

## **Law is not enough!**

### **- The mutations of the access to family and children law and justice in Portugal**

*Patrícia Branco/João Pedroso*

Confronted with new scenarios, shaped under the signs of flexibility, fluidity and plurality, family and child law is called upon to answer to new questions, still indeterminate and undefined, that manifest themselves inside a two-fold dynamics – privatization and deinstitutionalization of family relations, on one hand, and (re)publicness, on the other. These transformative speeds – one rapid and one more moderate, respectively family and family regulation – are accompanied of a third one, moving at a slower pace – the system of access to family and child law and justice, without which effectiveness of rights cannot be guaranteed and citizenship cannot be fully exercised.

**Keywords: families; family and child law; access to law and justice; transformation of family regulation**

#### **I. The changing family (or when family regulation isn't what it used to be)**

Since it is difficult to define family law itself, to discuss or write about family regulation has become a complex question. In fact, *Bernini* (2007) claims that the term is still used in the lack of a better one. Since the end of Second World War (1945), and especially throughout the last 30 years, we have assisted to the mutations of family, in the European countries as well as in the rest of the so-called western world.

The practices and ideology inherited from the 19<sup>th</sup> century imposed, in Europe, the social and juridical model of the nuclear family (father, mother and children), based upon a new culture of family and marriage. This model was submitted to a rigid set of norms linked to the different roles each member was supposed to fulfil. Consequently, there was an uneven status between men and women, for men had the right, and the duty, to accomplish their individual path outside the household, while women had the social task of providing for their care and comfort. However, by the end of the 20<sup>th</sup> century (especially after the 1970s) the ideals of family democratization liberated women from that unequal status they had been confined to and gave them the status of social and juridical equality. Men and women were, at last, full-right partners and each one of them was allowed personal fulfilment and satisfaction, inside the conjugal relationship (*Oliveira*, 2004: 763). That is, inside equality each one seeks his/her difference, since each one formulates his/hers yearnings.

More and more, family tends to transform itself from a permanent and total experience into a partial and transitory experience of individual life. Or, paraphrasing *Bauman*, we are confronted with a new family model: liquid family<sup>1</sup>. By being ‘limitless’ (unconfined), it transforms itself into ‘families’, pointing to all the variety and multiplicity of family experiences, resulting from the voluntary choices of the individuals (*Zanatta*, 2008: 10). Thus, we are confronted with new flexible and fluid family scenarios: *de facto* partnerships’ increase; monoparental families’ increase; recombined families’ increase; transnational families’ increase; and unipersonal families have also increased; and the number of children born outside the wedlock has increased heavily. Such scenarios are a result of the following factors: the nuptial rate decrease; the conjugal instability augmentation (resulting in separation and divorce); the birth-rate drop; migration processes and globalization. Consequently, we are dealing with the weakness of the matrimonial union and of the ‘family institution’ (*Pocar and Ronfani*, 2008: 126). Nevertheless, more than discussing a “family crisis”, we should speak of a crisis affecting a precise family model, i.e., the stable, harmonious, affective and fecund family, regulated by a rigid role division and settled upon a hierarchy between man and woman, parents and children<sup>2</sup>. Thus, in a context marked by flexibility and fluidity, the prevalent model is still the nuclear family, not always put forward in accordance with symmetry and democracy. Yet, this is no longer the referential followed by a large number of people, at least in some of their life phases’. This is why we can no longer speak of a univocal definition of family.

In Portugal, the situation is much the same, although the transformations started occurring only after the 1974’s Democratic Revolution. As claimed by *Aboim*, the Portuguese family life is on the move, traversed by the modernization movements occurred over the last decades, which have converged towards the demographic and familiar patterns already occurring in other countries (2006: 63).

Of course, these transformations have reflections on the juridical regulation of family, occurring through law reforms, especially after the equality principle’s consecration (between spouses and children) in constitutional and civil family laws, as well as with the

---

<sup>1</sup> Zygmunt Bauman created, throughout his books, such as *Liquid Modernity* (1999) and *Liquid Love* (2003), the concept of “liquid”, of which the main characteristics are fluidity and dynamicity. Therefore, liquid societies are made of “boundless bonds”, and this is also suitable to family relations.

<sup>2</sup> In Europe there exist several family models: the Nordic model (Scandinavian countries: children leave the household at an early age; high rates of civil partnerships and a high rates of children born outside the wedlock; high divorce rates), the Mediterranean model (southern European countries: children leave the household at an older age; birth-rates decrease and civil partnerships increase; nubile age augments; divorce rates also increase) and the continental (or intermediate) model (Austria, Belgium, France, Germany and Luxembourg) (*Zanatta*, 2008).

fragmentation and expansion of the legal regulation of family relations inside labour law, social security law or, even, criminal law<sup>3</sup>.

