GENERE, SOGGETTIVITÀ, DIRITTI · 7

GENDER BASED APPROACHES TO THE LAW AND *JURIS DICTIO* IN EUROPE

edited by Elettra Stradella

with the collaboration of Giovanna Spanò

PISA
UNIVERSITY
PRESS

Gender based approaches to the law and juris dictio in Europe / edited by Elettra Stradella ; with the collaboration of Giovanna Spanò. - Pisa : Pisa university press, 2020. - (Genere, soggettività, diritti ; 7)

342.0870866 (23.)
I. Stradella, Elettra II. Spanò, Giovanna 1. Identità sessuale - Tutela – Diritto 2. Discriminazione sessuale - Diritto

CIP a cura del Sistema bibliotecario dell'Università di Pisa

Opera sottoposta a peer review secondo il protocollo UPI

The project ELaN is funded by the European Commission under the Programme Erasmus+ Action - Jean Monnet Module - Call for Proposals 2019 - EACEA-03-2018 Application No 611685-EPP-1-2019-1-IT-EPPJ-MO-MODULE

The European Commission support for the production of the publication does not constitute an endorsment of the contents which reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

In copertina: immagine di Francesco Ungaro, *www.pexels.com*

With the support of the Erasmus+ Programme of the European Union

European Law and geNder

Società con socio unico Università di Pisa
Capitale Sociale € 20.000,00 i.v. - Partita IVA 02047370503
Sede legale: Lungarno Pacinotti 43/44 - 56126 Pisa
Tel. + 39 050 2212056 - Fax + 39 050 2212945
press@unipi.it
www.pisauniversitypress.it

ISBN 978-88-3339-457-2

layout grafico: 360grafica.it

COMITATO
UNICO
DI GARANZIA

Collana a cura del Comitato Unico di Garanzia dell'Università di Pisa

Table of contents

Towards a Functionalist Notion of Family in European Private Law

Antonio Vercellone

1. The mainstream notion of family and the centrality of marriage

Although no EU body can legislate on family law, since the European Union does not have such a mandate, it has correctly been upheld that the EU has an impact on family law, in a constant interaction between the legal system of the Union and the ones of its member states[1].

Indeed, many of the rights at the cornerstone of the architecture of the Union require EU law to implement a notion of family, since their full enjoyment is strictly related to the protection of the family life of the right holder.

The main example is the right of the citizens of the Union to freely move and reside within the territory of the member states.

[1] This is proved by the increasing interest that, in the last years, the European legal scholarship has put in research projects aimed at finding a common core of European family law as well as in the study of the interactions between domestic and EU family law. With this respect, important series of collective studies have emerged. Among them, we should at least mention the four volumes edited by Sherpe (Sherpe J.M. (eds.), *European Family Law*, Edward Elgar, 2016) as well as the series promoted by the Commission on European Family Law and published by Intersentia (*European Family Law in Action)* which have now reached forty-six volumes.

Indeed, such a right would be just apparent if not extended to the right holder's family[2]. Not surprisingly, the disciplines on free movement of citizens are considered as a paradigmatic example of those cases in which the EU, by legislating *par ricochet* on matters upon which it does not have a direct competence, impacts on the law of its member states.

With respect to the notion of family, such disciplines have often been blamed to be discriminatory in their nature[3].

The very first regulation on free movement enacted by the EU (at the time European Community), was Regulation n. 1612/68 of the Council[4].

Although this regulation has been repealed, its content, and the case-law which had developed upon it, is worthy of mention, since its main features are still at the cornerstone of the current understanding of the family in Europe.

The regulation granted the freedom of movement to the "worker" and to his (!) "family"[5]. The notion family had to be intended as to encompass only the spouse of the worker and his not independ-

---

[2] See Berneri C., *Family Reunification in the EU: the Movement and Residence Rights of Third Country National Family Members of EU Citizens*, Oxford, Hart Publishing, 2017; see, also, the essays collected in the third part of the volume edited by Gonzàles Pascual M., Torres Pérez A. (eds.), *The Right to Family Life in the European Union*, London, Routledge, 2017.

