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FINDING A PLACE FOR "PUBLIC FAMILY LAW" IN COMPARATIVE LAW

Nausica PALAZZO[1]

Résumé

Le droit de la famille est considéré comme faisant partie du droit privé. Sa dimension publique et les choix politiques contingents qui sous-tendent la régulation étatique des familles ont été occultés. L'article illustre les bénéfices pour le droit de la famille comparé qui découlent de la mise en lumière de cette dimension « publique ». Notamment, une perspective de droit public de la famille peut contribuer à : (i) aborder les thèmes traditionnels du droit de la famille comparé (comme la pension alimentaire pour enfants ou le mariage) d'une manière plus précise ; (ii) élargir notre horizon analytique et déclencher de nouveaux axes de recherche (comme des comparaisons sur la question de savoir s'il faut abolir le mariage civil).

La première partie offre un aperçu des deux aspects qui ont contribué à occulter la dimension publique du droit de la famille : l'idéologie de la sphère privée, et la conception selon laquelle le droit de la famille relève du droit privé. Pour illustrer les avantages d'une perspective de droit public de la famille aux efforts comparatifs, la partie II examine une étude de cas : le débat sur l'abolition du mariage civil aux États-Unis. Après avoir expliqué les contours du débat et ses implications constitutionnelles, la partie III se propose d'évaluer l'applicabilité d'un tel débat à l'Europe. Il constate que ce débat n'a pas eu lieu du tout en Europe et que les raisons en sont dans une autre phase de constitutionnalisme et de régulation distincte de la famille au niveau constitutionnel. En s'appuyant sur l'étude de cas, la partie III.B. souligne les avantages de la perspective proposée lors de la comparaison des lois sur la famille à travers le monde.

Mots clés : *droit public — mariage — abolition du mariage — droit comparé de la famille*

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Abstract

Family law tends to be seen as part of private law. As a result, its public dimension and the contingent policy choices that back the state regulation of families have been obscured. The article illustrates the benefits to comparative family law that ensue from bringing to light this "public" dimension – and using the conceptual lenses of public law. Notably, a public family law perspective can contribute to: (i) addressing traditional themes in comparative family law (such as child support or marriage) more accurately; (ii) expanding our analytical horizon and triggering new strands of research (such as comparisons on the question whether to abolish civil marriage).

Part I offers an overview of the two aspects that have contributed to overshadowing the public dimension of family law: the ideology of the private sphere, and the view according to which family law falls under private law. To illustrate the added benefits of a public family law perspective to comparative endeavors, Part II examines a case study: the debate of the abolition of civil marriage in the US. After clarifying the contours of the debate and its constitutional implications, Part III moves to assess the applicability of such debate to Europe. It notes the absence of similar discussions in Europe and traces the potential reasons behind it. Building on the case study, Part III.B. concludes by outlining the benefits of the proposed perspective when comparing family laws across the globe.

Keywords: public law — marriage — abolition of marriage — comparative family law

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Introduction

A field of legal science once considered exceptional, and marginal, family law is no longer a "sleepy area of law".[2] This change was somewhat inevitable. Modern states find themselves compelled to face important questions spanning the legal emersion of non-marital relationships, the recognition of same-sex relationships, and the regulation of assisted reproduction, contraception, and abortion.[3]

The interest in how other jurisdictions tackle similar questions is also growing. This overtly contradicts the traditional habit of seeing such laws as "inevitably" domestic in nature.[4] The ill-founded conviction that family law is not suitable for comparisons has been persuasively scrutinized by scholarship,[5] and time itself. Cutting-edge projects aimed at comparing[6] and harmonizing

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[2] Young, Alison Harvison, 2001. The Changing Family, Rights Discourse and the Supreme Court of Canada. Canadian Bar Review, 80(1-2): 753.

[3] Harry Krause introduces his work arguing that "[f]amily laws are unfolding in similar directions. For all their very real differences, nations around the world find themselves facing fundamentally similar questions and dilemmas in defining and regulating the modern family". See Krause, Harry D., 2006. Comparative Family Law: Past Traditions Battle Future Trends—and Vice Versa. In *The Oxford Handbook of Comparative Law*, 1st edition, eds. Mathias Reimann and Reinhard Zimmermann, 1101. Oxford: OUP. See also Herring, Jonathan, Probert, Rebecca and Gilmore, Stephen 2015. *Great Debates in Family Law,* 2nd edition. Basingstoke: Palgrave Macmillan (listing amongst these important questions the legal regulation of parenthood, children's rights, adoption, marriage and civil partnership, cohabitation, divorce, and domestic violence).

[4] *See infra* note 6 and 7 and accompanying text. Fernanda Nicola situates this shift in the 1990s, where family law started drawing attention due to "the proliferation of international human rights and feminist movements". Nicola, Fernanda, 2010. Family Law Exceptionalism in Comparative Law. *American Journal of Comparative Law* 58(4): 777-810, 779. She further argues that "[t]his shift to human rights and fundamental principles enshrined in constitutional regimes has enlisted the family as a fundamental field for comparative and international law projects addressing the possibilities for convergence, unification, and harmonization of family law". *Ibid*. 780. Mary Ann Glendon notes that already starting from the Sixties the family laws of other jurisdictions started drawing attention as useful resources to mobilize when attempting to modernize domestic family laws. Glendon, Mary Ann, 1989. *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe*. Chicago: University of Chicago Press.

[5] For more recent work, see*, e.g., ibid*.; Marella, Maria Rosaria, 2011. Critical Family Law. *American University Journal of Gender, Social Policy and the Law* 19(2): 721-754; Halley, Janet and Rittich, Kerry, 2010. Critical Directions in Comparative Family Law. *American Journal of Comparative Law* 58(4): 753-775.

[6] Relevant examples are numerous and span the legal recognition of non-marital families, in vitro fertilization, domestic violence, and children born out of wedlock. Important works have been conducted by national committees producing law reform reports in certain areas. *See, e.g*., Basedow, Jürgen, Hopt, Klaus, Kötz, Hein and Dopffel, Peter eds., 2000. *Die Rechtsstellung Gleichgeschlechtlicher Lebensgemeinschaften*. Tübingen: Mohr Siebeck (legal recognition of same-sex relationships); New South Wales Law Reform Commission, 1983. *Report on De Facto Relationships*, no. 36 (legal recognition of informal relationships); Law Commission

family laws across federal states or continents[7] demonstrate that family laws can be fruitfully compared.

But, while the relevance to modern states of family law and comparative family law is rising, there still is another sleeping beauty today: public family law. By "public family law", I would like to refer to the study of a state's conception of its relationship with families and the role of families, as well as the political determinants behind them. The state-family relationship is a dialectic one in which both terms define themselves in their mutual relations – and in this sense, we are not discussing how the state treats families under positive law but instead assessing the state *per se*, and how it constitutes itself by implementing family politics.[8] The conceptual premise behind the use of the category is that granting or denying a public status to the family and defining the contours and content of this status is undoubtedly a public law problem (this is what I would like to refer to as the "public law thesis"). In other words, when attaching direct or indirect relevance to the family, or simply ignoring it,

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(London), 1982. *Family Law: Illegitimacy*; Law Commission (London), 1986. *Family Law: Illegitimacy* (2nd Report) (children born outside of wedlock); Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization, 1984. *Report on the Disposition of Embryos Produced by In Vitro Fertilization (Waller Report)* (legalization of in vitro fertilization). It is especially noteworthy the European Family Law Series published by Intersentia "under the auspices of the Organizing Committee of the Commission on European Family Law". At the time of writing, the series included 51 volumes spanning succession law, legal pluralism in family law, registered partnerships, the recognition of same-sex relationships and the regulation of parenthood. *See, e.g*., Boele-Woelki, Katharina, Dethloff, Nina and Gephart, Werner eds., 2014. *Family Law and Culture in Europe.* Cambridge, UK: Intersentia; Schrama, Wendy, Freeman, Marilyn, Taylor, Nicola and Bruning, Marielle, 2021. *International Handbook on Child Participation in Family Law*. Cambridge, UK: Intersentia.

[7] The most emblematic example of a project aimed at harmonizing family laws has been conducted in Europe by the Commission on European Family Law (CEFL), a commission established in 2001 by an international group of scholars in the area of family law and comparative law. *See* Boele-Woelki, Kathrina and Martiny, Dieter, 2007. The Commission on European Family Law (CEFL) and its Principles of European Family Law Regarding Parental Responsibilities. *ERA Forum* 8: 125-143. These efforts are even more commonplace in federal states, such as the United States. Lately, the Uniform Law Commission is providing guidance to the states on crafting a uniform framework on the economic remedies for cohabitants through the drafting of the Uniform Cohabitants' Economic Remedies Act. See https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b10b36a7-6910-c79e-c681-b055ffc884ce&forceDialog=0 (last accessed on August 20, 2021).

[8] This definition is consistent with the one proposed by Eric Millard according to which "les définitions de la famille d'une part, du droit public d'autre part sont-elles déterminées par les relations qui existent entre ells. … [U]ne analyse portant sur la famille et le droit public est, au-delà d'une analyse *de* droit public, une analyse *du* droit public". Eric Millard, 1995. *Famille et droit public. Recherches sur la construction d'un objet juridique* 2. Lyon : Université Jean Moulin - Lyon III.

the state is giving an answer to one of the most troubled questions of public law: what is the family and what its role and the role of the members therein?

The public and inherently political nature of fundamental choices in family law managed somehow to be overshadowed over time.[9] While the ideology of the private sphere – that is the idea that the family is a space of lawlessness – has been critically scrutinized,[10] the private law thesis (and thus the idea that family law is essentially part of private law) needs more critical contemplation. The insistence on relegating family law to private law could be seen as the modern equivalent of the habit of relegating families to the private sphere. Conceptualizing family law as part of private law contributes to obscuring the contingent (and thus contestable) policy choices that back the state regulation of families. This tendency whereby policy choices are obscured is, for instance, visible in law school classrooms. There, the emphasis is placed on the nitty-gritty provisions of marriage, child custody or divorce, as opposed to the policy considerations behind the regulation of families.[11]

Prominent thinkers have demonstrated the feebleness of the private law thesis in family law.[12] However, this thesis continues to hold its grip, especially

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[9] *See infra* Section I.B.

