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FAMILY AND THE MARKET IN THE 3RD
GLOBALIZATION: A SURVEY OF LITERATURE

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1. *Introduction*

In ‘Three Globalizations of Law and Legal Thought: 1850-2000’, Duncan Kennedy, reflecting on the three globalizations doctrine, affirms that the main element that is each time globalized is a mentality.¹ Indeed, the first globalization (1850-1914) was dominated by Classical legal thought (CLT). In the CLT legal consciousness, three elements were seen as defining the law: individualism, formalism, and divides between private and public law, and family and the market. Thus, the divide between family and the market can be perceived as a creation of this legal consciousness. It is characterized by different *paradigms*, but also different *legal techniques*. CLT, for example through *System of Modern Roman Law*, from Friedrich Karl von Savigny, defines the market as the realm of individualism and free will.² It is a space where equal individuals contract with each other, in order to serve their best interests. The market therefore embodies the idea of modernity and is ruled by the law of obligations, which is viewed as merely technical. On the other hand, the family is perceived as marginal, which gave birth of the theory of ‘family law exceptionalism’. The family is considered as governed by some affects like altruism, and private relations between individuals, according to their status granted by the State, like ‘husband’, or ‘mother’. The dichotomy also contains ideological elements, since the market is pictured as hierarchically superior to the family, that can only remain marginalized. According to Duncan Kennedy,³ the prevailing will in the family is the one of the State, and not the one of individuals. Therefore, the organization of the family is said to be hierarchical, but also fundamentally local, for it is shaped by traditions, cultures and ideologies. Because the family is seen as the realm of affects, it has to be marginalized from the market, to be protected from the corruption of the economy. This marginalization is also meant to protect the family from the intervention of the State (‘non-intervention doctrine’), but it is no just a legal marginalization. Even the scientific approaches of law treat the family as an exceptional field and are reluctant to apply a

¹ Duncan Kennedy, ‘Three Globalizations of Law and Legal Thought: 1850-2000’ in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development. A Critical Appraisal* (CUP 2006).

² Friedrich K von Savigny, *System of the Modern Roman Law* (J Higginbotham 1867).

³ Kennedy (n 1).

comparative analysis to it. It is therefore submitted to family law, that departs from the rest of the law. This exceptionalism of family, when compared to the market, can be epitomized by another divide, which is the core/periphery divide.⁴ The market thus appears as the center of private law, whereas family remains untouched in the periphery.

Therefore, in the first globalization, the family and the market are two very different domains, relying on contrasting paradigms, which justify their submission to contrasting legal techniques. The divide between family and the market is seen as a reflection of the reality, as a natural and preexisting dichotomy. The second globalization started deconstructing this divide created by CLT, as the family was apprehended for its important social role. It was no longer seen as purely private and exceptional because a social interdependence between the family and the rest of society was identified by the scholars. Besides, some values that were presented as specific to the family in the first globalization, like solidarity, started to be implemented in the market, through social labor laws.

According to Duncan Kennedy,⁵ the third globalization can be dated back from 1945, to nowadays. The main feature of this period is the notion of 'identity'. Kennedy argues that identities have different interests, values or even rights, that can conflict. The role of the judge is thus to produce the legal decision as a compromise between these 'conflicting considerations'. The legal tool is seen as a *langue*, that can be used to produce different *paroles*, namely different regimes of positive law. Both family and the market are submitted to the identity discourse. For example, the market is not completely free, since its actors are forbidden to discriminate the weaker parties, like minorities, women etc. Rights are allocated to identities, regardless of the divide between family and the market. Alongside with the concept of identity stands the concept about human rights. The latter are a main feature of the third globalization, because protecting them is an important concern for the legislator, both in the family and in the market. Besides, the international scale is increasingly relevant, which leads to international pressures for the liberalization of family law, that is no longer seen as local. These

⁴ Maria Rosaria Marella, 'Critical Family Law' (2011) 19 Am UJ Gender Soc Pol'y & L 721.

⁵ Kennedy (n 1).

observations can lead one to believe that there is a blurring of borders between the family and the market in the third globalization.

Therefore, we may wonder if the family and the market divide is a mere product of the first globalization, that is completely off-topic in the third globalization, or if and how it is still relevant. If it is the case, we may wonder if the divide needs to be superseded, as an outdated and Manichean perception of the law, or if it can still be significant nowadays.

Thus, we will see that in the third globalization, Critical theory has acted as a powerful tool to emphasize the existence and significance of the divide between the family and the market (Section 2). This recognition of the divide gave birth to some attempts to supersede and defeat it, in the context of the third globalization (Section 3). Nevertheless, the main outcome of the legal critiques of the third globalization might not be found in this will to deconstruct the divide, but rather in the proposition to reconceive it (Section 4).

2. Critical theory as a tool to recognize the existence and significance of the divide between family and the market in the third globalization

2.1. The distributive effects of the divide

Even though the family and market divide was presented as ‘natural’ in the first globalization, critical legal scholars like Frances Olsen, Duncan Kennedy, and the ‘Up Against Family Law Exceptionalism’ movement helped unveiling the fact that it was created. Indeed, the idea that contracts were dominated by the market, and therefore by bargaining behaviors, was a way to dissociate it from the family, as if no bargains could occur in it. As Debora L Threedy argues, naming something a ‘market behavior’, which refers to bargaining, implies that there are also ‘non-market behaviors’, namely family matters.⁶ Therefore, the existence of the divide itself is sufficient to exclude family from the market, and from contractual law. Critical theory has, nevertheless, claimed

⁶ Debora L Threedy, ‘Feminists and Contract Doctrine’ (1999) 32 Ind L Rev 1247.

that the discourses about this divide mask its distributive effects.

