Alongside national legal systems there could be, as it were, a transnational family law system that parties could specifically declare to be applicable to their legal relationship. This vision presupposes the fact that the conflict law of the applicable court allows for a legal choice in all the fields of persons and family law. Although party autonomy is gaining ground in international family law, it still does not specifically lead, in contrast to international property law, to its predominance in the private international law systems of Europe».*³¹

Actually, searching for the “better rule”, as intended by the CEFL, implies comparative efforts, even if the goal is finding the applicable law through the private international law framework or general principles in order to harmonize national legislations³². In fact, a mapping effort is needed anyway, but the *discrimen* can be caught trying to understand if the comparative investigations and insights affect only different national legislations or go through other legal formants, as the Common Core approach suggests.

The CEFL’s comparative work might also be realized through the use of functionalism, but, since the author of this article is not a member of the Commission, it is impossible to state with certainty if functionalist approaches have been considered or not in CEFL’s work.

The Commission applies the method of US restatements³³ in order to extrapolate the aforementioned principles, which are the expression of the synthesis of the different legal systems and inspiration for national legislators.

³¹ Cfr. K. Boele Woelki, *The road towards a European family law*, in *Electronic Journal of Comparative Law*, November, 1997, in <http://www.ejcl.org/ejcl/11/art11-1.html>.

³² These differences between the CCFL and the CEFL methodology are stressed also by K. Boele Woelki, *Common Core and Better Rule in European Family Law*, Intersentia, Antwerp, 2005.

³³ On the US restatement’s nature, aims and methodology, see R. Bauman, *Ideology and Community in the First Wave of Critical Legal Studies*, University of Toronto Press, Toronto, 2002, p. 365-370; R. Braucher, *Interpretation and Legal Effect in the Second “Restatement of Contracts”*, in *Columbia Law Review*, 1, 1981, pp. 13-18; L. Jacobs, *Legal Realism or Legal Fiction? Impracticability Under the Restatement (Second) of Contracts*, in *Com. L.J.*, 87, 1982, pp. 289 *et seq.*; J. Kelly, *The Codification of Contract Law in the Twentieth Century*, in *Dick. L. Rev.*, 88, 1989, p. 289. In Italian, see R. David - C. Jaufret Spinosi, *I grandi sistemi giuridici comparati*, Cedam, Padua, 2004, pp. 363-354; A. Gambaro - R. Sacco, *Sistemi giuridici comparati*, Utet, Turin, 1996, pp. 210-215; with new considerations on the nature, the last edition by A. Gambaro - R. Sacco, *Sistemi giuridici comparati*, Utet, Turin, 2018, pp. 158-159. U. Mattei - E. Ariano, *Il modello di common law*, Giappichelli, Turin, 2018, p. 323; T.M. Jagear Fine, *Il diritto americano*, XL Edizioni, Rome, 2011, pp. 93-96. The CEFL’s

It has been noted, however, that this method may prove to be inadequate, as the differences between the legal systems may be to such an extent that it may not be possible to identify common principles³⁴.

The Commission is convinced that a certain degree of harmonization of family law is necessary to facilitate the free movement of persons and to strengthen the European identity, in the wake of what has been done in the past by the Scandinavian countries and the United States through the so-called uniform laws³⁵.

In fact, the harmonization of family law in Europe is a difficult task³⁶, given that in the United States, despite the unity of culture and language, as well as of legal substratum, this branch is strictly competence of each State and that the Uniform Laws have achieved results that are not exciting.

Consistently, it has been pointed out that in the construction of a European common family law what is at stake is the denial of a “vital” aspect of the nation state.

There have been many criticisms of both the method and the objectives of this project³⁷, which, on the one hand, evokes broad and general formulations and, on the other hand, aims at identifying detailed prescriptions, which could find their typical dimension in a European civil code.

This is a position that it could be defined as “maximalist”, which aims at developing a body of legislation that immediately contains choices regarding the rules of detail.

aims at finding out a set of principles common to the European legal systems in a certain subject matter, as proved also by some book's titles, which are the final product of the research group, *id est* for example the one by K. Boele Woelki - F. Ferrand (eds), *Principles of European family law regarding divorce and maintenance between former spouses*, Intersentia, Anwerp-Oxford, 2004; K. Boele Woelki - F. Ferrand (eds), *Principles of European family law regarding parental responsibility*, Intersentia, Anwerp-Oxford, 2007; K. Boele Woelki - F. Ferrand (eds), *Principles of European family law regarding property relations between spouses*, Intersentia, Anwerp-Oxford, 2013. The collection contains many other titles. This short list is just to clarify the method oriented towards the research for “common principles”. In particular, the 2004 book on divorce and maintenance contains ten principles, listed and explained in part II of the volume and across three chapter, which are supposed to be used and followed by EU legislator or national ones to produce new norms and reforms on such subject matter. A sort of legal framework built through principles. For a deeper analysis of these principles and more in general of the methodology, see K. Boele Woelki, *The principles of European family law: its aims and prospects*, in *Utrecht law review*, 1, 2013, available on line at <https://www.utrechtlawreview.org/articles/10.../ulr.../download/>.

