# Equal and Not. A Feminist Perspective on Italian Family Law

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**Abstract**

In countries of the so-called global north, family law is currently based on the principle of gender equality. However, despite this foundation, both formal and substantive discrimination persists. In this context, it is imperative to apply a feminist perspective to identify where the law and the courts uphold or challenge traditional gender roles and power dynamics.

Beginning with a chronological analysis of the introduction of formal gender equality in Italian family law, the article examines two areas of significant social importance where women often encounter *de facto* discrimination: post-marital property decisions and domestic violence. It concludes by considering the role of Italian family law scholarship in promoting both formal and substantive equality.

## I. The Need for a Feminist Approach to Family Law

In countries of the so-called global north, family law is now based on the principle of formal equality between men and women, resulting in a predominantly gender-neutral attitude.[1]

However, the shift towards equal treatment is relatively recent. Conventionally, it can be traced back to the British Married Women's Property Act of 1870, which recognised the rights of married women to keep their earnings and investments independent of their husbands, to inherit modest sums and to own rented or inherited property from close relatives. While this was a step forward for women's rights, married women still did not achieve full financial independence, as the majority of their financial assets and property were still legally controlled by their husbands.[2] In recent decades, one of the most notable achievements in the UK

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[1] As is well known, the term 'gender' has been borrowed from the medical field to denote characteristics (attitudes, behaviors, clothing, language, etc.) believed in a given society and culture to be fitting and appropriate for men and women. In this perspective, it may or may not align with sex, which, in contrast, pertains to biological characteristics (such as genitalia, chromosomes, and reproductive organs). A classic reference on this topic is A. Oakley, *Sex, Gender, and Society* (London: Temple Smith, 1972). On the origin of the equality principle and its development in Family Law see W. Müller-Freienfels, 'Equality of Husband and Wife in Family Law' 8 *The International and Comparative Law Quarterly*, 249 (1959) and on the road from negative equality to positive equality between men and women J. Richards, 'Feminism and Equality' 9 *Journal of Contemporary Legal Issues*, 225 (1998).

[2] B. Griffin, 'Class, Gender, and Liberalism in Parliament, 1868-1882: The Case of the Married

has been the passing of the Equality Act 2010. Indeed, this comprehensive piece of legislation takes a holistic approach to promoting gender equality across different facets and stages of life. Among its key provisions, the Act abolishes the remaining vestiges of marital power entrenched in common law and previous legislation, thereby furthering the cause of gender equality.[3]

Moreover, full formal equality has not been achieved in all countries, and discriminatory laws against women persist. One of the best-known examples is family names. For centuries, it has been a social and legal convention that children take their father's surname. However, according to the European Court of Human Rights (ECtHR), the automatic precedence of the father's surname over that of the mother's violates the prohibition of discrimination and the right to respect for private and family life guaranteed by Arts 8 and 14 of the European Convention on Human Rights (ECHR). For example, in *Cusan and Fazzo* v *Italy* (7 January 2014), the ECtHR found a violation in the inability of married couples to agree to give their child the wife's surname. More recently, in *León Madrid* v *Spain* (26 October 2021), the Court condemned the rigidity of the rule that the paternal surname should come first in cases of parental disagreement. Moreover, in many countries, the law allows women to add or even replace their maiden surname with their husband's surname when they marry, but men do not have the same option. The ECtHR has repeatedly challenged this discrimination. In *Burghartz* v *Switzerland* (22 February 1994), the European judges addressed the inequality resulting from the fact that wives, but not husbands, are allowed to add their spouse's surname to their own after marriage. In the case of *Ünal Tekeli* v *Turkey* (16 November 2004), the European Court criticised a national provision which required married women to take their husband's surname upon marriage, thereby preventing them from retaining their own surname. In *Losonci Rose and Rose* v *Switzerland* (9 November 2010), the Court considered the prohibition for the husband to retain his own surname after marriage as discriminatory, given that the same right would have been granted to his wife if the roles were reversed.

However, most of the discrimination that women face today stems from violations of the principle of substantive equality. The phenomenon is widespread also in the systems of the so-called global north, which often perceive themselves as fully committed to formal equality and well-positioned in rankings assessing substantive discrimination within family households. Indeed, traditional gender

Women's Property Acts' 46 *The Historical Journal*, 59 (2003). However, according to Chused (R.H. Chused, 'Married Women's Property Law: 1800-1850' 71 *Georgetown Law Journal*, 1359-1426 (1982)), the enactment of married women's property laws reflected an increase in women's family responsibilities, more than a new role for them in the commercial and political world.

[3] See Section 198, which abolishes the husband's common law duty to maintain his wife and the common law presumption of advancement (stating that a man transferring property to his wife, child, or fiancée is making a gift of that property to the recipient, unless there is evidence to the contrary). This section also establishes the presumption of equal shares when one spouse pays the other a housekeeping allowance.

roles dictate that women bear a disproportionate burden of care responsibilities for children, dependent relatives and domestic work. Despite a shift towards a dual-earner household model, this work remains largely invisible, undervalued in terms of its importance and lacking in economic recognition. Since the 1960s, legislators and courts have actively sought to promote *de facto* equality. For example, several European countries, including Italy, introduced the community property (*comunione legale* in Italy, régime de la *communauté réduite aux acquêts* in France, *régimen de gananciales* in Spain) as the default matrimonial regime to recognise the value of domestic work within the family. The aim is to provide greater financial protection for the spouse without an independent income. However, in most countries the result has fallen short of expectations due to a number of factors, including the complexities involved in managing and dividing joint property. In addition, the ease of choosing separate property, which is now preferred by the majority of couples entering into marriage regardless of their income level, has contributed to this outcome.

An exceptional event such as the Covid-19 pandemic has highlighted how formal and, above all, substantive inequalities experienced by women within families are exacerbated in emergency situations. Indeed, these situations place a disproportionate burden of social and economic consequences on this part of the population.[4]

Under this light, a feminist perspective is crucial as it helps to identify and address gender injustices, promote gender equality, and challenge traditional norms and stereotypes.[5] Indeed, it analyses how family law legislation and practice affect gender equality within the family and society, seeking to understand whether they reinforce or challenge traditional gender roles and power dynamics. For example, as I will discuss later in this article, divorce legislation that prioritises the autonomy and independence of each spouse and gender-neutral custody arrangements may work well in a social context where both partners share family responsibilities and are dual earners. However, it may exacerbate the economic and social challenges faced by divorced wives and mothers in a country where gender inequalities in household management are still significant. In addition, an intersectional approach, which considers the interplay of multiple intersecting identities and factors when addressing legal issues related to family and domestic matters, recognises that women's experiences and rights may differ based on factors such as race and class. For example, intersectionality is critical in child custody and child support cases because it shows that the best interests of the child must be considered in the context of various intersecting factors (such as income, employment opportunities and caregiving responsibilities) that may affect the child's well-being and the parents' ability to provide care and support. Indeed, the best interests of the child

[4] World Economic Forum, *Global Gender Gap Report 2021* (Geneva: WEF, 2021), 43.