## II. Family law is ‘going through changes’

As stated before, modernity sort of ‘imposed’ a generalized family model, established upon the heterosexual couple with children living in cohabitation. According to *Martinez* (2008), this worked as a morally correct and economically suitable patrimonial unity, which contributed to the good of society. As for the contents of said matrimonial relation, these were determined by general standardized norms of conduct (*Pereira Coelho and Oliveira*, 2003).

Nonetheless, and as referred by *Roseneil*, more and more people spend an immense part of their lives outside the conventional family unit. Accordingly, the romantic heterosexual couple supporting the family institution is being questioned, and, as the author claims, the conventional family is becoming, nowadays, a minority (*Roseneil*, 2006: 41).

The analysis of the families’ transformations allows us to capture the main characteristics of the contemporary families: equality and symmetry of the household roles; democracy in family decisions; women’s investment on their professional careers; informality, contractuality and individualization of and within the family relations; the prevalence of affection; the affective centrality of children and the public sphere’s responsibility for the socialization and the promotion of children’s rights.

Consequently, we can confirm an accelerated mutation of the juridical regulation of the western societies’ famil(y)ies. Its study allows us to identify the following axes of change within family law: the principle of equality’s consecration, the democratization of family life and gender parity; individualism and privatization of family law; secularization, deinstitutionalization and contractuality of the family relations; the (re)publicness of the new family law; the valorisation of affection in detriment of hierarchy; the diminishment of procreation’s significance; children’s rights as the central focus of the new family law; fragmentation, retraction and expansion of family law (from civil law to social security law); the dejuridification and dejudicialization of family’s civil conflicts’ resolution; the cultural and normative pluralism of the contemporary’s family regulation.

---

<sup>3</sup> This is not only a national occurrence, but also a result of European and global movements, which produce consequences in terms of family law and the other branches of law upon which the institution is structured. Although some authors claim there is a movement towards a “European family law”, the convergence and divergence movements tend to result in specificities in each country, with a tendency to attenuate over time (*Oliveira*, 2001; *Antokolskaia*, 2007).

### **III. Law is not enough: family and children law needs effectiveness**

The transformation of family and family and children law also means its democratization and, consequently, a corresponding mutation of the access to law and justice mechanisms, in order for all to have conscience of his/hers rights and duties and fully exercise them. Without effective mechanisms, family and children law will not play its part in the making of a better individual and collective citizenship. Thus, it is important to analyse the effectiveness of said mechanisms and the conditions of its exercise, in order to value its adequacy or sufficiency towards the transformations of family and family and children law.

#### **1. The fundamental right of access to law and justice: a Portuguese map**

Discussing the transformations of family and, consequently, the transformations of family and children law, also means discussing the transformation of the means to accede law and justice in general and, in particular, access to family and children law and justice. We will now present a “map” concerning the access to family and children law and justice mechanisms existing in Portugal.

It is still very important to discuss access to law and justice for the very reason that, as a basic human right, consecrated in international documents such as the Universal Declaration on Human Rights (article 10) or the European Convention on Human Rights (article 6), it still is the way of achieving citizenship, that is, it means ascending to the status of being a subject of the law and a subject of rights, which implies, on an instrumental level, the way of accessing the legal information and the capacity of enforcing one's rights (*Faget, 1995*). Therefore, and as *Cappelletti and Garth* already claimed in their seminal work of 1978, “*effective access to justice can thus be seen as the most basic requirement – the most basic ‘human right’ – of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all*”.

However, access to law and justice cannot be seen just as an equivalent of access to courts, and it is fundamental to broaden the perspective. That is why we must consider access to law and justice as implying legal information, legal counselling and legal representation on court, as well as the resolution of conflicts by impartial, not-corrupt and fair institutions (*Luca, 2007*). Hence, and on a broader conception, access to law and justice refers to the methods by which individuals are able to get legal information and legal services and to resolve disputes, including then access to a court procedure, to legal aid and to extra-legal mechanisms to resolve conflicts.

In that sense, the “*three waves*” metaphor by *Cappelletti and Garth* (1978) is still valid, for we can observe an advancement in the access to law and justice regimes: the first wave (started around 1945) concerned the creation of the legal aid regimes, where the objective was to provide legal assistance on court; on a second moment, there was the promotion of representative actions and other procedures that would allow a single lawsuit to resolve a large number of claims (the defence of collective rights); and on a third moment or wave there was the emergence of the alternative dispute resolution mechanisms and other procedural changes, as well as the legal systems’ reforms, searching for more economical solutions, where concepts like efficacy and efficiency become fundamental. Nowadays, the transformations of the access to law and justice models are under an important development, in which those three moments and different models of action interpenetrate and coexist (legal aid; public interest; and alternative dispute resolution mechanisms).

