# International Family Law, Policy and Practice

## Some Themes from the Centre's 2019 Conference

## Gender, Inclusivity and Protecting the 21st-Century Family

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# Contents

# Editor's Message

This issue, following the Centre's 2019 trienniel Conference on Gender, Inclusivity and Protecting the 21st Century Family, was meant to be published in the winter of 2019-20 to pick up some of the themes of that conference which took place at the University of Westminster during the first week of July 2019, the period when our regular delegates working in the wide field of Family Law have for some years found it most convenient to gather in London from both the Northern and Southern Hemispheres, so as to share information, views, opinions and experience in both civil and common law jurisdictions worldwide. Following receipt of final versions of the articles, peer reviewed as usual, the issue should have been published before spring 2020. But then came the pandemic.

Publication has therefore been somewhat delayed owing to the infection which began to spread globally at the time that we would normally have finalised content in mid winter 2019-20. However, unfortunately that coincided with academics and practitioners worldwide suddenly being burdened with having to find innovative ways of keeping both universities and law offices working remotely in challenging times, while also attempting both to stay safe and to control the spread of infection everywhere.

Accordingly, it is only now, after in some places the impact of this widespread disaster appeared to be loosening (but it seems in others is already going the other way) that it has finally been possible to publish; although sadly it is still unclear when it will be possible for the activities of the Centre to resume, and in particular whether that will include any viable plans for the usual triennial conference to take place in 2022 without risk of cancellation, since this would require planning to begin in early 2021.To date no regular 2020 conferences in our field of Family Law & Practice have been able to take place as planned, although some organisers have retreated into modern technology versions. However we have not wished to contribute to the prevailing cancellation fatigue by setting even a notional date for 2022, since we feel that IFLPP would not take well to an online mode. We are nevertheless still receiving draft articles for submission to further issues of the journal so that channel of communication at least may still continue to be open.

The 2019 conference week was memorably started on Monday 1 July 2019 by the delivery of the 2019 International Family Law Lecture, which in that last year of her presidency of the UK Supreme Court was deliverd by Baroness Hale of Richmond the Centre's Patron. Her chosen topic – chiming with the third limb of the 2019 conference themes – was a broad examination and analysis of the concept of 'Protecting the 21st Century Family'. Her thoughtful text is reproduced in this issue with her kind permission as our keynote article, asking the crucial question as to what we are protecting the 21st Century Family from: the outside world or the enemy within?

In the remainder of the collection in this issue we have four articles. Together these highlight some topics of key international interest in relation to the cross border context in which our international delegates work, two of them with particular reference to the post Brexit era which has, since the 2019 conference, at last assumed practical reality for the UK and in particular for English and Welsh Law. This issue of focus on our now fairly imminent end to the Brexit transition period is now beginning to assume some importance, in that the current British government (however much criticised and distracted by the Covid-19 pandemic) has still been actively working with the EU towards an ultimate exit in some sort of order in January 2021 rather than extending the transition for another year. Pandemic permitting, it therefore seems that we are not looking to the persistence of EU law in the UK any longer than during this transitional year of 2020 rather than being likely, as previously thought, to bleed into 2021 if the UK asked for an extension of the transition period.

Following on from the 2019 pre-conference issue, in which David Hodson of iFLG in London took the positive, optimistic and ambitious stance on the future influence of English Family Law globally in both civil and common law jurisdictions, it is hoped that such certainty as we now have that EU law in the UK is really scheduled to end on 31 December 2020, and that that will now also shortly bring about the start of that fruitful future for the spread of the influence of the common law themes of English Family Law that David has already previewed.

The 2019 pre-Conference issue also marked Professor Peter De Cruz's move, on his retirement from full time teaching, from Joint Chair of the Editorial Board, to a more hands on role in production of the journal, thus bringing his comparative law perspective to content, which is reflected in the present issue by an article from former Judge Philip Marcus from Israel on Parental Alienation in his own and other jurisdictions, which have taken different views from those of English law - which has not been particularly successful in addressing this problem of deliberately uncooperative post separation parent-chlld relationships.

We also have an article from Elena Falletti from Italy on the religious roots of marital fidelity and the evolution of Italian Family Law; and an article from Josephine Ruvarashe Wazara nee Gumbo from Zimbabwe in Africa on the life and culture of the Shona wife, which indicates the powerful role that ancient culture still exerts in one country in a continent which must seek to modernise sufficiently if it is to make the most of joining the contemporary global society . We are particularly glad to have this article since a paper was scheduled at the conference on this topic of culture driven gender disadvantage which would have been presented by the author, had she not been unable to attend at the last minute owing to the absence of the requisite visa.

These articles are complemented by a review by David Hodson of IFLG of a new book from the European publisher Intersentia on Fundamental Rights and Best Interests of the Child in Transnational Families by Elizabetta Bergamini and Chiara Ragni.

We have held over for a Winter 2020-21 issue (for which we already have some interesting submissions) one of their periodic reports from our Indian correspondents on issues currently claiming the attention of practitioners in India, and a further Intersentia publication, *Safeguarding Children's Rights in Immigration Law*, a collection of contributions from a variety of authors, edited by Mark Klaassen, Stephanie Rap, Peter Rodrigues and Tom Liefaard.

The themes from this issue, covering some important topics, including some unexpected when the 2019 conference was initially set up, will meanwhile afford an excellent aide memoire of that year's meeting.

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# Editorial Board of *International Family Law, Policy and Practice*

# What is a 21st-Century Family?

**Baroness Hale of Richmond*[1]**

Way back in the mists of time when I first studied Family Law, we thought we knew what a family was. It was a group of people linked together by consanguinity or affinity or a mixture of both. Only those gave rise to legal consequences – property, succession, obligations of cohabitation and support. Even then, consanguinity did not count for much if a child was born out of wedlock. She had a limited legal relationship with her mother and an even more limited one with her father but she was not a member of the wider family on either side.

This model of the family was clearly linked to the dynastic needs of the rich and powerful or indeed anyone with any property. As John Eekelaar has explained, 'Humans need a way to ensure that wealth and power pass from one generation on its demise to the newly born'.[2] In patrilineal societies like ours, they want to ensure reliable descent through the male line. They also mind about the quality of the line and about forging alliances with other suitable lines. So, a marriage with a suitable woman is arranged, after which it is presumed that all the children she has are her husband's children. This necessarily entails a strong obligation of fidelity in the wife, at least until 'the heir and the spare' have been supplied, although not necessarily in the husband. Indeed, Finer and McGregor[3] saw a difference in attitudes between the aristocracy and landed gentry, who typically practised a system of primogeniture, and therefore were not too concerned once the succession had been assured, and the middle classes, who typically shared their wealth between their children, and to whom therefore fidelity was more important. Neither approach necessarily entailed a life-long union. If the business is done, the wife can be dispensed with. If the business is not done at all, she can also be dispensed with, as Catherine of Aragon sadly discovered.

But, as A V Dicey pointed out more than a century ago,[4] while the patriarchal family may not have much interest in keeping spouses together, the state undoubtedly does, for reasons similar to those which motivated the Christian church to insist on the indissolubility of marriage. As I have said before, the conjugal family is its own little social security system, a private space, separate from the public world, within which the parties are expected to look after one another and their children. The more the private family can look after its own, the less the state will have to do so. As the first Lord Chancellor Hailsham put it in *Hyman v Hyman*,[5] the power of the court to secure sufficient provision for a wife when her marriage was dissolved was not only in her interests, but in the interests of the public: hence it was against public policy for the parties to oust the jurisdiction of the court in a private agreement.

Perhaps it was for this reason that the narrow view of family relationships began to expand. An obvious step was to expand consanguinity beyond relationships traced through marriage. But I have always thought it odd that the Family Law Reform Act 1969 recognised the relationships of children to their unmarried parents for the purposes of the law of succession while the rest of the law still treated them differently. But the Family Law Reform Act 1987 put that right. I am still very proud of section 1, which basically got rid of the assumption that 'child' did not include a child born to unmarried parents and wider family relationships did not include relationships traced through unmarried parents.

Another step was to expand the consequences of consanguinity beyond genetic relationships. Adoption came first. The common law had refused to recognise this as having legal consequences, so strong was the patrilineal model. Even when it was first introduced by the Adoption Act 1926, an adopted child did not acquire the same

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*President, Supreme Court of the United Kingdom, Patron, International Centre for Family Law, Policy & Practice. The International Family Law Lecture 2019 was given at the University of Westminster, London W1, on Monday 1 July 2019, in association with the Third Trienniel Conference of ICFLPP, which was held at the University 3-5 July 2019.

[1] With the invaluable help of my Judicial Assistant, Penelope Gorman.

[2] *Family Law and Personal Life*, 2006, Oxford University Press, p 57.

[3] Finer and McGregor, 'History of the Obligation to Maintain, Appendix 5 to the Report of the Finer Committee on One-Parent Families, Cmnd 5629, 1974.

[4] A V Dicey, 'Introduction to the Second Edition', *Law and Public Opinion in England during the Nineteenth Century*, 2nd edn, 1914, London, Macmillan, p lxxix.

[5] [1929] AC 601, 614.

succession rights as a natural child. It took until the Children Act 1975 for their position to be entirely assimilated, so that the transfer from one family to the other was complete (except, of course, in relation to peerages and titles of honour where adoption has no effect).

But the Family Law Reform Act 1987 took an even more momentous step. It deemed the husband of a mother who bore a child as a result of artificial insemination from a donor to be the father of the child for all legal purposes, unless it was proved in court that the husband did not consent to the insemination. (As usual, this did not apply in relation to dignities and titles of honour.) Some of us had reservations about tampering with the genetic record in this way. But the enthusiastic doctors pointed out that the presumption of legitimacy meant that a remarkably high proportion of husbands registered as fathers were not genetically related to their children.

This was, of course, only the beginning. The Human Fertilisation and Embryology Act 1990 took things further. It provided that the carrying mother was always the mother, regardless of her genetic relationship with the child.[6] It also provided that where an unmarried couple were being treated together (without defining what that meant) the mother's partner was deemed to be the father of the child for all legal purposes (with the usual exception).[7] And the Human Fertilisation and Embryology Act 2008 took the further step of applying the same principles to two women.[8]

This will not have seemed a radical step by then, as the Adoption and Children Act 2002 had extended adoption in England and Wales to a 'couple', defined as either a married couple or two persons (whether of the same or different sexes) 'living as partners in an enduring family relationship'.[9] Scotland followed suit in 2007 but Northern Ireland did not. However, in *In Re G (Adoption: Unmarried Couples)*,[10] the House of Lords held that it was unjustified discrimination in the enjoyment of the right to respect for family life for the law in Northern Ireland to exclude unmarried couples from any chance of adoption, even when this was in the best interests of the child concerned.

The 2008 Act also contains the adoption-like procedure (originally contained in the 1990 Act) whereby the commissioning parents in a surrogacy arrangement may apply to become the child's legal parents.[11] This was originally limited to couples – married, civil partners or 'living as partners in an enduring family relationship'. But this has recently been extended to allow a single applicant (following a declaration made by the President of the Family Division in *In Re Z (A Child) (No 2)*[12] that excluding them was incompatible with the Convention rights). A single applicant or at least one of joint applicants must be a genetic parent of the child. The legal parents must consent.

Which brings me on to the expansion of affinity. The 2002 Act is example of how unmarried cohabitation is now recognised as conferring some rights which are akin to those of married couples, although by no means all. Attempts are still being made to improve their rights: Lord Marks' Cohabitation Rights Bill[13] received a second reading in the House of Lords in March 2019, although no date has yet been set for a committee stage. Among other things, this would give the courts power to make financial settlement orders along similar lines to the powers that already exist in Scotland (but more complicated).

Then came the Civil Partnerships Act 2004, conferring a marriage-like status on same sex couples who registered their relationship. This applies throughout the United Kingdom. This was followed in England and Wales in 2013 by the Marriage (Same Sex Couples) Act extending the status of marriage to them. Scotland followed suit in 2014 but Northern Ireland did not.

This instantly created discrimination between same sex couples, who could choose between marriage and civil partnership, and opposite sex couples who could only choose marriage. Some of us wondered why they were still so reluctant to marry. Marriage has lost virtually all the legal trappings associated with the old patriarchal and dynastic system. But pure reason is not to be expected when it comes to personal relationships. The legacy of the olden days is still a powerful one – Rebecca Steinfeld and Charles Keidan saw marriage as symbolic of the old 'patriarchal and

[6] Section 27.
[7] Section 28.
[8] Section 42.
[9] Section 144(4).
[10] [2008] UKHL 38, [2009] 1 AC 173.
[11] Section 54.
[12] [2016] EWHC 1191 Fam, [2016] 3 WLR 1369.
[13] https://publications.parliament.uk/pa/bills/lbill/2017-2019/0034/lbill_2017-20190034_en_1.htm. (The Bill has now been carried forward into 2019-21, Ed).

hetero-normative' days, as their counsel put it to us, and wanted nothing to do with it, but they did want to be legally committed to one another. The Supreme Court held that it was unjustified discrimination in their enjoyment of the right to respect for their private and family life to deny them the same choice that gay couples had *(R (Steinfeld and Keidan) v Secretary of State for International Development).*[14]

The astonishing thing about that case was how hard the Government had fought it at every stage. They successfully claimed in the High Court that this was not sufficiently close to the core values protected by article 8 to engage the duty not to discriminate – but if the right to respect for family life is not about the legal recognition for family relationships what is it about? Anyway, they lost the argument in the Court of Appeal and did not pursue it before us. But they successfully claimed in the Court of Appeal that the difference in treatment was justified by the need to 'wait and see' before deciding how to remedy the discrimination – whether by extending civil partnerships to both or by abolishing civil partnerships now that gay marriage is available. A further alternative, not canvassed, would be to abolish marriage as a legal institution, leaving couples who wished to do so to have a separate religious or other ceremony once they had entered into their civil partnership.