[5] As is well known, there is a plurality of feminisms inspired by different methodological approaches and political options. The common feature among them is the questioning of male dominance, both in society and in law. A classical reference is K.T. Bartelett, 'Feminism and Family Law' 33 *Family Law Quarterly*, 475 (1999).

require that custody arrangements are made on the basis of the quality of the child's relationship with each parent and not on the basis of their standard of living after divorce, which may be influenced by disparities in wealth, often based on gender discrimination against women in the acquisition of property.[6]

In this respect, Italy is an interesting case because of the existing tension in family law between modernity and tradition.[7] In particular, progressive legislation has facilitated faster divorces (legge 6 May 2015 no 55) and introduced the possibility of divorce without judicial proceedings by private agreement (decreto legge 12 September 2014 no 132). Furthermore, civil mechanisms to combat gender-based violence were strengthened with the enactment of the *Cartabia Reform* of civil procedure (decreto legislativo 10 October 2022 no 149). Nevertheless, Italy still faces a scenario in which family structures continue to place a disproportionate burden on women, who are assigned the primary responsibility for caring for children and managing the household.[8]

In the following paragraphs, I will first provide a diachronic analysis of the incorporation of the principle of formal equality without gender distinction into Italian law. I will then consider two areas of considerable social importance in which women often encounter *de facto* discrimination: a) post-marital property decisions following the breakdown of marriage; b) domestic violence, a phenomenon that disproportionately affects women and is rooted in historically unequal power relations between women and men, which amounts to discrimination against women. I will conclude with reflections on the potential role of Italian family law scholars in promoting both formal and substantive equality in family law.

## II. Formal Equality in Family Law

As previously stated, the establishment of formal equality between men and women in family law is a relatively recent occurrence.

In Roman law, full legal capacity was granted exclusively to the *pater familias*, with the simultaneous presence of the *status libertatis*, *status civitatis* and *status familiae* in the same person. Women could only acquire such capacity under

[6] The issue appears more complex than just the gender wage gap. For an interesting socio-psychological reconstruction of the dynamics that can lead to a greater concentration of property in the hands of men, see C.M. Rose, 'Women and Property: Gaining and Losing Ground' 78(2) *Virginia Law Review,* 421 (1992).

[7] With a specific focus on the Italian regulation of the property effects of divorce and marriage on spouses, M.R. Marella, 'Il futuro del divorzio (e del matrimonio) fra autonomia e solidarietà', in C. Camardi ed, *Divorzio e famiglie. Mezzo secolo di storia del diritto italiano* (Padova: CEDAM, 2021), 320, draws on Duncan Kennedy's considerations regarding the clash in the United States between pro-sex reformers and neo-Puritan reformers.

[8] See the data collected by ISTAT, Distribuzione carico di lavoro nelle coppie, available at http://tinyurl.com/2p9z262a (last visited 10 February 2024), regarding the 'asymmetry index', which measures the percentage of family workload carried out by women aged 25-44 out of the total family work time carried out by couples in which both partners are employed.

certain circumstances (if they were released from the *patria potestas* of the *pater* and emancipated from the *manus* of the husband) and with certain restrictions (eg, they were never granted *potestas* over other individuals). In addition, women, even those *sui iuris*, were restricted in their capacity to act, as they were subject to the *tutela mulierum* throughout their lives: that is to say, they could administer their property alone, but for extraordinary administration acts the *auctoritas* of the guardian was required.[9] As scholars have pointed out, the rationale for the institution of *tutela mulierum* is not to be found tout court in an *infirmitas sexus* stemming from a genuine belief in the existence of a weak state of women. [10] On the contrary, it was a cultural construction used to justify the real social reason, namely the protection of the agnates' expectations of succession, in the overriding interest of preserving the family as the key organism of society, capable of ensuring the maintenance of social peace and the protection of all its members. The same reasoning inspired the fact that only female adultery was relevant and sanctioned: the intention was to prevent the offspring of a person other than the husband from benefiting from his wealth.[11] Under this light, if until Augustus adultery by women was prosecuted and punished within the family, with the *lex Julia de adulteriis*, the state took over the powers previously held by the *pater familias* and made adultery a public offense.[12]

Throughout the pre-modern period, the family maintained a marked asymmetry of gender roles, particularly in the relationship between spouses. In particular, marriage remained the basic instrument for ensuring the orderly transmission of property from one generation to the next.[13] In order to maintain the coherence of the family patrimony over generations, institutions such as *maggiorascati* and *primogenitura* were established, guaranteeing a preferential distribution of inheritance in favour of older sons. Conversely, daughters received a reserved portion of the inheritance, known as a dowry, which facilitated their marriages and served as advance compensation for the loss of their parents' inheritance upon separation from the family of origin.[14] With marriage, the woman passed from the power of the paternal family to that of the husband, who not only had the administration and availability of the dowry (formally, the dominium of these goods remained in the hands of the wife), but also the power to authorise or not to

[9] The primary reference is to B. Albanese, *Le persone nel diritto privato romano* (Palermo: Università di Palermo, 1979).

[10] Hence P. Zannini, *Sulla tutela mulierum* (Torino: Giappichelli, 1976), 8.

[11] As is known, in fact, pater vero is est quem nuptiae demonstrant (Digest, 2, 54).

[12] V. Arangio-Ruiz, *Storia del diritto romano* (Napoli: Jovene, 1942), 254.

[13] M. Morello, 'Humanitas e diritto: la condizione giuridica della donna nella famiglia dell'età pre-moderna' *Studi urbinati di scienze giuridiche politiche ed economiche. New Series A - 2016*, nos 3 and 4, 378 (2016).

[14] P. Ungari, *Storia del diritto di famiglia in Italia* (Bologna: il Mulino, 2002), 68; G.S. Pene Vidari, 'Dote, famiglia e patrimonio fra dottrina e pratica in Piemonte' *La famiglia e la vita quotidiana in Europa dal '400 al '600. Fonti e problemi, Atti del Convegno internazionale*, Milano 1-4 dicembre 1983 (Roma: Ministero per i Beni culturali e ambientali, 1986), 111.

authorise the wife to dispose of her personal property (the so-called parafernals).[15] The Italian statutes of the 13th century were generally silent on the subject of adultery, as if to express a precise desire to leave the problem to individual family strategies. But already at the beginning of the 14th century, in the statutes of several Italian communes, the punishment for the man was only a fine, but for the woman it was more severe, even death.[16] A common element in all the legislation was the need for action by the husband, father-in-law, father or brother.[17] The rationale was clear: to ensure the certainty of male descent, while allowing male household members to condone adultery if they found it functional to their needs (eg, a sterile husband seeking progeny).

The French Revolution opened a breach in the patriarchal system. In fact, the key principle of equality (*égalité*) reverberated, at least at the height of the revolutionary ferment, as a recognition of the need to overcome the social and legal discrimination suffered by women, but also as a personalist principle that gradually transformed marriage, no longer as a mere political and patrimonial instrument, but as a place for the realisation of free and equal individuals.[18] The *Déclaration des droits de la femme et de la citoyenne* written by Olympe de Gouges in 1791 states that 'ignorance, forgetfulness or contempt of women's rights are the sole causes of public disasters and the corruption of governments' (preamble) and that

> 'the exercise of women's natural rights is limited only by the constant tyranny of men who oppose them; these limits must be reformed according to the laws of nature and reason' (Art 4).