³⁴ W. Pintens, *Europeanisation of Family Law*, in K. Boele Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, Oxford-New York, 2003, p. 31.

³⁵ W. Pintens, *cit. above*, pp. 29 *et seq.*

³⁶ D. Martiny, *Is Unification of Family Law Feasible or Even Desirable?*, in AA.VV., *Towards a European Civil Code*, The Hague, London-Boston, 1998, p. 151. More generally, not with reference to family law, but to the possible methodological approaches and objectives of the harmonization of European private law, R. David (ed.), *International Encyclopedia of Comparative Law*, vol. II, cap. V, *International Unification of Private Law*, The Hague, Tübingen-New York, 1971; M. Bussani - U. Mattei, *Making European Law. Essay on the “Common Core”*, Trento, 2000; M. Cappelletti (ed.), *New perspective for a common law of Europe*, Leyden, Stuttgart, 1978.

³⁷ For a critique on the projects of harmonization of family law, see D. Bradley, *op. cit.*, in K. Boele Woelki (ed.), *Perspectives for the unification and harmonization of family law in Europe*, Intersentia, Oxford-New York, 2003, pp. 65-104; M. ANTOLOSKAIA, *The harmonization of family law: old and new dilemmas*, in *ERPL*, 2003, pp. 30 *et seq.*

This solution, however, takes for granted the possibility of finding specific common solutions regardless of the existence of a nucleus of common principles and values, from which, instead, it seems necessary to start if we want to ensure that legislative uniformity corresponds to uniformity also at the operational level.

It seems that the attempt to harmonize European family law through the work of a group of academics from all European countries can contribute partly to the circulation of models and to the search for the common roots of this branch of law. However, it is not possible to always find such roots. It is then necessary an open-minded attitude to the chance of being able to obtain results only with reference to certain principles and certain institutes. It is also necessary to consider the expansion of the competences of the European Union: the legislator has intervened by influencing European private international law³⁸, in a sectorial and not always systematic way, but pursuing a plan of modernization and challenge to established and traditional categories of domestic private law. This is done in an attempt to bring out different and alternative principles without formally affecting the values that constitute the heritage – often interfering with its cultural settlements and legal thinking – of individual local systems.

Probably, this could be less problematic, in terms of policy of law, given the weakening of the ethical-social weight of legislative rules and the strengthening of general principles, especially in relations of international law, i.e. in the wider legal space of human relations. In this sense, the tendency towards the construction of the European unity by principles and through the so-called soft law³⁹ is undeniable, in contrast to the hard one of the legislative unification, *i.e.*, imposed from above through a binding normative corpus.

Such an approach has its strength precisely in its weakness, meaning that the elaboration of guiding principles, without the authority of the law, allows those same principles to circulate, be recalled and used, as long as they are able to meet the real needs of the international community they are addressed to. In this way they are effectively competitive with respect to other regulatory systems, so as to be accepted and integrated gradually but steadily in their context of reference⁴⁰.

³⁸ The reference is to the so-called Brussels I, Brussels II and II-*bis* regulations on the circulation of judgments in matters of separation and divorce and parental responsibility; to the Regulation No 4/2009 on maintenance obligations; to the Regulation No 1259/2010 on enhanced cooperation in the area of the law applicable to disputes in matters of separation and divorce and parental responsibility; to the Regulation No 1103/2016 on matrimonial property regimes and No 1104/2016 on property consequences of registered partnerships .

³⁹ G. Zagreblesky, *Il diritto mite*, Einaudi, Turin, 1992, *passim*; A. Di Robilant, *Genealogies of Soft Law*, in *Am. J. Comp. Law*, 54, 2006, pp. 499 *et seq.* In particular, with regard to the activity of the Court of Justice in the sector that we deal with and with specific reference to the preliminary ruling on the subject of free movement of persons, which affects family relations, see S. Peers, *Who's judging the watchmen? The judicial system of the "area of freedom security and justice"*, in *Year book Eur. Law*, 1998, pp. 365 *et seq.*; H. Labayle, *Les nouveaux domaines d'intervention de la Cour de justice: l'espace de liberté, de sécurité et de justice*, in M. Dony - E. Briobosia (eds.), *L'avenir du système juridictionnel de l'Union européenne*, Éditions de l'Université de Bruxelles, Brussels, 2002, pp. 73 *et seq.*

