The Duty of Marital Fidelity and the Evolution of Italian Family Law in a Comparative Perspective

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1. Same-sex civil union and the duty of fidelity in the political debate in Italy

In Italy regulation for same-sex civil union was approved only recently. It is Law 20 th May 2016, No. 76,[1] and shows some differences compared to heterosexual marriage regulation: among them the new law does not establish the mandatory duty of fidelity for same-sex couples. This distinction suggests some reflections on this expunction from civil union law. It concerns a balance of apparently irreconcilable interests: on the one hand there is the traditional vision of marriage, involving a man and a woman as a couple that conceive and educate their offspring. In this perspective marital fidelity duty is strictly connected with fertility control of the wife, giving the very sense of marriage, namely procreation. On the other hand, there is privacy, self-deteremination and non-discrimination for sexual orientation reasons. In common law, this evolution started with Sir Edward Coke, who affirmed that family is the place where an early society like a family springs out following l*ex naturae.*[2] Privacy doctrine intervention was much later and oriented to ensure parents authonomy on their children education.[3]

In 2015 the European Court of Human Rights (hereinafter ECHR) condemned Italy in the case Oliari,[4] a turning point decision in the Italian political debate on the right of people that are in same-sex relationships to fully live in legally binding relationships according their sexual orientation, unanswered until 2016.[5] Indeed, the Italian Constitutional Court had explicitly pressured the Parliament to pass this kind of regulation since 2010,[6] however the Parliament reached this only six years later. The new law equalized almost completely same-sex civil union and heterosexual marriage under a substantial perspective, but not formally because it adopted a different definition between them, qualifying same-sex civil union as a "specific social formation" (specifica formazione sociale) according to Articles No. 2 (protecting individual inviolable rights) and 3 (protecting equality) of the Constitution without any reference to Article 29 (protection of the right to marry) as well. Under this perspective, the exclusion of step-child adoption and duty of fidelity from same-sex couple regulation is coherent with the (debatable) approach according to which everything not strictly associated to heterosexuality does not deserve the same legal treatment.[7]

1 Published on the Gazzetta Ufficiale 21.05 2016, No 118, enforced on 5.06.2016.

2 E. Coke, *Institutes of the Laws of England*, 11-12; C. W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 Fordham L. Rev. 1699 (1998), p. 1768.

3 C. W. Christensen, *If Not Marriage?* cit.

4 European Court of Human Rights, 21.05.2015, App. No. 18766/11 and 36030/11, *Oliari and others v. Italia.*

5 S. Canata, *La legalizzazione della vita di coppia: panorama europeo e le prospettive di riforma in Italia, Fam. Pers. Succ.*, 2010, 3; F. R. Fantetti, *Il diritto degli omosessuali di vivere liberamente una condizione di coppia,* Id., 2012, 12.

6 Costitutional Court, 15.04 2010, No. 238. S. Rodotà, *Diritto d'amore*, Roma-Bari, 2015, p. 109.

7 M. R. Marella, *Dal diritto alla bigenitorialità al ddl Cirinnà: un'incursione nelle strutture profonde del diritto di famiglia*, 2016, available on www.europeanrights.eu.

The Italian Costitutional Court itself suggested this legal approach in its decision 11th June 2014, No. 170 that imposes divorce on married transexual people after he or she amended his or her birth sex with medical surgery.[8]
This strict interpretation of marriage to a heterosexual parameter promoted by the Constitutional Court let a not strictly legal view emerge, nevertheless strongly influencial on juridical interpretation. I refer to the idea that homosexual oriented people could be "physiologically" less adequate to express feelings like love and that their nature could allow them to be unfaithful. I totally reject this idea both under a factual and juridical perspective. Indeed, my analysis intends to show how the duty of fidelity could be considered as an "accidental element of marriage" and consequently it could be excerpted from both same-sex civil union and marriage duties as well, in oreder to accomplish the non-discrimination principle.
The duty of fidelity binds the wedded person to express very personal and utterly incoercible feelings. It covers a promise that, statistically,[9] is becoming more and more complicated and unrecoverable because it concerns a moral duty. However, the political solution adopted by Law No. 76/2016 is not interested in dealing with the evolution of the individualistic sense of Italian society and the transformation of this duty of marital fidelity into an anachronistic heritage with the involvement of genetics in filiation matters.
The perception of this historical transition probably justified the legislative attempt to stabilize through a law a rearguard vision of personal relationships that under a social profile had changed for some time. In this context, the Parliament delegates the Judiciary to correct the ideological limitations of this legislation, forgetting that in a civil law system, like the Italian one, the case law is fragmented, and consequently in favor of those who can afford to pay the costs of justice, so discrimination issues are addressed only on a case by case basis.
Scholars are divided on this new law . Some of them,[10] in an idealistic perspective, complain about the breach of protection offered by same-sex civil union compared to egalitarian marriage, which is now the more widespread institute in Western countries for the protection of the rights of homosexual persons.[11] Italy, therefore, runs a rearguard position in the protection of fundamental rights and the Italian legal system is discriminating against homosexual orientation in an unacceptable and blatant way, as regards the protection of the fundamental right of marriage. The second opinion, more pragmatic and acceptable to me, says that even if there is such a discrepancy in the protection of fundamental rights according to sexual orientation of applicants aspiring to protection, the legislation in question represents a significant improvement compared to the previous legislative silence.[12]

2. Canon marriage, civil marriage and civil union

In his " De bono coniugalis" (Of the Good of Marriage), Augustine indentified three benefits of marriage:

- "bonum fidei", that is the obligation of exclusivity and the mutual duty of fidelity of the spouses;
- "bonum prolis" that is the duty of procreation and education of children;
- "bonum sacramenti", that is indissolubility of marriage[13].

8 B. Pezzini, O*ltre il "caso Bernaroli": tecniche decisorie, rapporti tra principi e regole del caso e vicende del paradigma eterosessuale del matrimonio, Genius*, I, 2015, p. 83 e ss.

9 ISTAT, *Matrimoni, separazioni e divorzi*, Anno 2014, available on www.istat.it, pp. 2 e 3.

10 F. Bilotta, *Quanto è lontana l'Europa*? in *Diritto e Questioni Pubbliche*, 2015, p. 105 ss; Id., *La tirannia della maggioranza*, in *About Gender*, 2016, No. 5, p. 146.

11 A. Sperti, (ed.) "*Obergefell v. Hodges: il riconoscimento del diritto fondamentale al matrimonio*" *Genius*, 2015, I.