A law of 20 September 1792 allows spouses to jointly apply for divorce, either by mutual consent or at the request of one of the parties, on grounds of incompatibility, ill-treatment or desertion of the matrimonial home. With regard to succession by death, following the abolition of primogeniture in 1790, the National Assembly decided in April 1791 that succession without a will should be divided equally between all the children, regardless of sex or age, and in 1793 and 1794 the principle of equality was extended to all forms of succession.[19]

The Napoleonic era, on the other hand, as is well known, marked a drastic strengthening of the leading position of the husband-father in the family. In fact, with the notable exception of divorce, Napoleon himself promoted the inclusion in the Civil Code of family legislation of a reactionary nature, aimed at ensuring 'the strong family in the strong state'.[20] Parental authority is termed '*paternelle*' as it is exclusively attributed to the father, conceptualized as a '*magistrat domestique*',

[15] ibid 65.
[16] M. Morello, n 13 above, 387-388.
[17] ibid
[18] P. Ungari, n 14 above.
[19] S. Desan, 'Pétitions de femmes en faveur d'une réforme révolutionnaire de la famille' *Annales historiques de la Révolution française* (2006).
[20] P. Ungari, n 14 above 104.

almost akin to a public office.[21] Furthermore, married women required authorization from their husbands to perform acts of a patrimonial nature: this authorization was, in fact, unfamiliar in countries following the *droit écrit* but acknowledged in countries following the *droit coutumier*.[22] The provision was later reiterated in the first Civil Code of the Kingdom of Italy (1865), albeit with a milder formulation. It no longer mandated such authorization for acquisitions but limited it to donations and sales of immovable property, mortgages, assignments, recoveries of capital, as well as related transactions and legal actions (Art 134 of the Civil Code of 1865).[23] From the outset, this provision and the overall deeply autarchic and misogynistic framework of the Civil Code faced strong criticism from intellectuals and political figures, both male and female.[24]

However, it was not until legge 17 July 1919 no 1176 (commonly referred to as the Sacchi Law, named after the deputy who introduced it) that the requirement for the husband's authorisation was abolished in Italy.[25] The law was passed not only because of social evolution, but also because of the

> 'need to improve the legal status of women, and also to give praise and honour to what Italian women have done and will do for their country'[26] (the reference is to the essential social and economic contribution of women during the First World War).

Despite the progressive emancipation of women in public law (eg, the right to vote in 1946 and the right of access to public offices and all positions in the public administration, including the judiciary, in 1963), the road to full equality between

[21] A. Desrayaud, 'Le père dans le Code civil, un magistrat domestique' 14(2) *Napoleonica. La Revue*, 3 (2012).

[22] As P. Ungari notes, the legal provision marks a step backwards for the women of Lombardy and Veneto in whose pre-unification territories the Austrian code, which did not know marital authorisation, applied.

[23] For additional study, refer to P. Ungari, n 14 above, 162 and F. D'Alto, *La capacità negata. Il soggetto giuridico femminile nella giurisprudenza postunitaria* (Torino: Giappichelli, 2020).

[24] Among the women, there was the journalist Anna Maria Mozzoni, author of, among other works, the remarkable *La donna in faccia al progetto del nuovo Codice civile italiano* (Milano: Tipografia sociale, 1865). Others included the educationalist Valeria Benetti Brunelli, known for her work *La donna nella legislazione italiana* (Roma: Forzani e C., 1908), and the doctor and socialist politician Anna Kuliscioff, who argued that without social conquests, civil rights would be limited to the few who could afford them.

Among the politicians, one could mention, for example, the Brindisi lawyer Salvatore Morelli. He was the author of *La donna e la scienza o la soluzione del problema sociale* (Napoli: Società Tipografico-Editrice, 1869) and, although unsuccessful, lobbied parliament for a bill on the legal reintegration of women and two bills on divorce.

[25] The evolution of women's status, as comprehended through shifts in family roles stemming from the industrial revolution and its detachment from the exclusive domestic sphere, stands as one of the central themes in P. Passaniti, *Diritto di famiglia e ordine sociale* (Milan: Giuffrè, 2011).

[26] Thus, the Hon. Sacchi spoke in Parliament during the presentation of the project. For a detailed reconstruction, refer to M. Severini, *In favore delle italiane. La legge sulla capacità giuridica della donna (1919)* (Venezia: Marsilio, 2019).

men and women in the family is long and tortuous, especially with regard to the personal relationship between spouses. The Italian Constitution of 1948 proclaims the 'moral and legal equality of the spouses', although it allows the law to set limits 'in order to guarantee the unity of the family' (Art 29, para 2). This reference to the 'family unit' allowed the original text of the 1942 Civil Code to maintain a patriarchal view of the family for decades (for example, Art 144 stated that the husband was the 'head of the family'), thus avoiding possible constitutional objections.

Towards the end of the 1960s, there was a significant shift, largely attributed to key interventions by the Italian Constitutional Court. A notable case illustrating this change pertains to the differential treatment of adultery. Despite the provisions in the Civil Code of 1865 and the original text of the Civil Code of 1942 emphasizing the reciprocal nature of the duty of fidelity (Art 121 of the Civil Code of 1865 and Art 143 of the Civil Code of 1942), a teleological and systematic interpretation had, until the 1960s, construed this duty to imply sexual exclusivity for the wife alone. This interpretation influenced the rules on legal separation, which excluded the possibility of separation 'on the grounds of adultery on the part of the husband, unless there are circumstances such that this fact constitutes a grave insult to the wife' (Art 151, para 2, of the Civil Code of 1865 and Art 151, para 2, of the 1942 Civil Code, original text). The 1930 Penal Code also distinguished between two forms of adultery: that committed by the wife (Art 559) and that committed by the husband (referred to as 'concubinage' in Art 560). The former was constituted by sexual intercourse by the woman outside of marriage, while the latter required the additional condition of a genuinely stable relationship leading to 'concubinage'. In its judgments no 126 of 16 December 1968 and no 147 of 27 November 1969, the Constitutional Court declared the two criminal provisions on adultery unconstitutional because they violated the principle of equality by treating adultery differently based on the sex of the person violating fidelity.

During the 1970s, the legislator played a prominent role by enacting law no 151/1975 under the so-called 'reform of family law'. Men ceased to be the 'head' of the family and husbands and wives have equal rights and duties (Art 143, para 1, of the Civil Code) and are expected to 'cooperate in the interests of the family' (Art 143, para 2, of the Civil Code). The institution of dowry was abolished (Art 166 *bis* of the Civil Code) and the term 'paternal authority' was replaced by 'parental authority', which emphasises the joint exercise of both parents, irrespective of their gender (Art 316 of the Civil Code).

Other parliamentary interventions followed over the years, gradually eliminating the vestiges of marital and paternal power from the legal system. Finally, in 2013, the rule - admittedly without practical relevance, but of undoubted symbolic value - that still existed in the Civil Code, according to which the paternal will prevails over the maternal in the event of disagreement between the parents on an urgent and unavoidable intervention for the child (Art 316, para 3, of the Civil Code), was abolished.

However, one glaring example of discrimination remains: the family name.

A particular aspect concerns marriage. The wording of the Italian Civil Code of 1865 and the original text of the Civil Code of 1942 established, as an expression of the attribution of marital authority by the husband to his wife, the automatic attribution of his surname to her by law.[27] Nevertheless, the interpretation gradually evolved, emphasising that the marital surname is a sign of family membership but does not change the woman's identity. The rule was therefore reinterpreted as a mere right and not an obligation for the wife to use the husband's surname (Corte di Cassazione 13 July 1961 no 1692). As a result, identity documents now show the maiden name and, only with the wife's consent, the husband's surname. Despite this interpretation, there is no doubt that the fact that only the wife can add her husband's surname to her own (without the possibility for him, in agreement with his wife, to add her surname to his own) is not justified by sufficient reasons and must be considered as discriminatory.[28]

Even more significant in terms of its social and cultural impact is the practice of taking the paternal surname, which became widespread in Western Europe around the 11th century.[29] The reason is clear: the need to establish and make visible paternity, since maternity is already proven by birth. As the Honourable Marisa Nicchi put it during a general debate in Parliament on a bill (never adopted) to reform family names,

> 'The imposition of the father's surname stems from men's desire to establish their centrality in the generation of life and lineage from which they feel excluded. Consequently, by concealing the mother's name, the primary mother-child relationship is erased'.[30]

The practice was so deeply rooted in culture and society that the drafters of the Civil Code didn't feel the need to codify it in a written text, although they did refer to it indirectly on several occasions.[31] The fact that the paternal transmission rule was tacit has long prevented its constitutionality from being reviewed, since the Constitutional Court can only challenge the constitutionality of 'laws'.