## **2. The public system of Legal Aid in Portugal: the main lines of evolution**

Access to law and courts has a double dimension: on one hand, everyone is entitled to defend one’s rights and, on the other hand, it is the State’s obligation to guarantee that the protection of the citizen’s rights is not prevented based on financial justifications, although it does not mean gratuity of services.

The first Act to introduce legal assistance in Portugal was Law 7/70, from June 9<sup>th</sup>. Portugal was still under the dictatorship and only after the Revolution (in 1974), our Constitution (from 1976) proclaimed, in article 20.º, that to all citizens is guaranteed access to a court of law to defend their rights, as well as that every citizen has a right to legal information and to legal protection<sup>4</sup>. Law 7/70 was only revised with Act 387-B/87, from December 29<sup>th</sup>, which is ten years after the Constitution, and that reform meant changing from a mere legal assistance regime to the regime of access to law and courts, introducing now the possibility of having free access to legal information and legal advice.

In 2000, there was another major reform with the Act 30-E/2000, from December 20<sup>th</sup>, which transferred the competence to evaluate all the requests for legal aid/support from the courts to the social security services, for until then it was the judge appointed to resolve the conflict at stake who had to decide if the legal aid claimant was entitled to benefit from legal support. In 2004, there was yet another reform, mainly to carry out the transposition of the

---

<sup>4</sup> Legal protection can be divided into legal counselling and representation on court. Legal information and legal counselling are dependent of state and legal professions organizations’ actions.

European Directive on Cross-border legal aid in the European Union, as well as to enlarge the beneficiaries' range of application (Law 34/2004, July 29<sup>th</sup>).

In August 28<sup>th</sup> 2008, a new Act was enacted, Law 47/2007, enforced in January 2008, which has a broader range of application, for now every citizen who decides to resolve his conflicts under the competence of the Justices of the Peace (*Julgados de Paz*) or other alternative dispute resolution structures can request legal support, such as the cases processed by the civil notaries, like divorce based on mutual consent (since Act 272/2001, October 13<sup>th</sup>).

The present Portuguese public system of access to law and justice can be seen as a triangular system: it is funded by the Ministry of Justice, processed by the Social Security Services, and it is the Lawyers Bar competence to nominate and appoint the lawyers responsible for legal information, counselling and representation. This system is, nevertheless, subject to several critics: a) the eligibility criteria; b) the insufficiency of legal counselling; c) the poor quality of the services provided.

### **3. The *network* of family and child law legal services: the State, the Market and the Community**

The research we have been conducting<sup>5</sup> allows us to graphically illustrate the structures and actors involved in the Portuguese system of access to law and justice. As it shows, the mechanisms do not relate solely to the public system supra mentioned, but also to all those coming from community and the market or hybrid (public/private partnerships).

---

<sup>5</sup> This text is a result of the research being conducted in Portugal under the Research Project «*The mutations of the access to law and justice in the European Union - The case study of family law in Portugal*», funded by Fundação para a Ciência e Tecnologia (PTDC/JUR/65395/2006).

**Table I**  
**A Portuguese Map: the actors/structures of the access *network* to Family and Children Law and Justice**

Actions Spaces	Legal Information	Legal Advice	Representation	Conflict Resolution
COMMUNITY	-Formal and informal associations -NGOs -Third Sector	-Formal and informal associations -NGOs -Third Sector	- Barristers and/or Solicitors from these associations	- Family therapy/ Informal conciliation and mediation
MARKET	-Barristers and Solicitors -Lawyers/Family counsellors -Insurances	- Barristers and Solicitors -Insurances' lawyers	-Barristers and Solicitors - Insurances' lawyers	- Family therapy/conciliation and mediation (economic activity)
STATE	-Public Administration (ex. Social Security, Commission for Gender Equality - CIG) -Family Mediation System -Justices of the Peace -Public Prosecution	-Municipalities and local agencies (Lawyers) -Public Prosecution (child's superior interest)	-Public Prosecution (promotion of the child's best interest)	- Family Mediation System - Justices of the Peace - Courts of Law
State in partnership	-Lawyers' Bar Advice Cabinets - Commissions for the Protection of Children (CPCJ)	-Lawyers' Bar Advice Cabinets	- Lawyers (Legal Aid)	- Commissions for the Protection of Children (CPCJ)

Source: *Pedroso and Branco (2009)*

This analytical grid was inspired by the concepts of *structural place*, by *Sousa Santos* (1995: 411-455), and *principles of political regulation*, by *Ferreira* (2005). It analyses the actors behind legal information, legal advice/counselling, legal representation and conflict solving within the structural spaces/principles of political regulation of State, community, market, and State in partnership (when the State combines with other spaces/principles – such as the community or the market – in order to provide a better public service) regulation.