12 M. Sesta, L*a disciplina dell'unione civile tra tutela dei diritti della persona e creazione di un nuovo modello familiare*, in *Fam. dir.*, 2016, p. 881; V. Carbone, *Riconosciute le unioni civili tra persone dello stesso sesso e le convivenze di fatto* in *Fam. dir.*, 2016, p. 848.

13 A. Ferrari, I*l matrimonio nel diritto della Chiesa cattolica latina*, in *Il matrimonio, Diritto Ebraico, canonico e islamico: un commento alle fonti*, a cura di S. Ferrari, Torino, 2006, p. 95 ss.

In the following centuries this interpretation influenced the Catholic concept of marriage preventing poligamic marriages, divorces, repudiations and new marriages, as it was in both the pagan and Jewish tradition.[14] Indeed, the Patristic doctrine justified for Christian morality a pagan institution, sacralizing it.[15]
In this regard, there is constant reference in Canon law to

> *"Marriage as an institution willed by God, as a symbol of the union between Christ and the Church. It produces the grace for the spouses to live "full shared lives"("totius vitae communion") in harmony and with the pledge of spiritual benefits. Marriage is seen as a union which creates not only one flesh, but even one spirit. The offspring of this union is the purpose, the unity of spirit that unites the spouses; indissolubility and fidelity and chastity in marriage are the essential characteristics*".[16]

Canon marriage is considered by the Catholic Church as the only admitted paradigm, because its indissolubility is based on the sacrament oriented to *"the conservation and development of humankind, and to the elevation of souls*".[17] A legacy of this concept can be found even in the words of the well-known decision Obergefell v. Hodges of the US Supreme Court:

> "*Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations*".[18]

Even though this definition is emphatically reductive to every possible individual choice, it is oriented to recognizing legitimacy of a couple's life only in marriage.
According to traditional interpretations of canon law, marriage became an ecclesiastical institution with the Council of Trent, especially with Sect. XXIV, *De reformatione matrimoni,* of 1563 and with the Enciclycal *Tamesti, Decretum de reformatione matrimonii, cn. 1).* This document attributed to the ecclesiastical authorities the power to certify marriages,[19] meaning their existence and regulation. However, Catholic Church delegated the regulation of civil and patrimonial effects of marriages and the relationships between Catholic believers and non-Catholics to civil authorities.[20]
In Italy, conflicting relationships between Church and State already existed during the Risorgimento (which was the unification of Italy under the King of Sardinia),[21] but these tensions exploded after the Italian unification and they came into force in the new Civil Code in 1865. According to it, although the State left to each subject the freedom to govern his o herself following their own conscience about religious marriage, only civil marriage had legal effects.
The Catholic church could not accept that regulation and popes who succeeded since then have always claimed the primacy of the church on marriage.[22] Indeed, according Catholic doctrine, Catholic believers are obliged to the religious celebration of marriage, since this is different from civil marriage

> *"not for the religiousness of the ceremony, but for the essence of the two marriages that have different assumptions at their foundation. Canon marriage is a monogamous and perpetual contract, elevated to a sacrament, creator of*

14 C. Pederoda, *Matrimonio canonico – Matrimonio civile*, in *I Quaderni di In Prin*, Udine, 2008, I, 1.
15 V. Parlato, *Note su matrimonio e unioni civili nella concezione cattolica e nel diritto canonico*, in *Stato, Chiese e pluralismo confessionale*, n.6/2014, p. 2.
16 V. Parlato, *op. cit.*
17 C. Pederoda, *op. cit.* Sul punto, si veda, Concilio di Trento, sess. XXIV, *de reformatione matrimonii.*
18 A. Sperti, *La sentenza Obergefell v. Hodges e lo storico riconoscimento del diritto al matrimonio per le coppie same-sex negli Stati Uniti*, in *Genius*, 2015, II, p. 10.
19 C. Pederoda, op. cit.
20 C. Pederoda, op. cit.
21 C. Pederoda, op. cit.
22 C. Pederoda, op. cit.

> *"gratia ex opere operato", while civil marriage is a monogamous and dissoluble "Rechtsgeschäft" (juristic transaction) from which certain rights and obligations arise for the parties".*[23]

In these words a supposed and alleged superiority of canon marriage over civil marriage could be seen because of its indissolubility. In fact, civil marriage is to be considered a mere legal transaction, dissolvable for the determination of either party, availability of cohabitation, non-enforceability of the breach of duty of loyalty, either in civil or criminal liability. Indeed, civil marriage fulfillment of conjugal duties is left entirely to the will of the spouses, and procreation is not an essential element of the institute, since the interruption of pregnancy is left solely to the will of the woman. Finally, civil marriage permits the split between sexuality, conception and marriage.[24] Furthermore, *"the legal prerogatives of marriage are debilitated compared to those of civil union and there is a progressive assimilation of marriages and domestic partnerships*".[25] Although from a secular perspective full equality is desirable between civil unions and civil marriage, it is clearly true that the conservative doctrine, related to the canonical principles, not only rejects this identification, but assumes that concordat marriage governed in the Concordat must be valid also for the laity that would refer only to civil marriage.

Concordat is one of the three Lateran Pacts subscribed by the Vatican and Italy on 11 February 1929. Article No. 34 of the Concordat establishes the substitution of the mandatory civil marriage stated by the Civil Code "Pisanelli" with a optional system of choice of the form of the celebration,[26] but granting to Canon marriage civil effects. Article No. 34 text states: "*The Italian State, wishing to restore to the institution of matrimony, which is the foundation of the family, that dignity which is conformable with the Catholic traditions of its people, recognizes the civil effects of the Sacrament of matrimony regulated by Canon Law.*[27] Ecclesiastical doctrine affirmed that

> *"in those years, even the secular concept of marriage did not differ substantially from the Catholic one: mutual fidelity of the spouses; indissolubility; purpose of procreation and education of children; mutual support of the spouses; the protection of children born in wedlock, i.e. legitimate, as opposed to the natural ones , who are recognizable, in certain cases, or even not recognizable, if born from adultery".*[28]

This perspective may have made sense in the Thirties of the Twentieth Century, but today it is no longer shared in Italian public opinion. Indeed, nearly ninety years have passed since 1929, and deep social changes have happened in society, families and people lives, and then on marriage and family law. This evolution has been neither quick nor easy, and probably it will be not definitive.

It began at the end of the nineteen-sixties, when the Italian Constitutional Court declared uncostitutional the difference on the application of punishment connected to the crime of infidelity perpetrated by the wife, compared to infidelity perpetrated by the husband,[29] until the reform of family law in 1975. This evolution has run a slow and tortuous path through the introduction of the possibility of dissolving the civil effects of marriage, which took place with divorce law in 1970.