[10] See *infra* Section I.A.

[11] Critical approaches to family law whereby we interrogate the policy choices of family regulation (for instance, what kind of adult relationships should we recognize, or how should we determine parenthood) are seldom in law school classrooms of civil law jurisdictions. There, family law is a marginal area of law, whose basic provisions are simply described either at the end of the "private law" course – devoted to contracts and tort law – or, more seldom, within an autonomous family law course. For instance, my law school in Milan did not offer a family law course nor did we have enough time to discuss the last chapter of the private law handbook (dealing with family law) within the general course of private law. Law school classrooms in North America are a partial exception in this regard. Under the impulse of feminist legal studies, the syllabus of some family law courses now includes sessions that interrogate some fundamental policy choices in our family legal-regulatory regimes, including sessions where it is asked why the state recognizes certain types of families while refusing to recognize others. My sense is that Canadian law schools are especially sensitive to these topics. By contrast, in the United States, according to an in-depth study regarding the content of family law handbooks conducted by Laura Kessler, the bulk of family law courses remain the "core subjects" (marriage, divorce, child custody and support). To critical approaches to family law is only paid "lip service". *See* Kessler, Laura T., 2020. Family Law by the Numbers: The Story that Casebooks tell. *Arizona Law Review* 62: 903-955, 944.

[12] I would especially like to refer to the work of David Bradley, who has exposed the deeply political significance and institutional dimension of family laws, outlining the political ideologies behind the enactment of family law reforms as well as their repercussions on economic, welfare, and social policy. *See* Bradley, David, 2014. Family Law. In Elgar Encyclopedia of Comparative Law, 2nd edition, ed. Smits, Jan M., 322-24. Cheltenham, U.K. and Northampton, MA: Edward Elgar. In France, Eric Millard has been an exponent of the public law thesis in his well-known dissertation (Millard, *supra* note 8). In Italy, the thesis has been advocated by family law scholar

in civil law countries.[13] My argument on bringing to light the "public" dimension of family law is thus not novel. However, I wish to stress a specific set of benefits of the public law thesis, namely those that it yields in the area of comparative law.[14] The public law thesis can contribute to the construction of a more robust conceptual apparatus for comparing family laws across legal systems. Notably, it has a two-fold benefit: first, it can contribute to addressing traditional themes in family law, such as child support or marriage, more accurately; second, it can expand analytical horizons and trigger new strands of research, an example being comparisons regarding the question whether to abolish civil marriage – an example that I discuss below.

True, the notion "public family law" lends itself to a misinterpretation: that according to which family law must become *more public* and thus be subject to increased state intervention.[15] A similar interpretation immediately conjures up echoes of authoritarianism and totalitarianism, political regimes within which families were exploited as tools for the advancement of state objectives, especially demographic objectives. However, such interpretation would embed a prescriptive component not present in the article, meaning that this contribution does not engage the issue of whether the state must intervene into family matters to a lesser or greater extent.[16] Instead, the article is premised on the idea that some fundamental choices in family law (already) are fundamentally public questions, and that these questions are better addressed through the conceptual lenses of public law and by resorting to the expertise of public lawyers.

Caggia, Fausto, 2017. Capire il diritto di famiglia attraverso le sue fasi. *Rivista di diritto civile* no. 6: 1572-1595; *id*. 2017. Per un uso politico del diritto di famiglia comparato. *Comparazione e diritto civile* 2: 46-56.

[13] On the approach of the CEFL Commission that frames family law as private law see *ibid*., 324. On the "axiomatic" way in which civil law countries frame family law as private law see *infra* note 53.

[14] David Bradley has pointed to the ways in which political determinants of family law get obscured in comparative law works of all types: those focusing on legal transplants, on the convergence of family laws and on advancing the private law thesis. *ibid*., 324.

[15] The issue of the boundaries of private freedom and public power is a distinct one and is not engaged by this article. Nikolas Rose offers a good summary of these distinct questions. Rose, Nikolas, 1987. Beyond the Public/Private Division: Law, Power and the Family. *Journal of Law and Soc*iety 14(1): 61-76, 62.

[16] We could think of a continuum that runs from lack of state intervention into family matters to conspicuous intervention into family matters. States adopting a family privacy approach, for instance, tend to situate themselves closer to the former pole, whereas contemporary illiberal democracies promoting traditional conceptions of family are closer to the latter.

To illustrate the potential benefits of a public family law perspective to comparative analyses, I take a recent debate in US family law as a case study. The debate concerns the provocative question whether civil marriage should be abolished altogether. While this question has drawn relatively broad attention in the US, especially before the Supreme Court decision on same-sex marriage,[17] similar questions have never gained momentum in continental European jurisdictions.[18] A public family law analysis can explain the unsuitability of the debate to Europe. In so doing, it would direct us to look at the larger values that underpin the regulation of the family, to spotlight how the constitutions of European jurisdictions and the US differ, including regarding family regulation, and the different phase of constitutionalism that applies to them.

Two methodological clarifications are in order. First, I focus on constitutional law. Suppose, by public family law, we refer to the state's conception of its relationship with families, one can quickly notice that several laws – within the realm of both private and public law – are infused with this conception. For example, welfare laws are a repository of similar conceptions. By taking certain types of families as the omnibus referent for allocating welfare benefits, the state promotes a specific conception of the family and "doing" public family law. Yet, in this script, I consider constitutional law as a privileged site of investigation for two reasons. First, constitutional law oftentimes explicitly articulates such conception, unlike other areas of law that might simply take it as a given. Second, other legal sources cannot overtly contradict constitutional doctrine in countries in which the constitution is the supreme law.[19] One could therefore assume that a particular conception of family enshrined in the constitution will percolate down into the legal system.

The second clarification is that this work covers jurisdictions in Europe and North America, and its findings are limited to these two areas. There are two main benefits associated with this methodological choice. First, I assume that the constitutions I examine are "normative". In other words, they are perceived as binding by the main actors of the political system and able to describe the

[17] United States, Obergefell v Hodges, 576 U.S. 644 (2015).

[18] *See infra* Section III.A.

[19] A caveat is in order. I will argue below that this only applies if constitutions are normative and thus perceived as binding and able to describe the political system.

political system.[20] This is to say that similar comparisons with other countries might potentially require adding an additional analytical step: one applying the preliminary distinction between normative, on the one side, and sham or nominal constitutions, on the other side, with the latter being constitutions unable to describe or bind the political system.[21] Should constitutions be simply sham or nominal, it would be of reduced utility to examine them to see what the state's conception of its relationship with the family is, to the extent that this conception will likely lie elsewhere. The second benefit of taking Europe and North America as a case study is the greater availability of comparative work between these two geographical areas. Legal comparisons between them are becoming increasingly appealing. True, cryptotypes – meaning, in the words of Rodolfo Sacco, implicit rules that we follow without being aware of it[22] and false friends are present.[23] But in recent times their communication enhanced, also due to the intelligibility of the two European supranational systems (of the European Convention of Human Rights and European Union) for lawyers in common law systems and vice versa.[24]

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[20] Loewenstein, Karl, 1965. *Political Power and the Governmental Process*, 2nd edition, 148-49. Chicago: University of Chicago Press (distinguishing between "nominal" constitutions which are "not lived up to in practice", "semantic" constitutions, which are descriptively accurate but unable to limit power, and "normative" constitutions, which are both able to shape behavior and descriptively accurate).

[21] Sartori, Giovanni, 1962. Constitutionalism: A Preliminary Discussion. *American Political Science Review* 56 (4): 853-864, 861 (drawing a distinction between "proper" constitutions, which "restrain the exercise of political power"; "nominal" constitutions, which "describe a system of limitless, unchecked power" but "frankly"; and "façade" constitutions, which neither constrain nor provide "reliable information about the real governmental process"); Law, David and Versteeg, Mila, 2013. Sham Constitutions. *California Law Review* 101(4): 863-952.

[22] Sacco, Rodolfo, 1991. Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II). *American Journal of Comparative Law* 39(2): 343-401, 343.

[23] The word "conjugality" is an emblematic example of a false friend. It seems that in civil law jurisdictions, it has a more formal understanding with "non-conjugal" designating families outside of wedlock (see, e.g., Gaudreault-DesBiens, Jean-François. Le droit constitutionnel comme vecteur de transformation sociale : le cas de la conjugalité au Canada. In *Conjugalité et discriminations*, eds. Gallus, Nicole, Gaudreault-Desbiens, Jean-François, Hennebel, Ludovic, Lefebvre, Brigitte, Mécary, Caroline et Moore, Benoît. Limal: Anthemis). By contrast, in common law countries, it has a more functional understanding. It indicates unions that do not have the typical marital-like features, including a sexual component (conjugality), thereby applying to unions of adult friends and relatives that lack such component (see, e.g., Barker, Nicola, 2016. Rethinking Conjugality as the Basis for Family Recognition: A Feminist Rewriting of the Judgment in Burden v. United Kingdom. *Oñati Socio-Legal Series* 6(6): 1249-1275).

[24] This aspect allowed me to compare the constitutional and international human rights approaches to recognizing non-conjugal couples. Palazzo, Nausica, 2021. *Legal Recognition of Non-Conjugal Families: New Frontiers in Family Law in the US, Canada and Europe*. Oxford: Hart Publishing.

The analysis proceeds as follows. In Part I, the work traces the origins of the ideology of the private sphere in family law. It then sketches out the thesis according to which family law falls under the purview of private law. Next, to demonstrate the added value of a public family law perspective to comparisons, I look at the debate on the abolition of civil marriage in the US. After clarifying the contours of the debate and its constitutional implications, Part III assesses the applicability of such debate to Europe. Ultimately, building on this case study, Part III.B. presents the benefits of incorporating an analysis of the public dimension of family law into comparative endeavors.