[3] See, for instance, McGlynn C., *Families and the European Union*, Cambridge, Cambridge University Press, 2006.

[4] Regulation (EEC) n. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

[5] According to article 10 of Regulation n. 1612/68:

«1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

(a) his spouse and their descendants who are under the age of 21 years or are dependants;

(b) dependent relatives in the ascending line of the worker and his spouse.

ent children. This wording has been very strictly interpreted by the Court of Justice, which has constantly excluded from the scope of application of the discipline any relationship falling outside the traditional notion of marriage between a man and a woman, such as *de facto* relationships, civil partnerships, same-sex relationships of any form etc.

The very formulaic approach undertaken by the Court emerged in several cases.

An example is *Diatta v. Land Berlin* (1985)[6].

Here's the facts of the case. Mrs. Diatta was a Senegalese national married to a French citizen. In 1977, this latter joined her husbands in (west) Berlin, where he worked, and moved into his apartment. The applicant was thus granted a permit of stay, on the ground of being the spouse of a European citizen lawfully living and working in one of the member states. The next year the couple broke up and, in 1978, Mrs. Diatta started living apart from her husband, in her own rented accommodation, intending to divorce as soon as it would have become possible under French law. After few months, Mrs. Diatta's residence permit expired. She thus filed a request for extension to the competent administrative office. The request was rejected on the ground that she could not be considered as a family member since she and her husband were not living together anymore.

The case ended up at the ECJ, which ruled in favor of Mrs. Diatta. According to the reasoning of the Court, art. 10 of the reg-

2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.

3. For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; this provision, however must not give rise to discrimination between national workers and workers from the other Member States».

[6] Case 267/83, *Diatta v. Land Berlin*, [198 ECR 567].

ulation, by stating that the spouse of a worker has the right to install himself/herself in the state where this latter resides, does not require to assess whether the couple lives together. Put in other words, according to the Court, the provision at stake only requires to ascertain whether a formal lien of marriage exists, not whether the underlying relationship is factually still in place.

A symmetric approach to *Diatta* was taken by the Court of Justice in another mid-1980s case: *Netherlands v. Reed*[7]. In this case, the Court had to decide whether the term spouse, provided for by article 10 of the 1968 regulation, could be interpreted as to encompass a long-term relationship pursued out of wedlock.

The applicant sought a permit of stay in the Netherland to join her partner, where he moved for work and with whom she had been living for several years. The permit was denied by the administrative authority since the couple, composed by two British nationals, was not married. Because of that, they could not be considered as a "family" under art. 10 of the regulation. The Court of Justice confirmed the decision of the administrative authority, stating that the term "spouse" had to be interpreted literally and in the light of its technical meaning, namely as the juridical status descending from a legally established marriage.

From these two cases, we should draw the conclusion that, under the old regulation, the pivotal element for the definition of family was the existence of a formal lien marriage.

This doctrine was interpreted in such a strict fashion as to conduct to paradoxical consequences, like the one of denying the status of family to two partners who had lived together for five years (and who were seeking to continue their common life) while granting such a status to a separated couple on the verge of divorce.

---

[7] Case 95/85, *Netherland v. Reed*, [198] ECR 1283; see, also, Case T-65/92, *Arauxo-Dumay* v. *Commission* [1993], ECR II – 597.

It has been upheld that this approach has partially been reversed in *Eyup* (2000)[8].

In this case, the Court had to take position on the interpretation of article 7 of the decision n. 1/1980 of the Association Agreement between the European Community and Turkey about the employment and free movement of Turkish citizens within the EC.

Mrs. Eyup, who entered Austria as a family member of a Turkish citizen lawfully residing in the country, applied for a work permit, which was denied by Austrian authorities. The reason of the denial was that, according to the administrative body in charge for the application, the deadline required to obtain the permit was not yet expired. Indeed, the Decision provided that the family member of a Turkish citizen could apply for the permit only after five years of regular residency in the country.