It also resulted in the break, even conceptually, from the idea of family ties, until the recent reform on the single status of filiation in 2013. However, Italian society has had strong reaction to this evolution, and it is reflected in recent statistics.[30]

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23 V. Parlato, op. cit. C. Pederoda, op. cit.

24 V. Parlato, op. cit. p. 5; G. Boni, *La rilevanza del diritto secolare nella disciplina del matrimonio canonico*, Milano, 2000, p. 212.

25 G. Boni, op. cit.

26 C. Pederoda, op. cit.

27 source: http://www.aloha.net/~mikesch/treaty.htm

28 V. Parlato, op. cit

29 P. Palermo, *Uguaglianza e tradizione nel matrimonio: dall'adulterio alle unioni omosessuali*, in *Nuova Giur. Civ.* 2010, 11, II, 537.

30 ISTAT, *Matrimoni, separazioni e divorzi*, Anno 2014, cit.

Table 1: Marriage, Separations and Divorces in Italy, Source: Istat – Italian National Institute of Statistics, 2014

	2008	2010	2012	2013	2014
Number of total marriages (absolute values)	246’613	217’700	207’138	194’057	189’765
First marriages of both spouses both Italians (absolute values)	185’749	168’610	153’311	145’571	142’754
First civil marriages of spouses both Italians (%)	20.0	22.1	24.5	27.3	28.1
Marriages of at least one foreign spouse (absolute values)	36’918	25’082	30’724	26’080	24’230
Rate of male spouses at first marriage (‰)	461.1	461.9	460.0	431.6	421.1
Rate of female spouses at first marriage (‰)	580.4	516.6	506.9	475.5	463.4
Civil marriages (%)	36.8	36.5	41	42.5	43.1
Separations (absolute values)	84’165	88’191	88’288	88’886	89’303
Total of Separation (‰ of marriages)	286.2	307.1	310.6	314.0	319.5
Separation with minor children (%)	52.3	49.4	48.7	51.9	52.8
Divorces (absolute values)	54’391	54’160	51’319	52943	52’355
Total Divorces (‰ of marriages)	178.8	181.7	173.5	182.6	180.1
Divorces with minor children (%)	37.4	33.1	33.1	34.8	32.6

Supporters of the removal of duty of loyalty from the civil union bill were still tied to a rearguard vision of marriage, linked to canon marriage. Conservative parties won the political struggle, but their vision is no longer monolithically represented in society. Furthermore, the legal stigma associated with same-sex civil unions is based both on discrimination and on the idea that canon law marriage is the exclusive legal bond for marital life and it cannot be extended to other couples. Civil union legal scheme is based on civil marriage, not on the canon one. Indeed, referring the comparison between civil marriage and civil union, in civil union the new law establishes that there is no separation before divorce and so the parties cannot be charged for breaching the (hyphotetical) promise of fidelity.

However, the traditional model of Canon/concordat marriage remains strong in the collective mindset, even more than in the legal reality. Therefore, in order to understand its root as a cultural heritage, the role played by the duty of loyalty in the construction of such imaginary has to be analyzed.

3. Historical and comparative roots of the duty of fidelity

One of the most challenging chapter titles in a book focused on an anthropological perspective on marriage begins with a not obvious question: “What are husbands for”?[31] The author answered taking back grandparents’ words: “To make women honest”, focusing marriage value on sexual fidelity and then on fatherhood certainty and thus on the security of legacy recipients.

Roman marriage was a private act reserved to members of higher classes who had a heritage to transmit.[32] During the Augustean Age *Lex Iulia de adulteriis coercendis* was introduced to contrast moral corruption. It sanctioned female *adulterium,* and the husband was obliged to repudiate his adulterous wife, otherwise he was himself accused of pandering.[33] When the Roman Empire began to crumble, the Church proposed itself as new point of reference for people “who risked being lost”.[34] At

31 L. Mair, *Il matrimonio: un’analisi antropologica*, Bologna, 1976, p. 19.

32 L. Cracco Ruggini, *La sessualità nell’etico pagano-cristiana tardoantica*, in C*omportamenti e immaginario della sessualità nell’Alto Medioevo*, LIII Settimane di studio della Fondazione Centro Italiano di Studi sull’Alto Medioevo, Spoleto, 2006, p. 11.

33 G. Lagomarsino, *L'esclusione della fedeltà coniugale prima e dopo la riforma del diritto di famiglia, con riferimento all'esclusione canonica della fedeltà nel ns ordinamento,* in *Il diritto delle persone e della famiglia*, 2015, p. 719.

34 L. Cracco Ruggini, o*p. cit.*, p. 11.

that moment, pagan and Christian moralities merged, styling new standard models for men, but aboveall women, following Augustinian theology. Indeed, this interpretation influenced the Christian concept of marriage. Furthermore, Costantine's Edict reduced the causes for divorce, formerly restricted only to the loss of "*affectio maritalis*" according to classical Roman law, and the adultery of the wife was one of them.[35] Later, through the authority of Liutprand, the influence of the Church in Longobard society was strong enough to spiritualize the ancient pagan ritual of marriage with the introduction of the ceremony of *subarrhatio cum anulo*, which became a symbol of fidelity in Catholic marriage (*anulus fidei*). The anulus (ring) was given by the groom to the bride, "to raise the marriage to a higher level in comparison to less evolved Germanic law".[36]

The medieval canon law was categorical in establishing the indissolubility of marriage: the spouses should be united until death did them part, but history tells of several episodes of repudiation,[37] some related to adultery, according to which the adulterous wife would have been locked up in a convent (as the legend of Guinevere, Lancelot and King Arthur reminds us) or sent to prison for decades (as it was for Eleanor of Aquitaine), or made victim of the execution block, as happened to the ill-fated Anne Boleyn, whose story no longer belongs to the Middle Ages, but to the tumultuous times of the Reformation. Indeed, the theological vision of Luther's Reformation had a double effect on marriage concept: on the one hand, marriage was not a sacrament and so it recovered its original character of conventional agreement about communion of life.[38] As a consequence, it was accepted that, marriages, like agreements and conventions, could be dissolved through divorce.[39] On the other hand, the custom of engaged couples living together before marrying was abandoned. In fact, marriage was accomplished through the spouses' consent even before the ceremony was celebrated. However, the combination of the custom changes, both Reformation and Counter-Reformation,the extensive war affliction which disseminated the epidemic of syphilis dictated that marriages had to be celebrated in churches, and that husbands and wives could not live together before the ceremony. These attitudes were shared both by Protestants and Catholics,[40] and it contributed to stiffening the sexual morality of future centuries. Since then, a rigid paradigm for marriage has been upheld, since spouses must be of different sex, bound in a monogamous relationship for life, and prenuptial sex was prohibited.