I. WHERE DID THE "PUBLIC" GO IN FAMILY LAW?

A. Family law and the private sphere

Common wisdom had it that the regulation of families belongs in the private sphere.[25] Families, the view goes, are better left to self-regulation as they are traditionally governed by rules of morality, religion, and customs. According to the popular metaphor mentioned during the debates of the Italian Constituent Assembly – entrusted with drafting the Constitution of 1948, the family is an "island" that waves of law can only lap upon. Implied in this thinking is the idea that families are "sovereign" entities capable of claiming limited or no interference on the part of the state.[26]

The private sphere is not synonymous with private law. Relegating the family to the "private" realm was a more radical attempt. It substantiated in relegating families to a space of lawlessness in which members therein would take care of their own businesses without government intrusion. The state only channelled families and reproduction into specific family structures ("the

[25] On the ideology of the private sphere see generally Diduck, Alison, and Kaganas, Felicity, 2006. Family Law, Gender and the State, 13-17. Oxford: Hart Publishing; Albertson Fineman, Martha, 1999. What Place for Family Privacy? *The George Washington Law Review* 67: 1211-15. On Germany being an exception in this regard, see *infra* note 27.

[26] Caggia, Fausto e Zoppini, Andrea, 2006. Art. 29. In *Commentario alla Costituzione*, I, cur. Bifulco, Raffaele, Celotto, Alfonso e Olivetti, Marco, §2.2. Torino: Utet.

appropriate household"), while leaving "internal affairs" to families themselves.[27]

The ideology of the private sphere relied on a set of dichotomies. The first set of dichotomies flowed from an idealized notion of secularism that took hold in the aftermath of the French revolution. The new secular society heavily relied on a set of oppositions that included the religious and the political and the private and the public.[28] To these paired opposites, Joan W. Scott added that between reason and sex, according to which passions must be consigned to the private sphere to promote decency, while reasonableness is performed in those interactions occurring in the public sphere.[29] Critical legal approaches to family law predominantly focused on the pull exerted by the market/family dichotomy. According to this additional dualism, families

> house intimate, private, emotional, and vulnerable relationships; they are unique because they preserve (against modernity and/or the global or foreign) the traditional, the national, the indigenous; they are unique because (as against the secular) they derive from sacred command.[30]

The dichotomy traces back to the work of von Savigny and then of Classical Legal Thought (CLS). Von Savigny argued that the family and the market were respectively governed by family law and "potentialities law", that is patrimonial

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[27] Fudge, Judy, 1987. The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles. *Osgoode Hall Law Journal*, 25(3): 511. When applied to Europe, however, this sounds like an excessively broad generalization. In particular, Germany seems to have devoted much attention to so-called domestic relationships, thereby departing from the French tradition of "[i]l n'y a que l'individue et l'État". The Prussian Code of 1790 was the first in its kind to see domestic relations as autonomous and separate from the "law of persons". Then, the German civil code (BGB) also "viewed domestic relations and succession as independent, coherent bodies of facts, slices of social life, to be ordered within a private-law framework". See Müller-Freienfels, Wolfram, 1967. Family Law and the Law of Succession in Germany. *The International and Comparative Law Quarterly,* 16(2): 416. This increased attention is also attested by the fact that the German Civil Code, unlike the French and Austrian codes, took the family as one of the relevant units to the law of succession. *Ibid*. at 416.

[28] Asad, Talal. 2003. *Formations of the Secular. Christianity, Islam, Modernity*, 3. Stanford, CA: Stanford University Press.

[29] Scott, Joan W. 2009. *Sexularism.* Ursula Hirschmann Annual Lecture on Gender and Europe held at the European University Institute on April 23, 2009, 3, https://cadmus.eui.eu/handle/1814/11553 (last accessed: 26 Aug. 2021).

[30] Halley and Rittich, *supra* note 5, at 754.

law.[31] While family law was the domain of status, particular/local in nature, and an expression of *volksgeist*, patrimonial law was considered to fall under the domain of the will, and as a universal legal science – in the sense that it could be the same across jurisdictions.[32] In line with an understanding of the family as a "separate, self-sufficient entity", family law developed over time as an exceptional domain of law. Notably, it developed as an autonomous *corpus* of special laws,[33] and as a set of exemptions from ordinary rules designed for non-familial relationships, spanning property law, criminal law, obligations and torts, etc.[34] The exceptionalism of family law, compared to, say, contract law, was justified by family law's applicability human relationships that pertain to the domain of nature and morals. Interestingly, in von Savigny's view, family law's exceptionalism implied acceptance of the natural law of the family, seen as a set of mandatory rules that confer what in Sir Henry Maine's terms is a status.[35] In its conferring a predetermined condition within society that cannot by waived or changed (through contracts or other expressions of will), von Savigny would locate family law within the realm of public law.

CLS enhanced the exceptionalism narrative. CLS was a composite movement informed by legal positivism, that trusted legal science to protect individual freedoms and property rights.[36] This movement promoted a view according to which contract law is situated at the core of the legal science, while family law would lie at its periphery.[37] As "it dealt with human conflicts and real people in distress, not legal abstractions",[38] family law soon came to "occup[y]

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[31] von Savigny, Friedrich Karl, 1867. *System of the Modern Roman Law* (William Holloway trans., 1979). Westport, Conn.: Hyperion Press.

[32] *Ibid*. at 757.

[33] Fineman, Martha A., 2004. *The autonomy myth: A Theory of Dependency,* 108-109. New York: The New Press.

[34] *See, e.g.,* Siegel, Reva, 1997. Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action. *Stanford Law Review* 49: 1111-1148, 1117-19 (noting that courts in the late nineteenth century invoked the respect for marital harmony and privacy when shaping common-law doctrines that prevented wives from legal redress for domestic violence or economic disadvantage).

[35] Maine, Henry, 1861. Ancient Law 99 (1972. London: Everyman's Library). Under an ideology of status, the relationship is framed as "inevitable and absolute". *See* Dolgin, Janet L., 1990. Status and Contract in Feminist Legal Theory of the Family: A Reply to Bartlett. *Women's Rights Law Reporter* 12(2): 106.

[36] Kennedy, supra note 45, at 19-20.

[37] Marella, *supra* note 5, at 722.

[38] Katz, Sanford N. 2003. *Family Law in America*, 1. Oxford: OUP. This should also explain why only recently family law emerged as a separate legal discipline. See Shakargy, Sharon, 2021. The Outlawed Family: How Relevant is the Law in Family Litigation? *Mitchell Hamline Law Review* 47(2): 568- 605, 571, n.14 citing inter alia

the lowest rungs of professional status".[39] This dualism between core and periphery then informed comparative law through the work of prominent thinkers, such as Rodolfo Sacco[40] and Alan Watson.[41] Under the core–periphery divide, contract law would lend itself to legal transplants across legal systems that can occur without interferences from political or social conditions. By contrast, family law reforms can simply not happen without accounting for the socio-political context. In this sense, while the typical universalism associated with contract law makes it an "elective site"[42] of legal science, family law is best left to sociology and other non-legal disciplines.[43] This brief overview is to say that comparative law has only contributed to magnifying the exceptionalism narrative.[44]

The ideology of the private sphere is today on shaky grounds. The family is no longer seen as a space of lawlessness. What Duncan Kennedy dubs the "second globalization" has opened the door to pervasive state intervention.[45] A public interest in remedying pathological situations of abuse or asymmetry has justified a similar intervention on grounds of the interdependence of all social components. The social ideology no longer treated the family as an island but as an "institution with functions and purposes crucial to the social whole".[46] Contemporary legal consciousness is more layered as it witnesses a repositioning of left- and right-wing actors around the desirable degree of intervention into family matters,[47] with some feminist and libertarian actors advocating a more limited intervention with some private-sphere overtones. Yet, the core of the ideology of the private sphere has been eroded by the

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to Müller-Freienfels, Wolfram, 2003. The Emergence of Droit De Famille and Familienrecht in Continental Europe and the Introduction of Family Law in England. *Journal of Family History* 28(1): 31, 37-38.

[39] Meyer, David D., 2008. The Constitutionalization of Family Law. *Family Law Quarterly* 42(3): 529-572, 571.

[40] *See* Sacco, Rodolfo, 1991. Legal Formants: A dynamic Approach to Comparative Law (Installment I of II), *American Journal of Comparative Law* 39(1): 1, 10.

[41] *See* Watson, Alan, 1995. From Legal Transplants to Legal Formants*. American Journal of Comparative Law* 43(1): 469-476.

[42] *Ibid*. at 727.

[43] *Ibid*. at 726-727.

[44] *See supra* Introduction.

[45] *See* Kennedy, Duncan, 2006. Three Globalizations of Law and Legal Thought: 1850-2000. In *The Law and Economic Development: A Critical Appraisal,* eds. Trubek, David M. and Santos, Alvaro, 37-62. Cambridge, UK: CUP.

[46] *Ibid*. 51.

[47] *Ibid*. 64.

mentioned social developments, it is much harder to sustain, and, arguably, will not return to its heyday.

B. Family law as private law

A second common view is that according to which family law falls under private law, although obvious differences across jurisdictions exist. Lawyers in the common law world are less intrigued by the question of whether family law is part of private or public law, despite tending to see it as part of private law reflexively.[48] There is a clearer sense that family law also includes a public law component in certain common law jurisdictions. For instance, in the United Kingdom, family law proceedings are seen as part of public law when local authorities are involved in so-called social services.[49] In Canada, the view that family law has been attracted within the realm of public law after the enactment of the Canadian Charter of Rights and Freedoms of 1982 had prominent supporters.[50] These scholars contended that the Charter had a

[48] Mann Bromley, Peter, 1957. *Family Law.* London: Butterworths. This might also be due to the increased liquidity of the private/public law divide in common law relative to civil law. John Austin, a prominent English legal positivist that would posthumously influence the development of English and American law, convincingly challenged the boundaries between public and private law as artificial by noting that "[t]here is scarcely a single provision of the law which does not interest the public, and there is not one which does not interest, singly and individually, the persons of whom that public is composed". Austin John; Campbell, Robert, ed. *Lectures on Jurisprudence or the Philosophy of Positive Law,* 776. London: John Murray. William Blackstone, following Sir Matthew Hale, also placed the "law of political persons", i.e., public law, within (and therefore as a limb of) the law of persons, instead of presenting them as two paired opposites. *Id*. at 776-77.

