Filiation between Law, Language, and Society

By Ilaria Pretelli

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11:30

Good morning and thank you, Mr Chairman. I wish to express my warm gratitude, to begin with, to Yuko Nishitani and Cristina González Beilfuss for their generous commitment to our conference, and for having shared with us their concerns and suggestions. They have made it quite clear that we need to better address, as soon as possible, the existing conflicts of laws on filiation, which are now deprived of an adequate legal framework.

(C) Leonard J Matthews

1. The Practical Problem

As we have seen, what emerges as a problem of private international law is that of **recognition of foreign birth certificates which are contrary to the forum's public policies.**

There is a clash between different perspectives emerging from approximatively four groups of States:

Certain States that welcome same-sex marriage and rainbow families but consider egg donation and surrogacy to be contrary to their public policy. Others that consider same-sex marriage and rainbow families to be contrary to their public policy, but that authorise egg donation and surrogacy. Others that consider all of this to be contrary to public policy, and yet others that are liberal as regards all of those policies.

Against this background, the circulation of birth certificates among these groups of States is problematic and creates obstacles to the free movement of persons and families.

2. Political, Ethical and Legal Issues

Behind this practical problem is the wider problem of the **governance of a new kind of filiation**. The institution of filiation with which we are acquainted concerns natural filiation – which is the birth of a child from the mother's womb - and legal filiation - which is the attribution of paternity by operation of law on the basis of presumptions or voluntary

declarations. In recent years, a new form of filiation has seen the light of day, which **appears to be somewhere in between legal filiation and adoption: it is contractual filiation.**

A contractual filiation is **a filiation attributed on the basis of a contract organising the birth of a child**. One of the most sophisticated legislations in this respect, is that of the **Canadian State of British Columbia**. In the same jurisdiction, it has been acknowledged that a contractual filiation may also be the result of a **private agreement between three or more adults**, to which the law can give relevance, a priori or a posteriori.

When a child is born as the result of a contractual agreement, that child will have **a multiple parentage**. In addition to the biological parents – of whom there may be up to three: i.e. two women, the egg donor and the surrogate mother, and a man, the sperm donor – the intentional parents or their partners will possibly participate in the child's upbringing.

In connection with this new reality, law is faced with two urgent questions: **the first concerns governance of the fertility and surrogacy industry with a view to preventing tailspins and falls into criminal activities.**

"Ad for surrogate mothers, Burbank, California, USA" by gruntzooki

We sadly have already been experiencing baby farms and commodification of children in the context of illegal adoptions. In December 2020, the Swiss Federal Council has had to acknowledge that Swiss authorities had failed to prevent illegal adoptions despite evidence of sometimes serious irregularities. This happened in particular, but not only, from the 70s to the 90s in Sri Lanka.

The second urgent legal need concerns the development of an **appropriate common and scientific terminology and legal framework for the following issues:** contractual filiation, birth certificates attesting it, and the rights and duties of each of the persons intervening in the contract of birth, as well as an approach to transsexual, intersexual and queer parents, and multiple parents.

In the next minutes, I will attempt to sketch the interrelatedness of legal, linguistic and societal developments, with the aim of encouraging a way out of the present debate which tends to polarise into the **opposition between two antagonistic ideas of the family: a traditional one and a progressive one.**

3. Political, Ethical and Legal Issues

Private international law has developed some of the most sophisticated theoretical paradigms in legal science. At the very beginning of its study as an autonomous scientific discipline, in the **nineteenth century**, many authors believed and taught that private international law was **ideologically neutral**: it was a mere **technique of geographical allocation of legal disputes: Recht über Recht**. Against this background, Pasquale Stanislao Mancini formulated the hypothesis that the creation of supranational entities, such as the Hague Conference, would bring the conflict of laws to an end and ensure international harmony of solutions, respect of the parties' legitimate expectations and legal certainty.