Among protestants, Calvin was particularly harsh against marital infidelity. According to him, it was the most despicable of crimes since with only one act the husband or the wife breached the alliance with his or her spouse, God and the whole community itself.[41] Such stringency would eventually loosen, especially during the Enlightenment. In fact, marital fidelity was not given the same value, but the infidelity severity varied depending on the status and origin of the persons concerned.[42] After the French Revolution, a new distinction between liberals and conservatives was spread from France to all Europe.[43] It did not follow national borders, but pertained to social classes, and was present in each legal system, especially in family law.[44] During the French Revolution, on September 20, 1792, a law allowing divorce upon request of a spouse and without attributing fault was introduced.[45] That law

35 M. A. Glendon, *The Transformation of Family Law*, Chicago-London, 1989, p. 17; S. Sanders, *The Cyclical Nature of Divorce in the Western Legal Tradition*, 50 Loy. L. Rev. 407, (2004), p. 409;

36 G. Di Renzo Villata, *Persone e famiglia nel diritto medievale e moderno*, Digesto, 1995, F. Brandileone, *Contributo alla storia della «subarrhatio»,* in *Pel cinquantesimo anno d'insegnamento di Enrico Pessina*, III, Napoli, 1899, ora in *Saggi sulla storia della celebrazione del matrimonio in Itali*a, Milano, 1906, p. 406.

37 R. H. Helmholz, *Marriage Litigation in Medieval England*, Cambridge, 1974, p. 4.

38 J. Gaudemet, *Le mariage en Occiden*t, Paris, 1987, p. 191. M. Rheinstein, R. König, Introduction, Chapter I, Persons and Family, International Encyclopedia of Comparative Law, Tübingen – Leiden – Boston, 2007, IV, p. 1-9, c. 7.

39 D. Macculloch, *Riforma. La divisione della casa comune europea (1490 – 1700)*, Roma, 2010, p. 828.

40 M. A. Glendon, *The Transformation of Family Law* cit., p. 25

41 J. Witte Jr., *John Calvin on Marriage and Family Life*, 2007, http://ssrn.com/abstract=1014729

42 S. Desan, *Making and Breaking Marriage: An Overview on Old Regime Marriage as a Social Practice*, in S. Desan, J. Merrick, (eds.), *Family, Gender, and Law in Early Modern France*, Pennsylvania State University Press, University Park, 2009, p. 4; B. Craveri, *Gli Ultimi Libertini*, Milano, 2016, p. 31.

43 M. A. Glendon, *The Transformation of Family Law,* cit., p. 160.

44 M. Antokolskaia, *Family Law and National Culture. Arguing against the cultural constraints argument*, in *Debates in Family Law around the Globe at the Dawn of the 21st Century*, (K. Boele-Woelki, ed.), Antwerp-Oxford-Portland, 2009, p. 41.

45 M. A. Glendon, op. cit., 159; M. Parquet, *Droit de la famill*e, Levallois-Perret, p. 85.

attributed to both spouses mutual divorce with a declaration to the Registrar in case of mental incapacity, detention, abandonment *émigration*[46] and *"incompatibilité d'humeur"*,[47] that is incompatibility.

Divorce has led to a claim of freedom common to both men and women, but there have been more women to claim divorce with a need of relief from "marital despotism"[48]. However, it should be noted that marital infidelity and adultery were not explicitly reasons for divorcing. Divorce has experienced mixed fortunes in French law. It survived after "revolutionary excesses", albeit with restrictions in the Napoleonic Code for personal interest of the Emperor,[49] and then it was abolished after the Restoration,[50] and reintroduced in 1884 almost seventy years later.[51] Regarding the duty of marital fidelity, under Code Napoléon, affairs were tolerated, but pregnancies were considered. There was no indulgence for the guilty women to give birth to an illigitimate child,[52] because the male line would be polluted.

In Common Law, the interference of descent line with the breach of the duty of fidelity was present as well. In this regard, it should be noted that Catholic tradition influence of the canonical tradition has been mantained through the Church of England, which considered infidelity as destructive of families and it extended the definition to include the husband's extramarital sexual activity,[53] even if male monogamy was socially considered a mere fiction.[54]

Even today, neither English nor American common law legal systems refer to marital fidelity duty as a marriage obligation, but its violation is punished differently depending on whether it is "fornication", a term for a sexual intercourse in both conjugal or extra-conjugal male infidelity, or to "adultery",[55] referred to the betrayal of the wife. Indeed, the idea was that the woman's betrayal has a "*tendency to adulterate the issue of an innocent husband, and to turn away from the inheritance away from his own blood, to that of a stranger*".[56] In fact, the legal concept of adultery is based on the idea of theft, therefore it has long been considered a crime punishable by law with diversified penalties, such as exemplary wrote Nathaniel Hathworne in his novel "The Scarlet Letter".

During the 18th and 19th centuries, in reformed countries such as England[57] and Germany,[58] adultery and divorce were still strictly connected. However, this perspective deeply changed in the late 20th Century because of women's control of their fertility by assuming contraceptives.[59]

From this female awareness, it could be observed a very rapid developments in science that permitted a massive use of artifical techniques of human reprodction. Actually the break of the hendiadys "sexuality and reproduction" was a prelude to the separation between conception and

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46 K. Carpenter, *Emigration in Politics and Imaginations,* in D. Andress, *The Oxford Handbook of the French Revolution*, Oxford – New York, 2015, Ch. 19.

47 M. A. Glendon, op. cit., S. Desan, *Pétitions de femmes en faveur d'une réforme révolutionnaire de la famille, Annales historiques de la Révolution française*, 2006, p. 6, http://ahrf.revues.org/5883

48 S. Desan,, op. cit.

49 M. A. Glendon, op. cit.

50 Loi Bonald, 1816, M. Parquet, op. cit., p. 85).

51 Loi Naquet, 27.07.1884 (M. Parquet, ult. op. loc. cit).

52 M. Parrot, *Figure e compiti,* in P. Ariès, G. Duby, *La vita privata. L'Ottocento,* (trad. it., F. Cataldi Villari, M. Garin, S. Neri, F. Salvatorelli), Roma-Bari, 1991, p. 110.

