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“Family” as a legal concept ***

“Familia” como concepto jurídico

“Familia” como conceito jurídico

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Abstract
Resumen
Resumo

The concept of “family” plays an important role in the way national legal regimes distribute both power and resources. However, the idea of what a family is or should be is not univocal for all branches of law. In this paper we wish to contribute to feminist thinking about the law and to legal theory in general, by showing the contradictions and gaps in law’s incorporation of the legal concept of the family and their distributive impact. We use the notion of conceptual fragmentation to refer to the irregular manner in which family as a legal concept lands into the realms of diverse fields of law at different moments in time and with different emphasis. We argue that conceptual fragmentation makes connections through time and subject matter invisible, and therefore makes it harder to have a critique of the role of the family, treated as a legal concept, in the oppression of women. We establish that conceptual fragmentation is not irrational or incoherent but rather patterned in ways that correspond to the losses of women in contemporary societies. We use the case of colombian law to illustrate the stakes involved in defining the family and the operations that we call fragmentation. In particular, we explain how family law exceptionalism was produced, the importance of the legal concept of the family within family law and its ambivalence as to the proper definition, and the evolution of the concept of family within social policy. We argue that even if the stakes of the family seem to be all for same sex couples, in so far as “family” is still about reproduction and distribution, we should be vigilant about how women fare in the conceptual turns that seek to bring us closer to the natural family.

KEYWORDS:

Family law | social policy | feminism | gender | inequality | women

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El concepto de familia desempeña un rol fundamental en la forma en que los regímenes jurídicos distribuyen poder y recursos. No obstante, la definición de qué es una familia o que debería serlo, no es uniforme en las distintas ramas del derecho. En este artículo buscamos contribuir al pensamiento feminista con respecto al derecho y a la teoría jurídica en general, mostrando las contradicciones y lagunas que existen en la forma en la que el derecho incorpora el concepto jurídico de familia, así como también su impacto distributivo. Para este fin utilizamos el concepto de fragmentación conceptual, que permite abordar la forma irregular en la cual la familia, como concepto jurídico, es incorporada en distintas ramas del derecho, en distintos momentos y con distintos énfasis. Argumentamos que esta fragmentación conceptual hace que las conexiones a través del tiempo y materia sean invisibilizadas y, por ende, hace que sea más difícil criticar el rol de la familia como concepto jurídico que

contribuye a la opresión de la mujer. Concluimos que la fragmentación conceptual no es irracional o incoherente, sino que está estructurada en formas que corresponden a las pérdidas que sufren las mujeres en las sociedades contemporáneas. Usamos el caso colombiano para ilustrar lo que está en juego en la definición de la familia y las operaciones que llamamos de fragmentación conceptual. En particular, explicamos cómo se produjo el excepcionalismo del derecho de familia, la importancia del concepto legal de familia dentro del derecho de familia y las dificultades que existen para llegar a una definición apropiada dentro de este campo; así como también la evolución de la idea de familia dentro de la política social. Argumentamos que aunque pareciera que solamente las parejas del mismo sexo tienen algo que perder en el debate sobre la familia, en cuanto la “familia” sigue tratándose de la reproducción y la distribución de recursos, debemos vigilar cómo les va a las mujeres con los giros conceptuales que buscan acercarnos a la familia natural.

PALABRAS CLAVE:

Derecho de familia | política social | feminismo | género | desigualdad | mujeres