Slowly and steadily, the doctrine discovered, throughout the **twentieth century,** that such neutrality was a myth and that, like any other legal discipline, private international law was infused with ideologies. It was found that even the simple anchoring of the personal status to nationality or domicile and habitual residence reflected imperialist policies: the first being more attractive for States with large-scale emigration, the second for States with large-scale immigration. This is just an example of how to extend the reach of legislative sovereignty by means of private international law. Acknowledgment of the substantive law dimension of the conflict-of-laws led to loss of hope on the actual possibility of solving all kinds of conflict of laws, just by developing private international law tools and techniques. It seemed then that the very structure of each national legal order, its **national substantive rules and legal theories influenced private international law rules to a large extent**: in the domaine of

characterisation and in the choice of connecting factors, not to mention the ***lois de police*** and the public policy exception.

At the very beginning of the **twenty-first century,** we are now witnessing a third step: the perspective is reversed with **private international law tools and techniques being used to influence the legislative evolution of national legal orders**, under the control of supranational courts such as the Court of Justice of the European Union and the European Court of Human Rights.

Paradigmatic is the example of recognition of birth certificates resulting from surrogacy arrangements. As we have seen, the recognition of these foreign birth certificates challenges the substance of domestic legislation by confronting States with reverse discrimination: why are couples entitled to sign and enforce surrogacy arrangements abroad, in order to raise their children at home, and not to proceed directly at home?

"baby handover" by pinguino

It is becoming increasingly clear that the interplay between **private international law and fundamental rights is ultimately promoting the consecration of a right to parenthood**.
The EU is now working on a project for the creation of a European Certificate of Parenthood. The title as such is problematic in that, in putting the focus on parenthood, it could be understood as aimed at creating a sort of “certified parent”.

HAS

"who ~~is~~ a parent in a Member

HAVE

State should ~~be~~ a parent in all

Member States".

EUROPEAN CERTIFICATE OF

~~PARENTHOOD~~

FILIATION

The use of the term parenthood reflects the policy resumed in the slogan coined by Ursula von Der Leyen to the effect that "**whoever is a parent in a Member State should be a parent in all Member States**". Here the accent is placed on the parent, as if the child were solely an element of the parent's identity. The European Court of Human Rights has already stated that being a biological parent is an important aspect of a person's private life and, consequently, a biological parent has "a protected interest in establishing the truth about it and have it recognised in law". However, the European Court of Human Rights has also said that the protected interest of the parent must not take precedence over that of the child.

This accent on the right of parents appears quite retrograde in light of the evolution of the legal developments on parent-child relations, and it is worth reflecting on the choice of terms. A better policy option would have been for von Der Leyen to say "**whoever has a parent in a Member State** should have the same parent in all Member States" and, consequently, opt for a **European Certificate of Filiation** and not of Parenthood.

4. *Status Filiationis* in Historical Perspective

The term **filiation** has its origins in Roman Law, but curiously, it does not appear in the legal texts until the Middle-Ages. It is seen as a paradigm shift and the end of the times when **children were viewed as property**. There certainly was, at those time, a right to parenthood, a right which belonged to men, and reflected the very idea of **Patria Potestas,** Paternal Power, power over children, wife, and the other ***famuli,*** servants and whoever else was necessary to run a comfortable home. This right of property explains the right of fathers to sell their offspring or even to kill them. It is clearly stated in the formula for the adoption of children made by Aulo Gellio in the second century AD which clearly testifies to the ius vitae necisque and reads: ""Express your desire and ordain that Lucius Valerius be the son of Lucius Titius as justly and lawfully as if he had been born of that father and the mother of his family, and that Titius have that power of life and death over Valerius which a father has over a son. This, just as I have stated it, I thus ask of you, fellow Romans."

Our legal culture is still subject to this **unfortunate imprint**, which we share with other legal cultures as well. We may take the example of the dowry or bride price, which has been said to ultimately reflect the price paid by men to have women's offsprings belong exclusively to them. These practices may seem shocking to the attendees of this webinar, but one need only look slightly behind, or around us, to realise that they are not.

There are many legal rules which allow men to choose their descendants by excluding their biological sons and daughters from their genealogical line and by including sons and daughters of other lines to their own.

A series of legal rules – widespread in the European codifications of the previous century and still in existence in non-Western legal orders – allow **biological fathers to disavow children born out of wedlock, excluding them from their genealogical line**.

Fathers and, in this case, mothers, also have a choice to add children to their lineage: adoption and the institution of possession of status allow parents to choose the children who will continue their genealogical line.

