Legal reasoning and stereotypes in the case law from a comparative family law perspective

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Abstract: The aim of this paper is the analysis of gender stereotypes in comparative family law, focusing on English and Italian case law, especially to the traditional gender roles: male-female, husband-wife, father-mother. Indeed, analyzing the grounds of the judgments in an area with a strong influence of political, philosophical, religious and social issues as family law, we find that stereotypes, especially gender stereotypes, could hide themselves behind apparently neutral concepts. But what is a "stereotype"? Especially a "gender stereotype"? It concerns the sex of a person, especially his or her failure to conform with socially accepted sexual behaviour about what "real" men or women do or don't do.

Keywords: Legal Reasoning – Same-sex – Gender – Stereotype – Comparative law

1. Introduction

It is a truth universally acknowledged that in comparative law the pattern of judgments is very varied. For instance in civil law systems themselves, such as in France, nowadays, the ideology related to the *juge est-il la bouche de la loi*, implemented during the French Revolution, justifies the synthetic model of French judgments, showing only hints of the facts of the case and the legal reasoning of the judge. On the contrary, in Germany, according to the systematic and phylosophical tradition, judges often describe the complexity of their logical and juridical reasoning. In the Common Law system in the case law method the "direct presence of facts distinguishes reasoning with previous decisions in the "classical" common law context from reasoning statutes or the constitution" (Komárek). Furthermore, judges have to detail each logical step according to the distinguishing principle. According to the model of judgments it is possible to find gender stereotypes in the legal reasoning because the pattern of decisions allows judges to express their own opinions in 'rainbow family' cases, therefore this is an empyrical analysis of the Italian and English case law.

2. The stereotype of "nature" in same-sex couple cases

In Italy, the traditional thought permeates so much the mentality of legal operators that only Italian legal scholar books need to specify the required difference of sex between husband and wife as a requirement for the validity of marriage. In fact neither the Italian Constitution nor the civil code explicitly provide for the sex difference between spouses as a prerequisite for marriage. This point was faced by the Counstitutional Court in 2010. It refers to the concepts of "natural", "marriage" and "celebration": the marriage stands as the foundation of the legitimate family "defined natural society with such an expression as can be seen from the preparatory work of the Constituent Assembly, which wished to emphasize that the family has original pre-existing rights even stronger than those of the State". In the latter half of the 20th century, marriage lost almost the aspects of the nature that were attributed to it by tradition and therefore lost its aspect of economic discipline for having a new role, mainly affective, and so focusing on the development of the personality of the person who enters into it. However, the 138/2010 Constitutional court's decision has blocked the marriage concept to older values rather than modern, especially with its express reference to the naturalness of "a consolidation of a thousand years tradition", despite the fact that the homosexual condition has not been unknown. These words were used by the Court of Cassation in the judgment 4184/2012 in which the judges overcame the stereotypes of nature and tradition in recognizing a foreign same-sex marriage as effective (though not valid) in Italy. Even in this case the reference to nature was inevitable for overturning what the Constitutional Court stated. In fact the Court of Cassation's judgment radically disputed the idea that the sex difference is a natural prerequisite of marriage, because the Article 12 European Convention of Human Rights took away any legal significance to the sex difference between spouses and including same sex families in the concept of family life.

In the English case law, the first case concerning a same-sex household was Fitzpatrick v. Sterling, ([1999] UKHL 42), related to the surviving partner in a stable and permanent homosexual relationship

that claimed succession rights under the Rent Act in respect of premises of which the deceased partner was a protected tenant. The claimant, who sued the case in front of all jurisdictional levels up to the House of Lords, was never recognized protection, even though his case satisfied the requirement of the Rent Act. Indeed, it was recognized that the claimant, involved in a homosexual relationship, was a member of the deceased's family. The House of Lords considered that the term *spouse* is to be defined as a person living with the original tenant as a wife or husband, and absolutely did not include a same sex partner. The expression used in paragraph 2 (2), could be applied only to legal spouses or heterosexual life partners, given the obvious literal meaning, but evidently it refers to a traditional cultural context. According to this decision, jugdes have *"to resist the temptation to change a bad law by giving it a new linguistic twist, because such changes could only be made by Parliament*". The cultural issue of tradition is related to the case Ghaidan v. Mendoza ([2004] UKHL 30, [2001]), very similar to the Fizpatrick case. The defendant argument is focused on parenthood: Same sex partnerships cannot be equated with family in the traditional sense. Same sex partners are unable to have children with each other, and there is a reduced likelihood of children being a part of such a household". Justice Nicholls affirmed that *"The line drawn by Parliament is no longer drawn by reference to the status of marriage. Nor is parenthood, or the presence of children in the home, a precondition of security of tenure for the survivor of the original tenant. Nor is procreative potential a prerequisite"*. There is a connection between the security of the tenure for the survivor of the couple living in that home and it consists of an important and legitimate purpose of a social nature since the couple shares the home and life together in that place. This circumstance is real, applicable and common both to heterosexual and homosexual couples. Justice Nicholls overcame the classic conservative traditional argument and its connection with the protection of children born to a married heterosexual couple.