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O conceito de família desempenha um papel fundamental na forma como os sistemas jurídicos distribuem poder e recursos. No entanto, a definição do que uma família é ou deveria ser não é uniforme nas diversas áreas do direito. Neste artigo procura-se contribuir para o pensamento feminista no que diz respeito ao direito e à teoria jurídica em geral, mostrando as contradições e lacunas que existem na forma em que a lei incorpora o conceito jurídico de família, bem como o seu impacto distributivo. Para este efeito, usamos o conceito de fragmentação conceitual, que permite abordar a maneira irregular em que a família, como conceito jurídico, é incorporada em diferentes áreas do direito, em momentos diferentes e com diferentes ênfases. Argumentamos que essa fragmentação conceitual faz que as conexões através do tempo e matéria sejam invisíveis e, portanto, dificulta a crítica do papel da família como conceito jurídico que contribuiu para a opressão das mulheres. Conclui-se que a fragmentação conceitual não é irracional ou incoerente, mas está estruturada de forma que corresponde às perdas sofridas pelas mulheres nas sociedades contemporâneas. Usamos o caso colombiano para ilustrar o que está em jogo na definição de família e as operações que chamamos de fragmentação conceitual. Em particular, explicamos como produziu-se o excepcionalismo do direito da família, a importância do conceito legal de família dentro do direito da família e as dificuldades em chegar a uma definição adequada neste domínio, bem como a evolução da ideia de família na política social. Argumentamos que, embora parece que apenas casais do mesmo sexo têm algo a perder no debate sobre a família, já que a “família” continua sendo sobre a reprodução e distribuição de recursos, devemos vigiar como as mulheres se saem com as mudanças conceituais que procuram nos aproximar da família natural.

PALAVRAS-CHAVE:

Direito de família | política social | feminismo | gênero | desigualdade | mulheres

Introduction

The family has been at the heart of feminist theorizing and activism for a long time. Three lines of debate stand out in this camp. In the first place, the “family” appears as the institutional arrangement for the expropriation of women’s labor and the production of their dependence to men that occupy the roles of husbands and fathers (Engels, 1966; Orloff, 1993; and Shamir, 2010). Secondly, the “family” is conceived as the enabler and result of the “traffic in women” (Rubin, 1975). Finally, the “family” is presented as the site for affective protection and fulfillment, as the ideal for “community” (Stone, 1979; Olsen, 1983). In this case, family is positively valued and women are considered important because of the attention they give to the family and not in spite of it.

The role of the family as a legal concept, on the other hand, has been far less controversial for feminists (Bartlett, 1999). In part, this has to do with the relatively marginal use of family, until quite recently, as a legal concept in many jurisdictions.¹ In part, it is related to the little importance that some scholars afford to legal concepts in what concerns the shaping of reality, as opposed to the power they grant to particular rules and doctrines.² Contemporary battles over same sex marriage and adoption, and recent calls for public policies on the family, however, have placed the legal concept of the family at the forefront of constitutional argumentation, as the definition of the family contained in the Universal Declaration of Human Rights, and in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, has become part of modern constitutions.³

Indeed, while initially, the introduction of the definition of the family in national constitutions could be understood as part of the turn to the social at the constitutional level, which started in the 1920’s and was consolidated in the 1960’s (Díaz Guijarro, 1953: 478), tensions over the proper interpretation of “family”, or rather of the family as a legal concept, have only become intense as the very countries that included the definition of the family in their constitutions suddenly found themselves confronting the issues of same sex marriage and adoption by same sex parents. Throughout these

1. On how the “family” was produced as the site for the conservation of culture in Colombia during the nineteenth century, see Isabel Jaramillo (2011:233-247). For the production of the family as a unity of society in Latin America see Isabel Jaramillo (2010:843-872). For the case of the United States, see Janet Halley (2011:1-109). For how these processes fit in a general pattern of family law exceptionalism see Duncan Kennedy (2006:19-73).

2. On the relevance of legal concepts for understanding the role of law in shaping reality, see Duncan Kennedy (2006)

3. The Universal Declaration of Human Rights in its article 16, ord. 3, establishes: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”. The International Covenant on Economic, Social, and Cultural Rights, in the same vein, established the following in its article 10: “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society...” The International Covenant on Civil and Political Rights defined the family in its article 23 as: “The natural and fundamental group unit of society and is entitled to protection by society and the State”.