Indeed, Threedy sheds light on the fact that the divide excludes both the family and women from contract law. She takes the examples of the *Miller v Miller*⁷ case to show how intrafamilial bargains between men and women have been excluded from the application of contract law. In this specific case, the written agreement between Mrs Miller and her husband, according to which she would not leave him and provide him with a home in exchange for money, was considered unenforceable by the court, whereas in *Hamer v Sidway*⁸, an agreement between an uncle and his nephew was found enforceable. In the first case, the judge refused to apply contract law because he affirmed that the performance offered by Mrs Miller was merely her duty as a married woman and could not be bargained. The divide was a justification for the reluctance of the courts to submit family bargains between sexes to contract law, and to recognize them as market activity. The marginalization of the family was therefore the result.

The same goes for women, according to Threedy, because our definition of contracts as market bargains dates from a time where women were mainly involved in family transactions and excluded from the market. Applying different legal techniques to the family and to the market has distributive effects, since women and men are not submitted to the same rules, nor entitled to the same rights. For example, when a woman and a man married, they were considered as one single entity, which justified that the woman was not entitled to make contracts in her own name, but only in her husband's.

Critical legal studies on the divide between family and the market enabled the recognition of its existence, and of its distributive effects, because of its overlapping with the women/men divide. Indeed, the idea that the family shall be completely isolated from the market, and thus from contract law, deprived women of the power to bargain themselves.

But despite the existence of these critiques, some distributive effects of the divide persist in the third globalization, for unveiling the existence of the divide did not make it disappear. We can take the example of the European Union harmonization policies. In their article 'Critical Directions in Comparative Family Law: Genealogies and

⁷ [1887] 35 NW 464.

⁸ [1891] 27 NE 256.

Contemporary Studies of Family Law Exceptionalism', Janet Halley and Kerry Rittich⁹ explain that the European Union has adopted the Savignan model, because there is still the dominant idea, according to which family law is related to the nation. Thus, the debate only takes two directions. The first one is based on the idea that each Member State has its own nation, and that therefore there cannot be a European harmonization. The second claims that there is only one European nation, which makes harmonization possible. In both cases, this debate abides by the idea that family law is exceptional, and different from the market, that has been regulated by the EU for a long time. Besides, the family is still majorly seen as part of the State sovereignty, and as a more political field than the market. Even though international family law scholars praise for demarginalizing the family, by for example accepting international or European harmonization, the reluctance of the States shows that the divide is still present.

Besides, we can see that some bargains relating to family and reproductive matters, like surrogacy contracts, or sex work, are left out of the market in many countries. Thus, these bargains relating to the body of women are not submitted to contract law, because this law is seen as the attribute of the market only.

This exclusion of sexual and reproductive bargains from the market has been criticized in the third globalization, for instance by Martha Nussbaum.¹⁰ The latter argues that all workers receive money for the use of their bodies. But some occupations, such as prostitution or surrogate motherhood, are particularly stigmatized. Nowadays, in most countries, prostitution itself, or the resort to prostitution are illegal. Among the multiple consequences of this exclusion from the market, we can find immorality. Indeed, the refusal of the law to regulate these activities is not neutral and produces an ideological discourse about them. There are in fact reciprocal relations between the law and morality in this topic, since the refusal of the law to regulate these activities produces them as 'immoral', but their pre-existing 'immorality' is also what justifies their legal exclusion. As Nussbaum explains, this discourse raises the question of how appropriate

⁹ Janet Halley and Kerry Rittich, 'Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism' (2010) 58 *Am J Comp L* 753.

¹⁰ Martha C Nussbaum, "'Whether from Reason or Prejudice': Taking Money for Bodily Services' (1998) 27 *J Leg Studies* 693.

it is to use moral arguments as the basis for legal restrictions. Indeed, the law pursues other goals than morality, as for instance protecting weaker parties that are submitted to high risks, like prostitutes. But stigmatization also comes from the idea of reification of the sexuality of the prostitute in the market. The transactions on sexual or reproductive capacities are seen as turning these capacities into objects, for men to use and control. But Nussbaum claims that prostitution is no more a commodification of the sexuality of women than teaching is a commodification of the mind of the teacher. In fact, she argues that the ban of prostitution is a way to maintain male control over female desire. Like any other occupation involving health and violence risks, it should be regulated in order to protect the prostitutes, which is the reason why Nussbaum is in favor of the legalization and regulation of prostitution, instead of punishment. She believes that excluding it from the market, and therefore, from the common law, is endangering and disempowering women, also because some of them have no other alternative to have an income. The regulation of prostitution, on the contrary, would enable these women to have an actual control over their working conditions, as well as to have better legal protection like any other employee.

Whether we agree or not, we can see that the divide between family and the market still manifests today through the refusal of most countries to apply contract law to these types of 'family' related bargains.

2.2. The factors explaining the creation of the divide

Although the divide between family and the market was presented as 'natural' and as translating the social reality, many authors unveiled the fact that it is the product of human creation.

The divide between family and the market is firstly a creation of language. Indeed, when analyzing the different functions of the language, Roman Jakobson identified the 'conative' function, that can also be called the performative function.¹¹ It is the idea that the language does not only reflect reality, but it can also produce it.