⁴⁰ On the circulation and imitation of different models through legal transplants, see A. Watson, *Legal Transplants and law reform*, in *L.Q.R.*, 92, 1972, pp. 79 *et seq.*; *Id.*, *Law and legal change*, in *Camb. L.J.*, 38, 1978, pp. 313 *et seq.*; *Id.*, *Two-*

6. The role of international private law in harmonizing family law in Europe

A further relevant approach in this comparison of methods is that of private international law. The path retraced, during this analysis, is gradual and limited to the instruments of private and procedural international law⁴¹ and, therefore, to the relations that are characterized by an element of trans-nationality. It started from an initial intervention in the field of jurisdiction and recognition of decisions in matrimonial matters and parental responsibility and continued with the regulation UE/1259/2010 for an enhanced cooperation on the law applicable to divorce and legal separation, and with the two recent 2016' regulations on matrimonial property regime and on registered partnerships' property regimes (EU/1103/2016 e EU/1104/2016). All these pieces of legislation are characterized by the intention of harmonizing the rules of conflict.

This is a long process, where the harmonization of conflict rules would appear to be only an intermediate stage, a first way of simplifying the discipline, which could be followed by a further stage.

Tier Law, an approach to law making, in *Int. & Comp. L. Q.*, 1978, pp. 552 *et seq.*; Id., *Legal change: sources of law and legal culture*, in *Un. Of Pennsylvania L. Rev.*, 131, 1983, pp. 1121 *et seq.* With some criticisms on Watson theory, see H. Kahn-Freund, *Book Review, Legal Transplants*, in *L.Q.R.*, 91, 1975, pp. 292 *et seq.*; W. Twining, *Diffusion of law: a global perspective*, in *Journal of Legal Pluralism*, 49, 1, 2004, pp. 34-35; Id., *General jurisprudence: understanding law from a global perspective*, Cambridge University Press, London, 2009; P.G. Monateri, *The 'Weak Law': Contaminations and Legal Cultures (Borrowing of Legal and Political Forms)*, 2008, available on line at the Alan Watson Foundation website: www.alanwatson.org. On legal formants and circulation of models, see again R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, in *The American Journal of Comparative Law*, 39, I, 1991, pp. 1-34 and II, pp. 343-402; R. Sacco - A. Gambaro, *Sistemi Giuridici Comparati*, Utet, Torino, 1996, pp. 4-7; R. Sacco, *Introduzione al diritto comparato*, Utet, Turin, 1992, p. 43; Id., voce *Circolazione e mutazione dei modelli giuridici*, in *Digesto civ.*, II, Utet, Turin, pp. 365 ss. For the dialogue between the Rodolfo Sacco's and Alan Watson's theories see S. Ferreri, *Assonanze transoceaniche. Tendenze a confronto*, in *Quadrimestre, rivista di diritto privato*, 1, 1993, p. pp. 179 *et seq.*; U. Mattei, *Why the wind changed. Intellectual leadership in western law*, in *Am. J. Comp. Law*, 42, 1994, pp. 195 *et seq.*; A. Watson, *From legal transplants to legal formants*, in *American Law Journal of Comparative Law*, 43, 3, 1995, pp. 469 *et seq.*; P.G. Monateri, *Black Gaius*, in *Hastings L.J.*, 51, 2000, pp. 510-513.

⁴¹ For an overview regarding this line of intervention, please refer to A. Anceschi, *La famiglia nel diritto internazionale privato*, Giappichelli, Turin, 2010; S. Bariatti, *La famiglia nel diritto internazionale privato*, Giuffrè, Milan, 2007; S. Bariatti - G. Danovi (eds.), *The family without frontiers. Proceedings of the conference held at the Faculty of Law of the University of Milan on 25 May 2007*, Cedam, Padua, 2008. For foreign doctrine, see K. Boele Woelki, *Unification and harmonization of private international law*, in AA. VV., *Private law in the international arena. Liber amicorum Kurt Siebr*, The Hague, Asser Press, 2000, pp. 61-77; J. Meeusen - M. Pertegás-G. Straetmans - F. Swennen, (eds.), *International family law for the European Union*, Intersentia, Antwerpen-Oxford, 2007; there, but with a different approach, more oriented towards the perspective of private international law as an instrument of harmonization, D. Martiny, *Objectives and values of private international law in family law*, pp. 69-99.

The next step would be the harmonization and alignment of the national legislations, limited to matters having a direct impact on the functioning of the market⁴², i.e. the matrimonial property regime of married or unmarried couple⁴³.

