Law's role in democratising the family

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Abstract

This paper explores the dynamics of family law's transformation over the past 50 years as the result of interactions of two autonomous systems: the law and the family. The interesting feature in the change of family is its democratisation. Equality, consent, freedom of partners and participative governance have become ideals of the Western family. Law is a motor of this family transformation through its own internal transformation on two points: the transformation of legal reasoning, based on human rights; the use of mediation in judiciary conflict resolution. This U turn can be explained by the new mechanisms of social order in modern differentiated societies. Following Anne Rawls' reading of Durkheim's insights, the article argues for the centrality of "constitutive practices" in modern societies. Legal framework can no longer derive and perform social order through moral rituals. Modern law must fit the procedural morality (instead of a moral consensus) of family interactions in order to be able to solve conflicts. This explanation of the success of mediation in family law is also the key to understand the constitutionalisation of family law via the use of principles (instead of rules) in legal reasoning. Intercultural conflicts arise inside families as well as inside societies. New flexible family law becomes a factor of pluralization of family forms. On this basis, transnationalization of family law can develop, even if state sovereignty remains a powerful brake of this evolution.

Key words

Family Law; mediation; Durkheim; constitutionalism; human rights; Giddens

Resumen

Este artículo explora la dinámica de transformación del derecho de familia en los últimos 50 años como resultado de las interacciones de dos sistemas autónomos: el

derecho y la familia. La característica interesante del cambio de la familia es su democratización. La igualdad, el consentimiento, la libertad de las parejas y el gobierno participativo se han convertido en ideales de la familia occidental. El derecho es un motor de esta transformación familiar a través de su propia transformación interna en dos puntos: la transformación del razonamiento jurídico, basado en los derechos humanos; el uso de la mediación en la resolución de conflictos judiciales. Este vuelco, a su vez, se explica por los nuevos mecanismos de orden social en las modernas sociedades diferenciadas. Siguiendo la lectura de Anne Rawls de las ideas de Durkheim, el artículo defiende la centralidad de las "prácticas constitutivas" en las sociedades modernas. El marco jurídico ya no puede derivar y realizar el orden social a través de rituales morales. El derecho moderno debe adaptarse a la moralidad procedimental (en lugar de a un consenso moral) de las interacciones familiares para poder resolver los conflictos. Esta explicación del éxito de la mediación en el derecho de familia es también la clave para entender la constitucionalización del derecho de familia mediante el uso de principios (en lugar de normas) en el razonamiento jurídico. Los conflictos interculturales surgen tanto en el seno de las familias como de las sociedades. El nuevo derecho de familia flexible se convierte en un factor de pluralización de las formas de familia. Sobre esta base, puede desarrollarse la transnacionalización del derecho de familia, aunque la soberanía estatal siga siendo un poderoso freno de esta evolución.

Palabras clave

Derecho de familia; mediación; Durkheim; constitucionalismo; derechos humanos; Giddens

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1. Introduction

Family law's spectacular transformation over the past 50 years is a challenge to social theory. The recognition in the 1970s of divorce by mutual consent (Théry 1993) appears to have been the trigger, after which the whole edifice of legal regulations relating to the family and sexuality gradually collapsed, to be replaced by new forms of legal regulation. This historical process saw the transformation of two distinct systems: that of the law; and that of the family. Each of these transformations deserves to be studied on its own, but what interests us in this article is the dynamic coupling without which neither could have occurred.

Geoffrey Willems' article "Same-sex marriage as a human right" (2024) has the immense merit of analysing, in a subtle and detailed manner, the profound internal transformation of family law driven by constitutional (or quasi-constitutional) courts in three large geographic areas (the United States, the European Union, and Latin America). The common point of reasoning these judges share the same reference to human rights as the supreme basis of law. In each case, this raises the question of respect for national (or, in the case of the United States, of federated states') sovereignty. The judges concerned provide nuanced, sometimes contradictory, answers to this question, all of which nevertheless demonstrate the same concern for the values of freedom and equality.