This idea can be applied to the family and the market divide, that does not only

¹¹ Roman Jakobson, *On Language* (Harvard University Press 1995).

reflect reality, but produces it as well. Some legal scholars, like John L Austin,¹² Carol M Rose¹³ or Mary Joe Frug,¹⁴ have reflected on this performative power of language, especially when it comes to law. Frug focuses on the performative power of the legal discourse, taking the example of the impossibility doctrine. She says that two authors, Posner and Rosenfield,¹⁵ adopted an analysis based on male virtues, which lead them to a binary outcome: whether full performance should be executed (strict liability), or, if there is ground for impossibility, then full discharge should be granted. There is no in-between in their analysis, which is why Frug says that they privilege predictability and have an abstract idea of contractual relationships. In the opposite, she examines Hillman's¹⁶ theory of impossibility, which she qualifies as based on female virtues. Indeed, Hillman adds other goals to the doctrine than predictability of the allocation of risks. These other goals are fairness norms and adaptability to the situation. Therefore, he privileges flexibility over predictability. Frug's point is that the legal discourse is gendered, even though the gender does not necessarily correspond to the one of the authors. Therefore, a language, including the legal discourse, cannot be neutral. It is the result of a political and social context and gives birth to different legal outcomes. Frug's analysis is thus important to understand that the legal discourse about family and the market divide is a gendered creation of the language. When we look at the values attributed to each of the elements of the divide, we can see that the values associated with the family are more feminine, and the values associated with the market, more masculine. The family and the market divide overlaps the women/men divide, that is also constructed and based on stereotypes of what characterizes the masculine and the feminine.

These stereotypes can be the idea that housework is to be unpaid, as a 'normal' female activity, which is why the family and market divide also overlaps the un-paid/paid work divide. Because of these stereotypes, care-work is identified as part of the 'family',

¹² John L Austin, *How to Do Things with Words* (2nd edn, Harvard University Press 1955).

¹³ Carol M Rose, 'Women and Property: Gaining and Losing Ground' (1992) 78 Va L Rev 421.

¹⁴ Mary Joe Frug, 'Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law' (1992) 140 U Pa L Rev 1029.

¹⁵ See Richard A Posner and Andrew M Rosenfield, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' (1977) 6 J Leg Studies 83.

¹⁶ See Robert A Hillman, 'An Analysis of the Cessation of Contractual Relations' (1983) 68 Cornell L Rev 617.

which deems it to remain out of the market and un-paid. Carol Rose summarizes it, saying that 'the economy of domestic relations' is a 'non-market'. Care-work is only one example on how the rhetoric surrounding the family and the market constructs their differences and separation. The family is depicted as the realm of altruism, care, affects, solidarity. All these values are also the ones that the social discourse associates with women. Rose also says that women 'have a taste for cooperation'. This tendency to solidarity and altruism is not necessarily something natural for women, but many people share the cultural belief that they should have this taste. And if women do not have this taste for cooperation, Rose explains that, because of the cultural belief that they should, they can be punished, for example through social exclusion. The consequence will be that whether they naturally have a taste for cooperation or not, women will be coerced to act in accordance with this idea in order to be socially integrated. In addition, there can be legal demands that women cooperate. Rose explains that for example, laws denying women the capacity to own their own property, or to obtain an education, are depriving them of alternatives to cooperating with their husband. On the contrary, the market is depicted as governed by individualism, independence, and self-interest, which are values said to be more masculine. This rhetoric about family and the market creates them as two different and well separated realms. This construction of the language is self-reproducing, and has legal consequences, as care-work illustrates. Indeed, as it is seen as an element of the family, it remains out of the market and unpaid, which, in the end, disempowers women.

This very same rhetorical power of the law can also be observed in the discourse relating to prostitution. As said above, the refusal of many legal systems to regulate prostitution through contract law is justified by the 'immorality' of this activity. In the French Civil Code for instance¹⁷ the conditions of validity of a contract include the 'lawful' character of the agreement, which is the basis used to refuse the enforcement of prostitution agreements. The legal discourse is thus not neutral. When it identifies an activity as 'immoral', it gives legal consequences to this qualification, by, for example, excluding it from the official market.

¹⁷ See Article 1128 Code Civil ('The following are necessary for the validity of a contract: 1. The consent of the parties; 2. Their capacity to contract; 3. Content which is lawful and certain').

Consequently, the critical analysis of law, that has been taking place in the second globalization, and mostly in the third, helps to unveil the existence of the dichotomy between family and the market, and how it constructed by the language. This dichotomy thus appears as a structure of power, as it overlaps other dichotomies like female/male, and has consequences on the distribution of the bargaining power.

But the divide's construction through the language took place in a particular context, which is capitalism. Focusing on this context also helps to unveil how the divide was constructed and does not merely express the social reality.

In their article, Halley and Rittich¹⁸ explain that the family and the market divide has not always existed. They also affirm that the 'distinctiveness' between family, its law and the rest of the legal order is not a reflection of reality, but 'a constitutive and productive basis for it'. They explain that before the idea of family as exceptional, there was the 'household'. It was an economic entity, that can be compared with the concept of Firm by Ronald Coase,¹⁹ because it was internally producing some goods like food, but also sometimes resorting to external contracts for the goods that it could not produce. Therefore, the economy of the household was continuous with the economy of the market. This entity was semi-public, as it mixed public and private fields, as well as family and the market. It was indeed composed of the family, but also servants or farm employees for example. The authors believe that the rise of capitalism produced the family law exceptionalism, by segregating the functions of the household in two separated spheres. All the paid work moved to the market, whilst only the husband, the wife and the children remained in the family. They also believe that, whereas the household was dominated by masculinity, the main gender of the family was female. It was a way for patriarchy to establish a distinct feminine domain, deprived of any pecuniary power, and therefore subordinated to the masculine market. This segregation between the two spheres had legal consequences, as family law was applied to the family, whereas the law of obligation applied to the market.