However, this path always leaves the parties the power to choose whether to use the matrimonial property regime drawn up at the supranational level.

Therefore, it will be the private autonomy that determines the applicable regime and it will be the choice of the persons involved in the relationship, which will determine the withdrawal of a detailed rule of national law in favor of another rule developed at another level.

In other words, private autonomy - in family relations - becomes a function and measure of the principle of subsidiarity⁴⁴, as parties will choose the law they feel more closed to them, the model that better fit their situations. Private autonomy, therefore, will contribute to the competition between models and different systems. In fact, the rule governing the relationship can be identified directly by the parties. Only if this choice is not made or is inefficient or even contrary to fundamental values and principles (for example, in contrast with the limit of public policy), a national or supranational intervention is justified.

Otherwise, even if the elimination of regulatory differences would solve at the origin every problem with regard to the rules applicable to the transnational relations and would remove the differences between the Member States of the Union, it is not a desirable solution.

In the area of family law, it is not useful to go back over the long and complex road that has characterized the harmonization of contract law, both because family relations do not directly affect trade and the market, but only in a mediated way, so that the path would probably be much longer, and also because this is not an aim of the Union at all, since the Union's aim is to respect national identities in such subject matter.

⁴² M. Fallon, *Constraints of internal market law on family law*, in J. Meeusen - M. Pertegás-G. Straetmans - F. Swennen, (eds.), *International family law for the European Union*, Intersentia, Antwerpen-Oxford, 2007, pp. 149-233.

⁴³ On specific nature of the issues involved in family relations, references should be made to D. Martiny, *Is unification of family law feasible or even desirable?*, in A.S. Hartkamp (ed.), *Towards a European Civil Code, Kluwer Law International*, Nijmegen, 2004, pp. 307-333; M. Costa, *L'intervento dell'Unione Europea per l'armonizzazione del diritto di famiglia*, in *Famiglia*, 2006, pp. 125-153; F.R. Fanetti, *Codificazione europea per l'unificazione dei procedimenti di separazione e di divorzio*, in *Famiglia, Persone e Successioni*, 2008, pp. 346-360; F. Moro, *Observations sur la communautarisation du droit de la famille*, in *Riv. dir. intern. priv. e proc.*, 2007, pp. 675-712; M.C. Andriani (ed.), *Un nuovo diritto di famiglia europeo*, Cedam, Padova, 2007.

⁴⁴ On such principle, see G. Berman, *Taking subsidiarity seriously. Federalism in the European Community and the United States*, in *94 Columbia Law Review*, 1994, 331; R. Van Den Bergh, *The subsidiarity principle in European Community Law. Some insights from law and economics*, in *I Maastricht Journal of European and Comparative Law*, 1994, p. 337; H. Siebert - M.J. Koop, *Institutional competition. A concept for Europe?*, The Free Press, New York, 1990. For an analysis linked to the issues of models' competition through the tools of international private family law, see M. Tenreiro - D. Ekström, *Unification of private international law of family law matters within the European Union*, in K. Boele Woelki (ed.), *Perspective for the unification and harmonisation of family law in Europe*, Intersentia, Oxford-New York, 2003, pp. 364 et seq.

Without any attempt at reducing the scope of the problem or minimizing the impact of the matrimonial property regime on commercial transactions within the single market, the question to be asked is: why do almost all the disputes brought to the attention of the European Courts concern violations of fundamental rights (as enshrined in the ECHR or the Nice Charter), gender discrimination and discrimination on grounds of sexual or religious orientation, family reunification, the best interests of the child and parental responsibility? Why has it been so rare that disputes over the different matrimonial property regimes in the various Member States of the Union have been brought before the European courts? And this, also in consideration of the fact that property can be considered at many extents a fundamental right, because it is mentioned as such in many Constitutions of the member States and in the Nice Charter (art. 17), which is an essential part of the TFEU.

The questions are rhetorical, given that, as it is well known, according to a “general declamation” the European Union has no competence in family matters⁴⁵.

From this point of view, new synergies would be created between policies related to the protection of human rights, those related to the cooperation area and those more closely linked to the issues of the market, so that we have indirect effects of market rules on family law ones.

The Court of Justice, for example, in the case *Garcia Avello*⁴⁶, has stigmatized the behavior of the Belgian authority, which had denied the attribution of the double surname (paternal and maternal) to the children of a Spanish citizen and a Belgian citizen, residing in Belgium.

The European judges reaffirmed the importance of the principle of loyal cooperation between States (international private law principle), making it clear that they must take actions in order to achieve the aims set at EU level and to promote the free movement of persons in the common market.