Equally astonishing is the speed with which our declaration of incompatibility was remedied: by the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019, which requires the Secretary of State to make regulations extending civil partnership to opposite sex couples by the end of 2019.[15] The Scottish Parliament is planning legislation along similar lines. (Still in process, Ed).

The most recent ONS statistics[16] give us a picture of what families look like now. A family is defined as a married, civil partnered or cohabiting couple with or without children, or a lone parent with at least one child. Children may be dependent or non-dependent. So they are talking about the so-called nuclear or household family, rather than the wider family or kinship group.

In 2017 there were 19 million families. Nearly 13 million were married or civil partner couple families. Of these, the great majority, 12.8 million, were opposite sex married couple families. There were 35,000 same sex married couples and 55,000 civil partner couples. There were 3.3 million cohabiting couple families, the great majority of whom were opposite sex couples, compared with 1.3 million in 1996. There were 2.8 million lone parent families. Lone parent families grew by over 15% from 1996 to 2017, but did decrease from 3m to 2.8m from 2015 to 2017.

There were 14 million dependent children living in families in 2017. 15% of them lived in cohabiting couple families (up from 7% in 1996). 21% lived in lone parent families (compared with 20% in 1996). This does not, of course, give us a clue to the relationship between those children and the adults with whom they were living: were they children of the couple, or only one of them, or adopted, or deemed to be their children because of the Human Fertilisation and Embryology Act, or unrelated in any of those ways?

The complexities of those relationships are well illustrated by the Family Division case of *AB v CD, EF, GH and IJ*.[17] This was about twin children, GH and IJ, who were born in 2010 as a result of a surrogacy agreement entered into in India. The surrogate mother, KV, was married to HV, and in English law they were the twins' legal parents.

The commissioning parents, CD and EF, were married to one another. They were also the twins' genetic parents. The twins were handed over to their care in accordance with the surrogacy arrangement. They did not realise that they should have applied for a parental order after the birth and did not do so within the six month time limit. In 2014 their relationship broke down and they were subsequently divorced. The twins remained in the care of their genetic mother. She began a relationship with AB who moved in to live with her and the twins in early 2015. Contact between the twins and her former husband, their genetic father, continued for a while but stopped at the end of 2016. This led to several applications before the High Court:

- AB, the commissioning mother's new husband, applied for a parental responsibility order.
- EF, the genetic father, applied for a child arrangements order and the court was requested to consider granting him parental responsibility.
- AB and CD, the genetic mother and her new husband, applied for the children to be made wards of court.

[14] [2018] UKSC 32, [2018] 3 WLR 415.
[15] Section 2.
[16] Snapshot of Families and Households in 2017 (ONS)
https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2017
[17] [2018] EWHC 1590 (Fam).

- CD, the genetic mother, applied for a child arrangements order that the children live with her.
- AB, her new husband, applied for a child arrangements order that the children also live with him and an order restricting EF's parental responsibility.

The genetic parents, CD and EF, could not apply for a parental order because they were no longer married to each other and the twins' home was not with both of them. CD, the genetic mother, could not at the time of the judgment make the application on her own (but this would now be possible). AB was not therefore married to a person who was in law a parent of the twins, so he could not acquire parental responsibility as a step-parent.

The court proceeded on the basis that there should be no presumption in favour of a genetic parent (EF) (following King LJ's statement in *Re E-R (A Child)*[18] that 'there is no 'broad natural parent presumption' in existence in our law'). AB could be treated as a psychological parent of the twins, applying the definition of social and psychological parenthood in *In re G (Children)*[19]:

> 'the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later, at the more sophisticated level of guiding, socialising, educating and protecting.'

The court decided to make the children wards of court for the time being, a child arrangements order in favour of AB and CD, no order as to contact or a parental responsibility order for EF (against whom allegations of abuse had been established) and an order restricting the exercise of the parental responsibility of the surrogate mother and her husband. So it found a sensible solution to the arrangements for looking after the children: but it was powerless to do anything to change their legal parenthood (unless and until there was an application to adopt, which would, of course, have excluded the genetic father from parentage, but would not have required his consent because he was not a legal parent).

Given all these changes in the concept of a family over the last fifty years, have the objects and purposes of family law also changed? What are we protecting them from and why? There are several observations to be made.

First, there is the continuing importance attached by many people and by the law to genetic relationships. We saw this first in the provision for adopted children to trace their birth parents, acknowledging the importance in establishing their own identity of having some knowledge of their origins. We have seen it again in enabling children born of donated gametes to know the identity of their donors, a hotly contested matter when the 1990 Act was first passed.

A rather different manifestation is in all those reported cases where known donors who have provided the sperm so that a lesbian couple can have children to bring up have tried to assert a father-like involvement with their children (see for example, *JK v HS*;[20] *In re G (A Child) (Child Arrangements Order: Third Party)*[21]). Sometimes they have succeeded and sometimes they have not. The precise terms upon which the donation was made are often disputed. If they have succeeded it is because it is in the best interests of the child to know and have some relationship with the father, and not because it is in the best interests of the father to have a relationship with his child. But it is noticeable how strongly some of these donors feel about it, in the face of opposition from the women who are bringing up the child, and the risk of de-stabilising their family life together. The moral for these women is, of course, to seek treatment from a licensed clinic using an anonymous donor.

A further manifestation is the development of surrogacy and the desire to secure that surrogacy arrangements should be enforceable. When my daughter and I did an 'in conversation' together at an 'Out on the Street' dinner, on the very day that the Supreme Court had given judgment in the so-called 'gay cake' case, there was little outrage at our decision but a great deal of outrage at the present state of our law on surrogacy. The Law Commission has published a long consultation paper, *Building families through surrogacy: a new law*.[22] The key proposals for reform are:

- The creation of a new pathway to legal parenthood in surrogacy, which will allow intended parents to be legal parents from birth

[18] [2015] EWCA Civ 405, [2016] 1 FLR 521.
[19] [2006] UKHL 43, [2006] 1 WLR 2305 at [35].
[20] [2015] EWFC 84, [2016] Fam. Law 155.
[21.] [2018] EWCA Civ 305, [2018] 1 WLR 2769.
[22] Joint Consultation Paper, Law Commission Consultation Paper 244, Scottish Law Commission Discussion Paper 167. (So far no further progress on this topic, Ed).

- Requirements and safeguards for the new pathway
- A regulator for surrogacy
- Removal of a requirement of a genetic link between the intended parents and the child where medically necessary (although a genetic link will still be required for international arrangements)
- Creation of a register to allow those born of surrogacy arrangements to access information about their origins
- Unified guidance on nationality and immigration issues, and provision for recognition of legal parenthood across borders

The pathway includes medical and criminal record checks for the intended parents and the surrogate and her spouse or partner, and assessment of the welfare of the child to be born and a written surrogacy agreement before conception. If this is followed the intended parents will be the child's legal parents from birth although there will be a period after the birth in which the surrogate can object. If this pathway is followed, it is suggested that the current requirement for one of the intended parents to have a genetic link to the child can be removed in domestic cases, though only if the intended parents are medically unable to contribute sperm or eggs. The genetic link requirement should remain for international cases to avoid the risk of surrogacy being abused for the purposes of child-trafficking.

Parental orders would still be possible for other cases. Interestingly, the President of the Family Division stressed, in *Re X (A Child) (Surrogacy: Time Limit)*,[23] the 'transformative effect' of a parental order for the child: 'It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious consequences', as well as the legal ones. Does the legal deeming have the same effect?

This points to the enduring significance in many people's lives of symbols and of formal recognition. We have already seen that two thirds of families are married or civil partner couples and of these the vast majority are married. After the surge when civil partnership was first introduced, the figures stabilised at around 6,600 a year in the UK, until the introduction of gay marriage, when it fell to just over 1000 a year.[24] It looks as though gay marriage is far more popular than civil partnership, although there are still people, both gay and straight, who reject the symbolism they see in marriage while wanting a legally recognized relationship which is almost identical to marriage. I remember that the International Society on Family Law's conference in Uppsala in Sweden in 1979 was somewhat dismissive of the importance in people's lives of the symbolism involved in marriage - whether for or against – but we see things rather differently now.

Finally, what of the family as its own little social security system? Spouses and civil partners do still have mutual obligations to support one another, although the 'tailor-made' approach of English law to financial provision after divorce is increasingly under attack. But there are still striking illustrations of the view that it is the family, rather than the state, who should be supporting its more vulnerable members. This must be part of the reason for the decision in *Ilott v Blue Cross and others*.[25] There a mother had wholly disinherited her estranged grown-up daughter in favour of charities with whom she had had no known previous connection. The court ordered some modest provision for the daughter from the estate – although the decision certainly revealed a fundamental difference of opinion between those who favoured some family solidarity and those who favoured complete freedom of testation, there could be little other reason for giving the daughter anything.

A further (small but vivid) example of the demands which the state makes on the family to support its members was revealed in the Mathieson case (*Cameron Mathieson, a deceased child (by his father Craig Mathieson) v Secretary of State for Work and Pensions*).[26] Cameron Mathieson was a severely disabled child who needed inpatient care for over a year in hospital. Cameron's parents were expected to be present at the hospital as his primary caregivers throughout his stay. But his disability living allowance ended after 84 days in hospital. We held that this was unjustified discrimination against children in Cameron's position, when there were so

[23] [2014] EWHC 3135 (Fam), [2015] 2 WLR 745 at [54].
[24] England and Wales: ONS, Civil Partnership Formations, Table 1; Scotland: Vital Events Reference Tables 2017, Table 7.10; Northern Ireland: Registrar General Annual Report 2016.
[25] [2017] UKSC 17, [2018] AC 545.
[26] [2015] UKSC 47, [2015] 1 WLR 3250.

many additional personal demands and financial costs for the parents associated with attending the hospital to look after him.

However, the social security system of the family is facing a number of threats. Some might (no doubt will) argue that the moves to adopt a wholly 'no-fault' ground for divorce will weaken the stability of marriage and civil partnership. The Government launched a consultation exercise at the end of 2018 and published its response to this on 10 June this year.[27] The resulting Divorce, Dissolution and Separation Bill made rapid progress through Parliament.[28] This bears a remarkable resemblance to the proposals which the Law Commission made back in 1990: the replacement of the need to prove facts before getting a decree with a waiting period during which the post-divorce arrangements can be agreed. But the idea is to strengthen the system by reducing the acrimony involved in having to prove facts and so create a better climate for making amicable agreements about the financial and child arrangements.

More threatening in my view is Baroness Deech's Bill, which has made its way through the House of Lords and is now before the Commons.[29] The main provisions are:

- Pre and post nuptial agreements will be binding provided that certain conditions are met (clause 3). These all relate to the circumstances in which the agreements were entered into rather than the needs of the parties at the time the relationship breaks down: compare the recommendations of the Law Commission, which were that parties should not be able to contract out of making provision for needs.
- Matrimonial property should be divided equally and only departed from if necessary to achieve fairness in certain circumstances (clause 4).
- Spousal maintenance will be limited to 5 years unless the spouse would otherwise suffer 'serious financial hardship' (clause 5).

I can see the attractions of all of this when set against the agony, the uncertainty and the expense of seeking our tailor-made solutions when the parties cannot be helped to agree something sensible. But I question how one size fits all can possible meet the justice of the case or fulfill the role of the family in shouldering the burdens which it has created rather than placing them upon the state. I fear that it assumes an equality between the spouses which is simply not there in many, perhaps most, cases. It also sits oddly alongside Lord Marks' Bill, which aims to give unmarried couples a remedy which will redress the economic advantages and disadvantages suffered by each party in the course of their relationship.

In conclusion, three things stand out from the developments of the last 50 years. The first is an increasing desire and respect for individual autonomy in adult decision-making – by both men and women. So we try and facilitate or at least acknowledge the family life created between same sex couples, through informal partnerships, through assisted reproduction, adoption and surrogacy. At the same time, we increasingly respect their decisions to bring their adult relationships to an end and their autonomy in deciding upon the financial consequences of doing so. The pressure to impose some financial obligations between unmarried couples might run counter this were it not for the proposals to allow contracting out.

