

## **THE CONCEPT OF “LEGAL FAMILY” IN MODERN LEGAL SYSTEMS: A COMPARATIVE APPROACH**

**Federica Giardini, University of Padua, Italy**

### **1) Introduction: the concept of legal family - the significance of a comparative law analysis**

The concept of ‘family’ in a legal sense - that is what a legal system considers to be or not to be a family – has always been one of the factors distinguishing and characterising legal systems. The way in which the family is considered the essential nucleus that affords protection to the individual as a social being is in effect closely and historically bound to the different individual characters of single Peoples. It is because of this awareness of the historical bond existing between the identity of a people and the family nucleus where it finds expression, that the European Union has not included, for example among its institutional aims, the objective of harmonising family law, and on account of this the Commission on European Family Law (CEFL), which recently issued its Principles on European Family Law, is a Commission of voluntary origin based on legal theory. Despite these premises, we are today witnessing (perhaps more than in the past) forms of evolution in legal systems involving the institution of the family, considering this unit as an elemental legal entity.

In this precise context it may be interesting to examine the development of the main contemporary legal orders from a comparative viewpoint, first considering the systems belonging to the European Union, also having regard to the common law systems, to discover whether there are in effect common trends and if so, to define what these trends are and the principles on which they are based.

Let us begin by observing that the traditional concept of ‘legal family’ handed down to us by the historical development of the different legal orders is the family based on the institution of marriage. Whether it is common-law marriage, or so-called ‘continental’ marriage or even Islamic marriage with its own peculiar features including openness to polygamy, marriage as the institution founding the family is historically the union of a man and a woman.

Two important changes are currently taking place in the development of contemporary legal systems in this sphere. The first is that the institution of matrimony no longer constitutes the sole, exclusive title on which recognition of the legal entity ‘family’ within the legal system is based. The second aspect is that the concept of marriage itself is changing and evolving to the point of including the union between two persons of the same sex. Complex aspects are involved in each case, which are not free from internal inconsistencies. I will now try to analyse each separately,

focusing on what appears to me to be their most important technical significance, and obviously aiming to stay within the scope of this contribution.

## **B) The different family models: registered partnerships and the family based on marriage**

For some time now, the family based on marriage is no longer the only family model. This realisation has led interpreters – and for good reason - to speak of families in the plural, rather than the family in the singular.

With the arrival of new models, differences between legal systems are delimited. These differences concern both typology: how and on what grounds is legal protection afforded?; and time scales: at what historical and cultural moment does the national legislator decide to intervene to regulate by law phenomena that are already widespread in society?

To begin our observation in the ambit of the European Union, we can note that the EU contains legal systems that are still firmly anchored to traditional relations in which not only is the concept of legal family still solely and exclusively based on marriage, but also marriage is an institution contracted solely between a man and a woman. One of the most significant examples of this is perhaps precisely that of the Italian legal system, which puts the institute of matrimony at the centre of the entire family law. Marriage in Italy is governed by a body of rights and duties that may not be ceded by the spouses and is the centre around which not only situations regarding the relationship between the spouses revolve, but also the rules of attribution of status in relation to the issue (children). Still today in Italy it does not fit with legal reality to pose the issue of the family in terms of recognition of the family outside marriage. The political will to place a new family model by the side of the traditional family seems to be lacking, despite the numerous legislative proposals that have lain unenacted in Parliament for many legislatures and which have even aimed in some cases at incorporating foreign models, like those of the French PACS which do not in fact even manage to satisfy the needs for which they were created in France. Since the late 1980s the relevance of cohabitation outside marriage continues to be relegated to single aspects of legal protection. For example, a cohabiting partner can succeed as tenant to a lease following the partner's death; or can be protected by orders of severance from the family; he or she may be appointed guardian in case of the partner's incapacity; or may abstain from giving testimony against the partner in court. However, these are single circumstances where protection is granted on a piecemeal basis for reasons that do not coincide with the existence of cohabitation, resting instead on the protection of the right to the family home and on the protection of the person, rather than on safeguards for the accused.