The situation of Mrs. Eyup was in fact quite peculiar. She did enter the country as the wife of a Turkish worker legally residing in Austria. The couple, however, divorced after a couple of years. Notwithstanding that, following the divorce, the ex-spouses kept on living together *more uxorio* and, during this period, they also had children. The couple thus married again and, three years after the second marriage, Mrs. Eyup applied for the permit at stake. The Austrian authorities only considered as relevant the time between the second marriage and the application (three years), denying relevance to both: the amount of time the parties live together during the first marriage and between this and the second marriage.

The Court of Justice ruled in favor of Mrs. Eyup, highlighting that the period between the end of the first matrimony and the celebration of the second one should have been counted for the purposes of the requirement of "continuous residency" provided for by the relevant discipline.

[8] McGlynn C., *op. cit.*, 122.

Although it may seem that, in this judgment, the Court paved the way for a broader notion of family, able to encompass also *de facto* relationships, in fact the idea of family conveyed in Eyup is still a very traditional and marriage-centric one. Indeed, in the reasoning of the Court, it is precisely because of the existence of the two marriages that is given relevance to the period the parties lived unmarried. Also, to prove that in the period spent out of wedlock the parties kept on living as a family, the Court relied on a very traditional pattern, highlighting how, in that time, Mrs. Eyup was not working and was taking full time care of the home and of the children[9].

In 2004, regulation 1612/68 was repealed by the new free movement directive, currently in force (Directive 2004/58/EC)[10]. The political debate which has conducted to the adoption of the new discipline, tells the story of a missed opportunity[11]. Indeed, the Parliament demanded valuable changes to the first draft proposal of the Directive, in the attempt to expand the concept of family to *de facto* relationships and same sex couples. The Commission rejected most of the suggested changes, and in the end the Parliament ac-

[9] See, especially, paragraph 32 of the decision, reported hereinafter: «Notwithstanding the decree of divorce between the spouses, Mr and Mrs Eyüp did not at any time interrupt their living together, since they never ceased to reside together under the same roof. Four children were born during the extra-marital cohabitation period. Mr Eyüp always maintained his family, Mrs Eyüp devoting herself essentially to household tasks and having only occasionally taken certain short-term jobs».

[10] Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) n. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[11] See Toner H., *Partnership Rights, Free Movement and EU Law*, Oxford, Hart Publishing, 2004, 63.

cepted the Council's version, which substantially relies on the same concept of family envisaged by the previous regulation: a spouse and minor children[12].

The major shift from the previous discipline has been marked through the case-law of the Court of Justice, which has opened the scope of the regulation as to include same sex couples.

In *Coman* (2018)[13], the Court stated that, when the union has been legally formalized (in both an EU or extra EU country), the same-sex partner of a European citizen has to be recognized as "spouse" for the purposed of the application of the directive, independently on whether or not the country of residence recognizes same-sex unions.

---

[12] According to article 2, paragraph 2, of the Directive:

«"family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)".

It shall be noted that the Directive does contain a provision on *de facto* partnerships. Such a provision (art. 3, para 2, let. b.), however, does not set any obligation, since it only provides that member states *shall* facilitate the entrance of the partner. The norm reads as follows:

"Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) [*omissis*]

(b) the partner with whom the Union citizen has a durable relationship, duly attested».

[13] Case C-673/16. *Coman and Others v. General Inspectorate for Immigration and Ministry of the Interior.*

2. A critique of the mainstream notion of family

The legal regime briefly sketched above has been strongly criticized. Those criticisms fall within a more general critique carried out by many scholars and activists, highlighting the heteronormative nature of the concept of family generally envisaged by EU law, of which the disciplines on freedom of movement is a paradigmatic example[14].

In fact, the notion of family analyzed in the previous paragraph substantially mirrors the nuclear straight couple, having sexual intercourses, living together, possibly with children. This concept is legally embodied in the institution of marriage, which, not by coincidence, is the crucial element in defining the family, independently on the underlying relationship between the parties.

This approach is indeed very exclusionary since many families do not fit within this paradigm.

In the era of pluralism of family models[15], a lot of people decide to develop their familiar bonds in ways which are very different from the married couple living with its children.

