

Book Review

***La responsabilidad civil en el ejercicio de la parentalidad. Un estudio comparado entre Italia y Colombia*, Natalia Rueda, Universidad Externado de Colombia, Bogotá, 2020, 531pp, ISBN 978-958-790-377-5**

The possibility of applying tort liability within the family is not a recent issue. It has been a debate for most of the last century, especially in common law legal systems, given their traditional principle of marital¹ and parent–child² immunity. Similar understandings have permeated civil law legal systems, where even today the applicability of the law of torts within the family is less than straightforward.³ There are several reasons behind this immunity or reluctance to use tort remedies in this area: not upsetting family harmony; not encouraging the courts' involvement in trivial disputes; the argument that both criminal and divorce law provide adequate remedies, and protecting family solidarity and privacy, among others.⁴

In her most recent book, Prof. Natalia Rueda challenges these reasons and argues for the extension of the law of torts to the family domain in her home country, Colombia. She uses a comparative methodology and chooses the Italian legal system as the comparison. The author highlights Italy's development of tort liability within the family during the second half of the last century, which, together with other reasons, makes the country a fruitful source of inspiration for her purpose in Colombia. After defending her PhD dissertation, *Responsabilità civile dei genitori verso i figli: dall'esperienza italiana ai danni endofamiliari nel diritto colombiano*, in Pisa, she returned to Colombia to write *La responsabilidad civil en el ejercicio de la parentalidad. Un estudio comparado entre Italia y Colombia*. The book is divided into four chapters, preceded by a very positive prologue by Inmaculada Vivas Tesón, professor at the University of Seville, and an introduction by the author herself. The introduction poses the main problem she identifies: Colombia has not yet systematically dealt

1 *Thompson v Thompson*, 218 U.S. 611, 31 S Ct. 111, 54 L.Ed. 1180 (1910).

2 *Roller v Roller*, 37 Wash. 242, 79 P. 788 (1905).

3 Exceptionally, the German legal system explicitly acknowledges this possibility: § 1359 BGB sets the scope of the duty of care between spouses, that is, a threshold of diligence in their conduct towards each other, and § 1664 BGB establishes the limited liability of parents in exercising parental responsibilities. Vid. Josep Ferrer, 'Domestic Relations', *InDret* 4, 2001. For a comprehensive analysis of the question in Spain, where no *ad hoc* rules have been implemented, vid. Alma María Rodríguez Guitián, *Responsabilidad civil en el derecho de familia: especial referencia al ámbito de las relaciones paterno-filiales* (Aranzadi, 2009).

4 H.H. Clark Jr., *The Law of Domestic Relations in the United States*, Student ed., 2d ed. (West Publishing Company, 1988) pp. 371, 375–376.

with compensation for harm suffered within the family. The main thesis is also put forward here: Colombia needs to acknowledge and compensate torts within the family. While many types of harm can occur in the family context, Rueda chooses to focus on that caused by parents to children, centring her analysis on four types of conduct in particular: violence and abuse, breach of parental responsibilities, the refusal to recognise an extramarital child, and challenging a deliberately false recognition (*reconnaissance de complaisance*). The implementing of tort liability in the family domain in Colombia, and in fact in any country, poses important questions, such as: what is the basis of parents' responsibility? What does the appropriate conduct of parents towards child consist of? Should they compensate for harm caused to their children? How? To what end? (p. 25). Chapter 1 deals with these and more philosophical questions and serves as a comprehensive introduction to the topics that will be revisited later on. Chapters 2 and 3 provide a critical description of the current legal and jurisprudential treatment of the issue in Italy and Colombia. Finally, Chapter 4 compares the two systems and presents the author's main proposals and contributions.

Chapter 1 thus opens with a reflection on the notion of the family in the legal system. The author shows excellent knowledge of the matter, especially of the philosophical literature. She delves into an issue that is fundamental to every aspect of family law: the role of language and its power to mandate what constitutes a family and what does not.⁵ The legal notion of the family is highly ideological and the current institutional concept is based on a patriarchal vision in which authority and hierarchy are central (p. 66). Rueda rejects the idea of deregulation that some advocate as a way to guarantee autonomy: she believes that non-interference is not neutral; on the contrary, it can be a tool for perpetuating the *status quo*. Furthermore, in the particular case of harm caused in the exercise of parental functions, she argues that delimiting the idea of what a family becomes essential for setting a harm tolerance threshold. However, any legal concept of the family must be flexible enough to accommodate social changes, and the author therefore highlights the need for law agents to adopt an open concept of family in the light of empirical evidence from other disciplines (p. 64). At this point, although this is clearly not the focus of the book, it would have been interesting to know more about the current sociological structure of Colombian families. Following the reasoning above, Rueda argues that the courts' creative power is a way to better guarantee minority rights: the legislator cannot foresee every possible situation and at the same time may not be in contact with non-normative groups or understand their circumstances, whereas the courts listen to people's realities every day. She provides us with the interesting example of *familia de crianza*,⁶ a jurisprudential development in Colombia, which consists of a family that lacks biological links but, after a considerable cohabitation period, is equally recognised and protected as it constitutes a source of care for the vulnerable (p. 79). Later on, Rueda decides to address the traditional discussion on the conflict