⁴⁵ That is true, even though the Union has laid down the legal basis for the adoption of acts able to affect the family, as also noted by C. Honorati, *Verso una competenza della Comunità europea in materia di diritto di famiglia*, in S. Bariatti (ed.), *La famiglia nel diritto internazionale privato*, Giuffrè, Milan, 2007, pp. 3-45.

⁴⁶ ECJ, 2 October 2003, C-148-02, in *Europa e dir. priv.*, 2004, pp. 3 *et seq.*; in *Dir. comunitario e scambi internaz.*, 2004, pp. 59 *et seq.*; in *Nuova giur. civ. commentata*, 2004, pp. 461 *et seq.* For the indirect effects of EU rules on market and human rights into family law matters and personal statuses, see A. Iannello Saliceti, *La cittadinanza dell'Unione Europea*, in P. De Cesari (ed.), *Persone e famiglia, Trattato di diritto private dell'Unione Europea*, vol. II, Utet, Turin, 2008, pp. 90 *et seq.*, available on line at <https://www.lider-lab.sssup.it/lider/pubbl/la-cittadinanza-dellunione-europea>. On the indirect effects of the ECJ's and of the ECHR's case law in harmonizing family law, see K. Lenaerts, *Interlockin legal orders or the European Union variant of "E pluribus unum"*, in A.R. Nafzinger-S.C. Symeonides (eds), *Law and justice in a multi state world. Essay in honour of Arthur T. von Mehren*, Transnational Publisher, New York, 2002, pp. 751 *et seq.*; G. Ferrando, *Il contributo della Corte Europea dei diritti dell'uomo all'evoluzione del diritto di famiglia*, in M.C. Andriani (ed), *Un Nuovo diritto di famiglia europeo*, Cedam, Padua, 2007, pp. 136 *et seq.*; *Il diritto di famiglia oggi: c'è qualcosa di nuovo, anzi d'antico*, in *Politica del diritto*, 2008, pp. 30 *et seq.*; E. Caracciolo di Torella - E. Reid, *The changing shape of the "European family" and fundamental rights*, in *European Law Review*, 2002, pp. 80-90.

The “free circulation of *status*es” is not, however, a foregone or already achieved goal, since it does not find unconditional recognition in every state⁴⁷.

However, it is important to point out that it seems difficult to highlight a contrast between detailed rules on family property regimes and the principles and rights enshrined in the above-mentioned Charters, or between the local rules themselves and the rules of the Treaties governing the single market⁴⁸.

As a matter of fact, the question of patrimonial relations affects the regime of circulation of goods, but it seems that to ensure the correct functioning of the single market, in this ambit, the approach already used at European level with the Regulations of private international law can be adequate.

That is to say, the recognition and circulation of judicial and non-judicial decisions, the harmonization of conflict-of-law rules and the publication of foreign property regimes are adequate instruments for ensuring the proper functioning of the market, so that the harmonization of rules of substantive law would appear to be an abnormal means for this purpose⁴⁹.

The method of dialogue, cooperation and normative differentiation, introduced with the season of regulations of private and procedural international law, as mentioned above, seems to be a winning one⁵⁰, since, by allowing the parties to choose the applicable law

⁴⁷ A clear reference is made here to the extremely heterogeneous solutions at the level of national laws concerning registered unions, homosexual marriages and consequent personal *status*es. In this regard, there are scholars who point out the danger that a model of relations between individual States and EU excessively marked by the principle of recognition of family pluralities runs the risk of falling into a too neutral attitude of the EU legislator and reveals the existence of a European law that refuses to be the bearer of its own values. F. Sweinnen, *Atypical families in EU (private international) family law*, in J. Meeusen - M. Pertegàs et al. (eds), *International family law for the European Union*, Intersentia, Antwerp, 2006, pp. 289-424; D. BRADLEY, *op. cit.*, in K. Boele Woelki (ed.), *Perspectives for the unification and harmonization of family law in Europe*, Intersentia, Oxford-New York, 2003, pp. 65-104.

⁴⁸ M. Antokolskaia, *Objectives and values of substantive family law*, in J. Meeusen - M. Pertegàs - G. Straetmans - F. Swennen, (eds.), *International family law for the European Union*, Intersentia, Antwerpen-Oxford, 2007, pp. 49-76.

⁴⁹ The innovative character of this approach has been emphasized by scholars such as S. Poillot Peruzzetto - A. Marmisse, *Le droit international privé communautaire de la famille*, in *Revue des affaires européennes*, 2001-2002, pp. 460-468; F. Davì, *Il diritto internazionale privato italiano della famiglia e le fonti di origine internazionale o comunitaria*, in *Riv. dir. internaz.*, 2002, pp. 861-902; S. Tonolo, *Le nuove fonti comunitarie del diritto internazionale privato e processuale*, in *Studium iuris*, 2002, pp. 1048-1052; J. Sedlmeier, *Diritto processuale internazionale ed europeo. Recenti sviluppi concernenti il reciproco riconoscimento delle decisioni giudiziarie in Europa e nel mondo*, in *European Legal Forum*, 2000, pp. 34-45; P. McEleavy, *The Bruxelles II Regulation: How the European Community has moved into family law*, in *Int. Comp. Law Quarterly*, 2002, pp. 883-908.