Secondly, at the same time, the interests of the children involved are increasingly seen as paramount. The law has had to be flexible and inventive to make sure that there are ways of protecting their interests in this new and scientific landscape. Their rights to understand and develop their relationships with their parents – of all sorts – while feeling secure in their care arrangements lie at the heart of this. So, children's interests are seen as being individual to them in a way that would have been unthinkable in the past.

But thirdly, therefore, is there a tension between these two evolving trends? Can we allow adults their individual autonomy if this conflicts with the best interests of their children? To what extent should the shouldering of child and family care responsibilities be compensated by the family, as its own little social security system, rather than the state? To say nothing of developing responsibilities towards the rapidly ageing population?

So, I ask myself again, what are we protecting the 21st century family from? The outside world or the enemy within?

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[27] https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/

[28] https://services.parliament.uk/bills/2017-19/divorcedissolutionandseparation.html. And has now received the Royal Assent in June 2020. Ed)

[29] https://services.parliament.uk/bills/2017-19/divorcefinancialprovision.html.

# Parental Alienation: Legal Responses[1]

**Philip Marcus***

## Introduction

The accent of this article is on the remedies that the law affords to children and parents in cases where parental alienation is alleged, and to what extent each of these remedies is effective, if at all, in preventing the development of alienation into total cessation of child-parent contact, and the effects of legal proceedings on the child.

After a brief description of Parental Alienation ('PA') and the need to prevent it, the article will discuss the areas of law in which proceedings may take place, the assumptions underlying the adoption of such proceedings, and the timeliness with which such processes will be handled by the courts.

Underlying the analysis is the appreciation that there is a pressing need that matters of PA, in whatever legal context, be handled quickly; delay in reaching conclusions, while the child can still be influenced by an alienating parent, may deepen the alienation and make efforts at reconciliation, which in any PA case are difficult enough, less feasible. In addition, the uncertainty which is inherent in any judicial process has a damaging effect on the child, quite apart from alienating behaviour. It is well understood that a child's perception of time is different from that of adults, and delays which might seem justifiable to an adult are perceived by the child as taking away a large part of his childhood, exacerbating the child's feelings of helplessness, anger and despair, and his need to blame someone for the fact that his family is broken.

Finally, there will be a brief description of the accelerated procedures and remedies in the Israeli Family Court system.

## Parental Alienation

Parental alienation (PA) is one type of contact failure, where a child, who previously had a loving relationship with both parents, unjustifiably ceases to have contact with one parent, because of the actions, words or inaction, of the other parent.

PA must be distinguished from justifiable cessation of contact (sometimes called estrangement), where the rejected parent has acted in such a way as to render continuing contact with the child a clear danger to the child's physical or mental health.

Failure of contact between a child and a parent and Parental Alienation are among the most serious effects of divorce and separation, and among the most difficult to treat. The literature shows that in most cases efforts to reinstate contact after PA are unsuccessful, and even in cases where contact is renewed, the mental and functional damage to the child is severe, and lasts into adulthood, often preventing the victim from forming normative relationships. It constitutes maltreatment[2] of the child and causes manifest suffering to the child and the rejected parent.[3]

As such, PA falls within the range of behaviours to which the legal system is designed to provide remedies. In what follows, the article will deal with the areas of law - criminal law, torts (civil wrongs), contracts, child protection law, and family law – which may be used in order to attempt to right the wrongs done.[4]

## The objectives of legal responses to PA

We can summarise the aims of legal responses as being directed to:

- Stopping the alienating behaviour;
- Enabling treatment of the child;
- Moving the child away from the alienator;
- Restricting decision making powers of the alienator;
- Punishing the alienator;
- Compensating the alienated parent and/or the child;
- Educating the public and potential alienators;
- Prevention.

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[1] This article is based primarily on a presentation given at the Conference of the International Centre for Family Law, Policy and Practice in London 3-5 July 2019, and developments in several jurisdictions.

[2] In this article the issue of whether PA is abuse which gives rise to a duty to report will not be discussed for reasons of lack of space. Suffice it to note that there are differing legal regimes about compulsory reporting – who is a mandated reporter and to whom the report is to be made, and what needs to be reported.

[3] For a more detailed discussion of PA, see: P. Marcus 'Parental Alienation, Contact Refusal and Maladaptive Gatekeeping: a Multidisciplinary Approach to Prevention of Contact Failure, published in Family Law and Family Realities', *16th ISFL World Conference Book*, C. Rogerson, M. Antokolskaia, J. Miles, P. Parkinson, M. Vonk (eds.) (2019, The Hague, Eleven International Publishing) 349-366.

[4] This article is predicated on the divisions of law into areas which are common in Israel and many other Common Law jurisdictions; although, other legal systems may have other ways of identifying laws and remedies, what follows is applicable, *mutatis mutandis*, in all systems.

The legal disciplines of the areas of law mentioned above are not always separate and distinct one from the others: for example, the remedy of moving the child away from the alienating parent can be achieved under child protection statutes, which permit the child protection authority to move the child from a place where his safety and health are endangered, and/or under tort law, which provides for the making of injunctions, and/or in family law, which gives powers to the court, in the context of proceedings between the parents, to give orders as to the times when each parent is responsible for the child's living accommodation. In what follows, an attempt will be made to establish the advantages and disadvantages, especially for the child, of handling PA in each of these areas, and to what extent the proceedings achieve the objectives of legal interventions set out above.

## Criminal Law: Is PA a Crime?

Child Maltreatment is a crime in many jurisdictions. In some places, PA has been expressly declared by statute to constitute a criminal offence: for example, Germany, Romania, Brazil.

However, so far as it has been possible to establish, the criminal law has not been effective (except, perhaps, by way of expressing society's disgust at the reprehensible actions of alienating parents) in that few, if any, prosecutions have taken place.

For example, in Germany, although the statute (Art.228, St.G.B.) provides a criminal offence, and although there are many cases of PA, there have been no prosecutions whatsoever.[5]

In Romania Art.379 of the criminal code makes preventing child-parent personal contact a crime, punishable by 1-3 months imprisonment, there has been a handful of prosecutions; however, the process of investigating the alleged crime and bringing the case to trial takes up to three years, and in any event the penalties are so low – up to a few months in prison or a low fine - that the criminal sanction in the statute provides little disincentive to an alienating parent.

In Brazil, Article 6 of Law No. 12-318 of 26 August 2010 declares PA to be a crime, but the penalty authorized by section III of the article is a fine only. In addition, article 249 of the Law of the Child and the Adolescent (Law 8069/1990) provides for an administrative financial penalty for disobeying the duties inherent in parental powers or arising from custody or guardianship, as well as the determination of judicial authority or Guardianship Council.[6] Efforts to obtain judgments of the court in which there has been a finding of guilt and the imposition of penalties have so far been fruitless.

The disadvantages of criminalization of PA may be summarized thus:

- Criminal proceedings usually relate to events in the past – was there a specific act or acts of alienating behaviour on specific occasion, and each act must be proved by testimony as to the act itself (*actus reus*) and also as to the act as being intentional (*mens rea*);
- PA is usually characterized by a series of acts, some committed without specific intent to alienate, but which in aggregate cause the cessation of contact. Thus the need for the complainant to recall the precise details of what may be dozens of specific events may by itself discourage the alienated parent from making the complaint or preclude the giving of a detailed statement to the police, and the prosecutor preparing the case faces serious difficulties;
- The child might have to be interviewed by a police officer, who may not necessarily have the requisite skills and training to speak to a child;
- The process of investigation, preparing charges, and the court process itself, may take several months, and may sabotage the efforts of the family court to resolve the issues swiftly;
- The child might have to give evidence in court, before judge and jury, who may not necessarily have the requisite skills and training to speak to a child, or familiarity with the range of behaviours within the family which are normative, and those which are liable to cause damage;
- Defence lawyers will forbid the alleged alienator to admit his guilt, thereby removing one channel for remorse (which may be essential for therapy for the alienated child, and for re-education of the parent) and incentivising continuing alienating behaviour;
- If the parent is liable to be fined or incarcerated, the child may feel guilty that he has caused the parent to be subjected to criminal proceedings;
- The parent and family members may put pressure on the child to withdraw his complaint or change his description of alienating behaviours;
- If the parent is convicted and sentenced, the child may

[5] Personal communication, Jorge Guerra Gonzales, June 2019

[6] I am grateful to Viviane de Fátima dos Santos Zanatta, Advocate, of Porto Alegre, Brazil, for her assistance in referring to the relevant provisions of Brazilian Law.

be terrified by the possibility that the parent will exact retribution from the child or the other parent;

- The existence in parallel of two sets of proceedings before different courts arising out of the same fact situation, with different burdens of proof (in a criminal case - beyond reasonable doubt, and in a civil case - the balance of probabilities or the preponderance of the evidence), may lead to contradictory verdicts as to the existence of PA;
- The need to prepare for two different processes, and to give evidence before two different courts, would place even more pressure, both financial and in terms of time, on the parents, who would be even less able to give the child the attention he needs;
- The alienating parent may use the existence of the police investigation to bolster the all-too-common message to the child that the alleged alienating parent is the victim of the other parent, of "the system", of the social services, etc, and thereby increase the alienation.

In light of the above issues, to do with the practicalities of the criminal investigative and judicial processes, the conclusion must be that apart from the declaratory statement that PA is a bad thing, there is much damage and very little benefit for the child and for the general public in making PA a criminal offence. The alienating behaviour being dealt with happened in the past, and punishing the offender, while sending a message to the public that PA is reprehensible, does not help the child.

## Torts: Is PA a civil wrong, and what remedies are available?

There is some controversy as to whether using the law of torts (in common law jurisdictions) or applications for constitutional and convention remedies (in civil law countries) is appropriate in cases of PA[7] However, there is little doubt that the actions of the alienating parent cause damage to the child, and very often to the alienated parent, thus justifying the recognition they are tortious and/or contravene conventions.[8]

Among the torts recognized in such cases are negligence (failure to behave, in the exercise of the parental functions, in a way calculated to prevent contact failure), breach of statutory duty (where the law or convention provisions impose obligations on parents to act jointly in the best interests of the child), and other grounds of claim.

In some common law systems, the court dealing with a claim based on tort can give injunctive relief, so as to prevent deterioration of the situation; in the case of PA, to forbid the alienating parent from continuing alienating behaviour, etc. However, as will be shown, family law proceedings are far more flexible and allow much better supervision of compliance.

According to both systems, civil law and common law, PA will found an action for monetary compensation by the parent and also by the child (as a minor, by a legal guardian, and as an adult in his or her own claim), for compensation for the damage caused by the alienator.

However, many of the issues which make criminal proceedings inappropriate apply also in tort proceedings.

- The need for proof of specific acts;
- The need for the child to give evidence;
- The risk of contradictory judgments as to whether a specific act was alienatory;
- There are serious difficulties in estimating, in money terms, the compensation for non-financial and non-bodily injury;
- The preparation, the trial, the making of an award, and appeals processes, and then collection of the compensation awarded, may take years. Tort or convention proceedings will not contribute to a resolution of the problematic ongoing situation of lack of contact, and will in all likelihood exacerbate the relations between the parents;
- The involvement of the parents in multiple proceedings with the concomitant expense of time and money;
- Tort cases are almost always heard in the regular civil courts, and the judges may have little or no familiarity with proceedings regarding family relationships. As a result, proof of the elements of tortious liability may require extensive expert evidence.

In sum, while the award of compensation may in some way palliate the suffering, such relief is in all cases partial, and does not return to the child or the parent the years of no-contact. For this reason, the effectiveness of such proceedings is highly limited, and may only be suitable in cases where the alienation is absolute and irrevocable, and then only to have the court express its rejection of PA as being unacceptable behaviour.

[7] For example, in favour, S. Varnado, 'Inappropriate Parental Influence: a New App for Tort Law and Upgraded Relief for Alienated Parents; 61 *De Paul L. Rev.* 113 (2011), and against, K. Schwartz 'The Kids Are Not All Right Using the Best Interests Standard to Prevent Parental Alienation and A Thearpeutic Approach to Provide Relief' 56 *Boston College L. Rev.* 803, 827 (2015).

[8] E.g. Provisions for ensuring family life in the UN Convention on the Rights of the Child (CRC), and the European Convention on Human Rights (ECHR). However proceedings for compensation under the ECHR may only be brought against states. *Moog v. Germany* ECtHR 23280/08 [2016] ECHR 839 (06 October 2016),

## Contract Law

There is a possibility that statute law or courts may impute into the relationships between parents and children a contract between the parents regarding promotion of ongoing contact between the child and each parent. In such a case, an action for compensation for breach of contact may be possible in cases of PA. However, the difficulties shown above in claims based on torts or convention obligations will apply no less to such contract-based claims.

