

# THE PROCESS OF HARMONIZATION OF THE FAMILY LAW IN THE EUROPEAN LEGAL AREA

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## **ABSTRACT**

*The family law is the expression of values and principles on which is based the entire social fabric. However, the definition of "family" - because of the socio-economic and cultural changes of recent years - varies from State to State, and assumes different connotations even within the same legal system.*

*The present report proposes to analyze the working method of the Commission on European Family Law (CEFL), which is founded to promote, on the basis of "Principles" elaborated on issues of importance and topicality, a European process of harmonization of the Family Law.*

## **KEYWORDS**

*Family law, human-rights, Cedu*

## **1. INTRODUCTION**

«The themes of family relationships are almost a litmus test to evaluate the evolutionary process of a European private law that moves decisively toward an integration of forms, but which cannot claim to impose cultural models»<sup>[1]</sup>.

This paper provides a study on the process of harmonization of the Family Law in the European legal area.

Family law gives rise to a growing interest on the part of students, also thanks to the study of some concrete cases submitted to the European Court of Justice that is called to face, with greater frequency, supranational issues. However, there is no mutual recognition of different family models in the context of European legislation. Consequently, many institutions - including the divorce and legal separation - are regulated in different manners depending on the sort order of the considered country. The current community legislation considers the European citizens not only as simple consumers but as persons holding rights <sup>[2]</sup> expressly protected by the Charter of Fundamental Rights <sup>[3]</sup>: for instance, the right to respect both private and family life, the freedom of marriage and to create a family.

The introduction of the principle of freedom of movement and residence has contributed to the diffusion of various forms of family organizations on the European territory. Such diffusion, although positive, has fuelled (within the context of the applicable law and jurisdiction) many contrasts that the European Union is still addressing with the adoption of specific regulations. Although the art. 81 of the Treaty of Lisbon implies the judicial cooperation in civil matters <sup>[4]</sup> in order to balance the various Member States regulations, the art. 67 sets a condition: the respect of fundamental rights, of jurisdictions, and of different European legal traditions <sup>[5]</sup>. Under this perspective, there are EU rules and principles on the process of unification of family law, in light of a

wider concept of family - the first pillar of the juridical order<sup>[6]</sup> - that welcomes also same sex unions.

In the last decade, in many European States new forms of family union were governed (the so-called partnership registered), which are far apart from marriage and even open to pairs of people of the same sex. In other countries (such as Spain) the discipline of the matrimonial union was extended to couples of the same sex. Some States continue, instead, to recognize only the family founded on the traditional marriage, or to acknowledge the importance of the single heterosexual coexistence uxorio blackberries. According to the orientation of the Strasbourg Court, although the failure of a Member State in extending the access to marriage to same sex couples does not constitute a violation of Article 12 of the Convention, the registered partnerships and de facto unions (heterosexual and homosexual) are legitimate forms of "family life" under the art. 8 of The Convention. Therefore, we have to recognize them the same rights and obligations [13].

Starting from this premise the Court has recognized the violation of Article 8 (Right to respect the private and family life) in conjunction with the Article 14 (on the prohibition of discrimination), committed by a Member State that does not guarantee legal protection and adequate recognition of homosexual couples within its law. On the other hand, the emphasis is no longer on the "Act", but on the "rapport", as the family is conceived as an effective communion (material and spiritual) of life beyond the institution of marriage and sexual orientation.

Regarding the limits imposed by the principle of conferral [16], the action exerted by the European Union on family law developed over the years, affecting different aspects of the discipline. Far from being able to talk about a "European model of the family", it will be necessary to gain the costumes and lifestyles of people in Europe, in order to seize the identifying traits of social formation, capable of realising the fundamental instances of the person concerned in the totality and the multiplicity of its expressions [17].

The dialog between European and national courts, in the current complexity of the system of the sources, plays a fundamental role in the process of harmonisation.