⁵⁰ Although there have been some critical comments on some of the interventions, see B. Ancel - H. Muir Watt, *La désunion européenne: le Règlement dit Bruxelles II*, in *Revue critique de droit international privé*, 2001, pp. 403-457; Id., *Aliments sans frontières. Le règlement CE n. 4/2009 du 18 décembre 2008 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et la coopération en matière d'obligations alimentaires*, in *Revue critique de droit international privé*, 2010, pp. 457-484. Indeed, although they cannot be considered the expression of a genuine family policy, the regulations of international law represent a core of the European private international law, Union-driven and highly innovative. See, F. Pocar, *La comunitarizzazione del diritto internazionale privato: una “European Conflict of Law Revolution”?*, in *Riv. dir. int. priv. proc.*, 2000, pp. 873 et seq.; J. Basedow, *The communitarization of the conflict of laws under the Treaty of Amsterdam*, in *Common law market review*, 2000, pp. 687 et seq.; R. Jessurun d'Oliveira, *The EU and the metamorphosis of private international law*, in *Reform and development of private international law. Essays*

and the competent court in the regulation of their relations, it could lead to the identification of the models and solutions that are the “most chosen”, as they are the most efficient and functional to the needs and interests of the subjects involved.

This would determine the identification of a *better rule* that comes from practice and case law⁵¹, formed on the basis of the choices made by the parties, and not from an academic legal elite, which moves like an obscure legislator⁵².

Is not possible, and neither desirable, denying here the central role of the comparative doctrine and method, nor specifically the contribution made by the CEFL, considering that the comparison serves mainly to better know other legal models different from one’s own, to the measurement of differences, rather than for practical purposes⁵³.

In order to achieve the objectives pursued by the Union in the field of family law, a model allowing dialogue between national laws, cooperation between States but regulatory differentiation seems sufficient.

Combining the model, already described, of the Regulations of private international law and procedural law, with the enhancement of private autonomy and the free will of the parties in the choice of the rules that will govern their relationship, it could be shaped a system in which, as mentioned, the *better rule* will be identified by the parties, without prejudice to the protection of fundamental rights⁵⁴.

Moreover, when the parties themselves choose the discipline to be applied to the legal relationship and, therefore, the regime that will govern it, the agreement on this point should at least ideally reduce pathological moments and the possibility of disputes.

If these solutions, which have been identified by consensus, should nevertheless lead to disputes, the interpretative activity of the national courts, also chosen by the parties, or

in honour of Sir Peter North, Oxford University Press, Oxford, 2002, pp. 111-136; L.S. Rossi, *L'incidenza dei principi del diritto comunitario sul diritto internazionale privato: dalla “comunitarizzazione” alla “costituzionalizzazione”*, in *Riv. dir. int. priv. proc.*, 2004, pp. 63 *et seq.*

⁵¹ On the circulation of models from formant to formant, see again R. Sacco, *cit.*, in *American Journal of Comparative Law*, 39, 1991, I, pp. 1-34; *Id.*, *cit.*, in *American Journal of Comparative Law*, 39, 1991, II, pp. 343-401; P.G. Monateri - R. Sacco, *Legal formants*, in P. Newman (ed.) *The New Palgrave. A dictionary of economics and the law*, Mc Millan, London-New York, 1998, p. 531 *et seq.*

⁵² See again, U. Mattei, *cit.*, in *Diritto e Impresa/Europa*, 1998, p. 216 e A. Gambaro, *cit.*, in *Foro it.*, 1983, 106, V, coll. 85-93.

⁵³ G. Gorla, voce *Diritto comparato*, in *Enciclopedia del diritto*, 1964, XII, p. 928 e R. Sacco, *Introduzione al diritto comparato*, Utet, Turin, 1992, pp. 3 *et seq.*; P.G. Monateri, *Pensare il diritto civile*, Giappichelli, Turin, 1995, pp. 89-153; H.M. Hart - A.M. Sacks (eds.), *The legal process: basic problems in the making and application of law*, Westbury, New York, 1994.