[49] Examples of public law proceedings include the application to remove a child from her home or placement orders aimed to place children for adoption with prospective families. United Kingdom, Adoption and Children Act 2002, s. 21.

[50] Young, Alison H., 2001. The Changing Family, Rights Discourse and the Supreme Court of Canada. *Canadian Bar Review* 80(1/2): 749-792 (supporting the public law thesis); Boyd, Susan B. and Young, Claire F.L., 2004. Feminism, Law, and Public Policy: Family Feuds and Taxing Times. *Osgoode Hall Law Journal* 42(4): 545- 582, 554 (arguing that family law can no longer be seen as falling within the scope of private law). *But see* Leckey, Robert, 2007. Family Law as Fundamental Private Law. *Canadian Bar Review* 86(1): 69-96 [Family Law as Fundamental Private Law] (offering evidence of the limits of the public law thesis and of how the major shifts in family law were already occurring before the Charter). Robert Leckey, however, uses the category of public family law for a different purpose, namely, to demarcate two distinct areas of substantive family law: "the private law of the family treats matters of status and property as between family members […]. Public law concerns the relationship between individuals and the state. In the family context, it consists largely of the programs through which governments carry out redistribution and deliver goods and services to individuals by virtue of their family relationships". Leckey, Robert, 2009. Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past. *IRPP Choices* 15(8): 1-44, 3. Hence, he simply acknowledges that some

fundamental role in shaping notions of substantive family law and that, at any rate, "the characterization of family law as purely private law […] is out of date [as i]t is now widely acknowledged that family law reflects fundamental Canadian social issues, such as changing definitions of family".[51] In the common law world, the public law thesis has gained support in South Africa as well.[52]

By contrast, in civil law jurisdictions, family law falls under the purview of private law in an axiomatic way.[53] The applicability of constitutional principles to family relationships is explored as part of the broader trend of the constitutionalization of private law, which, however, leaves the dichotomy (public/constitutional law and private/family law) intact.[54] Hence, one can notice the palpable bewilderment of academics in the face of public law scholars working on family law. In one of the few available works in public family law, French scholar Eric Millard argued that "[q]u'un publiciste réfléchisse sur les relations entre sa discipline et la famille ne doit pas surprendre".[55] But it does indeed continue to surprise many. Due to the fixed boundaries that separate research areas, public lawyers are seen as apostates unduly trespassing into the domain of private law. Participating into a selection for a professorship in public law, for instance, would immediately raise questions of suitability if not the impression that the candidate is cheating.

Yet, as others have noted, family law "can no longer be characterized *simply* as an area of law falling within the domain of private law".[56] While many have advanced this position, there are still resistances preventing family law

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public law rules applicable to the family deserve the family law tag, as others have. *See, e.g.*, Kennedy, Duncan, 2010. Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought. *American Journal of Comparative Law* 58: 811.

[51] Boyd & Young, *supra* note 50, at 554.

[52] *See* Sloth-Nielsen, Julia and Van Heerden, Belinda, 2003. The Constitutional Family: Developments in South African Family Law Jurisprudence under the 1996 Constitution. International Journal of Law, Policy & Family 17(2): 121- 146.

[53] Ghestin, Jacques, Goubeaux, Gilles, avec le concours de Muriel Fabre-Magnan, 1994. *Traité de droit civil : Introduction général,* 4th édition, n. 101. Paris: LGDJ. Quebec, a civil law province in Canada, is no exception. Leckey, Family Law as Fundamental Private Law, *supra* note 50, at 71.

[54] Favoreu, Louis, 1982. L'influence de la jurisprudence du Conseil constitutionnel sur les diverses branches du droit. In *Itinéraires : Etudes en l'honneur de Léo Hamon*, 235 et s. Paris: Economica; Luchaire, François, 1982. Les fondements constitutionnels du droit civil. *Revue trimestrielle de droit civil* 249 et s.; De Salvi, Cesare, 2015. *Capitalismo e diritto civile: Itinerari giuridici dal Code Civil ai Trattati europei*. Bologna: Il Mulino.

[55] Millard, *supra* note 8, at 1.

[56] Young, *supra* note 50, at 792.

from being seen as part of public law. This is surprising considering where family law comes from. As noted above, the traditional mandatory nature of family law rules – unlike contracts or property law – are evidence of the structurally hybrid, ambivalent nature of the discipline. Today, these resistances are even harder to comprehend if one considers the following developments.

First, the family has been constitutionalized across the Globe.[57] This process was not linear and without its difficulties. In continental European jurisdictions, the seemingly neutral autonomy of the family entailed the subordination of women and the authority of the husband.[58] Such subordination was engrafted into law through civil codes in continental Europe, inspired as they were by the Code Civil of Napoleon – and confirmed in subsequent versions or amendments to the code to preserve the "unity" of the family.[59] Against this backdrop, the constitutionalization of the family became an extremely controversial issue that polarized constituent assemblies, often requiring delicate compromises.[60]

This tension between the private-sphere ideology and the new revolutionary constitutional principles overtly played out in the context of the constitutions enacted after World War II in continental Europe and animated

[57] Glendon, supra note 4, at 2 (describing the emersion of a new legal imaginary of family with "[m]any traditional family law norms hav[ing] been found inconsistent with the values contained in constitutions or international conventions"); Norrie, Kenneth McK., 2005. Marriage and Civil Partnership for Same-Sex Couples: The International Imperative. *Journal of International Law & International Relations* 1(2): 49-260, 255 (2005) (locating in the late 1990s the process of constitutionalization of family law throughout the West); Wardle, Lynn D., 2007. Lessons from the Bill of Rights About Constitutional Protection for Marriage. *Loyola University of Chicago Law Journal* 38(2):279-322, 285-91 (finding that "the national constitutions of 134 nations, more than two-thirds (actually, over 70%) of the countries of the world, contain substantive provisions defining, protecting, or expressing a commitment to the institution of marriage, family or families, parenting, motherhood, and/or family rights and relationship."); Meyer, *supra* note 39 (describing the constitutionalization of US family law).

[58] O'Donovan, Katherine, 1985. *Sexual Divisions in Law*, 57. London: Weidenfield and Nicholson.

[59] The Italian civil code of 1942 is an illustrative example of the ongoing pull of the principle of authority, as it comes only a few years before the enactment of the constitution. *See, e.g.*, Italy, Piero Calamandrei, session of 17 April 1947, Constituent Assembly, II, 964 ff. The principle of authority was also preserved in the French civil code and only reformed much later in the period 1965-75 – until which time women could not have a bank account and husbands could unilaterally decide aspects such as if women could work for a pay or where the family had to reside. Scott, *supra* note 29, at 5.

[60] For instance, in Italy, the constitutionalization of the family in Article 29 on the one side ensured that modern principles such as the equality of spouses would apply to family laws, on the others it "had" to make reference to family as a "natural society", i.e., an entity that pre-dated the state. *See* Scalisi, Vincenzo, 2013. Le stagioni della famiglia nel diritto dall'unità d'Italia a oggi. *Rivista di diritto civile* 59(5): 1043-1061.

the bargaining process that led to the crafting of the "constitution of the family". Regardless of the concrete compromises being reached, the constitutionalization of the family entailed that the narrative of the private sphere and its legal underpinnings had to come to grips with the new constitutional values. Notably, they could not compromise the application of fundamental principles, such as the principles of equality and dignity.[61]

Constitutionalization processes also resulted in injecting human rights and rights analysis – and thus the typical language of rights – into the realm of the family.[62] Liberty- and equality-based lines of arguments are routinely invoked to scrutinize family laws across the West, with the parameter against which the assessment is carried out being either the constitution or international human rights law. Rights analysis is contributing to major shifts in family law. These include the legalization of same-sex marriage,[63] the piecemeal legal recognition of opposite- and same-sex cohabitants,[64] the improvement of the status of illegitimate children,[65] to mention a few. According to some thinkers, this process whereby constitutional courts and human rights tribunals increasingly apply notions of equality, privacy, and dignity to shape all areas of family law might even lead to the "inevitable convergence" of family laws across the West.[66]

Domestically, however, the growing influence of rights talk garners attention and critique. Notions of privacy/autonomy, for instance, have allegedly been used in certain jurisdictions to harm the most vulnerable members of the family, especially women and children.[67] Others have noted

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[61] A similar tension between this traditional view and the new constitutional principles was also traceable in certain common law countries. The private law ideology seemed to constitute a formidable shield from judicial review in Canada at the beginning. Earlier attempts at scrutinizing family laws under the Charter of 1982 encountered significant hurdles. Boyd, Susan, 2000. The Impact of the Charter of Rights and Freedoms on Canadian Family Law. *Canadian Journal of Family Law*, 17(2): 293-332.

[62] *But see* Glendon, *supra* note 4, at 88-89 (identifying this trend even before the constitutionalization of family law).

[63] *See, e.g.,* United States, Obergefell v Hodges, 576 U.S. 644 (2015); South Africa, Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [2005] ZACC 19.

[64] *See, e.g.,* Canada, M v. H [1999] 2 SCR 3 on the recognition of same-sex cohabitants in a common-law marriage.

[65] *See, e.g.,* ECtHR, Mazurek v France (2006) 42 EHRR 9.

[66] Nicola, *supra* note 4, at 783.