5 J.R. Searle, *The Construction of Social Reality* (Free Press, 1995).

6 Which could be translated into English as a 'nurture' or 'upbringing' family. The author explains that this term has been especially applied in cases where there is a conflict between a foster and a biological family; vid. pp. 79–80 and notes 89 and 90.

between individualism and solidarity in the family context. She maintains that this is actually a false dichotomy: the family's interests are those of its members, and individualism should be interpreted as a responsible exercise of rights (pp. 96–97).

Rueda returns to her main thesis in the last part of the chapter. Given the insufficiencies of criminal and civil law to provide remedies for some types of harm caused within the family—they focus on sanctioning the injurer but not on reparation for the victim—tort law can provide an adequate additional solution for compensating for harm. In the family context, it promotes the injurer's accountability, while retaining the possibility of continuing the family relationship. In this model, tort remedies could be seen as a response of support for the victim, rather than a disrupter of family harmony or solidarity. After giving the issue thorough consideration, Rueda informs readers that she favours the idea of applying general rules of tort law over the option of no regulation and of creating *ad hoc* rules. Tort law should be applied to the family, however, in an adapted form; that is certain principles should be observed, such as the children's best interests, equality, freedom, solidarity, and the 'primacy of reality'.⁷ Naturally, this conclusion obliges her to confront the issue of traditional family immunity in tort law, which she does by focusing on the Colombian context at the end of the chapter.

Chapter 2 provides a critical analysis of the Italian legal system and how it deals with tort law within the family. Rueda deals with each of the selected conducts separately, but highlights the insufficiency of traditional remedies in them all, especially with regard to children's interests. She begins with the problem of violence and draws readers' attention to the fact that this is particularly serious in a family context due to the relationship of dependency and the fact that injurer and victim may continue to live together; that is, the family relationship itself may increase the harm. She also poses the problem of its identification and conceptualisation when the violence is non-physical, acknowledging that advances in this field are mainly due to the work of feminist theory. Reflecting on violence towards children from a philosophical point of view, the author argues that the *ius corrigendi* principle, a power to correct children reserved to the man of the family, has reinforced family immunity, although, both this principle and the basis for immunity are being eroded by the increasing recognition of the autonomy of the child and his/her personal rights. Taking this philosophical background into account, she proceeds to describe how Italian criminal law treats violence. The other main problems she identifies are that the criminal justice system primarily fulfils a punitive function through prison sentences and fines, and that certain types of violence are irrelevant in a criminal sense, either because they are not serious enough, or if they are, they fall into an area of immunity given the family relationship. Rueda next turns to the Italian civil code, which contains a series of remedies that share a dual sanction and protection function and cover the removal of parental responsibility; the obligation to perform the responsibilities that have been breached; general measures of assistance, such as psychological treatment, and

7 According to which, courts must take into account the factual realities of the case, in addition to normative considerations; vid. note 182.

separation of residence. Rueda places special emphasis on the reforms introduced into the civil code in 2001,⁸ which regulated protection orders⁹ and measures for children for the first time in Italian civil law. With regard to the breach of parental duties, Rueda first interprets their scope according to Article 30 of the Italian Constitution, before describing and analysing both civil and family law remedies and the criminal law remedies for their breach.

After these two conducts, readers are provided with an introductory note on determining parental status (affiliation regimes) in Italy as a preface to the analysis of harm related to affiliation and parental status. Where the lack of recognition of extra-marital children is concerned, Rueda cites many Italian cases in which the privation of a parental relationship, that is, abandonment, is identified as the main harm (non-financial dimension) and compensation is based on the idea of procreational responsibility.¹⁰ Lastly, she deals with the challenge to a deliberately false parental recognition from the position of the child who loses a parental figure. She criticises the fact that the principle of *favor veritatis* generally trumps the child's best interests in the civil law domain, although recognises that this principle could also favour a legitimate interest of the child, which is the knowledge of his or her biological origins. This is related to what she calls a systematic contradiction, which arises when the legal system allows the false parent to recognise the child and acquire parental status, yet later permits a successful challenge. After this philosophical reflection, she proceeds to describe and analyse the possible criminal sanctions of these conducts and the development of Italian tort law in these situations, especially regarding the identification and quantification of any resulting non-financial harm.