Only recently, the Constitutional Court has intervened in the matter,

[27] In 1927, Scaduto refers to the wife's 'right and, at the same time, obligation to carry out the acts of her legal life under her husband's surname' (G. Scaduto, 'Sul cognome della donna maritata' *Annali della Università di Messina*, 215 (1927).

[28] As already pointed out by F. Prosperi, 'Eguaglianza morale e giuridica dei coniugi e la trasmissione del cognome ai figli' *Rassegna di Diritto Civile,* 842 (1996). In case law, a relevant reference is the European Court of Human Rights, *Ünal Tekeli* v *Turkey*, cit.

[29] M. Bourin and P. Chareille, 'Désignation et anthroponymie des femmes. Méthodes statistiques pour l'anthroponymie'. Tome II-2 (Tours: Presses universitaires François-Rabelais, 1992).

[30] Camera dei Deputati, 'Discussione del testo unificato dei progetti di legge: Disposizioni in materia di attribuzione del cognome ai figli' (A.C. 360 ed abbinate-A), 14 July 2014.

[31] For example, Art 262 of the Civil Code stipulates that in the case of children born out of wedlock, 'the child shall take the surname of the father if both parents have given their consent at the same time'. The aim is to establish a rule similar to that which exists for legitimate children.

progressively recognizing the unconstitutionality of the automatic transmission of the paternal surname. In 1988, the Court merely reiterated the traditional view that had led the Constitution to allow 'limits' to the equality of spouses 'in order to guarantee family unity' (Corte costituzionale 11 February 1988 no 176). However, in 2006, it began reversing its position, stating that the patronymic rule was 'the legacy of a patriarchal concept of the family, ... and of an outdated marital power ...', but concluded that the question of legitimacy was inadmissible due to the discretionary power that should be granted to the legislator in the matter (Corte costituzionale 16 February 2006 no 61). In 2016, the Constitutional judges recognised the right of parental couples to choose, by agreement, the attribution of the double surname of both mother and father, declaring the patronymic rule unconstitutional because it violated both the principle of equality without distinction of sex and the right of the child 'to be identified ... by taking the surname of both parents' (Corte costituzionale 21 December 2016 no 286). Ultimately, in May 2022, the Court decisively overturned the longstanding discriminatory practice requiring children to bear only their father's surname. This reversal was prompted by the Court's recognition that the exclusive inheritance of the father's surname violated Art 2 (the right of children to identify with both parents), Art 3 (prohibition of discrimination based on sex), and Art 117 (infringement of Arts 8 and 14 of the ECHR as interpreted by the European Court) of the Italian Constitution (Corte costituzionale 31 May 2022 no 131).[32] Consequently, all Italian children born after June 2022 will carry both their mother's and father's surnames, in an order determined by the parents; in cases where parental consensus is absent, the decision will be entrusted to the judiciary.

## III. Substantive Equity

### 1. Marriage and Divorce Laws

As noted above, the violation of substantive equality today has a more tangible and serious impact than the remaining remnants of formal equality violations.

A relevant example is the neglect, in the event of separation and divorce, of the significant contribution made by the spouse, often the woman, who is primarily responsible for caring for the family, raising the children and managing the household. In fact, the Italian legislator has intervened on several occasions to value domestic and family work.

A key instrument is the introduction of the *comunione dei beni* (community property) as statutory regime by the Family Law Reform of 1975. Indeed, according to Art 159 of the Civil Code, this regime applies to all couples, unless the spouses

[32] The judgement is annotated in this journal by A. Diurni, 'In the Name of the Child: Remedies to Adultcentrism in Naming Law' 8 *The Italian Law Journal*, 857 (2022) and G. Terlizzi, 'In the Name of Equality. The Italian Constitutional Court Rewrites the Rule on Surname Attribution' 8 *The Italian Law Journal*, 873 (2022).

expressly state otherwise at the time of their marriage or in a subsequent agreement. According to its rules, the property acquired by the spouses during the marriage, either individually or jointly, becomes part of their joint property, with the exception of personal property (Art 179). In the absence of proof to the contrary, movable property is deemed to form part of the community property (Art 195 of the Civil Code). The fruits of a spouse's personal property, such as the rent received for a house owned solely by that spouse, and his or her personal activities (eg salary or pension), provided they still exist at the time of the dissolution of the community, are also considered part of the community property (so-called 'deferred community property'). Joint property may be administered individually by the spouses (Art 180 of the Civil Code). However, acts of extraordinary administration and the conclusion of contracts granting or acquiring personal rights of use require the joint action of both spouses. In the event of the dissolution of the community regime (Art 191 of the Civil Code, including change of regime, separation, divorce or death), the property is divided equally.

The choice of community property as the legal regime reinforces the concept of marriage as a partnership in which both spouses share equally in the responsibilities and benefits. It recognises the equal value of the contributions of husbands and wives, whether one is the main breadwinner or both work. In particular, it promotes the equal sharing of assets acquired during the marriage. In the event of divorce or the death of one spouse, it facilitates the division of property to ensure that both share in the assets and financial security, even where there is a significant income disparity.

However, a critic that could be addressed to community property system is that it can lead to gendered economic inequality, as assets acquired during the marriage are divided equally between the spouses, regardless of each spouse's financial contribution. This can be unfair if one spouse has a significantly higher income or has accumulated more assets prior to marriage. Another limit of the statutory community property regime is that it is easy to deviate from it without having to justify the choice. Spouses are indeed free to choose the separate property regime either at the time of marriage or later. Current statistics show that in Italy the separate property regime has become the norm in new marriages, regardless of the economic conditions or lifestyle choices of the spouses.[33]

A second instrument used by the legislator to value women's family work is the discipline of the so-called *impresa familiare* (literally 'family business') provided for in Art 230 *bis* of the Italian Civil Code. The purpose of this provision, which was introduced in 1975, is to give legal recognition to work carried out informally (eg without an employment contract) by family members (spouses, third- and second-degree relatives) in a single enterprise owned by one of them. Specifically, family

[33] According to ISTAT (the National Institute of Statistics), 74.7% of new marriages chose the matrimonial regime of legal separation of property: ISTAT, Marriages, civil unions and divorces 2020, available at http://tinyurl.com/nvbxestx (last visited 10 February 2024).

members of the entrepreneur are legally entitled to participate in the management of the business and are granted the right to maintenance, participation in profits, distribution of business increases and liquidation of shares.

The *impresa familiare* provision promotes equality between spouses within the family business by emphasising that both spouses can have legitimate interests in the management and success of the business. In particular, it recognises that women often make a significant but unpaid contribution to the family business and ensures that they have access to a fair share of the business assets or matrimonial family property.

The disadvantages of regulating family businesses under Art 230 *bis* of the Italian Civil Code, according to some critics, can include complexity in the division of assets, especially when the business has multiple activities or divisions. It can also create financial constraints that make it difficult to manage the business or to distribute profits fairly between the spouses. Finally, it can lead to family conflict, especially if family members disagree about management or distribution.

A third instrument to ensure recognition of women's unpaid work in the family is the spousal support and maintenance order in the context of marital breakdown.[34] The situation varies when it comes to legal separation and divorce. Indeed, maintenance payments are subject to different rules depending on the nature of the breakdown. Art 156 of the Civil Code governs legal separation, specifying the criteria for maintenance eligibility, which include the requirement of 'inadequate income' and the absence of fault on the part of the potential beneficiary.[35] Art 5, para 6, of legge 898/1970 provides for divorce maintenance when 'adequate means' are lacking and cannot be acquired due to objective reasons. The article further mandates a thorough assessment of the personal circumstances of the spouses and includes an evaluation of the reasons for the decision, the individual and economic contributions made by each spouse to the family and the formation of their respective or joint property, their individual incomes, and the duration of the marriage.