## Child Protection

As has been made clear, PA is a form of maltreatment of the child. As such, it should be identified by child protection agencies as emotional abuse and neglect.[9]

Indeed, child protection workers may be the first professionals outside the family to see the beginnings of contact failure, including maladaptive gatekeeping and alienation by one of the parents. Failure of a parent to cooperate with treatment that has been recommended for helping the child, for example by failing to bring the child to therapeutic appointments or to attend relevant appointments themselves, strongly indicates alienating behaviour. Child protection personnel should regard such behaviour as abuse, and act accordingly, according to their powers.

Child protection statutes are designed to permit state intervention only when it is essential – that is, when neither parent is capable of supplying some essential need of the child.[10] In cases of absence of contact because of PA, the alienating parent is clearly in breach of his responsibilities to the child, which include ensuring that the child has ongoing positive contact with the other parent, while the targeted parent may, without any fault, be unable to fulfil parental responsibilities to the child because of the child's refusal, albeit unwarranted, refusal to have contact.

There are certain issues which need to be carefully considered.

- Child protection officers constitute an additional level of persons involved in planning and executing treatment and reconciliation plans;
- In some jurisdictions, child protection cases are brought to the court by police officers, who may not have the skills and experience in handling complex family situations or the sensitivity needed for speaking to children;
- In child protection proceedings, the applicant is a state agency and the parents jointly are respondents, while in the family court the parents are opponents. This is confusing, at the least, for the child, and may lead to important information being concealed from the courts;
- The criteria for a finding of neediness, so as to make orders in child protection proceedings, are different from those required for a finding of PA in the family court. Here also, it may be that on the same facts the courts may arrive at contradictory conclusions;
- The extent to which the child is involved in proceedings, and the ways in which his views are considered, may differ in different courts.

On the other hand, a court hearing child protection proceedings may

- Remove the child from the home of the alienating parent;
- Put a stop to alienating behaviour;
- Enable therapeutic intervention for the child.

For this reason, child protection proceedings may be helpful in preventing deterioration, but they should be available to a family court dealing with the child, so as to prevent duplication.

## Family Proceedings

The natural place for handling disputes between parents about the upbringing of their children is the family court, and as has been demonstrated, proceedings about PA in other courts, particularly those with criminal or regular civil jurisdiction, are fraught with difficulties, particularly for the child.

However, effective responses to allegations of PA require that the family courts have broad jurisdiction, including child protection; that the courts have appropriate powers; and that the judges handling such cases be experienced in the field. Proper measures need to be in place so that the child's views and interests are properly considered. It is also important to have social services available for consultations and guidance for the parents, and facilities to which the parents and child can be referred for interventions, including therapy for the child, parental education for the parents, and contact centres, with security measures if necessary, for re-establishing contact between the child and the alienated parent. Court calendars must be sufficiently flexible so as to allow immediate hearings where PA is alleged.

*The jurisdiction and powers* of the court should include the possibility of making orders to maintain the status quo or

[9] A.N. Joyce, 'High Conflict Divorce: A Form of Child Neglect', *Family Court Review*, Vol. 54, No. 4, (2016), pp. 642-56.
[10] P. Marcus: 'Parental responsibilities: Reformulating the Paradigm for Parent–Child Relationships Part 2: Who has Responsibilities to Children and what are these Responsibilities?' *Journal of Child Custody*, (2017) 1, 19-21 DOI: 10.1080/15379418.2017.1370407

prevent deterioration, and also

- to make interlocutory orders, such as for the immediate re-establishment of contact, even ex parte, or at least within a few days of the application being filed;
- to give injunctions, prohibiting alienating behaviours;
- to make protection orders, prohibiting the alienating parent from interfering with contact between the child and the other parent;
- to make orders changing residence and contact arrangements, including temporarily banning all contact between the child and the alienating parent, so as to permit reconciliation with the other parent;
- to make orders moving the child from the family home or homes, where conflict is so high as to endanger the child, emotionally and mentally, in the home with either parent;
- powers to enforce court orders, including the imposition of penalties on recalcitrant parents so as to ensure compliance.

The court itself should be staffed by *judges who have knowledge and experience in the field of family law* and in-service training in the relevant therapeutic disciplines. If possible, all matters concerning the family should be handled by the same judge.

The court should be oriented towards *finding agreed solutions*, and not only to trying cases and handing down judgments. For this reason, the principles of therapeutic jurisprudence should inform the court's thinking, and the availability of social services is of great importance.[11]

*The child's views and interests* need to be considered. This requires procedures whereby the child may speak confidentially to a trained person, and availability of children's lawyers or guardians to be provided at low or no cost.

The need for *immediate hearings* where PA is alleged is driven by the child's perception of time and the fact that reconciliation becomes increasingly more difficult as the length of the absence of contact is more prolonged. Instead of handling the case in the traditional manner, with court documents being filed at long intervals, and hearings taking place only after the pleadings are complete, there is a need to investigate forthwith whether there is indeed PA, or whether child-parent contact has justifiably ceased, and if there is PA, to order contact and treatment forthwith.[12]

## Conclusions

While each state has its own laws and procedures, which may differ one from the other, reflecting different cultures and attitudes, this article has approached the issue of allegations of PA from the viewpoint of the main types of norms which may be applicable. PA is clearly tortious, and constitutes maltreatment of the child, and so offends against the norms of society that it may be classified as a criminal offence. However, the proper forum for handling these cases should be the family court, which needs to be a specialist court with procedures and powers, and also ancillary services, so as to enable a single judge to supervise all aspects of the legal and therapeutic handling of the case. Splitting the same alienated child's plight to be dealt with in parallel by different forums, according to different laws and procedures, will inevitably prolong and complicate the process of reaching a comprehensive disposition of the case reflecting the child's welfare.

In some states, it may be possible to reach this situation without new legislation. In the light of the above, these are some of the questions which policymakers might see fit to address, while considering if legislation is needed:

- Should PA be defined as maltreatment (abuse/neglect)?
- Should PA be made a specific criminal offence?
- Should PA be made a specific ground for child protection interventions?
- Should PA be a reportable act?
- Should PA be made a specific ground for changing residence and contact arrangements?
- Should PA be a ground for removing the alienator's decision-making powers regarding the child?
- Should PA be made a specific civil wrong/tort, leading to compensation?

This article has shown that the legal proceedings of different kinds may be utilized in cases of PA, but discretion must be used in deciding what proceedings are likely to achieve the needed effect.

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[11] P. Marcus: 'The Israel Family Court – Therapeutic Jurisprudence and Jurisprudential Therapy from the Start' (2017) *International Journal of Law and Psychiatry* DOI 10.1016/j.ijlp.2018.06.006

[12] For a description of how cases of PA should be handled, see P. Marcus, 'Innovative Programs in Israel for Prevention & Responding to Parental Alienation: Education, Early Identification and Timely, Effective Intervention', (2020) 58 (2) *Family Court Review*, 544-559.

# Religious roots of the duty of marital fidelity and the evolution of Italian family law

**Elena Falletti ***

## Outline

1. Same-sex civil union and the duty of fidelity in the political debate in Italy.
2. Canon Marriage, Civil Marriage and Civil Union.
3. Historical and comparative roots of the duty of fidelity.
4. The duty of fidelity and filiation in the Italian legal system
5. The change of the parenthood paradigm
6. The duty of fidelity in case law
7. Conclusion

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

In Italy, the law on same-sex civil unions was approved only recently. The relevant legislation is the Law of 20 May 2016, No. 76,[1] and shows some differences compared to heterosexual marriage: amongst the differences is that the new law does not establish the mandatory duty of fidelity for same-sex couples as for those of the opposite sex. This distinction suggests some reflections on this expunction of the duty of fidelity 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 who conceive and educate their offspring: in this perspective the duty of marital fidelity duty is strictly connected with fertility control of the wife, mirroring the very essential element of marriage, namely procreation. On the other hand, there is privacy, self-determination and non-discrimination for sexual orientation reasons. In common law, this evolution started with Sir Edward Coke, who affirmed that the family is the place where in early society the concept of a family arose, following the *lex naturae*.[2] The intervention of a privacy doctrine came much later and was designed to ensure parents' autonomy over their children's education.[3]

In 2015, the European Court of Human Rights (hereinafter the ECHR) condemned Italy in the case of *Oliari*,[4] a key decision in the Italian political debate on the right of people in same-sex relationships to live a full life in legally binding relationships according to their sexual orientation, a concept unrecognised until 2016.[5] Indeed, the Italian Constitutional Court had explicitly pressed their Parliament to pass this legislation from 2010,[6] although when Parliament did so the legislation in fact brought both civil unions and heterosexual marriage into substantial uniformity of perspective, although strictly this was not formally achieved in law because the legislation adopted a difference of definition distinguishing the two, by qualifying same-sex civil unions as a 'specific social formation' (*specifica formazione sociale*) according to Articles No. 2 (protecting individual inviolable rights) and 3 (protecting equality) of the Constitution, but without any reference to Article 29 (protection of the right to marry).

Under this perspective, the exclusion of step-child adoption and the duty of fidelity from same-sex couple legislation is consistent with the (debatable) approach according to which everything not strictly associated with heterosexuality does not deserve the same legal treatment.[7] The Italian Constitutional Court itself suggested this legal approach in its decision of 11 June 2014 No. 170, which imposes divorce on married transexual people after either has amended his or her birth sex following medical surgery.[8]

This strict interpretation of marriage to refer to heterosexual parameters promoted by the Constitutional Court allowed a view to emerge which was not strictly juridical, but nevertheless strongly influencial on legal

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[1] Published in the Gazzetta Ufficiale No 118 of 21 May 2016, in force on 5 June 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"*, (1998) 66 Fordham L. Rev. 1699, p. 1768.

[3] C. W. CHRISTENSEN, *If Not Marriage?* Opus cit.

[4] European Court of Human Rights, 21 May 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] CONSTITUTIONAL COURT, 15 May 2010, No. 238. S. RODOTÀ, *Diritto d'amore*, Roma-Bari, 2015, p. 109.
*bigenitorialità al ddl Cirinnà: un'incursione nelle strutture profonde del diritto di famiglia*, 2016, available on www.europeanrights.eu. #

[7] M. R. MARELLA, *Dal diritto alla*

[8] B. PEZZINI, *Oltre 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.

interpretation, referring to the idea that homosexually orientated people could be 'physiologically' less able to express feelings such as love, so that their nature could allow them to be unfaithful. This idea is totally rejected, both under factual and juridical perspectives. Indeed, analysis by the present writer tends to show how the duty of fidelity could be considered as an 'accidental element of marriage' and consequently that it could be excised from the duties of both same-sex civil unions and marriage, in order to respect the principle of non-discrimination.

The duty of fidelity binds a party to a marriage to express personal and uncoercible feelings. It covers a promise that, statistically,[9] is becoming more and more complicated and irredeemable because it concerns a moral duty. However, the political solution adopted by the 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 stabilise a rearguard vision of personal relationships under a social profile that had been changed for some time. In this context, Parliament has delegated to the judiciary the task of correcting the ideological limitations of this legislation, forgetting that in a civil law system, such as the Italian one, case law is fragmented, and consequently in favour 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 the same-sex civil union provisions compared to those of egalitarian marriage, which is now the more widespread equality 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 the present writer, 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 Benefit 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]

In the following centuries this interpretation influenced the Catholic concept of marriage, preventing polygamous marriages, divorces, repudiations and new marriages, as it was in both the pagan and Jewish traditions.[14] Indeed, the Patristic doctrine justified for Christian morality a pagan institution, sacralising 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

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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, *La 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, *Il matrimonio nel diritto della Chiesa cattolica latina*, in (S. Ferrari, ed.), *Il matrimonio, Diritto Ebraico, canonico e islamico: un commento alle fonti*, Torino, 2006, p. 95 ss.
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, *opus cit*.

the only admitted paradigm,[17] because its indissolubility is based on the sacrament orientated to 'the conservation and development of humankind, and to the elevation of souls'[18]. 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.[19]

Even though this definition is emphatically reductive to every possible individual choice, it is orientated to recognising 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 *Tamesti, Decretum de reformatione matrimonii,* cn. 1. This document attributed to the ecclesiastical authorities the power to certify marriages[20], meaning their existence and regulation. However, the Catholic Church delegated the regulation of civil and patrimonial effects of marriages and the relationships between Catholic believers and non-Catholics to civil authorities.[21]

In Italy, conflicting relationships between Church and State already existed during the Risorgimento (which was the unification of Italy under the King of Sardinia),[22] but these tensions did not disappear after Italian unification and they persisted in the new Civil Code in 1865. According to the Code, although the State left to each subject the freedom to govern his or 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 have succeeded since then have always claimed the primacy of the Catholic Church on marriage[23]. Indeed, according Catholic doctrine, Catholic believers are obliged to accept 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 "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.[24]

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 by the determination of either party, providing the availability of cohabitation, and non-sanction of the breach of duty of loyalty, either in civil or criminal liability. Indeed, in civil marriage fulfillment of conjugal duties is left entirely to the will of the spouses, and procreation is not an essential element of the institution, 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.[25] Furthermore, 'the legal prerogatives of marriage are debilitated compared to those of civil union and there is a progressive assimilation of

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[17] 'Only marriage could legitimise sex. As the influential Synod of Angers declared in 1217 "Every voluntary emission of semen is a mortal sin in both male and female unless excused by legitimate marriage. But faith teaches that sexual intercourse between male and female is excused by legitimate marriage as long as the union is in the proper manner" (Synod of Angers (c. 1217), quoted in P. P. PAYER, *Sex and Confession in the Thirteenth Century*, in J. E. SALISBURY, *Sex in the Middle Ages: A Book of Essays*, Garland, 1991, 130; G. R. STONE, *Sex and the Constitution. Sex, Religion, and Law from America's Origins to the Twenty-First Century*, Liveright Publishing Corporation, New York, London, 2017, 33 ss.