53 S. S. Varnado, *Avatars, Scarlet "A"s, and Adultery in the Technological Age,* 55 Ariz. L. Rev. 371 (2013), p. 385.

54 *Note: Constitutional Barriers to Civil and Criminal Restrictions on Pre- And Extramarital Sex*, 104 Harv. L. Rev. 1660 (1991), p. 1671.

55 C. J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 BYU J. Pub. L. 449, (2004), p. 457.

56 New Jersey Supreme Court, State v. Lash (N.J. 1838).

57 D C. Wright, T*he Crisis of Child Custody: A History of the Birth of Family Law in England,* 11 Colum. J. Gender & L. 175, 176-82, 238-49 (2002); W. E. Schneider, *Secrets and Lies: The Queen's Proctor and Judicial Investigation of Party-Controlled Narratives*, 27 Law & Soc. Inquiry 449, 453-62 (2002); H. D. Lord, *Husband and Wife: English Marriage Law from 1750: A Bibliographic Essay*, 11 S. Cal. Rev. L. & Women's Stud. 1, 1-3, 12-26 (2001).

58 S. Sanders, op. cit., p. 419; M. A. Glendon, op. cit., p. 174.

59 F. Héritier, *Dissolvere la gerarchia. Maschile/Femminile II*, trad. it. A. Panaro, Milano, 2004, p. 166.

procreation. Indeed, now sexual intercourse between a man and a woman is no longer a *condition sine qua non* to carry out a birth, because the generation of another human being could happen through artificial procreation and fertilization. In this perspective, procreation, and therefore filiation, become acts of free individual choice, no longer bound to the exclusive purpose of perpetuating the lineage through which to transmit name and family heritage, as well as deciding to reproduce at a time deemed appropriate to the interested person regardless of his or her physical and genetic possibilities.

Under these perspectives, it should be questioned whether the duty of fidelity still remains in modern legal systems. In any case, the persistent influence on canon marriage in Western legal tradition has to be taken into account. It is based on the factual circumstance that the canonic model maintained its value under both canonic and legal perspective, and it slowly deteriorated only after the Reformation.[60]

The modern comparative viewpoint is focused on divorce for fault. In fact, the abolition of the divorce fault attribution could mean the removal of the influence of ethical values on marriage regulation.[61] In this regard, it should be noted that under a general point of view, the dissolution of marriage discipline is silent on the explicit reference to the violation of the duty of marital fidelity, but the law rules the irreparable marriage breach,[62] which could emerge from other circumstances. For instance, in Germany[63] and the Netherlands[64] in case of a joint divorce application, the judge does not verify the reason of the irreparable breakdown of marital life.[65]

In Sweden, the breach of duty of fidelity was not subjected to specific sanctions, and during the 70s there was a wide-ranging debate on its preservation, considered a deterrent to marriage by young couples.[66] The reform of marriage law came into force in 1982, when the legal focus was on fidelity was interpreted in a broader sense than the sexual integrity, referring to loyalty and solidarity between the spouses.[67] This experience was a model for the Spanish reform of family legislation, which does not state specific reasons, but the will of one of the spouses is sufficient for divorcing.[68]

In France, Article 212 of the Civil Code stipulates that spouses mutually must give "respect, fidelity, aid, assistance" to each other while Article 242 states that failure to do so can be considered a sufficient reason for divorce.[69] It is due to one or more events that constitute a serious or repeated violation of duty and obligations of marriage,[70] and it has led to a permanent alteration of the marital bond.[71] In this regard, it is noted that in recent French case law, infidelity is considered as an effect of marriage that has been become intolerable,[72] even in the case of mutual infidelity.[73] For example, divorce is caused by "*the erosion of feelings on everyday married life, the presence of in-laws used as adjuncts to care for the child when both parents work, the differences of intention, the presence of very banal elements in the life of a couple. These are evidences suggesting that the sole responsibility of the progressive disintegration is due solely to the wife, whose behaviour was excessive and harmful to maintaining a satisfactory conjugal unio*n".[74]

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60 P. McKinley Brennan, *Of Marriage and Monks, Community and Dialogue*, 48 Emory L.J. 689, (1999), p. 700.

61 C. Sörgjerd, *Reconstructing Marriage. The Legal Status of Relationships in a Changing Society*, Cambridge-Antwerp-Portland, 2012, p. 122.

62 C. Sörgjerd, op. cit., p. 127.

63 D. Martiny, *German Report, in European Family Law* in *Action, Vol. I: Ground for Divorce*, Cambridge-Antwerp-Portland, 2003, p. 80. (D. Martiny, op. cit., p. 188 ss).

64 C. Sörgjerd, op. cit. 128.

65 K. Boele-Woelki, O. Cherednychenko, C. Lieeke, Dutch Report, European Family Law in Action, Volume I: Ground for Divorce, 2003, p. 89.

66 C. Sörgjerd, op. cit.

67 C. Sörgjerd, op. cit., p. 123.

68 C. Sörgjerd, op. cit., 126.

69 C. Sörgjerd, op. cit., 126.

70 Article No. 242 Code Civil amended by Loi n°2004-439, 26.05.2004.

71 Article No. 246 Code Civil

72 Cour d'appel de Limoges, 13 05 2013, RG 12/00908; Cour d'appel de Bastia, 10 042013, RG 11/00356

73 Cour d'appel de Rennes, 14 10 2014, RG 13/04534.

74 Cour d'appel de Versailles, 17 03 2016, RG 15/02921.

In the US, the family law is under state jurisdiction and the courts can declare a marriage broken only in cases provided by law. In most States, the violation of the duty of loyalty is still established as grounds for divorce,[75] while other states[76] apply the "no fault rule", although there is a continuing link with tradition through references to adultery.[77]

4. The duty of fidelity and filiation in Italian legal system

In Italian legal system the legal presumption of paternity is strictly connected to the duty of fidelity, even under the recent reformation of filiation law which guarantees equal status to children born out of wedlock as to legitimate ones. In the legal presumption of paternity there was a religious significance that considered the woman as a necessary property for reproductive purposes. This was the husband's right, called "*jus in corpore*". In this sense, the former "*codex juris canonici*" at paragraph 1081 stated "*consensus matrimonialis est actus voluntatis quo utraque pars tardit et acceptat jus in corpus, perpetuum et exclusivum*, *in ordine ad actus per se aptos ad prolis generationem"*.[78] This definition contained not only a vision of the woman's body as property.[79] but it was strictly connected with fatherhood certainty and the purity of lineage promoted by the Catholic Church trough a "Catholic construction of family relationships",[80] that is a marriage concept oriented to procreation.[81] Through Article No. 34 of the Concordat of 1929, the Italian State accepted to apply the efficacy of canon marriage for all effects of a civil marriage.[82] This equalization was accepted by the new Italian Republic though the controversial inclusion of the Lateran Pacts in the Constitution of 1948.[83] This recognition allowed the lasted survival of the connection between marital fidelity and presumption of paternity, keeping the fact that being a parent consisted of a father's right to have a child, instead of the right of a child to have a parent.[84] Therefore, marriage was the indispensable condition for having a legitimate father, indeed the decisive question was whether the offspring was born inside or outside of wedlock.[85]

