Gender Competent Family Law

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Abstract

This chapter discusses the construction of family and family law as central tenets of gender equality projects in law and society. It begins with a review of the evolution of family institution from the traditional nuclear to the models that are not constituted through either heteronormativity or marriage contract. Hence, it draws on LGBTQIA+ family formations including parenthood and intimate partnership. Furthermore, the chapter elaborates on the development of gender equality in family law and marriage contract in various social settings through an intersectional analysis of rights and responsibilities of partners, parents, and children. The chapter also explores domestic violence as a matter of gender equality in family law. It discusses how legal protection and prevention of domestic violence in family law can reduce harmful effects on family members, who are the victims of violence directly or affected by domestic violence as witnesses.

16.1 Introduction

This chapter introduces the institution of family as one of the most important sites where gender and power relations define individual and collective practices. Feminist theoretical perspectives on the construction of egalitarian family based on gender equality are covered in this chapter. Therefore, it elaborates on the following key concepts: patriarchy and patriarchal dividend, gender binary system, male privilege/authority, dual family model, marriage contract, commodification, the concept of care, marriage property regimes, non-heteronormative parenting, reproductive autonomy, childcare, and co-responsibility as well as domestic violence.

Learning Goals

- The first learning objective of this chapter is to explain how feminists' critical views on traditional family practices and gender inequalities within family law and society have led to important legal and policy changes overall. The main learning objective is to understand the difference between traditional family and family laws on one hand and the egalitarian family and family laws, on the other. Feminists have disrupted the institution of family as a safe and stable place for women where women's lives are constrained by multiple forms of violence and discrimination, particularly domestic violence. Thus, feminists' approaches in debunking patriarchy and male authority have not only contributed to the recognition of women's unpaid work in family, but also women's participation in labour market. As a result, domestic violence has been challenged in its form of women's economic dependence.
- The second objective of this chapter is to analyse marriage contract through a gender perspective, an analysis that problematises unequal power relations and gender inequalities within marriage as a social and a legal practice. Issues of same-sex and gender non-binary marriage are discussed according to the International and European Human Rights Conventions drawing on the right to marry and choose one's family. Furthermore, the legal and social implications of marriage contract such as filiation, property, alimony and spousal maintenance and divorce are discussed within substantive and procedural law.
- The third objective of this chapter is to present how an egalitarian family model can be realised through acknowledging equal rights and responsibilities based on gender, sexuality, (dis)ability, nationality, race, ethnicity, age and religion, all of which needs legal recognition. The chapter argues that family is not constituted by a heterosexual married couple who are assigned specific gendered roles. Moreover, parenting is not defined on the basis of biology, nor is it established on a binary understanding of gender. The development of assisted reproductive technology has advanced family formation insofar as to make it possible for single persons, same-sex couples and trans persons to become parents.

16.2 Family from a Gender Perspective: Evolution and the Current Situation

The construction of family and relationships within family have great impacts on how laws, such as family law, regulate family and family relations. In the study of gender perspective on family law, it is important to consider the evolution of the concept of family from a traditionally grounded, model male-dominated (by husband or father), to a gender-equality-based model. This section will focus on the development of gender equality in family law and policies as well as how these developments can be improved for a more gender equal family in contemporary societies.

The traditional nuclear structure of family consisting of a man and a woman with children who live together has changed due to development of an urban industrial and highly mobile society across time. This has also led to the isolation of nuclear family, and the growth of companionship different from traditional family. One of the structural changes which has been associated with industrialisation has been the separation of home and work activities.

A traditional model of family justifies the dominance of men over women and the oppression of children by parents. On this construction of family, discriminatory family laws become a way to reinforce the patriarchal male domination and parental oppression by portraying them as lawful. However, laws and policies have undergone changes throughout history differently in different societies. More egalitarian family laws have been developed to account for plurality and diversity of the ways through which human relations are shaped and family institution is formed in contemporary societies.

Example

The success of the "One million signatures" campaign of the women's movement in Morocco since 1992 led to the Moroccan's family law reform which took place in 2004. This was the landmark for reducing men's dominant position within the family providing equal rights for women and children. ◀

Family in modern industrialised societies has been changing more rapidly since the end of World War Two. By focusing on changes in the process of family formation in several modern industrialised countries, it is argued that the increase of women's participation in labour market and the rise of women's earning power and capital investment have been the most critical factors in the process of the evolution of family structure.[1]

During the last decades of twentieth century, the traditional family has been replaced by a multitude of understandings of what constitutes a family. This is due to a number of factors, including, the increased rate of divorces, participation of

[1] Blossfeld and Kiernan (2019).

women in paid labour force and the growth of female headed households.[2] The structure of family in many European countries has altered throughout the century due to the developments of gender relations and deconstruction of essentialist gender roles in society.

Nowadays, in many societies, marriage contract is not necessarily the basis of forming a family. Male authority in the family has gradually disappeared, and same-sex couples' cohabitation and marriage are legally recognised in many European countries such as Andorra, Austria, Croatia, Cyprus, Greece, Denmark, Sweden, Finland, Iceland, Norway, Ireland, Italy, Spain, Slovenia, Switzerland, Portugal, the Netherlands, Malta, Liechtenstein, Luxembourg, Germany, and France. In these countries, same-sex social and legal visibility are allegedly entered the family systems. The Nordic countries have been the pioneer in adopting legal recognition of same-sex marriage and parenthood in comparison with other European countries.[3]

In contrast to the patriarchal family model, today we find a family model in which mothers and fathers exercise their rights and responsibilities over their children on equal terms, whether in the framework of a marital relationship or a de facto union. We also find same-sex families, single-parent families, etc. The emergence of new family models is the result of a gradual process in which, among other factors, the demands of feminist movements and LGBTQIA+ groups, and the recognition in international and national legal texts of the principle of equality and non-discrimination on the grounds of sex, sexual orientation or gender identity, have played a decisive role. Among the international texts, we can cite, for example, the Convention on the Elimination of All Forms of Discrimination Against Women, of 18 December 1979, in particular, Articles 5 b) and 16.1, which establish the obligation of States Parties to take appropriate measures to eliminate discrimination against women in matters relating to marriage, family and rights and responsibilities over children. We can also cite the Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity ("Yogyakarta Principles"), of 26 March 2007, which in its Principle 24 recognises the right of everyone to found a family, regardless of sexual orientation or gender identity, and the obligation of States to take the necessary legislative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation, without discrimination on the basis of sexual orientation or gender identity. However, these principles are not a treaty and therefore do not constitute a binding norm for States that have signed up to them but are intended to guide the application of international human rights law to protect LGBTQIA+ persons.

Gender competent family law and policies are the major site for promotion of gender equality in many countries since the structure of the traditional/mainstream family law is based on patriarchal dividend and gender binary system that values and privileges men.

[2] Nelson (1997).

[3] Digoix (2020).

Gender equality happens through changes in gender and gender relations. In the Nordic countries, gender equality policies started to develop in the 1880s regulating the lives of women in the family and public realm. The central issue of women's movements in all the Nordic countries in 1905 was the reform of marriage law through which they demanded to repeal a husband's authority in marriage and also to grant women economic independence.[4] Thus, all the Nordic countries united to establish the Scandinavian law committee with the aim of enhancing gender equality in the Nordic countries through harmonization of marriage law in 1909.[5] The outcome of the committee brought about reforms concerning the liberal formation and dissolution of marriage in 1913 and gender equality legal effects of marriage in 1918.[6]

The Nordic countries marriage law reform presented a family model that is structured as a dual breadwinner model. In this model, the work of women at home is legally recognised as contributing to family maintenance. At the same time, eugenic ideologies were used in Nordic countries to introduce marriage impediments for people of old age, people with a lot of children, people who are mentally challenged, immigrants and those with deaf-muteness.[7]

Family policy in Nordic countries emphasises on the link between gendered division of labour, unpaid work and gender equality in labour market which supports women's employment and values care work. The Nordic model recognises individualism while emphasising on the collective responsibility for family care by combining family and work obligations with childcare which is both free and of a good quality. This approach is explained as defamilisation.

► **Definition** Defamilisation is a concept that is used in refer to welfare states relationship with family and work force. Therefore, Defamilisation describes the Nordic countries' approach to gender equality policy by which family and work obligations are combined with high quality and affordable childcare institutions.[8] Defamilisation indicates the division of labour between the family, market and the state. In other words, the family goes public.[9]

The Swedish welfare state, as part of the Nordic model of gender equality, emphasises equality for all through universal benefits.[10] In the 1960s, a shift from the nuclear family to the individual family member took place in Sweden as the women's role as both mothers and workers became part of family policy discourse.[11]

[4] Melby et al. (2006), pp. 651–661.
[5] Melby et al. (2006), pp. 651–661.
[6] Ibid.
[7] Ibid. See also: Mattila (2019).
[8] Sandin (2012), p. 61.
[9] Sümer (2014), pp. 59–69.
[10] Esping-Andersen (1990), pp. 92–123.
[11] Sümer (2014), pp. 59–69.

Sweden has taken up a more progressive approach with regard to family policy in comparison with many other countries in the world. For example, women were allowed to divorce their partners without any particular reason in 1974 and women were granted the right to abortion until the18th week of pregnancy without providing reasons in 1975. However, when it comes to LGBTQIA+, Sweden, among other Nordic countries, has a long way to go. For example, assisted reproduction with donated sperm has been legal for same-sex couples in Sweden since 2005[12] and for single people since 2016.[13] However, egg donation is only legal for opposite sex couples, which forbids gay men in Sweden to receive egg donation. Before 2013,[14] not only were trans people unable to freeze and save gem cells before gender affirming treatment, but they were also forced to sterilisation prior to the legal gender transition in Sweden.[15]

Granting family rights to LGBTQIA+ people in Europe has been contested since early 2000. As a result, same-sex partnership and civil union are deemed legal in many European countries. Whereas same-sex marriage is not yet legalized in most of Europe. For example, Switzerland has just passed a legislation same-sex marriage through a referendum in 2021. Legal recognition of parenthood rights is still limited in some European countries such as Spain, Italy and Serbia. Moreover, very few countries have granted equal parenting rights to trans and queer couples. For example, Norway introduced a gender-neutral Marriage Law in 2009 replacing the law on Registered Partnership that was introduced in 1993.[16] The new law gives lesbian, gay and heterosexual couples equal marriage and parenting rights however, it does not recognize trans parenthood.[17] It took until 2019 for Swedish law to finally recognise trans parenthood, which allows trans people to be acknowledged on their children's documents. Furthermore, trans men who give birth are recognised as fathers and trans women are recognised as mothers.

