

# Family Laws in the European Union

**Pablo José Abascal Monedero**

Pablo de Olavide University, Sevilla, Spain  
[pjabamon@upo.es](mailto:pjabamon@upo.es)

**Abstract.** EU social policies should be complemented by contributing to a harmonious development of society, by reducing structural and regional imbalances, developing a balance between the a localized community and the national society, and improving the living standards of citizens and families of member states (Garrido 2002). Such important social policy principles as freedom and justice are addressed and represented in family laws in the EU regulations introduced during the period of 2000–2016. In this article, we studied the EU's legal solutions in reference to national (Spain) laws on these matters: children and parental responsibility (adoption, child abduction, family benefits) and couples (matrimonial, regimes, prenuptial agreements, provisional measures). This legislation is necessary in the face of the proliferation of families whose members have different nationalities, and even in the mobilization of residences. Cooperation has intensified between national judicial authorities to ensure that legal decisions taken in one EU country are recognized and implemented in any other. This is highly important in civil cases, such as divorce, child custody, maintenance claims, or even bankruptcy and unpaid bills, when the individuals involved live in different countries. The development of family laws is one of the most important factors of family welfare in European countries.

**Keywords.** family law, European jurisdiction, parental responsibility, adoption, child abduction, matrimonial regimes, prenuptial agreements.

## Introduction

The objective of this article is to study some of the ordinary issues that affect families, both married and unmarried couples, analyzing the legislation of countries of the European Union in a comparative way. We will see if this study leads us to demonstrate the need to further develop European family law. That is the part on which the European Union has legislated less due to the eminently economic nature of the EU. We will analyze some of the most common questions (parental responsibility, adoption, child abduction, family benefits, matrimonial regimes, prenuptial agreements, provisional measures) represented in family laws in EU regulations (Regulation 1347/2000 and Regulation 1259/2010 on Jurisdiction place, Regulation 1393/2007 on Jurisdiction, Regulation 2201/2003 of parental responsibility, Regulation 4/2009 on monetary contributions to children's pensions, Regulation 1104/2016 on Registered Facts Couples). The study of Family Law is sociologically important, since it is a relevant part of the work done by family technical teams consisting of sociologists, social

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workers, and psychologists, who collaborate with their administrative institutions, especially justice departments.

The methodology of comparative law is used as the main method of analyses. At the end of the nineteenth century and the early twentieth century, in France, Raymond Saleilles and others saw comparative law mainly as an instrument for improving domestic law and the legal doctrine, and renovating the fossilized approach of the still-dominant Exegetic School to the Civile Code and its interpretation. By the end of the twentieth century, many legal scholars in Europe considered comparative law to be the necessary instrument for a (desirable) harmonization of law within the EU.

### **The development of family law: general insights**

We have previously indicated that family law has not been developed enough in the scope of the European Union because of the essentially economic and monetarist sense of the Union. However, this is also influenced by differences in terms of religion and legislative models, followed by Roman law and German law. Fortunately, the universalization implied by the first declarations of the Hague and the UN allow for a harmonization of the legislations, which are only currently broken by the new development of “new” European nationalism. We found four models in historical European family law:

- *Roman Law.* We have many institutions present in our codes (*pater familia, manus o potestas*), but the Code of Justinian is the principal legal reference. Mutual consent was only needed to get a legal marriage in Roman law (in the absence of marriage impediments). The main Roman principle on marriage is *consensus facit nuptias*. In Roman society, concubinage was accepted for unmarried persons as a secondary form of conjugal union (Savigny 2005).
- *German Laws.* Medieval family law should certainly not be seen as a kind of degradation or regress. It perfectly suited the medieval society of the time. The Sippe and Haus are institutions of medieval German laws. Pre-Christian family law, with its informal rules on the formation of marriage, easy divorce, tolerance toward concubinage, and acceptance of illegitimate children, resembles modern family law much more than medieval law. The introduction of the feudal system brought the right of succession, which belonged to the firstborn as its cornerstone. Around the 11<sup>th</sup> century, the horizontal, cognate family structure of Carolingian times, in which male and female heirs were equal, was replaced by a vertical, agnate family structure, in which only the male line was important and male heirs were privileged. The goal of this change was to limit the number of heirs, in order to prevent any further division of land. The restrictions of family law served the same purpose (Planitz 1957).
- *Catholics laws.* The family law of the whole European continent before the Reformation was mainly a uniform canon law. It was built by two separate systems, Catholic and Orthodox, which were in fact very much alike. The unification of canon family law in the Catholic part of Europe was achieved around the 12<sup>th</sup> century; Graciano’s Decree was the most important legal reference and brought about dramatic changes. In Orthodox Europe,

the process of unification, although more spread out in time, reached the same results (Antokolskaia 2007).