The possession of status gives legal relevance to social parent-child relationships regardless of the biological reality. In France, Article 311-2 makes it subject to the following conditions: "*La possession d'état doit être continue, paisible, publique et non équivoque*". Adoption is,

as we have seen a legacy from Roman law, which entails the intervention of public authorities. It has maintained its **original function of allowing a couple to have a descendant.** This explains its most acute effect: that of severing the parental ties between adopted children and their biological ancestors. **The severance of these ties may also respond to a preoccupation with limiting the number of persons entitled to intervene in the upbringing of the child**, since reducing the number of persons is likely to reduce the number of possible conflicts arising in connection with the educational, health, religious and other choices with which a parent is confronted in the course of a child's upbringing.

However, severing the parental ties between adopted children and their biological parents serves, in the first place, the interests of the adopting parents, who acquire an instrument with which to perpetuate the family name and preserve its patrimony. Full adoption is thus considered a classist and patriarchal institution.

This situation is very different from that of other institutions, which are more respondent to the present *Zeitgeist*, such as the Muslim *Kafalah*, where **the accent is put on the child**, and the child's needs, education and overall care. The diffusion of simple adoption in Western countries, where children maintain their original identity, surname and parentage, testifies to this trend.

"Grandma and Grandson, Family gathering at Navruz, Bukhara, Uzbekistan" by Boonlong1

5. Shifting the Balance between the Respective Rights and Duties of Parents and Children

Around the world, legislators are changing the legal terms used to describe the relation ship between a parent and a child in terms of "**parental authority**" a terminology which is very close to that of "patria potestas" and which has, as a correlative, the **duty** of wives and children **to obey** the man entrusted with parental authority. Here too, a series of legal rules - widespread in the European codifications of the previous century and still in existence in many legal orders - prescribe a duty for wives and children to obey to the head of the family.



Obedience

Correctional Powers

Zahlvaterschaft

« La fille est considérée comme étrangère à la personne dénoncée (le père biologique) et n'a droit à aucune indemnité, car elle est le résultat d'un acte illégitime cautionné par sa mère »
(Cour de cassation du Maroc - cas de viol)

"Black and white photographs old Russian family." by petukhov.anton/ "A Muslim family, Philippines, 1890-1907" by J. Tewell/ "Muslim family" by vhines200

In the fascist-inspired vision of the family, daughters and sons were expected to obey their father, the other male members of their father's family, and subordinately their mother. Disobedience led not only to the exercise of "correctional powers" but even to radical sanctions, such as removal from the family and placement in correctional institutions. The father could establish in his will compulsory conditions for the mother to bring up “his” children and to administer the children's property (which was tantamount to allowing him to administer his property after his death). Control over the mother's compliance with these conditions was entrusted to a body called the "family council" which was composed of the male members of the so-called extended family (grandfather, grandfather's brothers, uncles and, if they were of age, brothers of the orphan). The council also had authorising functions, with which to formalise the mother’s lack of capacity to make choices on the education of her children.

Until the seventies, in Switzerland Article 309 of the civil code of 1907 granted the natural child (or its mother) an action for the establishment of a sort of “monetary paternity”

(so-called Zahlvaterschaft) which would not establish any parental link between a child and a father but would, instead, make the latter liable for alimonies to be paid to the child. In sum, the structure was that of an action to redress a tort.

This approach was (and still is) common in many jurisdictions which do not give children or their mothers the opportunity **to file a paternity action** against a biological father.

A major cultural shift in the recognition of children's rights vis-à-vis their parent is the well known 1989 UN Convention on the Rights of the Child which has also brought about **a series of linguistic changes.** One of the most important is the abolition of the term parental authority in favour of that of **parental responsibility** which reassesses the parent-child relationship by attributing rights and duties to both parties and not, as in the original concept, by concentrating the rights on parents, in particular male parents, and the duties on children. Among the most significant rights attributed to children by the 1989 UN Convention and other instruments are the following:

"Through the eyes of a child" by robynejay

1. The **right of the children to be cared for in a way that ensures their wellbeing,** with the correlative duty of their parents to provide for them, or, failing this possibility, the duty to ensure that children receive a substitutive care in the form of foster care, kafalah or other instruments;
2. The **right of the child to have access to their origins, as a means of ensuring the integrity of the child's identity**, which encompasses the right to search and file for the legal establishment of their paternity and maternity and search for other family members (as siblings).