Legal change and development of gender equal family polices benefit from applying intersectional analysis and conceptualisation of multiple inequality grounds. Social divisions of sexuality a long with discrimination based on 'race', class, ethnicity, age, (dis)ability and religion must be taken into account in approaching gender equality family policies. "Directives on gender equality at EU level have a material scope that extends from equal pay, equal treatment in employment and self-employment to pregnancy protection, parental leave, access to services and social rights".[18]

[12] Assisterad befruktning och föräldraskap*:* Lagutskottets betänkande 2004/05:LU25.

[13] Assisterad befruktning för ensamstående kvinnor: Socialutskottets betänkande 2015/16:SoU3.

[14] Lag (1972:119) om fastställande av. könstillhörighet i vissa fall.

[15] Lag (1999:332) om ersättning till steriliserade i vissa fall.

[16] Frantzen (2011), p. 273.

[17] Hollekim et al. (2012), pp. 15–30.

[18] Kantola and Nousiainen (2009), pp. 459–477.

16.3 Gender and Marriage Perspectives[19]

16.3.1 Discrimination Against Married Women: Evolution to the Present Situation

The family founded on marriage has historically been the traditional family model, influenced by European religious, cultural, political and philosophical traditions. In this patriarchal family, the husband was the head of the family and had the power to decide on all matters relating to married life, and the upbringing and education of minor children, given his status as the sole holder of parental authority. In the name of good family governance, the husband had the power of control over his wife; this included the power to prevent her from engaging in any extramarital activities that were seen as incompatible with her family duties. In this sense, the codifications considered the husband to be the head of the marital community who should therefore decide family matters. The wife was responsible for the care of family members and management of the household, in a division of roles governed by the principles of inequality and submission. This resulted in a marriage, in which the woman suffered discrimination, due to her status as a wife, against her husband. Married women lacked capacity and autonomy insofar as they owed obedience and submission to their husbands. Women were under the legal guardianship of their fathers until marriage, and then the husband took over as legal guardian of his wife. Women suffered a substantial limitation of their capacity, so married women constituted a different and inferior status to their husbands. Through marriage, the woman became entitled to take her husband's name and, more importantly, achieve his family status. Married women were also subject to marital authority in the area of the property. The wife appears to have been almost a 'possession' of the husband because of his legal guardianship over her.[20] Marital authority thus took the form of a set of prerogatives granted to the husband, his spouse and concerning his property.

As we can see, the marriage regulation reflected the gender roles attributed to spouses. In this sense, discrimination against women was particularly intense for married women, i.e. in their position within marriage. The unmarried woman, subjected to the power of the family, found herself in an even worse situation when she decided to marry. The new marital status, instead of bringing her new levels of freedom or recognition of her rights, caused her to fall into a situation of profound inequality and discrimination. More seriously, however, many of the above restrictions persisted in the legal systems of Western European societies well into the twentieth century.

It is interesting to mention that, at least since 1825, the year William Thompson published his attack on the 'white slave code' of marriage, feminists have criticised marriage on the grounds that it was not a valid contract. Specifically, marriage is

[19] This section has been translated with the translation service of the University Research Institute for Sustainable Social Development (INDESS).

[20] Sörgjerd (2012), p. 30.

criticised as being called a contract, when it is an institution in which one of the parties, the husband, has exercised the power of a slave owner over his wife, making it far removed from a contractual relationship.[21]

Around the time of the two world wars, marriage underwent an evolution in European countries: from a traditional model based on the husband's priority, to one founded on the equality of reciprocal rights and duties between the spouses. However, in some countries, such as Sweden, the change was introduced in 1920[22] and others, such as Spain, from 1981 onwards.[23]

Thus, the wife's submission to the marital authority in fixing the place of residence, the acquisition of nationality[24] or the imposition of the husband's surname disappeared.[25] Regarding the spouses' relationship with their children, equality between the spouses was expressed by placing husband and wife on par as legal guardians of their joint children. The husband's power in the administration and disposition of property also disappeared. The normative evolution towards marital equality resulted in suppressing of the wife's unilateral duties, replacing them with reciprocal rights and duties of respect and protection between the spouses. The idea of marriage as a joint project, based on equality, to which each spouse contributed according to his or her capacity, was central in European legislation. Since the various reforms that have modified family law, the dignity and moral and legal equality of the spouses has been assumed as a fundamental pillar of the system, so that it is difficult to defend any limitation of the rights of the individual on the grounds of marriage.

16.3.2 The Right to Marry and Form a Family

By way of introduction, we may note that marriage is a legal bond, created voluntarily, between two persons who—depending on the acceptance of same-sex

[21] Pateman (1997), p. 154.

[22] Karlsson Sjögren (2011).

[23] In the Spanish legal system, the Law of 13 May 1981 brought about the expected institutional change in this area.

[24] Article 9.1 of the Convention on the Elimination of All Forms of Discrimination against Women declares that 'States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband'.

[25] In App. No. 29865/1996, *Case of Ünal Tekeli v. Turkey* (ECtHR, 16 November 2004), para. 66, App. No. 7971/2007, *Case of Leventoglu Abdulkadiroglu v. Turkey* (ECtHR, 28 May 2013), para. 22 and App. No. 38249/09, *Case of Tanbay Tüten v. Turkey* (ECtHR, 10 December 2013), para. 28, among others, the Courts found a discrimination on the grounds of sex that authorities had refused to allow the applicants to bear only their own surname after their marriage, whereas Turkish law allowed married men to bear their own surname.

marriage by national laws—may or may not be of the same sex and who usually, but not necessarily, live together.[26]

Formal or de jure family relationships represent a typical situation under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'),[27] which recognises the right to private and family life. The European Court of Human Rights has emphasised, in this regard, that 'whatever else the word 'family' may mean, it must, at any rate, include the relationship that arises from a lawful and genuine marriage'.[28] Article 12 of the Convention states that '[m]en and women of marriageable age have the right to marry and to find a family, according to the national laws governing the exercise of this right'.[29] From the inclusion of the formula 'according to the national laws governing the exercise of this right', it is evident that Article 12 of the Convention does not guarantee an unlimited right. "The national legislature has been left a certain margin for subjecting the right laid-down exercise in Article 12 to certain conditions, regulating the legal consequences of marriage and laying down provisions concerning the resulting family ties".[30] The limitations ensuing from national law must not restrict or reduce the right to marry in such a way or to such an extent that the very essence of the right is impaired.[31]

Article 12 autonomously safeguards two rights: the right to marry and the right to found a family. The former is essentially 'a right to form a legal relationship, to acquire a status'.[32] The right to found a family, conceived in the light of Article 12,

[26] Almeida (2015), p. 117.

[27] The Convention was adopted by the Council of Europe on 4 November 1950.

[28] App. Nos. 9214/80; 9473/81; and 9474/81, *Case of Abdulaziz, Cabales and Balkandali v. The United Kingdom* (ECtHR, 28 May 1985), para. 62.

[29] Article 9 of the Charter of Fundamental Rights of the European Union (2000) expresses itself in similar terms: 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights'. Furthermore, Article 23.2 of the International Covenant on Civil and Politican Right (1966) reads as follows: 'The right of men and women of marriageable age to marry and to found a family shall be recognized'. Finally, it is worth mentioning Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (1979). This article states the following: '1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent [. . .]'.

[30] Van Dijk (2006), p. 842.

[31] App. No. 11329/1985, *Case of F. v. Switzerland* (ECtHR, 18 December 1987), para. 32 and App. No. 30141/04, *Case of Schalk and Kopf v. Austria* (ECtHR, 24 June 2010), para. 49.

[32] App. No. 7114/75, *Case of A. S. Hamer against The United Kingdom* (ECtHR, 13 December 1979), para. 58.

presupposes the existence of marriage (couples living together outside marriage, on the other hand, deserve protection under Article 8).[33]

The right to marry is protected even where there is no intention or possibility of procreation.[34] The right to found a family entails the right of a married couple to procreate and have children, although this does not mean that the person must enjoy the real possibility of procreation. Thus, it is considered that the inability of a couple to conceive or raise a child cannot *per se* deprive them of the right to marry.[35]

Article 12 does not distinguish between the right to marry and the right to remarry.[36] Thus, ensuring the right to remarry for divorced persons in cases where the contracting state recognises the possibility of dissolving the marriage bond through a divorce.

The essential effect of marriage is to give birth to a marital status, which gives rise to a series of relationships and duties that develop within the framework of a community. Marriage creates a legal relationship reflected in the personal sphere and the property of each of the spouses.

16.3.3 Personal Aspects (Equal Rights and Duties of the Spouses)

"The ECtHR has held that marriage continues to be characterised by a corpus of rights and obligations that differentiate it markedly from the situation of a man and woman who cohabit".[37] The principle of equality governs all these rights and duties arising from the marriage. The legislation describes the rights and duties of spouses, which they have in the same way without discrimination on the grounds of sex. The recognition of equality and equal rights between husband and wife is one of the significant democratic achievements that is now an irreversible part of our legal culture.

Article 12 is inspired by Article 16 of the Universal Declaration of Human Rights, which is expressed in broader terms, adding that spouses 'are entitled to equal rights as to marriage, during marriage and at its dissolution'.[38] This reference to the equality of spouses was included in 1984 in Protocol no. 7 to the Convention for

[33] European Court of Human Rights, *Guide on Article 12 of the European Convention on Human Rights. Right to marry*, First edition—31 December 2020, 5 (https://www.echr.coe.int/Documents/Guide_Art_12_ENG.pdf).

[34] App. No. 7114/75, *Case of A. S. Hamer against The United Kingdom* (ECtHR, 13 December 1979), para. 58.

[35] App. No. 28957/95, *Case of C. Goodwin v. The United Kingdom* (ECtHR, 11 July 2002), para. 98.