Legal reasoning's recourse to higher principles of justice is, Geoffrey Willems argues, a central and relatively recent feature of contemporary family law. By analogy with public law, this could be called a constitutionalisation of private law (as explained by Gunther Teubner, 2016). A constitution effectively limits the exercise of national sovereignty on the basis of a catalogue of individual rights and freedoms. A proportionality principle must prevail; this requires reducing to the strictest minimum any limitation on individual rights and freedoms made necessary by the pursuit of the general interest. It is therefore indeed constitutionalisation when judges set out to determine – on the basis of the higher principles of law that are the right to marriage, the right to found a family, or children's rights – the legitimacy of state regulation of the family. From an outsider's point of view, the diversity of these judges' conclusions cannot mask transnational progressive evolution of the legal *reasoning* (even if, as in the case of the Supreme Court of the United States, any reference to transnational law is explicitly rejected).

2. The democratisation of the family

This *constitutionalisation* of family law is the legal system's expression of the *democratisation* experienced by the family. As a social system, the contemporary family does indeed seem to function according to organising ideals which borrow largely from the vocabulary of political democracy. *Equality*, *freedom*, and *participation* have become key words in contemporary family life. In 1992, Anthony Giddens opened the last chapter of his sociological study on the mutations of intimacy with these words: "a democratization of the private sphere is today not only on the agenda, but is an implicit quality of all personal life that comes under the aegis of the pure relationship" (Giddens 1992, 184). The 30 years that separate us from this observation have not disproved it.

The idea of democracy can be understood in three senses. First, democracy is a system of government. In private life as well as in the state sphere, strong boundaries must

protect everyone from the arbitrariness, or violence, of those in authority. Just as constitutional monarchy replaced the despotism of the Ancien Régime, so constitutional parenthood now replaces unlimited paternal power. As for the conjugal couple, partners' responsibility to participate in determining the exact terms of their association has continued to expand, basing the family on "everyday consent" and requiring permanent deliberation. Second, family democracy must be understood in the Tocquevillian sense of equality of conditions. In the contemporary family, each treats the other as an equal – or at the very least as a being equal in value, since the family constitutes in principle a knot of relations among beings who, by reason of age or health, are subject to imbalances. Taking differences into account should never take precedence over valuing similarities. Mutual respect is a *sine qua non* of interaction among partners who may not adopt attitudes of contempt, humiliation, or subordination. Finally, the family constitutes a place of solidarity where, in principle, a certain distributive justice reigns. The great inequalities between spouses and between children, characteristic of the traditional family, have given way to the permanent goal of equal resources. The reciprocity of gifts *within* the family in principle counteracts competition from (and therefore inequalities with) people on the market or the public sphere. An economy of reciprocity and sharing is essential in the contemporary family. As Giddens (1992, 195) puts it, "political democracy implies that individuals have sufficient resources to participate in an autonomous way in the democratic process. The same applies in the domain of the pure relations ship, although as in the political order it is important to avoid economic reductionism. Democratic aspirations do not necessarily mean equality of resources, but they clearly tend to in that direction".

This description in no way implies an excessive idealisation of reality. The normative mutation should not be confused with a description of reality. As Lynn Jamieson and Judy Wajcman (2010) put it, "the fact remains that in the light of empirical data collected on the daily lives of men and women, there is still a gap between the ideals of gender equality and the realities of everyday life". In our complex societies, democratisation remains very unevenly implemented according to class, gender, and cultural affiliation. It is obvious that the contemporary family does not always achieve an ideal "pure relationship" characterised by freedom, equality, and solidarity (Jamieson 1999). Giddens's very general observation is nevertheless not unrealistic. It gives the direction of a historical development of modern family not only as the dyadic relationship, but as a triadic relationship including the child. Axel Honneth (2015, 239–273) has convincingly reconstructed the stages of this development. "Democratisation" designates an immanent normativity that imposes itself as a frame of reference for everyone, but is never fully realised. What he calls "family democratisation" does not therefore constitute a positive fact, but what Gurvitch called a "normative fact" – that is to say, a fact which cannot be understood or explained without assuming the immanent presence of ideals (and the prescription of corresponding norms).