The Law 1 December 1970 No. 898, that introduced the possibility of dissolving civil effects of concordat marriage, indroduced a change in concept of family ties linked only with blood ties, enshrined in the sanctity of the marriage ceremony. Indeed, the implementation of scientific and technological innovations in human reproduction definitely upset the traditional perspective. As an example, the birth of the first baby conceived through in vitro fertilization (Louise Brown, born in 1976) made a disruptive split between the sexual act, conception, and pregnancy, which were the stages of human reproduction.[86]

From a female perspective, the technique allows to extract oocytes, fertilize them and choose whether to continue the pregnancy. So, fertilization and childbirth became two distinct elements, whose lead character may be different, as the ova can belong to a different woman from the one that brings the pregnancy to term and gives birth. Therefore, the traditional Latin maxim, crystallized by

75 Alabama, Alaska, Arkansa, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Louisiana, Maine, Massachusetts, Maryland, Mississippi, News Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Vermont, West Virginia (S. Varnado, *Avatars, Scarlet "A"s, and Adultery in the Technological Age,* 55 Ariz. L. Rev. 371 (2013), p. 383).

76 Arizona, California, Colorado, D.C., Florida, Hawaii, Iowa, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Oregon, Washington, Wisconsin, Wyoming (S. Varnado, op. cit.).

77 S. Varnado, op. cit.

78 V. Carbone, L'*irreversibile crisi della coppia legittima l'adulterio, rendendo non addebitabile la separazione?*, *Fam. dir*, 1999, 2, 105

79 M. D'Amelia, *Recensione a Nozze di Sangue, di Marco Cavina*, in *Il Mestiere di Storico*, 2012, 1, p. 171.

80 P. Ginsborg, *Famiglia Novecento, Vita familiare, rivoluzione e dittature, 1900-1950*, trad. it., E. Benghi, Torino, 2013, p. 284.

81 P. Moneta, Voce: "*Matrimonio canonico*", in Digesto civile, UTET, Torino, 1994 e dottrina ivi segnalata.

82 P. Moneta, Voce: "*Matrimonio concordatario*", in Digesto Civile, UTET, Torino, 1994;

83 G. Ferrando, voce: "*Matrimonio civile"*, in Digesto Civile, Aggiornamento 2014, UTET, Torino, 2014.

84 L. Zoja, *Il gesto di Ettore*, Torino, 2010, p. 171.

85 G. Galeotti, *In cerca del padre*, Bari - Roma, 2009, p. 5-7.

86 M. Iacub, *L'impero del ventre. Per un'altra storia della maternità*, It. translation S. De Petris e C. Bonfiglioli, Verona, 2004, p. 134.

centuries, *mater semper certa est* may not reflect the truth anymore. Indeed, it breaks down in the face of possible combinations of biological contribution (the woman who provided the egg), gestational contribution (the woman who was implanted the fertilized egg and that led to childbirth), and social contribution (the woman who raises and educates the child born from that oocytes and pregnancy). In fact, recently, the courts also took note of this technological evolution implemented by social custom.[87]

From a male perspective, paternity legal presumption is questioned by this technique as well. The new text of Article No. 231 (Husband's paternity) of the civil code[88] affirmed that: "The husband is the father of the child conceived or born during the marriage". It does not affect the core of the traditional notion of filiation, that is related to the attribution of fatherhood to the husband. This rule has a fundamental importance in Italian family law because it attributes to marriage the function of determination of paternity and the parent-child relationship.[89]

The main consequence of wedlock is that the offspring obtains filiation through both parents and not each of them individually. Therefore, out of wedlock maternal and parternal filiations are considered distinct cases by law, and wedlock filiation constitutes a unique case according to which the relationships that bond mother, father and children are indissoluble.[90]

According to article No. 231 c.c., the traditional requisites for wedlock filiation, a child is considered legitimate when four elements subsist: a) a marriage between parents; b) the child delivery by the wife; c) the child was conceived and born during marriage; d) the paternity of the husband.[91] However, the legal paternity presumption is recognized by law even in absence of requisites c) and d). Indeed, legal paternity presumption during marriage, according to Article 231 c.c.,[92] the husband is the father of the child born during marriage and so he has to be considered the child's father even if the child was actually conceived with another man.

Considering the split between biological truth and legal truth, there is an additional element emblemic of a deep attachment to tradition but questioned by technological involvment in human reproduction through heterologous fertilization. This is allowed in Italy through the donation of both female and male gametes to couples in which one of the prospective heterosexual parents, is barren or infertile. Indeed, Article No. 1 of the Law No. 40/2004 establishes that in this case an intervention of artificial insemination is permitted "if there is no other effective treatment to remove the causes of infertility". The Constitutional Court modified this law several times.[93] In this context, the Constitutional Court amended the prohibition of heterologous fertilization for sterile couples stated by the original text of Article No. 4 par. 3 of Law 40/2004.[94] With the same decision, the Constitutional Court authorized ova donation as well. This prohibition was intrusive to the freedom of self-determination to be a parent under both physical and psychological perspectives for couples in which a member is totally sterile. Furthermore, it represented an economic discrimination against couples that could not undergo such treatments abroad. It should be noted that in this case the Constitutional Court argued its legal reasoning under the perspective of freedom of choice to be a parent, while Italian Law usually disciplines reproductive issues under the right of health perspective. According to the Constitutional Court, in the balance of constitutional values parent's self-determination prevails on the newborn's right to genetic identity. However, the Constitutional Court explicitly distinguished this situation form surrogacy, which is prohibited in the Italian legal

87 Corte di Cassazione, 30.09.2016, No. 19599.

88 Modified by D. Lgs. 154/2013

89 G. Cattaneo, *Della filiazione legittima,* in *Comm. c.c.* Scialoja e Branca, Bologna-Roma, 1988, p. 29; G. Ferrando, *Filiazione legittima e naturale*, in Digesto civ., VIII, 4 a ed., Torino, 1992, 30, p. 5.

