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The Impact of Multicultural Issues on the Notion of "Family Member"

1. Introduction

Cross-border families, multicultural issues, and migration flows are nowadays widespread in the EU. Family is at the centre of a new, complex scenario with a plurality of family forms and a mix of cultures and traditions.

In a global context of increasing migratory flows, the family maintains indeed an essential role in the migration plans and in the life choices of individuals, including the decision to emigrate and which family members must or can do that. According to Eurostat data[1] in the EU during the year 2014, about half (49.5%) of the people who decided to move from their country of birth to another country did so for the purpose of family reunification. Analysing the reason to migrate by gender, significant differences can be observed: the proportion of foreign-born women (58.2%) who decided to migrate for family reasons was a fifth more than the corresponding proportion among foreign-born men (40.4%). Conversely, fewer foreign-born women than men decided to migrate for work. More generally, the proportion of foreign-born immigrants who have been living in the country for 10 years or more and who migrated for family reunification (53.7%) was double the proportion of those who migrated for work (25.5%). Such family migration flows are significant and require specific attention.

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[1] Eurostat, Migrant integration, URL: https://ec.europa.eu/eurostat/documents/3217494/8787947/KS-05-17-100-EN-N.pdf/f6c45af2-6c4f-4ca0-b547-d25e6ef9c359, p. 66.

At the same time, migration can alter marriage and couple models, forms of cohabitation, and ways of living together in the host state. Thus, the "migrant family" becomes an element of a social system characterised by roles and relationships partially—or sometimes wholly—different from the ones of the countries of origin. Residence and settlement in the host country as well as migration plans and strategies depend on multiple factors. Significant examples of this huge variety can be: family reunions, mixed marriages, polygamous families, same-sex partnerships, small-sized families, foster families or those with adopted children, childless couples, single parents or voluntary commitments to take charge of minor children belonging to other families.[2]

Migration flows, with their cultural implications, can even redefine internal family relational dynamics. A crucial issue is the notion of the family member itself. Given that the model of the migrant family is so diversified in the EU, the notion of "family member" needs to be reconsidered to reflect the rich cultural diversity and mobility. The prevailing approach in law so far has been tendentially restrictive, so that some family relationships that are legally recognised in some national legal systems outside the EU are not recognised in the EU. Such an approach can be criticised as Eurocentric and perhaps even outdated in today's multicultural world.

Taking the above sociological context into account, the purpose of this article is to understand better what the concept of "family member" means and eventually propose a broader legal formulation to reflect the rich plurality of migrant family forms that exist within and outside the EU.

2. The Prevalence of *Status Personae* in the Family Sphere: Taxonomic Issues Linked to the Notion of "Family Member"

The problem analysis has to be hermeneutically centred on the *status personae.* In the legal tradition, there has always been a distinction between *status civitatis* (or citizenship) and *status personae* (personality or legal subjectivity).[3] Universal human rights are inclusive needing to be recognised irrespective of the specific citizenship *status*.[4] That means that this category of rights must be detached from the *status civitatis*/citizenship; its super-national nature linked to the *status personae* has to be recognised. This has implications on two respects: at constitutional level, fundamental rights must be guaranteed

[2] Cf. Crespi, Meda, Merla, Introduction: Gender and Intergenerational Relations (2018), pp. xxv–xxvi.

[3] Bader, Conclusion (1997), p. 182.

[4] Cf. La Torre, Citizenship And Beyond, Remarks On Political Membership And Legal Subjectivity (1997), p. 293: "[h]uman rights, especially legal personality, that is, the 'right to have rights', are not only morally but also conceptually prior to political rights and citizenship".

inside of the states while at international level they must be guaranteed outside the states and against the states if necessary.

The issues related to the family are placed in this context: being part of the family—or in other words, the quality of "family member"—refers to the person and the sphere of his or her fundamental, intangible rights. That is what can be defined as the *status personae*. This set of rights does not cease to exist when the subject moves to another country, alone or with the whole family.

The sphere of *status civitatis* cannot prevail over that of *status personae*. Nonetheless, the fact that the two spheres can be colliding is a real concern, as the *status civitatis* is linked to the concept of public policy, which varies from country to country.[5] This concept places strict limits on the recognition of matrimonial and family models among different legal systems. Significantly, by referring to the marriage model, a marriage celebrated for example in Spain or France may not be recognised as a marriage in Italy if the spouses are not of the opposite sex, due to the limits set by the criterion of public policy in the Italian law.

