

## *New Families in the Legal World: a Comparative Perspective*<sup>13\*</sup>

**Federica Giardini**<sup>14§</sup>

**Summary.** *The definition of a legal family is changing and evolving in our contemporary legal system. Many important changes are currently taking place in the development of contemporary legal systems in this sphere. Most of these involve the institution of matrimony, which no longer constitutes the sole, exclusive title on which recognition of the legal family is based. At the same time, the concept of marriage itself is changing and evolving from the past, 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.*

**Key words:** *legal family, traditional family, institution of marriage, notion of family in its legal sense*

*\*Received: 11/09/2012 - Revision: 23/09/2012 - Accepted: 08/09/2012*

*Self-declaration of compliance with ethical standards: 10/01/2013*

*§Professor of Private Comparative Law, School of Law, University of Padua, Italy. Tel: +39 049 8273392. Fax: +39 049 8273399. Email: federica.giardini@unipd.it; giardini@giuri.unipd.it*

*13 This article reproduces the paper presented as a member of CIRF at the International Conference on Family Law "Sustaining Families," held at the University of Iowa, Iowa City, June 14-16, 2012*

*Interdisciplinary Journal of Family Studies, XVIII, 2/2012*

## **The concept of “legal family”**

Defining what “legal family” exactly means is a theme that could be explored in general – valuing what is the model of a family in a legal sense that circulates between the contemporary legal systems or within a so called family of legal systems or between a group of them?

Is the notion of family in a single legal system always the same or it is different? Does it change from time to time or is it different in the different branches of the legal system such as Immigration Law, Family Law, Criminal Law and so on.

The purpose of this paper is to discuss the first of these.

The concept of what a legal system considers a family to be or not– has always been one of the factors distinguishing and characterising different legal systems. The way in which the family is considered to be 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 people. It is because of the awareness of this historical bond between the identity of people and the family nucleus that the European Union has not included amongst its institutional aims for example the objective of harmonising Family Law.

Despite these premises, we are today witnessing perhaps more than in the past the evolution of legal systems involving the institution of the family and considering this unit as an elemental legal entity.

In this context it is interesting to compare the development of the main contemporary legal orders in the systems belonging to the European Union. At the same time to discover whether there are in effect common trends in the common law systems, 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. Marriage forming the basis of the family has been historically identified as the union of a man and a woman whether it is common-law marriage, or so-called

“continental” marriage or even Islamic marriage with its own peculiar features including openness to polygamy.

Two important changes are currently taking place in the development of contemporary legal systems in this sphere. The first is that the institution of marriage no longer constitutes the sole or exclusive title on which recognition of the legal entity of “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.

### **The “traditional” family based on marriage and registered partnerships**

Although marriage was historically the only type of relationship between adults which was accepted socially and recognised legally, for some time now it 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 not only on what grounds is legal protection afforded but also the time scales of 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 the legal family still solely and exclusively based on marriage, but also that 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 institution of marriage 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 the relationship between the spouses revolve but also the rules of attribution of status in relation to the issue (children). Still in Italy today it does not fit within the legal reality to pose the issue of the family in terms of the recognition of the family (in a legal sense) 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 not approved in Parliament for many legislatures and which have even aimed in some cases at incorporating foreign models.

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 the 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. These are single circumstances where protection is granted on a piecemeal basis for reasons that do not coincide with the existence of cohabitation. They rest 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.

Single profiles are emerging in which cohabitation is relevant and they 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 adoption of minors. Here adoption is admitted only for spouses, but the period of cohabitation prior to marriage may be included as part of the three years required before making an application for adoption. Another example is in artificial insemination, where Law no. 40 of 2004 permits access even to cohabiting couples, but it does not concern itself with specifying the 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. This 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 generally the numerous European Union countries where a family can be formed not only through matrimony, but also alternatively by registration of cohabitation. Among many others, Norway moved in this direction from 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. This may be in relation to third parties, such as the state and private or public institutions, and in their reciprocal relations. This protection may extend especially in the most delicate phase where the relationship between the partners comes to an end which may be voluntary when 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.

A peculiar choice is that of Portugal and Brazil where the legislators governed and regulated cohabitation automatically, without any form of voluntary registration by the cohabitants.

In a general point of view, according to the relationship between the voluntary registration of the cohabitation, that is on the basis of the new models of families in a legal sense and the most traditional one, that is the family based on marriage, it is interesting to underline that in some cases the national legal systems also regulate the way in which it is possible to convert a marriage into a registered partnership and vice versa.

