Oñati Socio-Legal Series (ISSN: 2079-5971)
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Introduction: Law and the family at the crossroads of democratisation and transnationalisation

OÑATI SOCIO-LEGAL SERIES VOLUME 14, ISSUE 1 (2024), 166–174: DOSSIER ABOUT TRANSNATIONALISATION OF FAMILY LAW
DOI LINK: HTTPS://DOI.ORG/10.35295/OSLS.IISL.1988
RECEIVED 26 JANUARY 2024, ACCEPTED 29 JANUARY 2024, VERSION OF RECORD PUBLISHED 1 FEBRUARY 2024

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Abstract

In this introduction, the authors present the ambition that guided the composition of this edition devoted to family law. They first highlight the interest in addressing the intersection between the process of democratisation and the process of transnationalisation of families. These two processes are refracted in family law. They find their origin in the same refusal of a substantial moral definition of the "good family". However, all normative perspective is not abandoned. A new normative and effective relationship is established between interactions and institutions. The new regulation of the family gives an important place to interactions and their immanent normativity. Legal principles (human rights, procedural standards) give expression to this mutation. Institutions are no longer given before the interaction, but rather constitute instruments for repairing the interactional order. This trend in the evolution of the law is particularly visible in the two cases treated in the issue: homosexual marriage and international child abduction. The close analysis of these two situations, however, suggests the persistence of obstacles to these transformations, due to the persistence of the principle of national sovereignty.

Key words

Family Law; human rights; democratisation; transnationalisation; child abduction; same sex marriage

Research funded by the Fonds National de la Recherche Scientifique (Belgium) – PDR T 0112.16.
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Resumen

En esta introducción, los autores presentan la ambición que guió la composición de esta edición dedicada al derecho de familia. En primer lugar, destacan el interés por abordar la intersección entre el proceso de democratización a y el proceso de transnacionalización de las familias. Estos dos procesos se refractan en el derecho de familia. Encuentran su origen en el mismo rechazo de una definición moral sustancial de la "buena familia". Sin embargo, no se abandona toda perspectiva normativa. Se establece una nueva relación entre interacciones e instituciones. La nueva regulación de la familia da un lugar importante a las interacciones y a su normatividad inmanente. Los principios jurídicos (derechos humanos, normas procesales) reemplazan las reglas que definen la "buena familia". Las instituciones ya no se dan antes de la interacción, sino que constituyen instrumentos para reparar el orden interaccional. Esta tendencia en la evolución del derecho es particularmente visible en los dos casos tratados en el número: el matrimonio homosexual y la sustracción internacional de menores. El análisis cuidadoso de estas dos situaciones, sin embargo, sugiere la persistencia de obstáculos a estas transformaciones, debido a la persistencia del principio de soberanía nacional.

Palabras clave

Derecho familiar; derechos humanos; sistema familiar; sustracción de menores; matrimonio homosexual

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1. Introduction

If one wants to understand family law today, one must analyse law and family together as mutually constitutive institutions. This focus on reciprocal causation of law and society is, of course, a classic – and we think necessary – starting point of sociology of law, albeit an insufficient one. Our project in this special issue seeks to take this analytical view two steps further to grasp the features of law, the family and family law in contemporary societies. First, we argue that we must take into account simultaneously the effects of transnationalisation and democratisation on the family and the law. Second, we claim that the reciprocal causation between law and family must be understood both at the interactional and the institutional levels. In a third section, we will introduce the two specific cases on which we offer precise analyses, the case of homosexual marriage and that of the abduction of the child.

2. Law and the family at the crossroad of democratisation and transnationalisation

The first step consists in aiming attention at *democratisation* and *transnationalisation* in law *and* in family. Most of the works on the matter study these two processes separately and pertain to different research fields, hence often evolving in parallel without ever discussing their intersection.

On the one hand, many studies are indeed interested in family forms that transcend national borders, in the solidarity networks that they establish, care giving practices that they build and the use of new technologies (Parreñas 2001, 2005, Chamberlain and Leydesdorff 2004, Le Gall 2005, Mazzucato and Schans 2011, Razy and Baby-Collin 2011, Kilkey and Merla 2014, Merla 2014, Baldassar *et al.* 2016). Many studies are also interested in the transnationalisation of the law, particularly studies on global governance in security matters or trade, in the European area and beyond (Berman 2005, Stone Sweet 2006, Turner 2006, Cotterrell 2008, 2009, 2012, Zumbansen 2008, Scott 2009, Vauchez 2009, Tuori 2013, Vervaele 2013, Muir Watt 2016, Whytock 2016).

