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The evolution of Family Law: changing the rules or changing the game?

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*Carlos Martínez de Aguirre**

1. If a lawyer of the early 20th. Century woke up from his hibernation in these days, he would find a lot of new words he would not understand (internet, wifi, microwave, and so on). However, when reading, or talking, about family and family Law, he would probably feel more comfortable and think to himself: "I do know this", (being "this", words like marriage, husband, wife, spouses, son, daughter, parents and so on). But after a short period of time he would realize that being these words the same ones that he knew, their current meaning would be completely different.

Indeed, Family Law has undergone significant changes in the last few decades. These changes have affected not only marginal issues, but also the very heart of Family Law: marriage, filiation- relationship and parenting. On the other hand, these changes are not only legal: the social conception about marriage and family and the social configuration of family relationships have also changed. To sum up, families have changed, the ideas about family and family relationship have changed, public policies relating family have changed, and the laws concerning families have changed too.

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Those changes are following a general trend towards subjectivisation, from two points of view: the one from the individuals, and the one from the State. This has been a long process that has been accelerating in recent years. As a consequence of this process, family, marriage and parenting, on the one hand, are no more considered as basic natural realities that are fundamental to society, whose meaning and content are tied to human nature, and whose legal regulation, in their core aspects, must respect that meaning and that content; on the other hand, family, marriage and parenting are subject to human will, “human will” as a meaning of the will of every individual and the will of the society as a whole: hence both, individuals and societies are allowed to fill the words “marriage”, “family” and “parenting” with almost every meaning they want.

Next I will briefly introduce some of these issues.

2. There are many factors that have influenced on this subjectivisation. I will mention just some of them: for example, the idea that marriage is nothing but a contract (and no more considered as a social institution, even though it is based in the free will of the spouses); or the increasing importance of romantic love as the only ethical foundation for people entering into marriage (with its logic consequence: when romantic love fails, the marriage must finish, divorce must be granted by law).

I would also like to underline the importance of medical and biological advances related to human reproduction (chemical and mechanical contraceptive means, that allow sex without reproduction; assisted reproductive technologies, that allow reproduction without sex): in the same way that people can choose to marry or not, or to have sex or not, they can choose to have sex without having children, or to have children without sex: all those choices, on the other hand, are independent of

marriage, since being married or not has increasingly fewer legal importance, either for adults and children. The remaining idea is the domination of human will (of individual will) over marriage, sex and procreation.

We can add to this quick outline, the current surgical techniques for gender reassignment, and hormonal treatment for transgender, that seem to transform a man into a woman or *vice versa*; or the Laws relating to gender reassignment, even without neither surgical nor hormonal treatment: with all this, a man seems to be able to become a woman, or a woman seems to be able to become a man, at least from a legal point of view (but allow me to add that the odd cases in which a woman becomes a man, and after that becomes pregnant –apparently, a pregnant man–, show that he/she has never stopped being a woman, because a woman is the human being that can become a mother). In this way, humankind seems to be able to dominate sexuality, not only by relating to its consequences, but also regarding the belonging to one or another gender.

There is a parallel phenomenon, in which marriage and family has become progressively a subject to the power of the State: in a first phase, the State power confined itself to the legal recognition of marriage and family as a natural and fundamental group unit of society, which deserve protection and support: in this phase the legal rules affected mainly technical or peripheral aspects of marriage and family, and their meaning and basic structure are preserved; in a second, we could even consider it a third phase, the State claims the right to decide what marriage is, and what a family is; hence, marriage and family become whatever the State decides they are.

The result of this process is a public approach to marriage and family characterized by neutrality and pluralism. The recognition of the power of individuals to organize their affective and sexual life, together with the ideological pluralism of western societies, necessarily leads to a high social number of models of organizing sexual and affective relations, all of them claiming to be “family models”, many of them looking forward to being considered (and being legally named) “marriage”.

All these changes have legal consequences. As prof. Glendon wrote, many years ago, “where general ideas about the conduct of family life are expressed in the law, they are bland and neutral, capacious enough to embrace a variety of attitudes and life styles”. After this evolution, that I have summarized so briefly, State and society do not seem to have a clear set of ideas and values related to the way in which citizens should organize their sex, marriage and family relationships: it has been said that “*le Droit se desengage du mariage et de la famille*” (the Law is no more committed to marriage and family).

