Papeles el tiempo de los derechos

**THE CHALLENGES FOR FAMILY LAW AND FAMILY RIGHTS
IN THE CHANGING EUROPEAN SOCIETIES**

M.ª ISABEL GARRIDO GÓMEZ

University of Alcalá

THE CHALLENGES FOR FAMILY LAW AND FAMILY RIGHTS IN THE CHANGING EUROPEAN SOCIETIES[1]

M.ª ISABEL GARRIDO GÓMEZ
University of Alcalá

ABSTRACT

Family Law and family rights are, without doubt, currently undergoing changes in that underlying values have been inverted. Major differences can however be observed and different models prevail in the contemporary States. There are four separate options, in fact, according to whether one adopts a view based on liberalism/authoritarianism or on egalitarianism/non-egalitarianism: the absolute nuclear family, the egalitarian nuclear family, the birth family and the community family. Family Law and family rights can be said to revolve around these principles. This essay therefore examines equality with regard to drafting legislation in the light of both dimensions and considers the current tendency to specify the rights of the family. The essay concludes with an analysis of some of those rights and setting out the cultural and ideological, political and economic issues that necessarily serve to question the subject of this study.

1. FAMILY LAW AND FAMILY RIGHTS IN A NEW LIGHT

The subject of family crops up again and again whenever the desire to examine realities that have undergone profound change arises. The family unit has effectively changed in modern times and can be constituted and structured in a variety of ways. Movements that have in some way affected that process of change have sprung up in this regard right across Europe, albeit at different times. Reference is made to a menu of variations on family life, from which to choose the desired variation. Families range from matrimony, with or without children, common law couples, single parent families,

---

[1] Project Consolider-Ingenio 2010 "The Age of the Rights", CSD2008-00007.

reconstituted families, etc. There are also para-style families and homes that are not family-based.

The predominant structure within the European Union, furthermore, despite the manner in which domestic structures are evolving, is the family home. These variations on family units however differ according to the different areas. The proven extent of that diversity provides a mirror image of the overriding values so important in family structures, with economic, cultural, technological, employment, town planning and social changes having a particularly strong effect (Commaille 1986; Garrido 2000).

Clearly, along the lines of these observations, Europe came into being as a separate entity arising out of historical-cultural factors poured into a diverse anthropological mix and in addition to this there is the desire to introduce different family models as appropriate to the implosion of immigrant settlers who embody quite different ethical values. Judicial and political protective mechanisms have come about as a result of the right of such people to autonomy and personal freedom. Nevertheless, and pursuant to the line of reasoning used here, there is a need to establish boundaries based on dignity as a pillar of judicial order, to link justice, society and human rights together and to design Law that will enable families to realise their full potential (Fernández García 1995).

It can therefore be said that the de-institutionalisation of marriage is currently occurring while at the same time marriage is becoming contract-based, privatised and lacks clear jurisdiction. Secularisation separates the religious aspect from the temporal and that does not amount to opposition. Marriage is deemed to be a voluntary formal agreement giving rise to judicial effects. This is fundamentally important to the partners in a marriage and only of secondary importance to their groups of origin; regulating both the social-financial effects and personal aspects of the spouses involved. The aforesaid voluntary agreement establishes the requirements necessary to commence, exercise and terminate the marriage -as well as requirements for suspension (by separation) or for dissolving the marriage (by divorce) on grounds of certain breaches-. The fact that divorce is now allowed under Member State legal systems effectively

reflects the importance of affection and serves in practice to move away from the nuclear family toward a different type of single-parent or reconstituted family unit (Carbonnier 2001; Meulders-Klein and Théry 1993).

One should however point out that the institutionalisation of *de factum* relationships came about in an attempt to separate legal matrimony from its sacred nature and to alter the configuration, given that subjection of the will of the parties to previously regulated legal standards was seen as an attack on personal freedom. Traditionally, the most widespread argument to justify the failure to acknowledge common law couples as a legal principle was that they went against morality, public order and good practice. Along those lines, although such couples are clearly no longer subject to the same level of criticism as to their immoral nature, traditional underlying family values effectively mean that married couples continue to receive preferential treatment in Law (Bradley 1996; Estrada 1991; Villagrasa 1996).

The fact that women are currently gaining equality with men in the eyes of the law and share authority both within the family group and over the children is also significant. An internal process of democratisation has taken place in this regard brought about by a weakening and decentralisation of masculine power. Nevertheless, and despite the fact that this is so, sentiments are still largely seen as a feminine stronghold and the man deemed to represent everything external to the home. While it is true to say that women are now protected under law and although there has been a move toward material equality, this is not yet fully in place. Nevertheless and notwithstanding these points, femininity is still largely seen as the stronghold of sentiment and the man as embodying factors outside the home. Women are protected in so far as their rights are concerned and yet, despite certain material improvement, absolute equality has yet to be achieved (Dornbusch and Strober 1988).

Child-bearing occurs predominantly in matrimony, although this does not preclude the unanimous protection of childhood and youth and acknowledgment of their rights, whatever their parental background. The rule of thumb is that children of marriages and children born outside marriage are deemed equal, the parents having

identical duties and the offspring similar rights. Adoption has become particularly important in this regard as a way for childless couples or couples seeking to enlarge their family to have children lawfully and is equally important for abandoned children. Legislation has clearly followed a trend to treat biological and adoptive families equally, requiring minors to be treated as active, involved and creative citizens, bearing in mind that all decisions are intended to help the child develop its personality to the full (Calvo 1994).