## **2. THE PROCESS OF HARMONIZATION OF THE FAMILY LAW**

The family is the object of numerous articles contained in the Charter of Fundamental Rights of the European Union: the art. 7 ensures the respect of private and family life; the art. 9 guarantees the right to get married and to found a family; the art. 14 affirms the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical, and pedagogical convictions; the art. 23 enshrines the right of equality between men and women; the art. 24 recognizes the right of children to receive protection and care for their welfare; the art. 25 recognizes and respects the rights of elderly to lead a dignity and independent existence and to participate in the social and cultural life; the art. 26 protects disabled; the art. 33 sets the principle of general order, according to which it is ensured legal, economic, and social protection of family.

Contemporary society is oriented to overcome the boundaries between different States as it is emphasised, for instance, by the numerous marriages celebrated between persons of different nationalities or by compatriots deciding to transfer their married life abroad. Thus, several parties feel the need to operate a harmonisation of family law through the adoption of a unitary discipline that, by transposing the ongoing changes, can regulate the various legal situations concerning the family. Currently, the regulatory landscape of each Member State, offers a great variety of solutions, both concerning substantive law and private international law. This inevitably causes a situation of absolute uncertainty: let's consider for instance, couples linked by a registered union not recognized beyond the borders of the State within which such registration had been successful.

This overall disharmony highlights an important fact: a European legal process of integration, also involving the family law, is necessary to protect and ensure the respect of the fundamental rights of the person and to assert these rights everywhere within the Union. Although the aim of

unifying the field of family law is essential and urgent, the realization seems still too far away, and insidious<sup>[7]</sup> for someone. To this day the European institutions have prepared a series of regulatory interventions, above all concerning private international law in order to dictate - with reference to family situations having cross-border implications - the criteria for solving conflicts of law, as well as the condition of mutual recognition of judicial decisions and/or their execution<sup>[8]</sup>. In this context the European Union adopted some specific regulations regarding separation and divorce, parental responsibility, maintenance obligations, matrimonial relationships between spouses, and successions (and other regulations are in itinere).

However, there are numerous drawbacks hindering the creation of homogeneous European rules, in light of a shared model of family. It could happen, in fact, the so-called *forum shopping*, e.g. the opportunistic search by one of the spouses of the more favourable law to him. In such a situation, for example, the content of a judgment concerning separation or divorce varies according to the seized national court: this could lead to a discriminatory treatment and significant uncertainty regarding the existence or no existence of certain rights, obligations, or status. One of the proposals presented by the European Commission to solve the problem of *forum shopping* was to introduce the possibility to choose previously the applicable law. For example, in relation to one of these proposals concerning divorce, which currently is set differently among Member States. However, this solution would not solve a recurring phenomenon: the so-called *forum racing*, e.g. the opportunity of the actor to choose, among multiple possible jurisdictions, the Court that allows him to benefit from the effects of more convenient proceedings<sup>[9]</sup>.

Given the importance of European citizenship (art. 9 TEU Art. 20 TFEU)<sup>[10]</sup>, it is imperative the adoption of a common family discipline, which takes into account the ongoing relevant changes and social transformations. Only in this way it will be possible to achieve a reasonable balance between different national families, aiming to introduce a European model as common denominator to avoid the dispersion of the family concept. The creation of a uniform family law in Europe is a very complicated operation that needs necessarily to be based on the costumes and lifestyles of European people, in order to grasp - in spite of the variety of organizational forms - the identifying traits of social formation in which the person is considered in the totality and the multiplicity of his expressions and active events.

The hope is that, with the constant jurisprudence of the Court of Justice and of the European Court of Human Rights, the shortcomings of the European legislator could be overcome. The purpose is to create an organic body of rules and principles, and to promote a mutual recognition of the family and of the personal status within the European Union, achieving the so-called "Family without frontiers"<sup>[11]</sup>.