In the context of legal separation, the criterion for assessing the 'adequacy' of resources is commonly interpreted by the courts as the standard of living maintained during the marriage. The rationale behind this is clear: separation may loosen the marital bond, but it does not completely sever it. Consequently, the economically disadvantaged spouse is expected to maintain a standard of

[34] In Italy, both legal separation and divorce continue to exist. The former is by far the most common cause of divorce. However, there are situations in which legally separated spouses do not seek a divorce (in accordance with the principle of canon law of the indissolubility of the catholic marriage they contracted or for practical reasons, such as the intention not to lose the survivor's pension in case of the other spouse's death).

[35] The spouse who has caused the breakdown of the marriage by violating the rights and obligations of marriage is indeed penalised with the loss of the right to maintenance if he or she is the economically weaker spouse.

living comparable to that of the more financially secure separated partner.[36] This principle seems crucial not only in cases where one spouse, by and large the wife, does not work outside the home, but especially in cases where she receives a lower income. In such situations, the reference to the standard of living experienced during the marriage allows for the recognition that the husband's higher income also reflects the contribution of the wife's domestic efforts. In essence, it serves as a means of recognising women's unpaid domestic work.

However, the reference to the standard of living is open to criticism. The first is that the expectation of maintaining the same standard of living is no longer worth protecting because of the separation, which demonstrates the intention to end the community of life.[37] Moreover, the criterion of the standard of living, and in particular the reference to the 'potential' standard of living, rebalances the property situation of the spouses to the detriment of the freedom of the spouses to reject the community property regime.[38] The challenge of measuring living standards could also be emphasised; it is a parameter fraught with difficulty in objective measurement and open to various interpretations. Particularly, the pervasive tendencies towards tax evasion and fictitious deprivation can pose challenges for the courts in gauging the capacity of the economically stronger spouse to contribute. Another critique centers on the potential disincentive effect of the alimony, as recipients might be dissuaded from pursuing economic independence, believing the received allowance sufficiently covers their financial needs. This scenario could be detrimental to both the recipient and the paying spouse, who may find themselves obligated to disburse a substantial amount over an extended period.

The situation appears different in the case of divorce. Until 2017, the courts employed the standard of living during the marriage as a benchmark for assessing financial sufficiency after divorce, but interpretations have since evolved. A significant shift then occurred with Judgement no 12196 of 16 May 2017 (commonly known as the Grilli judgement after the name of one of the parties involved, Mr Grilli, a former Italian minister). In this ruling, the Supreme Court declared that post-divorce alimony payments should no longer be tied to the standard of living experienced during the marriage. Consequently, a financially independent woman, regardless of her contribution to family formation and the husband's assets, is not entitled to alimony. The ruling emphasized the need to move beyond the patrimonialist concept of marriage as a permanent arrangement. The Court recognized marriage as an act of freedom and self-responsibility, an arena of affection, and an effective community

[36] Several scholars note that post-separation maintenance amounts to nothing more than a transformation of marital rights to material assistance and contribution. C.M. Bianca, *Diritto civile* (Milano: Giuffrè, 2005), 197; E. Quadri, 'La portata dell'art.143 cod. civ. nel matrimonio e oltre il matrimonio' *Nuova giurisprudenza civile commentata*, 510 (2000); P. Morozzo della Rocca, 'Separazione personale (dir. priv.)' *Enciclopedia del Diritto* (Milano: Giuffrè, 1989), 1397.

[37] L. Barbiera, I diritti patrimoniali dei separati e dei divorziati (Bologna: Zanichelli,1998), 14.

[38] L. Olivero, 'Sub art. 156', in G. Ferrando ed, *Matrimonio* (Bologna: Zanichelli, 2017), 917, considers the reference to the potential standard of living to be an 'accounting alchemy'.

of life, now commonly acknowledged in social customs as dissolvable. Therefore, the Court asserted that there is no legally relevant or protected interest for the former spouse in preserving the marital standard of living. Furthermore, the divorce decree extinguishes the matrimonial relationship not only at the personal but also at the economic-patrimonial level. Any reference to that relationship is deemed illegitimate, as it would unjustifiably reinstate it, albeit limited to the economic dimension of the matrimonial standard of living, in an unwarranted perspective of overextending the matrimonial bond. In essence, the nature of the interest safeguarded by the divorce allowance is not the re-equilibration of the economic conditions of the former spouses. Rather, it is the achievement of economic independence. Thus, the divorce allowance's function is exclusively welfare-oriented, and it is in this context that it must be understood. Indeed, at the heart of the Grilli ruling is the Anglo-American idea of divorce as a clean break: after divorce, each spouse is free to manage their own assets in order to rebuild their lives independently.[39] The allowance is recognised as having only a minimal welfare function, and any compensatory value for the greater efforts made during the marriage is denied.

However, for many women, even in situations of violence or irreconcilable conflict, there is a risk that they will be compelled to remain in the marriage for fear of losing their alimony and being unable to sustain themselves independently. Additionally, for women who have always worked within and for the family, there arises the necessity to seek employment outside the home after raising children. In essence, while the 'clean break' principle may be endorsed in the abstract, its application in practice can result in injustices, particularly when, as in Italy, formal equality is not paralleled by substantive equality between men and women within the family household and in the realm of employment.[40]

In this context, the Joint Section of the Italian Court of Cassation intervened in 2018 with judgment Corte di Cassazione-Sezioni unite 11 July 2018 no 18287. The Court, in its ruling, began by reasserting the multifaceted nature of the divorce alimony, emphasizing not only its supportive aspect but also its character as an equalizing-compensation measure. The supportive nature, as widely recognized, seeks to ensure the autonomy and economic independence of the former spouse lacking adequate means of support.[41] On the other hand, the compensatory character acknowledges

[39] It should be noted, however, that in Anglo-American systems, post-marital solidarity is essentially expressed in the equitable distribution of assets after divorce. This explains why alimony (ie the allowance) has a subsidiary and limited role.

[40] This is the rationale behind the criticism of the Grilli ruling, as voiced by feminists such as C. Saraceno (quoted by E. Pagani, 'Donne e uomini restano su fronti opposti "Noi siamo deboli"; Mai più sul lastrico' *La Repubblica*, 19 May 2017) and L. Sabbadini 'Divorzio, la Cassazione certifica una parità che non c'è' *La Stampa*, 11 May 2017).

[41] If the applicant spouse has no income, the allowance will therefore be due regardless of the duration of the marriage and regardless of the personal contribution made in the marriage by the applicant spouse.

> 'the contribution made to the realization of family life, particularly by considering the professional and economic prospects that may have been foregone, while also taking into account the duration of the marriage and the age of the applicant'.

Specifically, the Court of Cassation asserts that to grant the divorce allowance, it is crucial to assess whether there exists an imbalance in the financial resources of the two spouses, stemming from an unequal arrangement of the family household. This evaluation should encompass a unified consideration of the contributing spouse's role in family management, the creation of matrimonial as well as personal assets, and the duration of the marriage.[42]

However, looking at the case law following this 2018 judgment, there is a discernible trend towards reducing the compensatory and equalisation aspects of divorce settlements. In particular, a concrete demonstration of the 'sacrifices' made to contribute to the family's financial needs has become imperative. Indeed, there must be concrete evidence of the concrete losses made in order to contribute to the family's needs. In this respect, the courts go so far as to exclude the possibility of relying on indirect evidence by means of presumptions (Art 2727 of the Civil Code). Moreover, they tend to consider that donations and contributions made by the economically stronger spouse to the weaker one exclude the 'sacrifice' and, consequently, maintenance.