3. The **right of children to have a say as regards their custody**, when such custody is the object of litigation between the persons to whom the child is entrusted.

It is our common responsibility to make sure that these rights are respected at global level, by contributing to the cultural shift brought about by the UN Convention.

In addition, the implementation of the Convention is now monitored by the United Nations Committee on the Rights of the Child, a body of eighteen independent experts based in Geneva. On 19 December 2011, the United Nations General Assembly approved a Third Optional Protocol on a Reporting Procedure, which allows individual children to file complaints regarding specific violations of their rights. The Committee is empowered to adjudicate the 46 States Parties, and many complaints are already under review, especially by migrant and refugee children. This has created a mechanism similar to that provided by the European Convention on Human Rights, specifically for children, with the power to order states to comply with the measures it pronounces. The Committee also monitors the implementation of two optional protocols to the Convention, which prohibit the sale of children or their exploitation, including child prostitution, child pornography and the involvement of children in armed conflicts. These instruments promote a cultural shift dedicated to considering **children as vulnerable persons, rather than the "offspring" of someone above them**.

6. Characterisation of contractual filiation

Another tricky word is the word "**certificate**" when it refers to birth certificates drafted in conformity with contractual filiations.

This word also has Latin origins: a certificate is a document that attests the truth (certum facere). Before the advent of contractual filiations, a birth certificate was aimed at attesting the factual reality that a certain baby was born to a certain woman who happened to be married to a certain man (or not) at the time of the presumed conception of the baby.

In principle, birth certificates attesting natural and legal filiations do not encounter obstacles when presented abroad.

The problem has arisen with certificates attesting contractual filiations.

These documents are **ontologically different from the traditional ones and integrate what appears to be a new kind of certification**, which is somewhere in the middle between legal filiation and adoption.

The problem has been seen by private international law scholars as a problem of recognition of foreign birth certificates contrasting the forum public order, but a certain hesitation is evident. This suggests to approach the problem from another perspective. On closer inspection, the problem is one of characterisation. How to we characterise these **contractual filiations for the purposes of private international law?** The existing laws and systems of private international law have rules on filiation, including legal filiation, and adoption, but they do not have rules on contractual filiation and they certainly do not provide for **multiple parentage of children.** Hence, over and above the problem of the recognition of foreign certificates, the underlying issue is that of an **increasingly fragmented parenthood, which will likely lead to a graduation of rights and duties of the parents of a child.**

Such graduation already exists in the matters of parental responsibilities, where visiting rights may be attributed to grandparents and other figures close to the child who are deprived of any parental responsibility over the child

The European Court of Human Rights and national courts are increasingly confronted with these situations. In the recent case **A.L. v. France (no. 13344/20)** the Court underlined that the genetic link between a child and her parents does not entitle such parent to claim filiation or assume parental responsibility over the child. The Court had already recognised that such a parent has **a protected interest in establishing the truth about an important aspect of his private life, which must be balanced against the protected interest of the child**. An overall analysis of the best interests of the child in concreto is the most important parameter to be used as guidance when determining filiation in cases of multiple parentage.

In light of the foregoing, it seems to me that private international law needs to carry out an autonomous reflection on **what filiation is**, or, at least, **what kind of filiation private international law is promoting, spreading and channelling, by means of its rules**.

Case law has already given the European Court of Human Rights the opportunity to highlight some crucial questions:

1. Should a biological parent-child relationship take precedence over a socially established parent-child relationship? Up to now, the answer is more negative than positive
2. Is it always in the child's best interest to have multiple parental figures, all entitled to decide on issues concerning upbringing, education, and health or merely intervening in the form of being entrusted with visiting rights or allocated with custody? Here it is indeed

difficult to give a clearcut answer, without looking at the circumstances of individual cases, although in principle, the wellbeing of a child should increase when the child is surrounded by multiple affectionate figures

3. To what extent should the right of children to know and have access to their origins be recognised to children of multiple parentage?