[18M] M. SESTA, *La 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.

[18] A. FERRARI, *Il matrimonio nel diritto della Chiesa cattolica latina, in (S. Ferrari, ed.), Il matrimonio, Diritto Ebraico, canonico e islamico: un commento alle fonti*, Torino, 2006, p. 95 ss. C. PEDERODA, *Matrimonio canonico – Matrimonio civile, in I Quaderni di In Prin*, Udine, 2008, I, 1. 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. C. PEDERODA, *opus cit*. Council of Trent, sess. XXIV, *de reformatione matrimonii*

[19] 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.

[20] C. PEDERODA, *opus cit*.

[21] C. PEDERODA, *opus cit*.

[22] C. PEDERODA, *opus cit*.

[23] C. PEDERODA, *opus cit*.

[24] V. PARLATO, *opuscit*, C. PEDERODA, *opus cit*.

[25] V. PARLATO, *opus cit*. p. 5; G. BONI, *La rilevanza del diritto secolare nella disciplina del matrimonio canonico*, Milano, 2000, p. 212.

marriages and domestic partnerships'.[26] 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 marriage governed by the Concordat must be valid also for the laity who would rather refer only to civil marriage.

The 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,[27] 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'.[28]

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 natural ones, who are recognisable, in certain cases, or even not recognizable, if born from adultery.[29]

This perspective may have made sense in the Thirties of the Twentieth Century, but today it is no longer shared in Italian society. Indeed, nearly ninety years have passed since 1929, and deep social changes have happened in society, families' and peoples' lives, and also in marriage and family law. This evolution has been neither quick nor easy, and probably it will not be definitive. It began at the end of the nineteen sixties, when the Italian Constitutional Court declared uncostitutional the difference in the application of punishment connected to the crime of infidelity perpetrated by the wife, compared to infidelity perpetrated by the husband,[30] 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 the divorce law in 1970.

It also resulted in the break, including conceptually, from the idea of family ties, until the recent reform on the single status of filiation in 2013. However, Italian society has had a strong reaction to this evolution, and it is reflected in recent statistics.[31]

| | 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 Separations (‰ of marriages) | 286.2 | 307.1 | 310.6 | 314.0 | 319.5 |
| Separations with minor children (%) | 52.3 | 49.4 | 48.7 | 51.9 | 52.8 |
| Divorces (absolute values) | 54,391 | 54,160 | 51,319 | 52,943 | 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 |

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

[26] G. BONI, *opus cit*.
[27] C. PEDERODA, *opus cit*.
[28] Source: http://www.aloha.net/~mikesch/treaty.htm
[29] V. PARLATO, *opus cit*.
[30] P. PALERMO, *Uguaglianza e tradizione nel matrimonio: dall'adulterio alle unioni omosessuali*, in *Nuova Giur. Civ*. 2010, 11, II, 537.
[31] ISTAT, *Matrimoni, separazioni e divorzi*, Anno 2014.

Statistics contained in Table 1 show that from 2008 to 2014 the absolute number of marriages decreased constantly, but within the same years there was an increase in civil marriages. Consequently, it can be inferred that religious marriages show a marked decline. A decrease in confidence in marriage in an absolute sense should also be noted because, on the one hand, first marriages decreased, and on the other separations increased.

Supporters of the removal of the 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 types of couples. The civil union legal scheme is based on civil marriage, not on the canon marriage. Indeed, referring to the comparison between civil marriage and civil union, in civil unions the new law establishes that there is no separation before divorce and so the parties cannot be charged for breaching the (hypothetical) 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 roots as a cultural heritage, the role played by the duty of loyalty in the construction of such imaginary has to be analysed.

## 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?'[32] The author answered quoting grandparents' words: 'To make women honest' - focusing marriage 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.[33] During the Augustan Age the *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.[34] When the Roman Empire began to crumble, the Church proposed itself as the new point of reference for people 'who risked being lost'.[35] At that moment, pagan and Christian moralities merged, styling new standard models for men, but above all for women, following Augustinian theology. Indeed, this interpretation influenced the Christian concept of marriage. Furthermore, Constantine'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.[36] Later, in the Eighth century, through the authority of Liutprand, the influence of the Church in Longobard society was strong enough to spiritualise 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'.[37]

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,[38] some related to adultery, according to which the adulterous wife would be 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 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 the 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.[39] As a consequence, it was accepted that

[32] L. MAIR, *Il matrimonio: un'analisi antropologica*, Bologna, 1976, p. 19.

[33] L. CRACCO RUGGINI, *La sessualità nell'etico pagano-cristiana tardoantica, in Comportamenti e immaginario della sessualità nell'Alto Medioevo*, LIII Settimane di studio della Fondazione Centro Italiano di Studi sull'Alto Medioevo, Spoleto, 2006, p. 11.

[34] 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.

[35] L. CRACCO RUGGINI, *opus cit*, p. 11.

[36] 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.

[37] 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 Italia*, Milano, 1906, p. 406.

[38] R. H. HELMHOLZ, *Marriage Litigation in Medieval England*, Cambridge, 1974, p. 4.

[39] J. GAUDEMET, *Le mariage en Occident*, Paris, 1987, p. 191. M. RHEINSTEIN, R. KöNIG, Introduction, Chapter I, Persons and Family, *International Encyclopedia of Comparative Law,* Tubingen – Leiden – Boston, 2007, IV, p. 1-9, c. 7.

marriages, like agreements and conventions, could be dissolved through divorce.[40] 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,[41] 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.[42] 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.[43] After the French Revolution, a new distinction between liberals and conservatives spread from France to all Europe.[44] It did not follow national borders, but pertained to social classes, and was present in each legal system, especially in family law.[45] During the French Revolution, on September 20, 1792, a law allowing divorce upon request of a spouse and without attributing fault was introduced.[46] That law attributed to both spouses mutual divorce with a declaration to the Registrar in case of mental incapacity, detention, abandonment '*émigration*' [47]and '*incompatibilité d'humeur*',[48] i.e. 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'[49]. 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,[50] and then it was abolished after the Restoration,[51] and reintroduced in 1884 almost seventy years later.[52] Regarding the duty of marital fidelity, under the *Code Napoléon*, affairs were tolerated, but not pregnancies. There was no indulgence for the guilty women to give birth to an illigitimate child,[53] because the male line would be polluted.

In Common Law, the interference in the line of descent with the breach of the duty of fidelity was present as well. In this regard, it should be noted that the Catholic tradition's influence of the canonical tradition has been mantained by the Church of England, which considered infidelity as destructive of families. Indeed, it extended the definition to include the husband's extramarital sexual activity,[54] even though male monogamy was socially considered a mere fiction.[55]

Even today, neither English nor American common law

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[40] D. MACCULLOCH, *Riforma. La divisione della casa comune europea (1490 – 1700)*, Roma, 2010, p. 828.
[41] M. A. GLENDON, *The Transformation of Family Law*, p. 25.
[42] J. WITTE JR., *John Calvin on Marriage and Family Life*, 2007, http://ssrn.com/abstract=1014729.
[43] 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 Franc*e, Pennsylvania State University Press, University Park, 2009, p. 4; B. CRAVERI, *Gli Ultimi Libertini*, Milano, 2016, p. 31.
[44] M. A. GLENDON, *The Transformation of Family Law, opus c*it., p. 160.
[45] 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. 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.M. A. GLENDON, *The Transformation of Family Law, opus cit*, p. 160.
[46] M. A. GLENDON, *opus cit*., 159; M. PARQUET, *Droit de la famille*, Levallois-Perret, p. 85.
[47]K. CARPENTER, *Emigration in Politics and Imaginations*, in D. Andress, *The Oxford Handbook of the French Revolution*, Oxford – New York, 2015, Ch. 19.
[48] M. A. GLENDON, *opus. 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
[49] S. DESAN, *opus c*it.
[50] M. A. GLENDON, opus cit.
[51] Loi Bonald, 1816, M. PARQUET, *opus cit*., p. 85).
[52] Loi Naquet, 27.07.1884 (M. PARQUET, ult. opus loc. cit).
[53] 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.
[54] S. S. VARNADO, *Avatars, Scarlet "A"s, and Adultery in the Technological Age*, (20130 55 Ariz. L. Rev. 371), p. 385.
[55] Note: *Constitutional Barriers to Civil and Criminal Restrictions on Pre- And Extramarital Sex*, (1991) 104 Harv. L. Rev. 1660, p. 1671.

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 sexual intercourse in both conjugal or extra-conjugal male infidelity, or to 'adultery',[56] referring 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 the inheritance away from his own blood, to that of a stranger'.[57] 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, as exemplarily set out by Nathaniel Hathworne in his novel *The Scarlet Letter*.

During the 18th and 19th centuries, in reformed countries such as England[58] and Germany,[59] adultery and divorce were still strictly connected. However, this perspective fundamentally changed in the late 20th Century because of women's control of their fertility by adopting contraceptives.[60]

From this female awareness, a very rapid development could be observed in science that permitted a massive use of artifical techniques of human reproduction. Actually, the break of the hendiadys 'sexuality and reproduction' was a prelude to the separation between conception and 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 can happen through artificial procreation and fertilisation. 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 should still remain 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 a canonic and legal perspective, and it slowly deteriorated only after the Reformation.[61]

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.[62] 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,[63] which could emerge from other circumstances. For instance, in Germany[64] and the Netherlands[65] in the case of a joint divorce application, the judge does not verify the reason of the irreparable breakdown of marital life.[66]

In Sweden, the breach of duty of fidelity was not subjected to specific sanctions, and during the 1970s there was a wide-ranging debate on its preservation, considered a deterrent to marriage by young couples.[67] The reform of marriage law came into force in 1982, when the legal focus on fidelity was interpreted in a broader sense than the sexual integrity, referring to loyalty and solidarity between the spouses.[68] 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.[69] 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

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[56] 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.
[57] New Jersey Supreme Court, *State v. Lash* (N.J. 1838).
[58] D C. WRIGHT, *The 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).
[59] S. SANDERS, *opus cit*., p. 419; M. A. GLENDON, *opus cit*., p. 174.
[60] F. HÉRITIER, *Dissolvere la gerarchia. Maschile/Femminile II*, trad. it. A. Panaro, Milano, 2004, p. 166.
[61] P. MCKINLEY BRENNAN, *Of Marriage and Monks, Community and Dialogue*, 48 Emory L.J. 689, (1999), p. 700.
[62] C. SÖRGJERD, *Reconstructing Marriage. The Legal Status of Relationships in a Changing Society*, Cambridge-Antwerp-Portland, 2012, p. 122.
[63] C. SÖRGJERD, *op. cit*., p. 127.
[64] D. MARTINY, *German Report, in European Family Law in Action, Vol. I: Ground for Divorce*, Cambridge-Antwerp-Portland, 2003, p. 80. (D. MARTINY, *opus cit*, p. 188 ss).
[65] C. SÖRGJERD, *opus cit,* 128.
[66] K. BOELE-WOELKI, O. CHEREDNYCHENKO, C. LIEEKE, *Dutch Report, European Family Law in Action, Volume I: Ground for Divorce*, 2003, p. 89.
[67] C. SÖRGJERD, *opus cit*. p. 128.
[68] C. SÖRGJERD, *opus cit*. p. 123.
[69] C. SÖRGJERD, *opus cit*., p. 126.

failure to do so can be considered a sufficient reason for divorce.[70] It is due to one or more events that constitute a serious or repeated violation of duty and obligations of marriage,[71] and it has led to a permanent alteration of the marital bond.[72] 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,[73] even in the case of mutual infidelity.[74] 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 union'.[75]

In the USA, family law is under state jurisdiction and the courts can declare a marriage broken down only in cases provided by law. In most States, the violation of the duty of loyalty is still established as grounds for divorce,[76] while other states[77] apply the 'no fault rule', although there is a continuing link with tradition through references to adultery.[78]

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

In the 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 and 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*'.[79] This definition contained not only a vision of the woman's body as property,[80] but it was strictly connected with fatherhood certainty and the purity of lineage promoted by the Catholic Church through a 'Catholic construction of family relationships',[81] that is a marriage concept oriented to procreation.[82] 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.[83] This equalisation was accepted by the new Italian Republic through the controversial inclusion of the Lateran Pacts in the Constitution of 1948.[84] This recognition allowed the lasting 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.[85] Therefore, marriage was the indispensable condition for having a legitimate father, indeed the decisive question was whether the offspring was born inside or outside wedlock.[86]