⁵⁴ See G. Zagrebelsky, *Corte, Convenzione europea dei diritti dell'uomo e sistema europeo di protezione dei diritti fondamentali*, in *Foro it.*, 2006, pp. 353 *et seq.* For an interesting approach to the system of fundamental guarantees as a limit not only to the action of public authorities, but also to the private autonomy and action of the individual, please refer to P. Alston, *L'era della globalizzazione e la sfida di espandere la responsabilità per i diritti umani*, in P. Alston - A. Cassese (eds.), *Ripensare i diritti umani nel XXI secolo*, EGA, Turin, 2003, pp. 55-56; V. Coussirat Coustère, *Famille et Convention européenne des Droits de l'Homme*, in AA. VV., *Protection des droits de l'homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdall*, Köln-Berlin-Bonn-München, 2000, pp. 281-307.

of the European Courts, in the event of a conflict between the rules identified by the parties and the European rules contained in the Treaties and in the Charters of Fundamental Rights, will lead to the “cassation” of models which do not conform to the principle of free movement of persons⁵⁵, to the fundamental freedoms and to the common area of freedom, security and justice⁵⁶.

Such an approach would guarantee a certain level of diversity in the rules of detail⁵⁷ and, therefore, of competition at institutional level, but also a common interpretation of the limits to private autonomy and, thus, a certain level of uniformity in the solutions that must remain within the boundaries of the common general principles⁵⁸.

In the area of family relations, indeed, the hypothesis – of those who point out that when moving on to technical details, the music changes and the difficulties of finding a common nucleus could become paralyzing – seems well founded⁵⁹.

The model established with the Regulations of private international law could convey decisions and solutions that could become shared and constitute a common future substratum, over which the hermeneutical activity of the European Courts and national judges could be grafted.

The activity of the Courts would function as an instrument of integration and interpretation of the rules and choices made by the parties, and at the same time it serves as a tool for

⁵⁵ See, for example, ECJ, 13 July, 1983, C-152/82, *Forcheri e Marino c. Stato Belga e a.*, in *Racc.*, 1983 p. 2323, with a comment by G. Druésne, in *Revue trim. droit. eur.*, 1984, pp. 294 *et seq.*; commented also by G. Starkle, in *Cabiers droit eur.*, 1984, pp. 672 *et seq.*

⁵⁶ In this sense, even before the Lisbon Treaty, E.M. Honnerlein, *Profili di un diritto europeo della famiglia e della filiazione – il ruolo della Convenzione Europea dei diritti dell’Uomo*, in *The European Legal Forum*, 2000, pp. 252-260; P. De Cesari, *Principi e valori alla base della disciplina comunitaria in materia di diritto di famiglia*, in G. Pascuzzi (ed.), *La famiglia senza frontiere*, University of Trento, Trento, 2006, p. 9 and pp. 23-26.

⁵⁷ The importance of competition and legal pluralism as a heritage to be preserved is supported, among others, also by R. Sacco, *The system of European private law. Premises for a European code*, in A. Pizzorusso (ed), *Italian Studies in law. A review of legal problems*, Nijhoff, Dordrecht, 1992; L. Antonioli Deflorian, *La struttura istituzionale del nuovo diritto comune europeo: competizione e circolazione di modelli*, Università di Trento, Trento, 1996; N. Reich, *Competition between legal orders. A new paradigm of EC law*, in *Common Market Law Review*, 29, 1992, p. 862.

⁵⁸ The relevance of the principles of law, which are common to the Member States as far as we are concerned, in the reconstruction of the EU notions of family law, is clear from the examination of the case law. For all of them, see EC J, 17 April 1987, C-59/85, *Reed*, in *Racc.*, 1986, p. 1283. In the doctrine, see K. Lenaerts, *Le droit comparé dans le travail du juge communautaire*, in F.R. Van der Mensbrugge (ed.), *L’utilisation de la méthode comparative en droit européen*, Presse Universitaires de Namur, Namur, 2003, pp. 111-168. For a different approach, A. Rottola, *La valutazione internazionale-privatistica dei presupposti giuridici di norme materiali comunitarie*, in *Diritto dell’Unione Europea*, 2004, pp. 329-346.

⁵⁹ U. Mattei, cited above, in *Contratto e impresa/Europa*, 1998, p. 226. The author, with reference to the idea of the European code, proposed a systematic and meticulous use of the factual approach, discussing the common practical problems and looking for their effective solutions in all the national legal systems, through the use of advanced tools, such as the dissociated analysis of formants, with the objective of identifying the common core, but with the awareness that this could also lead to discover that simply there is no common core. With a critical attitude towards comparative efforts in family law, because of the values involved, see F. Nicola, *Family Law Exceptionalism in Comparative Law*, in *Am. J. Comp. L.*, 58, 2010, p. 777; M. Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, in *La. L. Rev.*, 62, 2002, pp. 773-782.

the evaluation of the legitimacy (in sense of compatibility with the legal system) of such choices⁶⁰.