On the other hand, studies on the democratisation of the family became seminal in late twentieth century sociology through the studies of A. Giddens or I. Théry (Giddens 1992, Théry 1996). The rise of individual autonomy in the law, reflecting the demands of this democratisation, has also been much discussed by legal scholars (Winick 1992, Cipriani 1993, Burt 2005, Wautelet 2012, 2014, Daly 2018).

In contrast to these single-focused and fragmented research fields, we argue that important changes occur at the very crossroad of transnationalisation and democratisation. The two processes reinforce each other. By interrogating the intersection of transnational and democratic impulses, we propose, in this special issue to shed new lights on family law in the face of the new challenges arising in contemporary societies.

3. A new relationship between institutions and interactions in family law

In this context, the legal regulation of the family must compose with the absence of a pre-established substantive moral consensus. Indeed, the democratisation of the family implies the end of a single normative model of family based on fixed and gendered social

roles. The same negative condition is required by the transnationalisation of the family. How can we set up a family regulation which is not based on a single moral definition of the "good family" transcending local cultures?

Democratisation and transnationalisation require us to go beyond substantive morality. A minimal moral substratum persists, however, in this context, embodied in principles such as the best interests of the child, the consent of those involved or the fundamental rights. These principles remain vague and allow for a great deal of semantic and pragmatic plasticity. It is no surprise then that (international) family mediation develops hand in hand with adjudication as it works to implement these principles procedurally, accommodating the specificities of the particular context.

This brings us to the second analytical step taken in this special issue: the apprehension of law and family through the levels of interaction and institution.

On the one hand, the law must allow the emergence and maintenance of "constitutive practices" that shapes the family from below, through the procedural rules of interaction between individuals (Rawls 2012). This view, "instead of treating formal institutions and the formal law as creating the social order from which everything else follows", A. Rawls says, "refocuses attention on informal levels of constitutive practice that depend on voluntary reciprocal action. In contrast with the conventional view". Like Durkheim, Rawls proposes "that formal institutions now have the job of supporting the informal" (Rawls 2012, p. 504). If the interaction is now the main locus of the production of this informal and immanent normativity key to family life today, the legal institution must still provide roles and status to individuals, as to give shared meaning to individuals and society as a whole. This shared meaning that legal institutions provide, however, is increasingly marked by principles that are semantically vague and allow a great adaptability to local contexts, especially as they are more and more implemented procedurally, through mediation or conciliation practises.

On the other hand, the transnationalisation of family law consists, above all, in organising coordination and cooperation between national jurisdictions. Here also, the right balance between interaction and institution, between procedural rules and substantives moral standards, is at the heart of regulation debates. Indeed, in many areas of family law in the EU and beyond, judicial cooperation and the principle of mutual trust are the very fuel of transnationalisation. They are nevertheless limited by exceptions based on principles of human rights, such as gender equality, due process, etc. It is thus remarkable that at the supranational level, the legal systems equally rest on interactional procedural rules such as trust and reciprocity, even though institutionally formalised in legal texts.

A new relationship between interactions and institutions quickly develops in our societies. With legal support, they combine to allow great length of freedom of choice and family configuration for individuals.

4. International child abductions and recognition of same-sex marriage as case studies

Our special issue is composed of four articles that deal with two themes: the recognition of same-sex marriages and the international child abduction. They are particularly rich

and relevant to identify the deep issues of the democratisation and the transnationalisation of family law. In order to deploy a sociology of law that does not evacuate the technicalities and the precision of legal knowledge and that is rooted in the legal issues themselves, we have systematically combined the perspective of lawyers and sociologists on each of the themes. For each subject, we will thus propose first a legal analysis that immerses us in the legal issues at stake, and then develop a sociological comment that allows us to reconsider the phenomenon in the light of social theory.

The first pair of researchers, Geoffrey Willems and Jean De Munck, focuses on the issue of new families, especially same-sex marriages, and more generally the transformation of legal argumentation.