### 3. THE COMMISSION ON EUROPEAN FAMILY LAW

The idea that a harmonisation of family law is necessary to facilitate the freedom of movement of persons and to reinforce the European identity is at the basis of the work of the "*Commission on European Family Law*". The Commission - with its headquarters in Utrecht - was established on September 1, 2001, due to an increasing interest shown by several European countries in family law. This organism (totally independent from any other institution or organization) was founded with the task of developing the "Principles of European family law" in order to contribute, through a continuous research, to the harmonisation of family law in the European context. In particular, the Commission verifies the current status of family law in European countries and proceeds to identify the guidelines that need to be adopted in Europe based on very precise rules collected in the *Principles of European Family Law*.

With reference to the organizational profile, there is a committee within the Commission whose task is - currently - to coordinate and to promote a group of experts' studies for the elaboration of

common principles. The themes to be treated are selected periodically and up to now they include "divorce and maintenance between spouses", "parental responsibility", and "schemes assets of the family". The process is divided into distinct phases. Based on a questionnaire realised by the Commission itself, each expert realises a report on the rules adopted by the country he represents. Subsequently, a comparative analysis is performed allowing to determine the harmonisation degree (or heterogeneity) through the comparison between the systems.

Following the achieved results, there is a final and decisive phase consisting of developing the principles through the "*common core and better law approach*": e.g. identify, where possible, a prevailing body of rules among the considered European legal systems. Only in a subsidiary way, where the lack of homogeneity in the legislation does not allow this, it needs to refer to the so-called *better law approach*: based on a comparison performed at a national level it is introduced a model that is considered preferable with respect to the other, as it is more suitable for the protection of the interests deserving it.

The principles - expression of regulations in force in most of the European countries - are intended to firstly provide a model for national legislators, mainly those who are preparing for a "recoding", in order to harmonize the different disciplines (family law) existing at national levels. The principles are drafted simultaneously in English, French, and German, by a group of jurists and then are submitted to the judgment of the Commission that will verify the accuracy and the correspondence of the used terms. They are also accompanied by observations of comparative law and comments explaining the accepted rule. According to the editors, the principles are not proposed as a law model, but rather they seek to establish a reference framework for the legislator, both at national and European level.

The first group of principles (*Principles of European Family Law Regarding Divorce and Maintenance between former spouses*) was published in 2004 and it concerns the European family law on divorce and maintenance between former spouses: the values on which they are based include equality of spouses, protection of individual freedom, obligation to show solidarity to the weak subjects of the family. At the beginning of 2007 the principles on parental responsibility were published. The objective is to achieve an identity of discipline, independently from the progeny or from the family state of the parents. The part dedicated to the theme of parental responsibility includes 39 principles divided into 8 chapters. In particular, the principle 3:1 considers the parental responsibility - whose parameter is represented by the "*best interest of the child*" - as a set of rights and obligations aiming to the promotion and protection of the psychophysical well-being of the child. The holders of the responsibility of minors are the parents or other people in addition to or in substitution of them (principle 3:2). Once the parental relationship has been established, the responsibility is got by law (principle 3:8) or by following a decision by the competent authority, regardless of the fact that the parents are conjugates between themselves. The ownership of responsibility may also be attributed in whole or in part to a different person from the parent.

A third sector affected by the work of the Commission, since by December 2006, is the patrimonial family law, which is considered a priority due to the publication of the green paper on the private international law of capital regime of goods.

The Preamble, which precedes the results of the works that have been published until now in form of principles, recognizes fundamental differences in national legal systems impeding the free movement of persons in Europe. It should be remembered, by way of example, that in some Member States (Spain, Holland) separation is not a necessary condition to obtain the divorce; in other countries (Austria, France) there are still forms of separation or divorce to blame; moreover in those States where the divorce is preceded by the separation of the spouses, times are not equal but they vary from country to country.

“Currently, the principles have not - or they not could have - binding value and, they cannot serve as optional templates at the choice of the parts replacing the national rules, but they constitute an important parameter of state legislators when they intend to amend or reform their legislation”. For these reasons, while respecting the differences among national legal systems of family, it is desirable a harmonisation of family law in Europe in order to promote a balance between the interests of spouses and society, and to protect the freedom of the individual and the minors’ interests.