The problem is amplified when we consider legal systems that are more distant from each other. This is the case of any European country when it must evaluate the possibility of recognising family institutions, such as polygamy or *kafala*, recognised in most Islamic legal systems.

A serious and still unresolved problem opens up: the idea that the legal regulation of the family is an internal matter for individual countries, which concerns the political choices of individual states.[6] This approach clearly separates the sphere of the family from the one of fundamental human rights. It has the effect of diverging person and family: the person by itself, according to this approach, has inviolable rights. These rights also pertain to the family sphere, but while the person's fundamental rights remain the same wherever the person is located, his or her fundamental rights relating to the family sphere could be lost depending on the spatial context in which the person and/or the family is settled.

Such an approach risks undermining the dignity of the person. This is true both in case a country completely denies the recognition of a family institution legally permitted in another given legal system or in case this country opts to guarantee protection to a family situation, without however recognising it as formally permitted in the legal system of origin. Therefore, the limits set by public policy in the sphere of the family must be observed only with respect to the protection of fundamental principles linked to the person: dignity, equality and freedom. The choice instead of recognising only specific

5 Cf. Carapezza Figlia, Tutela del minore migrante ed ermeneutica del controllo (2018), p. 224.

6 Marella, The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law (2006), p. 79: "[a]ccording to the traditional approach, family law—more than other fields in private law—purports political objectives".

models under the historical and cultural "tradition" determines negative consequences, as it implies the superiority of one culture over another.

In the European context, in particular, such an approach is even more problematic as on the external plane it proposes a "Eurocentric" family model (for example through the refusal of polygamy), while internally it lacks homogeneity (*e.g.* the recognition of marriage in different EU states according to the spouses' gender). Limits and restrictions can instead operate, with intensity and modality to be calibrated, in all situations in which a model implies unequal treatment based on gender or regulations that in some way may harm human dignity or the individual freedom. In this sense, recourse to family models whose application appears to be "neutral" in terms of gender and fully guaranteed in terms of individual freedom may appear to be a viable way.[7] In any case, before defining concrete solutions to problems, it is good to acknowledge the existence of a taxonomic problem relating to the family in Europe today.

Not only is there an objective plurality of models in terms of establishing the relationship, such as marriage (between persons of opposite sex or between persons of both opposite sex or same sex), recognised partnerships (between same-sex persons or between persons of same or opposite sex) or *de facto* partnership with subsequent recognition, but there is also the need for a broader family taxonomy, which allows being considered different possibilities of identifying a "family member". In this regard, the analysis of a specific situation is of particular interest: the issue linked to the international *kafala*, a parental sponsorship provided in Islamic family law.

3. A Non-Eurocentric Approach to the Notion of "Family Member": Issues Relating to *kafala*

Developing the analysis of the notion of "family member", particular attention must be paid to parental relationships: filiation, adoption and other legal measures for protecting children through forms of guardianship. Problematic issues, mainly related to cultural and religious identity, are linked to this subject.

Islamic family law, in particular, exhibits many fundamental differences with respect to the EU countries. The presence of Muslim population in the EU is significant. In 2016, it was estimated at 25.8 million—4.9% of the overall population[8]—and it is continually growing, also due to the record influx of asylum seekers fleeing conflicts in Syria and other predominantly Muslim countries.

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7 Garetto, The Notion Of Marriage From An Anthropological Perspective – Originary Multiplicity of Forms and Subsequent Evolution (2018), p. 73.

8 Pew Research Center, Europe's Growing Muslim Population, URL: https://www.pewforum.org/2017/11/29/europes-growing-muslim-population/, p. 11.

The issue related to filiation and adoption is problematic for Islamic migrant families who live in the EU. To preserve blood ties as the only way of filiation and to protect inheritance and patronymic rights, most countries influenced by or based on *Sharia* law explicitly prohibit adoption (*at-Tabanni*) in their national legislation[9] by referring to the commonly accepted interpretation of verses 33:4-5 of the *Qu'ran*.[10] However, *Qu'ran* mentions the importance of caring for orphaned and abandoned children.[11] Therefore, those countries have another measure for protecting children, the *kafala*.

