

Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions, edited by Katharina Boele-Woelki, Frédérique Ferrand, Cristina González Beilfuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny and Velina Todorova, Intersentia, 2019, 280pp, ISBN 978-1-78068-788-9.

It is indisputable that the Commission on European Family Law (CEFL) has had a profound impact on both the academic study and practical application of family law across Europe. As any reader of this journal will know, since its creation in September 2001 CEFL has produced a series of Principles addressing a range of important family law issues spanning divorce, maintenance and property relations between former spouses, and parental responsibilities. Made up of an Organising Committee and a panel of eminent national experts, CEFL works towards the harmonisation of family law across Europe and the oft-cited Principles emanating from their work exemplify the true value of comparative family law. These Principles serve the dual purpose of assisting national legislators through providing inspiration as to how domestic laws can be modernised alongside offering a mechanism to check the effectiveness of existing national strategies. Ever alert to the changing nature of family composition and relationship patterns, CEFL have now shifted their focus away from their earlier prioritisation of marital relationships and in this book detailed a set of principles focussed on property, maintenance and succession rights of couples in *de facto* unions.

Exploring differences and commonalities across jurisdictions in relation to *de facto* unions is a timely enquiry. Since the production of the first CEFL principles in 2004, much has changed in family law and one key trend has been a drive towards recognising and protecting in law the non-marital family. Marriage, of course, still remains a popular option for many couples and, following the lead of the Netherlands in 2001, same-sex marriage has now become a reality for many Western European states indicating a longevity and future for that particular institution. But to focus too much on formalisation, whether through marriage or registered partnership, runs the risk of overlooking the general, albeit not universal, decline in marriage rates across Europe and the lived realities of couples who are choosing not to formalise their relationships. This trend is interrogated in the detailed Introduction of this book and supported using some rather striking statistics. Whilst some largely Eastern European jurisdictions have witnessed an increase in marriage rates over the past fifteen years, Denmark saw its marriage rate decrease by 28.5%, with the Netherlands following that trend with a decrease of 27% (pg 9). A more consistent trend is that the average age for men and women entering marriage has increased over the past ten years. CEFL also analysed registered partnership statistics, but unsurprisingly extrapolating trends here was harder to do given the wide variation in terms of their eligibility rules, statistical uptake and even existence owing to the fact that some of the jurisdictions surveyed had phased out their regimes following the introduction of same-sex marriage. In spite of these different approaches to formalisation, CEFL has still managed to navigate these complexities effectively and, where possible, discern important patterns so as to provide useful context for the Principles.

Before examining the substantive Principles, the methodology used by this project should be addressed. As noted above, CEFL promotes the harmonisation of substantive family laws owing to the fact that the European Union has no competence to do that under its treaty arrangements. Motivated by that desire, the approach taken by CEFL, carefully detailed in this

book, largely mirrors that adopted in their previous work. As is common with comparative family law study, CEFL used a detailed questionnaire containing 74 questions that was answered by experts that prepared 29 comprehensive National Reports reflecting the law as it stood in 2014. After meetings with the Expert Group, the Organising Committee engaged in a systematic analysis of the responses and formulated 27 Principles. Methodologically, this ambitious endeavour showcases the scope, rigour and richness in terms of legal data that is exemplified by CEFL projects. Indeed, alongside these Principles and the associated commentary contained in this book, all of the National Reports are available on CEFL's website (www.ceflonline.net) for those seeking greater clarification or insight into a particular aspect of a jurisdiction's approach.

As evidenced by the title, it is the position of *de facto* couples across Europe that is the primary focus of this book. Unsurprisingly, however, CEFL immediately encountered a perennial issue in this area, namely how we label the intimate relationships of individuals outside of marriage. From the outset, CEFL takes the sensible course of rejecting the use of the term 'cohabitation' as 'outdated and old-fashioned' and similarly rejects 'informal' (as distinct from formal statuses) believing that such term 'suggests that there is less commitment on the part of the persons involved, which...cannot be assumed' (pg 7). Instead, it is noted that during the course of the project CEFL switched the terminology to *de facto* unions. In many ways that decision is backed up by established practice given the fact that this term is widely used in Australia and New Zealand to describe such unions. However, without wanting to engage in further linguistic gymnastics, it could be questioned whether 'non-formalised' might have been better so as to avoid generating the comparison between '*de facto*' and '*de jure*' in the same manner CEFL sought to avoid contrasting 'formal' and 'informal'. After all, from a *de jure* perspective, the law rarely completely *ignores* cohabiting relationships and, if anything, when we think of *de facto* regimes in Australia and New Zealand what often comes to mind is their generosity and automatic nature, which stands very much in stark contrast to the largely weaker, ad hoc entitlements offered to cohabiting couples across Europe.