From the legal point of view the provisions set down under European Law on family issues are not complete but rather comprise isolated regulations and it is therefore more appropriate to analyse national Laws. National Constitutions are set down in terms that acknowledge family reality and order public authorities to protect and support that reality, as appropriate to a Welfare State within which the application of Law is often transferred to the political arena in a confusing manner (Bainham and Pearl 1993). Furthermore, both Civil Law, intended to conserve and to adapt, and Administrative Law, at the forefront of the battle against precariousness and exclusion arising out of changes in family behaviour, serve as particularly important legal benchmarks. There is an outer circle of conditioning legislation revolving around that nucleus: Constitutional Law, as mentioned above, Criminal Law, Procedural Law, Private international Law, Tax and Social legislation. As a final point in this regard, international effectiveness is dependent on the Constitutions and judicial practices of each particular Member State, while international instruments assist at the same time in overcoming difficulties inherent in the various ways that national guarantees operate (Cretney and Masson 1997; Dewar 1992; Hantrais 1992).

Having thus established the parameters in which current Family Law must operate it is important to note that the connection between the subjective and the human/familiarity cannot be set aside without denying the primary function of Law, namely, to protect and to promote personal identity. Law provides a channel for social freedom and guarantees the outcomes sought by citizens through the allocation of responsibility. Seen from those viewpoints, if homes are to be organised according to the social, political, moral and/or religious principles of family members, then the family is provided space as freedom to develop its personality and its inherent rights as

well as an intimate space in which the boundaries between public and private action are specified. A sense of privacy therefore becomes a social value and family privacy a protective barrier (Béjar 1995; Glendon 1996).

One can in reality consider that private autonomies converge within family autonomy along agreed lines in a process of contractualisation of rights and obligations. Official Law is subservient to the internal standards created within any given group in the event of danger or insufficiency for the purpose of guaranteeing that family goals are attained by means of indispensable standards. This effectively amounts to the creation of an area of public order within Private Law with a set of factors that are neither particularly consistent nor very clear and that must not be breached given the social interest in ensuring the family is able to carry out its particular roles. Such standards are irrevocable in that, although the individuals may or may cause a legal relationship to occur, what they certainly cannot do is to avoid the legal imperative imposed upon them, other than in exceptional cases and to a very limited degree (Fortino 1997; Hayes and Williams 1999; Millard 1995). A review of Family Law in this regard takes us from the concepts of Private Law under Rome and the era of Protestant Reform, to the realm of Public Law. Private law has, at the same time, gained greater influence since the very different view held in the 18th century, when Private Law was seen as the origin of Public Law, giving rise to freedom of the individual and regulation of the Welfare State. Changes are currently being proposed in view of the smaller family circle and the greater degree of responsibility being taken on by social organisations fulfilling traditional purposes (Castán 1994; Coing 1996).

We can therefore see that legal standards act as incentives to decision making for future action and laws themselves determine the scope and effects of family relationships in detail (Commaille 1991; Díez-Picazo 1984). In other words, any agreements reached by dint of the autonomous will of the parties concerned will, in theory, have to adapt to the impediments of the legal system given that legal power is instrumental. The problem arises in that the ethical content of those legal powers, built on religion, ideology, tradition and values, holds great sway and it can be difficult to achieve consensus on issues such as marriage, divorce and child custody (Doria 1996). Furthermore, equality in the eyes of the legal rules out any discrimination and attempts

to bring about a minimum level of security of material circumstance. The rules regarding equality are general in nature and specify that no-one should be excluded yet, insofar as sharing common assets is concerned, that equality does not suffice as it is neither real nor effective. The right to social services assistance and to safety is conceived as expressing the family interests and on that basis, therefore, individuals must be dealt with in such a way as to achieve satisfactory togetherness with the other members of the family group (Bobbio 2000).

2. EQUALITY WHEN DRAFTING FAMILY LAW AND FAMILY RIGHTS LEGISLATION. A FUNDAMENTAL YET CONTROVERSIAL ASPECT

Equality as a legal imperative when drafting legislation does not mean that all are equal under every viewpoint. That would simply render the legal standards inoperable and would do away with provisions that are necessary if legal powers of jurisdiction are to be exercised. Similarly, one cannot simply require equality to be carried out across all natural qualities and *de facto* situations in which people find themselves (Alexy 2001). What is more, as already highlighted, equality under Law provides that no arbitrary differences may be established unless rational grounds exist to justify such differences. That prohibition is directed at the legislator, who is bound to abide by the rule.

It could therefore be argued that equality of this type is not an absolute, but rather implies an absence of any discrimination based on significant criteria that have been positively prohibited. This is why one finds inequalities within general legal standards intended to assist disadvantaged persons, based on the so-called principle of social equality or of levelling conditions to compensate for inequalities (Pennock and Chapman 2006).

The legal imperative to treat the equal equally and the unequal unequally can be used by the legislator taking a universalistic view according to which "valid for all x where x has properties P1,P2 ….. Pn, and that judicial consequence C must therefore be applicable to x". What this equates to, however, is a formula which is valid for the

legislator and for those applying Law of a formal nature and that must nevertheless be interpreted as a requirement aimed at the content of legislation as if it were a mandate for material equality. This, according to Alexy, imbues the often disregarded formula with a degree of importance regarding two interrelated issues: "whether and to what extent it is possible to provide rational grounds for necessary value judgments under the framework of the maxim of equality" and "who within the legal system is to have jurisdictional competence to formulate such value judgments, in the last instance and as binding in Law: the legislator or the Constitutional Court?" (Alexy 2001).

On the basis of the legal principles set out above, the legislator is bound to the principle of equality to a lesser degree than the judge in that the former has a greater general margin for action. In practice it is easy to see how the legislator continually introduces differences in treatment and grants benefits or allocates responsibilities to certain groups. The question then becomes "how can one reconcile that apparent contradiction?" The answer lies in being reasonable. In this sense, European Court of Human Rights case law upholds that any inequality must be based on objective and reasonable grounds, that is to say that it must pursue a constitutionally legitimate purpose and that it should be possible to discern such justification by considering reasonableness and objectivity, pursuant to generally accepted criteria and value judgments and to proportionality of the means used and the purposes and effects sought by differentiated treatment set down in Law, requiring the application of logic (Bilbao and Rey 2003).