The etymology of the word *kafala* highlights two different meanings in Arabic: it can be related to taking in charge of all the needs of an individual, such as food, clothes, education, or to the "guarantee" (*daman*), taking in care of the individual in particular situations, a sort of surety bond.[12] *Kafala*, according to the etymological meaning, is defined so as a voluntary person's (*kafil*) commitment to take charge of the needs, upbringing and protection of a minor child deprived of his or her family (*makfoul*).[13] The same term "*kafala*" is often used also in other contexts, relating to migrant workers. As this form of *kafala* falls outside the sphere of family law, it will not be considered here.[14]

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9 Cf. the Morocco *dahir*, 18 December 1957, art. 83, that provides that "adoption does not have any juridical validity and it does not produce any of the effects of filiation"; Article 46 of the Algerian Family Code (9 June 1984), that states that "*l'adoption est interdite par la Chari'a et la loi*". Similarly, in Syria adoption is not recognized since it is in conflict with the Islamic *Sharía* and therefore with Syria's Constitution.

10 Cf. *Qu'ran* 33:5-6: "5. Allah has not made for any man two hearts In his breast; nor has He made those of your wives, from whom you keep away by calling them mothers, your *real* mothers, nor has He made your adopted sons your *real* sons. That is *merely* a word of your mouths; but Allah speaks the truth, and He guides to the *right* path. 6. Call them by the *names of* their fathers. That is more equitable in the sight of Allah. But if you know not their fathers, then they are your brothers in faith and your friends. And there is no blame on you in any mistake you may unintentionally make in this *matter*, but *what matters is* that which your hearts intend. And Allah is Most Forgiving, Merciful". (Emphasis added).

11 Roberts, The social laws of the Qu'ran (1990), p. 40.

12 About the etymology of the word *kafala*, cf.: Marotta, Italy and *Kafalah*: Reinventing Traditional Perspectives to Accommodate Diversity (2016), p. 193.

13 Bargach, Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco (2002), p. 29: "[u]nlike the Euro-American understanding of plain adoption as creating family, *Kafalah* does not automatically imply the living of the person taken into *kafalah* with those who offer the *kafalah*, for it may enact only a select number of provisions, such as a financial protection, a moral or physical guardianship, or a combination of some of them. It is a gift of care, however one chooses to implement it".

14 In the last decades the original Islamic law of *kafala* was expanded to include a system of fixed-term sponsorship of migrant workers in several countries in West Asia. This specific application of the *kafala* system is quite foreign to our analysis. For more information on this issues related to *kafala* working system and human rights, cf.: Rajan, South Asian migration to and remittances from Gulf (2018), p. 225.

In some instances, *kafala* is combined with tutorship.[15] Even though *kafala* arrangements are always intended to be permanent (in the sense that they last until the child reaches adulthood), they do not create a legal parent-child *status* (legitimate filiation) producing a specific personal *status* with legal entitlements. For this reason, despite *kafala* provides care, education and protection of the child, it is not legally considered equivalent adoption in European countries. There are indeed significant differences compared to adoption: the *makfoul* will not carry the surname of the *kafil* nor acquire inheritance rights and impediments to marriage are not established for *kafala*, unlike in case of adoption.

Different forms of *kafala* are provided by Islamic law.[16] *Kafala* can be laid down via notary decision, in case of care provided by an extended family member for a child with a known parent, or via judicial decision, in the circumstance of an abandoned child or a child whose parents are unknown.[17] *Kafala* can be provided also via administrative decision, by a specific commission.[18] The *kafala* system in the Islamic countries is supposed to provide procedures regarding evaluation and other mechanisms to ensure the best interests of the child.[19]

Certainly, *Kafala* can be considered beneficial in multiple aspects. It offers a family-based solution, in place of long-term residential care of the child. Furthermore, it provides protection from social stigmatisation in cases where children have been abandoned for reasons such as birth outside marriage.[20] Due to its structural flexibility, *kafala* allows adjustments concerning the evolution of the child's individual situation. Therefore, it offers the opportunity to ensure a future family-reintegration, when possible, and at the same time to provide family ties with the *kafil*'s family. *Kafala* provides access to family allowances without depriving the child of the rights towards the biological family, as natural family ties are not permanently removed.

Patrimonial issues in *kafala* can be significant. As not all children deprived of a family environment need to live in situations of economic hardship before being eligible for

15 See, e.g. Tunisia: Mclean Eadie, The application of kafala in the West (2018), p. 65.

16 There are other child protection measures in Islamic legal systems: *sarparasti* (Iran) and *damm* (Iraq).

17 Büchler; Schneider Kayasseh: Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates (2018), pp. 40f.

18 This is the case of Morocco, where a "family commission" for *kafala* is provided by the dahir 10 September 1993 that amended the Family Code. Cf. Bargach, Personalizing It. Adoption Bastardy Kinship and Family (2001), p. 76.