Giddens' 1992 investigation was based mainly on an exploration of new approaches to eroticism, addiction, or homosexuality. Thirty years later, the institutionalisation of new forms of intimacy has progressed considerably, through an unprecedented legalisation of the family and sexuality. To the medicalisation discussed by Foucault and the transformations in cultural practices described by Giddens are now added extensive

legalisation practices that affect not only the family and intimate relationships, but the law itself, which is forced to adjust its modes of intervention and analysis.

Geoffrey Willems' contribution on this issue (Willems 2024) provides an excellent analysis of the transformation of legal reasoning by the use of principles. But if we want to understand changes to family law, we must also consider a dispute-resolution technique which, although once marginal, has become central to family law: *mediation*. As John Lande says, the major legal and social changes in family law "have dramatically affected the way that family disputes are resolved". Family courts have embraced dozens of dispute resolution processes for separating and divorcing parents, in order to solve difficult problems of child custody, domestic violence, parental relocation, parental alienation, rights of stepparents, etc. (Lande 2012).

I would like to argue that these two changes in family law are deeply linked and can be explained by a complex sociological dynamic located at the intersection of internal changes in the family system and the internal demands of the legal system. Neither process is an outright *reflection* of the other, for family logic is radically different from legal logic. Rather, the family and the laws that regulate it change together, by reciprocal causation. We are dealing with a structural coupling of family structure and law, one leading the other into a morphogenesis that is far from stabilised.

In what follows, I would like to distinguish, like Margaret Archer (1995), two aspects of this dynamic: change in the order of interaction, and in that of structures.

First, the empowerment of interaction as a relatively autonomous normative procedure deserves to be considered a central phenomenon. For this, we will follow in the footsteps of Anne Rawls (2009, 2012). We will see how this process changes the approach to modern civil law. Modern law must open a space for interactions which obey a specific normative dynamic and which have a constitutive and creative scope. This new functional necessity explains the use of mediation in addition to adjudication.

Secondly, the evolution of cultural and socio-economic structures poses challenges for the law, called upon to reformulate according to the principles of democratic ideals (equality, freedom, participation) which adjust to the new structural situation (while allowing the deployment of case-by-case justice (Willems 2016, 37) respecting the normative potential of the people in interaction). This requires a transformation of the judge's mode of argument, called upon to rule on the basis of *principles* rather than *rules* (De Munck 2015).

We will conclude with a few comments on the pluralisation of family forms on the transnational level. Within Western societies, family law now accompanies and promotes a great plurality of family forms. This modern law is therefore a good vehicle for the transnationalisation of law welcoming legal pluralism. Nevertheless, we must underly the problematic incompleteness of the internationalisation of family law. On the one hand, the reference to principles tends to offer family law a transnational framework which allows for dialogue between judges across borders and the relativisation of national sovereignty. On the other hand, national sovereignty resists, opposing the potential for generalisation of the law contained in this new mode of legal reasoning based on universal principles.

3. Families' constitutive practices

The spectacular development of family mediation has been the subject of numerous debates and commentaries since the 1980s. This transformation has been observed throughout the Western world and affects other sectors of social life (De Munck 1991). Originally, mediation was presented as an alternative to adjudication. Over time and following legislative reforms, it has gradually become a necessary complement in the solution of family litigation, whether before, during, or after the legal process itself. This hybridisation of a judicial mode with an alternative mode of conflict resolution sometimes casts doubt on the coherence of the process: mediators and judges fear for the rectitude of their respective operations; the entanglements of both a vertical procedure and of horizontal negotiations seem each to threaten the presuppositions of the other. We believe, however, that this hybridisation has become, for sociological reasons, quite inevitable.

The change to the dispute-resolution system in fact corresponds to a very profound transformation within the family itself. The relationship between system and interaction was profoundly disrupted in the 1970s, to the extent that it brought about a structural modification of family law. In order to understand this dynamic from the point of view of social theory, we can look to two important authors: Anne Rawls and Margaret Archer. Both have stressed the importance of interaction in accounting for the emergence of order in modern societies. Anne Rawls (2009) underlined the importance of interaction to account for the normativity of modern social facts; Margaret Archer (1995) focused her discussion on the explanation of observable social changes. She argues that the duality of structure and interaction is irreducible in any analysis of the transformation of social systems. In other words, no social change is explicable if we do not consider the articulation of two types of integration, one systemic, the other interactionist.