90 G. Cattaneo, *Della filiazione legittima*, 23; F. Mantovani, *La filiazione legittima*, in Il *nuovo diritto di famiglia* diretto da G. Ferrando, III, Bologna, 2007, p. 240.

91 A. Cicu, La filiazione, in *Tratt. dir. civ.* Vassalli, 2 a ed., Torino, 1969, p. 6; M. Sesta, La filiazione, in *Tratt. dir. priv.* Bessone, IV, Il diritto di famiglia, 3, Torino, 1999, p. 7.

92 G. Cattaneo, *Lo stato di figlio legittimo e le prove della filiazione*, in *Tratt. dir. priv.* Rescigno, 4, III, 2 a ed., Torino, 1997, p. 8.

93 M. Azzalini (eds.), *La procreazione assistita dieci anni dopo*, Roma, 2015.

94 Corte cost. 10.06. 2014, n. 162.

system by Article No. 12, par. 6 of the Law No. 40/2004, which remains legally binding.[95] Therefore, according to Italian law, a discrepancy between the birth-giving mother and genetic mother is legally admissible, while a similar distinction between the surrogate and intended mother is unacceptable.

5. The change of the parenthood paradigm

Such innovations have overturned the focus of interest protection, both under factual and juridical aspects, from the rights of male adults to control the offspring lineage and the transmissibility of the name and heritage, to the rights of children and the protection of the best interest in their relationship with their parents. Since the child is the focus of legal protection, the traditional concept of "family" has been reshaped, and the traditional parent roles are under pressure through the admissibility of gender reassigment of the parent and the possibility of surrogacy.

Although this traditional paradigm is changing, it should be investigated whether the logical and juridical coexistence of the duty of marital fidelity and paternity presumption makes sense with the recent law reform of the single legal state of filiation estabilished in articles 315 and following of the civil code.[96] This analysis has to be done considering the surviving distinction between children born within or outside of wedlock concerning regulation stated by the code of civil procedure.[97] Under a civil process perspective, the biological parent of a child born outside of wedlock does not have any legal impediment to claim a disavowal availaible to any interested party.

Since the law n. 76/2016 does not allow step-child adoption to same-sex couples (a specific article was deleted from the bill during the parlamentarian debate), it should be noted a relationship between the deletion of the duty of fidelity and of step-child adoption. It is related to the submerged element that parenthood has to refer only to heterosexual married couples. Indeed, the abovementioned deletion is focused on a controvesial issue. This is about the hypothesis of a homosexual couple cohabiting with minor children of one of the partners, born through heterologous fertilization or surrogacy agreement, establishing a social parenthood relationship with the partner of child's parent. Indeed, in these circumstances, filiation law recognizes only the relationship with the biological parent, while the bond with the social parent has been recognized by courts only recently in Article No. 44, d) of adoption law No. 184/1983.[98] It regards the maintenance of constant relationships with both parental figures, even in social or de facto parenthood cases.[99] Courts of merits accepted these "vertical" bonds between the child and his or her social parent according to European and sovranational principles. In fact, in 2008, the European Court of Human Rights (hereinafter ECtHR) affirmed that denying adoption to a single homosexual person, when a Member State allows it, on the sole basis of his or her sexual orientation[100] infringes Article No. 8 (protection of private and family law) and 14 (prohibition of discrimination) of the European Convention of Human Rights. In 2013, the ECtHR affirmed that preventing a homosexual couple from step-child adoption is a violation of both Articles 8 and 14 of the Convention when it is allowed to heterosexual more-uxorio couples.[101] This decision's *ratio* is related to the equality of family life both for homosexual and heterosexual parenthood. Actually, the Strasbourg Court underlined the importance of undoubted personal qualities and aptitude for raising children of prospective parents. These qualities have to be evaluated under the perspective of the protection of the best interest of the child assessment, a key notion of the relevant juridical instruments at international level.

95 Corte cost., 10-06-2014, n.162, cit., A. Querci, *La maternità "per sostituzione" fra diritto interno e carte internazionali*, *Fam. dir*., 2015, 1142.

96 V.Carbone, *Le riforme generazionali del diritto di famiglia: luci ed ombre*, *Fam. dir*., 2015, 11, 972; C. Cicero, *The Italian Reform of the Law on Filiation and Constitutional Legality, The Italian Law Journal*, 2016, pp. 258 ss.

97 V. Carbone, *La diversa evoluzione della responsabilità genitoriale paterna e di quella materna*, *Fam. dir*., 2016, 2, 209.

98 Cass., 26.05.2016, n. 12962

99 Trib. Palermo, 6.04. 2015

100 European Court of Human Rights, 22 11 2008, E. B. v. Francia.

101 European Court of Human Rights, 19 02 2013, X and others v. Austria

The Italian legislator has set itself in opposition of this jurisprudence.[102] Indeed, the rule that allowed the adoption of the partner's child has been eliminated and this was consistent with maintaining the traditional view of the family and heterosexual married couples perspective, so linked to the legal presumption of fatherhood.
However, the consequences of this erasure are serious for minor children of same-sex couples. On the one hand, the legislature neglects to protect their best interest by extending *erga omnes* what the courts decide case by case, that is to allow step-child adoption according to Article No. 44, paragraph 1, lett. d) of Law 184/1983. On the other hand, these juridical situations are protected, albeit residually, by the closing clause contained in paragraph 20. It establishes that these principles are to be applied according to what is expected and permitted in relation to the adoption by current standards." The purpose of this clause is to remove all obstacles to the full enjoyment of the rights and fulfillment of duties by the couples formed by people of the same sex. In fact, as regards the Law No. 184/1983, it is common opinion that the abovementioned clause could exclude the extention of the dispositions of the adoption law containing the word “spouse” to civil partners. The Italian legal system states a residual protection for the children of homosexual couples and this situtation is far from a proper protection of the best interest of the child to the recognition of the uniform status of filiation, as the effects of the “fault” of the homosexuality of the parental couple (both biological parent and social parent) would fall on their child.