Therefore, by unveiling how capitalism, through the use of a rhetoric, produced the divide between family and the market, which resulted in the exclusion of women

¹⁸ Halley and Rittich (n 9).

¹⁹ Ronald Coase, 'The Nature of the Firm' (1937) 16 *Economica* 386.

from the law of obligations, critical analysis of the law dating from the third globalization, enables to understand the origins of a dichotomy that still has legal impacts today.

2.3. The actual complementarity between family and the market

As explained above, the divide between family and the market is a rather recent creation, though it claimed to be a mere mirror of the social reality, during the first globalization. This idea of the existence of two distinct spheres still has legal consequences today, but many scholars have recently tried to demonstrate that this dichotomy is not the reality. Indeed, there are interactions and interconnexions between the family and the market, which reinforces the idea that the divide is a mere creation of the legal language.

The Idea of background rules, that was, among others, elaborated by Robert Hale,²⁰ helps to unveil these interactions. We can argue that Wesley Newcomb Hohfeld²¹ is a precursor to this idea of background rules. In his article, he indeed came up with the idea that clear-cut separations between legal concepts are a confusion created by the language. In reality, he believes that all legal interests are relational. Each legal concept has an opposite and a correlative. But jural opposites do not mean that the concepts are separated in an absolute way. For example, privilege is the jural opposite of duty. But privilege and duty are still in relation because the privilege can be defined as the negation of the duty. The privilege against self-incrimination means the negation of the duty to testify. This idea that legal opposites are in relation can be applied to the family and the market divide. In his article called 'The Stakes of Law, or Hale and Foucault!', Duncan Kennedy²² addresses the work of Hohfeld, to elaborate on background rules. The main feature from Hohfeld's work is the idea that, in a legal system, 'inaction is a policy'. Indeed, when the law is silent, it is not however neutral, because it could also regulate instead. For example, if a legal system does not recognize a prostitution agreement as a valid contract, it does not leave this agreement out of the law. On the

²⁰ Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 Pol Sci Q 470

²¹ Wesley N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 23 Yale LJ 16.

²² Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15 Leg Stud F 327.

contrary, this legal system is deciding that prostitution *should* not be a contract, which is a political choice. With every ‘right’ allocated by the law comes a ‘no-right’, that also distributes the bargaining power. For example, the allocation of the right to contract comes together with the ‘no-right’ for infants to contract. This idea helps unveiling the distributive effect of the law. In this article, Kennedy sheds light on the fact that, both action and inaction on the part of the law have consequences in how the power is distributed between the parties. It is also the idea of the article ‘Bargaining in the Shadow of the Law: The Case of Divorce’, by Mnookin and Kornhauser,²³ because law has distributive effects in the foreground, as well as in the background. For example, the settled divorce is regulated by specific rules (foreground), but the rules regulating specifically the litigated divorce will also have consequences on the tendency of the parties to resort to the settled divorce. Therefore, the rules of the litigated divorce act as background rules of the settled divorce. Kennedy²⁴ also emphasizes the role of alternatives, that act in the background as well. For example, if women have many alternatives to marriage, to have an income, their resort to divorce will be more accessible, and possibly more important. The main element that we can take from this analysis is that there can be no complete isolation of the family from the market, in a legal way. Indeed, the family and the market divide relies on the idea of non-intervention of the law of obligations in the family spheres. It would mean that only family law could apply to the family sphere, which is the main feature of family exceptionalism theory.

Nevertheless, the theory of background rules helps to challenge this idea that there can be a clear-cut divide between the family and the market, because these two spheres are actually in relation, from a legal point of view. In their article,²⁵ Halley and Rittich argue that there are four layers of rules influencing the family sphere. The first layer (FL1) is composed of the foreground rules that are distinct from the rest of the legal system, namely family law, regulating marriage, divorce etc. But the rhetoric about the existence of a divide between the family and the market claims that only these rules

²³ Robert H Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1979) 88 Yale LJ 950.

²⁴ Kennedy, ‘The Stakes of Law’ (n 22).

²⁵ Halley and Rittich (n 9).

apply to the family, for it is exceptional. Halley and Rittich explain, on the contrary, that three other layers influence the family. The second layer (FL2) is composed of substantive laws, not directly addressing the family, like tax law, social insurance law. These rules are not distinct or exceptional like FL1. Then, there are rules of the third layer (FL3), that structure silently the family sphere, as employment rules that enable to dismiss an employee 'at will'. Finally, there is the fourth layer (FL4) that is composed of informal rules. Therefore, the authors explain that there is no actual separation between family and the market, but rather a *continuum*. Because of the interconnections between foreground rules and background rules, every legal reform provokes a flow of resources across a *continuum* between the family and the market. The authors indeed say that, 'Reconnecting FL1 to FL2, FL3, and FL4 renders the modern family visible as part of the law of work, part of poverty law, and reveals its *intimate connection* to wider transformations in the social state and the *global market*' (emphasis added).

Duncan Kennedy has a similar idea when he talks about 'circular causation',²⁶ because he believes that if a reform modifies one foreground rule, it will have an impact on all interconnected background rules, which will eventually reinforce the initial change, following a circular motive.