That Law is defined as being both general and abstract is, clearly, one of the most representative definitions of the liberal Nation which, arising as it does out of the collective will, is then defined according to a series of general mandates. That type of structure establishes a mode of regulation in which the legislator considers classes and categories of individuals and scenarios. The general nature of such regulation has to do with the impersonal nature of legal regulation and abstraction with an indeterminate number of scenarios or *de facto* situations of the same kind (Galiana 2007; Marcilla 2005). The legal consequences provided for under the legal regulations arise in any given circumstances where the conditions for application or the *de facto* situations occur. General legal provisions therefore serve to bring value to formal equality. The

formula which States that all are equal in the eyes of the law comes about due to the general nature of legal regulations involved in the provision of justice according to Aristotle. It also, however, brings other values, such as impartiality, into play (Bobbio 1990).

Generality and abstraction furthermore stand as structural guarantees to combat any unfairness on the part of public authorities. Marcilla takes this point further and considers that any Law of such characteristics is non-discriminatory and likely to be applied in a true and sure manner by the public authorities. It also leads to legal equality, given that the legal principles involved are down the middle, with equality and legal certainty deemed absolutely necessary in order for individuals to be able to develop lifetime strategies as liberalism intends (Marcilla 2005). Individuals enjoy full autonomy as regards selecting projects for good living on a private scale; in public life, however, certain principles of justice must be agreed that are nowhere to be found in such projects (Dworkin 2001). The key deliberation, then, is that the equal attribution of individual rights must suffice to guarantee a diversity of democratic societies, promoting universal and formal respect of rights relating to negative freedom.

Abstraction purports to guarantee stable legal order and thus to give rise to certainty and predictable Law (Zagrebelsky 2009). The formal requirement for legal regulations to be general in nature thus seems *prima facie* to be a requirement of the principle of equality, i.e for legislation to be set down as being applicable to an abstract individual. This means, in principle, that you cannot have laws that are constructed in a personal manner. Such Laws can only occur when there are proper grounds. We do not, however, simply have to make do with a logical-abstract structure to achieve this. The decisive factors are the criteria for selection used to determine the category or class of person or the scenarios to which the legal consequence provided for under such legislation will apply (Bentham 2004; Fernández Ruiz-Gálvez 2003).

The fact that legal provisions are deemed general with regard to the intended subject and abstract with regard to the action they regulate has its origins in ideology rather than logic and has to do with equality as the purpose of Law, in that all are equal in the eyes of the Law. Insofar as the abstract nature of Law is concerned, this tends to

fulfilment of another purpose of Law, the legal certainty (Bobbio 1998). Thus if all legal provisions of any given system are, as Bobbio has said, to be both general and abstract, this can only in fact occur in an ideal model and in reality individual and specific regulations do in fact exist. One can therefore extrapolate this to say that if we were to combine the four principles we would have general and abstract regulations; general and specific regulations; particular and abstract regulations and particular and specific regulations (Bobbio 1998). We can therefore see that generality is a fact that contradicts legal regulation being directly specifically at any one category or type of agent. The very term abstract, for its part, also refers to a category or type of actions where the opposite is deemed to be anything specific (Bobbio 1990).

3. TREND TOWARDS SPECIFICATION IN FAMILY LAW AND FAMILY RIGHTS

Safety is intertwined nowadays with basic legal assets, and ensuring safety is deemed socially and politically necessary. Justice is gradually losing its ideal and abstract dimension and being shaped by the requirements that define its content in a social and democratic rule of Law. These issues are closely associated with the relationship between the public and private arenas (Béjar 1995; Esping-Andersen 1993; Flora and Heidenheimer 2000; Pérez Luño 2007). In this instance, legal certainty plays an informative role which is conclusive with regard to freedom, equality and solidarity, assumed under the legality arising out of fundamental rights, and this role guarantees the realisation of freedoms. Objectively speaking, certainty is governed by the structural and functional regularity of the legal system bringing about a perception of tranquillity and relief in knowing what one can rely on. The conditions for structural correction and guarantee of regular provision or drafting of rights, as well as functional correction, providing the guarantee that those rights will be fulfilled for all the persons to whom they apply, should therefore all concur together with regularity of action on the part of the official bodies charged with applying the legislation (Pérez Luño 19994).

Actions by public authorities must, in this sense, provide assets and services that are indispensable for integrating individuals and groups within society; and at the same time, insofar that if such rights and freedoms were actually exercised this would ensure a minimum degree of wellbeing and bring about involvement at the community level, then what Jellinek has termed *status positivus socialis* would come into being. When

considering these views, it is absolutely necessary to evaluate the socio-economic issue; rights to benefits, in general, imply available financial reserves and must be interpreted by the public authorities and specified according to current political-economic models in force at any given time (Gomes Canotilho 1988; Jellinek 1905).

The State must, in this regard, ensure and encourage individual and group initiatives and check they duly exercise their rights and obligations, helping them reach their potential, providing anything they may lack and substituting for them whenever this proves absolutely or partially impossible or if they are ever unable to meet their legal duties properly. Separately to those issues, one should also highlight the promotional role of the Welfare States and this enables us to see that the objectives are to be sought by trying to "render the desired action necessary, feasible and advantageous". One of the most noteworthy points to emerge from the Welfare States is the multiplicity of legislation aimed at providing incentives and consisting of "promoting desired behaviours" with a difference between *facilitating* -which ranges from "grants, aid or financial contributions or help with loans"- and *positive sanction* - scenarios in which "highly conforming behaviour is rewarded or a tax exemption provided"-. Arising from that, it would be helpful if general theory on the rights of families and their members were built up by uniting the relationship of individuals and the public authorities together with the role played by private authorities thereby giving rise to two types of relationship: the relationship between individuals and private authorities and the relationship between public and private authorities (De Asís 1996).