[36] App. No. 11329/1985, *Case of F. v. Switzerland* (ECtHR, 18 December 1987), para. 33.

[37] App. No. 27110/95, *Case of J. O. Nylund v. Finland* (ECtHR, 29 June 1999), para. 8 and App. No. 11089/84, *Case of Lindsay v. the United Kingdom* (ECtHR, 11 November 1986), para. 181.

[38] In the same terms, Article 16.1.c) of the Convention on the Elimination of All Forms of Discrimination against Women guarantees 'The same rights and responsibilities during marriage and at its dissolution'.

the Protection of Human Rights and Fundamental Freedoms. Article 5 of this Protocol, under the title of 'Equality between spouses', states that '[s]pouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolutions', and adds that '[t]his Article shall not prevent States from taking such measures as are necessary in the interest of the children'.

Spouses are equal before the law in duties and rights. In this regard, Article 16.1. g) of the Convention on the Elimination of All Forms of Discrimination against Women specifies that 'States Parties shall ensure, on a basis of equality of men and women, the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation'. This equality means that decisions affecting the family may be taken by one or the other. If such decisions are agreed upon, it is irrelevant who makes them. Otherwise, no opinion will be predominant, but judicial intervention will be necessary. On this premise, the logical conclusion must be that the duties and rights imposed on marriage are reciprocal.

It should be noted that a married woman's unilateral decision to terminate her pregnancy voluntarily is not a breach of any marital duty.[39]

16.3.4 Patrimonial Aspects (Management of Marital Property)

If we said earlier that the principle of the husband's authority and the corresponding submission of the wife was evident in the personal sphere, the same was true in the property sphere, where the husband had the initiative. With marriage, the woman lost the capacity to dispose of her property and contractually bind herself without her husband's consent. This power of domination is transferred from the father to the husband. The husband's power over the wife's property took precedence, restricting her capacity to act. The husband administered the marital property, represented the wife, and allowed her to act in the course of business. Traditional law required the husband's permission for the wife to perform various acts. In addition to that, married women could not engage in trade without a marriage license. An example of the secondary role of the wife was the dowry, which compensated the husband who was obliged to feed her.

Today, the marginalisation of the married woman concerning the administration and disposal of marital property has been abolished.[40] In the legislation of the majority of the countries, the management of the matrimonial property is no longer

[39] The *European Court of Human Rights*, in App. No. 8675/15, *Case of G. Boso c. Italy* (ECtHR, 5 September 2002), in a case where the applicant complained that the legislation on the termination of pregnancy had prevented him from founding a family, found that the termination of the wife's pregnancy was in conformity with Article 12 of the Convention.

[40] Article 16.1.h) of the Convention on the Elimination of All Forms of Discrimination against Women recognises 'The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration'.

attributed to the husband but is rightly divided between the two spouses. Nevertheless, a high percentage of women continue to carry out domestic chores, either exclusively or in combination with outside work.

The life partnership that originates with marriage requires a response from the legal system to several questions that affect both the spouses' financial relations and those with third parties. It is necessary to provide a legal answer to a number of questions, such as how to contribute to the burdens generated by marriage, the organisation of the powers of management, organisation or disposition between the spouses, the organisation of their assets and the relationship between their asset's liability towards third parties. It is the principle of equality between spouses that inspires the normative response to all these questions. Thus, there is no longer forced representation of one spouse by the other, and, on the other hand, the spouses can relate financially to each other and third parties in the same way as they did before marriage since marriage does not restrict legal capacity.

About the specific property regimes applicable to the spouses (usually community or separation of property), community property regimes, in which there is a common property for both spouses, constitute an equitable system in the event of an economic imbalance between the two spouses, as was the case when the woman married and devoted herself exclusively to housework. The entry of women into the labour market, and changes in gender roles, have led to separate property regimes being the most suitable to guarantee the total capacity and equality of the spouses. Separation of property systems can be unfair to the spouse—up to now, it has always been the woman—who, having no or minimal initial assets, has collaborated in the development and increase of the other spouse's assets.

16.3.5 Non Binary Marriage

The traditional understanding of marriage is a union between persons of different biological sexes. The transformations that social evolution has brought to the institution of marriage have destroyed the dogma that marriage can only occur between a man and a woman. The opposition to same-sex marriage inevitably reflects a desire to maintain a difference between sexual roles on which traditional marriage is founded.[41]

The wording of Article 12 of the Convention seems to imply that the holders of the right to marry are two persons of different sexes. On the other hand, Article 9 CFR contains no mention of the sex of the spouses, omitting any express literal reference to the man or the woman.

[41] Herring (2019), p. 106.

Initially, the ECtHR rejected the right of trans individuals to marry people of the same biological sex.[42] The starting point was that Article 12 of the Convention enshrines the traditional concept of marriage as being between a man and a woman.[43] However, some European States recognised marriage between a transsexual and a person of the same biological sex. A new stage in recognition of the right to marry for transsexuals was opened in the Case of *Goodwin v. The UK*, 11 July 2002,[44] with the acceptance that the inability to procreate cannot, *per se*, be regarded as an obstacle to marriage and, consequently, with the recognition of the transsexual's right to marry. It should be noted that the Yogyakarta Principles plus 10 (2017) state that "no status, such as marriage (. . .) may be invoked as such to prevent the legal recognition of a person's gender identity" (principle 3).

As far as homosexually oriented persons are concerned, while societal developments have profoundly changed the institution of marriage since adopting the Convention, there is no consensus in Europe on same-sex marriage. The ECtHR has held that the Convention does not oblige the Contracting States to grant same-sex couples access to marriage,[45] marriage being widely accepted as conferring a particular status and special rights on those who enter it.[46] For the ECtHR, the protection of marriage constitutes, in principle, a fundamental and legitimate reason which may justify a difference in treatment between married and unmarried couples.[47] Thus, States have a certain margin of appreciation to treat differently married and unmarried couples, particularly in matters falling within the realm of social and fiscal policy such as taxation, pensions and social security.[48] These conclusions are valid despite the gradual evolution of States in this area, as more and more countries allow couples of the same sex to marry;[49] others offer legal

[42] App. No. 9532/81, *Case of Rees v. The United Kingdom* (ECtHR, 17 October 1986), paras. 49–50 and App. No. 10843/84, *Case of Cossey v. The United Kingdom* (ECtHR, 27 September 1990), para. 43.

[43] In App. Nos. 22885/1993 and 23390/1994, *Case of Sheffield and Horsham v. The United Kingdom* (ECtHR, 30 July 1998), para. 66, the Court recalls that the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex.

[44] App. No. 28957/95, *Case of C. Goodwin v. The United Kingdom* (ECtHR, 11 July 2002), para. 98, 100–104.

[45] App. No. 30141/04, *Case of Schalk and Kopf v. Austria* (ECtHR, 24 June 2010), para. 63 and 101, App. No. 37359/09, *Case of Hämäläinen v. Finland* (ECtHR, 16 July 2014), para. 71 and 102 and App. Nos. 26431/12; 26742/12; 44057/12 and 60088/12, *Case of Orlandi and Others v. Italy* (ECtHR, 14 December 2017), para. 192, among others.

[46] App. No. 13378/2005, *Case of Burden and Burden v. The United Kingdom* (ECtHR, 12 December 2006), para. 59 and *Şerife Yiğit v. Turkey* (ECtHR, 2 November 2010), para. 72.

[47] App. No. 34615/97, *Case of F. Quintana Zapata v. Spain* (ECtHR, 4 March 1998).

[48] See, *mutatis mutandis*, *Burden*, cited above, para. 65.

[49] Currently 16 European countries legally recognise same-sex marriages: Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.

protection to stable same-sex unions outside the institution of marriage (civil partnerships).[50]

16.4 Gender Perspective and Divorce/Separation

16.4.1 The Impact of Gender on the Temporary or Final Break-Up of the Marital Relationship

The temporary or final break-up of the marital relationship is perhaps one of the fields in which the contribution of gender studies to legal studies is more evident and more significant. The reason lies, on one side, in the close connection between the impact of divorce on the spouses' patrimonial and personal conditions and the cultural and professional roles that society traditionally allocates to each gender, on the other side, in the link between the approach towards marriage and divorce and the features that are inherently typical of each gender, female, male or trans.[51]

Although the regime of separation and divorce takes different shades in each legal system, we could argue that, at least in all countries belonging to the Western legal tradition, it is aimed at granting equal treatment to the spouses, not only from a formal but also from a substantive viewpoint.

The core of such a regime is the attempt to remedy the imbalances that the establishment, regulation, suspension and interruption of the marital relationship have created between the spouses as a product of factors like their mutual attitudes towards negotiation and litigation, their respective degree of commitment to family life, their propensity to form another family and their chance of doing so, their way of balancing the care of the family with their personal and professional ambitions.

16.4.2 Gender Equality and the Grounds for Separation/Divorce

The legislative and judicial tactics to reach such goal have faced deep transformations over the years, along with the evolution of the societal perception of genders. 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.[52]

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

[50] Fourteen European countries recognise some form of same-sex civil union, namely Andorra, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy, Liechtenstein, Monaco, Montenegro, San Marino, Slovenia and Switzerland.

[51] For a general overview of the main sociological implications, see Leopold (2018).

[52] See Boele-Woelki et al. (2004). The law should permit both divorce by mutual consent and divorce without consent of one of the spouses.

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.[53]

Some legislations still list the typical grounds of divorce, among which scientific progress forced to add the change of gender by one of the spouses, but such grounds simply coexist with the 'irretrievable breakdown' allegation, rather than replacing it.[54]

Moreover, in the majority of legal systems fault is still a relevant element but to other effects, such as succession rights of the separated or divorced spouse, welfare-linked rights and the existence and quantification of maintenance.[55] Though, the very concept of fault has been evolutionary construed by courts: case-law is now set on the view that fault cannot be automatically inferred from the mere infidelity of one of the spouses, while it occurs only when this latter's behaviour was such as to violate the other spouse's dignity.[56]

16.4.3 Gender Equality and the Consequences of Separation/Divorce: The Distribution of Marital Property

The second tactic for promoting formal equality between the spouses in facing the criticalities of the marital relationship deals with the consequences of, rather than the grounds for, 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 the community of goods. In a nutshell, the purpose of such regime is to avoid that one of the spouses—historically speaking,

[53] Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses, above, Chapter I.

