GENDERING FAMILY LAW IN EUROPE

DERECHO DE FAMILIA CON PERSPECTIVA DE GÉNERO EN EUROPA

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ABSTRACT: The paper deals with the evolution of the concept of family from a traditionally grounded model, male-dominated (by husband or father), to a gender-equality-based model. The European framework of values adopts a pluralistic vision of the family as a community based on affection, which is afforded legal protection as a place where the individuals can exercise their fundamental rights in an equal position.

KEY WORDS: Gender; family; equality; social values; legal systems.

RESUMEN: *El documento aborda la evolución del concepto de familia desde un modelo de base tradicional, dominado por los hombres (por el marido o el padre), a un modelo basado en la igualdad de género. El marco de valores europeo adopta una visión pluralista de la familia como comunidad basada en el afecto, que goza de protección jurídica como lugar donde los individuos pueden ejercer sus derechos fundamentales en condiciones de igualdad.*

PALABRAS CLAVE: *Género; familia; igualdad; valores sociales; sistemas jurídicos.*

SUMMARY.- I. EVOLUTION OF THE CONCEPT OF FAMILY TO A GENDER-EQUALITY-BASED MODEL.- II. PRIVATIZATION AND FRAGMENTATION OF "FAMILY ARCHIPELAGO".- III. BEST INTEREST OF THE CHILD IN THE FIELD OF PROCREATION.- IV. GENDER EQUALITY PERSPECTIVE AND PRIVATE INTERNATIONAL LAW. - V. CONCLUSIONS.

I. EVOLUTION OF THE CONCEPT OF FAMILY TO A GENDER-EQUALITY-BASED MODEL.

First of all, let me thank Professor Dragica Vujadinovic for the excellent coordination of the LAWGEM project, which has produced important academic output like the textbook "Gender-Competent Legal Education" and the "Gender Perspectives in Private Law" book series published by Springer. Our hope is that the academic cooperation between our universities can continue and be further strengthened.

Additionally, I would like to express special thanks to all the speakers who demonstrated through their excellent reports that despite the efforts made to prevent gender discrimination, several examples of gender inequality can still be encountered in the field of family law. Sometimes there are actual legal rules that lead to direct discrimination on the basis of gender but more often the signs of discrimination reside in how legal rules are applied or even not applied at all. The core of the problem seems to be in the mentality of jurists, their tradition and the persistence of customs and practices, which can also be expressed in the form of cryptotypes.

Our speakers showed that the study of gender perspective in family law cannot but start from the evolution of the concept of family from a traditionally grounded model, male-dominated (by husband or father), to a gender-equality-based model.

In the western legal tradition, the family founded on marriage has historically been the key model, influenced by religious, cultural and social values. The regulation of marriage reflected a strongly unequal division of roles: the husband was the head of the family, had power of control over his wife and was the sole holder of parental authority.

In our age, marriage underwent a process of change in European countries: from a model based on the primacy of the husband to one founded on the equality

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of reciprocal rights and duties between the spouses. The idea of marriage as a joint venture to which each spouse contributes according to his or her abilities is central in the European legal landscape. However, as Enrico Al Mureden's exquisite speech showed, some disparities in the treatment of wives have only recently disappeared, such as imposition of the husband's surname. Although the giving of the paternal surname to children is one manifestation of the male's hegemonic role in the domestic sphere typical of a patriarchal model, that preference continued in some legal systems, including Italy, despite being at odds with an egalitarian family model that implies recognizing the same rights for both parents in relation to their children, without any discrimination in connection with the right to respect for family life.

II. PRIVATIZATION AND FRAGMENTATION OF "FAMILY ARCHIPELAGO".

More egalitarian bodies of family law have been developed to take account of the plurality and diversity of the ways through which family relations are shaped in contemporary societies. During the past few decades, the traditional family has been replaced by a multitude of understandings as to what constitutes a family unit. The structure of the group consisting of a married man and a woman with children who live together has changed. Families are not only formed by a heterosexual married couple whose members have been assigned specific gender roles.

In European legal systems, several fundamental principles of constitutional, international and supranational rank perceive the family no longer as an institution embodying interests that are superior to those of its members but as a social formation within which the personality of its members can be developed. Only a legal framework inspired by the equal position of the partners is fit to achieve the material and spiritual communion of life, which – according to the European Court of Human Rights (ECHR) – is the essence of family.

The European framework of values confirms a pluralistic vision of the family as a community based on affection, which is afforded legal protection as a place where the individuals can exercise their fundamental rights in an equal position.