19 On the concept of best interest of the child, cf. Zermatten, The Best Interests of the Child Principle: Literal Analysis and Function (2010), pp. 483–499. For a general consideration see also Perlingieri, Il diritto del minore all'assistenza: aspetti problematici ed attuativi (1980), pp. 1041–1049.

20 This is particularly important in "a society in which the stigma of «illegitimacy and bastardy» is extremely potent", Bargach, Personalizing It. Adoption Bastardy Kinship and Family (2001), p. 74.

kafala,[21] the *kafil* that is entrusted of the protection of the child is also responsible of the administration, conservation or disposal of the child's property and can represent and assist him.[22] On the other hand, although the child has no legal right to inherit from the *kafil*, not belonging to his family, in practice very often the child, as *makfou*, is assigned an inheritance through testamentary succession.[23] According to Islamic law, an individual can control the inheritance of no more than one-third of his property or estate.[24] Within this proportion, the *kafil* can deliberately attempt, with testamentary dispositions, at ensuring equality between his natural children and the *makfou*.[25]

It must be underlined that the *kafala* system, provided in the Islamic countries, presents also some problematic aspects. The main issue concerns the uncertain legal *status* of the child. Some countries, like Morocco, informally admit even what could be considered a sort of "customary adoption".[26] This legal uncertainty depends on inadequate records being kept and can imply, sometimes, violations of the right to know one's origins. The *kafala* system lacks an accurate administrative and legislative framework and often does not provide effective monitoring of its development and a regular follow-up; that can allow accessible possibilities of revocation and can sometimes lead to cases of children's exploitation.

A relevant issue, central in perspective of possible enlargement of the notion of "family member", consists of the transposing of *kafala* in non-Islamic countries. The main advantage of this transposing consists of the cultural and religious continuity: child and *kafil* come indeed from the same social environment. That allows the preservation of family bonds, as the placement abroad can regard extended family members living abro-

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21 Assim, Sloth-Nielsen, Islamic *Kafalah* as an Alternative Care Option for Children Deprived of a Family Environment (2014), p. 331.

22 Detrik, Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and measures for the Protection of Children (1997), pp. 77f.

23 Assim; Sloth-Nielsen: Islamic *Kafalah* as an Alternative Care Option for Children Deprived of a Family Environment (2014), p. 330: "children taken into families under *kafalah* are not left out of the property distribution process as the *Qur'an* enjoins Muslims to assign portions of their wealth to others who, though unrelated to them by blood, are equally dependent on them".

24 Al-Azhary Sonbol, Adoption in Islamic Society: A Historical Survey (1995), pp. 48–50.

25 Hashemi, Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation (2007), p. 219.

26 Some Islamic countries, *e.g.* Morocco, have situations that can be defined "customary adoption". Cf. Bargach, Personalizing It. Adoption Bastardy Kinship and Family (2001), pp. 72–73: "[t]here is a family or customary adoption by which I mean the gift of a child from one family to another. The scenarios may vary widely, but generally in this kind of adoption a family with no child or one with only boys or only girls may solicit a brother or a cousin who may be willing to give a child. This exchange, often but not always between close kin (agnate or collateral), is an informal transaction that does not require a «legal» procedure".

ad and can realise a sort of international kinship care. However, we must be aware that the reception of a *kafala* placement within the legal system of a non-Islamic country is for sure complex. Furthermore, in some cases, it is not possible at all, as certain Islamic countries, like Egypt, Iran and Mauritania, strictly apply *Sharía* law and prohibit international *kafala*.[27] Other Islamic countries, like Algeria, Jordan, Morocco and Pakistan, are more flexible, deciding case-by-case.[28] A few Islamic countries, like Indonesia and Tunisia, lifted the ban of adoption, and now allow both international adoption and *kafala*.[29]

Equally complex, but even more delicate, results in the situation of non-Islamic receiving countries. Unless the receiving country decides to fully recognise *kafala* as legally regulated in the country of origin of the child, two options are possible. The country can refuse to recognise *kafala* placements, as *kafala* is a foreign concept to its legal system. This choice has serious consequences, as puts the child that already lives with his or her new family in a situation of limping *status* that implies uncertain and unstable nature of the residency *status* and limited access to social benefits and protection. The second option, after the child was brought into the territory of the receiving country, is to convert automatically *kafala* into adoption. That need to happen with the implicit acceptance of all the involved actors. In this way, however, the child's country of origin's legislation is clearly violated. However, at the same time, the child's best interests can be compromised, as this forced assimilation is not preceded by adequate evaluations, investigations regarding the child's adoptability, informed consent of the biological parents and proper preparation of the child and the "adoptive" parents.