Certain difficulties have arisen in modern day society with regard to intergenerational and new forms of mediation have come into play between family members (cultural, material, economic, political, religious and legal). The structure, however, is the same as it has always been: from parents to offspring and offspring to parents, much like the circular nature of communication that encompasses us all, spouse, parents, children, brothers and sisters and other family members. A child's first relationships are formed with the family members it lives with and then come friends, peers and relatives. Altruism, as an underlying assumption of solidarity, must be mutual although it is entirely up to the individual and the ethical values running through the family. When couples are in conflict with one another, however, such altruism tends to either completely or partially disappear (Bott 1990; Donati 1993).

Rights-obligations can be said, from the point of view of efficacy, to be the containers of an irreducible factor and to be a socio-legal objective that Law must set into order to a minimally satisfactory degree. There is evidence to show that compliance with family obligations in the modern day family is based on the freedom to seek equilibrium and reconciliation with the principles of private autonomy and development of the individual personality from a background of solidarity. Regulations in force across European Member States acknowledge the equal rights and obligations of spouses and their relationships with their children, under the principle that obligations go hand in hand with the family position, in the case of separation or breakdown, or pursuant to the obligations previously incumbent on the obliged party. This concept of solidarity is clearly expressed in matrimonial joint asset arrangements, in the duty to provide food as well as in the obligations a child should share when living at home with the family.

There is general consensus with regard to the need for the family to be protected by public authorities and a substantial difference in the degree of attention given and the way duties and responsibilities are set down, the instruments used and the extent to which they are used. Some member States, such as France, have introduced an explicit policy, taking action for and on behalf of the family, without any common goals as reference points. Other Member States where no such policy exists, such as the United Kingdom, act without referring directly to it but rather indirectly, as the principles form an integral part of social services and social action (McLynn 2006; Rymsza 1996).

Evidence of the above can be seen from the fact that family policy within the European Union borders comes in a variety of guises and has gone through different periods since its inception. The stages can be categorised as follows (Navarro, Negro and Pallarés 1992; Ribes 1990):

The first stage lasted from the end of the nineteenth and early twentieth century up to 1918. The main feature of this period was its liberal nature, where it was left to the good intentions of business owners to pay employees having family obligations.

The second stage, running from 1918 to 1928, concerned compensation. social costs arising for provisions to families were shared among the various different business owners in any one particular industry or locality, not related to the number of children anyone had.

Then came the third stage, which prevailed from 1928 onwards and under which provision was deemed compulsory, family benefits were extended and obligation to pay was imposed by Law.

This all goes to show that just as in the field of general social policy, different positions exist with regard to family-State and as to how the State should act. Family social policies are restricted to carrying through the ideologies that were defined under traditional policies in each particular area: a) Social-democratic model (Denmark, Finland and Sweden; b) the corporativism model (Austria, Belgium, Germany, Luxembourg and the Netherlands); c) the Southern European or Catholic model (Spain, France, Greece, Ireland, Italy and Portugal); and d) the British model (United Kingdom) (Botella 1997; Dumon 1987; Katz, Eekelaar and MacLean 2000).

4. SOME INSTANCES OF FAMILY RIGHTS

Taken together with the preceding paragraph, the most important family rights may be said to be: The right to health protection. Health is deemed to be a personal value having a transcendental effect on the family and arising out of cultural and moral principles. Health protection measures as provided for under Law are both preventative and curative and intended to maintain hygiene standards, eradicating poverty, unemployment and social exclusion, which are all proven to have a negative effect. National, regional and local authorities are the primary players and receive support from the European Union for efforts made by Member States in the field of public health, assistance in drawing up and carrying through objectives and strategies and contributory measures to guarantee protection strategies (Daniels and Sabin 1997; De Lora 2004; Dworkin 1993).

In this sense, notwithstanding the tremendous differences at the organisation and financing levels, health systems are all experiencing a common increase in costs as an absolute value and proportionate to GNP. There is a noticeable tendency to divert part of public health financing to family homes. All Member States have social protection

measures to ensure that a very large proportion of the population is covered pursuant to principles of quality, fairness and accessibility. Social services are seen as aid agencies that take responsibility for managing services where financing provisions provided under Law are channelled.

Health costs usually vary, however, depending on whether or not they include aspects such as social assistance services, health in schools or chronic disease. Chronic or long term disease requires special attention or home help, in the case of disabilities, that go hand in hand with financial considerations and create a need for education centres, nurseries, means of transportation etc. This problem is further compounded by the absence of any accepted international definition for the term *health costs* and due to the inherent difficulty of properly measuring the degree to which current systems in place are represented (Álvarez 2004).

One should additionally make reference to the right-duty to work, which is not set down in writing as an obligation, but is rather a meta-legal value that requires interpretation with a Rule of Law in force, according to the statutory regulations governing the general economic situation. The same is true with regard to guaranteeing personal autonomy, with regard to the freedom to choose the type of work one wishes to do together with the freedom to change from one type to another or the right to an employment career path suited to the capability of each person.

The salary or consideration on the part of the employer to the employee can be defined as the fruit of man's work by means of which both he and his family subsist. Such remuneration must be equitable, i.e. fair, and sufficient to maintain an decent lifestyle providing dignified conditions on the material, social, cultural and spiritual level. That is why we would again emphasise the fact that the family-work relationship is intrinsic, with the European population living on salaries, for the most part. Work is seen as a means to maintain the family and ensures that basic needs are covered. This translates to well-being in the home, bringing life to the home to which all contribute with their work. Work is therefore profoundly social from the savings and consumer spending viewpoint, not just as a means of production. The remuneration referred to should be sufficient to permit each individual person to attain their material and spiritual potential, to start a family, attend to its needs and save enough to build up the family

assets (Bernard 1995). There is an ethical basis to salary payment in that it produces a current *debitum* and a sense of ownership, in that it belongs to the employee in exchange for the work carried out.