series of events, two particularities of the wording have been most controversial. First, the clause uses the expressions “natural and fundamental” to refer to the family. These expressions suggest both that there is something universal and ahistorical about the family, and that the family’s importance and need of protection is intimately connected to these characteristics. Second, right before or after this definition, there are usually clauses that were intended to guarantee freedom of marriage and ended up excluding, to the eyes of most interpreters, both polygamy and same sex marriage. For example, the article 16 of the Universal Declaration of Human Rights establishes that: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family”. For some people this means that only men and women have the right to marry and that only one man and one woman may marry. For example, the South African Constitutional Court, when reviewing the claim that the protection of the family was necessary for the Constitution to comply with international human rights standards, pointed out that such definition could be used to exclude polygamous and same sex marriages, and that it was not clear from the text what did it protect that could not be achieved through other texts.⁴

Moreover, legal confrontation at the judicial level has not happened without reverberations at the legislative level. In 2009, for example, the Colombian Congress approved the law 1361 of 2009, concerning the “Total Protection of the Family”. The Venezuelan Congress also approved the law 38.773 for the “Protection of Families, Motherhood and Fatherhood” in 2007. These laws, and others that are similar, create obligations for government regarding the existence of public policies for families, gathering information about families and establishment of authorities that will develop and monitor both goals. By foregrounding the “family” as a social unit for intervention, these type of laws up the ante in debates about the legal definition of family. It seems that whoever gets to determine what is a family as a legal concept, also wins the battles over the resources that public policies are bound to allocate among families.

This context of high stakes attached to the legal concept of family raises two questions that are relevant to feminists:

- 1) Is there a legal concept of the family that may encourage or bring about more equality and freedom for women?
- 2) How does the legal concept of the family operate currently to help or hurt women?

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4. For example, the Constitutional Court of South Africa considered that the definition of the family was not necessary for the Constitution to fully conform to international human rights standards. See, Constitutional Court of South Africa, Case CCT23/96, *Certification of the Constitution of the Republic of South Africa*, 1996 (# 96 a 103).

In this paper we wish to contribute to feminist thinking about the law and to legal theory in general, by showing the contradictions and gaps in law's incorporation of the legal concept of the family and their distributive impact. We use the notion of conceptual fragmentation to refer to the irregular manner in which family as a legal concept lands into the realms of diverse fields of law, at different moments in time and with different emphasis. We argue that conceptual fragmentation makes connections through time and subject matter invisible, and therefore makes it harder to have a critique of the role of the family as a legal concept in what concerns the oppression of women. We establish that conceptual fragmentation is not irrational or incoherent but rather patterned in ways that correspond to the losses of women in contemporary societies.

It is crucial to our argument to note that we do not believe that, as scholars, we should fight to bring about a correct definition of the family.⁵ We are not striving to know what "family" means in the law by making analogies or eliminating existing contradictions, nor are we rooting for a particular definition that would embody all our aspirations for human emancipation. Rather, we seek to stress the political nature of law by emphasizing the extent to which it does not fully adopt any political program or ideology, nor is it shaped completely by one legal consciousness at a given moment. We claim that it is because the law is full of these compromises, intersections and even time lapses that law appears at the same time as capable of offering emancipation and doomed to reproduce oppression; as merely a device that reflects decisions made elsewhere and as a device that constitutes those decisions. We believe that an understanding of the layering, hybridity and miscegenation that constitutes law phenomena, could bring us closer to an apprehension of its role in the distribution of resources and power (Jaramillo y Alfonso Sierra, 2008; y Alviar García y Jaramillo, 2013).

Along these lines, in this paper we focus our interest on three types of layering of the family considered as a legal concept.⁶ First we focus on family law exceptionalism and the use of the family as a legal concept to produce an autonomous field. Then we show how, within this field, multiple versions of the family may coexist both as the result of specific rules and doctrines, and as the product of attempts to integrate the concept of the family across the legal system. Finally, we concentrate on a specific dimension of family conceptual fragmentation, which has been revealed through historical shifts in social policy from one presidential term to another, and also has appeared as blindness

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5. In this our work is substantially different from Martha Fineman's. She has also been interested in showing different conceptions of the family in the law (in her case the law of the United States) and has also claimed that those conceptions are patterned in such a way that women lose. However, she also argues that law should strive to come closer to social reality in order to protect women, and that the social reality is that the bonds that exist between women and their children are the only ones that merit protection. She proposes, then, replacing the "sexual family" with the "natural family" of mothers and children. (Fineman 1995, especially chapters 6 and 7)