3.1. The constitutive practices at the source of modernity

A return to Durkheim, now very popular in social theory debates, will help us better understand the democratisation of the family. In a stimulating rereading, Anne Rawls showed to what extent one could establish a continuity between Durkheim's deepest intuitions and twentieth century developments in sociological interactionism (Goffman and Garfinkel).

Seeking a scientific explanation for the great historical transformation he witnessed, Durkheim had the immense merit of bringing to light the new practices of coordination that constitute modern societies. He fully understood, according to Anne Rawls (2012), that in modern societies the social order could no longer rest on a pre-ordained moral consensus. In a differentiated society, order must be produced by the cooperative interaction of actors *in situ* following procedural rules of cooperation. Durkheim has often been presented as a sociologist sceptical of modernity, an author who anticipated social disintegration were moral consensus eroded. In fact, this is not the case from either an explanatory or a normative point of view (Lukes and Prabhat 2012). On the contrary, he demonstrated on various occasions (notably during the Dreyfus affair) his attachment to a normative individualism without which society cannot function.

Anne Rawls demonstrates the close connection between Durkheimian "constitutive practices" and the daily interactive practices uncovered by symbolic interactionism. According to her, interactionist sociology implemented a research programme initiated by Durkheim. Under the methodologically controlled gaze of Garfinkel and Goffman, the most basic interactions of modern social life demonstrate an ability to generate social facts identifiable by all participants from the application of procedural rules. These rules have, as Durkheim pointed out, a strong moral connotation. They are formed in an immanent way during face-to-face meetings between people seeking to coordinate (in conversational practices, for example).

Two features characterise constitutive rules: contextuality and normativity. They nonetheless embrace the *specific in situ* conditions of coordination. This means that even if general rules of interaction can be identified, they will always have to be supplemented by rules specific to different social-life situations. In term of sociology, this means an increased attention to the details of interactions, their singularities, and their specialisations; hence the obsession with meticulous, even tedious descriptions. On the other hand, one should not be satisfied with seeing in these practices a purely empirical "practical know-how"; there is indeed normativity – and therefore "rules" – implemented in these situations, so that the players in this self-regulated game know very well how to distinguish between correct and incorrect behaviour in relation to the requirements for reciprocity, mutuality, and equality. If they do not treat each other as equals, interaction partners fail to produce social facts that are intelligible and recognisable to others, Garfinkel points out. We can say that failure of coordination is the first sanction for discrimination and exclusion from the social game.

This normative dimension of interaction was described by Goffman and Garfinkel, but was first brought to light by Durkheim, who saw it as morality's place of origin in modern societies. This immanent normativity of interaction can be grouped under two categories: *trust* and *justice*. On the one hand, as Garfinkel insisted (Turowetz and Rawls, 2021), interaction cannot lead to the establishment of social facts without the establishment of trust between the partners. The unspoken structures of interaction are the basis of common sense; they assume that expectations of equality and reciprocity are fulfilled among the participants, who "must implicitly trust one another to meet these expectations in order to achieve coherent meanings" (Turowetz and Rawls 2021, 7). Trust is the anticipation – based primarily on knowledge (always incomplete) of the partner's dispositions – of behaviour in uncertainty. We trust because we conjure a partner's reliability based on a set of clues. But there is also a moral dimension to this trust: partners make certain promises, however vague.

3.2. The morphogenesis of constitutive practices of the family

When Durkheim discusses these constitutive practices, he initially invokes such fields as science, politics, and economics. This partial view of his own discovery is understandable given his historical situation. The modern family has only recently moved away from the traditional mode of social consensus. Until the 20th century, role systems were inherited rather than achieved, and legal norms depended on a morality shared by society as a whole.

