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REPORT ON GENDER-SENSITIVE FAMILY LAW

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Why is a gendered or gender sensitive reading of family law important for a law and gender project? Well, the answer is quite obvious: family is the embryo of society and the mirror of a country's culture or the *volksgeist*, as the historical school of law would say. To be more accurate, family is one of the institutions that have been and is more influenced by the traditional division of roles between genders.

All, or at least the majority, of inequality problems in this field of the law have been and continue to be a reflection of the idea that marriage should be the ambition of every woman, as a matter both of self-realization and economic realization; the idea that every woman should waive her professional ambitions for the care of the family and the family home; and the possible clashes between those two ideas.

On one side, gender equality between spouses have been the flagship of – let's say – modern family law, of all the reforms that were enacted by the various European States starting from the seventies; it has been a principle that inspired specific family law provisions and guided the construction of the whole family law regime in force. In attempting to implement that principle, courts have been responsible for a deeper and lengthy evolution of family law.

Such evolution, which has gradually acquired a transnational dimension (with the various international charters devoted to equality in family law, with the ECHR and with the Principles of European Family Law), has led to a strong individualization of family law. There has been a shift from the conception of family as an institution transcending individuals to a conception of family as the expression of individual personality (this is the approach that emerges, in particular, from ECHR case-law). Along with this, there has been the acknowledgement of gender as a right and its fundamentalisation as a component of personal identity. Whatever my gender is, I have the right to form a family and even, but this is more controversial, the right to be parent. Those two points are crucial for understanding current family law and should be the background of a gender-sensitive reading. Current family law is all about striking a balance between the struggle for individuality and the quest of the "best interest of the family".

On the other side, inequalities still persist from a substantive viewpoint, in the "law in action", and often as a product of systemic shortcomings that it is not for family law to remedy, but for welfare law, labor law and so on. But a gender-sensitive reading of family law could nevertheless be crucial for identifying such shortcomings and even finding solutions capable of mitigating them while waiting for legislative interventions. And it could be useful also for avoiding the risk of "reverse discrimination", i.e. the risk of a bias or drift of gender-based correction rules; in other words, the risk that a blind application of such rules lead to an over-protection of one of the spouses to the detriment of the other (the most common example is the post-divorce maintenance which sometimes turns into a life insurance for one of the spouses).

Besides, inequality problems are magnified by cultural divergences and the spread of "alien" family models in the European territory.

Those should be, in my opinion and in a nutshell, the aims of a gender-sensitive reading of family law. But now, let us come to the merits and dig into the main aspects on which such gendered reading should focus, and on which we, as the family law and gender unit, tried to focus for the textbook.

The first aspect is freedom of marriage, which has two components: equal access to marriage and freedom not to choose marriage as the family model. As to the first component, gender-sensitive family law should fight against the problem of arranged or forced marriages. As to the second component, gender-sensitive family law should fight for family pluralism. The increased sensitivity of the law to those relationships in which the parties live together as a couple in an enduring relationship without being married or otherwise related, mainly known as cohabitations or *more uxorio* partnerships or de facto unions, can be considered as a milestone in the path towards gender equality. In fact, the formal and substantive equality of the spouses, which is the pillar of modern family law, would be severely undermined if marriage was the only possible choice for a couple that wished to build up a family without having their children labelled and treated as illegitimate or simply share a life together without being outlaw.

A prejudice still exists, deeply rooted in certain social or geographical or religious contexts, against cohabitation and affects mostly women, who are not so rarely educated by their families in the belief that marriage is the key to a full self-realization, one of the paramount goals in life and an absolute must in case of pregnancy. But that is nowadays only a social prejudice, by no means supported by the law. In fact, European legal orderings have gradually removed all those obstacles that could lead couples to consider marriage as the only real alternative.

The second aspect on which we should focus is the marital relationship per se. Within the marital relationship, the evolution has brought to the equalization and mutuality of the rights and duties arising from marriage and to the acknowledgment of the same dignity to domestic

work in the contribution to the family ménage. This, together with equal capacity of disposing of the marital property and the necessity of both spouses' consent. For cohabitation, case-law has filled in the legislative gap by using traditional contract law and restitutionary remedies for granting protection to the "weaker cohabitant". Equal rights and duties are also borne by spouses or partners or cohabitants towards children.