6. It is worth noting that this paper constitutes a first attempt at articulating an argument that will be further developed in a book, which seeks to weave together the histories of family law and social policy regarding the family.

to the rules and doctrines within family law. We finish by asking how to make sense of this fragmentation and the contradictions it produces. At the same time, we acknowledge the contribution of the family to the oppression of women. We hope to develop a full answer to this question in future projects. Here we only suggest some of the ways in which the changes appear to hurt women. But, in so far as they have also benefited them, we believe that we need a theory capable of explaining how to deal with the facts in order to attain an accurate balance of wins and losses.

Family law exceptionalism

It is not a “natural” or “necessary” characteristic of legal systems to be organized to include a field of law pertaining to the “family” (family law) (Halley y Rittich, 2010). This change, in most jurisdictions, happened during the dominance of the “social” approach as a framework for understanding law and legal thinking (Kennedy, 2006). This legal viewpoint was founded on two main ideas. The first one was the assumption that the law should be organized to “reflect” social reality. The second one, was the conception of the family as an observable social reality (Jaramillo, 2010). This kind of approach to the nature of the family generated a process of legal production of rules about marriage, divorce, marital property and parental relations which define the “creation and evolution of families” (Jaramillo, 2010).

This turn to “family law” had several tangible consequences. First, it established a set of moral and scientific arguments about the “family” as relevant for legal debate. Since the family was recognized as a social reality, social sciences in particular gained voice in establishing the meanings of the law (Jaramillo, 2010). Second, it skewed our understanding of the family, directing its definition towards the idea of marriage, the consequences of its absence and its effects over parental relations. In third place, it opened space for the arising and manifestation of different arguments within the field, while preserving the notion that the family was just like market in what concerns its relation to the State. Specifically, it authorized rules and doctrines which were highly restrictive of free will, and at the same time it defended that the family was a private realm that should not be intervened by the state.

In Latin America, the compromises that family law has to contain in order to cope with the cultural demands that pounded upon it were expressed most clearly in the debates over the proper classification of family law. For some, family law should be a part of social law. Since it comprised rules about our relations as dependent beings. For others, family law should remain part of private law, because notwithstanding the nature of the relationships it regulates, free will commands the creation of those relationships. Thus, following catholic doctrine, freedom to marry and procreate were

enshrined as principles of family law at the very same time that it was accepted that once *in a marriage or parental relation*, choice has a very limited role (Jaramillo, 2013).

The turn to “family law”, then again, should not be assumed as completed or free of contradictions. Two notorious examples of the lingering influence of classical legal thought on the construction of arguments about marriage, are the reasons used to exclude same sex couples from marriage and to restrict annulments. Indeed, while family law exceptionalism demands strict interpretation of causes for annulment, most jurisdictions do not include sex difference as a cause for annulment, leaving mention of this only for the clause that explains what the marriage contract is. Thus, the *Colombian Civil Code (CCC)* establishes that “Marriage is a contract between a man and a woman” (article 113 CCC). But there is no cause for annulment of marriages celebrated between two men or two women (article 140 CCC). In order to exclude same sex couples from marriage, it was necessary to “import” into family law the doctrine of the inexistence of contracts because of the lacking of an element thought to be a necessary part of the essence of the contract. In this case the essential lacking element would be sex difference; and it is considered to be indispensable to the essence because of the definition. The doctrine of inexistence cannot fit smoothly into the free will theory. That happens precisely because it limits the juridical consequences of desiring a result. But it is understood as necessary to attack solemn contracts that have the appearance of being one thing while actually being another. This rationale, however, is not supposed to hold for marriage which, following our understanding of the family, we would want to preserve at all costs.

A similar discussion arises in relation to the prescription of annulment causes. According to the doctrine of exceptionalism, as it was stated before, annulment causes must be interpreted restrictively; that is, should not be analogized to the general regime of contract validity. However, several authorities accept that annulment causes should expire in marriage as they do in general to warrant predictability in human relations. In this situation, the general interpretation seems to agree with the intention of exceptionalists in what concerns the preservation of marriage. But it still goes against the grain of annulment causes such as incest or bigamy that could not be understood as subject to the possibility of expiring in any relevant way.