In this way, the Court of Cassation appears to impose a challenging burden of proof on women, demanding a retrospective reconstruction of the family's economic setup, specifying the particular choices that resulted in financial imbalance. However, such a task seems practical only in certain specific scenarios, such as family relocations due to the spouse's work or the decision to opt for part-time employment following the birth of a child.[43] For instance, the Court of Cassation reversed a second-instance judgment that had granted a €300 alimony to the ex-wife of a wealthy construction and tourism entrepreneur. The Court stated that, despite the marriage lasting for twenty years, the presumption of an equal contribution from the wife to her husband's assets could not be justified.[44] According to the Court, the causal link between the established economic inequality between the spouses and the applicant's contribution to the management of family life must be examined in detail, taking account of the fact that the couple had not had any children and that the wife had continued her professional career as a teacher.

Truly, as mentioned above, the prevailing view in case law tends to be that

[42] ibid

[43] The impact is almost a devil's proof for the potential beneficiary, as it necessitates reconstructing the family household retrospectively. There are few straightforward cases (eg, transfers driven by the work obligations of one spouse, opting for part-time employment following the birth of a child.

[44] Corte di Cassazione 20 April 2023 no 26252.

the purpose of maintenance is only fulfilled if, at the time of the divorce, the situation of the spouse claiming maintenance is worse than it would have been if the sacrifice for the family's needs had not been made.

An emblematic illustration is a ruling by the Court of Pavia in July 2018, shortly after the Joint Sections decision of the Supreme Court.[45] The case involved a couple who divorced after thirty-nine years of marriage (having separated after twenty-seven years), raising three children and relocating multiple times due to the husband's job. At the time of the divorce, the wife, over fifty years old, possessed 'no professional income or pension' as she had forsaken her career to dedicate herself to the family. However, she owned three properties, transferred to her name by her husband during the marriage, and inherited assets totaling approximately €660,000.00 at the initiation of the proceedings. The Court asserted that, considering the presented facts, there was no economic disparity justifying the requested alimony, despite the absence of pension income for the wife. The judgment emphasises the fulfillment of the 'post-marital solidarity' requirements. The Court noted that, based on common experience, pursuing a career as a journalist (the wife's profession) would not have placed her in a better financial situation than her current standing at the end of her working life. The ruling is particularly noteworthy as it states that the compensatory function of alimony should not address rectifying labor market and economic recognition inequalities concerning women's non-domestic work. Instead, these inequalities should be considered solely to assess whether an ex-wife, who dedicated herself exclusively to the family by mutual agreement during the marriage, can find employment after divorce.

Lastly, it is noteworthy that Italian courts reduce or diminish the divorce allowance in cases where a stable de facto cohabitation arises for the woman receiving the allowance. While this is arguably reasonable for alimony with a supportive nature, it raises concerns when applied to alimony with a compensatory function. If the wife is granted the allowance for dedicating herself primarily or exclusively to the children and the household during the marriage, why should she forfeit this compensation in the event of a new romantic relationship?[46]

It is indeed true that both men and women experience economic challenges as a result of separation and divorce, contributing to what sociologists describe as a new form of poverty stemming from family crises. Men, especially separated fathers, often encounter financial difficulties, frequently bearing the financial burden of relocating to a new residence and facing the inherent instability prevalent in today's job market.[47] However, women typically find themselves in more vulnerable

[45] Tribunale Pavia 23 July 2018, *Nuova Giurisprudenza Civile Commentata*, 126 (2019) with a note by C. Rimini.

[46] In this sense also C. Rimini, 'Una visione sbagliata che penalizza le donne' *La Stampa*, 8 November 2020.

[47] According to a report by Caritas (pastoral organisation of the Italian Bishop's Conference), approximately 80,000 divorced men with children find themselves on the brink of poverty. See Caritas, False restarts, 2014 Report on Poverty and Social Exclusion in Italy, available at

positions, often being recipients of alimony and struggling to fulfill financial obligations for various reasons. Primarily, the pervasive issues of tax evasion and precarious employment complicate the Italian court's assessment of the working parent's ability to make payments. Additionally, even if the court establishes the maintenance amount and the ex-husband fails to pay, enforcement often pose challenges: conventional legal mechanisms, such as Art 473 *bis*70 of the Code of Civil Procedure, include asset seizure as an option, but if the debtor lacks assets or has transferred them, recovering the maintenance allowance becomes almost impossible. Furthermore, the procedures for debt recovery are frequently protracted and intricate, demanding time, financial resources, and legal expertise. These factors may dissuade many women from pursuing the recovery of the maintenance they are rightfully entitled to.

In addressing the highlighted inefficiencies related to both the regulation of matrimonial property effects and the financial repercussions of separation and divorce, it is imperative to adopt comprehensive measures on various fronts. From a legislative perspective, exploring alternative solutions, such as the equitable distribution of property upon the separation of a married couple, akin to the equitable distribution system in Anglo-American law, is essential. Additionally, courts should place greater emphasis on considering the economic and social implications of their decisions. Lastly, at the administrative level, there should be a dedicated focus on implementing policies that strengthen women's economic autonomy.

### 2. Domestic Violence Against Women

Another example of *de facto* discrimination against women within the family is male domestic violence. According to the Istanbul Convention, this phenomenon refers to 'acts of physical, sexual, psychological or economic violence' perpetrated against a woman as such (ie because of her gender) and

> 'occurring within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim' (Art 3(a), (b)).[48]

This is in fact the most common form of violence against women: statistics clearly show that gender-based violence is usually perpetrated by a woman's partner or former partner.[49]

http://tinyurl.com/mvya55v6 (last visited 10 February 2024).

[48] I will refrain from using the term 'victim' in alignment with professionals who believe it may risk relegating women to a passive position of weakness. Terms such as 'survivor' appear to more effectively convey women's empowerment.

[49] World Health Organization (WHO), *Violence against women* (New York, WHO, 2021). In Italy, according to data from the Italian National Institute of Statistics (ISTAT), the most severe forms of violence are often inflicted by partners, relatives, or friends. Specifically, 62.7% of reported rapes

In 2001, the Italian legislator (Law 154) introduced protection orders against family abuse for the first time in the Civil Code (Art 342 *bis* and 343 *ter*). These orders served as a civil instrument to safeguard family members facing abuse. However, a minority of courts had long undermined this instrument by deeming the orders inapplicable if, at the time of the application, there was no ongoing cohabitation between the abuser and the person affected – despite the latter leaving the family home due to violence and later seeking the protection order. The recent Cartabia reform of civil procedure has addressed this issue by legally establishing that these orders can be sought even if cohabitation has ceased (Art 473 *bis*.69 of the Code of Civil Procedure).

In April 2022, the *Commissione parlamentare di inchiesta sul femminicidio, nonché su ogni forma di violenza di genere* (parliamentary investigation Committee on femicide and gender violence) published a report highlighting the phenomenon of 'secondary victimization' experienced by women and their children during family court proceedings. This form of victimization stems not directly from the violence but rather from the response of institutions, including the police, courts, health, and social services. A first example of revictimization is the resort to conciliation and mediation in cases of domestic violence – an approach explicitly discouraged by the Istanbul Convention due to the inherent power imbalance in situations of violence, which impedes the ability of the more vulnerable person to negotiate a fair agreement.[50] A second instance involves the neglect to consider partner violence against women when determining custody and visitation arrangements for their minor children in the event of the separation of the parental couple.[51] Paradigmatic cases include judicial decisions of shared custody in the context of domestic

were committed by partners, 3.6% by relatives, and 9.4% by friends. Even instances of physical violence, including actions like slapping, kicking, punching, and biting, are predominantly carried out by partners or ex-partners. See ISTAT, *Il numero delle vittime e le forme della violenza* (Roma: Istat, 2014). In the first half of 2021, a report from the State Police revealed that 89% of women killed within the family context fell victim to emotional violence perpetrated by their partner or ex-partner. See Dipartimento della Pubblica Sicurezza - Direzione Centrale della Polizia Criminale - Servizio Analisi Criminale, *Vite Violate - Analisi Dati I semestre 2020/2021* (Rome: Dipartimento Pubblica Sicurezza, 2021).