4. The jurisprudence of the European Court of Human Rights and of the Court of Justice in the matter of *kafala*

The case law of the European Court of Human Rights (ECtHR) is the reference point for the protection of children's rights at the national level[30] with relation to *kafala*. The ECtHR delivered two judgments in that field: the case *Harroudj v. France* of 4 October

[27] E.g. the 19 June 1984 Algerian law, art. 46 expresses that "*l'adoption est interdite par la Chari'a et la loi*"; the Libyan law n. 15 from 1984; the "*dahir*" from Morocco, 18 December 1957, art. 83, claims that "adoption does not have any juridical validity and it does not produce any of the effects of filiation". Similarly, in Syria adoption is not recognized since it is in conflict with the Islamic *Sharía* and therefore with Syria's Constitution.

[28] About the application of *kafala* in Morocco, cf. Crea, L'evoluzione del diritto di famiglia in Marocco e la prospettiva italiana ed europea (2016), pp. 268f.

[29] For Tunisia, cf. Mclean Eadie, The application of kafala in the West (2018), pp. 64–65.

[30] An updated overview on the national jurisprudence related to *kafala* and best interest of the child in a single MS (Italy) is provided by Deplano, *Kafalah* e controllo di conformità all'ordine pubblico (forthcoming).

2012 and the case *Chbihi Louboudi and others v. Belgium* of 16 December 2014. Their examination offers essential indications to the States at the time of providing adequate legal recognition to the *kafala* in domestic law. Both cases, although with specific differences, present elements of similarity.

The first case concerned the refusal of permission for a French national to adopt an Algerian child already in her care under the Islamic-law form of *kafala*. The Court held, unanimously, that there had been no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights. The Court found that a fair balance had been struck between the public interest and that of the applicant, the authorities have sought, with due regard for cultural pluralism, to encourage the integration of *kafala* children without immediately severing the ties with the laws of their country of origin.[31] The decision emphasises the individual's cultural identity and the links of that identity to the country of origin, rather than the receiving country's interest in the uniform application of its law to its nationals.[32] In the alternative *status personael status civitatis* the first one seems to prevail on the other one.

In the second case, *Chbihi Louboudi and others v. Belgium*, the plaintiff is a couple of Moroccan spouses dealing with the refusal by the Belgian courts of an adoption order regarding their niece. The European Court has held that the right to respect for family life does not require signatory states to grant an adoption if a child has been placed in the custody of other persons by a *kafala*.

The rulings of the ECtHR and the different positions of the States in matters of *kafala* highlight the difficulties of coordination between different legal systems. Dealing with *kafala*, it is challenging to balance the interests at stake: the protection of the child on the one hand, and the interests of the State on the other hand.

The European countries have to face the difficult choice whether to assimilate or not the Islamic institution to the adoption, despite the express bans, provided by the *Qu'ran* and the *Sharía*, of the countries of origin of the minors, or to find other solutions for the transposition of *kafala* in their legal systems. Furthermore, it must be considered as eventual the possibility of circumvention of immigration rules through the *kafala*: this could represent an additional problematic issue in the future choices of the EU and of the single states to the *kafala*. For sure this could not be a decisive element, as the concern of circumvention cannot prevail on the fundamental human rights, nor on the right of

31 See Muir Watt, Future directions? (2014), p. 381.

32 See Insch, *Harroudj v. France*: indications from the European Court of Human Rights on the nature of choice of law rules and on their potentially discriminatory effect (2014), p. 43: "[t]he view of the private international law of family relationships that the Court approves of in the Harroudj case is the modern (or postmodern) view emphasising the individual's cultural identity and the links of that identity to his or her national origin, rather than the 19th century view (also held by most private international lawyers for much of the 20th century, for that matter) based on the State's interest in the uniform application of its law to its nationals".

the "migrant family" to have recognised its identity and, in some way, the legal structure provided by the country of origin.