Constitutional thinking has also made its way into family law, and so destabilized its claim to exceptionalism. Constitutional thinking (Kennedy, 2006), beyond constitutional translation, means that the notion of fundamental rights takes priority in argumentation; and with it, the same would be true for both, the moral dimension of legal concepts and their relative incompleteness in presence of the rights of other members of the community (Kennedy, 1998).⁷ Children’s rights, for example, are currently competing

7. I use the expression “constitutional translation” here in order to mark a difference between the type of constitutionalization that was heralded as necessary in the 1950’s with regards to the social (Jaramillo, 2010) and the

with *patria potestas* as a frame to understand parent-child relationships. Within this new frame, parents have duties not only with regards to their children's money and physical security, but also in relation to their education, health and development. Women's rights to live free from violence also compete with divorce as a frame to understand marital relations. Here, the nature of the relationship and the formal possibilities of exiting it are considered less important than the material conditions of economical and psychological dependency that feed violence.

In sum, to speak about family law, conceiving it as a field within a given legal system, is to grant the legal concept of the family the capacity to ground claims about the interpretation of the rules and doctrines that constitute the field. Historically, family law was created as an exception within private law, and with regards to the will theory. This exceptionalism continues to operate today, even if the will theory was never completely abandoned, and constitutional thinking is already de-centering social thinking about law with regards to the family.

Conceptual fragmentation within family law

In spite of the importance of the family as a legal concept for the modern thinking about law, in particular family law, legal scholars, and specially those in the field of family law, acknowledge that there is no univocal concept of the family. In their introductory chapters to family law treatises they explain that the family is a contested concept in sociology and anthropology, even if they go no further than late nineteenth century and early twentieth century views on it, and from that point they proceed to assert that the family can be defined as an economic unit, an affective unit or a biological unit (Jaramillo, 2010 & 2013). These different concepts are legally important because they determine who is included as a member of a family, and how an individual ceases to be part of it. Thus, treatise writers explain that the family as an economic unit is a group of individuals who provide for each other and live under the same roof (a definition very close to the definition of the household); that as an affective unit it is a group of individuals who are bound to each other by means of filial and romantic love (this definition is close to the definition of a couple); and that as a biological unit it is a group compounded by persons who are bound to each other by means of kinship (this definition overlooks that kinship is of cultural nature and does not possess a biological ground; but while doing so, it tends to emphasize reproduction, and therefore children, as the core of families).

constitutionalization that came along with the globalization of American legal thought, as explained by Kennedy. Constitutional translation would mean, thus, to take an argument all the way up to the constitutional, to have additional arguments to force government to make a certain determination, but not to give citizens guarantees to materialize certain provisions or services as a matter of "right".

For our purposes it is crucial to note the paradoxical embrace of family as a concept that is useful to “fill in the blanks of the law”, so to speak; and that at the same time is recognized as indeterminate and full of contradictions. We see this fragmentation playing out in two ways. First, allowing the reconciliation of incompatible agendas. Secondly, keeping the family as a relevant institution in what concerns decisions about sex and reproduction. We believe that this conceptual fragmentation depoliticizes the family in so far as it presents different definitions, and assumes them as scientifically plausible options, each one of them with the same technical value. The de-politicization of the family makes it harder to imagine arguments outside or beyond the family. Also, it turns the family into a pure benefit, whereas not being a family becomes a pure cost.

To understand how conceptual fragmentation operates within family law, we propose two examples, in which the legal concept of family has been brought to bear on the solution: common law marriages and same sex marriages. In these cases, conceptual fragmentation has manifested itself (through the power of the cultural and social reality of affection and solidarity) by expanding, in the case of common law marriages, the notion of the family beyond legal formalities,; and through the inefficacy of these very same arguments within the context of same sex couples.⁸ Indeed, when it comes to discussing the legal stand of same sex couples, the arguments become purely biological. Same sex couples are not considered to be the same thing as couples formed by people with different sexes. This assumption is based upon the argument that they cannot engage in reproduction. In consequence, because same sex couples cannot claim to be families according to this biological approach, they have yet to win the battle over adoption and marriage.