[54] See, e.g. the French Civil code, which provides four types of divorce: divorce by mutual consent, divorce by acceptance of the principle of the marital breakdown, divorce for irretrievable alteration of the marital relationship, and divorce for fault (arts 229 ff.); and the Italian Statute No. 898 of 1970, which provides that divorce can be claimed by one of the spouses when the spiritual and material community between them cannot be maintained or rebuilt (art. 1) due to one of the circumstances listed thereafter in art. 3, among which the conviction of one of the spouses for certain criminal offences, the serious mental illness of one of the spouses, the prior separation, the fact that one of the spouses remarried abroad; the failure to consume the marriage and the change of sex by one of the spouses.

[55] Ruggeri et al. (2019).

[56] See, in particular, Italian case law: ex multis Corte di Cassazione, 15 settembre 2011, No. 18853, Famiglia, persone, successioni, 2012, 94, which clarified that the spouse can be liable for adultery and therefore bear the duty to compensate the other spouse only when his conduct was such as to infringe the other spouse's dignity or undermine his/her health.

the husband—is the sole owner of matrimonial property just because he is the only one who is entitled to work and therefore the only one who can afford to purchase assets.

In fact, the community regime entails that an ideal half of every goods, including e.g. earned qualifying periods for pension, that is purchased during the marriage, even by only one of the spouses, belongs to the other spouse. This means, on one side, that the consent of both spouses is needed to transfer the ownership of matrimonial property, and, on the other side, that such property will be equally divided between the spouses upon divorce.

Not every system solved the problem of gender equality through the community of goods. In some of them 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.[57]

A glance at practice reveals that, following the evolution of women's role in society, especially from the viewpoint of working ability, nowadays couples tend to opt for the separation of goods, according to which each spouse remains the owner of the goods that he/she purchased in his/her name and with his/her own resources, or for other conventional regimes, rather than keeping the default one.[58]

16.4.4 Gender Equality and the Consequences of Separation/Divorce: Maintenance

As far as financial consequences of the marital break-up are concerned, the goal of gender equality needs to be reached through the regulation of after-separation or after-divorce maintenance.

In this domain as well, legislation and above all case-law are in constant evolution. 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.

[57] For instance, this is the case of the English system, where the first and foremost technique for regulating the consequences of the martial break-up is the distribution of property between the former spouses through the so-called property adjustment orders. See Matrimonial Causes Act 1973, Part II, as amended by the Matrimonial and Family Proceedings Act 1984 and by the Welfare Reform and Pensions Act 1999.

[58] Besides practice, in some States community of goods is not the default regime anymore. For instance, in Germany the default regime is *Zugewinngemeinschaft*, according to which each spouse remains the owner of the goods he purchased prior to and during the marital relationship (see § 1363 and § 1378 BGB).

Compensation referred to the need of rewarding the spouse that sacrificed his—but most of the time, her—professional and personal ambitions for the care of the family and the family home; the punishment referred to the need of sanctioning the spouse who was responsible for the end of the marital relationship; and 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. In a first phase, most systems tended to hold that the periodical allowance should be such as to grant the spouse the same standard of living that he—but most of the time, she—used to enjoy in the wedlock.[59]

In close connection with this aspect, the duration of the periodical allowance tended to be equalled to the weaker spouse's life. Such approach, though, is reasonable only to the extent that the weaker spouse has no chance of rebalancing its position otherwise, for instance by finding a job on its own.

Absent this, the approach risks to result into a discrimination of the stronger gender. In fact, on one hand, the weaker spouse may be encouraged to behave opportunistically, relying on the fact that he/she would always benefit of maintenance even if he/she makes no effort to become financially independent; on the other hand, the duration of the periodical obligation to pay the allowance creates a further tie between the spouses, which is a tie of economic dependence, thus never allowing the spouses to start their new life.

For those reasons, the courts' and the legislators' approach has gradually changed and moved towards the so-called 'clean break philosophy', which has been variously interpreted by the legal systems.[60] In some of them, it meant the residuality of maintenance and the prevalence of other remedies, such as property adjustment or pension sharing mechanisms;[61] in some others it meant the payment of a lump-sum maintenance rather than of a periodical allowance or the limitation of the duration of maintenance.[62]

[59] In particular, the use of the "standard of living" criterion rather than the "economic independence" criterion has been heatedly debated by Italian case-law: for an overview, see Terlizzi (2018).

[60] See nn 46–47. In Italy, see e.g., Corte di Cassazione 10 May 2017 no 11504, Famiglia e diritto, 636 (2017).

[61] This is the solution adopted by the Family Law (Scotland) Act 1985, on which Fotheringham (2019), p. 601; Mair et al. (2016). Scottish legislation is perceived as a model of efficiency and predictability both by Scottish family law experts and practitioners and by English jurists. See, for all the Proposal by Baroness Deech: Divorce (Financial Provision) Bill [HL] (HL Bill 21 of 2016–17).

[62] Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses, above, Principle 2:8 Limitation in time. The competent authority should grant maintenance for a limited period, but exceptionally may do so without time limit. Principle 2:9 Termination of the maintenance obligation. (1) The maintenance obligation should cease if the creditor spouse remarries or establishes a long-term relationship. (2) After its cessation according to paragraph 1 the maintenance obligation does not revive if the new marriage or long-term relationship ends. (3) The maintenance obligation should cease upon the death of either the creditor or the debtor spouse. On the French system, see Bidaud-Garon (2019), pp. 581–600.

▶ **Definition** The 'clean break' can be defined as the approach to the regulation of the consequences following a divorce that aims at terminating the situation of economic dependence of one spouse from the other within a reasonable time after the end of the marital relationship.

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 approaches have raised several gender-based objections and concerns, above all among family law attorneys and experts.[63] 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 the spouses' 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.

Example

The Family Law (Scotland) Act 1985, 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/her to adjust, over a period of not more than 3 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/her of hardship over a reasonable period. ◀

[63] See Schumm and Abbotts (2017), p. 1116.

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.[64] On 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.[65]

16.4.5 From Gender Equality to Party Autonomy: The Recognition of Divorce Agreements

Another step in the evolution of the relationship between gender and the marital break-up has been the legal recognition and enforcement of pre-nuptial or post-nuptial agreements regulating the consequences of separation and divorce.[66] The underlying idea is that equality should lead to autonomy: the marital relationship is a place where the spouses share the same chance of personal growth and development so that the shaping of their living-together as well as their breaking up should be committed to them.

This presupposes that the spouses really are on equal footing when negotiating the agreement. In order to grant such substantive equality, courts tend to be particularly careful in applying those contract law doctrines that are aimed at the protection of weaker parties, such as moral duress, fraud and, from a common law perspective, unconscionability.

A fundamental upstream tool for granting such substantive equality between the parties would undoubtedly be the use of trained facilitators, like mediators or

[64] See, e.g., the evolution of Italian case law, on which Terlizzi (2018), p. 449.

[65] For an in-depth analysis, see Kim and Edward (2018), pp. 384–398.

[66] Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses, above, Principle 2:10 Maintenance agreement. (1) Spouses should be permitted to make an agreement about maintenance after divorce. The agreement may concern the extent, performance, duration and termination of the maintenance obligation and the possible renouncement of the claim to maintenance. (2) Such an agreement should be in writing. (3) Notwithstanding paragraph 1, the competent authority should at least scrutinise the validity of the maintenance agreement.

negotiators, with special skills and experience in the different approaches to negotiations that are typical of each gender.[67]

16.5 Gender Perspective and Unmarried Couples

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,[68] mainly known as cohabitations or *more uxorio* partnerships or *de facto* unions, can be considered as a milestone in the path towards gender equality.[69] 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 sometimes 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, nowadays, this is 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.

Ordinary and constitutional case-law of the various legal systems has started acknowledging cohabitation—provided that it was effective, of a significant duration and based on affection, not merely on a sexual intercourse[70]—as a community in which human beings can express their personality and around which revolve interests worthy of protection. This has allowed courts to acknowledge, for instance, the right of the surviving cohabitant to replace the other in the lease for the family

[67] See Menkel-Meadow (2012); and, focused on a more specific topic, Feigenbaum (2015), p. 245.

[68] This definition is drawn from Principle 5:1 of the Principles of European Family Law regarding the property, maintenance and succession rights of couples in *de facto* unions, available at http://ceflonline.net/wp-content/uploads/English-De-Facto.pdf. Not every legal system defines the concept of cohabitation. For a definition, see, e.g., Art 515-8 of the French Civil Code, according to which a *concubinage* is a factual union characterized by common life with the character of stability and continuity, between two persons of the opposite or same sex, living as a couple; and Art 1, section 35, of legge 20 maggio 2016 no 76 (so-called legge Cirinnà), according to which cohabitants (*conviventi di fatto*) are two persons, having reached the majority of age, that are bound on regular basis by a couple relationship of mutual moral and patrimonial assistance, without being related or married to each other.

[69] From a non-European perspective, see Song and Lai (2020), pp. 53–80.

[70] See Hiekel et al. (2014), pp. 391–410.

home and to extend to cohabitants the rules on civil liability for protecting them against the tortuous infringement of their relationship by third parties.[71]

In the meantime, pushed by case-law and a pressing social need, legislation has begun extending to cohabitants certain public law privileges granted to spouses, namely, the right to visit the ill partner in the hospital or in prison, the possibility to adopt children or to resort to medically assisted reproduction and access organs donation.[72] The more significant step of such legislative evolution has been the reforms of family and succession law towards the acknowledgement of the full equality between children born within a marital relationship and children born outside it and the full equalization of their legal position.