The fact that working time is limited has a dual dimension. One aspect is that spending time is a person's right to enjoy free time, to rest and to be with the family; the other is the perception of a scarce commodity -work itself- as a collective right. Furthermore, Member States have not reached agreement as to the length of the working day, in the belief that the European community should effectively acknowledge the right to family time and therefore to set down a series of legal principles as to minimum working time, rest periods, holidays, weekend work and overtime. There is a clear need to keep work time allocation flexible and suited to company working conditions and dynamics.

Secondly, insofar as the right to an education is concerned the starting premise is that the functions of education, with regard to social policy, centre around the use of a socialising role in order to guarantee equal opportunities. The task is a democratic one, preparing the child to play its part in society, and to exercise its rights and freedoms; in addition to the work involved in making sure that society moves forward (Palomeque 1991; Sastre 1996). Described in this way it becomes obvious that one must educate individuals and provide them with overall training to prepare them to appreciate values, ordering rationality, and this is the idea behind the 1948 Universal Declaration of Human Rights (article 26.2) which provides: "the purpose of education is to fully develop an individual's potential and to strengthen respect for fundamental rights; it should enhance understanding, tolerance and friendships between ethnic and religious groups; and promote the development of United Nations peace keeping activities".

Educational procedures serve to teach young people about acceptable behaviour and pass on knowledge that forms part of culture. They serve to teach students how to co-exist and to bring their own desires in line with common group values. The socio-political aims of education should be to help the child acquire knowledge about its cultural surroundings, perfecting methods of adaptation aimed at improving culture as necessary. That is why merely technical and pragmatic style education must be flatly

rejected, creating as it does a person lacking in such fundamental values (Martínez de Pisón 2003).

The grounds alluded to serve to support the idea that what one needs is equilibrium between acknowledging freedom of education and equal opportunities is a desired objective, rendered effective by compulsory measures and free basic schooling so that illiteracy can be eradicated and everyone can promote themselves. In this regard there should also be a balance between academic fees and family income that makes it possible to provide subsidised loans to those not receiving educational grants but who nevertheless have financial difficulties. Proper adaptation to current reality at any given time, combined with a clear vision for the future render it essential to achieve usefulness to society and scientific progress. Member States are aware that their economic policies inherently involve competitivity upheld by productions costs, dependant on innovation and creativity. Continuous retraining must also be guaranteed to raise awareness of new advances and theories. Information technologies and communications have become tools at the service of training (Berthélemy, Brunet and Jamoulle 1998; Esteban and González-Trevijano 2004).

Thirdly, the right to housing stands out in that it is the location of the home, family life and activities and a family without a house-room is unthinkable. It has to do with family intimacy. The family home is of transcendental importance as it is the external expression of the tension between private and public life; between the house and the city of houses; between domestic reality and civilian society

A home needs to have certain minimum conditions and to be a refuge from outside interference. The limitations of the home are defined according to the way it is used and the actions that take place there and the minimum living area for appropriate communal living of all who inhabit it must be reviewed. Having a decent home is, according to estimated parameters in the Member State settlement area, an additional pre-requisite together with the right to family regroupment (art. 10.3 Regulation 1.612/68), pursuant to the appropriate needs and wellbeing of the family, so that it can live together and perform its functions in a proper manner.

Residence is a separate concept to housing and involves issues of transience and home address, implying habitual dwelling. The concept of habitual residence has been created in Law: the place where one's interests are centred and rights and actions exercised, obligations complied with. Housing is therefore the dwelling where the family habitually resides, i.e. its effective centre of interests. Family home, housing, and habitual residence are different expressions encompassing realities that have a specific meaning (González Ordovás 2004).

These ideas imply that housing is a family requirement. The task of Government authorities would consist either of making direct provision, such as building decent family homes, providing finance, purchasing and use of such homes or indirect provision by approving laws to make such homes available. The standards of decency and suitability of materials in that regard must also extend to the environment and make town planning allocation necessary (Corriente 1986; Pisarello 2003).

5. ISSUES THAT REQUIRE FAMILY LAW AND FAMILY RIGHTS TO BE REDEFINED

Cultural and ideological issues arise within Europe, due to its unique historical background, which are the outward expression of the different traditions, mentalities and social norm priorities and these, due to their very nature, impede harmonisation and the setting of objectives for convergence. It is therefore absolutely necessary to start out from the diversity of systems, cultures and cultural practices that have survived within the traditions and manner in which their peoples developed. Germany and France are respectively representative of authoritarianism and egalitarianism and continue to act as two opposing poles; British culture, individualistic per se, treats individuals according to their race, ethnic background and religion. This explains the fragmentation that exists, with its roots in such varied anthropological origins. The European democratic model combines British elements, respect for the German and French civil rights and, as Todd (Todd, 1995) has stated, we are faced in Europe with a variety of family types due to religious attributes, literacy, industrialisation, birth control and ideology.

In turn, just as there is a relationship between national or regional political temperament and the ideological system, whether a society is agricultural or urban is another factor which affects the way the family group is structured. In the first instance,

practices with regard to inheritance and co-residence rules become highly formalised. It is harder to perceive the transparency of overriding values in the city. Religion influences institutions and beliefs as well as individual activities, although secularisation has arisen out of industrialisation, urbanisation and modernisation. There is a parallel between the feudal master family, with land ownership that meant they could stand up to the power wielded by priests and orthodox Protestantism (Northern Germany, central France and Sweden); between the absolute nuclear family and Armenian style Protestantism (the Netherlands and United Kingdom) (Hamilton 1995).

Thus, if we take *culture* to mean the combination of spiritual, material, intellectual and sensorial factors that are characteristic of a society or social group, then Europe is a response to the values that justify its existence. This is because the Member States that comprise it have a unity of origin and interests. The policy of cooperation acknowledges the pluralism that exists and is intended to improve Member States' knowledge of other European Community Member States and their information regarding European history and culture. The concept of *Common European Heritage* is based on a socio-political idea based on respect for the person and individual fundamental freedoms. The central focus is always the individual and, given that individuals are from families, then family social policy acquires special importance (Chabod 1992).