The final outcome is, so to speak, the emptying of the notion of marriage: it is not stable anymore, on account of the unilateral, groundless divorce, as it is right now in Spain; it is not heterosexual anymore, on account of same sex marriage; it is not related to procreation anymore, on account of same sex marriage too; and it remains a couple for the time being, but only by a sort of legal inertia; but this inertia is slowing down, as shown by the recent proposals about legal recognition of the so called “polyamory”. Indeed, after this process, what is the real legal content of marriage? Marriage seems to be only a name, and some legal formalities: an empty shell, and legal inertia.

The conclusion, after this process so briefly described, is that not some ancillary technical rules about marriage and family have changed, but the very legal meaning of marriage and family; not the rules, but the game itself has changed. Our society is playing a completely different game, despite keeping its name.

3. All these changes are supposed to be made in order to achieve better family relationships. Indeed, our time has witnessed an impressive effort to identify the best model related to sex, marriage and family relationships; governments, groups and individuals have devoted a great deal of time and effort looking for the improvement of family life: in many countries there are Ministries of Family; there are family public organizations, trying to improve the living conditions of the families; there are National, regional and local Plans of Support to the Families; there are parenting schools, that promote skills for the optimal development of family life; there are lots of books and websites about how to improve family life, how to have a successful family, or how to build a happy family with happy members... But it is striking, that all this effort is accompanied by a sharp fall of the quality standards linked to family life: the decline in the number of marriages, and in the number of children growing in a stable family; the increase of family break-ups; the decreasing of the birth rate; the increasing rate of births out of wedlock; the rates of suicide among children and youth; the rate of psychopathologies due to causes linked to the problems of family life, the rise of domestic violence and so on...

This shocking paradox has been explained accurately by prof. Viladrich, with the, so to speak, “fable of the North Pole Explorer”. Imagine an explorer who wants to reach the North Pole with his dogsled;

the first day, before beginning his journey, the explorer checks the direction with his compass, and begins to move at a high speed on a snowy frozen ground towards the North; he stops every three hours and checks the direction of his trip with the compass: and every time, he notices that he is further from the North Pole than he was at the beginning of the day; every time he checks his direction with the compass, and notices that he is really going northwards. At the end of the day, after twelve hours of exhausting effort, he is further from the North Pole than he was in the morning. How is it possible? To solve this paradox, we have to gain some perspective: from a birds-eye-view, we would be able to notice that the explorer is making his journey on a very huge iceberg, which is going to the south faster than he is able to go to the north in his dogsled. The conclusion of prof. Viladrich, as well as mine, is that in this crisis of the family, and of Family Law, we have to gain perspective: all the social and public efforts, relating to family life are based on incorrect assumptions about family human relations; we are devoting substantial efforts to, so to speak, peripheral family issues, but we are failing in the way we are dealing with the core aspects of family life. It is therefore imperative that there be a complete rethinking of the way our western societies are dealing with sex, marriage and family: as far as I think, this is one of the main purposes of the International Academy for the Study of the Jurisprudence of the Family, founded by prof. Wardle and prof. FitzGibbon seven years ago: the intellectual, open minded and respectful debate about the foundations of Family Law.

In my opinion, this debate would be especially useful when adopting a teleological point of view; in other words, if it focuses on why society and Law take care of sex, marriage and family. To clarify this idea, it might be appropriate to think about benches and signs. Imagine a bench, on which there is a sign that says "do not sit". We can ask ourselves what to do:

leaving the sign on the bench, removing it, removing the sign and the bench as well, or even putting a similar sign on all benches. To give the right answer, first of all we need to know why that sign is on the bench, and what that sign is on the bench for. We can then figure out different answers: if the sign was put there when the bench was painted so that nobody got stained when sitting on it, the reasonable thing is to remove the sign once the paint is dry; if it was put there because the bench is in a bad condition, to avoid accidents by preventing people from sitting down, either the bench is repaired (and then the sign should be removed), or both bench and sign should be removed; but if the sign was put there because the bench has a historical and/or artistic value and to preserve it, then the sign and the bench should be maintained (and also an identical sign should be put on all the benches with the same value).

Something similar occurs with Family Law, and more specifically with the relationship among the different family models. What should we (Law, society) do with family? Should all those new models be regulated by the same rules as marriage? Should marriage be directly abolished? Should we change the main content and regulation of marriage making it unrecognizable? Should we establish different regulations for each one of those family models (or even not regulate some of them specifically)? These are the questions I am going to address in the following few minutes.