The influence of background rules on the family sphere also enables to challenge the idea that it is meant to stay local, whilst the market would be international. Taking the example of nannies that can come from another country, the authors shed light on the fact that migration rules can act as background rules and influence how much a care-worker can expect to be paid in another country. Thus, we can see that the family cannot be reduced to exceptionalism, nor to localism, and that comparative studies can also apply to this sphere.

The critical studies in the third globalization show that the idea of a separation between the family and the market is reductive. It is a construction of the legal language, a rhetoric that produces distributive effects, but it does not take into account the complexity of the law, that is made of multiple interactions. No legal sphere can be fully insolated, which is why, from a normative point of view, the divide between the family

²⁶ Kennedy, 'The Stakes of Law' (n 22).

and the market can seem irrelevant. Nonetheless, it has concrete consequences from a descriptive point of view, and therefore, some attempts have been made to disrupt this dichotomy in the third globalization.

3. The attempts to supersede the divide, and the family law exceptionalism in the third globalization

3.1. The current merger of family and the market

Even though, as explained above, the divide does not seem to correspond to the normative reality, because of the intertwining of foreground and background rules, it still has concrete effects from a descriptive perspective.

Nevertheless, even from this descriptive point of view, we can see that there is a tendency to the merger of the family and the market spheres in the third globalization. This merger questions the relevance of this divide in the third globalization and may lead us to wonder if it is about to be superseded.

The merger between family and the market takes two directions. First, family tends to be in the market, through a transfer of values. Second, the market is increasingly present in the family, as this sphere tends to shift towards more individualism.

As to the first direction, we may argue that the market started to shift towards the values of the family in the second globalization, that was very socially oriented, as Duncan Kennedy explained.²⁷ Frances Olsen²⁸ also focused on this idea, explaining that with the rise of the Welfare state, the market was no longer solely based on individualism, as redistribution of the wealth became a main governmental goal. She also believes that it is wrong to consider the family and the market as separated spheres. To her, they are rather a *continuum*, to which a *chiasmus* structure can be applied. Using this chiasmus structure, she argues that some values of the family easily transfer to the market, such as altruism, and that this transfer can be beneficial especially for women. In the third globalization, this merger is still relevant since concepts that were seen as

²⁷ Kennedy, 'Three Globalizations' (n 1).

²⁸ Frances E Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 Harv L Rev 1497.

specific to the family are imported in the market. We can take the example of ‘good faith’ in the French contract law. Since the 2016 reform of the law of obligations, article 1104 of the Civil Code²⁹ says that good faith is now a general principle that shall apply to the whole contracting process (negotiation, formation and execution of the contract).

About the second direction, we can also argue that the family is shifting towards the market. Indeed, in the third globalization, the tendency for the family is to give a more important place to individualism. During what Duncan Kennedy identifies as the first globalization,³⁰ the husband and the wife were considered as one single entity. The wife was completely merged with her husband and had therefore no contracting power. Another main feature of this merger is that there was the intrafamilial immunity doctrine, which meant that you could not resort to tort law when it came to the family. Nevertheless, in the third globalization, this intrafamilial immunity doctrine started to be defeated in most countries, as Maria Rosaria Marella explains in the article “Love Will Tear Us Apart”. Some Thoughts on Intrafamilial Torts and Family Law Modernization Between Italy and Canada’.³¹ We can in fact observe that many countries transferred tort law, which is part of the law of obligations usually devoted to the market only, into the family sphere. For example, the breaching of marital obligations such as fidelity can now give right to damages, especially for morally hurting the other spouse, or for attempting at the spouse’s dignity.³² It shows that marital obligations of one spouse are now considered as legal entitlements to the other spouse, who is a distinct entity from his husband or wife. As Marella affirms, ‘Domestic relations are no longer regulated exclusively by family law, they can even be ruled by the law of obligations’. This idea goes beyond the theory of background rules, because here, the law of obligation is consciously applied to the family (as a foreground rule) and does not only play ‘in the shadow’. This incorporation of tort law in the family could lead us to believe that the

²⁹ See Article 1104 Code Civil (‘Contracts must be negotiated, formed and performed in good faith’).

³⁰ Kennedy, ‘Three Globalizations’ (n 1).

³¹ Maria Rosaria Marella, “Love Will Tear Us Apart”. Some Thoughts on Intrafamilial Torts and Family Law Modernization between Italy and Canada’ (2016) 7 Comp L Rev 1.

³² See Article 1240 Code civil, that can be invoked in the context of a divorce, to obtain damages (‘Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it’).

divide between family and the market has been superseded. Nevertheless, family law remains exceptional, and still applies to the family sphere, alongside with tort law, which is why we can talk about a ‘stratification’.

Thus, we can observe a tendency to the merger of family and the market, through the transfer of family values to the market, and stratification of family law and the law of obligations, which reinforces the idea that there is a *continuum* between the two spheres. This shift towards the superseding of the divide, especially by shifting the family towards the market is often seen as a modernization, as an improvement.

3.2. The ideas justifying this apparent merger

In the third globalization, some critical movements, like feminist studies praised for the defeating of the remains of the family and the market divide, as it was seen as disempowering women. For example, the exclusion of their reproductive or sexual from the market was addressed as a limitation to their right to self-determination. Thus, superseding the divide was a way to reach more formal equality between women and men, as we have seen above that the divide overlaps the female/male divide. This goal would be reachable because including these bodily contracts into the market would give a wider access to income, to women. The consequence could be that women as a social class would gain economic influence and could thus have more political power to incentivize legal reforms. The effort of feminist scholars focused on unveiling the fact that dichotomies like family and the market, or production and reproduction are constructions of the mind. They indeed insisted on the existence of a *continuum*, instead of opposition. For example, as we saw with care-work, the reproduction cannot be disconnected from production because it is the condition to the existence of a labor force. In order to disrupt dichotomies and go beyond the gendered structure of the legal system, two main paths were explored.