[67] Bennett Woodhouse, Barbara, 1999. The Dark Side of Family Privacy. *George Washington Law Review* 67(5/6): 1247-1262, 1251-59.

how constitutional litigation concerning family laws adopts a binary logic in which exclusion (of the claimant group) is either permissible or impermissible.[68] This logic is detrimental to the extent that it "discourages outcomes subtler than total exclusion or assimilation".[69]

An additional recurring criticism concerns the potential for rights discourse to sharpen divisions. Similar discourses are said to inject that kind of individualism-driven selfish attitude that stands at odds with the solidarity and (vulnerability-driven) interdependence of familial bonds.[70] Rights discourse has also attracted a criticism outside of the realm of family. According to some thinkers, it risks exacerbating social divisions, especially when courts deal with rights in absolute or win-lose terms.[71] For instance, in his book *How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart,*[72] legal scholar Jamal Greene speaks of "rightism" to refer to that kind of dangerous, dysfunctional rights culture that is developing in the United States, which prevents individuals from finding more reasonable and shared solutions to political problems.[73] *Mutatis mutandis*, this argument might also apply to intra-familial relationships.

In the end, for conservative thinkers, the issue arises as to whether the excesses of individualism (including a "culture of rights") can be curbed as they seem to be weakening familial bonds.[74] For more progressive thinkers, similar trends conjure up the issue of whether the constitutional protection of the

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[68] Leckey, Family Law as Fundamental Private Law, *supra* note 50, at 77-78 (outlining the limits of Charter-based litigation in the area of family law).

[69] *Ibid*. at 78. An example is the regulation of committed siblings that, despite their interdependence, are unlikely to demonstrate the impermissibility of their exclusion from a regime–in Canada, where the example is advanced, this is because they are unlikely to prove historical disadvantage.

[70] Glendon, Mary Ann, 1991. *Rights Talk: The Impoverishment of Political Discourse,* 12. New York: The Free Press.

[71] Jamal Greene, *How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart*. Boston: HMH Books.

[72] *Ibid.*

[73] In the United States, "disputes about rights are all about figuring out who has the right". Social cleavages are thereby increased, and individuals no longer seek shared solutions to political problems. See Kelefa Sanneh, From Guns to Gay Marriage, How Did Rights Take Over Politics? *The New Yorker,* May 24, 2021, https://www.newyorker.com/magazine/2021/05/31/from-guns-to-gay-marriage-how-did-rights-take-over-politics?fbclid=IwAR2iJx9M_Z9S9FWQkS8Im87jB4wx8c0ncYTBUs8iAd0gWjb0UvpMeRL42JI (last accessed: 26 Nov. 2021).

[74] Gaudreault-DesBiens, *supra* note 23. On the meaning of the term modernization in family law see Antokolskaia, Masha, 2003. The Harmonization of Family Law. *European Review of Private Law*, 11: 40-41.

family might need a 2.0. version which perhaps eschews the dangers of rightism, identity politics, and the exacerbating of social, religious, and interpersonal (including intra-familial) divisions stemming from rights talk.

The mentioned phenomena render the assumption that family law is also part of public law all the more evident. Yet, families had a public dimension also before them. The family has always enjoyed public relevance because public authorities stand in a peculiar relationship with the family. Public lawyers (as well as political scientists, philosophers, historians, and theologians) have thoroughly inspected this relationship. Significant endeavors trace back to the German Historical School[75] and the French Exegetical School.[76] An important question concerned whether the family is an "object natural" or an "objet juridique."[77] While the former view was popular during the heyday of the private-sphere ideology,[78] subsequent accounts have contended that the family is a legal object that exists from an institutional perspective.[79] The state–family relationship has been described as ambiguous or a *jeu de mirroir*,[80] and the constitutive and dialectic nexus between the state and the family expounded. On the one hand, when introducing a constitutional or statutory regulation of the family, the state is policing an institution that it has actively created, not merely carved out from phenomenological reality.[81] On the other hand, the "constitution" – which emblematically means "creation" – of families is integral to defining a state. By drawing the contours of family definitions, the state is also constituting itself since rules of kinship are a constitutive element of state structures.[82] The family stands in "functional continuity" with the state in this

[75] von Savigny, *supra* note 31.
[76] Millard, *supra* note 8, at 2.
[77] Millard, *supra* note 8, at 3.
[78] By appearing outside of the scope of law, family units came to be depicted as a "fact of nature". Rose, *supra* note 15, at 64.
[79] La famille n'est pas un objecte naturel, n'a même aucune existence en dehors du droit qui la régit seulement un objecte juridique ou, s'il on préfère, un objecte construit ou constitué par le droit". Troper, Michel, 1992. *Du politique et du social dans l'avenir de la famille*, Intervention au séminaire du Haut Conseil de la Population et de la Famille (Paris 6-7 fevrier 1990) 179.
[80] Bruschi, Christian, 1990. Essai sur un jeu de mirroir: Famille/État dans l'histoire des idées politiques. In *L'état, la Révolution française et l'Italie*, Actes du VIIème colloque de l'Association française des Historiens des Idées Politiques (Milan, 14-16 Septembre 1989) 49-65.
[81] Troper, *supra* note 79, at 179.
[82] Bourdieu, Pierre, 1998. *Practical Reason: On the Theory of Action,* 67, 71. Cambridge: Polity Press.

sense.[83] Such a functional continuity emerges, for instance, from specific assertions by social conservatives that social phenomena such as same-sex marriage or single parenthood are signs of an imminent demise of the state.[84]

The analysis corroborates the contention according to which family law cannot be simply seen as part of private law. Again, when attaching direct or indirect relevance to the family, or simply ignoring it, the state is answering one of the most troubling questions of public law: what is the family and what is its role and the role of the members therein?

Below, I illustrate how an approach that situates family law also within public law can be beneficial to legal comparisons in this area.

II. A CASE STUDY: THE US DEBATE ON THE ABOLITION OF MARRIAGE

This section focuses on the debate on the abolition of marriage in the US, and why a similar debate has not taken place in continental Europe. This focus should not surprise. The section does not discuss whether marriage pertains to the public or private sphere (it is undoubtedly a public good as it gives public recognition to families); neither does it discuss whether marriage law is part of private or public law (its private law nature is undoubtable, although marriage has also been constitutionalized across the world and enriched with a wide array of public law benefits). It merely looks at this fascinating debate as illustrative of the extent to which marriage is also a matter of public law as well as the special significance of the analytical categories of public law for those who venture into comparative studies in this area. This special expertise is in fact necessary to address the question of whether marriage should be granted as a matter of law as well as its opposite: whether it could be abolished, and abolition would pass muster.

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[83] Millard, *supra* note 8, at 123. The family is endowed with family functions which are at the core of the state's attention and protection. Such functions are also construed by the state.

[84] Stacey, Judith, 1996. *In the Name of the Family: Rethinking Family Values in the Postmodern Age*. Boston: Beacon Press.

A. An overview of the debate

Marriage is an institution central to the human condition. It contributes to shaping our personality, relationships, and aspirations.[85] Marriage is also a sort of "Esperanto" in personal relationships, in the sense that pretty much everywhere, throughout history, people have married.[86] The term "civil marriage" refers to a marriage that the government recognizes. In the US, marriage and the associated welfare are the province of the states, acting in the police power capacity conferred by the Tenth Amendment of the federal Constitution. Therefore, it is up to the states to set out rules for issuing marriage licenses.[87] Marriage has been, however, also a matter of concern for federal courts. Lately, this attention reached a new peak when the US Supreme Court had to rule whether the prohibition of same-sex marriage violates the US constitution.[88]

The state's involvement has several implications and affects people's civil and political standing. Some thinkers hence started questioning the current state of affairs, one in which the government is in charge of licensing marriages. The idea that civil marriage could be abolished as a legal category started emerging in the '90.[89] Martha Fineman, an influential feminist legal theorist based at Emory Law School, advocated for this idea in her book *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*.[90] Offering a feminist critique of the most patriarchal aspects of marriage, she argued that egalitarian partnership marriage is a façade. She pointed out how current

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[85] Fineman, Martha A., 1995. Masking Dependency: The Political Role of Family Rhetoric. *Virginia Law Review*, 81: 2181-2215, 2189.

[86] Bethmann, Dirk and Kvasnicka, Michael, 2011. The institution of marriage. *Journal of Population Economics,* 24(3): 1005-1032, 1032-1033.

[87] Usually, states provide that a couple files with the government a request for a marriage license, upon completion of forms whereby they demonstrate that they meet certain requirements (such as age requirements). Then, the marriage is celebrated before a civil or religious officiant, and the license is issued.

[88] United States, Obergefell v Hodges, 576 U.S. 644 (2015).

[89] Implied in the idea that marriage can be abolished as a legal category is the contention that secular or religious ceremonies of marriage could be retained, for those who wish to sanction their relationships through this form of public commitment. Fineman, Martha A., 1995. *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, 229. New York: Routledge.