What are the systemic mechanisms that allow such a transformation? First, there is the changing *function* of the family in modern societies. The family specialises in modernity; its internal normativity is based on love and care. The primary condition for this functional specialisation is the transformation of its economic function. Industrial society tends to separate the sphere of productive work from those of leisure and consumption. The family certainly continues to perform (re)productive domestic functions, but in a very specific way. Economic goods and services (including a significant aspect of personal care) are provided by the market. Secondly, we see a clear specialisation of the family in terms of cultural reproduction: the expansion of exo-education deprives the family group of control over the socialisation of the child from an early age (sometimes a few weeks after birth), reducing it to a primary socialisation function. However important this cultural function may be for the acquisition of language and the primary norms of sociality, it is now severely limited by external social control and by the fragmentation of cultural communication in religious, artistic, scientific, educational, and media systems. As for the political functions of the family, they have gradually lost their scope over the course of modernisation. Individual political behaviour is less and less determined by loyalty of birth and family membership. The differentiation between political office and family origin is continually widened by anti-corruption norms targeting nepotism.

This functional differentiation of the family allows interactions to be freed from constraints external to the purposes of love and reciprocal care. The "second modernity" family specialises in a register of affective support and intimate reproduction of individuals. Sentiment prevails over interest or status. These family interactions nonetheless share normative moral demands with other types of interaction. As in interactions between scientists, between citizens, or between contractors in a market, expectations of equality, trust, consent, and mutuality animate interactions between parents, between children, and between parents and children. There are many similarities between scientific, political, or commercial system and the family system: the same moral requirements govern interactions in them all. Family interactions must reinterpret these moral demands in the medium of love and care. They enable innovation in changing interpersonal circumstances in front of which the members of contemporary families must demonstrate open minds and a sense of improvisation.

Mediation differs from adjudication by the power conferred on the parties to decide the outcome of their deliberations. It presupposes the activation of a discursive procedure. The mediator is called upon to intervene on the basis of the principles of strict neutrality concerning the subject of the discussions, but not without a very strong axiological and normative orientation. It is about ensuring the mutual recognition of people in order to build a space of discursive cooperation that can lead to a justified agreement. We can see in this device a semi-formalised reflection of the informal norms of interaction described by Anne Rawls. Seen from this angle, mediation procedures appear to be artefacts making it possible to repair damaged family interactions in which neither justice nor recognition nor reasoned discussion any longer seem possible.

4. The legal system and the constitutive practices

Durkheim's message is not limited to highlighting constitutive practices. It cannot be reduced to an interactionist version of society. A level of institutional structuring

remains necessary, even if its function has changed compared to traditional societies. Consensual institutions, such as law or politics, must express and enable the realisation of constitutive practices, and not the other way around (as in traditional societies). Anne Rawls (2012, 504) writes: "Instead of treating formal institutions and the formal law as creating the social order from which everything else follows, it refocuses attention on informal levels of constitutive practice that depend on voluntary reciprocal action. In contrast with the conventional view, Durkheim proposes that formal institutions now have the job of supporting the informal. His argument explains the prevalence of the 'informal order' aspects of formal institutions that are so often treated as a problem. In a differential social context in which the self-organising practices of public civility are sufficiently developed, the job of political, legal and moral institutions will be to 'translate' the constitutive orders that are developed below them."

Durkheim therefore anticipated a new role for the state and the law which

> must provide for the general context of justice required by a form of solidarity based on contracts, a shared spontaneous commitment to constitutive work practices (…). Therefore, it is no coincidence that civil rights, general equality, and freedom have become the most pressing issues for modern governments. The role of authority structures has shifted from the production of social solidarity and meaning to the quite different job of maintaining the background conditions of justice against which stable contractual and constitutive solidarities can be produced *in situ*. (Rawls 2012, 506)

4.1. The limits of mediation

Family law has faced this burning question since the 1970s and 1980s. The rise of mediation has been accompanied by an awareness of its limits, for which the institution must compensate. Much controversy has revolved around this issue. In a famous 1984 article, Owen Fiss challenged mediation by presenting it as the search for a settlement completely ignoring the expectations of justice attached to law and adjudication. By seeking peace, by favouring a satisfactory solution, mediation would move away, he said, from demanding democratic ideals. Justice would be reduced to a negotiation of interests.