A recent judgement of the Court of Justice of the European Union in *SM (Algeria) v Entry Clearance Officer, UK Visa Section,*of 26 March 2019 is directly related to the *kafala*. The case concerned an application for entry clearance for a child placed in Algeria under the *kafala*. The application was made by two spouses of French nationality resident in the United Kingdom. The Entry Clearance Officer rejected the application on the ground that the *kafala* cannot be recognised as adoption. After several unsuccessful appeals, the case reached the UK Supreme Court that referred the question to the Court of Justice of the European Union. The Court considered whether the child under the *kafala* must be considered a "direct descendant" or an "extended family member" within the meaning of the Immigration (European Economic Area) Regulations 2006, Regs 7 and 8. This law, based on the Directive 2004/38/EC, implements the right of free movement of EEA (European Economic Area) nationals and their family members in the United Kingdom. The definition of Core family member (of an EEA national) only includes a spouse or civil partner, children under 21, or dependent children of any age and dependant parents. A person outside of this definition (for example an unmarried partner) may fall under the category "extended family member". While the Directive 2004/38 requires member states to "facilitate entry" for extended family members, it does not seem to grant any rights to extended family members.

The Court of Justice stated that as the main part of Islamic countries prohibit adoption, *kafala* is the only legal way to assume in that countries responsibility for the care, education and protection of a child. The child under the *kafala* system must be considered as one of the "other family members" of the EU citizen entitled to this legal guardianship in the Islamic country. The decision of the Court of Justice is directly related to the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, which applies only to adoptions that "create a permanent parent-child relationship" (Article 2, Convention on the Protection of Children) and that, for this reason, is not supposed to cover *kafala*.

With respect to the rights of the child, in case of adoption two international conventions must be considered: the United Nations Convention on the Rights of the Child (1989) and the mentioned Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (1993). Both the conventions apply a principle of subsidiarity,[33] but while the first one is centred on the "care" for the child, the Hague Convention emphasises the "family".

[33] See Engle, The Convention on the Rights of The Child (2011), p. 814: "[t]he doctrine of subsidiarity is not expressly written into the CRC. In the CRC however the theory is implicitly expressed in the idea of a "national preference" to adoption, or even foster care or care in an orphanage to international adoption 39 as expressed in Articles 20(3) and 21(b)"; Brakman, The Principle of Subsidiarity in the Hague Convention on Intercountry Adoption: A Philosophical Analysis (2019),

Islamic countries were critical from the beginning with the approach of the Hague Convention, as it seemed to disregard the UN Convention on the Rights of the Child by not providing provisions that would consider the child's nationality, culture, or religion. These specific necessities were expressed clearly in the African Charter on the Rights and Welfare of the Child (1999).

The decision of the Court of Justice on the *kafala* is focused on the category "family". It would have been necessary to pay more attention for the dignity of the child—instead of to the vague term "interest of the child", still adopted in the most recent of the universal human rights treaties but certainly generic and ambiguous.[34] At the same time, the concern about the care for the child under the *kafala* would have suggested probably to reformulate the same notion of a family member, overcoming the distinction adopted/taken in charge through *kafala*. In that way, the *status personae* would have prevailed on the *status civitatis,* and the fundamental rights of human being would have also been guaranteed in the family sphere. These rights indeed go beyond the simple free movement rights (the Court grants indeed to a child under *kafala* his or her entry and residence, if the assessment of his or her "best interests" is positive) and concern the dignity of the subject: the Court recognised that the child under *kafala* was abandoned at birth and she had no other family except her *kafil* (as to say her "guardians"). The qualification as "extended family member" does not correspond to reality and, in some way, affects the same dignity of the child.

5. Conclusion

The significant presence of cross-border families in Europe is an inescapable matter of fact. The number of "migrant families" is on the rise. Thus, we have to rethink completely the legal model of the family. The traditional, Eurocentric, family structure needs to be overcome by a more flexible and dynamic model of the family that can meet the demands of a multicultural society. On the axiological plane, the limit threshold of this change is represented by the respect for a triad of values: freedom, equality and dignity. This is a central issue: the respect of family traditions that express cultural identity despi-

p. 207: "[c]onceptually, the HCIA rests on two ethical principles: the best interests of children and subsidiarity".

[34] See Carozza, Subsidiarity as a Structural Principle of International Human Rights Law (2003), p. 60: "[d]espite the multiplication of legal instruments, ambiguity still characterizes some of the most fundamental terms. Consider, for example, the most recent of the universal human rights treaties, the Convention on the Rights of the Child." 28 While its provisions are much more detailed and comprehensive than the earlier and more generic protections in the International Covenant on Civil and Political Rights, it still relies throughout on the concept of "the best interests of the child. Yet this term, in the abstract, is so vague that its meaning effectively varies widely across the cultural, legal, and political contexts in which it may be applied".

te being an aspect of great importance cannot prevail on this triad of principles that are the core values of a democratic society.[35] On the other hand, these principles must be the guiding criteria of any new change to the family structure.