The Law of 1 December 1970 No. 898, that introduced the possibility of dissolving civil effects of Concordat marriage, introduced 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 definitively upset the traditional perspective. As an example, the birth of the first baby conceived through in vitro fertilisation (Louise Brown, born in 1976) made a disruptive split between the sexual act, conception,

[70] C. SÖRGJERD, *opus cit*., 126.
[71] Article No. 242 Code Civil amended by Loi n°2004-439, 26.05.2004.
[72] Article No. 246 Code Civil
[73] Cour d'appel de Limoges, 13-05.2013, RG 12/00908; Cour d'appel de Bastia, 10.04.2013, RG 11/00356
[74] Cour d'appel de Rennes, 14.10.2014, RG 13/04534.
[75] Cour d'appel de Versailles, 17.03.2016, RG 15/02921.
[76] 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*, (2013) 55 *Ariz. L. Rev*. 371, p. 383).
[77] Arizona, California, Colorado, D.C., Florida, Hawaii, Iowa, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Oregon, Washington, Wisconsin, Wyoming (S. VARNADO, *opus cit*.).
[78] S. VARNADO, *opus cit*.
[79] V. CARBONE, *L'irreversibile crisi della coppia legittima l'adulterio, rendendo non addebitabile la separazione?, Fam. dir*, 1999, 2, 105
[80] M. D'AMELIA, *Recensione a Nozze di Sangue, di Marco Cavina, in Il Mestiere di Storico*, 2012, 1, p. 171.
[81] P. GINSBORG, *Famiglia Novecento, Vita familiare, rivoluzione e dittature, 1900-1950*, trad. it., E. Benghi, Torino, 2013, p. 284.
[82] P. MONETA, Voce: "*Matrimonio canonico*", in Digesto civile, UTET, Torino, 1994 e dottrina ivi segnalata.
[83] P. MONETA, *Voce: "Matrimonio concordatario*", in Digesto Civile, UTET, Torino, 1994;
[84] G. FERRANDO, v*oce: "Matrimonio civile*", in Digesto Civile, Aggiornamento 2014, UTET, Torino, 2014.
[85] L. ZOJA, *Il gesto di Ettore*, Torino, 2010, p. 171.
[86] G. GALEOTTI, *In cerca del padre*, Bari - Roma, 2009, p. 5-7.

and pregnancy, which were previously the essential stages of human reproduction.[87]

From a female perspective, the technique allows extraction of the oocytes, fertilisation of them and choosing whether to continue the pregnancy. So, fertilisation 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, crystallised by 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 provides the egg), gestational contribution (the woman who is implanted with the fertilised egg and gives birth), and social contribution (the woman who raises and educates the child born from that oocyte and pregnancy). In fact, recently, the courts also took note of this technological evolution implemented by social custom.[88]

From a male perspective, legal presumption of paternity is questioned by this technique as well. The new text of Article No. 231 (Husband's Paternity) of the Civil Code[89] 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.[90]

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 paternal filiations are considered distinct cases by the law, and wedlock filiation constitutes a unique case according to which the relationships that bind mother, father and children are indissoluble.[91]

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's delivery by the wife; c) the child was conceived and born during marriage; d) the paternity of the husband.[92] However, the legal presumption of paternity is recognized by law even in absence of requisites c) and d). Indeed, legal presumption of paternity during marriage, according to Article 231 c.c.,[93] 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 involvement in human reproduction through heterologous fertilisation. 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.[94] In this context, the Constitutional Court amended the prohibition of heterologous fertilisation for sterile couples stated by the original text of Article No. 4 par. 3 of Law 40/2004.[95] With the same decision, the Constitutional Court authorised 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, a 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 system by Article No. 12,

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[87] M. IACUB, *L'impero del ventre. Per un'altra storia della maternità*, It. translation S. De Petris e C. Bonfiglioli, Verona, 2004, p. 134.
[88] Cass., 30.09.2016, No. 19599.
[89] Modified by D. Lgs. 154/2013
[90] 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.
[91] 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.
[92] 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.
[93] 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.
[94] M. AZZALINI (ed.), *La procreazione assistita dieci anni dopo*, Roma, 2015.
[95] Corte cost. 10.06. 2014, No. 162.

par. 6 of the Law No. 40/2004, which remains legally binding.[96] 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 their offspring's 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.[97] 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.[98] Under a civil process perspective, the biological parent of a child born outside wedlock does not have any legal impediment to claim a disavowal availaible to any interested party.

Since the Law no. 76/2016 does not allow step-child adoption to same-sex couples (a specific article was deleted from the Bill during the parlamentarian debate), a relationship should be noted 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 fertilisation or surrogacy agreement, establishing a social parenthood relationship with the partner of the child's parent. Indeed, in these circumstances, filiation law recognises only the relationship with the biological parent, while the bond with the social parent has been recognised by courts only recently in Article No. 44, par. d) of adoption law No. 184/1983.[99] It regards the maintenance of constant relationships with both parental figures, even in social or *de facto* parenthood cases.[100] Courts of merits accepted these 'vertical' bonds between the child and his or her social parent according to European and supranational 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[101] 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.[102] 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 assessment of the protection of the best interest of the child, a key notion of the relevant juridical instruments at international level.

The Italian legislator has set itself in opposition to this jurisprudence.[103] 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,

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[96] Corte cost., 10.06.2014, No. 162, cit. In dottrina, A. QUERCI, *La maternità "per sostituzione" fra diritto interno e carte internazionali, Fam. dir.*, 2015, 1142.

[97] 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.

[98] V. CARBONE, *La diversa evoluzione della responsabilità genitoriale paterna e di quella materna, Fam. dir.*, 2016, 2, 209.

[99] Cass., 26.05.2016, No. 12962; Cass. SS. UU., 08.05.2019, No. 12193.

[100] Trib. Palermo, 6.04.2015.

[101] European Court of Human Rights, 22.11.2008, *E. B. v. France.*

[102] European Court of Human Rights, 19.02.2013, *X and others v. Austria.*

[103] A. SCHILLACI, Un buco nel cuore. L'adozione coparentale dopo il voto del Senato, www.articolo29.it.

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 of Article 1 Law. No. 76/2016. 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 same sex couples. In fact, as regards to the Law No. 184/1983, it is common opinion that the above mentioned clause could exclude the extension of the dispositions of the adoption law containing the word 'spouse' in relation to civil partners. The Italian legal system states a residual protection for the children of homosexual couples and this situation 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.

## 6. 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,[104] 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 Constitutional Court said that this difference was a privilege in favour of 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 towards the erosion of the marital duty of loyalty, which has guaranteed 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,[105] especially shifting it from the importance of the sexual reproduction issue to the personal respect of the spouse.[106] About this, scholars wrote about 'physical and spiritual devotion', or of 'loyalty', or pledge 'not to betray each other's trust'[107] as well. The 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.[108] Judges cannot attribute fault for separation only on a mere breach of marriage duties established by Article No. 143 c.c. (especially, duty of fidelity), but they must verify the impact of this violation on the intolerability of the 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.[109]

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 establish a separation period before dissolution comparable to that established for married couples. When same-sex partners want to end

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[104] Giur. It., 1969, 1, 416.
[105] L. REMIDDI, *Le unioni civili dopo la legge Cirinnà: le questioni ancora aperte*, Giudicedonna.it, n. 1/2016.
[106] D. MORELLO DI GIOVANNI, *Obbligo di fedelta' e pronuncia di addebito, Fam. dir.*, 2013, 8-9, 777.
[107] Cass. 01.06.2012, No. 8862, in *Banca Dati Leggi d'Italia*, 2012; Cass. 11/06/2008, n. 15557, in D&G, 2008.
[108] Cass. civ. Sez. I, 12.04.2013, No. 8929, in *Famiglia e Diritto*, 2013, 6, 602; (Trib. Milano, sez. IX, 25.06.2012, in *Database Leggi d'Italia*, 2012; Cass. 07.09.1999, No. 9472, in *Giur. it.*, 2000, p. 1165; Cass. 13.07.1998, n. 6834, in *Mass. Giust.* civ., 1998
[109] Cass. 11.12. 2013, n. 27730

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 past ones, enhanced individual freedoms and non-conformist behaviours.

The Constitutional Court removed criminal sanctions for both adultery (1969),[110] and for concubinage (1968)[111], 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.[112] 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.[113]

## 7. 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 the *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.[114] 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.[115] However, in Germany homosexual people can marry under the new law '*Ehe für alle*' that was intended to be in force on 1 October 2017.[116]

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.

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 legal provision and its related sanction.

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[110] Corte Cost. 3.12.1969, n. 147

[111] Corte Cost. 19.12.1968, n. 126

[112] 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

[113] Cass. 21.03. 2013, n. 7128

[114] European Court of Human Rights, 24.06.2010, *Schalk e Kopf v. Austria*.

[115] S. PATTI, *Le Unioni civili in Germania, Fam. dir.*, 2015, 10, 958.

[116] M. HONG, *Warum das Grundgesetz die Ehe für alle verlangt, Warum das Grundgesetz die Ehe für alle verlangt*, VerfBlog, 2017/6/29, http://verfassungsblog.de/warum-das-grundgesetz-die-ehe-fuer-alle-verlangt/, DOI: https://dx.doi.org/10.17176/20170629-100004; U. VOLKMANN, *Warum die Ehe für alle vor dem BVerfG nicht scheitern wird*, VerfBlog, 2017/7/02, http://verfassungsblog.de/warum-die-ehe-fuer-alle-vor-dem-bverfg-nicht-scheitern-wird/, DOI: https://dx.doi.org/10.17176/20170702-195845.

# The Shona Wife: Culture and Reality[1]

**Josephine Ruvarashe Gumbo Wazara ***

## Introduction

**Policy and Legislative Framework**
The normative frameworks in Zimbabwe and the types of marriages

**The Shona Prescription of Gender Roles**
The pre-colonial, colonial and post-colonial gender roles

**Social Norms, Cultural and Religious Values: Belief about Self and Self Expectations**
What does the average wife believe she should do to be acceptable? Working wife vs Stay at Home Wife

**Social Expectations**
Cultural and religious norms in place

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Penalties a wife can face for not meeting societal expectations.

**Carriers of the Social Norms**
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Inclusivity: how can men and women work together to bring solutions?
How can we preserve the family unit?

## Introduction

This article begins with a case study which might be found in the pages of women's journalism anywhere, a debate still embracing norms across borders and in two worlds, the present and the past.

One of my friends married the love of her life. He was everything she ever wanted and dreamed of. She lived and worked in South Africa and he lived and worked in Zimbabwe. After their marriage the husband decided to move to South Africa as the economy was becoming more undefined in Zimbabwe. They were so in love and enjoying life together. The husband began the job hunt as the wife worked to support them. After all they were on the same team working together to build their home.

As months went by the husband struggled to find a job as South Africa tightened its permit regulations. However, as much as they were on the same team, only one team member was playing. The wife woke up very early each morning to make breakfast for her husband. In the evening she would come back tired but would proceed to cook dinner and wash the dishes. All this while her husband would just be behind his computer. Over the weekend she would wash both their clothes and iron, cook, clean and perform all the tasks and roles of a married woman. As the months turned to a year she felt burnt out, angry, resentful and unhappy in her marriage.

She asked her husband at least to help her with some of the chores around the home. He was angry and offended. Was she now trying to dominate him. Was she trying to turn him into a house husband? After all, is it not a woman's job to look after a home, cook, clean, wash. It seems he purposed in his heart he was not going to do any of that. He told his wife that he was not going to be reduced to a woman just because he could not find a job.

Their marriage did not survive. Why?

For many female millennials, the general assumption had been that our mothers and grandmothers stayed in difficult marriage relationships and the role of the traditional homemaker was perpetuated because they were not educated or economically empowered. There has been a strong drive in 'modern' times to have the girl child educated so that she would be subsequently sufficiently empowered not be at the mercy of the existing institutionalized male dominance over women and society. Women have for some time been climbing the corporate ladders in different sectors, gaining control over resources and mastering a sense of self value and leadership. In the public sphere many institutional mechanisms and frameworks have been put in place legislatively, in policy and practice to provide protections and equity for women.

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[1] This article had its origins as a paper to be delivered at the 2019 Conference of the International Centre for Family Law, Policy and Practice at the University of Westminster in London on 3-5 July 2019, but which was unfortunately unable to be presented at that time as the author did not receive a visa for travel to the UK in time to attend to present personally.

In the private sphere however, the differences in the socialization and treatment of women and men continues to create glaring difference in capacity and expectations. Within the domain of marriage today, many female millennials are confronted with the same challenges faced by their previous generations. The difference is that most can self-support economically and if they cannot tolerate the deep rooted historical patriarchal domination, they can opt to leave the marriage. The question is, how do we overcome the struggle between male domination and equality (and/ or equity) for women? What are the options for women who wish to stay married, and for those who want to preserve the sanctity of marriage? How do we preserve and protect the 21st-century family and still effect liberalization of the woman from the role of the traditional submissive homemaker?