While all systems have dealt with non-marital filiation, not all of them have enacted a specific and comprehensive regulation of the relationship between cohabitants. This can be easily explained and justified considering that one of the possible reasons behind the choice of cohabitation instead of marriage is the will to prevent the relationship from being regulated by the State or equalled to marriage or the will to self-regulate it.[73] The European Commission on Family law attempted to provide a comprehensive set of principles, but such principles are not binding and they have not been followed by every Member State.[74]

Generally speaking, the regulation of such aspects as the distribution and management of the couple's property and assets and the contribution to the family *ménage* is committed to the cohabitants' agreement. For some of those aspects, like post-cohabitation maintenance, such agreement can be just the primary source of regulation, meaning that, if the cohabitants did not provide anything, there will be specific legal provisions applicable; for some other aspects, like property

[71] For instance, since the early 1990s, Italian courts have held that in case of death of a cohabitant caused by the tortuous conduct of a third person, the surviving cohabitant is entitled to claim for the compensation of the damage caused by the wrongdoer, under the general rules on civil liability (Art 2043 Italian civil code), even if the law does not provide him/her with any right of maintenance towards the other partner, on the grounds that the *more uxorio* relationship, though unregulated by the law, is considered by the legal ordering as an interest worthy of protection. See Corte di Cassazione 10 March 1994, n. 2322, Giurisprudenza italiana, 1995, I, p. 1370. Cohabitation is protected by the Italian Constitution as one of the groups in which human personality is expressed: see, for all, Corte Costituzionale 8 February 1977 no 556, Giurisprudenza italiana, 1980, I, p. 346; Corte Costituzionale 7 April 1988 no 404, Foro italiano, 1988, I, c. 2515; Corte Costituzionale 13 May 1998 no 166, Giustizia civile, I, p. 1759.

[72] For an overview of the complete framework of national legislations on *more uxorio* relationships, see the country reports available on the Commission on European Family Law (CEFL) website: http://ceflonline.net/informal-relationships-reports-by-jurisdiction. For a comprehensive analysis of the topic.

[73] Other reasons might be the will not simply to avoid external regulation but to self-regulate the relationship; or just the need to wait a certain time before marriage, in which case cohabitation becomes a sort of preliminary stage of the marital relationship; or the fact that one or both cohabitants are married with somebody else and do not want to end their prior relationships; or even the mistrust in the institution of marriage. On the topic, see Mol (2016), pp. 98–113.

[74] Principles of European Family Law regarding the property, maintenance and succession rights of couples in *de facto* unions, above.

distribution, it can be the only source of regulation, meaning that, absent it, there are no provisions applicable, neither *ad hoc* rules nor the ones devoted to the marital relationship.

This could raise a double problem: on one side, the possible substantive inequality of the cohabitants can result into an imbalance of bargaining power during the negotiation of the cohabitation agreement and therefore lead to an undue prevarication of the stronger party over the weaker one. On the other side, the lack of equalizing default provisions like the ones concerning the community or the separation of goods can enhance the risk for the weaker party to be placed in a worse position than the one prior to the beginning of cohabitation in case the relationship comes to an end.

As far as the first problem is concerned, where no specific legislation exists, the only form of protection available to the weaker party is the one provided by general contract law, namely the rules on the defects of consent; but the concepts of duress, mistake, fraud and lack of capacity seem to be unsuitable, as their application requirements are too narrow for including simple gender-related weaknesses.

As to the second problem, when an agreement between the parties is formed, in the absence of specific provisions, the only form of protection will be the validity test of the contract on the grounds of its compliance with mandatory provisions, public policy, and in the Italian system also morals. When there is no agreement between the parties and there are no default provisions, the forms of protection available will have to be drawn from outside the scope of family law. Namely, one should look at: (a) contract law, when the criticalities concern the purchase of goods by one of the cohabitants with money partially belonging to the other or the relationship with creditors or the restitution of the family house exclusively owned by one of the cohabitants; (b) property law, when the criticalities concern the management, sale or division of property jointly purchased by the cohabitants; (c) restitution law for unjust enrichment or liberalities when it is a matter of the mutual contribution of cohabitants to the cohabitation project.

16.6 Gender Perspective and Establishment/Contestation of Parenthood[75]

The impact of the gender perspective on filiation covers a wide range of issues, but to go into each of them in detail would go beyond the scope of this textbook, so we will focus on those that we consider being the most salient.

[75] This section has been translated with the translation service of the University Research Institute for Sustainable Social Development (INDESS).

16.6.1 Filiation Rights

As we have pointed out, the patriarchal family placed the father, as the head of the family, in a privileged position. One manifestation of this hegemonic position was the preference in the assignment of the paternal surname over the maternal surname when legally determining the son or daughter's filiation. Even if a person's maternal and paternal filiation had been determined, the father's surname was assigned or, if both the maternal and paternal surname could be given, the paternal surname came first. The establishment of an egalitarian family model implies recognising the same rights and responsibilities for the mother and the father in relation to their children; therefore, the continuation in the national legislation of the preference of the paternal surname would be contrary to this egalitarian model. In this regard, the European Court of Human Rights (ECtHR) has ruled in the Case of *Cusan and Fazzo v. Italy* that the Italian legislation imposing the assignment of the paternal surname to children and making it impossible for parents to choose freely and consensually between the paternal and maternal surname was contrary to Article 14 (prohibition of discrimination) in relation to Article 8 (right to respect for private and family life) of the European Convention on Human Rights.[76]

16.6.2 Adoption

Principle 24 of the Yogyakarta Principles requires States to take the necessary measures to ensure the right to find a family, including through access to adoption, without discrimination based on sexual orientation or gender identity. It also includes the obligation to take the necessary measures to ensure that the best interests of the child shall be a primary consideration in all decisions concerning children undertaken by courts and other institutions and that the sexual orientation or gender identity of any family member or other person may not be considered incompatible with such best interests.

On the other hand, the ECtHR has not affirmed the existence of a right to adopt. However, it has affirmed that the selection processes or the examination of future adoptive parents' suitability should not be influenced by discriminatory considerations or stereotypes based on the sexual orientation of those applying for adoption. In this respect, the ECtHR has ruled in the *Case Fretté v. France* that there was no discrimination in the selection process on the grounds of the applicant's sexual orientation.[77] However, this judgment has several dissenting opinions which maintain that the applicant's homosexuality conditioned the refusal to the adoption.

[76] App. No. 77/07, Case of Cusan and Fazzo v. Italia (ECtHR, 7 January 2014), para. 62, 66 and 67.
[77] App. No. 36515/1997, Case of Fretté v. France (ECtHR, 26 February 2002), para. 42 and 43.

In the Case of *E.B. v. France*, the ECtHR considered that there was a discrimination in the selection process on the grounds of the sexual orientation of the applicant.[78] However, this judgment has several dissenting opinions which argue that the refusal was based on the child's welfare because of the applicant's partner's lack of involvement in the adoption process.

16.6.3 Paternity Investigation and Filiation Proceedings

On the other hand, paternity claims arise as a right of the child in cases where the father has abdicated his responsibility to prevent the mother from being the only one obliged to bear the burden of raising the child.[79] However, at the same time, paternity claims are also a right of the man who wants to assume his responsibility for the child's care and maintenance. Besides, it should be taken into account that these claims involve a variety of rights, such as the mother's right to privacy, the child's right to privacy and the father's right to family.

16.6.4 Filiation and Transgender

Many legal questions arise in relation to the paternity or maternity of transgender persons, for example, does a trans-woman have to stay the father? Can she become a mother of the child? And vice-versa. The answer to these questions will depend on whether the change of gender, as well as its possible rectification in the registry, took place before or after the determination of parentage.[80]

16.6.5 Assisted Procreation

Regarding medically assisted reproduction, which includes assisted reproductive technology, the advances that have taken place in this field have favoured the emergence of new family models, insofar as they make it possible for single people without a partner and same-sex couples to become mothers or fathers.

In particular, assisted procreation with an anonymous sperm donor intervention allows a woman to become a single mother without any responsibility for the biological father. This procedure is also used by female couples who wish to become mothers. In some legislation, the motherhood of both women is legally recognised.[81]

[78] App. No. 43546/2002, Case of E.B. v. France (ECtHR, 22 January 2008), para. 96, 97 and 98.

[79] Vivas Tesón (1999), p. 373.

[80] For a more detailed study of the issue, see Jarufe Contreras (2016).

[81] For example, in the Spanish law about assisted procreation, but just when both women are married (see Article 7.3 of Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida).

However, in others, only the legal motherhood of the woman who gestates and gives birth to the baby after undergoing this procedure is recognised.[82] The latter situation poses some legal problems, especially when the couple breaks up, for the woman who has no legal link to the child but has also acted as a mother.

On the other hand, using assisted procreation, surrogacy allows men who wish to become parents alone, male couples and couples in which one of the partners is unable to gestate to become parents. Through surrogacy, one or two people (intended parents) enter into a contract with a woman (surrogate mother) who agrees to undergo this procedure to become pregnant (with her genetic material, that of the intended parents or that of a donor) and give birth to a child who will be given to the intended parents.[83] However, surrogacy is an illegal practice in most countries, for example, in Spain, Germany or Sweden.[84] The regulation of surrogacy is widely controversial, with voices for and against it.

The arguments in favour are very varied, among them, it is argued that no legalisation of this procedure would prevent biological parenthood through assisted procreation for men who want to be single fathers and male couples, as opposed to single women and female or heterosexual couples. This sector argues also that a law that guarantees the surrogate mother's rights would not infringe on her rights but would represent a decision in the exercise of her reproductive autonomy.[85] Among those who defend it, some argue that it should be free of charge to avoid the commodification of women.[86] On the contrary, others argue that the surrogate mother should receive financial compensation as is done in other procedures of assisted procreation, for example, egg and sperm donation.[87]

The sector against surrogacy argues, among other reasons, that surrogacy violates women's rights, that it contributes to their commodification, as it turns according to their opinion women's bodies into objects (as happens e.g. in prostitution), and to their exploitation, considering that most surrogate mothers tend to be women with few economic resources and living in countries with more income inequality. Furthermore, they argue that in its altruistic version, it contributes to devaluing pregnancy and childbirth, as has happened with other roles traditionally played by women (housework or raising children).[88]

The ECtHR has ruled on surrogacy in several judgments. In all of these judgments, the ECtHR has ruled about the problem concerning children born through surrogacy abroad whose filiation is intended to be registered in the country

[82] For example, the Spanish law about assisted procreation (see above) recognizes the maternity of both women when they are married but it says nothing when they are a couple of facto.

[83] Rodríguez Ruíz (2017), p. 259; Souto Galván (2006), pp. 182–183.

[84] As example, see Spanish law about assisted procreation (Article 10 of Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida).