A recent and very well-known case, decided by the Supreme Court of the United Kingdom [Bull & Anor v Hall & Anor [2013] UKSC 73 (27 November 2013)] could be abridged by the question formulated by Lady Hale at the beginning of the judgment itself: "*Is it lawful for a Christian hotel keeper, who sincerely believes that sexual relations outside marriage are sinful, to refuse a double-bedded room to a same sex couple*?". Baroness Hale's legal reasoning in this judgment fluorished in the definition of 'direct' discrimination according to EU law opposed to 'indirect discrimination', and what the meaning of the 'duty of accomodate' is. However, the real interesting core of her reasoning useful to underline the presence of stereotypes, even if implicit, is this statement: *"Homosexuals can enjoy the same freedom and the same relationships as any others. But we should not underestimate the continuing legacy of those centuries of discrimination, persecution even, which is still going on in many parts of the world. It is no doubt for that reason that Strasbourg requires "very weighty reasons" to justify discrimination on grounds of sexual orientation. It is for that reason that we should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion*". Although the main issue of this lawsuit is that the enforcing of non-discrimination principle with the freedom of society as a whole and, and at the same time, of its individual members, the content of this argument is almost unsettling. Indeed, this assertion highlights a fact related to past and present discrimination against homosexual people even if it does not seem to be stricly relevant to the decided case. It shows a nuanced sense of guilt for what still has not yet changed in other cultures, states or traditions that are discriminating and persecuting LGBTIQ people.

Recently, the England and Wales Court of Appeal (Bright & Anor v The Secretary of State for Justicee [2014] EWCA Civ 1628 (16 December 2014) decided the claim of two homosexual serving prisoners about the separation from their same-sex partners. In a restricted living environment such as a prison the behavior of inmates is a relevant safety issue. They complained an unlawful interference in their private lives according to Article 8.2. ECHR, that governs the proportionality and legality of the authoritative measures balancing them with the right to family life. The core of this decision was defining what 'insulting' or 'indecent' behaviour is when occurring in a prison, where "*it is not always possible to differentiate between consensual and coercive relationships in a custodial situation*". According to the Court of Appeal judges, the words 'insulting' and 'indecent' are ordinary words whose meaning is clear and well understood. They are sufficiently clear to form the basis of criminal offences. It is unrealistic (and not required by the Strasbourg jurisprudence) to expect the public authorities (in this case the Secretary of State) to provide a list of examples of 'insulting' and 'indecent' or other inappropriate behaviour. It is also unrealistic and unnecessary to expect him to spell out in

detail the kind of physical contact between prisoners (including cuddling) that is regarded as indecent or otherwise unacceptable. For these reasons the claimants' challenges were rejected.

3. Parenthood, religion and same-sex issues

It should be noted that in my mothertongue the word *pregiudizio* could be translated by both the terms "prejudice" and "prejudgment". In this perspective, the main issue solved by the Italian Supreme Court of Cassation is related to the question: "What is the hierarchy of values according to which the child should to be educated and brought up?" In this case, the father's point of view apodictically referred to "*the child's fundamental right to be educated according to both parents' principles and religious education".* This statement portrays the child as a passive object of her parents' desires, especially in consideration of the environment of origin of her Muslim father. Indeed, homosexuality and cohabitation of the mother with another woman means the formation of an unorthodox family situation according to religious teachings, related not only to the Muslim religion but also to other religions (such as Christian, Jewish, and so on). In this case, the lower courts have found that the child has received a negative impact related to her father's aggression, therefore the lower court gave the child exclusive custody to her mother. The Court of Cassation confirmed that the investigation about the influence of the mother's homosexuality on parenting does not matter. In fact, it is not sufficient in order to report generic unspecified "*negative impact on the educational level and the growth of the child - the family environment in which she lived with her mother - the specification precisely the lack of which had been stigmatized by the courts of appeal*". The judges of legitimacy also emphasize that "the basis of the applicant's complaint are not based on scientific certainty or data of experience, but only on the mere pre-judgment on homosexuality and it is detrimental to the balanced development of the child as living in a family centered on a homosexual couple. Between the alleged "pre-judgment" concerning the harmful effects of homosexuality and the demonstrated deleterious effects of paternal aggressive behavior, the Court has clearly specified its position, condemning also the possible alibi evidence of cultural and religious violence.