Defining (or rather: redefining) the notion of "family member" is an urgent necessity in contemporary Western society.[36] The *kafala* system transposed in the EU countries can be considered as the paradigmatic example of the need for an enlargement of the formal structure of the family. On one side, *kafala* cannot be assimilated in any form of adoption. This impossibility depends on several reasons: respect of the rules of the country of origin and protection of the same interest of the child, in some cases (with adoption, for instance, the child would lose hereditary rights respect the biological parents and relatives). Furthermore, *kafala* is expressly provided at Article 20 of the UN Convention on the Rights of the Child (1989) and clearly distinguished from adoption. On the other side, considering the child under *kafala* just like "other family member" reduces the sphere of the exercise of his rights, and at the same time undermines his dignity.

Kafala actually is just a single case, among many others, that we can consider to support the idea of redefining the notion of "family member". In this perspective, the relation stepchildren-stepparents, for instance, can be significantly taken into account.[37] Even more problematic are the issues related to non-matrimonial durable relationships: in the European Union, the partner of an EU citizen is not qualified as "family member", nor as "other family member".[38] Polygamous marriages present significant problematic issues. The objections to these forms of marriage, as already pointed out, originate

[35] On this triad of values, see: Garetto: Multiplicity of marriage forms in contemporary South Africa (2014), pp. 71f.

[36] See Mahoney: Reformulating the Legal Definition of the Stepparent-Child Relationship (1994), p. 191: "[t]he growing number of adults and children in our society who reside in nontraditional family settings, including stepfamilies, has caused family scholars to question whether the legal recognition, benefits, and burdens associated with legal family *status* should now be extended beyond the traditional nuclear family".

[37] Ibid., pp. 191f.: "[i]n addition to the obvious issues of child support and custody, questions have been raised about the proper treatment of stepfamilies under the laws governing inheritance, the construction of wills, family tort immunity, parent-child consortium claims, the vicarious liability of parents for the torts of their children, workers' compensation survivors' claims, the right of the parents to choose their children's surnames, the authority of parents to discipline children, the civil child protection system, special crimes of abuse in the family, and incest. The catalog of state law issues reveals the complexity of the legal parent-child *status*, which has provided the backdrop for reconsidering the legal definition of the stepparent-child relationship". Chiappetta, La "semplificazione" della crisi familiare: dall'autorità all'autonomia (2019), pp. 447f.

[38] Feldman; Mazzeschi: Durable Relationship and Family Members "by Analogy" in the European Union (2018), p. 175: "[t]he partner with whom the Union citizen has (only) a durable relationship, may enforce derived right of residence, but does not qualify as a family member or "other family member" of the EU citizen".

maybe from a Eurocentric attitude but on the other hand, the discrimination suffered by women in the typical polygamous form represents an insurmountable problem unless considering a hypothesis of gender-neutral marriage. The UN Committee on the Elimination of Discrimination against Women (CEDAW) calls for States Parties to "discourage and prohibit the practice of polygamous marriage",[39] but at the same time states that "with regard to women in existing polygamous marriages, States parties should take the necessary measures to ensure the protection of the economic rights of women".[40] The convenient form to ensure special protection these weakest parties seems to be the enlargement of the notion "family member" itself.

Contemporary family is inserted in the patchy framework. Not only is this an interesting insight, but it is also a significant challenge for a lawyer. Taxonomical analysis of the different forms of family relations represents now a necessity. This complex analysis can lead finally to a reformulation of the same notion of "family member".

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[39] CEDAW Gen Rec 34, paragraphs 32, 34.

[40] CEDAW Gen Rec 29, paragraph 28. Cf. Banda, Eekelaar, International Conceptions of the Family (2017), p. 853.