[85] Rodríguez Ruiz (2017), pp. 267–268; Igareda González (2020), p. 87.

[86] Souto Galván (2006), p. 195.

[87] Igareda González (2020), p. 83.

[88] Rodríguez Ruiz (2017), p. 261.

of origin of the intended parents, where this procedure is prohibited.[89] However, in these judgments, the ECtHR has not ruled on whether it is appropriate to legalise this practice, leaving this issue to each State's power.[90]

Finally, access to assisted procreation has also allowed women to delay motherhood, for example, by the procedure of egg cryopreservation. This reality finds voices for and against it. On one hand, assisted procreation allows women to decide, in the exercise of their reproductive autonomy, to delay motherhood to focus on their working careers. On the other hand, defending the benefits of these procedures and technology for women in the labour market implies imposing on them the parameters of a typically male work model where pregnancy, childbirth and child-rearing are not contemplated, instead of establishing measures that allow women to balance their work and family lives, and to establish an egalitarian model where child-rearing is also part of the work and family life of men.[91]

To conclude, regarding filiation, assisted procreation has favoured new models of family, but also creates some controversial issues that are unresolved or arises different opinions for and against. One of the most problematic issues is surrogacy. Some argue that a protective law for the surrogate mother is in accordance with women reproductive autonomy. On the contrary, others argue that surrogacy violates women's rights and contributes to their commodification.

16.7 Gender Perspective and Parental Responsibility, Child Custody and Child Support[92]

An androcentric society's construction was possible by relying on a specific family model as the most basic form of social organisation. A family was a social group encompassed by different people, goods, and resources, under the father's power, as the family's head. Thus, in Ancient Rome, the *pater familias* exercised power over his wife, children, slaves, and property. This patriarchal family model persists over the centuries. Although it underwent some variations, its essence remained the same: the male's hegemonic role in the public sphere was transferred to the family, so the father made the family sphere decisions, also concerning his children. Woman remained in the domestic sphere, in their role as wife and mother, under the decisions of the husband/father.[93]

[89] App. Nos. 65192/11 and 65941/11, Case of Menesson and Labassee v. France (ECtHR, 26 June 2014). App. No. 25358/12, Case of Paradiso and Campanelli v. Italy (ECtHR, January 2017). App. No. 906372014, Case of Foulon and Bouvet v. France (ECtHR, 21 July 2016). App.11288/2018, Case of D v. France (ECtHR, 16 July 2020).

[90] Igareda González (2020), p. 78.

[91] Álvarez Medina (2017), pp. 158–160.

[92] This section has been translated with the translation service of the University Research Institute for Sustainable Social Development (INDESS).

[93] Moraga García (2014), pp. 480–481.

With industrialisation (nineteenth century), the dichotomy between public/masculine and private/feminine became more acute. A rural way of life, where the family produced its resources and all family members contributed to its support, including the children as labourers from a very young age, is abandoned. With industrialisation, production was transferred to factories and family resources to its support had to be found outside the home, and this task fell to the father, who had to go out to work.[94] Although the majority of women remained at home, some women also started to work in factories and to access the labour market but keeping their household and childcare obligations.[95] Besides, children's rights began to emerge. Children started not to be considered as labour force, and the idea of woman as the best suited to care for young children prevailed, following child protection's footsteps.[96] As husband and father, the man was responsible for the family's economic support. The woman was responsible for the care of the children and the home without losing the father's hegemonic role within the family. This patriarchal model was what the codification movement of the nineteenth century took up and regulated, giving it legal backing. For this reason, in the nineteenth-century civil codes, the father had attributed authority and decision-making power over the children, with the mother occupying a secondary or subsidiary role, even though the mother carried out the functions of upbringing, care, and education of the children in practice.[97] The father maintained his authority over the children after the divorce to the mother's detriment (as we will see below). Even widowed woman continued in this subsidiary position, transferring decision-making power over the children to another male member of the family (the grandfather, an older brother or the woman's new husband).[98]

On the contrary, European codes nowadays establish the equality of father and mother in exercising their rights, duties and responsibilities towards their children. Following the example of the Spanish Civil Code, contrary to its original wording, the current Article 154 states:

> "Unemancipated sons and daughters are under their parents' parental authority. Parental authority, as parental responsibility, shall always be exercised in the interests of the sons and daughters, following their personality, and with respect for their rights and their physical and mental integrity".

In the Spanish Civil Code, parental authority is now a concept stripped of the old authority or hegemonic power of the father and configured as a responsibility, a function exercised for the benefit of the children and on equal terms by the parents,[99]

[94] Esquembre Valdés (2006), p. 42; Moraga García (2014), p. 481; Avilés Hernández (2019), p. 201.
[95] Esquembre Valdés (2006), p. 43.
[96] Moraga García (2014), p. 481; Avilés Hernández (2019), p. 201.
[97] Moraga García (2014), p. 481.
[98] Moraga García (2014), p. 482. Avilés Hernández (2019), p. 200.
[99] Verdera Izquierdo (2014), p. 457.

whether they are married or an unmarried couple, and whether they are of different or the same sex. Other examples of parental co-responsibility can be found in Article 316 of the Italian Civil Code.

This principle of co-responsibility can also be found in international law. Thus, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979, establishes in Article 5 b) that States Parties shall take all appropriate measures to ensure "the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases". Moreover, Article 16.1 (d) and (f) of CEDAW establishes that States Parties shall ensure, on a basis of equality of men and women, the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; and with regard to guardianship, wardship, trusteeship and adoption of children; in all these cases, the interests of the children shall be paramount. Furthermore, in the United Nations Convention on the Rights of the Child of 20 November 1988, Article 18.1 says that "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians shall have the primary responsibility for the upbringing and development of the child. The bests interest of the child will be their basic concern". Including the principle of co-responsibility in the Convention on the Rights of the Child makes it possible to sustain its relationship with the children's welfare. However, the latter must guide the exercise of this co-responsibility. Besides, it should be taken into account that Article 3.1 of the Convention on the Rights of the Child states that in all actions concerning children, the best interest of the child shall be a primary consideration. Nevertheless, as we shall see below, the interest of the child, being an indeterminate concept, can also be used to perpetuate gender inequalities.[100] In this sense, the General Comment No. 14 (2013) of the Committee on the Rights of the Children highlights in paragraph 34 that "the flexibility of the concept of the child's best interests allows it to be responsive to the situation of individual children and to evolve knowledge about child development. However, it may also leave room for manipulation; the concept of the child's best interests has been abused (. . .) by parents to defend their own interests in custody disputes."[101]

The evolution from a patriarchal family towards a model in which father and mother exercise their parental responsibility on equal terms has occurred gradually. The demands of feminist movements have undoubtedly played a fundamental role in

[100] Choudhry et al. (2010), p. 9; Rodríguez Ruiz (2017), p. 51.

[101] See General Comment No.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) of the Committee on the Rights of the Children. The Committee on the Rights of the Child monitors implementation of the Convention on the Rights of the Child by its State parties. https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx

this change. Both national and international legal texts have gradually taken up and covered the principle of equality and non-discrimination on the grounds of sex, which consequently must also be reflected in the regulation of parental responsibility. Likewise, the prohibition of discrimination on the grounds of sexual orientation or gender identity and the progressive recognition of LGTBQIA+ groups' rights regarding marriage, adoption, and access to assisted reproduction techniques have led to other family models being contemplated.

However, despite the formal recognition of equality in the exercise of parental responsibility, gender roles or stereotypes continue to weigh heavily in children's upbringing, care, and education, giving rise to material inequality situations. It happens because women have entered the labour market and the public sphere, but men have not entered the domestic sphere or have done so late, incompletely and unequally.[102] For this reason, it is still mainly women who take maternity leave, leave of absence and reduced working hours to care for their children.[103] Balancing between work and family life is still seen as particularly difficult for women, as they are who mainly carry the burden of domestic life. Thus, it has been argued that in practice, the current family model presents characteristics of an egalitarian system but also with roles and elements typical of the patriarchal family.[104] It shows that there is still a long way to go in terms of material equality. Therefore, positive and inclusive actions are required to remove these obstacles, but without falling into the trap of paternalism so that, far from promoting equality, the measures adopted perpetuate these inequalities or gender stereotypes. Moreover, following a gender perspective is no longer enough to adopt measures focused on a single aspect or area; instead, it requires cross-sectional actions that remove these gender inequalities or stereotypes, involving different areas (legal, social, educational, etc.) in a connected way.

On the other hand, inequality in children's care and responsibilities has been particularly evident in divorce cases or lack of parents' cohabitation. The conception of the family and the roles that its members play within it have conditioned the consequences of the cohabitation break-up in parental responsibilities.[105]

Thus, initially, considering that the father had a preferential role in decision-making about the children during the marital cohabitation, he was granted custody of the children with the divorce or the cohabitation break-up. The divorced or separated mother did not cohabitate, did not participate in decision-making and could even lose the right to interact with her children.[106]

[102] Moraga García (2014), p. 482.

[103] Wallbank (2010), pp. 107–110; Moraga García (2014), p. 483.

[104] Collier (2010), pp. 128–129.

[105] Avilés Hernández (2019), p. 198.

[106] Moraga García (2014), p. 482; Avilés Hernández (2019), p. 200.

Gradually, the balance has shifted child's custody towards the mother since, as we have seen above, under the influence of child protection measures, the idea that it is in the child's best interests to remain in the mother's care is gaining ground.[107] The father is responsible for the payment of maintenance and has visiting rights. The father's role as breadwinner and the mother as carer, with the dissociation between public/male and private/female, continues in these cases of the parents' cohabitation break-up.