#### **4. THE REGULATION ON BRUSSELS II-BIS**

In the context of the European Union legislation, the European Convention on Human Rights (ECHR) signed in Rome on November 4, 1950 and ratified by Italy with the law n. 848 signed on August 4, 1955 is the international source of greatest impact on the Italian family law. In particular, the art. 8 of the ECHR guarantees the respect of private and family life and the art. 12 regards the "right to form a family. Still, the community law considers family law as being within the competence of Member States, while pending a progressive harmonisation of the different laws.

The regulation n. 1347 of May 29, 2000 (the so-called Brussels regulation II) represented the first attempt to regulate, in a community framework, the matrimonial subject and the matter of parental responsibility. However, the regulation has a reduced scope (as it does not apply to homosexual unions and does not relate to matters relating to parental responsibility risen after the dissolution of marriage) and, secondly, it requires the *exequatur procedure* to ensure that a decision issued in one Member State can be enforced in another.

A step forward was taken by the next Regulation n. 2201/2003, known as the Brussels Regulation II bis, which represents a cornerstone of European judicial cooperation in family matter. It relates to the jurisdiction, the recognition, and the enforcement of judgments in both matrimonial and parental responsibility matter, as well as the international child abduction. The Brussels Regulation II bis is directly applicable in all Member States of the European Union, with the exception of Denmark, and it prevails over national law.

Within the scope of the Regulation there are established uniform rules on jurisdiction relating to divorce matter, legal separation, and marriage annulment. Regarding the parental responsibility, the Regulation offers a different vision of the relationship between parent and child, and it includes again all disputes relating to the parental responsibility on minor smaller in the discipline, which were risen independently from the dissolution of the marriage bond, especially the bio-parenthood regardless of persons claiming rights on child. Therefore, the commitment of the parent in respect of the son is no longer measured in terms of exercising a "power" but as a real responsibility.

Moreover, this regulation facilitates the free movement of decisions, public acts, and agreements within the European Union, establishing provisions relating to their recognition and their implementation in the other Member States. Despite the regulation is a tool intended to operate mainly in the field of procedural law, it contains a significant substantive approach to the subject of family law, within which only those proceedings aimed to engrave on the personal status of the subjects involved are included. When the Court is competent to rule on a dispute within the meaning of the Brussels II bis, the resolution of the dispute is adopted according to the family law of the Member State. It is detected, also, the competent court and guaranteed the recognition and enforcement of the decision in the other Member States. The Court of Justice of the European Union has pronounced itself many times on the interpretation of regulation. The European Commission has therefore submitted a proposal for the amendment of the regulatory text, in order to offer appropriate solutions to certain problems concerning the predictability and efficiency of cross-border procedures, questions of parental responsibility regarding the abduction of children by a

parent, cross-border placement of minors, and the recognition and enforcement of decisions and cooperation between national authorities (central and other type).

The Brussels Regulation II bis, while playing a vital role in the context of legal cooperation in civil matters, represents only a first step in that process of harmonisation that institutions are implementing for the creation of a European international private law of the family.

## **5. THE EVOLUTION OF THE FAMILY INSTITUTION IN ITALY**

The institution of the family experienced a significant evolution in the course of time <sup>[12]</sup>, because of profound socio- economic and cultural transformations that influenced the concept of "traditional family", including the access of women into the world of work and the industrialisation process.

The Albertine Statute in 1848 was totally devoid of a discipline regarding family relationships, leaving to the legislator the right to regulate on matters whose patrimonial aspects were governed by the Civil Code established in 1865. In the Fascist era it was preserved a hierarchical conception of the family with the absolute domination of man, conforming to the type of family institution defined as the core in which parents had to educate their sons according to the "principles of morality" and in conformity with the "national fascist sentiment".

The theme of the family is at the core of the art.29 of the Constitution that, in its first paragraph, asserts that "The Republic recognizes the rights of the family as a natural society". The qualification of the family as "a natural society" expresses its aptitude to be a privileged and autonomous social formation in continuous evolution, in which each state develops its own personality. Thus the Republic imposes to recognize the rights of the family, as expression of the social autonomy relating to the power of the State. From the patriarchal family, mainly based on the principle of authority and the indissolubility of marriage, a different type of family, focused especially on equality between the spouses (equipped with reciprocal rights and duties) and on parental responsibility, evolved.