However, single profiles are emerging where cohabitation is relevant and these contradict traditional claims that it is not; this is happening slowly and almost without a precise awareness on the part of the national legislator. One example of this is in the area of adoption of minors, where adoption is admitted only for spouses, but the period of cohabitation prior to marriage may be calculated as part of the three years required before making an application for adoption. Another example is in relation to artificial insemination, where Law no. 40 of 2004 permits access even to cohabiting couples, but does not, however, concern itself with specifying a criterion for determining which cohabiting couples are included in the generic formula and which are not.

By contrast, an essentially different outlook has been adopted in other legal systems within the European Union, which has already led to legislative reforms in some cases more than a decade ago involving the legal concept of the family, basically through legislation governing registered partnerships of couples.

There are differences between them, but in this ambit we can number not only Scandinavian legal systems, but more in general the numerous European Union countries where a family can be formed not only through matrimony, but also – as an alternative – by registration of cohabitation. Norway moved in this direction in 1991, followed by Sweden in 1995, Holland and Belgium in 1998. This more recent title for founding a family takes on different configurations and prerequisites in the individual legal systems. The common nucleus they all share seems to be that of providing cohabiting partners with protection both in relation to third parties, such as the state and private or public institutions, and in their reciprocal relations, especially in the most delicate phase where the relationship between the partners comes to an end; this may be voluntary in origin, as where the relationship breaks down, or it may be imposed by necessity, when one of the partners dies leading to succession rights for the surviving partner.

Among the most significant diversities that emerge in the sphere of registered partnerships I would underline this distinction: can partners of the same sex have access to the new family that arises in this way, or can they not? The Danish law of 1989 provided for registered partnerships, followed by many other laws in Europe, among them Norway in 1993, Sweden in 1995, some autonomous Spanish communities between 1993 and 1995, Iceland and Hungary in 1996, Holland in 1998, France in 1999, Belgium in 2000 and Germany in 2001. An overall view of this legislation governing cohabitation reveals in general that in some cases the laws are enacted both for opposite-sex partners and same-sex partners: this is the case of the French PACS, for instance; while in other cases, the laws only govern cohabitation between same-sex couples: this is the case of Denmark's 1989 legislation or the recent British law governing same-sex partnerships.

I believe that in a situation such as the present, the problem, as it correlates with the standpoints of same-sex and opposite-sex cohabitation, requires a different angle to be taken by national legislatures in each case, in order to create true parity of legal protection. In fact, where same-sex partners are denied access to marriage – and this is still so in the majority of legal systems today – lawmakers cannot simply reason in terms of a free choice to cohabit, as for heterosexual partners. What I mean to say is that the policy underlying the rules governing the family phenomenon, in elevating cohabiting couples to a ‘family’ in the legal sense, cannot fail to take into account the fact that apart from a minority of cases where one or both partners is unable to contract marriage – for example because still married to someone else – for opposite-sex partners cohabitation is the result of a free choice, the choice not to subject their relationship to the ties deriving from the legal status of marriage. The same is not true for same-sex partners, who in the majority of cases today still cannot marry each other and for whom cohabitation becomes the only possible form whereby they can live in communion of affection and mutual protection.

In this sense, I wish to underline that joint regulation of the two cases, which still differ greatly in terms of protection afforded, often appears to be more of a political solution than a legal solution to the problems.

### **C) The current development of the institution of marriage**

Even the title traditionally conceived as founding the institute of the family in the legal sense is slowly evolving. As far as the so-called Western world is concerned, the most significant development can be seen precisely in the access to marriage of same-sex partners, while taking Islamic law into general consideration, the most significant change may be seen in the weakening of practices linked to polygamy.

However, also within these specific areas of change, important differences may be observed. In the Netherlands, for example, the law of 2000 which was the first legislation in Europe to enable same-sex couples to contract matrimony adopted a different approach from the Belgian law of 2003, which expressly excluded that marriage between persons of the same sex could have consequences in the area of issue and adoption. Spain has also moved in line with important amendments to the Código Civil relating to the right to marry, providing expressly for equivalence between the traditional concept of marriage and the new notion introduced by the recent law approved on June 30<sup>th</sup> 2005, also as regards adoption.