- *Liberal laws.* The principal legal reference were the “Napoleon’s Codes” in the nineteenth century; new changes had developed toward the late-19<sup>th</sup> century. One of the possible reasons for this late liberalization of family law was the remarkable time difference between the progress of liberal ideas regarding public life and the progress of the same ideas regarding life in the private sphere. The ideas of the Enlightenment were primarily focused on the rights and freedoms of the individual as a citizen, but not of the individual as a private person. Family remained in the private domain, where individualism, personal freedom, and equality were acknowledged much later. Also illustrative of the late liberalization of family and private life is the development of the ideas on the place of romantic love. In days gone by, the family was the domain of duties, not of feelings. Affection was desirable but not necessary. The pressure imposed by duties diminished to personal freedom with the growth of prosperity and the change of the social function of the family, which no longer formed the basic economic unit. The literature of that century shows a wide range of desperate conflicts between romantic love and one of the central canonical dogmas: the inadmissibility of consensual divorce. Galsworthy’s *Forsyte Saga*, Flaubert’s *L’Éducation sentimentale*, Tolstoy’s *Anna Karenina* and *The Living Dead* are just a few well-known examples. This conflict raged for 150 years, and up until the 1960s, with the acceptance of consensual divorce, when love came to be considered the true basis of a family (Antokolskaia 2007).

We now have new laws of the European Union in the family legal area: Regulation 1347/2000, Regulation 1393/2007, Regulation 2201/2003, Regulation 4/2009, and Regulation 1104/2016. Basically, the European Union has competences regarding the unification of private international issues in family matters. For this reason, special European family law for cross-border situations is now a reality. The legal basis for this development is found in Articles 61(c), 65, and 67 of the EC Treaty, as revised by the Amsterdam Treaty (1997). Nowadays, it is generally accepted that the European Union has no competence under the EC Treaty to unify or harmonize substantive family and succession law. However, Article 65 of the EC Treaty speaks of measures in the field of judicial cooperation in civil matters having cross-border implications.

The development of family law from the end of the Middle Ages to today can be seen as a gradual abandonment of concepts of canon family law. Pre-ecclesiastical family law and current family law have more similarities between each than both have in relation to ecclesiastical family law. In this direction, the process of distancing from the canonical heritage can be understood perhaps as a return to the informality of pre-ecclesiastical family law. The process of gradually abandoning the concepts of canon law was essentially the same in all European countries and took place under the influence of the same liberal ideas. This process, however, did (and still does) not take place simultaneously. The major differences in the history and current state of the family law of the European countries may be considered differences in the timing and extension of this process. In countries that are under a strong, persisting religious influence, such as Greece, Italy, and Ireland, this process has plodded along wearily

and slowly. In Scandinavia and Eastern Europe, where secularization took place at an earlier stage and canonical concepts did not obstruct reform, the process was faster and more radical. But the general direction of these changes was and is undoubtedly the same everywhere.

The composition of the group of countries where family law had already been radically revised in the beginning of the 20<sup>th</sup> century (i.e., Scandinavia, Portugal) reveals a discrepancy between the level of economic development and the modernization of family law and suggests a primary role of ideological factors, such as a collision with religious concepts and the influence of liberal ideas. In Spain, the process of distancing from the canonical heritage has been a slow one throughout the 20<sup>th</sup> century. Spanish family law had already been radically revised at the end of 20<sup>th</sup> century. The principal dates of the modernization of family law in Spain: 1981 Divorce; 2005 Matrimonial Violence. The main regulation is Article 32 of the Constitution of 1978, and Article 39, which establishes the intervention of public authorities with respect to the family and the protection of children and mothers. In development of the principles contained in Article 39 of the Constitutional text, laws that transformed family law have been enacted (in terms of filiation, parental authority and the economic regime of marriage, procedures to be followed in cases of nullity, separation and divorce, etc.)

“Article 32. Men and women have the right to marry with full legal equality. The law will regulate the forms of marriage, the age and capacity to contract it, the rights and duties of the spouses, the causes of separation and dissolution and their effects.” (The Spanish Constitution, 1978)

“Article 39. The public authorities ensure the social, economic and legal protection of the family. The public authorities also ensure the integral protection of children, who are equal before the law regardless of their filiation, and of mothers, whatever their civil status.” (The Spanish Constitution, 1978)

Within the situation of a marital crisis, the Law distinguishes three assumptions: nullity, separation, and divorce. There are differences between these three figures, and therefore each one has its corresponding legal regime, which we briefly analyze. Law 30/1981 envisaged separation and divorce related to a legally foreseen cause, and as the last resort to which the spouses could avail and only when it was evident that, after a long period of separation, their reconciliation was no longer feasible. To grant the petition, an effective termination of conjugal cohabitation or a serious or repeated violation of conjugal duties was required. In this way, the law did not offer another option for spouses to continue the disunity publicly or to reconcile without the marriage being dissolved as a result of an agreement between the spouses in this regard. In the second place, the practice revealed difficulties in contentious separations due to the fact that, on many occasions, the cause alleged by the plaintiff could not be proven, which, in the context of the privacy of the marriage itself, made it an impossible attempt on many occasions. Based, above all, on the critique to which we have referred, the legislator considered that this regulation was not appropriate to the times, and its reform was necessary.