4. The, so to speak, “modern” approach to family and Family Law seems to be based on love and cohabitation: Society and Law would be concerned with the family because it is a relationship that involves love, or because it is a situation of cohabitation, or, above all, because it is a situation of cohabitation that involves love. The idea of two people loving each other and living together would seem to be enough for Law. This

approach was applied first time to marriage, in order to vanish the legal differences between married and unmarried couples, then to regulate same sex couples and, finally, to admit same sex marriage: it has been a process that took two decades more or less. Nowadays, this approach is also applied to the relationship between parents and children: parenthood seems no more to depend on biological filiation, but on love and cohabitation between an adult and one or several children the adult takes care of: that is the reason why, for instance, we are beginning, with the help of the new reproductive technologies, to discuss about legal tri-parentality or pluri-parentality (in cases of the biological parents and the second husband of the mother, who cares about the child as well; or in the case of two lesbian mothers and a gay father, who provided the sperm and wants to have a legal relationship with the child: many legal conflicts arise in these situations, and there have been several striking cases settled by Courts in the United Kingdom); this is why we are dealing with same sex adoption too.

I have no time to properly address both perspectives (vertical and horizontal) of family relations. Relating to the horizontal one, the thing is that this approach does not solve the problem of brothers, or friends, who live together and love each other, but as brothers do, or as friends do: there is love, there is cohabitation, but it does not seem to be enough for the Law. Of course, there is a significant difference: sex. Unmarried couples have sex and brothers or friends have not. But, if so, why is sex relevant to society, and hence to Law? I think that the right answer is because of the children: children (new citizens) usually come from the sexual relations between their biological parents: and this is clearly in the interest of society. At this juncture, it is also clear that the social importance of heterosexual couples is far superior to that of same-sex ones. Society is

more interested in heterosexual couples, first of all because citizens are born as a result of them (and from their sexual intercourse), and no citizens come as a result of sexual intercourse in same-sex couples.

Family is a human group of primary social interest, due to its roles in relation to society. From a social point of view, family is connected with the survival of society, as far as it provides the birth of new citizens, and offers an adequate framework for their integral development as human beings and their harmonic integration into society. These are the strategic functions of family from a social point of view. At this juncture, it is clear that the social importance of heterosexual couples is far superior to that of same-sex ones.

On the other hand, the process of integral maturing of human beings goes far beyond of the purely biological aspects: it also includes the development of their intellectual, volitional and emotional potentialities. Family has the mission to provide the proper framework in which such a process of humanization and socialization can be developed. This process is linked to the stability of the family (*i.e.*, of the union of father and mother), stability that can guarantee that the process is going to take place in the most appropriate way.

So, the strategic family functions, which are the reason why society and Law look after this institution, are linked to heterosexuality and to stability: the stable heterosexual family model seems to be the best endowed to carry out the strategic functions of the family, and, therefore, it is the model the most consistent with the reasons why Law and society are interested in that kind of relationship, and regulate it. The recovering of the Family Law presupposes the recovering (or the keeping) of the heterosexuality and the stability of marriage. And this applies mainly to the

debate about no fault divorce (or groundless divorce, divorce on demand, as it is in Spain) and same-sex marriage.

Please, allow me to give a short idea about this debate: the issue at stake is not the dignity of gay and lesbian people (whose dignity does not depend on the possibility of getting married to a man or a woman of their same sex: their dignity only depends on the fact that he is a man, and she is a woman): the issue at stake is the meaning of marriage. As Justice Cordy said in his Dissenting opinion in *Goodridge v. Department of Public Health*, “the Court has transmuted the *right* to marry into a right to change the institution of marriage itself... only by concluding that *marriage* includes the union of two persons of the same sex does the Court conclude that restricting marriage to opposite-sex couples infringes on the *right* of same-sex couples of *marriage*”.

5. From these conclusions, it seems that the solution to the problem of family, and Family Law, is clear, but not easy to implement: we have to regain perspective, and proceed to a global rethinking of Family Law, from the teleological point of view. Changing the direction of an iceberg, especially if it is a huge one, is not easy; but I think it can be done, and it should be done if we really want to keep playing the marriage and family game, and not only keep the name of the game. As all you know, ideas have consequences. Maybe the way is to focus on children, and to rebuild Family Law from the children perspective: but not only relating to the education of the children already born (in other words, from the “parenting” perspective), but mainly relating to the “children production and education units”, that are families.