Together with freedom of marriage, we have the equal freedom of breaking it. That is probably one of the most delicate aspects to be faced with by a gender-sensitive reading of family law. The first and more elementary step towards equality has been granting both spouses the right to obtain separation and divorce on the same grounds and without the need of the other spouse's consent. Gradually, most legal systems have moved from a fault-based separation and divorce to a non-fault model in which separation and divorce can be granted to each of the spouses upon the mere allegation of an 'irretrievable breakdown' of the marital relationship. This solution mirrors the *acquis commun* and is the one adopted by the Principles of European Family Law.

The second tactic for promoting formal equality between spouses in facing the criticalities of the marital relationship deals with the consequences of separation or divorce. In other words, the goal of gender equality requires an accurate assessment and management of the rules on the division of marital property and assets between the spouses and on the allocation of financial resources, usually labelled as maintenance.

As far as the distribution of marital property is concerned, in a time when women were considered the weaker sex, most legislations attempted to remedy the inequality by establishing as a default rule community of goods. In some systems there is no pre-fixed default regime, but courts have the power to distribute martial property between former spouses in the way that is more adequate for mitigating the economic or financial imbalances caused by divorce, even if such distribution turns out to be disproportional and even if it involves the spouses' personal property.

If that is not enough to remedy inequality, the goal at issue needs to be reached through the regulation of after-separation or after-divorce maintenance. In this domain as well, legislations and above all case-law are in constant evolution. Here the main problem has been to identify the criteria for granting the allowance and for quantifying it. The original trend was to award to the spouse who would have found itself in a detrimental position after divorce a periodical allowance. Both the decision to award the allowance and the calculation of its amount used to depend upon three parameters: the compensative criterion, the punitive criterion and the hardship criterion. Hardship referred to the need of providing the weaker spouse with enough resources to "live by".

One of the most controversial issues has always been the establishment of the threshold of that "live by" concept. If live by means maintaining the same standard of living, the

maintenance risks to become an insurance; if the allowance is periodical, the former spouses risk to be bound to each other by a sort of economic dependence.

For those reasons, the approach of the courts and the legislator has gradually changed and moved towards the so-called 'clean break philosophy'. The underlying idea is that the weaker spouse should be encouraged to become financially independent as soon as possible and break the ties with the other spouse (and also with the court, as all the remedies that do not imply an ongoing obligation are not subject to judicial revision).

Such new approach raised several gender-based objections and concerns, above all among family law attorneys and experts. First, it has been observed that economic independence upon divorce, or within a short time from that, neither grants gender equality nor the rebalancing of their positions, as women continue to be awarded lower salaries. Secondly, the 'clean-break philosophy' often does not take into account the fact that the women who have waived their career for the care of the family face significant difficulties in re-entering the labour market and in finding a job capable of providing them with an adequate salary on the basis of the compensative criterion.
The mentioned risks require a careful assessment of the circumstances through a case-by-case approach and a reasonable application of general principles. An efficient and rather fair model is offered, on those grounds, by the Scottish legislation.

The Family Law (Scotland) Act 1985, in its section 9.1, lists the principles that courts must follow in selecting the most adequate financial order to regulate the consequences of divorce. Those principles are: a) the fair sharing of matrimonial property; b) the balancing principle, according to which fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family; c) the fair sharing of the burden of childcare; d) the readjustment principle, according to which a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce; e) the relief from financial hardship, according to which a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

Along with the advent of the "clean-break philosophy", the courts have gradually abandoned the 'standard of living' criterion in favour of a mixture between a compensative criterion and the readjustment principle. In this view, one could claim that nowadays maintenance orders should be aimed at granting the spouse who has waived his/her personal or professional ambitions for the family enough resources to adjust to the new situation and find a job in line with the path that had concretely been undertaken and then interrupted with the marriage.

One of the strengths of the latter approach lies in its gender neutrality. The concrete assessment of the circumstances of the case and of the effective degree to which the spouses committed themselves to the marital life allows courts to overcome the binary male-female antithesis and focus on the personal features behind the genders. This flexible approach could be particularly helpful when separation and divorce proceedings involve trans-genders or same-sex couples.