[90] *Ibid*. *See also* Fineman, Martha A., 2004. *The autonomy myth: A Theory of Dependency.* New York: The New Press; *Id*., 2001. Why marriage? *Virginia Journal of Social Policy and the Law* 9(1): 239-272, 240; *Id.*, 2010-2011. The Vulnerable Subject and the Responsive State. *Emory Law Journal*, 60: 251-276.

custody, support, and welfare laws continue to exalt the work of fathering while marginalizing if not concealing the work of mothering.[91] This, in turn, overshadows women's role, who overwhelmingly perform the mothering role. Based on this observation, she constructs the concept of inevitable and derivative dependency. She argues for replacing marital ties with the mother-child relationship as the foundational relationship in family law.[92] This move, in her view, would have the additional beneficial effect of solving the puzzle of same-sex marriage.[93]

In 1996, Patricia Cain joined the efforts. She argued that the state should have no say when it comes to privileging certain types of relationships over others, including dyads over triads.[94] In her work *Imagine there's no marriage*,[95] she daydreamed of a world with no civil marriage. She proposed to deregulate marriage because the state should no longer take notice of people's living arrangements.[96] Instead, churches or communities would perform any marriage celebration under their own "rules". The age, race, or number of affiliates would be irrelevant for the state. Couples wishing to formalize their relationship would need to do so for themselves, without a family legal-regulatory regime with default rules.[97]

The question regained momentum in recent years, when the debate around same-sex marriage escalated, arguably putting on one of the most spectacular acts of the culture wars.[98] Some scholars and activists started questioning marriage, including same-sex marriage, as a tool through which the state imposes a particular vision of the good life.[99] This ensues from marriage's

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[91] Polikoff, Nancy, 2000. Why Lesbians and Gay Men Should Read Martha Fineman. *Journal of Gender, Social Policy and the Law*, 8: 167-176, 172.
[92] Fineman, *supra* note 89, at 234-235.
[93] *Ibid*. at 230.
[94] Cain, Patricia. 1996. Imagine There's No Marriage. *Quinnipiac Law Review*, 16: 27.
[95] *Ibid*.
[96] *Ibid*. at 29.
[97] *Ibid.* at 43.
[98] *See, e.g.*, Kindregan, Charles P., Jr., 2004. Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History. *Family Law Quarterly* 38(2): 427-447.
[99] *See, e.g.*, Brake, Elizabeth, 2012. *Minimizing Marriage: Marriage, Morality, and the Law (Studies in Feminist Philosophy)*, 135-139. New York: OUP; Metz, Tamara, 2010. *Untying the Knot: Marriage, the State, and the Case for Their Divorce.* Princeton, NJ: Princeton University Press; Estlund, David M. and Nussbaum, Martha C., eds., 1997. *Sex, Preference, and Family: Essays on Law and Nature*. New York: OUP.

yielding not only material benefits (such as legal benefits) but also expressive benefits, that is a stamp of public approval of the relationship at stake.[100] In Nussbaum's view

> [t]he expressive dimension of marriage raises two distinct questions. First, assuming that granting a marriage license expresses a type of public approval, should the state be in the business of expressing favor for, or dignifying, some unions rather than others? In other words, are there any good public reasons for the state to be in the marriage business at all, rather than the civil union business?[101]

In 2006, a nationwide manifesto was published on the website *beyondmarriage.org*.[102] Prominent scholars, activists, educators, artists, writers, lawyers, and journalists adopting a radical pluralist position advocated for a new "strategic vision for all our families and relationships" which entailed the abolition of civil marriage. They argued that marital unions ought not to be privileged, both legally and economically, over other deserving relationships. They included the following types of relationships in the list of deserving relationships: senior citizens living together and taking care of each other, adult children living with and caring for their parents, blended families, grandparents raising their children's (or relative's) children, committed households in which there is more than one sexual partner, extended families, single-parent households, committed close friends and siblings, and queer assemblages.

The abolition of marriage also appealed to followers of libertarianism, a political philosophy that seeks to maximize personal freedom and autonomy. Thinkers such as David Friedman,[103] Cass Sunstein, and David Boaz[104] referred to the "privatization" of marriage to advocate the cause. A recurring proposal aimed to transform marriage into a private contract that would resemble other

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[100] Shakargy, Sharon, 2021. Plus One: Who Decides Who is One's Significant Other? *International Journal of Law, Policy and The Family* 35(1): 2-8 (describing the distinction between what the Author calls status-related rights and monetary rights and expounding the rights comprised in each category).

[101] Nussbaum, Martha C., 2010. A Right to Marry? *California Law Review* 98: 667-696, 671-672.

[102] The website www.beyondmarriage.org is no longer available.

[103] Friedman, David, 2013. Gay Marriage: Both Sides are Wrong. *Ideas blog* Sept. 12, 2013, http://daviddfriedman.blogspot.it/2005/12/gay-marriage-both-sides-are-wrong.html (last accessed: 26 Aug. 2021).

[104] Boaz, David, 2013. Privatize Marriage. A simple solution to the gay-marriage debate. *Slate* Apr. 25, 1997, www.slate.com/articles/briefing/articles/1997/04/privatize_marriage.html (last accessed: 26 Aug. 2021).

commercial contracts. Through this contract, parties would stipulate all relevant aspects of their relationship, such as asset distribution, allocation of taxes, obligations in case of divorce, etc. Sunstein and Thaler's proposal, formulated in the book *Nudge*,[105] stated as its objective the protection of both individual freedom and religious liberty. Under their proposal, any two people can create a nonmarital union by entering into a "domestic partnership agreement".[106] Religious and private organizations would be still free to sanction marriages under their own rules and terms. The state, by contrast, would only allow the creation of private agreements while providing specific default rules should the parties not cover certain aspects of their relationship, such as their property regime.[107]

A recent twist concerns the appropriation of the cause for abolishing marriage by social and religious conservatives and certain conservative state legislatures, such as Missouri, Oklahoma, and Alabama.[108] These legislatures introduced bills seeking to abolish marriage licenses and replace them either with affidavits or with more neutral civil unions.[109] While the objective of the reforms has been variously articulated in libertarian terms and on account of freedom of religion, it seems that they were creative workarounds to prevent the officiation of same-sex marriages, which became mandatory after *Obergefell*.[110]

Therefore, what I referred to as the debate on the abolition of marriage is in fact a layered, multifaceted debate in which voices from different ranks sought to pursue distinct objectives. Social and religious conservatives wished

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[105] Thaler, Richard and Sunstein, Cass, 2009. *Nudge: Improving decisions about health, wealth and happiness*. London: Penguin.

[106] *Ibid.* at 111.

[107] A nudge is a default rule that parties are not bound to follow, which, however, exerts gravitational pull and thus is likely to be followed.

[108] Palazzo, Nausica, 2018. The Strange Pairing: Building Alliances Between Queer Activists and Conservative Groups to Recognize New Families 25(2): 161-237, 210-215 [The Strange Pairing]; ead., 2022. Queer and Religious Convergences Around Non-Conjugal Couples: 'What Could Possibly Go Wrong?'. In *Queer and Religious Alliances in Family Law Politics and Beyond,* eds. Palazzo, Nausica and Redding, Jeffrey A. New York: Anthem Press (forthcoming).

[109] Palazzo*, The Strange Pairing, supra* note 93, at 211; Dorf, Michael C., 2018. Does the Constitution Permit a State to Abolish Marriage?, *Verdict*, Mar. 21, 2018, https://verdict.justia.com/2018/03/21/constitution-permit-state-abolish-marriage (last accessed: 26 Aug. 2021).

[110] Palazzo*, The Strange Pairing, supra* note 108, at 210-215.

to not officiate same-sex marriages. Queer theorists wanted to find a solution for the expressive and material harms to non-normative relationships associated with the marriage model. Libertarians wished to "privatize" the institution as a way to promote individual liberties. Civil marriage should be dispensed with for these objectives to be achieved.

B. The constitutional implications of abolishing marriage

When discussing the abolition of marriage, it was impossible to eschew whether the constitution allowed a similar move. Before *Obergefell* explicitly upheld a fundamental right to marry – and thus firmly anchored civil marriage in the constitution – there was some (limited) room for arguing that abolition would pass muster under the constitution. The boundaries of the right to marry were blurred or at least ambivalent.

It was not clear, for instance, whether marriage engaged the equal protection clause or the substantive due process clause, since both legal bases had been invoked over time. Several landmark cases lent support to the view that the right to marry entails non-discrimination. These include *Loving v. Virginia*, invalidating the prohibition of interracial marriage,[111] *Zablocki v. Redhail,* invalidating the prohibition to marry for parents unable to meet child support obligations,[112] and state court decisions legalizing same-sex marriage before *Obergefell*.[113] Other cases referred to the right to marry as an implied fundamental right under the Fourteen Amendment.[114] The same cases, however, adopted complex lines of reasoning based on both Equal Protection and Due Process – as the Supreme Court will do in *Obergefell*.[115] The non-discrimination component, therefore, continued to be present.

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[111] United States, Loving v. Virginia, 388 U.S. 1 (1967).

[112] United States, Zablocki v. Redhail, 434 U.S. 374, 384, 386 (1978).

[113] E.g., Connecticut (US), Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 432-481 (Conn. 2008); California (US), In re Marriage Cases, 183 P.3d 384, 442-44, 446-52 (Cal. 2008); New Jersey (US), Lewis v. Harris, 908 A.2d 196, 217-21 (N.J. 2006); Vermont (US), Baker v. State, 744 A.2d 864, 884-86 (Vt. 1999).

[114] Cain, *supra* note 94, at 31.

[115] *See, e.g.,* Zablocki v. Redhail, 434 U.S. at 386 (finding that it would be contradictory to "recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.").

The nature of the right to marry itself also seemed ambivalent. One could argue that, prima facie, it resembled negative liberties, to the extent that it required that the state did not intervene in the formation and unfolding of intimate connections. Yet, the right also parted from typical negative liberties in the family domain, such as the privacy right to make decisions around reproduction, contraception, or childrearing.[116] Put differently, the right to marry cannot merely be seen as demanding non-intervention on the part of the state. It demands a *quid pluris* to be fulfilled. First, it requires creating the status itself – that would not exist without state recognition. Second, it requires filling such status with a set of legal rights, obligations, and benefits.[117] This conceptual framing informed the view that the government lacks a duty to continue to sponsor the institution – also in light of the well-known reluctance to uphold affirmative rights as a matter of American constitutional law.

Some scholars framed the right as a (mere) right to equal access based on similar observations. Martha Nussbaum, for instance, put forward a "minimal understanding" of the right to marriage, according to which *once* the state has linked a package of expressive and economic benefits to marriage, it cannot deny them on a discriminatory basis.[118] Similarly, Nelson Tebbe and Deborah Widiss maintained that, absent discriminatory purposes, abolition would not offend the constitution "so long as it denied access to marriage to everyone".[119] Cass Sunstein also argued that the right must be framed in terms of a mere "individual right of access to the official institution of marriage so long as the state provides the institution".[120] The equal access argument does not demand that the state officially sanction marriage. Neither does prevent the state from dismantling the current administrative apparatus surrounding it. It merely requires that the government evenhandedly administers the institution of marriage and associated welfare.[121]

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[116] Tebbe, Nelson and Widiss, Debora A., 2010. Equal Access to the Right to Marry. *University of Pennsylvania Law Review* 158: 1378.