5. The duty of fidelity in case law

As is well-known, the duty of marital fidelity has been traditionally interpreted as a wife’s duty towards her husband, and has been criminally sanctioned.
Under this perspective, the Italian Constitutional Court repealed Article No. 559 of the Criminal Code only in 1968. This article punished adultery in a different way - more severely if committed by the wife, and less rigorously if committed by the husband. Indeed, in the judgment of 19 December 1968 no. 126,[103] the Constitutional Court affirmed that the family unit was undoubtedly under threat both by adultery of the husband and that of the wife; but when the law faced a different treatment, this threat assumed more serious proportions, both for the aftermath of the act on the behavior of the spouses, and for the psychological consequences on the persons involved. According to this decision, the Costitutional Court said that this difference was a privilege in favour for the husband, and as a privilege it violated the equality principle under Articles 3 (principle of equality) and 29 (right to marry) of the Italian Constitution. This judgment represented the first step to the erosion of the marital duty of loyalty, which has guarateed the certainty of offspring’s paternity and, consequently, the transmission of family assets for centuries. Italian Courts changed the nature of the duty of loyalty,[104] especially shifting it from the importance of the sexual-reproduction issue to the personal respect of the spouse.[105] About this, scholars wrote about "physical and spiritual devotion," or of "loyalty", or pledge "not to betray each other’s trust" [106] as well. Courts main opinion stressed the strengthening of the material and spiritual communion of the spouses.
Regarding the breach of the duty of fidelity, Italian courts derive the offense to the dignity of the betrayed spouse with the consequent impossibility to maintain the conjugal life “as before”. About this issue, the Court of Cassation clarified that the breach of fidelity, with the consequent fault attribution, is realized in that moment in which the spouse’s relationship with another person comes into existence, even if this relationship does not constitute an actual adultery. However, the innocent spouse still appears offended in his/her dignity and honour, especially in the social enviroment in which the couple normally carried on their family life. [107] Judges cannot attribute fault for separation

102 A. Schillaci, *Un buco nel cuore. L'adozione coparentale dopo il voto del Senato*, www.articolo29.it
103 Giur. It., 1969, 1, 416
104 L. Remiddi, *Le unioni civili dopo la legge Cirinnà: le questioni ancora aperte*, Giudicedonna.it, n. 1/2016;
105 D. Morello Di Giovanni, *Obbligo di fedelta' e pronuncia di addebito, Fam. dir.*, 2013, 8-9, 777.
106 Cass. 01/06/2012, No. 8862, in *Banca Dati Leggi d’Italia,* 2012; Cass. 11/06/2008, n. 15557, in *D&G*, 2008.
107 Cass. civ. Sez. I, 12-04-2013, No. 8929, in Famiglia e Diritto, 2013, 6, 602; (Trib. Milano, sez. IX, 25/06/2012, in Banca Dati Leggi d’Italia, 2012; Cass. 07/09/1999, No. 9472, in Giur. it., 2000, p. 1165; Cass. 13/07/1998, n.

only on a mere breach of marriage duties established by Article No. 43 (especially, duty of fidelity), but they must verify the impact of this violation on the intolerability of spouses' marital life. Indeed, the breach of duty of fidelity has to cause it. In cases in which the infidelity is a subsequent reaction to a context of disintegration of the spouses' material and spiritual common life which has already taken place, judges cannot attribute fault.[108]

On this point, same-sex civil union law completely changes this perspective. In fact, the same-sex civil union law, at Article 1, par. 24 does not establishe a separation period before dissolution comparable to that established for married couples. When same-sex partners want to end their relationship, each partner can express to the other, even separately, the will of dissolution of the union in front of the registrar. Thus, the sanction of the breach of the union does not have any legal sense in this case, because according to the law No. 76/2016, the civil union is immediatly dissolved, without any intermediate time.

This difference in legal treatment in the dissolution of the couple regarding the breach of fidelity for heterosexual married couples could be considered as a point of discrimination since the duty of fidelity concerns a very spontaneous personal behaviour, and is imposed by the law only to heterosexual married couples. Indeed, marital duty of fidelity regards the expression of a conduct (loyalty to the spouse), connected to the presence of a feeling (falling in love with the spouse) in a social and legal context that, comparing current times to the past ones, enhanced individual freedoms and non-conformist behaviours.

The Constitutional Court removed criminal sanctions for both adultery (1969),[109] and for concubinage (1968),[110] while infringing duty of fidelity does not constitute the crime of breach of obligation of family assistance, formerly established by Article 579 of the criminal code.[111] However, after a long debate, case law recently applied civil liability principles in the context of family life, recognizing compensation for non-pecuniary damage suffered by the spouse who has experienced the breach of his or her dignity and honourability.[112]

6. Conclusion

The case law of the European Court of Human Rights recognizes the protection of family life under Article No. 8 of the European Convention of Human Rights both to heterosexual and homosexual persons. For example, in Shalk and Kopf decision, the Strasbourg Court stressed the change of the social, scientific, moral, and legal paradigm, extending the protection of family law to families of same-sex partners.[113] Under this perspective, it should be investigated if the different assessment of duties pertaining to family life for heterosexual couples (who can marry) and homosexual couples (who cannot marry but only have a "civil union") constitute discrimination for different treatment for an effective access to legal remedies.

Comparative law suggests that the model for the Italian "civil union" was the German "*Lebenspartnershaft*". However, the legal discrimination was abolished by both the German Constitutional Court and the Court of Justice of the European Union, and now legally both heterosexual and homosexual couples enjoy, legally and factually, the same rights and the same duties.[114] In the Italian context, erasing the duty of fidelity for same-sex couples and maintaining it for married couples let the Legislator express a specific intention, that is emphasizing a politically *capitis deminutio* for same-sex couples, oriented to dequalifying an important and modern reform of family law.

6834, in Mass. Giust. civ., 1998

108 Cass. 11.12. 2013, n. 27730

109 Corte Cost. 3.12.1969, n. 147

110 Corte Cost. 19.12.1968, n. 126

111 Cass. pen. Sez. VI, 04-07-2000, n. 9440, in Riv. Pen., 2000, 1004; Cass. pen. Sez. VI, 12-04-1983 in Giust. Pen., 1984, II, 230 ; Cass. pen. Sez. VI, 18-02-1980, n. 6067, in Giust. Pen., 1981, II, 329

112 Cass. 21.03. 2013, n. 7128

113 European Court of Human Rights, 24 06 2010, Schalk e Kopf v. Austria.

114 S. Patti, *Le Unioni civili in Germania*, *Fam. dir*., 2015, 10, 958.

However, things are not always as they appear. On the contrary, the obligation of fidelity erasure has two actual meanings: on the one hand, it configures the liberation from a long traditional legacy of social control; on the other hand it represents an achievement in favor of genuine and authentic awareness of the respect for the person with whom a partner decides to share at least part of his or her life. Living together, sharing joys, responsibilities and commitments because of a free choice of each other, and it is a free decision to do it and not because the partner is forced by a law provision and its related sanction.