The last and most important reform is the one that was made to address gender violence. The Organic Law 1/2004 of December 28 is the most important reform carried out in this

area – this law implies integral protection against gender violence. In its Article 1, it delimits its scope of application. To enforce judicial protection, the law provides four measures of a procedural nature: the creation of specialized jurisdictional bodies; overcoming the traditional separation of civil and criminal jurisdiction; protection and safety measures for victims; the creation of a prosecutor against violence against women.

Finally, we found a new concept of the family in the European Union based on principles of child protection, intimacy (Eid, Larsen 2008), love, and those with less religious concepts and more influenced by liberal ideas.

### **Child Care and Parental Responsibility**

“Parental responsibility” is a central concept. If one has parental responsibility, their most important roles are two: to provide a home for the child and protect and maintain the child. Court decisions on parental responsibility made in an EU country are recognized in any other without any special procedure being required. Their enforcement is facilitated by a standard procedure to find out how decisions on parental responsibility taken in one EU country can be recognized and enforced in another. Central authorities responsible for parental responsibility can be of help in specific cases.

Regulation 2201/2003 applies in all member states of the European Union except Denmark. There are no uniform EU rules on adoption. Each EU country applies its own rules. All EU countries do, however, share certain principles enshrined in international conventions on adoption: if alive, the child’s biological parents must freely agree to the adoption; the adoption must be decided in the interest of the child; the adoption must be granted by a court or administrative authority. In most EU countries, the child will be able to last name and nationality of their adoptive parent and should also have the same inheritance rights as a biological child. As an adoptive parent, the individual will have the same rights and obligations toward the child as any other parent.

### **Couples and Matrimonial Regimes**

The general rule in European countries, certificated by a Civil Registry, is evidence of marriage (Germany, Austria, Belgium, Spain, France, England, Greece, Holland, Hungary, Ireland, Italy, Luxemburg, Portugal, Switzerland, Turkey). We can find two different solutions regarding matrimonial regimes in national laws: (a) community of property or (b) separation of property. We find the community of property in Portugal, Spain, France, Belgium, Holland, Hungary, and Switzerland. We find the separation of property in Austria, Greece, Turkey, England, and Ireland.

In Germany, Belgium, Portugal, and Turkey, the election of a matrimonial regime with an agreement is restricted. The general rule in other countries is absolute freedom (Austria, Spain, France, England, Greece, Holland, Hungary, Ireland, Italy, Luxemburg, and Switzerland).

The general rule in European countries is based on matrimonial reciprocal contracts, which are valid and are the best solution to protect conjugal freedom. We can only find exceptions in Holland and Luxemburg, and limitations in Portugal.

### **Prenuptial Agreement**

The validity of a prenuptial agreement is always conditional. In other countries, we found prenuptial agreements about different matters, like children's pension, couple's properties, or infidelity. In Spain, prenuptial agreements are marriage contracts. They require a notary public form called *capitulaciones matrimoniales*. These are regulations that consist only on properties and money. The form of a prenuptial agreement is different across European countries, the general rule in European countries being that matrimonial agreements need a notary public form. In Hungary, we find a Public Notary or Private Agreement. In England and Ireland, private agreements are valid. In Spain, the validity of other agreements depends on ratification by the court. The court provides ratification only if the agreement is clear and complete, devoid of any illegal manifestations. Determinate matters cannot be the subject of prenuptial agreements. Certain matters are of public policy: grounds for divorce or consent to divorce, children issues, and the pension scheme.

### **Provisional Measures**

The Spanish Court will set provisional measures in separation or divorce on: monetary contributions, custody and visitation rights (no shared custody against the will of a parent), exclusive possession of the matrimonial home, restriction of power to dispose of assets. In Spain, there is a list of monetary contributions, but it is optional and the court does not have to follow it. With shared custody, both parents will continue to be involved in the rearing of the child. Shared custody refers to a specific type of shared parenting, where each parent receives an equal amount of time spent with the child. The place of jurisdiction for divorce or provisional measures is general, based on the domicile of the spouses and not nationality.

### **Conclusion**

The traditional building blocks of family law (marriage, parenthood, home, childhood) are being changed. Because of that, nowadays, the law is "old-fashioned." "The law is, frankly, struggling to keep up. I expect will emerge as the law to find an appropriate response to the realities of family in the twenty-first century" (Herring 2014).

We can find a new concept of the family in the European Union, based on principles of child protection, intimacy, love, and those less religiously motivated and more influenced by liberal ideas. There are different family laws regarding matrimonial regimes and different solutions: community of property and separation of property.

“Parental responsibility” is a central concept. This expression can represent two ideas: one, that parents must behave dutifully toward their children; the other, that responsibility of childcare belongs to parents, not the state. Court decisions on parental responsibility made in an EU country are recognized in any other without any special procedure being required. Their enforcement is facilitated by a standard procedure.

In the future family code of the European legal area, it would best to regulate the union and marriage of citizens from different European countries (Diez-Picazo 2008).

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