Chapter 3 aims to show the shortcomings of the current Colombian approach to harm within the family and follows a similar structure to Chapter 2. Rueda points out that the main difference between the two legal systems, as advanced, is that Colombia's Supreme Court has not yet decisively focused on reparation for harm within the family and the legal literature has only recently begun to deal with the issue. It is worth noting that in this chapter the author analyses the concept of parental responsibilities, which she finds problematic, as well as the characterisation of violence—in particular within the family—in Colombia. She also makes an effort to show some legal precedents for compensation for family harm and the few cases in which this has been recognised recently, which all address violence against a spouse. The fact that these cases have plainly rejected spouse immunity serves the author in the defence of her main thesis: that tort law can be used as a remedy for harm within the family in Colombia (p. 304). In the remainder of the chapter, she provides a similar description and critical analysis of the current Colombian legal system, as she does for Italy in the previous chapter.

8 Acts 149, of March 28 2001 (<https://www.camera.it/parlam/leggi/01149l.htm>) and 154, of April 5 2001 (<https://www.parlamento.it/parlam/leggi/01154l.htm>).

9 Connelly and Cavanagh, 'Domestic Abuse, Civil Protection Orders And The 'New Criminologies': Is There Any Value In Engaging With The Law?' (2007) 15 (3) *Feminist Legal Studies* 259–287.

10 M.J. Vonk, 'Towards a new concept of parenthood: procreational responsibility' in Boele-Woelki and Sverdrup (eds.), *European Family Law; European Challenges in Contemporary Family Law* (Intersentia, 2008) pp. 131–155.

Chapter 4 is divided into two parts. The first displays the results of the comparison of the two legal systems; Rueda argues that criminal law is inadequate in both systems, especially in relation to violence and abuse. Family violence is difficult to detect, especially when it is psychological, and those who report it often suffer revictimisation and/or retaliation, and so a higher and more complete institutional effort is needed to stamp it out. She also focuses on the lack of attention given to preventing harm: although protection orders serve a good purpose, they often come too late and are not enough by themselves. Also, criminal law does little to reconcile individual interests with those of the family unit. According to the author, neither of these two systems pays enough attention to either alternative dispute resolution mechanisms such as conciliation or alternative sentences to imprisonment or fines, which are incapable of either compensating or reconciling. Civil and family law does not offer a much better alternative, especially taking into account the current conceptualisation of *patria potestas*. However, it is in this area that the author most values developments in Italy, highlighting the recognition there of compensation for non-financial harm in cases of non-recognition of a child and challenges to deliberately false recognition. At the same time, Italian courts have adopted a much more flexible approach to the issue and can therefore adapt to rapid social change.

In the second part of the chapter, the author presents her proposals for an integral solution to the harm caused by these conducts. She advocates a solution that is not limited to one type of rule and that guarantees the rights and interests of the victim while protecting the family unit. Although her proposals need further development—the author herself acknowledges that this is only the first step in the debate—her contributions are worth noting. First, reconceptualising the parental role is of the utmost necessity. Constitutional principles such as equality, free development of personality, freedom, and autonomy make it essential to shift from a concept based on *patria potestas*, understood as the attribution of rights to parents, to a notion of parental responsibility that highlights the relational aspect and sets the bar for appropriate parental conduct. In this way, the author also defends the development of procreational responsibility, self-responsibility, and good faith within familial relationships in the Colombian legal system. Referring back to the first chapter, Rueda also argues for a reconceptualisation of solidarity and individualism within the family. Potential compensation and reparation for children do not necessarily end family harmony or solidarity; on the contrary, it can be seen as a way to restore these after the harm has been done.

As for remedies, the author proposes a model that takes into account the relational dimension of the conflict; that is, the harm needs to be acknowledged and taken into account but so does the possibility of maintaining or recovering the relationship between injurer and victim, and remedies must therefore go beyond punitivism and financial compensation. Although according to the author all four conducts can be conceptualised as breaches of parental responsibilities (p. 451), different specific measures can be used to tackle each one. To this end, institutional effort to prevent violence within the family and the breach of parental duties is much needed. Rueda defends an extramarital presumption with regard to affiliation-related harm (p. 449). This would make it easier to establish parentage and reduce the risk of refusal to recognise. Where deliberately false recognitions are concerned, she argues for a broad

application of the principle of good faith, so that only recognitions made in error could be refuted. Alternatively, if these challenges are allowed to succeed, the 'false parent' would owe the child compensation (p. 450). Although the author acknowledges that these two measures bring 'natural' and ART-derived affiliation regimes closer together, it would have been interesting at this point to consider the conflicts that can and do arise in two-mother families, due precisely to the fragility of establishing co-maternity.

Rueda believes that Colombia should follow the way paved by the Italian legal system, that is, accepting an adapted *lex Aquilea* in the family domain (p. 452). The remedy's flexibility would enable it to adapt to social change, therefore better guaranteeing respect for both individual and group interests. The author especially emphasises the possibility of non-financial harm and reflects on the possibilities for quantifying this (p. 455). She closes with an important reflection: tort law is no panacea either and other remedies that go beyond purely financial compensation must be implemented (p. 457), and underlines the need for 'ethics of responsibility'. With this meaningful conclusion, Natalia Rueda finishes a book that will surely be an influential contribution to the debate about tort liability within the family in the Colombian context.

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