Interestingly, the expansion of the concept of family to include “informal” or “natural” families (as Colombian law names them) has involved legal triumphs for individual women, and has been explicitly argued as a feminist development in Colombian law.⁹ In these cases, “winning” means that a judge has declared that the plaintiff has the same rights which a spouse would have in her situation, such as access to health, social security, inheritance, community of property, nationality, among others. On the other hand, in cases about same sex couples, most plaintiffs have been men. The claims in these cases have been, to a large extent, about similar issues.

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8. For the case of common law marriages see, in particular, Constitutional Court Sentencia T-098/2010 (explaining how progressively “concubines” or “partners” have acquired property rights through judicial decisions). For the case of same sex marriages see Constitutional Court Sentencia C-577/11 (establishing that the exclusion of same sex couples from marriage is not discrimination, but determining that the Colombian Congress should legislate to protect the rights of same sex couples).

9. See Constitutional Court Sentencia C-098/1996 (explaining that the exclusion of same sex couples common law marriage legislation is not unconstitutional because legislators are allowed to tackle one social ill at a time. In the case of common law marriages that ill was women’s poverty).

For us, these developments pose several questions concerning the role of law in producing the family as the site for the oppression of women. We find that the expansion of marriage privileges to common law couples seems to be in line with the feminist demand for community of property as a recognition of housework; and therefore, as a promising path for emancipating women from the malaise of the sexual division of labor. In this sense, it would seem that the “family” could have more positive distributive results for women as it undergoes a process of redefinition that transform it into an economic unit, so moving us away from marriage and the powers and privileges it is accused of embodying (Colker, 1991). Then again, it is rather suspicious that these changes have come about alongside an insistence on biology as the only possible route to exclude same sex couples from recognition as families. If more emphasis on “family” means also more emphasis on “biology”, so then rather than some form of emancipation, we could be facing a new mode of oppression that is conveyed through the family; one that, through sex, and under the condition of being opened to reproduction and the bearing of its costs, offers women the possibility of getting more resources from men.

Social policy and the family

As it was stated at the introduction to this paper, another dimension of fragmentation within family law is what we will call ‘the economic family’. It is conceived as the unit that is used to direct the distribution of public resources throughout different historical periods. The consideration of this dimension is fundamental to any attempt to answer the questions which were raised at the opening of this paper. Is there a legal concept of the family that may encourage or bring about more equality and freedom for women? And, how does the legal concept of the family currently operate? Does it help or hurt women? How does it? As this section will demonstrate, the understanding about who should be protected through social provisions has shifted according to ideological views of the family, the market and women’s participation within them.

Debates about the ‘economic family’ took place alongside the development process of family law, but social policy has produced its own “families” through statutes, cases, regulations and macro policy frameworks. It has happened mostly in isolation from other debates and reforms taking place within the fields of family law. Within this field we find less internal critique and ambiguity about the family in different periods, but fragmentation is manifested in two ways. First, through radical discontinuities from one period to the next. And secondly, through the isolation of social policy debates from debates in private law and, in particular, in family law. As is the case with family law, the type of conceptual fragmentation we are talking about leads to the de-politization of the family and the invisibilization of the stakes of “families”, in particular for women.

In this section we present two moments of social policy thinking in Colombia and reflect on the way in which ‘families’ were conceived in each moment. As in the previous section, we pay close attention to the work that conceptual fragmentation is doing, and we suggest some of the stakes involved in the definition of families within this field.

The evolution of social policy during the 1970s: modernization, state intervention to reach full employment, and the family as a black box

According to traditional accounts, during the early 20th century and up until the early 1970s, economic and social policy were intertwined with the overarching objective of modernization. The idea of modernization was understood in a wide range of ways that included migration from rural areas to the cities, industrialization and the mechanization of agricultural production, the elimination of semi feudal or feudal forms of production, the formalization of labor relations and the titling of land. The family was seen as a unit that would follow the transformation of its male head. Once society as a whole reached the promise of modernization, every member would benefit from its blessings.