One of these paths, as a concrete manifestation of this subversion of the divide, is the incorporation of tort law into the family sphere, studied by Marella.³³ The author explains that the transfer of tort law is for instance addressed in the legal discourse as a ‘modernization’ of the family sphere. It shows the persistence of the ideological perception of

³³ Marella, “Love Will Tear Us Apart” (n 31).

family and the market. Indeed, what comes from the market is seen as superior and more modern, whereas the family is said to be traditional and local. This transfer is also particularly important to take into account in the third globalization, as it was motivated by the goal of protecting human rights within the family, such as the dignity of the spouses. Thus, the idea of modernization is related to the lack of efficiency of family law mechanisms to protect human rights. Indeed, the remedies provided by family law were often only symbolic. For example, in the context of the no-fault divorce, when a spouse caused the breakdown of the marriage, the remedy was the loss of financial support during the time of the separation before the divorce, and the loss of succession rights, but it was ineffective in case the wealthier spouse (most of the time the man) was the misdemeanant spouse. Besides, many familial obligations like solidarity are addressed as moral duties by family law, and the incorporation of tort law helped turning them into enforceable rights. Marella indeed says that family law was acting as a 'soft law', because of the will to preserve the family as an affective unit. In that context, the regulation of domestic relations by other laws than family law can be perceived as an improvement. Using tort law is seen as more efficient because, as a mechanism of resources allocation, it associates an amount of money to each damage. It is therefore seen as a tool to introduce more formal equality into the family, because each member is considered as a specific entity, with its own rights and duties, that can be concretely enforced. Another example can be the increasing introduction of contract law into the family sphere. Pre-nuptial agreements are for instance becoming more popular. Un-married couples' relations are also regulated using contract law, like for example the civil solidarity pact in France.

Therefore, a possible way of defeating the divide, which was the goal of some feminist scholars in the third globalization, is to incorporate elements of the market in the family sphere. The outcomes of this shift towards more individualism are a better enforcement of fundamental rights, as well as more efficiency of the remedies to address family issues. The underlying goal of this attempt to supersede the divide is the search for formal equality between men and women. Nevertheless, we can argue that despite these efforts to reach more equality, there are important limits to the superseding of the divide through formal equality. A more suitable option, that has also been developed in the third globalization, is to reconceive the divide between family and the market, rather than trying to defeat it.

4. The limits of the superseding of the divide: reconceiving the family and the market divide

4.1. The endless reproducing of the divide

Before addressing the efficiency of the superseding of the divide in order to achieve equality, we may wonder if such a superseding is even possible. Indeed, if we consider that superseding the divide means bringing the family closer to the market, we may continue analyzing the incorporation of tort law in the family sphere, on the basis of Marella's article.³⁴

According to this article, the incorporation of tort law in the family sphere is not completely replacing family law, but rather creating a 'stratification'. Therefore, family law is still present, and continues to act as a symbolic 'soft law'. Even though the divide between family and the market seems to become less visible, because of this merger, another divide is created inside of the family. Indeed, the initial divide between family and the market is reproduced inside the family sphere between the family issues that are addressed by the law of the market (namely the law of obligations) and the ones still addressed by family law. The issues still submitted to family law can for example be housework.

In their article, Halley and Rittich explained that care work is seen as an exclusively familial activity. Therefore, it remains unpaid, unless it is performed by people that are not members of the family. The idea that housework is executed out of affection and moral values justifies its exclusion of the market, even though there are relations between the two. Indeed, care-work is crucial in the producing of the work force, that will later be used to produce marketable goods. This is the reason why some materialist feminist scholars claimed for a salary for care-workers, who are mostly women. Nevertheless, housework is still governed by family law exceptionalism, in the sense that it is not possible to sue a spouse for not equally taking care of the cleaning or cooking in the household. This remaining submission of care-work to family law illustrates the limits of the feasibility of incorporating the law of obligations in the family. Indeed, particularly in common law, even if we wanted to submit housework or

³⁴ *ibid.*

care for the children, for example to tort law, we would face the problem of the standard of care. In the common law, the standard used for negligence law is objective reasonableness, but defining an adequate standard of care is very difficult in the family sphere. This standard does not seem fitted to this sphere, because the characteristics and most importantly the status of the family members matter a lot in the appreciation of care. Even in the case of a subjectivization of the standard of care, we would face the problem of equal treatment among individuals, because the appreciation would depend a lot on the judge, which would lead to inconsistency. But even in civil law, where tort law applies when a right is violated, or when harm was caused, housework is still epitomizing family law exceptionalism, as non-performance of it is never compensated. The duty of contribution in marriage is indeed used to justify the absence of compensation when one of the spouses performs a surplus of care-work, as if it were merely a performance of this duty.

Marella concludes that there is a reproducing of the public/private divide but shifted in the sphere of the family. The intervention of the state through tort law can in fact be seen as an incorporation of public law in the family sphere, while private law remains present through family law, especially when it comes to housework. As the public/private divide overlaps the family and the market divide (cf Section 1), we can assume that the family and the market divide is itself reproduced inside of the family sphere. This conclusion challenges the concrete possibility of completely superseding the divides, because they seem deemed to reproduce themselves.