7. RIGHT TO KNOW ONE'S ORIGINS AND RIGHT TO IDENTITY

The **right to know their origin is an inextricable part of the identity of every person** at any age.

The right to know one's origins is recognized by various supranational norms. Of particular significance are those contained in **Article 7 of the UN Convention of 1989** on the "right of the child to know her parents" and in **Article 8,** which includes, among the constitutive elements of the identity of every minor, her family relationships. Other rules are included in the **Hague Convention of 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption (Art. 30)**, the European Convention on the Adoption of Children of 1967 (as amended in 2008); the Recommendation of the European Parliament of 26 January 2000, No. 1443, as well as the **Resolution of the Council of Europe of 27 June 2008**, which invite States to promote the right of the adopted child to know his/her origins.

"two sisters" by talourcera

The Council of Europe's Recommendation 2156 (2019) sets out principles to balance the rights of parents, donors and children born from anonymous donation of sperm and oocytes. It states that gamete donation should remain **a voluntary and altruistic act**, performed with the primary purpose of helping others and therefore without financial gain or other similar advantage for the donor and **prescribes the waiver of anonymity for any future gamete donation in Council of Europe member states.**

The use of anonymously donated sperm and oocytes is prohibited. Donors must be prevented from taking the initiative of contacting their genetic offspring whereas persons conceived through donation should have the right to take the initiative of contacting their genetic parent and any siblings, under certain conditions. This requires of Council of Europe member states that authorize sperm and egg donation that they "establish and maintain a national registry of donors and persons conceived through donation" in order to ensure: "the exchange of information", to "impose a maximum limit on the number of possible donations from the same donor", to "check that close relatives cannot marry", and finally to "**keep track of donors in case of medical necessity**". As a consequence, there is a **precise obligation for clinics and service providers to keep "adequate records and make them available to national registries".**

Compliance with these rules is guaranteed in Switzerland by means of a registry of sperm donors. The register ensures that girls and boys born from heterologous fertilization have the right to request access to their parent's identity data once they reach the age of 18.
In 2019, the process of accessing a donor's identity was further simplified. As of 2019, the first children born by sperm donation and recorded have turned 18. Three have requested access to information on the physical appearance of the sperm donor and two of them have also requested and obtained a meeting with their biological father.

8. Setting Up Registers of Sperm Donors and Egg Donors

The Council of Europe's Recommendation of 2019 also envisages the introduction of a "mechanism to ensure the **cross-border exchange of information between national registries**".

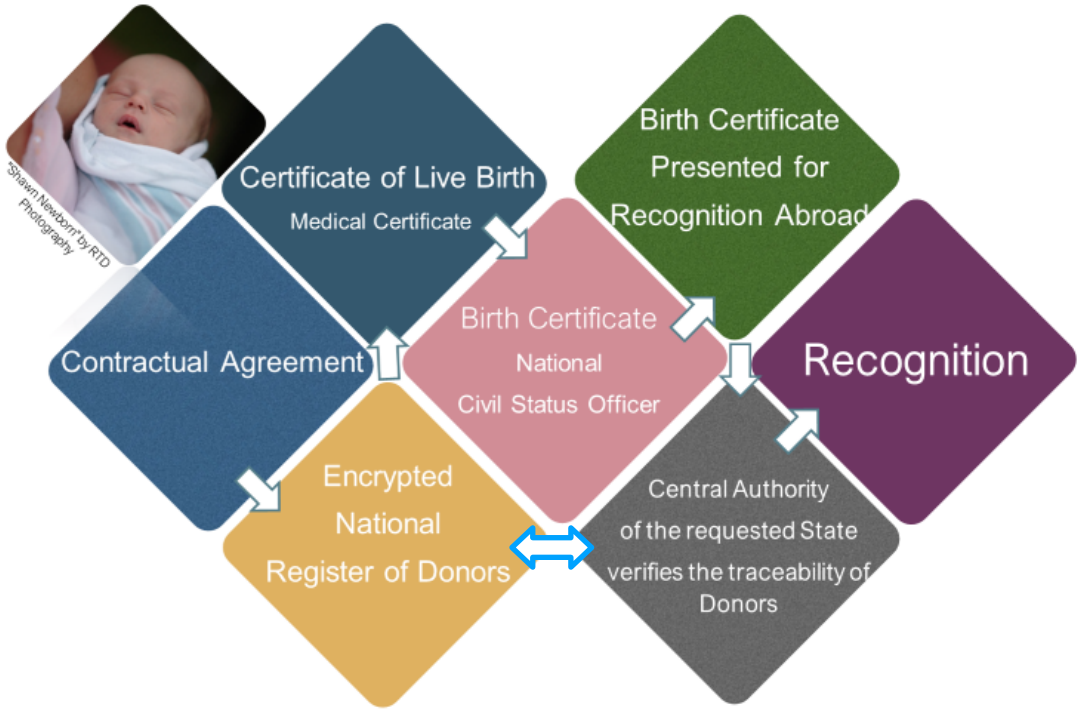
Cross-border enforcement of the right of children to know their origins could be done via existing National Central Authorities. These Central authorities ensure cooperation between States in the implementation of several Hague Conventions.
More recently, Central authorities have been given specific tasks for the implementation of the European Union's Brussels II system.