#### **a. The network of public actors/structures**

Access to law and justice is not merely served by the legal aid system. The information system is based upon a vast network of structures and/or actors, amid which Public Prosecution has an important role to play (Public Prosecution has a status analogous to the Judges).

We usually associate the Public Prosecution's action to the criminal area, for there is where it performs its main functions. However, it is important to stress that it is up to the Public Prosecution to play a fundamental role in promoting the citizen's access to law and

justice. Public Prosecution has the responsibility of defending social rights, as well as the duty to represent all of those who cannot represent themselves, like children. The Public Prosecution's judicial intervention on the defence and promotion of children rights has mainly to do with the judicial cases of a child or teenager at risk and the processes of judicial education, when a minor has committed a crime or an offence (Law 166/99, from the 14<sup>th</sup> September, and Law 147/99, from the 1<sup>st</sup> September).

However, before having any judicial intervention, the Public Prosecution provides an important public service of information. Its good geographical distribution and network integration provides for a nation-wide, easy, speedy, and at no cost service. Public Prosecution has, therefore, an important "interface" role to play, articulating mechanisms operating within the access to law and justice system, citizens and courts.

The Social Security services are, since 2000, responsible for the evaluation of the legal aid claims and eligibility criteria to access the public legal aid system. More recently, the Family Mediation Services<sup>6</sup> were created, as an extrajudicial form of family conflict solving. These services are promoted by the Ministry of Justice and are an informal, accessible, voluntary and confidential way of trying to reach an agreement. The services<sup>7</sup> are competent to mediate conflicts regarding alimony, divorce and several other questions mainly concerning divorce and separation. However, it is still under experimental phase and its territorial ambit of application is still reduced to some parts of the country.

As regarding the promotion of gender equality and the prevention of domestic violence, the *Comissão para a Cidadania e Igualdade de Género* (CIG) upholds a legal information system, providing legal information to victims of domestic violence.

#### **b. Partnerships, market and community: the broader network**

In order for the State to accomplish its constitutional duty, which that of guaranteeing a system of access to law and justice, besides appealing to the public administration (Social Security services, CIG) and to the Public Prosecution, and that of also developing partnerships to uphold the legal aid system. Therefore, as said previously, the State (Ministry of Justice and Social Security Services) finances and grants legal aid, but it is the Lawyers' Bar competence the appointment of a lawyer when the Social Security Services have granted legal aid. The Lawyers' Bar also has Legal Advice Cabinets where citizens can ask

---

<sup>6</sup> Despacho 18.778/2007.

<sup>7</sup> The mediation request may be done via telephone, email, mail or in place. Family mediation cases usually have a time length between 1 and 3 months, depending on the number of intervenients and the conflict at stake. The Ministry of Justice intends to have the program functioning all over the country by the end of 2008.



information regarding their legal questions. However, and because this system is always subject to criticism, usually regarding its insufficiency, there is the need to carefully monitor and evaluate its performance.

On the subject of promoting children's rights and resolving conflicts concerning "children at risk" or "in danger", with the aim of protecting the best interest of the child, the central State has instituted the *Comissões para a Protecção de Crianças e Jovens* (Commissions for the protection of children), as non-judiciary official institutions, with autonomy and decisional independence. The Commissions are an innovative way of institutional partnerships by the State with the municipalities and the associative entities from society, with a nationwide extension. These Commissions have the function of promoting children's rights and preventing or ending the situations which may affect children's safety, health, education or full development, and their activity is closely monitored by the Public Prosecution. Besides collaborating with the State, the Commissions also work together with several NGOs working with family matters and with children.

At the community level we must, as well, mention non-governmental organizations that provide legal information to those that seek their assistance, especially regarding domestic violence, children's rights or other family matters.

The market level is, essentially, performed by lawyers (barristers and solicitors), whose services are paid by those that can afford to do so. At this level we can, in addition, find the legal protection insurances, but they are still very marginal.