Besides, one may argue that the possibility of an effective superseding of the divide depends on the legal system. Marella shows, by comparing Canada and Italy, that tort law is not incorporated to the same extent in the family sphere, because of the difference between common law and civil law. On the one hand, in Civil law, tort law seems to be applied as an alternative to family law for any intrafamilial conflict that is violating a subjective right, because family law is no longer seen as satisfactory. On the other hand, in common law, there is an old tradition of intrafamilial immunity doctrine, which means that the use of tort law is restricted to 'hard cases' that family law does not traditionally address alone, like child abuse. The differences between the legal systems therefore lead to different degrees of intersections between the law of obligations and family law, and thus, of merger between family and the market, as if some systems

were more suited for the merger than others. It can lead us to question the possibility of uniformly superseding the divide between family and the market, through the shift of the family towards the market.

4.2. The negative effects of the merger of family and the market

As it was said above, the search for formal equality has sometimes led to believe that making the family more like the market was the solution. In this sense, the superseding of the divide through shifting the family towards the market was seen as an improvement, or a ‘modernization’, because it reduces family law exceptionalism, and redistributed better the bargaining power between men and women. Nevertheless, as Marella shows in her essay “Love Will Tear Us Apart”,³⁵ this merger between the family sphere and the law of obligations is not a full modernization. First, it is difficult to consider that the family sphere in Canada is less modern than in Italy. Yet, a comparative analysis of the two countries led to understand that Canada incorporates tort law in the family to a very narrower extent than Italy does.

But an even more convincing argument is that the incorporation of a law usually associated with the market into the family sphere resulted in an increased regulation of the family sphere. The author even qualifies it as a ‘hyper-regulation’ of domestic relations because we moved from moral duties to enforceable rights. There is also the fact that tort law quantifies every family issue, by associating an amount of money to it. The consequence is that the family sphere seems more rigidly regulated than it was under family law exceptionalism. This rigidity and hyper-regulation can be qualified as a shift towards traditions, instead of modernization, because State control is increased as in the paternalist order. This return to the traditionalism of State control is not the only critique that can be addressed to the shift of the family towards the market.

Indeed, many scholars pointed out the commodifying effect of the implementation of the law of obligations into the family sphere. This effect applies to both tort law and contract law when it comes to some propositions to legalize agreements regarding prostitution or surrogacy. For example, Marella explains that there is the idea that assessing elements of the family like psychic wellness, care or fidelity, by applying tort

³⁵ *ibid.*

law, is turning these elements into alienable goods. Even though incorporating tort law can seem like a way to enforce fundamental rights better, by protecting those familial values, we can argue that it remains an appearance, as an amount of money cannot replace the harm suffered inside of the family, in the case of child abuse for example. Therefore, one may question the ability of the elements of the market, like money compensation, to act as a relevant remedy to family issues, that cannot always be quantified.

As to the propositions of incorporation of contract law into the family sphere, that are often presented as a way to empower women and make them formally equal to men, interesting critiques have been addressed by Carole Pateman, in *The Sexual Contract*.³⁶ The author argues that contracts are presented as an act of free will and as a neutral tool. But, as Robert Hale already pointed out, this idea is in fact rather a rhetoric, because coercion is present into the market from the moment property exists.³⁷ Indeed, property as a right, is allocated by the State to some of the citizens, which gives them power to withhold the labor of the non-owners. In order to buy food and to work, non-owners are actually coerced into contracting with the owners, which is why coercion is present even in the market. Carole Pateman's point is close to this idea, when she argues that no contract including domination and subordination can be consented freely. From the moment there is an inferior party in the bargain (ie women when it comes to prostitution or surrogacy), this party has no choice but to accept disadvantageous conditions. She thus argues that 'it is the economic coercion underlying prostitution that provides the basic feminist objection'. Besides, she sheds light on the fiction of 'alienability of property in the person', that is used to justify these sexual and reproductive contracts. In fact, the justification of it is often based on the underlying idea that one's sexuality or reproductive power can be distinguished from the rest of themselves, and that it can be alienated. But Pateman claims that no such separability exists, and that selling command over your body is selling command over yourself. There is no possible commodification of these essential attributes of a person, which means that these contracts result into subordination of the debtor. Contract law applied to the family is actually not defeating the patriarchal order, as it reproduces and legitimizes hierarchy. Therefore,

³⁶ Carole Pateman, *The Sexual Contract* (Stanford University Press 1988).

³⁷ Hale (n 20).

incorporating contract law into the family, by allowing exchanges of property in the person, would actually result in more subordination of women, instead of empowering them and reaching equality. A main problem at stake here would also be the protection of the dignity of the human being. The idea of dignity claims the sanctity of the human being, including his body, which opposes its commodification. It is indeed a matter of public policy that is not only addressed in family matters, and also applies to male bodies. The protection of dignity is often seen by legal systems as a superior goal, that can justify restrictions in self-determination, and in what we could call individual freedom. For example, in a famous French case law, a dwarf man was selling his body to perform dwarf-tossing.³⁸ The Conseil d'État decided to forbid this activity because it was considered to be a violation of human dignity and an endangerment of the public order, even though this prohibition was a restriction to the man's right to self-determination.

Just like for the above conclusion about the incorporation of tort law, we can therefore argue that not all tools of the market (including contract law) are suited to deal with intimate relationships, and that preserving human rights like bodily integrity might in fact require the refusal to treat the body of women as an alienable good.