The Dutch legal system, for instance, passed new legislation in 2000 with a very simple procedure for converting a marriage into a registered partnership and vice versa. A simple deed of conversion drawn up by the civil status registrar suffices and a marriage or a registered partnership ends when the deed of conversion has been entered in the relevant register.

An overall view of this legislation governing cohabitation reveals that in some cases the laws are enacted both for opposite-sex partners and same-sex partners, while in other cases the laws only govern cohabitation between same-sex couples which is the case of the British law governing same-sex partnerships.

I believe that in the present situation the creation of true parity of legal protection for both same-sex and opposite-sex cohabitation requires a different approach to be taken by national legislatures.

In fact, where same-sex partners are denied access to marriage – and this is still true for 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.

In elevating cohabiting couples to a “family” in the legal sense the law must consider that cohabitation of opposite-sex partners is the result of a free choice, apart from a minority of cases where one or both partners is unable to contract marriage, for example because one partner is still

married to someone else. They can choose 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 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.

### **The institution of marriage: current developments**

Even the title traditionally conceived as the foundation of the institution 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. In Islamic Law the most significant change may be seen in the weakening of practices linked to polygamy.

Within these specific areas of change, important differences may be seen. In the Netherlands, for example, the law of 2000, which was the first legislation in Europe enabling same-sex couples to contract matrimony adopted a different approach from the Belgian law of 2003. That law expressly excluded that marriage between persons of the same sex could have consequences in the area of issue and adoption. Whereas the Dutch law made the adoption of children possible for same-sex couples.

Many other legal systems recognize today the same sex marriage. They include Spain, South-Africa, Sweden, Norway, Island, Canada, Argentina and more recently Portugal.

Meanwhile some legal systems require that at least one of the parties be a citizen or be habitual resident of the country to get married. In some other jurisdictions, such as in Canada for example, marriage is also open for non-residents. The introduction of same-sex marriage in these legal systems has the result that citizens go to Canada for the so called “tourist marriage” and then go home asking for legal recognition of the new legal relationship in marriage.

If some legal systems recognize same sex marriage without the possibility of adoption such as in Portugal, for instance, then common trend shows that legal rules and general legal principles can operate in favour of adoption also for same-sex couples and that this evolution involves the legal system in which initially adoption is a prerogative only for the spouses of different sex. An example of this, amongst the others, is the Belgian legal system where the Belgian legislator permitted adoption for same-sex couples by the law of 18 May 2006 which was only three year after the introduction of same-sex marriage in Belgium.

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 institution of marriage has undergone important development. The courts have often been inclined 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 of this is provided by the United States. The well-known decision of the Supreme Court of Massachussets 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 a civil marriage itself, not just some rough equivalent, such as a civil union.

In California, where the debate on this issue is still now particularly heated, it was initially raised in a new phase in 2004 between the Mayor of San Francisco. The Mayor issued a directive instructing the County Clerk to issue marriage licenses on a non-discriminatory basis. But the State Governor, approved a statement that same-sex marriages are illegal under Californian law and therefore invalid.

After the decision of the Californian Supreme Court on 15 May 2008 in *In re Marriage Cases*, same-sex marriage was available under California Law until November 2008, when Proposition 8 was approved by State elections. Officially titled: "Proposition 8: Eliminates right of same-sex couples to marry," it was a State wide ballot which finally added a new provision to the Californian Constitution, which stated that «only marriage between a man and a woman is valid or recognized in California». In its May 2009 ruling, *Strauss v. Horton*, the Californian Supreme Court upheld the validity of all those same-sex marriages (between 15.000 and 20.000)

took place in California from June 15, 2008 to November, 4 2008, essentially according to the grandfather clause principle. On August 2010 a federal judge in the case *Perry v. Schwarzenegger* ruled that Proposition 8 was unconstitutional under the Due Process and Equal Protection Clauses of the United States Constitution and barred its enforcement. More recently, Proposition 8 was declared unconstitutional in February 2012 by Ninth Circuit Court of Appeal and the proposition's proponents filed a petition for certiorari with the U.S. Supreme Court, requesting that the Supreme Court review the case. So the dispute in California has not yet been definitively decided.

At the same time the introduction of same-sex marriage in the single others US State's legislation is not free from contrast and moves between the introduction of so called "mini-Doma" and constitutional amendments against the introduction.