The common law world shows its particular characteristics and peculiarities also with regard to this change. Quite apart from substantive differences between the legal systems, the operation of precedent as a source of legal rules in the common law has a deep impact on the method by which the marriage institution has undergone important development. The courts have often been orientated towards admitting marriage between same-sex partners, thus redefining the very concept of marriage before such a change is expressly sanctioned by legislation and in any case without the need for such legislation. This change, too, is not free from conflict.

A paradigmatic example is provided in this sense by the United States. The well-known decision of the Supreme Court of Massachusetts in the case of *Goodridge v. Department of Public Health* of 2003 has had consequences at the highest political level, going so far as to lead to attempts and proposals before Congress to change the federal US Constitution with the aim of stopping this change. Effectively, the Court intimated that same-sex couples must be permitted access to civil marriage itself, not just some rough equivalent, such as civil unions. In California, the debate was played out between the Mayor of San Francisco, who issued a directive instructing the County Clerk to issue marriage licenses on a non-discriminatory basis and the Governor of the State, who approved a statement that same-sex marriages are illegal under Californian law and therefore invalid.

The scholar attentive to the way common law jurisdictions around the world develop the law by 'osmosis' will notice that the British consultation on same-sex partnerships preparatory to the recent legislation on the matter was launched by the British Government in summer 2003, just as the Ontario Court of Appeal on the other side of the Atlantic was amending the definition of marriage in force in Canada at that time and going back to the formulation by Lord Penzance in *Hyde v. Hyde and Woodmansee* in 1886, to include partners of the same sex. Today Canada is moving towards approval of the C-38 Bill, recognising same-sex marriage at federal level. In South Africa, for its part, the same objective is being neared, following the decision of unconstitutionality of the South African Marriage Act by the Supreme Court of Appeals of South Africa.

Signs of a certain development seem to be coming for marriage also from Islamic law. The principle of *jabr*, or imposed marriage, according to which a father can decide his daughter's marriage at his discretion has been abolished in the Moroccan and Tunisian codes, and remains in the Algerian code in the single event that bad behaviour by the girl can be foreseen. Polygamy, expressly permitted by the Koran (Koran: 4,3) is provided for in all the codes with the exceptions of Turkey and Tunisia. The recent Moroccan code attempts to make it impossible in fact, making it subject to the requirements of the first wife's consent as well as equality also in affections towards the wives on the part of the husband.

**D) Issue as a means of developing the notion of family in its legal sense. Conclusions.**

When talking about the new family models, it is common to highlight only the dynamics pertaining to the so-called ‘common-law family’ or registered partnerships, rather than matrimony, thus giving attention to the different forms of legal protection that are granted and may be granted to couples living together or to spouses. This means failing to take into account in our examination an element that in my opinion enters fully within the dynamics of family model formation: that of issue, not only in the form of children from a biological relationship, but also in the form of adopted issue.

There is a reason governing this widespread approach. It rests on the fact that legal systems have for some time taken the approach that it is the union of two adult persons formulated according to models from time to time recognised by law that gives origin to a new family entity. It is not necessary, then, that there should be procreation and therefore issue, to have a family.

While this is true and may be agreed with, a different and equally significant phenomenon must not be overlooked: that it is possible to have a family also by issue alone. This certainly happens where legal systems permit single persons to adopt children. In such cases the filial relation becomes the title for the formation of a new family in the legal sense. However, this phenomenon should also be investigated at legislative level for cases where children are not adopted, but natural, for instance where a single woman has a child which she cares for and brings up alone. Is this a family in the legal sense? It goes against common attitudes to say that it is not a family, especially considering the different widespread legal phenomena stemming from divorce, that have led to a large increase in situations where a single parent takes care of the children while the other parent does not even show economic interest. Can we say that this is a family just because for a limited period of time it has enjoyed that title, or could other contours be thought of to fit the case?

To conclude, I believe these brief considerations once again point to a significant fact that scholars have often highlighted on different occasions, including before this Association: that is, the indivisible bond between the concept of family and the protection of human rights. Only an appraisal that enables us effectively to establish full respect for human rights both outside and within the family unit can allow us to face the challenges posed now and in the future by developments in the concept of legal family.