4.3. Transforming the divide: from substantive equality to anti-discrimination

The latter observations on the possible unsuitability of the law of the market to regulate all family issues can lead us to believe that instead of superseding the divide, as some scholars of the third globalization suggested, we should instead consider its transformation. As Carole Pateman explained in her paper,³⁹ the search for formal equality assumes that gender neutrality is a reachable goal. It has sometimes led institutions to try to remove sex-based discrimination, by forcing women to conform to legal tools and structures designed for men. But, as evoked above, this quest, when it takes the form of shifting the family towards the market, does not seem to reduce the exclusion and subordination of women. Carole Pateman states that 'humankind has two bodies, and the bodies of women and men have very different social and political

³⁸ *Morsang sur Orge* [1995] CE, n 136727.

³⁹ Pateman (n 36).

significance'. This bodily difference can be the starting point of a questioning about how to deal with the problem of equality, that is one of the main issues created by the divide between family and the market. Indeed, an interesting option might be, as some other scholars suggested in the third globalization, to shift the goal from formal equality to *substantive equality*, that would be more adapted to the differences between the family and the market, and females and males taking into account their material conditions. Again, in this suggestion, an important limit is the legal rhetoric itself. Indeed, substantive equality can also lead to reproduce stereotypes about what is suited for the family and for women. Substantive equality is symbolically dangerous since it sometimes presents women as the weaker party, imprisoning them even more in the image of the victim, instead of freeing them. Thus, an even more relevant tendency of the third globalization is to shift the debate from equalizing, for example men and women, to fighting against discriminations regarding any identity. The main acknowledgement of the third globalization is that not only is it impossible to equalize the multiple identities, but it is also irrelevant. The idea is that the legal subject is neither uniform, nor binary, but rather completely fragmented. As Duncan Kennedy explained,⁴⁰ the hero of the third globalization becomes the judge, that has to protect identities against discrimination by balancing 'conflicting considerations' (ie interest, rights or values). Nevertheless, this conciliation between conflicts is also a task that the law must perform. We can take the example of how this effort to fight discrimination can take the shape of the re-conception of a legal paradigm. As men and women have different bodies, they are also perceived as behaving differently in the contracts, like Carol Rose addresses when she mentions the wider taste of women for cooperation.⁴¹ But contract law is usually seen as an element of the market because it is dominated by it, which is why it is not always fitted for intimate relationships. Carole Pateman points out that 'contracts and markets cannot be the model for an entire social order'. But an idea could be to reconceive the paradigm of contract law, for it not to be exclusively dominated by the market anymore. Addressing this idea of a re-conception of contract law, Threedy shows that it could be based on giving a central place to the *relationship* between the

⁴⁰ Kennedy, 'Three Globalizations' (n 1).

⁴¹ Rose (n 13).

contractors.⁴² Indeed, because contract law is currently dominated by the market, the main focus is based on what is exchanged in the contract, which mostly takes discrete contracts into account. Threedy's point is that shifting the focus to the relationship would shed more light on the inter-dependance of the contractors, mutuality and solidarity, like in a marriage rather than considering them as autonomous individuals. Threedy even says that this re-conception could be called the 'law of relationships'. In the end, it would be another form of compromise, as family values and perspectives would be associated to the paradigm of contracts. But in this proposal, human interconnections would be the basis of contracts, rather than hierarchical rights. It is close to what Frances Olsen suggested, when she said, in 1983, that we should make the market more like the family, because dichotomies limit the possibilities of human association and cooperation.⁴³ Here, the point is not to replace the law of the market by a paradigm based on the family sphere, but rather to create *ad hoc* legal structures that can be adaptive to both spheres. Duncan Kennedy presented this idea of reshaping of the legal paradigm as one of the main features of the third globalization. He explained that 'each new piece of positive law presents itself as a *parole*, dissolvable into the expended legal *langue* that now includes as interchangeable elements all the innovative concepts of the social [...]'.⁴⁴ This adaptation and expansion of the legal tool could be a way to reduce the discriminative effect of background rules. Indeed, legal tools need to be flexible enough to adjust to different interests and values, rather than to exclude.

⁴² Threedy (n 6).

⁴³ Olsen (n 28).

⁴⁴ Kennedy, 'Three Globalizations' (n 1).

5. *Conclusion*

Thus, in the third globalization, Critical theory appeared as a powerful tool to unveil how the divide between the family and the market is still structuring many aspects of our legal systems. Beyond acknowledgment, it has also proved to be a powerful tool to initiate change. Even though some propositions have been made in the direction of a superseding of the divide, it appears that defining anti-discrimination, regardless of whether it takes place in the family or the market, as the main goal may be a better option. Creating compromises between the different considerations of different identities, without searching to equalize them, is a task that belongs to courts, but also to the legal system itself. As we saw, reshaping the divide through the adaptation of contract law, for it to become more flexible, could therefore be a path to explore. It is only a suggestion, but the effort to incorporate more flexibility can be extended to other legal tools, as for example public law. Nevertheless, this acknowledgement that the legal subject is not binarily divided between the family and the market should not become an absolute fragmentation. The legal discourse has an important role to play here, in order to point out that the legal subject is maybe composed of diversified identities but remains nevertheless unified through common patterns like human rights. As the legal system gives recognition to identities, we may remember that it also produces them through the legal discourse. That is why Critical theory is constantly needed, as it questions how this language shapes the reality. This constant questioning is in fact a way to recognize the legal system as 'natural', but rather as a social production, that can always be re-shaped to reduce inequalities. Indeed, as it was well said by Debora L Threedy, '*Recognition* opens doors to change' (emphasis added).⁴⁵

⁴⁵ Threedy (n 6).