## Policy and Legislative Framework

Zimbabwe has a dual legal system, that is, there is the application of both general law and African customary law. General law has generally been straightforward as it is rooted in common law and statute. However, because customary law is not written, it has been open to variation and manipulation whilst perpetuating the underlying patterns, both positive and negative, of social and normative behavior. Significant legislative strides have, however, been made to make inroads in relation to property rights, marriage, divorce, custody and access, and inheritance.

The 2013 Constitution of Zimbabwe is progressive in nature with several provisions aimed to protect the family unit, especially women and girls, who have been marginalised for a long time. Alignment is still to take place for many pieces of legislation so as to ensure that the policy and legislative frameworks mirror the provisions of the Constitution. However, to a larger extent the protection available is mostly in the public sphere and less in the private domain. The law can regulate marriageable age, age of sexual consent, protection against violence and criminalization of wilful transmission of disease,[2] but to what extent can it legislate to ensure equality in the home? In the private arena, the executive and legislature have limitations and are often superseded by cultural norms, religious practice and patriarchal attitudes. These domains are often marred by gender inequalities and imbalances.

There are three types of marriages that currently exist in Zimbabwe, namely the civil marriage which is monogamous and available to all races, the registered customary marriage and the unregistered customary marriage which are potentially polygamous and available only to those of African descent. The most common type of marriage in Zimbabwe today is the unregistered customary law marriage. The precepts of this marriage type are governed by society and the family structure, while only recognized by law in relation to guardianship, custody, rights of succession of children born of the marriage and inheritance. Cohabitation is also a very common type of union. This latter form is when a couple choose not to marry but live as a family with all the financial, emotional and reproductive obligations of an actual marriage. These unions are only recognized in issues pertaining to domestic violence and inheritance and frowned upon within the customary law system.[3]

Currently there is an ongoing process to align the marriage laws of Zimbabwe to the Constitution whilst also harmonizing and consolidating rights and privileges accorded to each marriage type into one piece of legislation. A marriage bill has been gazetted, and there is an ongoing parliamentary consultative process. The bill is largely progressive with provisions outlawing child marriages, providing for unification of permitted marriageable age (set at 18 for both civil and customary marriages) and promoting equal rights and obligations during the subsistence, and at dissolution of, marriage. The bill also provides for chiefs as customary marriage officers so as to improve registration of marriages and legitimises civil partnerships. All marriages will in due course be provided for under one piece of legislation. As it currently stands, such legislation is piecemeal. The civil marriages are governed under the Marriages Act[4] and have superior rights to the other marriage types. The registered customary marriages are provided for under the Customary Marriages Act[5] with limited rights and privileges whilst the unregistered customary marriage has been for the most part governed by cultural norms and practices with the exception of guardianship, custody and inheritance issues.

A study conducted by the Ministry of Justice, Legal and Parliamentary Affairs in 2012 revealed that most women in

[2] A Bill has been gazetted and consultations are ongoing to revisit the criminalisation of wilful transmission of disease.

[3] Not therefore unlike many jurisdictions (such as England and Wales) which at the present time still have no formal legislation to recognise cohabitants' rights, (such have long been legislated for in several of the larger common law jurisdictions, for example Australia, New Zealand, Canada, some states of the USA and in the UK Scotland, and also in several civil law jurisdictions).

[4] Chapter 5:11.

[5] Chapter 5:07.

Zimbabwe do not have the power to choose the type of marriage they prefer. Often power lies with the husbands, whose decisions are often informed by cultural and religious norms.

Other efforts worth noting, and which are aimed at strengthening the family unit, include amendment of citizenship laws[6] to allow both men and women married to a Zimbabwean citizen for at least five years to acquire citizenship. In earlier years only women married to Zimbabwean men could get citizenship. The Constitution also provides that Zimbabwean citizenship will not be lost by marriage or dissolution.

## The Shona Prescription of Gender Roles

Pre-colonial Shona culture was polygamous and patriarchal. The men went fishing and hunting whilst the women stayed at home, cooking, cleaning, caring for their children and, most importantly tilling the land. The women owned nothing in their own right except their kitchen utensils. The land, the children, the homestead all belonged to the husband regardless of how much work she put in. Colonial Zimbabwe mostly maintained the same status quo. Most men moved from hunting to become employees of colonial masters on plantations, in mines or industries, or other enterprises. The status of the woman did not really change. A wife still tilled the land and cared for the home as she waited upon her husband to send some money or groceries from the city. In some households where both husband and wife remained in the communal areas, the women tilled the land and the men loaded the produce for resale. The fate of the money made was often determined by the husband alone. Some wives never saw it or knew what became of it.

Over time a significant number of women began to become educated and to compete in the market. It was no longer just the men going 'hunting and fishing'. Both husband and wife were now employed full time in full time '8 to 5' jobs. Regardless of women entering the arena of providing, the socialisation and treatment has for the large part remained the same. In the domestic arena, men have continued to control resources and make decisions, and the historical gender roles have remained the same.

## Social Norms, Cultural and Religious Values

In the private sphere most of the Shona marriages are governed by cultural and religious values. The dominant religion in Zimbabwe is Christianity which provides that men are the heads of their homes and that wives should submit to their authority. Wives, as the weaker sex, are also required to respect their husbands in recognition of his headship. The definition of headship and the terms of reference for the job vary from household to household and so do the requirements of submission and what respect looks like.

Culturally the man is the principal provider of the household. He should make sure that the financial needs are met and the wife should create a home. What culture has not yet addressed is the reconciliation of a generation where both the husband and wife work outside the home and in some instances where the husband is not the principal provider or cannot provide at all [7] (as in the case study which inspired this article).

It is evident that regardless of the ongoing social evolution, women continue to be affected by the deep rooted historical and patriarchal rules. 'Zimbabwean society today is characterized by an overlap between the traditional, feudal and highly patriarchal society on the one hand, and a modernising society with its roots in the colonial experience. Majority of the country's population is rural based and by and large continues to follow traditional ways of social existence. Practices which accord women specific roles in society in line with patriarchal and clan based cultures are evident. This wider customary practice, established principles and regulations are to be found governing issues such as courtship, marriage, the relationship between husband and wife, the relationship between parent and child, domestic disputes settlement and succession[8].' The governing of these issues has been skewed in favor of the male sex and have been passed down the generations as normal and acceptable and not open to challenge or change.

## Belief about Self and Self Expectations

I remember as a young girl overhearing a conversation among women in the community I grew up in. A young woman who at that time got married received a washing machine as a gift from her mother. This was the joke of the town. According to other mothers and wives, the bride's mother knew that she had not adequately trained her daughter for the wifely role and hence was compensating for her failure as a mother for her daughter's inability to

[6] A Bill seeking to ensure alignment with Chapter 3 of the Constitution of Zimbabwe (on Citizenship) has been drafted to repeal the Citizenship of Zimbabwe Act, Chapter 4:01.

[7] It is noted that in Zimbabwe customary laws, customs and practices vary across the different tribes with some more liberal than others. The Shona culture itself has different tribal groupings.

[8] A.S. Tsanga,*Taking the law to the People: Gender, law reform and community legal education in Zimbabwe*, Weaver Press, Zimbabwe, 2003, p59.

[9] An event hosted for a bride to celebrate her prospective marriage, share advice and shower with gifts.

wash by hand by buying a washing machine. This young bride was not 'wife enough' because it was assumed she could not wash by hand.

I learnt, as a young girl, from that conversation that I had to be able to wash by hand to be a really good wife. I learnt that any gadgets aimed to make the task easier were a sign of laziness. I learnt to iron, to clean well and to keep order in a home. My mother would also wake me up very early in the morning so I could already begin to do household chores for 'a good wife must wake up before the rest of the household' and clean so that everyone wakes up to a clean home and a ready prepared breakfast. Only the girl child gets this training while the boys sleep in or are required to study, resulting in gendered differences. In some households there is gendered chore distribution where the boys tend the gardens and the girls do all the indoor household chores.

Learning to do the work in itself is not a bad thing. The tasks are very relevant life skills. The problem is that only the woman is equipped to do the work hence most men do not have the capacity or expectation to assist. Their upbringing conditions them to believe that household work is for women whilst they have the primary role to provide financially. Inability to provide financially by the man is then deemed a failure on his part.

As far as the mothers above were concerned, they were more woman than this young bride because they washed by hand. The identity of a Shona wife is defined by how well she cooks and cleans. Introduction of tools and gadgets to make the workload easier was therefore laziness. It is acknowledged that this perception is slowly unfolding.

## Social Expectations

I have attended several bridal shower celebrations[9] and listened to the advice a Shona bride is given before her wedding. She is advised that she should keep her man happy. It is her main responsibility to keep him happy otherwise he will find alternatives. She should wash for him, iron for him, cook for him and serve him respectfully either by kneeling or bobbing a curtsy to him. She is to show interest in what he likes, pretend if necessary. The young bride should make sure he is sexually satisfied, before bed and first thing in the morning. The young bride should wake up earlier than him, bath and be ready for him sexually. Nowhere in this conversation is there ever talk about her being happy, or sexually fulfilled. Nowhere in this conversation is her worth even mentioned. The wife's job is to serve, serve, serve regardless of whatever other obligations she has. If she is to get the help of a maid, the household help's obligations are also limited. The mother of the house should be seen working. Her worth as a real woman is marked by how hard she works. The impending consequence for failure to perform in any one of these areas guarantees replacement or an affair with a woman who can 'hold it together'. Maids have also been known to be contenders for their employer's position especially if she is good at her household chores. Some household helpers scoff at how useless the woman of the house is because she cannot clean and wash as well as they do. They are more 'woman' than she is. This is regardless of the fact that this woman possibly holds high academic accolades or she is a top executive in the market place.

At the bridal shower, the bride is advised that to keep her man she has to perform excellently at all levels. She should bring money into the household. If she does not have an '8 to 5' employment then she should find something to sell. At the same time, she should make sure the home is clean, food is cooked and ready to be served as soon as her husband gets home, the children should be clean and should not make any disturbing noise around their father when he arrives so he can unwind. The wife should always greet him at the door with a smile, hug him, relieve him of whatever he is holding in his hands (with the exception of his cellphone), take off his jacket and help him settle. As she does this the expectation is that she should be smartly dressed and groomed. If she works, she should make an effort to get home before him to ensure this warm reception otherwise the household help will do that and lure him to herself. The wife should make sure his clothes are well ironed, the buttons are all in place, she should prepare a lunch box for her husband to take to work so that he is provided for at the workplace. There are no obligations or requirements of the husband other than that of financial provision. He is thus subject to luring away from the wife and it is the wife's responsibility to ensure he stays with her. If the husband ever has an affair, the first question the Shona wife has to ask herself - or is asked - is what she did not do to keep him from straying. The culture does not require much from him.

I believe the men enjoy this current cultural set up. Who does not want someone fussing over him and meeting his needs with no requirement for reciprocity? There is no responsibility required of him except from providing. If he provides adequately financially the wife should count her blessings. There is no requirement for accountability between husband and wife. As long as the bride price is paid, the services should be delivered. What was intended as a token of gratitude to the bride's family becomes corrupted to a transactional service fee.

The friend I referred to at the beginning of this article knows she lost her marriage because she failed to sustain performance of the domestic chores and duties that her

[10] Referred to in the introductory case study.

husband is entitled according to the customary culture. After the divorce he moved back to Zimbabwe, found a job and has since remarried with children. Sometimes my friend regrets complaining and asking for help. She regrets challenging the cultural status quo because then she would still have the love of her life. She has not remarried. Looking through the cultural lens, it does not matter how much she will accomplish in the market place, she is a failure.

## Carriers of the Social Norms

The gender roles of the Shona wife have been perpetuated by the Shona woman herself. As a young woman is being prepared for marriage, her family gives her the advice she needs to be a good wife. This advice is generic in nature and is assumed will be relevant to meet the needs of any man. Nothing is done for the young man preparing for marriage. Once married, the extended family plays a significant role in monitoring the wives. The mothers-in-law, aunts, sisters to the husband and women from the bride's family are often the inspectors awarding and deducting points to the young wife based on her performance on each of the prescribed tasks. She cannot be found to falter on any task. Any failures will reflect badly on the family that raised her as it suggests they did not teach her well. It also justifies sanctions from her husband or the in-laws involved. The gatekeepers continue to perpetuate the perception of the wife as a super human with special abilities who should never get tired. Culture has been portrayed as unchanging and any attempts to alter or change the Shona culture is a disparagement of the culture.