However, instead of consolidating liberal ideas, the modernizing process strengthened “an extremely conservative, authoritarian and unpopular vision of social, political and cultural order” (Melo, 1991: 237). Dominant economic groups, church and other social sectors promoted “a paternalistic view of labor relations and social order” (Melo, 1991: 237) under the idea of modernization, which consolidated the family as the natural and uncontroversial unit of society.

Since the late 1940s, welfare state provisions were intimately linked to the promotion of formal employment. At this time, the idea of modernization was mostly understood within the framework of Import Substitution Industrialization; and as a consequence of the focus on this kind of modernization, the design of social policy remained linked to the development agenda.

Beginning at the 1970s, academics and government officials started to speak about a ‘crisis of the modernization model’. This utterance about the crisis modernization process meant that the promises of modernization had not reached the majority of the Colombian population. President Alfonso López Michelsen (liberal, 1974-1978) explained such a frustration in the following terms:

Since the 1930s our country has had the same development plan which consisted of a strong and decisive support for the modern sector of the economy. The development plan which we are now presenting to congress has as its main objective to close the gap that this traditional development model has generated. (Departamento Nacional de Planeación, 1975: v)

One of the most salient gaps of the aforementioned process of modernization was the negative effect that its characteristic unequal distribution of resources exerted over families. A document prepared by Cepal, accounting for a decade of social policy in Colombia (since the mid-1970s until the mid-1980s) (Parra, 1987), describes this circumstance in the following terms:

Two situations had an enormous impact upon the Colombian family between 1950 and 1970: the expansion of the education model and the fact that women entered school and labor force. This meant that social expectations varied in all groups and there were transformations in attitudes towards childbearing and marriage. (Parra, 1987: 22)

During these years the basic policy directed to the aid of families was the establishment of publicly funded nursery, or 'Centros de Atención Integral Preescolar' (CAIP). This program received scant government support. For progressive liberal policy makers this was problematic, because it ignored that women were entering into the labor force, and therefore they needed childcare support (Parra, 1987: 27). For conservative ones this fact was problematic because children were left unattended. President Julio César Turbay (liberal, 1978-1982) explained this concern in the following terms:

The increase in the labor force participation rates of women, the change of the extended family to the nuclear family, and the slow growth of the infrastructure to serve preschool children, have led to a situation in which the child now suffers an increasing vulnerability during their early years.

The process of socialization and child care traditionally performed by women in the family have been affected by the increasing female labor participation, by the change from extended to nuclear family and new patterns of urban family life (Departamento Nacional de Planeación, 1980: 95).

For Turbay, the 'Centros de Atención Integral Preescolar' (CAIP) replaced, somehow, maternal care and have a real function of family instruction:

The accelerated urbanization of the country and the demographic transition experienced in the last decade have created new problems, that are affecting the stability of the social structure and the family organization, such as the irresponsible procreation and neglect of children, malnutrition, among others.

Consideration of these issues led the national government to design the new social policy -in which the care of children was highlighted as a priority -, which will make feasible to face those situations (Turbay, 1982: 201).

To sum up, during this period, women were affected by the economic family in two ways. On the one hand, according to conservatives, public resources should be provided for child care centers in order to replace the absence of women because of their entrance into the labor market. On the other hand, for liberals, the main issue was to help the entrance of women into the work force. In both cases, scarce public resources were concentrated in child care, with little attention to other gender based needs, such as access to sexual and reproductive rights, institutional arrangements to support female workers and an increase in access to education.

Social Policy in the 1990s: free market, focalized welfare provisions and the family as an indispensable recipient

By the late 1980s, the industrialization model was gradually abandoned in favour of free trade and the strengthening of market institutions (Alviar García, 2008). The abandonment of full employment had a significant impact on social policy because formal employment benefits were reduced. The economic development model was aimed at strengthening the market as the best distributor of resources; and as a consequence, social policy was geared towards aiding those entrances into the market for those who were outside it. The discussion on welfare style provisions was therefore focused on the concept of human capital.