The scholar, watching 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 was launched by the British Government in the summer of 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 Woodmandsee* in 1886, to include partners of the same sex (Giardini, 2004).

There are signs of some development for marriage in Islamic Law.

The principle of *jabr*, or imposed marriage by which a father can decide his daughter's marriage at his discretion, has been abolished in the Moroccan and Tunisian codes. But it remains in the Algerian code in the single event that bad behaviour by the girl can be foreseen.

Polygamy, expressly permitted by the Koran<sup>15</sup>, is allowed in all the codes with the exception of Turkey, which has a secular legal tradition that prohibits polygamy, and Tunisia. The Moroccan code attempts to make it impossible by making it subject to the consent of the first wife consent as well as the requirement of equality in the affection towards the wives by the husband.

But the current situation of polygamy in Islamic Law is more complex that it seems from these prohibitions.

<sup>15</sup> According which: "And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two, three or four, but if you fear that you shall not be able to deal justly (with them) then only one" (IV, 3)



For instance, Art. 145 in the recent Turkish civil code of 2002 expressly states that a man cannot marry more than one woman, but at the same time the phenomenon of the so called “fellow-wife” has not been eliminated in the society. Consequently it needs to receive modern definitions from scholars, which agree more with the contemporary social dynamics. The traditional definition of “fellow-wife” can be explained as «each one of the concubines that a man has other than his first wife» or «the name of the wife of a man among his others wives». According to the legal prohibition of polygamy already mentioned, a traditional and old definition of “fellow-wife” is certainly not acceptable and can be more justified by underlining e that fellow-wife is a woman living with a married man other than his legally married wife. Although the phenomenon in the society is not so common, with the acceptance of the legal wife it could be reasonably argued that the familiar situation created with the presence of a fellow-wife appears as a polygamous nucleus “de facto.”

In conclusion, it is clear, as often it happens, that the social context can supersede the legal provisions, particularly in the ambit where tradition is more firmly rooted in the society and where it is strictly connected with traditional and religious behaviour.

This perspective also has implications for the current developments in the institution of marriage, both formally as in a substantial evaluation of all the real dynamics and also socially – which is able to modify the definition of marriage itself, considering this institution as the most traditional basis of the definition of family in a legal sense.

### **Issue as a means of developing the notion of family in the legal sense**

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 to matrimony. This draws attention to the different forms of legal protection that are granted and may be granted to couples living together or to spouses. This fails to consider an element which, in my opinion, enters fully within the dynamics of family model formation: that of issue, not only children from a biological relationship, but also adopted children.

The reason behind this widespread approach that legal systems have for some time recognised by law that it is the union of two adult persons that defines a new family entity.

It is then not necessary to have procreation, and therefore issue, to have a family. While this is true and may be accepted, a different and equally significant phenomenon must not be overlooked: that it is also possible to have a family 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. This phenomenon should also be investigated at legislative level when 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. We traditionally say that this is also a family unit, but now we can add that it happens not only because for a limited period of time it has enjoyed that title (the marriage), but according to the presence of an autonomous title for defining the family in a legal sense, that is issue itself.

## **Conclusions**

The definition of family in a legal sense is changing and rapidly evolving in many contemporary legal systems. Sometimes this evolution is not definitively finished and it is often inconsistent.

For having a correct perspective that consent to read the real implications of this important evolution all over the world, particularly in a comparative legal perspective, the scholar can assume the method for testing the evolution (of the notion of legal family) according to its implication in terms of respect of human rights. Considering the historical evolution of legal institutions, there is a strong and indivisible bond between the concept of family and the protection of human rights.

Indeed, it is by establishing full respect for human rights both outside and within the family unit that the challenges posed now and in the future by developments in the concept of legal family can be faced.

## References

- Giardini, F. (2004). Verso una disciplina giuridica della same-sex partnership in diritto inglese. *Famiglia. Rivista di diritto della famiglia e delle successioni in Europa*, gennaio-febbraio: 149–171.
- Goodridge v. Department of Public Health, 798 N.E. 2d 941 (Mass. November 18, 2003).
- Hollingsworth v. Perry, 671 F. 3d 1052 (December 7, 2012).
- Hyde v. Hyde and Woodmandsee, L.R. 1 P.D. 130 (March 20, 1866).
- Rules on medically assisted procreation. Official Gazette no. 45 (February 24, 2004).
- Strauss v. Horton, 46 Cal. 4th 364 (May 26, 2009).