[117] United States, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003) (finding that "there are three partners to every civil marriage: two willing spouses and an approving State.").

[118] Nussbaum, *supra* note 101, at 688.

[119] Tebbe & Widiss, *supra* note 116, at 1406 (emphasis omitted).

[120] Sunstein, Cass, 2004. The Right to Marry. *Cardozo Law Review* 26: 2081-2120, 2096 (emphasis omitted).

[121] Tebbe & Widiss, *supra* note 116, at 1414.

Obergefell then seemed to shield marriage from abolition, by firmly grounding it in due process and those liberties pertaining to men's deepest instincts.[122] It conveyed the idea that marriage is not a contingent institution. It rather enjoys a central position in those liberties which are fundamental to all human beings.[123] Consequently, after the mentioned Supreme Court decision, pro-abolitionist arguments became harder to press.

III. ABOLISHING MARRIAGE IN EUROPE?

A. The unsuitability of the US debate

American thinkers with different backgrounds exploited the ambiguities of the constitution to argue that marriage could be abolished as a legal category. When asking whether a similar debate occurred in any of the 27 member states of the European Union, the answer is no. A few, isolated voices within civil society advanced similar arguments. For instance, in France, an anarchic group based in Lille has,[124] and a libertarian commentator echoing the proposal of researchers based at the US Cato Institute.[125] Yet, one swallow does not make a summer. The absence of discussions around the abolition of marriage is emblematic since, as it often occurs, omissions are more telling than actions. The absence of the debate reflects a different "public" understanding of marriage and family in the two contexts and hints at a sharp divide between Europe and the US in this area. I would like to sketch out the main aspects that potentially cause a similar omission in Europe.

The first divide concerns the strong interest that most European constitutions have in regulating the family and marriage, unlike the US constitution. As a result, there is an over-constitutionalization of family in Europe.[126] True, European countries take a variety of approaches to

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[122] Holmes, Oliver Wendell, Jr, 1897. The Path of the Law. *Harvard Law Review* 10(8): 457-478, 477.

[123] *But see* Sunstein, *supra* note 120, at 2098.

[124] http://lille.cybertaria.org/spip.php?article2257 (last accessed: 24 Aug. 2021).

[125] Delhommais, Pierre-Antoine, 2013. Et si on privatisait le mariage? *Le Point*, Jan. 10, 2013, www.lepoint.fr/editos-du-point/pierre-antoine-delhommais/et-si-on-privatisait-le-mariage-10-01-2013-1611845_493.php (last accessed: 24 Aug. 2021).

[126] See Pérez Serrano, Nicolás, 1984. *Tratado de Derecho Político*, 2 ed., 687. Madrid: Civitas. See Villabella-Armengol, Carlos Manuel, 2016. Constitución y familia. Un estudio comparado. Díkaion 25(1): 100-31; Palazzo,

constitutionalizing the family.[127] One can identify three main categories: countries that omit any reference to the family, countries that recognize families as worthy of social protection, and those that elevate families to the status of fundamental units of the nation.[128] But the majority of these documents seems to be "overly" interested in the family as an object of constitutional regulation. Since approaches are quite nuanced, organizing them on a scale that goes from least intrusive to the most intrusive approach seems like a fruitful exercise.[129]

The Netherlands and Denmark are the only two jurisdictions that do not explicitly mention marriage or family, despite the former directly applying international obligations concerning the family.[130] The second group of states, comprising Austria and Sweden, only allocate competencies in family-related matters, much like Canada. However, these are exceptions to the rule whereby European constitutions are overly interested in the family.

A third group comprising fifteen states protects family privacy and undue interference in family matters. This might imply that non-interference is the only concern for these jurisdictions. However, their constitutions also include provisions regulating the substantive or procedural conditions to enter into marriage and/or provisions that confer a "special protection" upon the family.[131] Procedural rules mandate that a civil marriage must precede a religious wedding,[132] that only civil marriage is allowed,[133] that only parliamentary legislation can regulate marriage-related matters,[134] or establish

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supra note 24, at 139. As noted above, this over-constitutionalization has occurred during the years in which an awareness of the social role of the family started emerging. *See supra* Section I.A.

[127] Millard, Eric, 2005. Le droit constitutionnel de la famille. In *Code civil et constitution*, Verpeaux. Michel, 66-67. Paris: Economica.

[128] Marella, Maria Rosaria e Marini, Giovanni, 2014. *Di cosa parliamo quando parliamo di famiglia*, 56-57. Bari: Editori Laterza.

[129] I preferred to organize them along a similar continuum to include countries that somehow defy macrocategories. Palazzo, *supra* note 24, at 133-42, Table 5.1.

[130] *Ibid.* at 134, figure 5.1.

[131] *Ibid.* at 139.

[132] Constitution of Belgium, Art. 21; Constitution of Luxembourg, Art. 21; Constitution of Romania, Art. 48, par. 2.

[133] Constitution of Bulgaria, Art. 46, par. 1; Constitution of Slovenia, Art. 53.

[134] Constitution of Slovenia, Art. 53 (including in the list of matters covered by parliamentary legislation also extra-marital unions); Constitution of Spain, s. 32; Constitution of Croatia, Art. 61 (including in the list of matters covered by parliamentary legislation also extra-marital unions).

rules on divorce, separation, and succession.[135] An additional group includes jurisdictions that outline the substantive requirements for entering into marriage, such as capacity and consent.[136] While some constitutions define marriage as the union of two persons regardless of gender, other documents – in Central and Eastern Europe – describe it as the union between a man and a woman.[137] The constitutions of Bulgaria, Italy, Lithuania, Malta, Poland, Portugal, Romania, and Slovenia take even a "bolder" approach and regulate the role of spouses within a marriage. While they usually tend to sanction the equality of spouses, the Constitution of Italy still requires that the "moral and legal" equality of the spouses encounters the limit of the "unity of the family".[138]

A large cluster of fourteen states grants a "special protection" to family affiliations or marriage.[139] These provisions run the gamut from those offering the special protection of the state and society to the family,[140] to those protecting parenthood,[141] or marriage.[142] More radically, some constitutions frame the family as "the cornerstone of the nation",[143] the basis of the survival of the nation,[144] the "necessary basis of social order and as indispensable to the welfare of the Nation and the State",[145] a fundamental element in society,[146] or the "the foundation of a cohesive society".[147] Others yet more radically frame

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[135] *E.g.*, Constitution of Ireland, Art. 4, par. 3.
[136] *E.g.,* Constitution of Cyprus, Art. 22 (a person of nubile age is free to marry and to found a family).
[137] These countries are Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, and Slovakia. Hungary and Croatia allow, however, same-sex registered partnerships.
[138] Constitution of Italy, Art. 29.
[139] These countries are Bulgaria, the Czech Republic, Estonia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia, and Spain. The ideology behind this special protection differs. As rightly pointed out by Maria Rosaria Marella and Giovanni Marini, if some of these countries simply recognize families as worthy of social and welfare protection, others confer special protection in light of the family being a pillar of the nation and with this centrality of the family having overtones grounded in tradition. Marella & Marini, *supra* note 128, 57.
[140] *E.g.,* Constitution of Bulgaria, Art. 14.
[141] *E.g.*, Czech Charter of Fundamental Rights and Basic Freedoms, Art. 32, par. 1; Constitution of Poland, Art. 18.
[142] *E.g.*, German Basic Law, Art. 6.
[143] Constitution of Greece, Art. 21.
[144] Constitution of Hungary, Art. L.
[145] Constitution of Ireland, Art. 41, par. 2.
[146] Constitution of Portugal, Art. 67.
[147] Preamble to the Constitution of Latvia.

the family as an institution that is antecedent to the state (a "natural" society).[148]

This over-constitutionalization of the family is consistent with the phase of constitutionalism to which European constitutions belong, namely socio-democratic constitutionalism. The constitutional tradition of continental Europe promotes a holistic vision of society in the sense that constitutions aspire to inform the regulation of society as a whole.[149] Constitutions are structured in such a way as to steer and accompany social change. Under the influence of the philosophical current called new constitutionalism (neocostituzionalismo in Italian and neoconstitucionalismo in Spanish),[150] the constitution comes to be seen as omniscient in the sense that there is hardly a question that does not find an answer or steering in the constitution.[151] Unlike the US, European societies do not adopt a neutral vision of society:[152]

> Under this tradition, the state is conceived not as merely an aggregate of the individuals who live in a given territory and coordinate their activities, but as a union of people who share a common value system and seek to promote those values (citation omitted).[153]

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[148] Constitution of Ireland, Art. 41, par. 1; Constitution of Italy, Art. 29; Constitution of Luxembourg, Art. 11. On how this framing has been interpreted as not ossifying family but accommodating its evolution in light of new social developments see Rodotà, Stefano, 1975. La riforma del diritto di famiglia alla prova. *Politica del diritto* n. 5-6: 661-683; Pinelli, Cesare, 2008. Gli appelli alla natura e le prospettive del diritto costituzionale. *Diritto Pubblico*, 703 ss.

[149] Pinelli, Cesare, 2011. The Combination of Negative with Positive Constitutionalism in Europe. *European Journal of Law Reform* 13: 31, 37. As to the attitude of constitutions in continental Europe to yield horizontal effects see Kumm, Mathias, 2016. Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law. *German Law Journal* 7: 341, 344. As to the debate in comparative constitutional law regarding whether constitutions and especially individual rights should be able to produce horizontal effects see Gardbaum, Stephen, 2003. The "Horizontal Effect" of Constitutional Rights. *Michigan Law Review* 102(3): 387-459.

[150] On the composite objectives of the legal philosophy "new constitutionalism", see Pino, Giorgio, 2011. Principi, ponderazione, e la separazione tra diritto e morale. Sul neocostituzionalismo e i suoi critici. *Giurisprudenza costituzionale* 56: 965–997.