9. Recognition of foreign contractual filiations

In particular, the Brussels II system, recently recast with regulation No. 1111 of 2019, creates a mechanism to ensure that Member States implement, within their national legal

system, **the right of the child to be heard**. This is done by introducing, within the grounds for refusing enforcement, **a specific ground for non-recognition**. A violation of the right of the child to be heard provides a reason to refuse recognition and enforcement of decisions in matters of parental responsibility.

In keeping with the idea that the **legal development should progress in the direction of giving more duties than rights to parents vis-à-vis the future generation**, the right to know their origin should be guaranteed to children in matters of filiation as much as the right to be heard is guaranteed in matters of parental responsibility.



Guaranteeing this right means that **information on the origin of the gamete donors and other persons intervening in the contractual filiation is collected, conserved and traceable.**

It should also be noted that recognizing and guaranteeing this right can offer a valuable tool for combating **illegal adoptions, human trafficking** and the **sale of children**.

10. **CONTRADICTORY TRENDS**

The legal problems around contractual filiation are often presented as creating an opposition between rainbow family and traditional ones but they conceal, underneath, an opposition between two distinct visions of filiation.

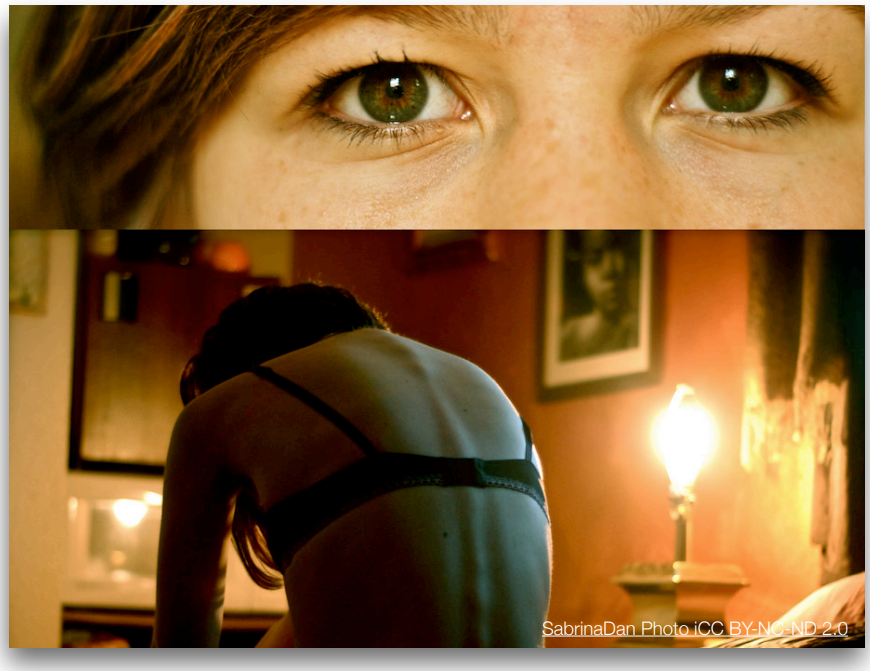
"Heavy is the Hand" by Joe Parks; An Orthodox Family" by Government Press Office (GPO) ; "Rainbow Families at the Twin Cities Pride Parade 2011" by Fibonacci Blue; "Dinner In Suburbia" by makelessnoise