Subsequently, the reform of family law in 1975 innovated the discipline of the family institution by insuring constitutional principles (such as the moral and legal equality of the spouses and the equivalence between legitimate and natural children), and the law on divorce and adoption. The passage from the patriarchal family to the one characterized by the moral and legal equality of the spouses engraved on the theme of fundamental rights in family relationships. Due to the massive migratory flows, that started in the post-war period (and still permanent), the family has slowly acquired an "international" dimension that it forces national legislators to adapt the regulatory systems to the continuous changes. Therefore, the institution of the family appears as a great "Babel" today, where it is now exceeded the traditional concept of the family based on marriage.

On 20th of May 2016, the Parliament approved the Law n. 76 providing on one side the civil unions, reserved to persons of the same sex, and on the other side the partnerships to couples both hetero and homosexual <sup>[14]</sup>. The family law of the Italian legal system was certainly influenced by the European and international law <sup>[15]</sup>. For example, the law on shared entrust has its roots in the New York Convention on the child's rights and in the Charter of Nice, which states the child's right to preserve meaningful relationships with both parents.

The law n. 76/2016, fits into a context in which the legal structure of family relationship has been deeply innovated by the introduction of the single status of son that - eliminating the differences of treatment between legitimate children and natural children - has valued the procreation (no longer the matrimonial bond), which assumption constituting the family nucleus.

From the introductory report to the law stipulates that were performed choices, in respect of art. 3 Const., aimed at "Limit to a minimum the differences between civil unions and marriage...[as] at

the basis of the choice of a homosexual couple to formalise the relationship of family life pulsano the thick desires and the same needs that animate the choice of marriage". Thus, it intends to "recognize the homosexual life the dignity that is his own".

However, as a result of its entry into force it is legitimate to wonder if the couple joined civilly can be considered to all effects a family, which parallels to the legitimate authority mentioned in art. 29 Const., or gives life to a ratio of a different type.

## 6. CONCLUSIONS

In conclusion, despite some convergences in matters of family law, the differences are still numerous. On one hand, it is unthinkable to reach a European code of family (transcribed into a single legal text), on the other hand the community legislature should operate a fitting on the matter by implementing the regulatory instruments currently in force, expected that each one is dedicated to different aspects of the discipline of the family, currently extremely fragmented.

The absence of coordination creates no few difficulties, in particular for the cross-border spouses involved in a dispute. The most frequent hypothesis concerns the dispute related to the liquidation of the assets in seat of dissolution of the marriage bond. In these cases, there is a risk that the judge called upon to decide on the separation or divorce does not have jurisdiction to adjudicate on the respective patrimonial pretensions boasted by the spouses. Thus, the spouses not only will be forced to establish a second process in another seat (with a considerable waste of time and money), but the decisions issued by the judges may even be conflicting with each other. In the face of these paradoxical situations, the proposal to prepare a family law at a European level appears to be extremely useful and it should be welcomed. It should not be forgotten, however, that only with an actual legal recognition of new family realities it will be possible to achieve a full legal integration between the States in respect of the person's rights.

In the contemporary society, so strongly oriented to overcome the boundaries among Members, there are always many more and multiple marriages, and different forms of family associations characterized by cross-border elements between individuals with different nationalities or between compatriots transferring their common life abroad, with business and goods probably located in more than a single country. In face of the tendency to the internationalisation of family and its dynamics in the European judicial area - characterized by a high level of integration among the Members - it is highlighted the usefulness of a law harmonization that simplifies the rules of legal situations with elements of foreignness through the adoption of a unitary framework, in view of a full realization of the free movement of persons.

The regulatory landscape of the individual Member States, indeed emphasises a great variety of solutions both at a substantive and private international law level, which inevitably leads to a situation of serious uncertainty.

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