In particular, Articles 8 and 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Articles 7 and 9 of the Charter of Fundamental Rights of the European Union (CFREU) acknowledge, as prerogatives of the single individual, the right to respect for family life and the right to marry and to found a family, rejecting any institutional conception of the family as an organism interposed between the person and the State in which group interests prevail over individual ones.

The variety of family models calls for a reconsideration of the principle of family unity, which cannot justify any authoritarian and hierarchical organization of family relationships but must be understood as a need for mutual solidarity and collaboration aimed at guaranteeing the aptitude of the family to promote the development of the personality of its members. There is no conflict between family unity and the equality of its members, because a family unit expresses precisely that balance between freedom and responsibility characteristic of the modern conception of a group. From that standpoint, Camilla Crea's report proved that domestic violence cannot be treated as a question pertaining to the private sphere but has to be identified as an issue of both international and national legal concern. In that respect, underlining the duty to take positive action to prevent a risk to victims of domestic violence, the ECHR has recognized that domestic violence is as a problem affecting women and children's fundamental human rights.

The decline of marriage as the only foundation for family life capable of encompassing all the ways in which people choose to give expression to their affections in reality has opened up a new horizon characterized by an array of family models. European legal systems have gradually removed all obstacles that could lead couples to consider marriage as the only real option and has started acknowledging cohabitation as a community where people can express their personality and around which interests worthy of protection can revolve.

European legislation and case-law have led the way to a process of privatization and fragmentation of what is known as a "family archipelago", now made up of new open social formations and where a protected family life may be lived.

Nevertheless, in some legal systems such as the Italian one, the family founded on marriage between a man and a woman, including due to its procreative potential, retains a central position in terms of the model of reference for family relationships.

According to the ECHR, although it can no longer be argued that "the right to marry enshrined in Article 12 ECHR must in all circumstances be limited to marriage between two persons of the opposite sex", Contracting States are under no obligation to open the institution of marriage up to same-sex couples, which is not a conventionally mandatory option because of its connection to "sensitive moral or ethical issues".

National authorities are however obliged to take measures designed to ensure effective respect for family life in the sphere of interpersonal relationships, including general legal recognition for couples who are in a stable relationship but cannot get married.

Therefore, in legal systems which require that spouses be of the opposite sex, it is imperative that the law provide for forms of registered partnerships, which have "intrinsic value" for people in a same-sex relationship, giving them "a sense of legitimacy", "irrespective of the legal effects, however narrow or extensive" that they are capable of producing. However, as the Italian Constitutional Court has also recognized, the legislature has a margin of appreciation both in identifying how to give effect to the "fundamental right to live freely as a couple" other than equating it with a marriage-based family and in setting out the exact *status* conferred by registered partnerships in terms of rights and obligations.

Indeed, Articles 8 and 12 ECHR and Articles 7 and 9 CFREU acknowledge respect for family life and guarantee the right to marry and the right to establish a family "in accordance with the national laws" governing the exercise of those rights, thereby showing deference to national constitutional identities in family matters. Moreover, not only is substantive law governing the family beyond the competences of the European Union, in keeping with the principle of conferral (Article 5 TEU), but also Article 81(3) TFEU provides that "measures concerning family law with cross-border implications" are subject to a special legislative procedure requiring the Council to act unanimously.

Nevertheless, European law has offered a decisive *impetus* to the progressive harmonization of the law governing family relations adopting a pluralistic approach. First, various EU regulations have adopted rules of a private-international nature which aim to standardize significant sectors of family law. Second, in the European legal area there are legal models that recognize couple and offspring relationships that transcend heterosexual marriage and that have entered domestic law through case-law arising from judicial review of conformity with public policy.

By way of example, although marital status falls within the exclusive competence of the Member States, the European Court of Justice (CJEU) has recently held that, in order to grant family reunification rights in accordance with the EU rules on free movement of persons, the term "spouse" has to be extended to include the same-sex spouse of an EU citizen who has moved to another Member State notwithstanding the fact that the legislation of the latter State recognizes only marriage between people of the same sex. Denial of such recognition would result in an obstacle to the fundamental freedom of movement, which can be justified only if based on objective considerations of general interest, proportionate to the legitimate purpose pursued. The need to ensure the effectiveness of the right to family reunification calls for a broad and neutral – for EU law – interpretation of the concept of "spouse", capable of including any person bound in marriage with an EU citizen regardless of gender.

III. BEST INTEREST OF THE CHILD IN THE FIELD OF PROCREATION.

An equivalent process of pluralist interpretation can be witnessed in the field of procreation.