It would be easy today to respond to Owen Fiss that his position ignores the morality that attaches to the interaction itself. Yet, he wasn't totally wrong. The law cannot be limited to the institutionalisation of case-by-case dispute resolution. It must also ensure the coherence of the system of family ideals and norms. It must take into account the values that are the foundation of democratic societies. After all, it is by no means given that fair procedures produce fair contracts. These may well be unfair as a result of the weakness of participants or of systematic distortion of communication. A legal system must not simply protect procedures, but must also finalise them by establishing democratic expectations. This assumes that the law is concerned with the "background conditions of justice", because disparities in resources, inequalities in position, and mechanisms of domination can make the practice of interactive justice impossible.

4.2. Changes in cultural and social structures

This is as true from a normative point of view as it is on an explanatory level. You cannot endow interaction with unlimited causal power. As Margaret Archer always insists,

structures are not only the result of current interactions, but equally of past interactions. These are deposited in the form of traces, standards, and accumulations of resources which condition the field of possibilities open to actors. The simple concatenation of interactions could never constitute an integrated society. Even if interaction, freed from traditional consensus, can innovate freely based on principles of reciprocity, it is still conditioned by structures that distribute resources, fix roles, and provide shared cultural referents. The question of the institution arises not only as one of protecting the moral principles of interaction, but also of articulation between the interaction and these structures. Archer (1996) distinguishes two main types of structures, both relevant to the issue at hand.

These structures are, on the one hand, cultural structures which stabilise the production of meaning in society. The moral of authenticity (Taylor 1992), a passionate romantic discourse, an overdeveloped feeling of childhood, participate in the horizon of meaning of the modern family, alongside other discourses. These moral feelings crystallise in an expressive individualism firmly attested to by modern literature, theatre, and cinema. Here again we can look to Durkheim: "Durkheim's idea," explain Lukes and Prabhat (2012, 374), "is that, in differentiated and plural societies, there are a range of increasing more core human norms which progressively instantiate the cult of the Individual or sacralisation of the person." Hans Joas (2016) has shown how this process of the sacralisation of the person is at the heart of the construction of modern law.

But we would fall into a simplistic culturalism if we sought to explain systemic changes only by the production of meaning. On the other hand, *material* and *social* structures open and close opportunities for actors, offer them resources, and establish role systems – and therefore powers to act. Class, gender, and race structures condition (without determining) the interactions that will enable them in order to give meaning to social situations. If material and social structures don't evolve, it is difficult to envision a real transformation in family mores. For example, it is obvious that the economic structures of the labour market since the 1960s have greatly promoted the emancipation of housewives; and advances in contraception have contributed to weakening the gender structures that shaped couples' lives. These economic and technical mechanisms go hand-in-hand with social regularities.

By distributing subjective rights, by embodying them in authorised and authoritarian interventions, the law contributes to the transformation (or, indeed, to maintaining the stasis) of economic and social structures. The legal institution provides substantial standards and powers to interactors if they are to give a shared meaning to their situation and set roles and behaviours that are acceptable not only to them, but to society as a whole. In other words, the legal norms are linked to family structures and modify the effects of those structures.

The intense legislative and judicial mobilisation of the last 30 years and the profusion of expert debates in family law would be incomprehensible if the transformation of this branch of law were reduced to the progressive institutionalisation of mediation. The legal norms of parenthood, the norms of filiation, the obligations and prohibitions of sexuality have to be aligned with the requirements of constitutive practices. This remarkable adjustment required enormous work that mobilised social movements,

legislators, judges, experts, ordinary citizens. The complete story of this transformation is yet to be written.