[50] The undue recourse to mediation and conciliation is also noted by the Council of Europe, *Implementation of the in Italy: Report of Women's NGOs (so called shadow report)* (Strasbourgh: Council of Europe, 2018), 1, 42, 48.

[51] According to Art 31 of the Istanbul Convention, 'Parties shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of this Convention are taken into account'. However, according to the shadow report (48) fathers accused of violence have the same probability as other fathers of obtaining custody of their children. In the same sense Grevio (Group of Experts on Action against Violence against Women and Domestic Violence), *Baseline Evaluation Report. Italy* (Strasbourg: Council of Europe, 2020) 60, which expresses 'extreme concern' about this 'widespread practice' noting that the group 'is concerned that the difficulties in fulfilling the requirements of Art 31 might be the consequence of the introduction of a legal reform on shared custody which failed to carefully assess the enduring inequalities between women and men and the high rates of exposure of women and child witnesses to violence, as well as the risks of post-separation violence' (paras 185 and 187).

violence, despite the presence of personal precautionary measures decided in criminal proceedings or juvenile court orders limiting parental responsibility.[52] Another noteworthy aspect is the abundant case law from tribunals, which, despite decisions for exclusive custody, allows unrestricted contacts between the perpetrator and the child.[53] Also, there are standardised decisions to strip abused mothers of their parental authority and entrust children to social services.[54] Indeed, mothers are at times subjected to a judicial assessment of their suitability as parents, based on the belief that they may not be capable of caring for their children due to their tolerance, at least for a certain period, of the abuse. Additionally, they are often labeled as 'alienating parents' (referring to the so-called Parental Alienation Syndrome) because they allegedly hinder the relationship between the child and the abusive father.[55]

The European Court of Human Rights has also identified dysfunctions in Italian law when dealing with cases of domestic violence. The case of *I.M.* v *Italy* (10 November 2022) is a compelling example. The case concerned a mother who fled home with her two children, aged 4 and 1, to escape the violence of their father. The juvenile court urgently suspended parental responsibility and mandated weekly meetings between the father and the children under 'highly protective' conditions, supervised by a psychologist (para 10). However, logistical challenges within the social services, such as a shortage of staff and inadequate space, led to meetings taking place in unsuitable locations (including a library, a room in the municipality, and the town square). These encounters lacked the presence of a psychologist, and on one occasion, the social services even left the children alone with the father, who displayed anger and frightened them (para 50). Mother's complaints and social service reports highlighted the father's seriously disparaging behavior towards his ex-partner during meetings and aggression towards the children (paras 17, 18, 47) and threats towards the professionals overseeing the meetings (para 23). However, despite the mother's repeated requests to halt the meetings, citing their danger to the children, and her subsequent refusal to accompany them, the Juvenile Court suspended the mother's parental responsibility for three years. The Court deemed her behavior harmful to the children, arguing

[52] The source is authoritative: Consiglio superiore della magistratura (Italian High Council of the Judiciary), Linee guida in tema di organizzazione e buone prassi per la trattazione dei procedimenti relativi a reati di violenza di genere e domestica (Rome: CSM, 2018), para 7.6.

[53] See eg Tribunale di Napoli, 28 June 2006, www.dejure.it; Tribunale di Roma, 11 October 2018, www.dejure.it; Corte d'Appello Palermo 12 June 2013 *Le leggi d'Italia professionale* (2023).

[54] As pointed out in the Shadow Report of women's association, all too often the custody of children is resorted to the Social Service (in 70.4% of cases for the ordinary Court and 90.7% for the Juvenile Court (above, 49-50).

[55] n 50 above 40, 48-51. The report highlights how courts and social services frequently adopt standardized approaches, prioritizing the preservation of the child's relationship with both parents without critically assessing the impact of violence against the partner on parenting skills. In essence, as noted in the introduction to this work, there appears to be a mindset of 'beat the wife, but do not touch the children'.

that she had not made sufficient efforts to protect the right of the children to joint responsibility of parents (paras 34, 38). It was only after three years that the visits ceased, coinciding with the father's imprisonment for drug trafficking. Subsequently, he was divested of his parental responsibility, and the mother regained full parental responsibility (para 61). The ECtHR found a violation of the children's and the mother's right to respect for family life. The children were indeed compelled to meet their father for years in conditions detrimental to them (para 125), and the mother was suspended from parental responsibility without a proper assessment of the allegations of domestic violence and the lack of adequate security conditions for protected meetings (para 136).

Many of the above-mentioned dysfunctions in family law legislation and practice in dealing with gender-based domestic violence have been addressed by the recent Cartabia reform of civil procedure. First of all the reform explicitly designates the new Section I of Chapter III of Title IV *bis* of the Civil Procedure Code as 'gender or domestic violence', thus introducing for the first time in this Code an explicit reference to 'gender' as a qualifying element of violence.[56] Indeed, while it is certainly true that rules must be general and abstract in order to apply to an indefinite range of situations, it is also true that they must respond to the specific needs of the persons involved. Specifically, the Cartabia includes several provisions aimed at addressing the secondary victimization of children. These regulations were incorporated during the review of the text in the Senate Justice Commission, following the recommendation of Senator Valente, the then President of the parliamentary Investigative Committee on Femicide, who was actively involved in the investigation that later, in 2022, resulted in the aforementioned report. Primarily, in cases involving allegations of 'domestic or gender violence', the law prohibits judicial conciliation (Art 473 *bis*.42 para 6) and family mediation (Art 473 *bis*.42 paras 3 and 6; art. 473 *bis*.43).[57] Furthermore, it is stipulated that the judge shall avoid the joint appearance of the parties (Art 4737.42, paras 2 and 6) and may order to keep secret to the perpetrator the place where the woman and the children are accommodated (Art 473 *bis*.13, para 2 and Art 473 *bis*.42, para 4). It is then forbidden, as far as possible, to repeatedly listen to women and children (Art 473 *bis*.13, par. 2 and Art 473 *bis*.45, para 2): it is indeed well known that repeated retelling of the violence suffered leads the person recounting it to relive it, at least in part. It is also stated that the hearing must take place in an appropriate setting (Art 473 *bis*.45 para 1). Finally, it is stipulated that any visiting rights granted to the abusive parent must not jeopardise the safety of the victims (Art 473 *bis*.46).[58]

[56] On the flip side, the phrase has drawn criticism for the use of the adversative conjunction 'or', which might imply an alternative between 'gender' and 'domestic' violence. However, it is evident that the intention is to encompass cases of both domestic and gender-based violence.

[57] M.C. Feresin et al, 'La mediazione familiare nei casi di affido dei figli/e e violenza domestica: contesto legale, pratiche dei servizi ed esperienze delle donne in Italia' *Rivista Criminologia Vittimologia e Sicurezza*, 13 (2017).