In this way, a model identified in the practice of family relations, reinterpreted by a national court, passed through the European courts, is formalized in decisions and, subsequently, enters through the doors of the courts of the other Member States or is chosen again in practice, without any legislative mediation⁶¹.

Therefore, for some institutions and areas, these shared models could constitute an essential nucleus of solutions, which, together with the common fundamental principles and the further decisions of the Courts, could work to regulate family relations within the Union. For some time now, the Court of Justice and the European Court of Human Rights have played a crucial role in expressing and clarifying the fundamental principles⁶², the aims and also the limits of the European system, through a process of constitutionalizing the European Union law, ensuring its uniform application and effectiveness⁶³.

The double sense of circulation of models – from practice, governed by private autonomy, to national courts, from national courts to European courts and from these again to national courts⁶⁴ and to the practice of legal systems that do not know the models in question – represents a path of harmonization of legal systems that in many ways is more significant than the one promoted by institutional-legislative or doctrinal-legislative means alone.

As a matter of fact, here, the legal solution adopted is not determined by the imposition, conveyed through the Regulation or the Directive, but by the choice of the parties and then, in the case of disputes, by the interpretation of the judge, who uses the principle or the rule formulated by the European Court or endorsed by the Court after having im-

⁶⁰ T. Koopmans, *European law and the role of the Courts*, Butterworths, London-Dublin-Edinburgh, 1993; A. Adinolfi, *I principi generali nella giurisprudenza comunitaria e la loro influenza sugli ordinamenti degli Stati membri*, in *Riv. it. dir. pubbl. com.*, 1994, pp. 521 *et seq.*; D. Liakopoulos - M. Romani, *Il ruolo della Corte di Giustizia delle Comunità Europee. Tra integrazione comunitaria ed efficacia del diritto internazionale privato e processuale*, Cedam, Padua, 2009; G. Martinico, *L'integrazione silente: la funzione interpretativa della Corte di Giustizia e il diritto costituzionale europeo*, Esi, Naples, 2008; T. Giovanetti, *L'Europa dei giudici: la funzione giurisdizionale nell'integrazione comunitaria*, Giappichelli, Turin, 2009.

⁶¹ Many scholars have pointed out that the circulation of models takes place, more often than one can imagine, through formants other than the legislative one. For everyone, see Z. Zencovich, *Il modo di formazione della legislazione europea di diritto privato: un laboratorio comparatistico*, in R. Pardolesi (edited by), *Saggi di diritto privato europeo: persona, proprietà, contratto, responsabilità civile, private*, Esi, Naples, 1995, p. 124.

⁶² For example, L. Tomasi, *Le coppie non tradizionali (nuovamente) alla prova del diritto comunitario*, in *Riv. dir. int. priv. proc.*, 2004, p. 977, highlights the crucial role played by the Court of Justice in defining a broad concept of marriage. On these issues, see also N. Reich - S. Harbacevica, *Citizenship and family on trial: a fairly optimistic overview of recent Court practice with regard to free movement of persons*, in *Common Law Market Review*, 2003, pp. 615-638.

⁶³ See, P. Mengozzi, *I problemi giuridici della famiglia a fronte del processo di integrazione europea*, in *Famiglia e Diritto*, 2004, pp. 643-647.

⁶⁴ On the wide use of the comparative method by national and supranational courts, see G. Smorto, *L'uso giurisprudenziale della comparazione*, in *Europa e diritto privato*, 2010, pp. 223-241; Id., *Il giudice ed il diritto straniero*, in L. Vacca (edited by) *Scienza giuridica e prassi*, Jovene, Naples, 2011, pp. 291-308. See also, J. Bengoetxea, *The legal reasoning of the European Court of Justice: towards a european jurisprudence*, Clarendon Press, Oxford, 1993, p. 256; K. Lenaerts, *Le droit comparé dans le travail du juge communautaire*, in F.R. Van der Mensbrugge (ed.), *cited above.*, pp. 111 *et seq.*

plemented them by other countries. Mapping all these routes is the fundamental goal that should be reached through the use of the Common Core's Method in family law.

As far as family law is concerned, it seems that competition between solutions offered at the level of single legal systems can represent a valid alternative to the process of harmonization.

The doubts expressed by the doctrine and also by the Member States about the idea of uniform legal models and the increasingly minimal objective that characterizes harmonization are signs that should lead to the idea of abandoning imposed solutions, in favor of a greater development of competitive techniques between models, which are also encouraged by the (hopefully) ever-increasing legal, economic, social and cultural integration between the Member States.