An example of this are polygamist and polyamorous families. Several studies highlight how models of families exceeding the concept of the "couple" are becoming increasingly widespread in Europe and how this phenomenon poses serious issues with respect to their integration and legal recognition[16]. Another example can be drawn from the so called "mutual aid families", namely those unions composed by two or more people deciding to share their lives to ensure one an-

[14] See McGlynn C., *op. cit.*

[15] See Scott E., Scott R., *From Contract to Status: Collaboration and the Evolution of Novel Family Relationship*, in *Col. L. Rev.*, 2015, 293-374; Marella M.R., Marini G., *Di cosa parliamo quando parliamo di famiglia*, Roma-Bari, Laterza, 2014.

[16] In the European legal scholarship, this issue has been approached especially by the Italian doctrine. See: Grande E., Pes L. (eds.), *Più cuori e una capanna. Il poliamore come istituzione*, Turin, Giappichelli, 2018; Rizzuti M., *Il problema dei rapporti familiari poligamici*, Naples, Edizioni Scientifiche Italiane, 2016.

other mutual aid and support (think, for instance, to two adult siblings living in the home of their elderly mother, one of them taking full time care of this latter, the other pursuing a job in the market to provide the trio with the necessary means of sustenance). Mutual aid unions not only impair the centrality of the "couple" as the pivotal unit of the family, but also the idea that such a couple needs to be sexualized and impliedly meant for reproduction. These traits can be also found in the phenomenon known as "kinships of choice", particularly diffused in the LGBTQ+ community, phenomenon which sees two or more friends living together, putting their lives in common as a family to ensure each other care and constant support[17].

Of course, the most relevant portion of unions still falling outside the scope of the mainstream European notion of family are *more uxorio* cohabitants, namely those (straight or same-sex) couples living together out of wedlock.

These criticisms have not been overcome by the latest development of the discipline under analysis. Indeed, the inclusion of (legally formalized) same-sex couples is the result of that assimilationist process, very well described by queer studies and legal feminism[18], according to which only those relationships which can be normalized within the accepted paradigm (which is thus confirmed and not

---

[17] See: Weston K., *Families we Choose: Lesbians, Gays, Kinship*, New York, Columbia University Press, 1991.

[18] See, *ex multis*: Barker N., *Not the Marrying Kind: a Feminist Critique of Same-Sex Marriage*, London, Palgrave, 2012; Franke K., *The Curious Relationship of Marriage and Freedom*, in Scott E., Garrison M. (eds.), *Marriage at a Crossroads: Law, Policy and the Brave New World of Twenty-First-Century Families*, Cambridge, Cambridge University Press, 2012; Ettelbrick P.L., *Domestic Partnerships, Civil Unions or Marriage: One Size does not Fit All*, in *Alb. L. Rev.*, 2001, 34-78; Warner M., *The Trouble with Normal: Sex, Politics and the Ethics of Queer Life, New York,* The Free Press, 1999; Emens E.F., *Monogamy's Law, Compulsory Monogamy and Polyamorous Existence*, in *N.Y.U Review of Law and Social Change*, 2014; (*contra*, however, see Aviram H., Leachman G.M., *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, in *Harvard Journal of Law and Gender*, 2015, 269).

at all criticized) can be accepted by the law. In the end, the traditional paradigm of the sexualized married couple has not been overcome in favor of a more flexible notion of family able to welcome all unions. To the contrary, such a paradigm (the sexualized married couple) has just been opened to those same-sex unions able to conform to it.

This last element is extremely important, since it highlights a fundamental issue.

In the field of family law, the modification of the law in the light of an ever-changing society, has taken the form of a slow broadening up of its traditional structure (marriage) as to encompass some situations historically excluded from it. This path, however, is accused to be still very conservative and exclusionary.

We thus need to ask whether another path is possible.

With this respect, critical legal studies developed in the field of private law may be helpful. Under this perspective, lessons can be taken from the critical reflections carried out in the field of property law.