Nomenclature aside, the book then reveals how CEFL encountered further challenges in the creation of their Principles owing to the variation in data and statistics across Europe as to the nature, demographics and prevalence of *de facto* unions. The book notes how the statistics on the number of unions in existence ranged from comprehensive datasets to mere estimations, with some jurisdictions offering no data at all as official statistics on informal relationships do not exist. The same issues arose in relation to data on termination of a *de facto* relationship by separation or death. One observation emphasised in the book that is striking, but well-known to UK readers, is that in 2014 cohabiting couples were the fastest growing relationship type (pg 17). Similarly, that trajectory is mirrored by the fact that across Europe there has been a marked increase in children born outside of formal relationships with, on average, 40-50% born to parents that were not married or in a registered partnership.

The Introduction also proffers some great insights into entry into marriage by those previously in *de facto* unions. For example, one statistic revealed that 82% of couples in Denmark had cohabited before entry into marriage, in contrast to only 7% in Italy. These figures really prompt the reader to delve deeper into the National Reports to seek explanations, although hypotheses readily spring to mind such as the influence of religion in

a particular jurisdiction, the prevalence of cultural/societal expectations surrounding interpersonal relationships, and how far families are supported by the State.

Moving onto the law's response, CEFL details the international law context noting that there are no instruments existing at this level that deal explicitly with the position of *de facto* couples. This observation, however, is supplemented by the important fact that whilst a dedicated treaty for *de facto* unions may not exist, basic principles contained within other international conventions can be of assistance. Naturally, here the European Convention on Human Rights can certainly have a role to play via Articles 8 and 14 guaranteeing the right to respect for private and family life and the prohibition of discrimination on grounds of, *inter alia*, one's sex and marital status, respectively. What this observation reveals is that whilst the influence of the United Nations, Council of Europe and European Union in this context can certainly be developed further, it really is for the Member States to sculpt protections for *de facto* unions in the meantime. That endeavour is far from simple because legislators may choose not to regulate this area for a variety of reasons ranging from the belief that marriage should be promoted, the need to avoid creating a 'marriage lite' framework, and the desire to resist imposing rights and obligations on couples that may have chosen not to marry (pg 41). These obstacles to reform, located within the religiously and culturally specific context of a particular jurisdiction, further justify the value of the work of CEFL through its creation of Principles. Indeed, if the regulation of *de facto* unions must for the time being exist at a domestic level, it is imperative that harmonisation and cross-fertilisation of ideas are pursued given the increasingly cross-border nature of modern families.

The book then moves on to the specific legislative provisions applicable to cohabitants and offers insightful analysis from a comparative perspective. What is noticeable in this section is a general trend suggesting the existence of fragmented protections for *de facto* unions that fall short of those offered to spouses. These protections are rarely contained within a comprehensive legal framework e.g. in the form of a dedicated *de facto* statute, or a section on *de facto* relationships within a pre-existing statute. Exceptions to this rule, of course, exist and are flagged up in this analysis such as the Scottish Family Law (Scotland) Act 2006 and the Irish Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. Interestingly, whilst the pattern across Europe is characterised by ad hoc context-specific regulations that can vary tremendously, some areas such as domestic violence see most jurisdictions treating *de facto* couples in the same manner than spouses. The same approach was noted in relation to the landlord and tenant context.

The Introduction section concludes with a discussion of the presence of reform proposals. It notes that in approximately half of the jurisdictions surveyed there were no plans for reform at present. In contrast, other jurisdictions were engaged in a law reform conversation whether through evaluating a recently introduced scheme, debating bills legislating for greater cohabitation protections, awaiting existing laws to come into force or reforming general areas of law that indirectly impact *de facto* relationships such as succession law or the law relating to parental rights (as is the case in Switzerland) (pg 48). This section is particularly fascinating as it reveals not only that reform in this context is very much a live debate, but also that the CEFL Principles could become incredibly useful by shaping nascent reform initiatives and guiding the evaluation of recently enacted provisions.

As for the Principles, there are 27 in total, which are spread across seven chapters. After beginning with a Preamble, these chapters cover definitions and scope of application, rights and duties, agreements, property and debts, separation, death and dispute resolution. Crucially, the focus is on the issues generated by the ending of the *de facto* union, so issues relating to the parent-child relationship, such as parentage and parental responsibility, are excluded. The remainder of the book is devoted to articulating each of the Principles. The text of each Principle is accompanied by an overview of international instruments affecting said Principle, a comparative analysis of any issues raised, and an explanation as to why the Principle was drafted as proposed. This format is particularly helpful for readers enabling them to get both an insight into the thought processes of those drafting the Principles along with a deeper understanding as to how the Principles can promote harmonisation. The Principles are then helpfully translated into French, German, Dutch, Spanish and Swedish, further enhancing their accessibility and potential to influence law reform.