[58] C. Angiolini, 'Note critiche sulla (ir)rilevanza delle violenza di genere nelle decisioni in merito

## IV. The Necessity of Incorporating a Gender Perspective into Family Law and the Role of Academia

Throughout this article it has been demonstrated that the achievement of equality remains a significant challenge. The existence of both formal and substantive equality is essential to the promotion of fairness, equality and justice, particularly in family law. Indeed, this area is of particular importance as discrimination within the family is one of the most pervasive and universal forms of societal prejudice.[59] Under the Agenda 2030 sustainable development goals, it is crucial to eliminate all forms of violence against women and girls in the private sphere too (target 5.2). This encompasses addressing harmful practices such as child early and forced marriage, as well as female genital mutilation (5.3) and gender based domestic violence. Notably, family law serves as the primary and most effective defense against violence, enabling its interception and counteraction before it escalates. As emphasized by the Italian parliamentary investigation Committee on femicide and gender violence,

> 'a family lawyer is the initial point of contact for a woman experiencing violence in a couple because her primary objective is the definitive termination of the violent relationship (i.e., divorce)'.[60]

In this context, academics, irrespective of gender,[61] should play a crucial role in advocating for both formal and substantive justice in family law. Indeed, it is essential to recognise that traditional assumptions of private law, such as the neutrality of law and the principle of private autonomy, cannot be universally applied. While civil and family law rules may seem gender-neutral, feminist literature has consistently argued that this neutrality is merely superficial. The application of these rules can, in reality, lead to substantial discrimination against women.[62] A notable example is the situation discussed earlier regarding divorce maintenance. The mention in the Grilli judgment of economic self-sufficiency as a prerequisite for receiving alimony could be reasonable in an ideal system where men and women earned the same salary for similar work and shared family responsibilities equally. However, in the reality of the majority of Italian families, where domestic responsibilities

all'affidamento e alla gestione dei figli nella prospettiva del diritto privato' *Ragion pratica*, 389 (2019).

[59] Social Institutions and Gender Index, 2019 Global Report. Transforming Challenges into Opportunities, Chapter 3.

[60] Commissione parlamentare di inchiesta sul femminicidio, nonché su ogni forma di violenza di genere, *La risposta giudiziaria ai femminicidi in Italia* (Roma: Camera dei Deputati, 2021), 85-86.

[61] It is not a coincidence that, nowadays, the majority of family law professors, especially in the lower ranks of academia, are women. It's as if the family, including in the field of law, is predominantly associated with femininity.

[62] Take, for example, the temporary prohibition of remarriage for the woman (Art 89 of the Civil Code) or the proof by childbirth of maternity (Art 269 para 3 of the Civil Code).

predominantly burden the mother-wife, this criterion becomes discriminatory.

It is therefore important to teach future legal professionals at university level that in family law it is not possible to adopt a 'neutral' perspective when assessing facts and conducts.[63] Indeed, judges will have to consider the gender perspective when interpreting events and behaviors. Thus, 'the concept of gender is extremely important in guiding a judicial process, assessing evidence and ultimately deciding a case'.[64] A negative example is provided by a judgment of an Italian court which refused to attribute fault for the legal separation to a husband who had been the perpetrator of violence against his wife (Tribunale di Biella, 7 December 2021, unpublished). The decision was based on the fact that the violence had continued for decades and that the wife had reconciled with her husband after each incident. The panel of judges was apparently unaware of the specificities that distinguish gender-based violence from other violations of marital obligations, including the so-called cycle of violence, in which episodes of violence typically alternate with periods of reconciliation.[65]

Family law professors are being urged to include discussions on gender equality, combat sexist stereotypes and eliminate discriminatory language in university lectures and textbooks. Currently, family law textbooks lack references to a feminist perspective. To address this, a family law lecturer can identify areas in the current curriculum for seamless integration of a feminist perspective, such as marital obligations, economic consequences of separation and divorce, child custody and support, and domestic violence. The lecturer could explore the historical development of family law in the context of the women's rights movement, invite guest speakers with insights from gender studies (eg lawyers from anti-violence centres), analyse case law through a feminist lens, include readings by feminist legal scholars, and assign papers and dissertations that explore family law issues from a feminist perspective. It is also necessary to condemn the use of discriminatory vocabulary, such as the term 'patria potestà' (paternal authority). This term is no longer used in law, but it is still widely used in everyday language and, more importantly, in administrative forms (eg school and health).

In addition, there seems to be a need to work at the level of academic research to gather evidence and data to identify biases and inequalities and to make recommendations for legal reform. In particular, it might be interesting to work with sociologists, social psychologists, economists and linguists to explore how family law affects gender dynamics, power structures and the well-being of individuals within families. Classical legal analysis of legal texts, judicial measures and doctrine could beneficially be complemented by 'field' analysis of court files and interviews with legal professionals. Evidence of the usefulness of such analysis can be found in

[63] G. Medina, 'Juzgar con perspectiva de género' *Justitia familiae*, 19 (2016).

[64] ibid

[65] It is worth noticing that the Italian Court of Cassation ruled out any relevance of reconciliation in cases of violence and admitted the separation charge even in the presence of a single episode of violence. In this regard, refer to the Corte di Cassazione 21 April 2015 no 8094, www.dejure.it.

the report on secondary victimisation prepared by the abovementioned Committee on femicide and gender violence.[66] The research methodology included a survey of court files related to separation proceedings with minor children registered in Italy in March, April, and May 2017.[67] In addition, interviews were conducted with legal professionals who routinely handle domestic violence cases. The study also involved a comprehensive examination of emblematic cases to understand the legal trajectories of women who claimed to have experienced secondary victimization due to the non-recognition of domestic violence in their court cases.

Finally, initiatives that promote policy advocacy and activism under the umbrella of public engagement and the so-called 'third mission' of universities should be welcomed. The opportunity for family law academics to participate in public debates and conferences, give interviews and use social media are all effective ways of informing and engaging the wider public about the need for reform. Working closely with lawyers, judges and legal practitioners helps to bridge the gap between academic research and practical application. Engaging with gender equality organisations and activists is crucial to influencing policy change. It is also important to raise public awareness of gender inequality in family law through various platforms, such as writing op-eds and using other means of communication. For example, the Faculty of Law at the University of Turin has been hosting classes from primary and secondary schools in the city of Turin for several years, providing a 'lesson' on legal issues.[68] One of the most well-received lessons is 'Bambine e Bambini a Scuola di Parità' ('Children in the School of Equality'), a didactic activity that initiates discussions on emblematic cases of discrimination against women closely linked to everyone's everyday life. For instance, the lesson addresses the issue of surnames, considering that the majority of Italians still carry only their father's surname. Subsequently, the session delves into exploring the prohibition of discrimination and underscores the actions that each individual, regardless of age and particularly within the family, can take to promote equality between men and women.

[66] Commissione parlamentare di inchiesta sul femminicidio, nonché su ogni forma di violenza di genere, 'Relazione. La vittimizzazione secondaria delle donne che subiscono violenza e dei loro figli nei procedimenti che disciplinano l'affidamento e la responsabilità genitoriale' (Roma: Camera dei deputati, 2022).

[67] Specifically, a two-stage probability sampling was implemented. The first-stage units were the Ordinary Courts, stratified by geographic regions (North, Centre, South). The second-stage units were the case files related to judicial separations with applications for custody of children recorded in the register during the three months considered in the year 2017. See n 66 above, 20.

[68] The activity is part of the programme *Un giorno all'Università* (A day at university), promoted by the City of Turin and ITER - Istituzione Torinese per una Educazione Responsabile (Turin Institution for Responsible Education) within the project *Crescere in città* (Growing up in the city) with the University of Turin, the Polytechnic, the 'Giuseppe Verdi' State Conservatory, IAAD - Institute of Applied Art and Design and the Albertina Academy of Fine Arts. For further information see Comune di Torino, available at http://tinyurl.com/eejntypt (last visited 10 February 2024).