[151] Prieto Sanchis, Luis, 2009. Neoconstitucionalismo y ponderación judicial. En *Neoconstitucionalismo(s*), coord., Carbonell Sánchez, Miguel, 216. Madrid: Trotta, Instituto de Investigaciones Jurídicas-UNAM.

[152] As to the difference between the common law notion of rule of law and the German notion of Rechtstaat (which has its equivalent in other European continental jurisdictions) *see* Kommers, Donald P., 1997. *The Constitutional Jurisprudence of the Federal Republic of Germany,* 2nd edition, 36. Durham: Duke University Press (explaining how the Rechtstaat, unlike rule of law, seeks to integrate state and society).

[153] Cohen-Eliya, Moshe and Porat, Iddo, 2013. *Proportionality and Constitutional Culture,* 45. Cambridge: CUP.

A consequence of European countries' adoption of a certain conception of the good life is the social element. European constitutions go beyond mere non-interference to take on a host of duties towards citizens to tackle social inequality. The social element was infused in such documents in the 20th century to fulfill their liberal aspirations, based on an awareness that equal rights applied to unequal conditions.[154] Social and economic rights were thus added "as a consequence of waning confidence in the self-regulation capacity of society".[155]

The distinct characteristics of the American model might explain why the debate on the abolition of civil marriage took hold in the country. First, unlike the near totality of European jurisdictions, that adopt what some scholars called a communitarian family model,[156] the US adopts an individualistic model called constitutional (family) privacy model.[157] This model is mainly concerned with protecting family members from the state's undue intrusion into family life, including through excessive or arbitrary regulation.[158] It is inherently individualistic, as it emerges from the Supreme Court's contention that "[t]he family is not an independent entity with a heart and mind of its own", with the focus always remaining the individual and never the marital relationship as such.[159]

The fact that the US constitution was created during the liberal phase of constitutionalism that led to the establishment of liberal-democratic constitutions, explains why protecting a sphere of privacy in family matters the main preoccupation. The driving force behind the American revolution (as well

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[154] Grimm, Dieter, 2012. Type of Constitutions. In Michel Rosenfeld and András Sajó, *The Oxford Handbook of Comparative Constitutional Law*, 125. Oxford: Oxford University Press (Grimm calls this type of constitution "the social or welfare state constitution").

[155] *Ibid*. at 127.

[156] Marella & Marini, *supra* note 128, at 62-69. The Authors demonstrate how the model has evolved towards a more individualistic one through the more progressive case law of constitutional courts.

[157] France is the jurisdiction that might constitute an exception in this regard, as it thas raditionally adopted a family privacy model. Boulouis, 'Famille et droit constitutionnel' in Études offertes à Pierre Kaiser, vol 1(Aix-en-Provence, Presses Universitaires d'Aix-Marseille, 1979) 149.

[158] The family privacy model has evolved to the point of reaching the paradox whereby it actually warrants a more penetrant scrutiny on the part of the state to protect intimate choices. Marella & Marini, *supra* note 129, at 74-75.

[159] Eisenstadt v. Baird, 405 US 438.

as the French one) was the idea, grounded in the social contract theory, that the state duty was only to protect individual freedoms and societal self-regulation.[160] A legacy of this phase of constitutionalism is that constitutional culture and discourse are imbued with what Iddo Porat and Moshe Cohen-Eliya have dubbed a suspicion-based conception of the state.[161] Under this conception, the paramount preoccupation is to shield individuals from the state's intrusions. This also explains why negative liberties are paramount and why the US Supreme Court defined the US constitution as a "charter of negative rather than positive liberties".[162] It furthermore explains the rooted reluctance to uphold affirmative entitlements, such as welfare benefits, as a matter of constitutional law.

The suspicion-based conception acts in tandem with an individualistic culture. Individual liberty ranks above social solidarity, and a general scepticism towards objectives that are not determined by individuals themselves prevails.[163] The emphasis that American queer and libertarian thinkers placed on marriage as duly imposing a unitary vision of the good life and as discriminating against other families that do not comply with the state-sponsored model is coherent with the mentioned view.

This concise overview of certain differences that characterize the development of constitutionalism in the two geographical areas can help understand why, unlike Europe, the US is a fertile ground for discussions about the abolition of civil marriage. A similar background constituted a fertile terrain to advance the argument that the constitution does not prevent the abolition of civil marriage. It also explains why similar discussions are not popular in Europe: despite constitutional case law having taken a more individualistic turn in Europe too, marriage has a firm constitutional aegis in most European countries. Constitutions also aspire to steer society and marriage is one of the main tools for promoting this seemingly legitimate objective. Therefore,

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[160] Grimm, *supra* note 154, at 117.

[161] Cohen-Eliya & Porat, *supra* note 153, at 52–53.

[162] United States, Jackson v. City of Juliet, 715 F 2d 1200 (7th Cir.), cert. denied, 465 US 1049 (1983) 1203-4 (referring to the American Constitution as a "charter of negative rather than positive liberties"); *see also* Tribe, Laurence, 1988. *American Constitutional Law,* 2nd edition, 998. La Habra, CA: Foundations Publishing.

[163] Cohen-Eliya & Porat, *supra* note 153, at 67. *See also* Wahl, Jean, 1925. The Pluralist Philosophies of England and America (Fred Rothwell trans, Chicago: Open Court Publishing), 317-18.

arguments that marriage should be abolished would sound at best exotic, if not outlandish.

B. Main takeaways of the analysis: Finding a place for public family law in comparative law

Comparative family law is a growing field of research in an academic world rightly disenchanted with the idea that family law is an exceptional domain of law. There are several foundational questions that states will have to grapple with in the next decades across the globe. Who is a parent, for instance? Can two friends who do not have a sexual relationship qualify as parents? To what extent artificial reproductive technologies affect our answer to the question?

Whether the legal category of marriage is still relevant is an undoubtedly important question. Marriage has been described above as a sort of Esperanto in personal relationships that we tend, as such, to take for granted. Some jurisdictions, however, started questioning its ongoing relevance and scholars exploited certain gaps in the constitution to advance the argument that the state lacks a duty to recognize civil marriage. Comparative lawyers should be intrigued by the fact that some jurisdictions ask the question of whether civil marriage is still relevant, while others do not. Yet, at present, it seems like similar questions have not garnered much attention. This is because similar questions are quintessentially public law questions that require the expertise and analytical "wisdom" of public law.

Other questions are not asked, beyond the example provided concerning the abolition of civil marriage. For instance, debates around vulnerability theory and the ethics of care should also solicit attention. These debates are especially influential in the US.[164] A public family law perspective would help grasp that the debate was aimed at compensating the lack of constitutionally entrenched notions of substantive equality and the influence of libertarian theories in the

[164] *See especially* Fineman, Martha A., 2008. The Vulnerable Subject: Anchoring Equality in the Human Condition. *Yale Journal of Law & Feminism* 20: 1-23 (adopting a notion of universal ontological vulnerability to overcome the negative liberty-based understanding of right behind anti-discrimination law in favor of a substantive conception of equality); Tronto, Joan, 1993. Moral Boundaries: A Political Argument for an Ethic of Care. New York, London: Routledge (explaining the complementarity of care and autonomy and advocating for the participation of people in shaping and implementing care-related policies under the assumption that care should be a form of democracy).

regulation of the family and its associated welfare.[165] A thus-framed comparative analysis would help discern that in continental Europe the debate would be misplaced. "Vulnerability" displays a different understanding in constitutional discourse and, more crucially, the implementation of the theory "does not require any invention, simply the implementation, legally due, of the normative plans formulated in constitutions".[166]

The legal recognition of new families across jurisdictions, including unions of adult friends and relatives or polyamorous unions, or the legal regulation of religion-based families in a comparative perspective are additional topics that could be addressed in a more systematic manner if a thus-framed view were to be adopted. This is to say that the perspective of public law can benefit the field of comparative law because it can *trigger new strands of research* around topics that have a quintessentially "public" component.

A second potential benefit can be discerned. A public family law perspective can help conduct analyses around more traditional topics in family law that are perceived to lie at the core of the field, what Duncan Kennedy refers to as family law 1 rules.[167] These rules include provisions around divorce, child custody, child support and adoption. What is the public interest that weighs in crafting these rules in a particular fashion? A broader understanding of family law as also encompassing a public component can, for instance, help discern the public concerns behind a state decision to prevent a father from procreating due to his inability to pay child support, as occurred in the US,[168] and why similar decisions might not be replicable in other jurisdictions.

In this sense, using a public family law perspective in comparing legal systems has a two-barreled advantage. First, it can give new life to more traditional topics in (private) family law by contributing to conducting more holistic analyses. Second it can trigger new strands of research around topics that are currently unexplored – arguably, as they summon the expertise of public lawyers and the conceptual framework of public law.

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[165] Re, Lucia, 2019. Vulnerability, Care and the Constitutional State. *Revista De Estudos Constitucionais, Hermenêutica e Teoria Do Direito*, 11(3): 314-326, 316-317.

[166] Ferrajoli, Luigi 2018. *Manifesto per l'uguaglianza*. Roma-Bari: Laterza, ch. 3, §. 5 (kindle edition) (translated from Italian by Lucia Re in *ibid.* at 320-321).

[167] Kennedy, *supra* note 50.

[168] Wisconsin (United States), State v. Oakley, 629 N.W.2d 200 (Wis. 2001).

Conclusion

Comparative family law is a treasure throve for answering the most pressing questions that will determine family policy in the years to come. Some such questions are quintessentially "public" in nature, such as "what is family" or "who decides what family is"? The idea expressed in the article is that for comparative works to unleash their full potential we should shake off those cultural legacies that still influence the development of the field. These legacies, especially the idea that family law is part of private law, are still yielding ill-fated effects.

Finding a place for public family law in comparative law, in the end, entails claiming a role for public lawyers in comparing family laws and policies. As unoriginal as this idea might sound, it is worth restating until a public family law perspective becomes widely accepted when comparing family laws across the globe.