For a long period, the academic debate and the political fights around the allocation of property rights followed a path very similar to the one we are now witnessing in family law. In fact, especially in the last decades of the past century, the allocation of new properties in favor of those excluded from it has been seen as the solution to social exclusion and marginalization (*i.e.* poverty).

However, especially after the economic crisis of 2008, a great interest has developed around the possibility to face these issues (not through the increase of the number of owners) but rather through a process of deconstruction of the notion of property[19]. In

[19] I am referring to the recent debate on the commons, which finds its roots in Harding G., *The Tragedy of the Commons*, in *Science*, 1962, 1243, the perspective of which has been overturned by E. Ostrom (Ostrom E., *Governing the Commons. The Evolution of Institution for Collective Actions*, Cambridge, Cambridge University Press, 1990). For an introduction to this debate see De Shutter O., Rajagopal B., *Property from Below: An Introduction to the Debate*, in Id. (eds.), *Property Rights from*

this sense, many theories and social practices have emerged, enacting new sophisticated models of ownership which paved the way for a new conceptualization of property, a conceptualization based on inclusion (rather than exclusion) and on distribution of wealth (rather than on its maximization)[20].

It is worthy to wonder whether such an approach could be applied as well to family law[21]. In other words, rather than working on broadening the scope of application of marriage to those excluded from it, without questioning its structural features, it may be interesting to see whether another path is viable, namely whether, beside marriage, it is possible to find another notion of family flexible enough to welcome all different types of unions.

Below: Commodification of Land and the Counter-Movement, London, Routledge, 2019. More in depth, on the theory of the commons, see Mattei U., *Beni comuni. Un manifesto*, Roma-Bari, Laterza, 2011; Quarta A., Spanò M. (eds.), *Beni comuni 2.0. Contro-egemonia. Nuove istituzioni*, Sesto San Giovanni, Mimesis, 2016; Dardot P., Laval C., *Commun. Essai sur la révolution au XXI siecle*, Paris, La découverte, 2015; Marella M.R. (eds.), *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, Verona, Ombre Corte, 2012; Marella M.R., *The Commons as a Legal Concept*, in *Law and Critique*, 2017, 28. On the hermeneutical role the notion of the commons plays on the institutions of private law see Mattei U., Quarta A., *The Turning Point in Private Law. Ecology, Technology and the Commons*, Cheltenham, Edward Elgar Publishing, 2019; but see, also, Capra F., Mattei U., *The Ecology of Law. Towards a Legal System in Tune with Nature and Community*, Oakland, Berrett-Koehler, 2015. The debate on the commons has especially developed in the field of urban property and, thus, with respect to cities (on this see, for instance, Foster S., Iaione C., *The City as a Commons*, in *Yale Law and Policy Review*, 2016, 2, 34; Vercellone A., *The Italian Experience of the Commons. Right to the City, Private Property and Fundamental Rights*, in *The Cardozo Electronic Law Bulletin*, 2020; Mattei U., Quarta A., *Right to the City or Urban Commoning?*, in *The Italian Law Journal*, 2015, 2, 304).

[20] An example of these models, with reference to urban property, is the Community Land Trust, on which see Vercellone A., *Il Community Land Trust. Autonomia privata, conformazione della proprietà, distribuzione della rendita urbana*, Milano, Giuffrè, 2020.

[21] See Marella M.R., *Critical Family Law*, in *Journal of Gender, Social Policy and the Law*, 2011, 2, 19.

To do that, we need to ascertain whether, in the matrix of existing law, side by side to the current mainstream notion of family based of marriage we could find another notion, which, although somehow recessive, could bear the transformative potential indicated in the above.

3. Towards a functionalist notion of family: *de facto* relationships

In the domestic legal systems of the member states, a potentially transformative notion of family can be found in the discipline of *de facto* unions, namely those *ménage* carried out by the parties out of wedlock. Such a notion, is common of those systems where the protection of *de facto* families originated not in a statute but, rather, through case-law and legal practice.

The Italian experience is a paradigmatic example of this trend[22].

In Italy, *de facto* families have only recently been subjected to a specific statutory regulation[23].