In a different case, the Juvenile Court of Rome authorized a step-child adoption for the partner of the child's mother. It is a very open minded decision, but in the legal reasoning there is a sentence that sounds out of place: *"homosexual parenthood is a divergent parenthood, but equally "healthy" and "worthy" to be recognized as such*". In this judgment, even if in a positive point of view, homosexual parenthood is related to the "*sanitarian*" concept of "*health*", while, as it is well-known, homosexuality is a personal condition and not a disease.

The most recent Italian judicial decision on this issue is related to the recognition of the same-sex parenthood to a child, the son of a couple of lesbian mothers, one Italian and one Spanish, regularly married in Spain according to the Spanish Law. The couple applied for registration of their son at the registry office of Turin. The child was born through a process of in vitro fertilization with a sperm donor and the fertilized egg which had been donated by the Italian woman, while the Spanish one had given birth to the child. The municipality refused to register the child's birth certificate because of the Italian law does not recognize any kind of parent-child relationship based on same-sex parenthood. The provision was legally challenged. The Court of First Instance stated that the transcription was "c*ontrary to public order understood as a set of principles established by the Constitution or otherwise founding the entire organizational system, including the rules of filiation that make express reference to the concepts of father, mother, husband and wife, the traditional stereotyped concepts of family members".* On the contrary, the Court of Appeal of Turin ordered the transcription of the child's birth certificate. In fact, it is not disputed that, from both the ethical and legal viewpoints, the identification of motherhood and fatherhood as a result of medically assisted heterologous procreation emphasizes the concept of voluntary behavior necessary for filiation as a choice and the recruitment of responsibility for parenting. Indeed, the Italian Parliament, with the law 154\2013 reforming the status of filiation, identified the concept of parental responsibility. In fact, the parent-child relationship changed deeply allowing several different parental figures as the result of new reproductive techniques: the genetic mother (who donated the fertilized egg), the biological mother (who carried out gestation) the social mother (who expresses a willingness to take on the parental responsibility); the genetic father, the social father (who take care of the child) or other social figures who may, in fact, not coincide with each other.

Recently, the English courts have been confronted with a case (Re J and S (Children) [2014] EWFC) 4 related to the presence of a double stereotypical prejudice: on the one hand it is based on ethnic

discrimination, provoking the escape of the family group from their home country, and on the other hand with the stereotype alleged by the family itself against homosexual foster parents who had been entrusted with two of the couple's children. This case is related to Slovakian Catholic citizens of Roma origins. They had to move from Slovakia to the UK because of the social deprivation and discrimination endured by the Roma community for many years. After they came to the UK, five of their ten children were taken in by foster families [[2013] EWHC 2308 (Fam)]. A homosexual couple took care of two of them. Their biological parents refused this solution and appealed against the foster care order. Their claim was based on these facts: they are a Slovak Roma family practising Catholic faith and a homosexual couple as potential adopters do not promote "the children's Roma heritage or their Catholic faith" because "they are a homosexual couple and as such their lifestyle goes against our Roma culture and lifestyle". Finally, they argued that their family has been subjected to a "conscious and deliberate effort" of "social engineering" to transform their "Slovak Roma children to English middle class children." The reaction of Justice Munby to the parents' claims concerns on the one hand the prevailing protection of the best interests of the child, in front of which even the pretense and inconsistent relevance of the children's ethnicity necessarily passes into the background, and on the other hand an obligation, not only moral, paid by the parents to adapt to the laws and customs of the country that welcomed them after their flight from a foreign land, in this case another country within the European Union. Justice Munby underlined that, even if the court must always be sensitive to social, cultural and religious circumstances of the particular child and his or her family, the case has to be judged *according to the law of England and by reference to the standards of reasonable men and women in contemporary English society. The parents' views, whether religious, cultural, secular or social, are entitled to respect but cannot be determinative. They have made their life in this country and cannot impose their own views either on the local authority or on the court*. In this specific case stereotyped prejudices were applied by the claimants, and Justice Munby had no shyness in censuring them from a legal viewpoint, recalling obedience to the laws of England for all those, citizens or foreigners, living on English soil. Furthermore, he made a moral comment, described the applicants themselves as "bigoted".

4. Conclusions

The empirical study of the Italian and English judgments showed different paths for identifying stereotypes. The Italian courts refer to abstract categories, because of the refusal of the Parliament to recognize equal treatment to LGBTIQ and heterosexual people. This forces the judges to face the legitimacy of traditional concepts, which are hidden in a narrative reconstruction disconnected from reality. In the English legal system, however, the recognition of equal rights has also allowed the judges' arguments to be more focused on the reality of the case and indentifying stereotype, especially in the arguments of the parties related to specific discrimination cases. The conclusion that could be drawn is that the stereotype is still present in the common mentality, but the English legal system, that has already fulfilled the recognition of equality among citizens regardless of their sexual orientation or gender, is more effective in contrasting stereotypes as demonstrated by the last case discussed, where it is said that cultural, social or religious elements can not prevail over law.