As a matter of fact, strategies against poverty changed their perspective of macroeconomic planning, and shifted to microeconomic solutions, by means of which the government sought to address specific issues of particular groups of individuals. These strategies responded to a change in the definition of poverty. From being identified as a structural problem that should be addressed through policies directed to groups of citizens, poverty became to be understood as a localized problem, which is linked to individual/household fortunes. As a consequence of that change in the conception of poverty, there was also a change in the design of the policy dedicated to address it. From that period onwards, policy was thought as something that should be directed to individuals, mainly through conditional cash transfers (Alviar García, 2013). In other words, poverty alleviation was focused on eliminating structural barriers to full participation in the market.

This economic family, as we have argued in a previous piece. (Alviar García y Jaramillo, 2013), also had adverse effects on women. For the purpose of this paper, it is important to point out that notwithstanding the opening up of the 'black box', there is a certain continuity with the way in which conservatives understood the economic family in the 1970s as a unit to protect children. And, contrary to what liberals thought during this previous period (that resource should be aimed at helping women enter the work force), conditional cash transfers limit women's possibilities to enter the market.

Conceptual fragmentation and the stakes of “family”

In the case of social policy, conceptual fragmentation materializes through visible shifts that would occur from one period to another, as well as through the isolation of the debates about the family from debates taking place inside family law. When gender is foregrounded, then again, conceptual fragmentation reveals yet another mirage: the more the family is a black box, there is less talk about the family, and vice versa. Indeed, during the 1970's and 1980's, the consequence of understanding the family as a black box was that male heads of household were the main characters in social policy programs and the main recipients of resources. The “family”, then, were those individuals upon whom each male casted his shadow. To the contrary, starting in the 1990's, the focus on individuals has led to channelling most resources through female heads of household. In this case, “family” is formed by unmarried or separated women and their underage children, in which can be thought as a turn from the economic family to the biological family.

Then, as in the case of family law, we find women as the main beneficiaries of the conceptual turn in the family, since they are the ones getting the only cash transfers offered by the state; and their visibilization as a goal explicitly argued as a feminist goal, which is due to the fact that it ends women's economic dependence on men. Here, however, the trick seems to be that while men were protected as employees, women's employment in the new policies (prominently through a policy known as Families in Action) is to get the transfer. They have to show that each and every one of their underage children have been vaccinated, attend school regularly and are properly fed. All this bureaucratic work has to be done for a meagre fee of 50 dollars per child. There is no prevision of savings or training for future employment. There are no policies to foster women's participation in the labor market.

Conclusions

As pointed out before, we started from the premise that law produces the family as much as it is produced by families. In the frame of thought delineated by this premise, the relevant question is how does law produces the family, and not whether or not it does a good job at protecting it. Thinking about the role of law, we propose, means taking into consideration statutes, cases, regulations, and theoretical frameworks. Moreover, it requires accounting for conceptual fragmentation and its distributional impact. In the case of the family in Colombia, we have suggested a three stage analysis of conceptual fragmentation. First, we study how rules on marriage, divorce and parental relations become an exceptional field, organized around the concept of the family. Then, we show how fragmentation does operate within family law, regarding its definition, as ambiva-

lence and ambiguity, but also as an answer to the gaps and contradictions that arise in the application of rules. Finally, we provide an example of how family is also configured and reconfigured through social policy provisions, which create what we call the economic family. This example provides evidence on how social policy works in an isolated stance, outside the debates about private law; understands itself as radically discontinuous with regards to the role of families, and often tends to invoke the family as pertaining to women. Relating to distribution, we point out that, either in the case of family law as well as in the case of social policy, changes in the concept of family have come along with the materialization of feminist agendas and the channelling of resources toward women. However, at the same time the emphasis on the biological family, which functions as a barrier for the expansion of the concept of family, has meant, on one hand, exclusions for same sex couples, and particularly same sex couples conformed by men; and, on the other hand, the intensification of the feminization of reproduction.

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