4.3. The constitutionalisation of family law

Geoffrey Willems' work on this subject emphasises the importance of changes to legal reasoning in family law, especially under the leadership of "human rights judges". We can call this a transformation of "legal rationality" (Willems 2016). As a semi-autonomous system based on social decisions, family law has been confronted with the difficult work of modifying its own operation from within. As in Hart's (2005) famous distinction, we can schematise this dynamic as the shift from a focus on primary rules of behaviour to a focus on secondary rules for evaluating situations. Until the 1960s, family law functioned as a "model" law (Théry 1993), in the sense that it sought to enact direct rules of behaviour, following a (presumably consensual) normative family model. It was about separating the good from the bad, establishing culpabilities and distributing penalties. In the new mode of legal reasoning, it is more a question of evaluating situations on the basis of relatively vague *principles* which make it possible to identify, in a situation, proposals for solutions (De Munck 2015, Guy-Écabert 2015). What are these principles? The *basic rights* (rights to privacy, to family life, to expression…) are included in the list.The principle of *shared parental authority* has been enshrined in almost all Western countries. It aims to ensure equality for parents (straight or gay) in the exercise of their responsibilities towards children. The principle of *the best interests of the child* has increasingly become a standard of reference for justifying family decisions, especially when conflicts of value divide parents. The principle of *informed consent* by deliberation by each stakeholder in family life has been strongly affirmed, both in terms of conjugality and of the treatment of children. It should be added that this consent must be continuous (for example in matters of sexual relations between spouses).

The central feature of these legal principles is that they mediate between the demands of interaction and those of systems. On the one hand, they seek to articulate roles and powers, and therefore to modify structure of the systems. On the other hand, they try to open up an autonomous spaces for interaction. Because they cultivate vagueness, they regulate the production of *in situ* rules, albeit without specifying them *ex ante*. On the one hand, the procedural rules of interaction are meta-rules, the application of which leads to arrangements on a case-by-case basis. On the other hand, legal principles guarantee consistency and complementarity between standards, while ensuring the procedural conditions and the substantive results of the interaction. Relying solely on mediation mechanisms would run the risk of endorsing any solution to the dispute, and of not taking sufficient account of structural inequalities in social positions. Principled support helps justify judicial decisions that balance the powers of the parties in interaction. This is why contemporary family law places increasing importance on human rights (Willems 2024).

These principles permit a reflective balance between the demands of interaction, made up of reciprocity and equality, and the asymmetrical systems of rights and duties that condition interactions. Obviously, the demand for the equality of persons cannot be directly realised in a family whose goal is precisely to bear a deeply dependent child to adulthood through a development process regulated by care and love. Respect for and the rights of the child must nevertheless be upheld as the child is, from birth, a

participant *virtually* equal to others. This balance between moral symmetry and dissymmetry of positions cannot be constructed as a set of binary rules to be applied in any situation. It can only be the subject of a heuristic guided by principles, such as the obligation of continuous contact between parents and children, or the obligation to take into account children's wishes in matters that concern them (Thørnblad and Strandbu 2018).

Can we therefore say that a new type of consensus is at the heart of contemporary family law? The answer must be qualified. Of course, it is indisputable that a very proactive individualism – and the legal principles linked to it – defines the relative value of any arguments advanced within the framework of the contemporary legal system. In this sense, we can identify a new consensus on egalitarian values which replaces the traditional, patriarchal family values of early modernity. A belief system accompanies this empowerment of the interactions. However, the beliefs involved are extremely abstract and vague. They are embedded in social life without reliance on repetitive rituals. These are beliefs in human rights, the central feature of which is that social order is based only on the equal and reciprocal freedoms of all. These beliefs do not obliterate the space of free interaction which constitutes, as Anne Rawls (2009) puts it, the other (non-consensual) basis of social order in modernity, namely the space of constitutive practices. Individualism is an enabling ideal, not a constraining norm. It cannot work as a basis for social order without informal practices of self-regulating interactions.

5. Towards a transnational family law?

This double mutation of legal reasoning constitutes an important factor in adapting the law to a societal context characterized by an increase in complexity. The family is diversifying. As a result, we must expect increased flexibility from the law. Confidence in family law as a global system depends on its acceptance of the variety of family forms. Legal change is complementary to social change. Internal changes in the law encourage the diversification of the family morphology; in return, this stimulates the internal transformation of the law.

The process of globalisation reinforces this tendency of modern societies. Refugee flows, economic and ecological migrations, development of the tourism industry create new family situations that contribute to the internal and national complexification. Conjugal or parental disputes suddenly become intercultural conflicts, either because family normativity clashes with state family law or because the family partners belong to different cultures. Transnational situations are, in principle, manageable by a family law which has been transformed along the two lines we have described (mediation and argumentation based on principles). This transformed family law can open wide the range of acceptable family arrangements on the global level.