Such a discipline represents, to a great extent, the crystallization of rules and principles elaborated by the case-law. Precisely for this, although the new statute entails specific provisions related to its scope of application, legal scholars and practitioners agree upon the fact that the actual scope of application of the rules on *de facto* families, in the Italian system, has to be found in the case-law prior to the enactment of the aforementioned statute[24].

---

[22] For a deeper account of this interpretation of the Italian law on *de facto* unions, see Vercellone A., *Più di due. Verso uno statuto giuridico della famiglia poliamore*, in *Rivista critica del diritto privato*, 2017, 4, 607 ss.

[23] See legge 20 maggio 2016, n. 76, article 1, paragraphs 36 and 65.

[24] See, for this position, Lenti L., *Convivenze di fatto. Gli effetti: diritti e doveri*, in *Famiglia e diritto*, 10, 2016, 931; Balestra L., *La convivenza di fatto. Nozione, presupposti, costituzione e cessazione*, in *Famiglia e diritto*, 10, 2016, 919; Perfetti U.,

It is precisely the scope of application which can be drawn from this case-law that sketches a legal notion of family which appears extremely relevant for our purposes.

One of the first rights the Italian case-law recognized to a *de facto* family member was the right to be compensated for damages in case of death of the partner. Before this case-law overruling, this right was traditionally granted only to spouses.

Applying the general principles on torts, the Italian Supreme Court (*Corte di Cassazione*) upheld that the right to be compensated for damages originates from[25]:

- A relationship which entails the economic support and cooperation between the parties, which stability allows to generate the expectation of its lasting in the future (economic loss – *danno patrimoniale*);
- A strong personal bond between the parties, so that the death of one of them would cause in the other(s) a severe emotional and psychological pain (non-economic loss – *danno non patrimoniale*).

These elements are not only proper of spouses, but of any stable relationship based on mutual moral and economic support.

A «stable relationship based on mutual moral and economic support» is thus the relevant definition envisaged by the Court. Such a notion, however, is not only compatible with those forms of *de facto* families shaped as couples living together and bearing sexual intercourses, but to any kind of unions. A polyamorous/polygamist family, as well as a mutual aid family, may well fulfill this notion.

Autonomia privata e famiglia di fatto. Il nuovo contratto di convivenza, in *Nuova Giurisprudenza Civile Commentata*, 2016, 1749.

[25] See Italian Court of Cass., n. 2988/1994, n. 8828/2003; n. 12278/2011.

A similar path was followed by the Court to grant some kind of protection to the member of a *de facto* family living with his/her partner and not having any formal title on the common home[26]. To protect the right to housing of the "untitled" partner, the Court has stated that this latter cannot be considered as a host, and thus he/she cannot be evicted by the title holder all of a sudden and without adequate notice. What differentiates the member of a *de facto* family from a host is the type of relationship existing between him/her and the title holder on the home, i.e. a stable relationship of mutual economic and moral support which finds in the common home a fundamental element. In the presence of a relationship as such, the untitled partner cannot be considered as a host and needs to be granted the legal protection of the possessor.

Again, in this case, the notion of *de facto* family is a «stable relationship based on mutual moral and economic support», without any reference to the number, the gender and/or the sexual life of its components.

This is the notion of family we find in the whole Italian case law on *de facto* relationships and which has shaped the construction of their legal prerogatives, from the right to abstain from testifying against the partner throughout a criminal proceeding to the possibility to enter a cohabitation agreement, from the rights on the common familiar enterprise, to the right to apply as a family to social housing facilities.

Elements recalling this approach can be found in other European legal systems[27]. This is not to say that all the following legal systems openly and undisputedly embrace a broad notion of *de fac-*

[26] See Italian Court of Cass., n. 7214/2013.

[27] See: Boele-Woelki K., Mol C., Van Gelder E. (eds.), *European Family Law in Action. Vol. V. Informal Relationships*, Cambridge, Intersentia, 2015; Miles J., *Unmarried Cohabitation in a European Perspective*, in Sherpe J.M. (ed.), *European Family Law*, vol. III, Cheltenham, Edward Elgar, 2016, 82.

to family, but that at least in some of their legal formants such a notion starts to emerge.