This scheme is maintained, although the legal texts regulate the figure of custody in an egalitarian manner, without leaning towards the father or the mother, but rather towards the parent who is more apt to take care of the child. It is because the choice of the most suitable parent following the principle of the welfare of the child means that in this difficult choice, judges opt for the parent who, until before the break-up, had been carrying out the tasks of raising and caring for the children, i.e. mostly the mother.[108] This sole custody system means that in practice, the mother continues to bear a more significant burden in the children's care and education, which worsens when the father neglects his responsibilities, for example, when he fails to pay child support. On the other hand, fathers argued that this model of custody prevents them from having a fluid relationship with their children and even from participating in making important decisions regarding their education or health when the figure of custody also includes or involves these parental responsibilities and also places an excessive financial burden on them (payment of alimony, moving out of the family home).[109] At this point the debate on joint or shared custody arises.[110]

Joint custody appears as an egalitarian model favouring co-responsibility after the break-up of the parents' cohabitation. Joint custody would make it possible to distribute the burden of parenting between the parents and favour a fluid relationship between the children and both parents after the break-up of cohabitation, all of this to benefit the child's well-being.[111]

However, this type of custody is subject to criticism. According to a critical voice,[112] the implementation of this regime in legal texts does not correct the inequalities between fathers and mothers in the care of children but rather maintains them to the detriment of women. Specifically, this opinion maintains that, even though the family model has changed a great deal and men are increasingly involved in childcare, childrearing's burden continues to fall mainly on women. If the father

[107] Avilés Hernández (2019), pp. 201–202.

[108] Vivas Tesón (1999), p. 339; Verdera Izquierdo (2014), p. 459; Rodríguez Ruiz (2017), p. 44.

[109] Wallbank (2010), pp. 95–96.

[110] We will use both terms as synonyms, although in some legal system they can involve some differences. Furthermore, joint and shared custody has different meanings in the diverse legal system and can involve cohabitation, care and making decisions concerning children. In any case, the model of joint or shared custody arises in relation to the debate about exercising parental rights and responsibilities on equality after the parents' cohabitation break-up. We will try to use these terms in a broad sense that encompasses their different meanings.

[111] Verdera Izquierdo (2014), p. 459.

[112] Moraga García (2014), pp. 479–485, 489–491.

was not involved in childcare before the break-up, shared custody would not correct this inequality. For this reason, this critical voice considers that shared custody should not be regulated in legal texts as a preferential system, nor should it be granted automatically by the courts. According to this opinion, before opting for this regime, the dedication that the parents have had during their cohabitation should be taken into account, so that shared custody should be chosen when both parents have been involved in the care of their children in a similar way. This critical view also considers that in those societies (for example, in Swedish) in which structural changes have been carried out to remove the obstacles that prevented the consolidation of an egalitarian family model (free childcare from the age of zero, rationalisation of work schedules to favour the balance with family life, parental leave for both parents under equal conditions, and so forth), this system of custody would be viable. But not in societies where the family model in practice is far from equal because the necessary conditions are not in place. The most critical voices against shared custody argue that it is a sexist and patriarchal demand. They believe that most fathers' rights movements that demand it are trying to maintain or recover the hegemonic position they had within the patriarchal family and get rid of their economic burdens; they argue that there is no genuine interest in sharing children's upbringing.[113]

Regardless of these views, there is no doubt that joint custody encourages co-responsibility and is in accordance with Articles 5 b) and 16.1 (d) and (f) of the CEDAW, as well as Article 18.1 of the Convention on the Rights of the Child, mentioned above. Let it be supposed that it is understood to be in the children's best interests that both parents participate in their care and upbringing during cohabitation; in that case, there is no reason to argue otherwise when they cease to cohabit. In this regard, Article 16.1(d) of CEDAW says that States Parties shall ensure, based on equality of men and women, the same rights and responsibilities as parents "irrespective of their marital status", but also adds "in all cases, the interests of the children shall be paramount". Therefore, the children's interests should guide this principle of co-responsibility, also when the parents do not live together.

In this sense, physical joint custody (cohabitation and care) favours co-responsibility. However, this system will not always be possible, for example, when the parents' homes are far apart, and in this case, other models that favour co-responsibility should be chosen. Thus, physical custody may be attributed to one of the parents with an extensive visiting regime for the non-residential parent, establishing the duty of both parents to contribute to the financial support of the child and also co-responsibility in legal custody, parental responsibility or parental authority (depending on the terminology of each legal system), i.e., the possibility of intervening in decision-making on important issues relating to the education, health, etc., of the child.

In the case of a shared custody model or other co-responsibility models over the children, the welfare of the children must be taken into account. Moreover,

[113] Moraga García (2014), pp. 482, 489–490.

according to Article 3.1 of the Convention on the Rights of the Child the best interest of the child shall be a primary consideration ahead of parents' interests. Nevertheless, the child's interests may not be used as an excuse to perpetuate situations of inequality, in one sense or another. In other words, it must be avoided that in the name of the welfare of the child, a system of sole or shared custody is chosen, not because the situation makes it advisable, but because of the maintenance of beliefs or stereotypes based on gender roles (for example, parents' sexual orientation, fathers are not suitable to care for young children, labour women are not good mothers, boys should be cared for by fathers and girls by mothers, among others). As noted above, this requires examining, among other issues, the relationship that the parents have had concerning the child and the relationship of the parents to each other before cohabitation break-up.[114] Therefore, joint custody would not be viable when violence has been exercised against the child and when one of the parents has exercised violence against the other. This raises all the problems related to gender violence, which we will not dwell on here since it is the subject of study in section 7, but on which it should be noted that it will have to be borne in mind when determining the system of custody, visitation rights or relationship with the non-residential parent and the exercise of parental responsibility.

To conclude, gradually, the patriarchal family has given way to a family model in which parents have equal rights and responsibilities over their children, in legal texts. After parents' cohabitation break-up, this situation of equal rights and responsibilities must be maintained in accordance with the child's interest. In this sense, shared custody arises as a system that favours co-responsibility after parents' break-up. However, despite the legal recognition of equality, gender roles and stereotypes continue to weigh heavily in the family, so that mothers are the main carers of children in practice. Because of that, it is required to remove stereotypes through actions that favour an equalitarian model of family in which both parents share their responsibilities over their children. In any case, child's interest has to be the primordial consideration and must not be used to perpetuate gender roles.

16.8 Gender Perspective and Domestic Violence

For a long time, domestic violence was regarded as a question pertaining to the private sphere of one's life and was understood to be a rare occurrence and unusual behaviour.[115] It was only after the actions of feminist movement conducted in the 1970s, that domestic violence was identified as a human's right issue. Such a conclusion was deduced from the fact that domestic violence against women was "global, systematic and rooted in power imbalances and structural inequalities between men and women."[116] Legal scholars maintain that there are two different

[114] Vivas Tesón (1999), p. 340; Wallbank (2010), p. 95; Rodríguez Ruiz (2017), p. 47.
[115] Petrušić and Konstantinović-Vilić (2010), p. 10.
[116] Choudhry (2010), p. 145.

schools of thought in regard to domestic violence. The first, feminist approach, considers domestic violence to be a result of power imbalances between women and men and the individual characteristics of the perpetrator, while the second school of thought considers domestic violence to be the result of emotional power imbalances in family relations caused by different factors and influences (unemployment, poverty, mid-life crises, alcoholism, etc.).[117]

Nevertheless, the understanding commonly accepted by authors is multi-layered, as it explains domestic violence to be a result of the deeply rooted roles assigned to women and men and of different socio-economic, social, cultural and psychological factors. For example, if we consider the everlasting cultural definition of gender roles and the belief in the inherent superiority of men on one side and women's economic dependence on men on the other, it can be deduced that women can feel trapped in their position.[118] Domestic violence and its causes have become an issue of both international and domestic legal concern.[119] As previously stated, it can also be deduced from the WHO's Report which concludes that globally, most violence against women is perpetrated by the current or former husband or intimate partner and that more than 641 million women aged 15 or older have been subjected to intimate partner violence.[120] With that in mind, it does not come as a surprise that the international community has enacted several international instruments related to the elimination of violence against women and in turn domestic violence.[121] Hence, the previously mentioned Convention on the Elimination of All Forms of Discrimination against Women takes an important place in bringing the female half of humanity into the focus of human rights concerns. Activities were also conducted on a regional level, as the Council of Europe has, in 1950, adopted the European

[117] Draškić (2008), p. 344.

[118] Schuler et al. (1996), pp. 1729–1742.

[119] Schuler et al. (1996), pp. 1729–1742.

[120] "Violence Against Women Prevalence Estimates, 2018, Executive Summary", World Health Organization on behalf of the United Nations Inter-Agency Working Group on Violence Against Women Estimation and Data (VAW-IAWGED), accessed April 20 2021, https://www.who.int/publications/i/item/9789240022256, VI.

[121] The General Assembly of the United Nations adopted the Declaration on the Elimination of Violence against Women with the resolution 48/104 of 20 December 1993, accessed April 20, 2021, https://www.ohchr.org/Documents/ProfessionalInterest/eliminationvaw.pdf. The Declaration urged Member States to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.

The said Declaration led to the adoption of the Bejing Declaration and Platform for Action adopted at the 16th plenary meeting of the Fourth World Conference on Women, on 15 September 1995, accessed April 20, 2021, https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf.

The General Assembly of the United Nations, on its 58th session on 22 December 2003 adopted the General Assembly Resolution 58/147 on elimination of domestic violence against women, accessed 20 April 2021, https://undocs.org/en/A/RES/58/147. The said resolution stipulated that that domestic violence is of public concern and required States to take serious action to protect victims and prevent domestic violence.

Convention of Human Rights (ECHR).[122] Although the ECHR does not specifically deal with the question of domestic violence it cannot be denied that it has "proved itself to be much more effective than other such instruments in ensuring State compliance with the human rights norms it represents."[123] In that respect, the European Court of Human Rights (ECtHR), aimed to achieve the rightful implementation of the ECHR in case of any breach of rights set thereto, has relatively recently had the chance to apply the ECHR to the issue of domestic violence. To be precise, it was first in *Kontrová v Slovakia*[124] that the ECtHR underlined the duty to take positive action to prevent a risk to a victim of domestic violence.[125] In *Bevacqua and another v Bulgaria*[126] the Court has, for the "first time recognised that a failure to protect a woman and her child from violence and harassment can constitute a violation of Article 8 of the Convention and urged the State to intervene where women face situations of violence in the private sphere."[127] Finally, in *Opuz v. Turkey*,[128] the Court held for the first time that domestic violence in the case at hand was gender-based[129] and that it "affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence."[130] Aside from the ECHR, it is important to underline that the COE has adopted the Convention on preventing and combating violence against women and domestic violence in 2011[131] (also known as the Istanbul Convention) which is the first legally binding instrument in Europe aimed to combat gender-based violence. According to the provisions of Istanbul Convention, the state is obliged to "prevent all forms of violence against women, take actions aimed to protect the those who experience it and prosecute perpetrators, and to promote equality between women and men prevent violence against women by encouraging mutual respect or non-violent conflict resolution and questioning gender stereotypes."[132]

[122] European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, accessed on 20 April 2021, https://www.echr.coe.int/documents/convention_eng.pdf.