In **patriarchal societies**, control over his genealogy by the patriarch is functional in the protection of the social position of the family. These societies are characterised by substantial social immobility. The wealth of sons and daughters depends entirely, in such contexts, on the ancestors. The importance of lineage can on the other hand be scaled back whenever, in a given society, it is possible to acquire wealth through one's own efforts in life, rather than only by retaining wealth from ancestors or acquiring it through marriage. Today, the wealth of the children of middle-class families, assisted from the educational and economic point of view by the welfare state, also depends on their ability to integrate into the social fabric through their personal contribution.

The legal focus should then shift **from the original "proprietary" notion of parenthood** to an approach **focused on filiation** and aimed at protecting and safeguarding the family environment destined to welcome and raise the next generation, so that, by ensuring that sons and daughters **develop as harmoniously as possible, they can create their own wealth**.

However, the paradigm shift inaugurated by the Convention on the rights of the child is clearly far from linear. Instead, **opposite trends are visible in the evolution of society**.

Just by way of example, the data on women's emancipation from violence show both progresses and regression. In Europe we have developed a precious legal instrument, the 2011 Istanbul Convention of the Council of Europe which promotes significant cultural changes but the global sex trade is considered to be the fastest growing form of commerce worldwide. Experts estimate that it is worth $32 billion annually in the US alone[1].



Another retrograde trend is visible in the pressure to abolish the terms mother and father from public documents. Although this change is thought to address concerns of non-discrimination against transexuals, intersexual, asexual and queer persons, it does not take adequate account of the representational role of language. Genders should be represented in language as much as they are in society. This has suggested "a modification of linguistic usages such as to make visible the presence of women in institutions, recognising their full dignity of status and preventing their role from being obscured by an uninformed use of language."

[1] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3651545/

Neutralisation, by definition, cannot guarantee, inclusion, but rather the exclusion from linguistic representation of the diversity of the social fabric. There is also the risk that neutralisation conceals that "universal masculinity" which is being rejected by linguists and epistemologists.

Beyond the fact that it seems paradoxical, just from a terminological point of view, to choose the path of neutralisation "in an inclusive sense", the problem remains that of adequate representation of the genders in language. The term "inclusion" is in stark contrast to a possible exclusion of mothers and fathers from collective representation.

"Seravezza (Lucca) – Statua della Sfinge" by giovanni_novara .

The emotional and historical baggage carried by those words is so immense that it could only impoverish humanity from all points of view. The modification of language responds to the need to make visible - not to erase - the presence of women and TIQ+ people, favouring a gradual change for the better that goes hand in hand with a greater awareness of language use.

From this point of view, legal language plays a fundamental role in bringing about the social change that is pursued through greater attention to language. On the basis of this awareness, it is clear that the inclusion of people who do not identify themselves as falling within the current binary scheme, requires the addition of a tertium genus without any claim to cancel the other two. Instead of opting, as some jurisdictions do, for the abandonment of the terms father and mother in favour of gender-neutral expressions - such as "first parent" and "second parent" - a true modernisation of the law can only be achieved by adding a third, neutral term to the two already existing ones.

To use English terminology now in vogue, the need for "gender-fair" language - and norms - does not necessarily imply the adoption of “gender-neutral" language - or norms. Simply put, ensuring that transgender, intersex, asexual or queer people have the opportunity to be recognised as parents without having to classify themselves as fathers or mothers suggests the use of the neutral term of "parent" - or even better, a term created for the purpose, in conformity with usage - to make visible the presence of this third category.

I thank you warmly for your patient attention to this sketch of legal, linguistic and societal aspects which arise in connection with contemporary practices surrounding the birth of a child[2].

[2] Many thanks to Helen Swallow for her valuable suggestions on terminology, her linguistic revision and the phrase “The emotional and historical baggage carried by those words is so immense that it could only impoverish humanity from all points of view.”.