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Roberto Garetto

Vpliv večkulturnih vprašanj na pojem družinskega člana

Nedavni družinski migracijski tokovi v EU so pomembni in zahtevajo posebno pozornost. Migracije lahko vplivajo na zakonsko zvezo, oblike partnerstev in sobivanja ter lahko celo spremenijo notranjo družinsko dinamiko odnosov. Ključno vprašanje je pojem družinskega člana. Napolniti ga je namreč treba z novo vsebino, tako da bo odražal bogato kulturno raznolikost in mobilnost. Doslej je bil prevladujoči pravni pristop restriktiven in evrocentričen. Sorodstvene vezi, ki so pravno priznane v nekaterih nacionalnih pravnih sistemih zunaj EU, v EU niso priznane. Cilj prispevka je okrepiti razumevanje pomena pojma družinski član in predlagati širšo pravno formulacijo. Na teoretični ravni je pojem migrantskega družinskega člana obravnavan glede na razlikovanje med statusom *civitatis* (oziroma državljanstvom) in statusom *personae* (oziroma osebnosti, pravne subjektivnosti), ob upoštevanju povezanih vprašanj človekovih pravic. V zvezi s tem je zaradi čedalje večje prisotnosti muslimanskega prebivalstva v EU še zlasti zanimiva analiza posebnega položaja – mednarodne *kafale*, starševskega pokroviteljstva, ki ga omogoča islamsko družinsko pravo. Vprašanje, povezano s sorodstvenimi vezmi in posvojitvijo, je za islamske migrantske družine, ki živijo v EU, problematično, saj Koran prepoveduje posvojitev. *Kafala* je glede na svoj etimološki pomen opredeljena kot prostovoljna zavezanost (*kafil*) osebe k prevzemu odgovornosti za potrebe, vzgojo in varstvo mladoletnega otroka, ki je izgubil družino (*makfoul*). Avtor opozori na pomembne razlike v primerjavi s posvojitvami: *makfoul* nima niti priimka *kafila* niti ne pridobi dednih pravic; poleg tega za *kafalo* ni ovir za sklenitev zakonske zveze. Prispevek obravnava tudi premoženjska vprašanja v zvezi s *kafalo*. Glede na možno razširitev pojma družinskega člana, ki bi vključeval prenos *kafale* v neislamske države, je obravnavana tudi s tem institutom povezana sodna praksa Evropskega sodišča za človekove pravice in Sodišča EU in tudi s tem povezane mednarodne konvencije. Ta kompleksna analiza pripelje do popolnega preoblikovanja pravnega modela družine in še zlasti pojma družinski član. Tradicionalno evrocentrično družinsko strukturo je treba preseči s prožnejšim in dinamičnejšim modelom družine, ki lahko izpolni zahteve večkulturne družbe. Taksonomska analiza različnih oblik družinskih odnosov je tako zdaj nujna.

Ključne besede: *kafala*, družinski član, priseljenska družina, posvojitev, otrokove pravice.

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Roberto Garetto

The Impact of Multicultural Issues on the Notion of "Family Member"

Recent family migration flows in the EU are significant and require specific attention. Migration can alter marriage, couple models, forms of cohabitation and can even redefine internal family relational dynamics. A crucial issue is a notion of "family member" itself. This notion needs to be reconsidered to reflect the rich cultural diversity and mobility. So far, the prevailing approach in law has been tendentially restrictive and Eurocentric. Family relationships that are legally recognised in some national legal systems outside the EU are not recognised in the EU. This article is aimed at understanding better the meaning of the concept of "family member" and eventually at proposing a broader legal formulation. On the theoretical plane the notion of migrant "family member" will be considered in relation to the distinction between *status civitatis* (or citizenship) and *status personae* (or personality, legal subjectivity), taking into account related human rights issues. In this regard, due to the growing presence of Muslim population in the EU, the analysis of a specific situation is of particular interest: the international *kafala*, a parental sponsorship provided in Islamic family law. The issue related to filiation and adoption is problematic for Islamic migrant families who live in the EU, as the Qu'ran prohibits adoption. *Kafala*, according to its etymological meaning, is defined as a voluntary person's (*kafil*) commitment to take charge of the needs, upbringing and protection of a minor child deprived of his/her family (*makfoul*) . Significant differences with regard to adoption will be pointed out: the *makfoul* will not carry the surname of the *kafil*, nor acquire inheritance rights; furthermore, impediments to marriage are not established for *kafala*. Patrimonial issues related to *kafala* will be taken into account as well. In the perspective of possible enlargement of the notion of "family member", consisting on the transposing of *kafala* in non-Islamic countries, the jurisprudence of the European Court of Human Rights and of the Court of Justice in the matter of *kafala* will be considered, as well as the related international conventions. This complex analysis will lead to a complete rethinking of the legal model of the family, aimed at the reformulation of the same notion of "family member". The traditional Eurocentric family structure needs indeed to be overcome by a more flexible and dynamic model of the family, that can meet the demands of a multicultural society. Taxonomical analysis of the different forms of family relations represents now a necessity.

Keywords: *kafala*, family member, migrant family, adoption, rights of the child.