In a very natural way, legal actors try to extend the innovations of family law to the international field. For example, the Hague Conference on Private International Law promotes the possibility of international family mediation. In its 1996 convention, it recommends the use of international mediation as a first step in conflict resolution in the best interests of the child (González Martín 2015). The Council of Europe, like the European Union, has endorsed mediation since the late 1990s (Stalford 2010, 156–157). Legislation and case-law almost systematically introduce references to human rights,

which may be the basis of an international legal order. Are we heading towards a transnational family law that would go beyond national law? We can only answer this question cautiously. Two obstacles to this globalisation of the contemporary democratic family.

While the last 30 years have seen the germination and flowering of procedural and substantive innovations, they have not abolished the system's contradictions. An important contradiction opposes the universalist contents of the principles to the permanence of state sovereignty. David Bradley rightly points out that although there are cultural and ideological changes, family law remains an important attribute of national sovereignty. Of course, there is a certain constitutionalisation of private autonomy, for example in European law, which affirms parties' right to choose the applicable law within the European Union. We can also point to the recognition of marriages celebrated outside national borders, even for homosexuals (Harding 2013). We are witnessing a developing "transnational dialogue of judges" (Garapon and Allard 2005) which tends to generalise reasoning and convictions beyond borders – not only on questions of public law, but also of family law (Willems 2024). We are nevertheless far from a transnationalisation of family law. We can even recognise, in the "principle of mutual trust" promoted within the European Union, a paradoxical reaffirmation of the principle of national sovereignty. Silvia Bartolini (2024) notes, for example, that the principle of mutual trust between states (in private international law) often creates, in the case of the illicit international removal of children, the presumption that the rights of the abducted child were fully protected in the state of origin. There is a heavy burden of proof to reverse this confidence in the foreign country. As a result, a judge in the country where the child has been moved is almost automatically expected to order the child's return to the country of origin. The mutual trust between states therefore boils down to blind trust in the justice practiced by a partner country. Unfortunately, this trust is often misplaced. It can seriously damage the interests of the child. We have observed that children are often moved – by the mother or sometimes by the father – out of a desire to protect them from attacks on their dignity and integrity, and ensure respect for their freedom. This principle of mutual trust between states protects national sovereignty in matters of the family, but can appear extremely flawed from a "constitutional" point of view.

It is especially beyond the borders of Europe and North America that we see obstacles to the transnationalisation of family law. In this case, globalisation no longer concerns functionally differentiated societies, but societies in transition, partly configured on the basis of more traditional moral consensus. International mediation can be used, but it comes up against the extreme difficulty of dissonance with the concerned institutions. It can certainly be argued, in line with Anne Rawls' sociological observation, that the *sui generis* order of interactions between strangers imposes standards of justice, "whether we believe it or not". But these standards may remain disarmed against the claims of a legal/moral authority based on social consensus. The reference to human rights and the Convention on the Rights of the Child can weaken a domestic traditional argument, but not completely overcome it.

Here we come up against the limit of social change through law. It would be futile to wait for the sheer magic of reformed family law to bring about a new transnational

family order. At the most, international law can be expected to stimulate family democratisation that has yet to be achieved by non-legal means – that is to say, through political action, cultural discussion, and the transformation of economic structures.

In conclusion, we may say that the democratisation of the family is probably one of the most striking societal phenomena of our times. The above has only sketched the sociological explanation and identified some issues for the orientation of law.

We must doubtless agree with Anne Rawls on one point: societal differentiation brings out ever more clearly the normativity that is always already operative in the most daily interactions of skilled actors. The evolution of the family law shows that contingent normativity of interaction must be taken into account by the modern legal system.

The law, however, is not a function of the interaction, but of the institution. Its method of argumentation must be profoundly modified to allow for the plurality of social life. The use of principles (human rights, best interests of the child, co-parenting, consent) makes it possible to maintain the reference to democratic ideals while respecting the inventiveness of those *in situ*. The transnationalisation of such a process is virtually on the horizon of modernity. Unfortunately, there is no doubt that state sovereignty, as well as powerful cultural and social structures, can obstruct this perspective.

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