#### **4. Conclusions (or opening a research agenda)**

Family law is, as we know, in permanent mutation. Thus, it is important to understand what kind of mechanisms citizens can make use of in order to defend their rights. What we find in this important social area is a plurality of mechanisms, public and private, that perform their services in and out of the judicial system. This network of services (complementary and interdisciplinary) offers a wide-ranging set of mechanisms that aim at safeguarding and promoting universal principles and fundamental rights, especially those of the more vulnerable families, the main beneficiaries of the legal aid public system. It has, as well, the purpose of defending and promoting the rights of every family and child, which is carried out by the Public Prosecution, by the Commissions for the Protection of children, by the family mediation system or by the mechanisms offered either by the market or the community.

The rapid mutations happening inside the family give way, as a moderate reflex, to the transformation of family law, as well as to the insufficiency of the access to law and justice

system, especially regarding legal information on rights, and how the system, as a whole, performs its objectives and answers to the citizens legal requests.

The ‘mapping’ we have elaborated and the insufficiencies we have encountered can act as a research agenda to be developed in the near future, in order to recognize the potentialities and the frailties of a law that is effective, accessible and promotes citizenship.

### **Bibliographical References**

Aboim, Sofia (2006), *Conjugalidades em mudança. Percursos e dinâmicas da vida a dois*. Lisbon: ICS/Imprensa de Ciências Sociais.

Antokolskaia, Masha (ed.) (2007), *Convergence and divergence of Family Law in Europe*. Amsterdam: Intersentia.

Bernini, Stefania (2007), *Family Life and Individual Welfare in Post-War Europe: Britain and Italy Compared*. Basingstoke: Palgrave Macmillan.

Cappelletti, Mauro; Garth, Bryant (eds.) (1978), *Access to Justice. A World Survey*. Milan: Giuffrè.

CNPCJR (2007), *Relatório Anual da actividade das Comissões de Protecção de Crianças e Jovens em 2006*. Lisbon: Instituto da Segurança Social.

Costa, Salvador da (2007), *O apoio judiciário*. Coimbra: Almedina.

Faget, Jacques (1995), “L’accès au droit: logiques de marché et enjeux sociaux”, *Droit et Société*, 30/31, 367-378.

Ferreira, António Casimiro (2005), *Trabalho procura justiça: os tribunais de trabalho na sociedade portuguesa*. Coimbra: Almedina.

Ferreira, António Casimiro; Pedroso, João; Dias, João Paulo; Branco, Patrícia; Lima, Teresa Maneca (2007), *A acção do Ministério Público no acesso dos cidadãos ao direito e à justiça, nos conflitos de família e do trabalho: um estudo de caso nos tribunais de Coimbra*. Coimbra: CES/Instituto de Investigação Interdisciplinar da Universidade de Coimbra.

Luca, Alessandra de (2007), *L’accesso alla giustizia in Inghilterra fra stato e mercato*. Turino: G. Giappichelli Editore.

- Martínez, M.<sup>a</sup> Olga Sánchez (2008), “El derecho ante los riesgos de las estructuras familiares plurales”, paper presented at the Research Committee in the Sociology of Law Annual Meeting, Milan-Como, 9th-12th July 2008.
- Ministério da Justiça (2008), *Sistema de Mediação Familiar*.
- Oliveira, Guilherme de (2001), *Temas de Direito da Família*. Coimbra: Coimbra Editora (2<sup>a</sup> edição).
- Oliveira, Guilherme de (2004), “Transformações do Direito da Família”, in *Comemorações dos 35 anos do Código Civil e dos 25 anos da reforma de 1977*, Vol. I. Coimbra: Coimbra Editora.
- Pereira Coelho, Francisco; Oliveira, Guilherme de (2003), *Curso de Direito da Família. Volume I*. Coimbra: Coimbra Editora (3<sup>a</sup> Edição).
- Pereira Coelho, Francisco; Oliveira, Guilherme de (2008), *Curso de Direito da Família. Volume I*. Coimbra: Coimbra Editora (4<sup>a</sup> Edição).
- Pocar, Valerio; Ronfani, Paola (2008), *La famiglia e il diritto*. Rome, Bari: Editori Laterza.
- Roseneil, Sasha (2006), “Viver e amar para lá da heteronorma: uma análise *queer* das relações pessoais no século XXI”, *Revista Crítica de Ciências Sociais*, 76, 33-51.
- Santos, Boaventura de Sousa (1995), *Toward a new common sense. Law, science and politics in the paradigmatic transition*. New York, London: Routledge.
- Zanatta, Anna Laura (2008), *Le nuove famiglie. Felicità e rischi delle nuove scelte di vita*. Bologna: Il Mulino.