On the other hand, political problems exist, in that the European Union has its origins in the desire to prevent armed conflict and wars between the States that comprise it although, in terms of the internal context of the European Union, the tendency is and has always been the defence of self-interest and there is therefore an urgent need to engage Europeans in building a Europe in which each accepts the differences of others, within a framework of tolerance and non-exclusion. While the lines of thought as to how that Europe can really be built are unclear, the starting point is that non-one can be excluded on racist, ideological, religious, social or national grounds, the differences of others must be accepted and educate to assimilate (Dahrendorf 1976).

It is important to mention migratory movements to and from the European Union on this point, as well as between the various different Member States and regions which have become an increasingly important factor of demographic evolution since the mid-eighties. The Member States where migrants have settled can be divided into two

large areas: Northern Europe, comprised of Member States such as Germany, France, the United Kingdom and Belgium; and Southern Europe, including Italy, Spain, Portugal and Greece. There has always been a tradition of migration to the first group but the phenomenon of migration only appeared later on in the second group. The Northern Member States wish to achieve an integrated population and migrants are treated there by the same principles of equality as nationalised citizens. Parallel to this, a social policy comprising specific rights and adapted to each particular situation is beginning to be set down. Inequalities between national systems of social protection therefore justify the different conditions between migratory processes and social insertion support programmes.

The end result of all these trends is that today's society is multicultural and that certain problems arise out of the economic and social repercussions. The different European migration scenarios within the population can be classified as old immigration; new migratory flows; and specific groups (refugees, asylum claimants and illegal immigrants). There are more men that women and more young people than older people. Migrants are typically adult, with few children or old people, and often set up home in the new Member State (Lahav 1997).

These categories highlight the need for new thinking to regulate family social policy. This problem can be overcome by promoting policies for inter-community relations as legal instruments to achieve judicial, economic and social stability bringing about equality of access to goods and services, with regard to finding work and decent housing (De Lucas 1999).

The same can be said to occur politically as culturally and ideologically, i.e., the European Union must take diversity within the unity into consideration and should not just fall into the danger of simple juxtaposition, creating a conglomerate of systems; neither should it avoid diversity in an attempt to introduce uniformity by focussing on the 'what' of the end product rather than the 'who' (Rawls 2001). Integration of the European Union Member States therefore requires us to found common political ideals which can only become known and valued by reviewing the European roots that can explain how it came about. The objective would be to reinforce European Union

structures, rationalise decision-making mechanisms, and deepen the sentiment of belonging to the Union.

Lastly, another kind of reason lies in economic grounds and particularly the repercussions of the socio-economic system on the way families are organised. Under the medieval rural economic system, women worked in agricultural, looked after the animals, took care of the home and reproduction. Services and goods produced in the home by the woman at home were intended for private consumption by the other family members. The housewife generated use values which, as they were consumed, meant that work efforts were partly reproduced. Over time, the arrival of urbanisation brought with it new lifestyles, habits and internal relationships, needs changed and the system was re-organised (Barrère-Maurisson 1987).

There appears to be a direct relationship between production and human reproduction as a social phenomenon. The pre-modern model (numbers of offspring as production assets) has given way to the modern model (quality of offspring as an investment asset). The pre-modern family, living in rural homes, had a greater number of children than modern families, living in urban dwellings, given the time and money involved in raising and educating those children and further considering that the possibilities for each child to realise their potential in the future is continually decreasing due to the difficulties of finding employment. Industrialisation has meant that the family no longer comprises the basic means of work organisation although the imposed method of working still fulfils certain traditional economic functions in that work is seen as an individual position inserted into other productive groups (the factory, the company, the State). The family continues to be the economic grouping dedicated to genetic-human reproduction and out of which the future work force arises (Gil Calvo 1997).

Specialisation and the subsequent division of labour that this creates are co-related with family factors in that each family member has its own task to carry out, the imposed rationalisation and organisation thereby implying a more efficient outcome. Such specialisation is dependent on cultural tradition, on masculine and feminine biological structure, despite the fact that women have joined the professional workforce and that the levels and types of education of the two sexes are increasingly similar. In

most cases the wages earned by the woman supplements the man's income, in that the production tasks are becoming increasingly similar as the locations where the family produces its income has moved to the factory, the company, the shop, etc. And from the standpoint of family policy, the economy plays a major role affecting that policy, as can be seen from the fact that whenever the economy is not doing well public authorities take on fewer responsibilities (Gómez 1990).

This is why we should review the problems involved in an aging population, the structure and make-up of families, the persistently high unemployment figures, the appearance of poverty processes and increasing cost of worldwide aid, where traditional poverty and modern poverty meet.

6. CONCLUSION

Insofar as the Member States of the European Union are concerned, some legal regulations have been set down by legal orders making provisions for the social interest surrounding the family. Family Law is essentially a national issue, centred on how they are constituted or the family pathology, parenting and parental authority. Family autonomy should be taken to mean the convergence of the private autonomies of the family members along a line of common interest, reached by agreement in a process of contractualisation of rights and obligations. National family law comes second to the internal regulations set up by the family group and in force within the privacy of the family home. The former only comes into play in the face of danger or inability to guarantee family objectives. Law contains indispensable regulations governing public order and the common good and these must respect aspects comprising the family itself.

The State intervenes along basic lines to the extent that it is in its interests to preserve the family as an institution. Regulations can be seen as a system providing incentives that have a decisive effect on future actions, although it is law itself that sets down the content and specific scope and effects of the legal-family relationship (Garrido 2000). Any agreement reached from the autonomous will of the parties must necessarily adapt to the limitations set down under the Legal System, in that legal powers arising out of legal-family relationships are deemed instrumental and are attributed in order to ensure the purposes provided for under that legal system and this cannot be left up to the independent criteria of individual citizens. The degree of difficulty arises from the

fact that families have very strong ethics which rely on moralistic and ideological issues, on religion, tradition and a value system.