Space precludes a detailed discussion of all the Principles, but some general observations can be made. As to the definition of a *de facto* union, the Principles state that '*de facto* unions are those where two persons live together as a couple in an enduring family relationship' (Principle 5:1(1)) and distinguishes that from a '*qualified de facto* union' where that relationship lasts for at least five years or the partners have a common child (Principle 5:1(2)). The commentary on this provision was particularly welcome because, consistent with CEFL's common core, it emphasised strongly inclusivity and gender neutrality (as exemplified further by Principle 5:4 noting that 'both partners have equal rights and duties'). Over the years problematic definitions of cohabitation have been produced and enshrined in domestic legislation, that utilise, for example, a comparison with marriage ('living as if husband and wife') or require some form of intimacy ('living in an intimate/conjugal/interpersonal relationship'). Here, the CEFL approach captures the essence of a *de facto* relationship by necessarily excluding siblings or commercial relationship whilst, at the same time, is sufficiently open textured so as to permit some degree of flexibility and interpretation. For example, whilst the text of the definition requires 'living together', the CEFL commentary does not limit this to one household under one roof. This helpful rejection of a static definition reveals the potential for evolution and refinement over time. Questions will, of course, still remain over the interpretation of an 'enduring' relationship but it must be accepted that a modifier has to be used because *de facto* relationships are subject to a functionality assessment and, by their very nature, do not benefit from the legal certainty as to start and end points like the formalised statuses.

The Principles carefully navigate another key issue which is probably is the most fundamental dilemma faced by a jurisdiction when regulating *de facto* unions; namely, how to balance protection for the vulnerable with respect for private autonomy. This tension is neatly encapsulated by Principle 5:6 that states, in essence, that where the parties are in a qualifying *de facto* union any act of disposal of rights to the family home or household goods requires the consent of both parties. Importantly, this protective mechanism survives the later autonomy-driven Principle 5:7 that 'partners are free to enter into agreements determining their personal, economic and property relationship'. This strategy is a theme running through the Principles and is premised on the belief that there should be a narrowly drawn core set of protections for couples, which is juxtaposed against explicit endorsement of contractualisation and the ability for couples to bargain in the shadow of the law. It is also a

sensible strategy too when it is recalled that often the most trenchant criticism of cohabitation proposals centres on the belief that couples are being trapped in a marriage-lite regime with no ability to jettison the applicable provisions. Again, that trend is supported by Principles 5:10 that states during a *de facto* union property is held separately by the parties and 5:13 which makes each partner liable for the debts they accrue. Although there is a presumption of joint ownership of property acquired for joint use (excluding gifts and inheritance), that presumption can be rebutted thus revealing, at a general level, that the paraphernalia of marriage like a community of property does not apply to *de facto* unions.

One final observation can be made about the entitlements and protections available upon separation. This is often a highly contentious aspect of any domestic reform proposal and sometimes one that means that proposals, in a bid to differentiate them from marriage, are drafted in such a cumbersome or complicated way they then become unworkable. Thankfully, the CEFL proposal adopts a simple approach, although it is likely that complexity could still arise when a national legislator is translating these Principles into a fully-fledged proposal. The approach obviously proceeds with the default position that separately owned property remains separate whereas jointly owned property is to be divided (Principle 5:15(1)-(2)). Of particular interest is the compensatory claim in Principle 5:17 that exists where one partner has made a financial or otherwise contribution to the household that is significant in comparison to the other partner's contribution and has created considerable disadvantage in terms of their income, property acquisition or profession. Where successful, such claim is to be met by a monetary payment, unless the partners agree otherwise (Principle 5:17(2)). This approach has much to commend it and is backed up by established practice in countries that already have some form of protection for *de facto* couples. Strengths lie in the fact that non-financial contributions to a household would be covered thereby recognising work in the home and that an assessment of a contribution's 'significance', operating in tandem with other Principles, means that meritorious claims can be satisfied. This regime is a far cry from the protections associated with marriage or registered partnership and that feature enhances their potential for implementation as being both pragmatic and politically palatable.

This accessible and informative book showcases the merits of rigorous comparative law analysis and, by offering a useful frame of reference, the Principles allow us to reflect upon reform opportunities. It clearly is the culmination of an ambitious and timely project that certainly will play an important role in shaping future legislation in countries at differing stages of their journey in cohabitation reform. When reading the comparative synthesis what was particularly noticeable were the commonalities emerging across jurisdictions as opposed to the divergencies. This realisation was heartening when thinking about how legislators might use these Principles to better protect *de facto* couples in the future. But, for an academic based in a jurisdiction that recently left the European Union, it was also something tinged with a degree of sadness especially when we remember that harmonised family laws, just like families themselves, are inter-connected entities that do not comply with country borders. Thankfully, though, CEFL principles are not exclusively aimed at Member States of the European Union and aim to offer inspiration for *all* jurisdictions in Europe.

Andy Hayward
Durham Law School, UK