

# **THEMIS 2011**

## **Observation File**

Second Working Session

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**Team Germany 1**

# Harmonisation of Family Law in Europe

## I. Italian Presentation

The Italian team pointed out that the concept of free market and the free movement of people are a very weak base for harmonization of the European family law.

Family law deeply depends on the history, culture, religion etc of the different countries. Therefore it has "grown" and developed differently in every European country.

They stated that Brussels II *bis* lacks a common definition of marriage, provision for divorce are preferred to the thought of upholding the marriage (*favor divortii*) and the consequences of the divorce are neglected. As Rome III includes the law that should be applied in case of divorce the missing link to the common market concept is obvious.

The problems can hardly be solved as the two approaches of creating a European law do not lead to sound results: The common core project must fail, because there is no common core. The best law concept must fail as there is no law system without inconsistencies.

European law should only guarantee basic human rights responding to family law, all member states should choose the way of transposing these rights within their law systems as they think they fit best within their systems. In the mean time some kind of interpretation of the national law in the light of these rights can be applied by the judges.

Thus, subsidiarity in family law means to respect the cultural differences between the European countries.

## II. French Presentation

The French team relied on the increased importance of European family law regulations because of increased movements between member states and because there are more and more "transnational-spouses". Yet, there was no comparison to earlier statistics. They pointed out the necessity of further harmonisation of family law within the European Union. This should guarantee legal certainty and avoid the rush to courts.

They reflected upon the history of harmonization in European family law by pointing out every single directive of the last years.

They talked about the problems of harmonization, of implementing directives in general and of different instruments to facilitate international cooperation.

It was concluded that only harmonization of family law can be considered as a way to secure fundamental rights. Cultural differences should not be emphasised.

## III. Amendments

The Italian presentation was on a very high legal level. The approach taken was often not only to state the current legal situation but also to ask critical questions showing the legal expertise of the Italian team.

Sometimes the speech was a bit too fast, which might also be stated in respect to the French team. The French team might have stated more clearly what kind of problems there may occur in respect to the harmonization process regarding family law.

There should be drawn a clear line between substantial law and collision law. In our opinion substantial family law is not only closely linked to cultural or historical developments. Throughout centuries family has been understood by people as their main way of living together closely linked to their culture. There was a big struggle to protect the "family" from the influence of the state. A European approach to determine substantial family law without a reliable ground for giving such regulations and without setting the conditions that people will accept such regulations will fail. Therefore cultural differences are legitimately pointed out.