For example, according to the case-law of the German Federal Constitutional Court, with an approach subsequently upheld by the Federal Supreme Court in civil, administrative and social security matters, a *de facto* union shall be defined as a "community of life" (*Lebensgemeinschaft*) established with a permanent purpose (*auf Dauer*) characterized by inner ties of commitment with a reciprocal responsibility between the partners which is more than a pure accommodation and economic community. The case-law has also made it clear that the sole essential element for a *de facto* family to exist is the presence of a mutual commitment to a shared life. Other elements, such as sexual intercourses between the parties or the existence of a common households, are to be considered as *mere indicators* of a common life.

A similar approach, although very much shaped around the notion of the couple, was taken by the Luxembourgian case law, according to which the core of a *de facto* union shall be identified in the existence of a common and stable shared life. A similar ruling can be found in a famous case of the Spanish Supreme Court[28].

It is worthy to note that in certain systems the idea of the amily as an inclusive structure based on mutual support and commitment stems from the application, to *de facto* unions, of general principles and rules of private law.

In Austria (but also in Switzerland, although not part of the EU) for example, under certain conditions and with respect to specific disciplines, *de facto* unions are considered as "civil law associations" established trough an implied contract. This is very relevant for our purposes.

[28] Spanish Supreme Court, decision of 18 May 1992.

In fact, to combine the institution of the association with the one of *de facto* unions stresses the idea of the family as a community of people cooperating for a common goal. Under a theoretical perspective, this also challenges the idea of the couple as the structure at the cornerstone of the family: as private law scholars very well know, the contract of association is the archetype of "multilateral contracts", i.e. it belongs to a category of agreements morphologically structured on a plurality of parties.

In the light of this, it is not surprising that especially in those countries where the regulation of informal relationships still relies on general rules of private law, the doctrinal formant starts to stress the idea that *de facto* unions shall not be limited to couples, but may also concern households beyond the couple. This is, for example, the case of Belgium[29].

It is interesting to note that a very similar notion of family has developed also at the level of EU law, and especially in the interpretation of art. 8 of the European Charter Human Rights given by the European Court of Human Rights[30]. It is worthy to recall that such an interpretation is part of the body of EU law. Indeed, according to article 52 paragraph 3 of Charter Fundamental Rights of the European Union, the rights contained in the charter «which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms» shall be given «the meaning and scope as those laid down by the said Convention». The provision of article 8 of the ECHR substantially overlaps with the one of 7 of the Charter, both providing for the respect of private and family life.

---

[29] See Swennen F., *Het personen- en familierecht. Identiteit en verwantschap vanuit juridisch perspectief*, Antwerp, 2015, n. 50.

[30] See at pp. 63 and following of the Guide on Article 8 of the CEDU issued by the European court of human rights, which can be found at the following link: *https://www.echr.coe.int/documents/guide_art_8_eng.pdf*.

4. Conclusive remarks

In the analysis carried out above we have suggested that to build up a new critical legal reflection on family law we should depart from the idea of broadening up the structural institution of marriage and pave the way for a reconceptualization of family according to a more inclusive and flexible notion.

Such a notion already exists in the law and can be found in the discipline of *de facto* families proper of certain member states as well as in the conceptualization of family developed by the ECtHR.

Such a notion is based on the idea of the existence of a bond of stable moral and material support between the parties, independently of their gender, number, sexual relationships etc.

It is interesting to note that such a notion was developed by the case law and arose from concrete situations of needs. With this respect, it can be deemed as "functional" in the sense that in front of different familiar needs arising from the bottom-up, one common relational feature can be drawn (namely the existence of a bond of stable moral and material support between the parties).

If this is true, it has to be highlighted that family law systems grounded on marriage, namely on a conceptualization of family based on a specific structure, mainly respond to the political need of promoting a specific form of familiar arrangement over others. This thing, in the presence of a valuable alternative, raises the question of the legitimacy of such an approach in the light of the main principles implied in European constitutionalism.