[123] Choudhry (2010), p. 147. That does not come as a surprise if we bear in mind that the ECHR guarantees amongst other, the right to life (Art. 2), prohibition of torture and inhuman or degrading treatment or punishment (Art. 3) and the right to respect for private and family life (Art. 8).

[124] App. No. 7510/04 Case of Kontrová v Slovakia (ECtHR, 31 May 2007).

[125] App. No. 7510/04 Case of Kontrová v Slovakia (ECtHR, 31 May 2007), para. 49.

[126] App. No. 71127/01 Case of Bevacqua and S. v Bulgaria (12 June 2008).

[127] App. No. 71127/01 Case of Bevacqua and S. v Bulgaria (12 June 2008), para. 65.

[128] App. No. 33401/02 Case of Opuz v. Turkey (9 June 2009).

[129] App. No. 33401/02 Case of Opuz v. Turkey (9 June 2009), para. 200.

[130] App. No. 33401/02 Case of Opuz v. Turkey (9 June 2009), para. 198.

[131] The Council of Europe Convention on preventing and combating violence against women and domestic violence, adopted on 11 May 2011, accessed on 20 April 2021, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084 82e.

[132] "What is the Istanbul Convention? Who is it for? Why is it important?" Publication of the European Commission, accessed on 17 June 2021, https://ec.europa.eu/justice/saynostopvaw/downloads/materials/pdf/istanbul-convention-leaflet-online.pdf.

It is important to note that domestic violence leads to grave consequences on the overall well-being of victims. Domestic violence can lead to unwanted pregnancies, STDs, miscarriages, depression, anxiety, low self-esteem, eating disorders and even to most fatal consequences such as suicide and intimate femicides[133] (gender-based murder of women and girls).[134] It should be stressed that one study testifies that in 2018 there were 147 cases of femicide in Germany, 139 in the United Kingdom and 121 in France![135]

As previously mentioned, most violence against women is perpetrated by the current or former husband or intimate partner. As a result, domestic violence has its deteriorating effects on the regulation of divorce/separation, especially when the said relationship includes children. It is not unusual that women often remain part of a destructive and unhealthy relationships mainly because they feel "helpless to leave the abusive partner"[136] and because "their alternatives are limited if they do not have economical and personal resources to make a satisfactory exit."[137] Accordingly, victims of domestic violence often opt to ignore the problem, adjust to the needs of the perpetrator and to remain silent on this issue. There are a variety of reasons which define the victim's decision not to report domestic violence. These reasons generally relate to the victim's feeling of shame to report the wrongdoing, understanding that the act of domestic violence was a rare occurrence which will not be repeated and a lack of trust towards the authorities. Moreover, authors argue that "there are some groups of women which are not even aware of the fact that they too are intitled to a life without domestic violence, such as Roma women, handicapped women, women in villages, etc."[138]

[133] Mršević (2014), p. 87. See also "Understanding and addressing violence against women", World Health Organization, 2012, accessed June 17 2021, https://apps.who.int/iris/bitstream/handle/10665/77421/WHO_RHR_12.38_eng.pdf;jsessio.

[134] "Domestic Violence against Women and Girls", United Nation's Children Fund, Innocenti Research Center, Florence, No. 6, 2000, accessed April 20, 2021, https://www.unicef-irc.org/publications/pdf/digest6e.pdf, p. 19.

It has been evaluated that a total of 50,000 deaths worldwide in 2017 were the deaths of women and girls resulting from intentional homicide perpetrated by an intimate partner or other family member. "Global Study on Homicide, Executive Summary", United Nations Office on Drugs and Crime, United Nations (2019), accessed April 20, 2021, https://www.unodc.org/documents/data-and-analysis/gsh/Booklet1.pdf, p.14.

[135] Statista Research Department, accessed on June 17, 2021, https://www.statista.com/statistics/1096116/femicide-in-europe-in-2018/#stat; Yllö, Bogard (1988), cited by Baber and Allen (1992), p. 52. Gelles, Conte, cited by Baber and Allen (1992), p. 52. See Mršević (2014), p. 51. In that respect Choudhry argues that "the individual interests of a parent victim of domestic violence could easily be overridden by the interests of the child, if those interests are threatened by choices made by that parent – choices which can range from a failure to leave an abusive relationship or to co-operate in action taken against the perpetrator." Mullender (1995); Hester et al. (2000), new edn 2007, p. 153. Choudhry (2010), p. 147.

[136] Yllö, Bogard (1988), cited by Baber and Allen (1992), p. 52.

[137] Gelles, Conte, cited by Baber and Allen (1992), p. 52.

[138] See Mršević (2014), p. 51.

The problem becomes even more severe if the said relationship includes children. It is not unusual that a victim remains part of an abusive relationship in order to protect the life and well-being of her/his offspring, seeing that a different scenario could potentially result in a tragic manner for both the victim and the child.[139] Since victims fear not only for their life, but more importantly for the life of their children they usually decide to do nothing on the subject matter, as they see no other possibility but to accept the position they are in. Such fear is indeed justified if we bear in mind that domestic violence has its serious implications on children as well. Better said, a study shows that at least 750,000 children a year witness domestic violence. Moreover, children who have experienced domestic violence are more likely to suffer from emotional trauma and mental health difficulties in adult life.[140]

The question of domestic violence is indeed recognised as a problem affecting women and children's fundamental human rights globally. It can nevertheless be argued that the existing system of international human rights fails to "adequately reflect and respond to the experiences and needs of women."[141] It is hence required to firstly address and adjust the existing understanding of the patriarchal division of sex roles and instead not only promote but also achieve material gender equality in every area of contemporary family life. Secondly, both the international and national systems ought to undergo a systematic change which will put more focus on the prevention of domestic violence and on rising awareness on harmful effects of domestic violence. Moreover, actions ought to be taken in order to create more reliable surroundings for the victims which would in turn lead to the increase of their trust in the authorities and to their willingness to report an act of domestic violence and to seek protection. Such behaviours would lead to the decrease of the rate of domestic violence and would pave the way towards a more balanced society.

16.9 Conclusion

Family law and family policies are the major site for the promotion of gender equality in many countries because unequal power relations and gendered practices are codified through family law reinforcing patriarchal structure and male domination. The backbone of family law in many countries is based on the patriarchal dividend and a heterosexual gender binary system that values heterosexual relations and enhances men's privilege.

Family as an interconnection between private and public spheres, is where various forms of violence and discrimination take place. Therefore, women's

[139] In that respect Choudhry argues that "the individual interests of a parent victim of domestic violence could easily be overridden by the interests of the child, if those interests are threatened by choices made by that parent – choices which can range from a failure to leave an abusive relationship or to co-operate in action taken against the perpetrator."

[140] Mullender (1995); Hester et al. (2000); new edn. 2007, cited by Choudhry (2010), p. 153.

[141] Choudhry (2010), p. 147.

movements have globally aimed to struggle for gender equality in family laws and policies by disrupting the institution of family that is based on patriarchal system, unequal power relations and gender inequalities. Hence, feminists have questioned family as a safe and stable place for women by advocating for family law reforms. The development of family laws has focused on equal power relations among family members including intimate partners (current and ex-partners), children, parents, and extended family members. Moreover, structural inequalities and violence in family, especially violence against women has been problematised through intersectional analysis of multiple inequality grounds i.e., sexuality, age, class, race, ethnicity, nationality, (dis)ability for over 70 years at international and national levels around the world.

The chapter's first key point is a critical examination of family as an institution where unequal gender roles are introduced through marriage law. What constitutes a family and to that extent what defines parenthood is based on the social and legal systems' perspective on gender. Thus, gender equality family laws and policies aim to promote a form of family that is based on sexual and gender diversity.

The second key point of the chapter is discussed through critical analysis of marriage and laws surrounding marriage related issues such as property, maintenance, divorce, parenthood, and child support. In this regard, gender equality law and policy development move towards equality of rights between partners. The life partnership that originates with marriage and ends with divorce requires a response from the legal system to several questions that affect both the spouses' financial relations and those with third parties.

The third key point that the chapter discusses is on the best interests of the child in family, which is also based on equal treatments of parents not only from a formal but also from a substantive viewpoint. In this sense, shared custody arises as a system that favours co-responsibility after parents' break-up. However, despite the legal recognition of equality, gender roles and stereotypes continue to weigh heavily in the family, so that mothers are the main carers of children in practice. Because of that, it is required to remove stereotypes through actions that favour an equalitarian model of family in where both parents share their responsibilities over their children in practice.

Domestic violence is the fourth important key point in this chapter as a gendered matter in family law. It was only after the actions of feminist movement conducted in the 1970s that domestic violence was identified as legal issue. Domestic violence against women is a crystal-clear result of systemic violence and structural inequalities imbued with unequal power relations in family. Moreover, domestic violence is not only based on gender oppression, but also oppression based on sexuality, race, class, ethnicity, religion, nationality and age.

Questions

1. **Understanding family formation:** The objective of this exercise is to understand the ways in which gender-equal family is constituted through the process of developing family equality law and policies.
   Analyse family law in your country by investigating how family is constructed with regards to gender and sexuality, then examine how gender division of labor is handled? Do gender roles define person's rights and responsibilities in family? Could you identify unequal power relations between the members of family? In what ways? How would you make changes to the current gender dynamics?
2. **Marriage and gender perspectives:**
   Analyse the evolution that the regulation of marriage has had in your country's legal system. Point out the most significative changes that have taken place from a patriarchal model to an egalitarian model. Point out those aspects that are still pending in the achievement of an egalitarian model.
3. **Parental responsibilities and child custody:**
   How has the regulation of parental responsibility and/or custody evolved in your country's legal system? What have been the most significant changes that have taken place from a patriarchal model to an egalitarian model in your country's legal system? What aspects are still pending in the achievement of an egalitarian model in your country's legal system?

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