In his paper, Geoffrey Willems compares the different uses of human rights in the field of family law in three jurisdictions: the US Supreme Court, the Inter-American Court of Human Rights and the European Court of Human Rights. Facing the challenge of same sex marriage, the judges share a common legal reasoning based on rights and principles. The democratisation of the field is dependent on this common language. The right to marriage, the non-discrimination requirements, sexual equality, are components of a "human rights doctrine" which opens the way to the obligation to give to same-sex partners at least a "couple status" and full equality between married and non-married couples, even when there is reluctance to recognise the same-sex marriage as an obligation (as in the European Court). Nevertheless, this constitutionalisation of family law faces the challenge of the respect of the sovereignty of the State and its traditional value-based national consensus. Even in the Western countries, national sovereignty remains an important pillar of the law. Transnationalisation is a mixed and ambiguous reality: the international dialogue of judges is clearly open in the Inter-American Court, closed in the US Supreme Court, and an ambiguous reality in Europe. Nevertheless, the judges seek a new international coherence, in face of families crossing the national borders.

According to Jean De Munck, this very deep transformation in legal argumentation is the consequence of changes in the family systems and interactions in the Western societies. In order to explain these trends, the author shows that a revolution in the family is underway at the level of interactions. Family order is no longer dependent on moral consensus, but on the "constitutive practices" of actors. These practices imply normative procedural assumptions of reciprocity, equality and consent. Such constitutive practices are differentiated from institutional design, and must be taken into account as a source of social order in modern, differentiated societies. As Durkheim suggested in his pioneering work on the division of labour, modern societies are no longer based on rituals and consensus; moral commitments of interacting actors constitute the *sine qua non* basis of any cooperation. When taking the level of interaction seriously, we can understand the second innovation of family law in the last twenty-five years. It is not commented by Geoffrey Willems: the mediation as a mode of conflict resolution.

The normative basis for mediation cannot be derived from any moral consensus, but only from the immanent normativity of interactions in fragmented societies. We should therefore consider the modern legal institution as a framework which is based on its accordance with these normative requirements. Legality goes beyond a rule-centered

order toward a principle-centered reasoning (as Ronald Dworkin puts it), leaving room to procedural contextualisation. The transformations of family in late-modern societies are clearly contingent on different evolutions (labor market, contraception techniques, cultural individualism etc.); the legal framework must adjust itself to deal with self-regulating families. The common language of human rights is consistent with the plural morphogenesis of "new families" side by side with more "traditional" families. Human rights are functional tools to meet the challenges of a pluralist society.

The transnationalisation of family law is parallel to this revolution of the family order in multicultural societies. It will challenge national sovereignty in the coming years because of the structural necessity to go beyond the under-differentiation between the family and the national state. In family (as in trade or political realms), the differentiation of systems frees the interactions as an autonomous instance of social order.

The second pair of researchers, Silvia Bartolini and Olivier Struelens, focus on the issues of international child abduction. Silvia Bartolini's contribution offers a deep examination of the legal rules regulating international child abduction in the EU, giving a particularly vivid and precise view of the juridical debate on the matter. She eloquently shows that there is a tension between the principle of mutual trust between states and the protection of fundamental rights on a case-by-case basis. Silvia Bartolini shows that the current state of regulation forces judges to automatically send back children to the state from where the child has been removed, and that this automatic trust is blindly granted, putting individual child's rights at risk. Inspired by the doctrinal development of the European Arrest Warrant, she advocates that the best interests of the child in EU return proceedings should be the primary consideration of judges and that a set of substantial procedural safeguards should be established to end the blind trust regime of child abduction regulation.

Olivier Struelens proposes to revisit Silvia Bartolini's article through a sociological broadening and a theoretical deepening of the notion of trust based on empirical research with judges in charge of child abduction cases. By revisiting founding sociological works on trust, he elaborates an analytical toolbox that distinguishes confidence from trust, and more importantly, institutional and interpersonal trust. The theoretical endeavour achieved allows grasping the role of institutional trust in child abduction cases, both at the institutional and interactional level. At the institutional level, Olivier Struelens reassesses the legal texts regulating child abduction in the light of institutional trust, underpinning the role of trust, distrust and communities of trust. In the last section of his stimulating paper, the author delves into the interactional aspects of institutional trust, detailing the attitudes that judges are likely to take on in practice, ranging from national reflex to ethical dilemmas.

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