REFERENCES

-Alexy, R., 2001. *Teoría de los derechos fundamentales*, translated by E. Garzón Valdés. Madrid: Centre for Political and Constitutional Studies.

-Álvarez, S., 2004. La autonomía personal y los derechos de los enfermos. *In*: J. Betegón, F.J. Laporta, J.R. de Páramo and L. Prieto Sanchís, coords.). *Constitución y derechos fundamentales.* Madrid: Centre for Political and Constitutional Studies, 911-945.

-Asís, R. de, 1996. Servicio público y poder privado. *In*: R. de Asís, E. Fernández García, M.D. González Ayala, A. Llamas and G. Peces-Barba. *Valores, derechos y Estado a finales del siglo XX.* Madrid: Carlos III University of Madrid-Dykinson, 33-74.

-Bainham, A., and Pearl, D.S., 1993. *Frontiers of Family Law.* London: University of East Anglia, Chancery Law Publishing**.**

-Barrère-Maurisson, M.-A., ed., 2001. *Partage des temps et des tâches dans les ménages.* Paris: La Documentation Française.

-Béjar, H., 1995. *El ámbito íntimo. Privacidad, individualismo y modernidad.* Madrid: Alianza.

-Bentham, J., 2004. *Nomografía o el arte de redactar leyes*, translated by C. Pabón. Madrid: Centre for Political and Constitutional Studies-Official Gazette of State.

-Bernard, C., 1995. *E.C. Employment Law.* Chichester: Wiley Chancery.

-Berthélemy, B. and others, 1998. *Commentaire Mégret. Le droit de la CEE politique sociale.* Brussels: University of Brussels,.

-Bilbao, J.M. and Rey, F., 2003. El principio constitucional de igualdad en la jurisprudencia española. *In*: Carbonell, M., comp. *El principio constitucional de igualdad. Lecturas de introducción.* Mexico: National Human Rights Comisión, 108.

-Bobbio, N., 1990. *Contribución a la Teoría del Derecho*, ed. by A. Ruiz Miguel. Madrid: Debate.

-1998. *Teoría general del Derecho*, translated by E. Rozo Acuña. Madrid: Debate.

-2000. *Igualdad y libertad*, translated by P. Aragón. Barcelona: Paidós.

-Botella, J., 1997. La opinión pública ante el "Welfare State" ¿oferta o demanda? *In:* S. Giner and S. Sarasa, eds., *Buen gobierno y política social.* Barcelona: Ariel, 195.

-Bott, E., 1990. *Familia y red social: roles, normas y relaciones externas en las familias urbanas corrientes*, translated by R. Gobernado and others. Madrid: Taurus.

-Bradley, D., 1996. *Family Law and Political Culture.* London: Sweet and Maxwell.

-Calvo García, M., 1994. La protección del menor y sus derechos. *Derechos y Libertades*, 2, 177-200.

-Carbonnier, J., 2001. *Flexible droit.* Paris: Librairie Générale de Droit et de Jurisprudence.

-Castán, J., 1994. *Derecho civil español común y foral*, t. 5, v. I (*Relaciones conyugales*). Madrid: Reus.

-Coing, H., 1996. *Derecho privado europeo*, vols. 1 and 2, translated by A. Pérez Martín. Madrid: Notarial ***Foundation.***

-Commaille, J., 1986. D´une sociologie de la familla à une sociologie du droit. D´une sociologie du droit à une sociologie des régulations sociales. *Sociologie et sociétés*, 18/1, 113-128.

-Corriente, J., 1986. "La configuración de la vivienda familiar y de su ajuar en el Derecho europeo. Líneas de construcción y directrices de política legislativa formuladas por el Consejo de Europa". *In*: P.J. Viladrich, coord., *El hogar y el ajuar de la familia en las crisis matrimoniales. Bases conceptuales y criterios judiciales.* Pamplona: EUNSA, 321-346.

-Cretney, S.M. and Masson, J.M., 1997. *Principles of Family Law.* London: Sweet and Maxwell.

-Chabod, F., 1992. *Historia de la idea de Europa*, translated by C. García. Madrid: University Complutense de Madrid.

-Dahrendorf, R., 1988. *The Modern Social Conflict. An Essay on the Politics of Liberty.* New York: Weidenfeld and Nicholson.

-Daniels, N. and Sabin, J., 1997. "Limits to Health Care: Fair Procedures, Democratic Deliberation, and the Legitimacy Problem for Insurer". *Philosophy and Public Affairs*, 26*,* 303-350.

-Dewar, J., 1992. *Law and the Family.* London: Butterworths.

-Díez-Picazo, L., 1984. *Familia y Derecho.* Madrid: Civitas.

-Donati, P. 1993., La equidad generacional: un problema educativo y de política social. *Revista Española de Pedagogía*, 196, 463-502.

-Doria, G. 1996., Autonomia privata e "causa" familiare. Gli accordi traslativi tra i coniugi in occasione della separazione personale e del divorzio. Milan: Giuffrè.

-Dornbusch, S.M. and Strober, M.H., eds., 1988. *Feminism, Children and New Families*. London: Guilford Press.

-Dumon, W., 1987. La politique familiale en Europe occidentale: une réflexion sociologique. *L´Année Sociologique*, 37, 291-308.

-Dworkin, R., 1993. Justice in the Distribution of Health Care. *McGill Law Journal*, 38/4, 883.

-2001. *La comunidad liberal*, translated by C. Montilla. Santafé de Bogotá: Universidad de los Andes-Siglo del Hombre.

-Esping-Andersen, G., 1993. *Los tres mundos del Estado del bienestar*, translated by B. Arregui. Valencia: Alfons el Magnànim.

-Esteban, J. de and González-Trevijano, P., 2004. *Tratado de derecho constitucional*, vol . 2. Madrid: Faculty of Law, University Complutense of Madrid.