First of all, a pluralist image of family can be seen in the tendency to grant parent-child protection that is independent from the features of the relationship existing between the parents and reflects the fact that all of a child's family relationships are legally relevant.

The gradual removal through case-law of unequal treatment based on the existence or inexistence of a marriage bond between the parents is often achieved by the use of the "best interest of the child" principle. Jurisprudence traces all parent-child relationships back to the scope of the right to respect for family life (Article 8 ECHR), which does not allow any discrimination rooted in "birth" (Article 14 ECHR). A child acquires a family life *ipso iure* at the moment and as a result of birth, so that it is independent from the couple's status and likewise whether the parents live together is irrelevant. A full grant to natural children of the right to develop normal family relations requires national authorities to treat them in the same way as children born in wedlock and to avoid any kind of deprivation of succession rights.

On the other hand, biological descent has lost its role as the exclusive paradigm in the law on filiation, first through laws on the adoption of minors and subsequently through laws regulating assisted reproduction techniques, which afford priority to the assumption of responsibilities over biological ties. Moreover, parenting is not defined on the basis of biology: the development of assisted reproductive technology has fostered the emergence of new family models, insofar as they make it possible for single people without a partner and same-sex couples to become mothers or fathers.

That said, the ECHR and several constitutional courts have clarified that the possibility to split procreation from natural conception, facilitated by scientific and technological progress, does not entail a "right to parenthood". Accordingly, specific conditions can be laid down restricting access to reproductive practices and setting some limits to the desire to have a child through the use of such technologies, constraints that serve to protect human dignity as well as the rights of the conceived (and of the future born) and of the pregnant mother. From this standpoint, it is possible to consider as fully legitimate those legislative solutions that – within the legal framework governing medically assisted reproduction – on the one hand, recognize that the techniques in question serve a purpose that is *latu sensu* therapeutic and, on the other hand, require a family model that envisages the coexistence of a paternal and a maternal figure.

In particular, according to the case-law of various constitutional courts, excluding same-sex couples from access to artificial insemination does not amount to unequal treatment in light of the fact they cannot be compared to infertile same-sex couples. Thus, we cannot consider as reasonable the belief of the legislature "as interpreter of the national community" according to which "a family ad *instar naturae* (with two parents, of different sexes, who are both living and of potentially childbearing age) represents, as a matter of principle, the most suitable 'place' to welcome and raise the newborn".

IV. GENDER EQUALITY PERSPECTIVE AND PRIVATE INTERNATIONAL LAW.

Cristina Campiglio's wonderful presentation showed us the decisive unifying influence exercised by private international law, the relevance of which has increased because mobility beyond national boundaries is becoming a common experience that no longer involves just a minority of the population.

A reinterpretation of the concept of family from a gender equality perspective affects private international law in various respects.

First, emerging principles like the international continuity of status constitute limits to the disavowal of foreign judgments and acts thereby enhancing a pluralist approach to family law. International public order requires States to ensure preservation of any status lawfully acquired abroad because the maintenance of bonds already established is connected to the right to respect for family life even if it concerns family models different from those of national law.

Second, a pluralist tendency emerges from the ever greater room for maneuver in the choice of the jurisdiction as well as the law applicable to a family's relations. Strengthening the *electio iuris* and the *electio fori* options is not only an aim pursued by national legislation but is also grounded especially in EU law: Article 12 of Regulation (EC) No 2201/2003 of 27 November 2003, Article 5 of Regulation (EU) No 1259/2010 of 20 December 2010, Article 22 of Regulation (EU) No 650/2012 of 4 July 2012 and Articles 7 and 22 of Regulation (EU) 2016/1103 of 24 June 2016, which allow the parties to choose the law applicable to their relations and decide which courts are to hear the case. Within the limits of public order, the choice of the applicable law fulfills the parties' interest to subject their relations to the rules that they consider more adequate to their needs, including of a cultural nature, confirming the approach of returning the family's relations to a pluralist "civil society" and identifying space for "personal rights" within the legal system.

V. CONCLUSIONS.

In conclusion, family law – as an interconnection between the private and public spheres – is the major arena for the promotion of gender equality in full respect of fundamental values and principles of European legal systems. The analysis of these issues by our speakers has clarified why it is important to reconsider private law from a gender equality perspective for the construction of an egalitarian family model and how the introduction of gender competent private law can contribute to a full affirmation of equal rights and responsibilities not only at the formal level of legislative recognition but also at the substantive level of interpretation and application of the law.

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