-Estrada, E., 1991. *Las uniones extramatrimoniales en el Derecho civil español*. Madrid: Civitas.

-Fernández García, E., 1995. *Filosofía política y Derecho*. Madrid: Marcial Pons.

-Fernández Ruiz-Gálvez, E., 2003. *Igualdad y derechos humanos*. Madrid: Tecnos.

-Flora P. and A.J. Heidenheimer, A.J., dirs., 2003. *The Development of Welfare States in Europe and America*. New Brunswick: Transaction Books.

-Fortino, M., 1997. *Diritto di famiglia: i valori, i principi, le regole*. Milan: Giuffrè.

-Galiana, A., 2007. *La ley: entre la razón y la experimentación*. Valencia: Tirant lo Blanch.

-Garrido, M.I., 2000. *La política social de la familia en la Unión Europea*. Madrid: Dykinson.

-Gil Calvo, E., 1997. La estrategia progenitora. *In*: L. Garrido Medina and E. Gil Calvo, eds., *Estrategias familiares*. Madrid: Alianza, 181-200.

-Glendon, M.A., 1996. *The Transformation of Family Law. State, Law, and Family in the United States and Western Europe*. Chicago-London: University of Chicago Press.

-Gomes Canotilho, J.J., 1988. *Tomemos en serio los derechos económicos, sociales y culturales*, translated by E. Calderón y E. Elvira. *Revista del Centro de Estudios Constitucionales*, 1, 239-260.

-Gómez, Y., 1990. *Familia y matrimonio en la Constitución española de 1978*. Madrid: Spanish Parliament.

-González Ordovás, M.J., 2004. El derecho a una vivienda digna y adecuada. *In*: J. Betegón, F.J. Laporta, J.R. de Páramo, and L. Prieto Sanchís, coords., *Constitución y derechos fundamentales*. Madrid: Centre for Political and Constitutional Studies, 971-986.

-Guiraudon, V. and Lahav, G., eds., 2007. *Immigration Policy in Europe: Tthe Politics of Control*. Routledge: Abingdon.

-Hamilton, C., 1995. *Family, Law and Religion*. London: Sweet & Maxwell.

-Hantrais, L., 1992. Les macro-régulations de la famille: une approche comparative. *In*: *Actes du Séminaire du Politique et du Social dans l´Avenir de la Famille, Haut Conseil de la Population et de la Famille*. Paris: La Documentation Française.

-Hayes, M and Williams, C., 1999. *Family Law: Principles, Policy and Practice*. London: Butterworths.

-Jellinek, G., 1905. *System der subjektiven öffentlichen Rechte*. Tubinga,

-Katz, S.N., Eekelaar, J. and MacLean, M. (eds.), 2000. *Cross currents: Family Law and Policy in the United States and England*. Oxford: Oxford University Press.

-Lora, P. de, 2004. "El derecho a la protección de la salud". *In*: J. Betegón, F.J. Laporta, J.R. de Páramo y L. Prieto Sanchís, coords. *Constitución y derechos fundamentales*. Madrid: Centre for Political and Constitutional Studies, 875-909.

-Lucas, J. de, 1992. *Europa, ¿convivir con la diferencia? Racismo, nacionalismo y derechos de las minorías*. Madrid: Tecnos.

-Marcilla, G., 2005. *Racionalidad legislativa. Crisis de la ley y nueva Ciencia de la legislación*. Madrid: Centre for Political and Constitutional Studies.

-Martínez de Pisón, J.M., 2003. *El derecho a la educación y la libertad de enseñanza*. Madrid: Carlos III University of Madrid-Dykinson.

-McGlynn, C., 2006. *Families and the European Union. Law, Politics and Pluralism*. Cambridge (United Kingdom): Cambridge University Press.

-Meulders-Klein, M.T. and Théry, I., 1993. *Les récompositions familiales aujourd´hui*. Paris: Natham.

-Millard, E., 1995. *Famille et droit public. Recherches sur la construction d´un objet juridique*. Paris: Librairie Générale de Droit et de Jurisprudence.

-Navarro, C., Negro, M. and Pallarés, A., 1992. Las políticas familiares en Europa. Especial referencia a España. *Presupuesto y Gasto Público*, 7, 57-82**.**

-Palomeque, M.C., 1991. *Los derechos laborales en la Constitución española.* Madrid: Centre for Constitutional Studies.

-Pennock, J.R. and Chapman, J.W., eds., 2006. *Equality*. New Brunswick: Aldine Transaction.

-Pérez Luño, A.E. 1994. *La seguridad jurídica*. Barcelona: Ariel.

-2007. *Teoría del Derecho. Una concepción de la experiencia jurídica*. Madrid: Tecnos.

-Pisarello, G., 2003. *Vivienda para todos: un derecho en construcción. El derecho a una vivienda digna y adecuada como derecho exigible*. Barcelona: Icaria.

-Rawls, J., 2001. *El Derecho de gentes y "Una revisión de la idea de razón pública*", translated by H. Valencia. Barcelona: Paidós.

-Rymsza, M., 1996. Socio-Legal and Ideological Aspects of the Evolution of Family Policies in Liberal Societies. *In*: J. Kurczewski and M. MacLean, eds., *Family Law and Family Policy in the New Europe*. Aldershot: The Oñati International Institute for the Sociology of Law-Dartmouth.

-Sastre, R., 1996. *El derecho al trabajo*. Madrid: Trotta.

-Todd, E., 1990. *L´invention de Europe*. Paris: Seuil.

-Villagrasa Alcaide, C., coord., 1996. *El Derecho europeo ante la pareja de hecho: la experiencia sueca y las tendencias legislativas en nuestro entorno*. Barcelona: Cedecs.

-Zagrebelsky, G., 2009. *El Derecho dúctil. Ley, derechos, justicia*, translated by M. Gascón. Madrid: Trotta.