## Sanctions for Contravention

A Shona wife who fails to fulfil her roles as prescribed and mandated by both the religious and cultural values may more often than not face sanctions or penalties for her failure. These sanctions include but are not limited to:

- Contempt from her in-laws.
- Divorce and replacement with another wife more capable of conforming to the required standard
- A husband having an affair. This is often accepted and justified by the wife's failure to make him happy or failure to perform any of the prescribed wifely tasks excellently
- A wife can be sent back to her parents' home for retraining. Often a family committee will meet and call the wife's paternal aunt to come and collect her. She can only return on condition that she has perfected where she is failing.

## Theory of Change: What can we do differently?

Most Shona husbands live like kings, but their wives are hardly ever queens, just the ladies in waiting whose terms of reference include conjugal rights. Life skills such as cooking and cleaning have been elevated to yardsticks that define the failure and successes of a woman as a wife and mother. He pays, she works. He makes the decisions, she submits and follows his lead. He manages the resources and has the final say even over the income she generates. The law may not be fully capable of entering the domestic arena, but work needs to be done to influence the socialisation of girls and boys in Zimbabwe.

There is a generation of Shona women which wants to preserve their marriages but also to shake off this status quo. If two people fall in love and marry, do they not form a team? On this team should not both members of the team do whatever it takes to make the team succeed? Why should the prescription of what one does on the team be determined by gender and not by abilities, skills and opportunities? My friend's husband[10] should have been able to help her around the home so they could meet each other halfway. Why should his identity and worth as a man be tied to what he does? He is a man by gender and his identity should be marked by his character and his treatment of his family, not by their respective activities or lifeskill based roles.

We cannot regulate legislatively how families are to run on a day to day basis. We can however influence the social permission[11] to reflect a progressive society where a family unit is formed and defined beyond the lifeskills acquired by each individual. This will begin with the requirement that the couple is given advice together on how to live and conduct themselves. The anticipation in doing this should be to allow dialogue between the two so they customise the advice to be relevant to both in line with their skill set and abilities.

I look forward to the day the bridal shower discourse changes the advice given to a young bride. A good wife and mother should not be qualified by how well she performs the household chores. A wife's identity is not household chores. Her happiness as a wife and mother should matter as much as that of her spouse and children. Mechanisms should be put in place by communities and their religious bodies to promote open dialogue between men and women, wives and husbands. It is only through this openness and dialogue that the culture will unlock some of its inequalities and bring change in the socialisation, education and expectations of the two genders and the roles.

[11] When society no longer allows a status quo to perpetuate.

## Book Review:
# *Fundamental Rights and Best Interests of the Child in Transnational Families*
### by Elizabetta Bergamini and Chiara Ragni, Intersentia Press

Independently mobile international couples choose to move. For better employment. For lifestyle. For retirement. To be with a loved one. The potential uncertainties and disadvantages of the new country are outweighed by the known advantages. Their choice.

Children do not have that choice. They move across borders, often although not always with one or both parents. They do not choose to reside in a regime or country where their rights may be less than their home country. Their say in the context of any parental abduction or relocation can still be fairly limited, and effectively non-existent in some countries. Although most countries now adopt a test of the best interests of the child in any family court proceedings, understanding and interpretation of what are those best interests vary dramatically. The child might also be involved in other proceedings such as immigration where different tests apply.

The UN Convention on the Rights of the Child has been highly successful in its normative influence on national and international laws. But there is so much still to be done for the children of our international families.

It might be thought that within Europe there would be far less issues, disagreements and disputes. A largely civil law region. 500 million citizens, or at least before the UK left. Notwithstanding some violent history, a huge amount of common heritages and cultures often sharing liberal enlightened values. First world countries with the resources to look after children and provide support for their well-being. An example for the rest of the world to follow. This is how it should be

This excellent book edited by Elizabetta Bergamini and Chiara Ragni, published by the resourceful Intersentia Press, shows what still has to be accomplished to further the fundamental rights and best interests of these international children with particular reference to Europe. The editors have gathered together a stellar cast of 16 top academics from Europe, primarily Italy but also the UK and the Netherlands, to cover these topics.

Europe sees an interplay of legislation from the Hague Conference, the European Union, the Council of Europe as well as the UN, coupled of course with the national law of the many European countries. These should reinforce each other and build up rights and protections. Often they do. Sometimes they don't with seriously adverse consequences. A strength of the book is looking at these interchanges. It asks quite fundamentally whether human rights and best interests of the child will always be in synergy and what should happen when there are conflicts within the family or with the state. The initial chapters cover the separate areas; right of free movement, family unification, asylum seeking and refugee status, expressing and hearing the wish of the child, so-called rainbow families and the right to an identity. None of these are easy. All of them are important for any child affected.

The second part of the book has an emphasis on Private International Law. This includes the intersection of private international law and human rights, surrogacy and adoption, the protection of rights in and after abduction, an examination of parental responsibility and the provisions of the Brussels Regulation. Although the entire book is written by leading academics, it's more likely this part will have a particular appeal for practitioners whether wanting to read more broadly on the topic or in respect of issues coming before the more senior courts. An increasing feature of national family justice systems at senior level, particularly Supreme Court or equivalent, is the tendency to look at other jurisdictions and other international instruments to reflect on the appropriate outcome, especially if based on the best interests test, in any particular case especially dealing with a matter of principle. I foresee this resourceful and well-balanced book referred to on a number of senior court judgements at national and international level.

Amongst the intra-Europe conflicts, perhaps none has been more obvious to the rest of the world than between the CJEU and the ECtHR in respect of the rights and best interests of a child in the Neulinger series of cases. They have caused consternation in common law jurisdictions outside of Europe, particularly USA and Australia. Inevitably they are dealt with in the book although I would have welcomed a greater analysis of these decisions and the rationale for them from an academic perspective. There has been much written from the law practitioner perception.

It is always a danger when a dozen or more leading authors in their field each contribute. The task of editing is huge. The editors are to be highly congratulated for channelling the various elements, the undoubted prescriptive demands on each author to stick within their boundaries and therefore the consequential overall text

Whatever else happens in the future of Europe, it must be hoped that Europe's children have their best interests looked after, a proper recognition for their human rights in their societies and for national and international legislatures continually to ask what more and better can be done for the children in international families

# International Family Law, Policy and Practice

## Submission of articles for publication in the journal *International Family Law , Policy and Practice*

The Editor and Editorial Board welcome the submission of articles from academics and practitioners for consideration for publication. All submissions are peer reviewed and should be original contributions, not already published or under consideration for publication elsewhere: authors should confirm this on submission (although material prepared for the Centre's own conferences and seminars may be accepted in suitably edited versions). Any guidance required may be obtained by contacting the Editor, (Frances Burton, at frb@frburton.com) before submission.

Each issue of *International Family Law, Policy and Practice* will be published on line and will be accessible through a link on the Centre's website. There will normally be three issues per annum, roughly coinciding with the standard legal and academic vacations (Spring: March-May depending on the date of Easter; Summer: August-September; and Winter: December-January). Copy deadlines will normally be three months prior to each issue. Certain issues may also be published in hard copy, for example, occasionally hard copy issues may be produced for commemorative purposes, such as to provide a collection of articles based on key conference papers in bound hard copy, but normally the policy is that provision of the online version only will enable the contents to be disseminated as widely as possible at least cost.

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Material should be supplied electronically, but in some cases where an article is more complex than usual a print out may be requested which should be mailed to the Editor, Frances Burton, at the production address to be supplied in each case NOT to the Centre as this may cause delay. If such a print out is required it should match the electronic version submitted EXACTLY, i.e. it should be printed off only when the electronic version is ready to be sent. Electronic submission should be by email attachment, which should be labelled clearly,giving the author's name and the article title. This should be repeated identically in the subject line of the email to which the article is attached. The document should be saved in PC compatible (".doc") format. Macintosh material should be submitted already converted for PC compatibility.

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stage and submitted by the requested deadline. Multiple proof corrections and late additional material MUCH increase the cost of production and will only (rarely and for good reason) be accepted at the discretion of the Editor. Upon any publication in hard copy each author will be sent a copy of that issue. Any offprints will be made available by arrangement. Where publication is on line only, authors will be expected to download copies of the journal or of individual articles required (including their own) directly from the journal portal. Payment will not at present be made for articles submitted, but this will be reviewed at a later date.

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## Tables/diagrams and similar

These are discouraged but if used should be provided electronically in a separate file from the text of the article submitted and it should be clearly indicated in the covering email where in the article such an item should appear.

## Headings

Other than the main title of the article, only headings which do substantially add to clarity of the text should be used, and their relative importance should be clearly indicated. Not more than three levels of headings should normally be used, employing larger and smaller size fonts and italics in that order.

## Quotations

Quotations should be indicated by single quotation marks, with double quotation marks for quotes within quotes. Where a quotation is longer than five or six lines it should be indented as a separate paragraph, with a line space above and below.

All quotations should be cited exactly as in the original and should not be converted to *International Family Law, Policy and Practice* house style. The source of the quotation should be given in a footnote, which should include a page reference where appropriate, alternatively the full library reference should be included.

## Cross-references (including in footnotes)

English terms (eg above/below) should be used rather than Latin (i.e. it is preferable NOT to use 'supra/infra' or 'ante/post' and similar terms where there is a suitable English alternative).

Cross-referencing should be kept to a minimum, and should be included as follows in the footnotes:

> Author, title of work + full reference, unless previously mentioned, in which case a shortened form of the reference may be used, e.g. (first mention) J Bloggs, *Title of work* (in italics) (Oxbridge University Press, 2010); (second mention) if repeating the reference - J Bloggs (2010) but if the reference is already directly above, - J Bloggs, above, p 000 will be sufficient, although it is accepted that some authors still use "ibid" despite having abandoned most other Latin terms.

Full case citations on each occasion, rather than cross-reference to an earlier footnote, are preferred. Please do not use End Notes (which impede reading and will have to be converted to footnotes by the typesetter) but footnotes only.

## Latin phrases and other non-English expressions

These should always be italicised unless they are so common that they have become wholly absorbed into everyday language, such as bona fide, i.e., c.f., ibid, et seq, op cit, etc.

## Abbreviations

If abbreviations are used they must be consistent. Long titles should be cited in full initially, followed by the abbreviation in brackets and double quotation marks, following which the abbreviation can then be used throughout.

Full points should not be used in abbreviations. Abbreviations should always be used for certain well known entities e.g. UK, USA, UN. Abbreviations which may not be familiar to overseas readers e.g. 'PRFD' for Principal Registry of the Family Division of the High Court of Justice, should be written out in full at first mention.

## Use of capital letters

Capital letters should be kept to a minimum, and should be used only when referring to a specific body, organisation or office. Statutes should always have capital letters eg Act, Bill, Convention, Schedule, Article.

Even well known Conventions should be given the full title when first mentioned, e.g. the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 may then be abbreviated to the European Convention. The United Nations Convention on the Rights of the Child should be referred to in full when first mentioned and may be abbreviated to UNCRC thereafter.

## Spellings

Words using 's' spellings should be used in preference to the 'z' versions.

## Full points

Full points should not be used in abbreviations.

## Dates

These should follow the usual legal publishers' format:

1 May 2010
2010–2011 (not 2010-11)

## Page references

These should be cited in full:

pp 100–102 (not pp 100–2)

## Numbers

Numbers from one to nine should be in words. Numbers from 10 onwards should be in numerals.

## Cases

The full case names without abbreviation should be italicised and given in the text the first time the case is mentioned; its citation should be given as a footnote. Full neutral citation, where available, should be given in the text the first time the case is cited along with the case name. Thereafter a well known abbreviation such as the Petitioner's or Appellant's surname is acceptable e.g. *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 should be cited in full when first

mentioned but may then be referred to as *Livesey* or *Livesey v Jenkins*. Where reference is to a particular page, the reference should be followed by a comma and 'at p 426'.

For English cases the citation should follow the hierarchy of reports accepted in court (in order of preference):

– The official law reports (AC, Ch, Fam, QBD); WLR; FLR; All ER
– For ECHR cases the citation should be (in order of preference) EHRR, FLR, other.
– Judgments of the Court of Justice of the European Communities should be cited by reference to the European Court Reports (ECR)

Other law reports have their own rules which should be followed as far as possible.

## Titles of judges

English judges should be referred to as eg Bodey J (not 'Bodey', still less 'Justice Bodey' though Mr Justice Bodey is permissible), Ward,LJ, Wall, P; Supreme Court Justices should be given their full titles throughout, e.g. Baroness Hale of Richmond, though Baroness Hale is permissible on a second or subsequent reference, and in connection with Supreme Court judgments Lady Hale is used when other members of that court are referred to as Lord Phillips, Lord Clarke etc. Judges in other jurisdictions must be given their correct titles for that jurisdiction.

## Legislation

References should be set out in full in the text:

Schedule 1 to the Children Act 1989
rule 4.1 of the Family Proceedings Rules 1991
Article 8 of the European Convention for the Protection of Human Rights1950 (European Convention)

and in abbreviated form in the footnotes, where the statute usually comes first and the precise reference to section, Schedule etc follows, e.g.

Children Act 1989, Sch 1
Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)
Art 8 of the European Convention

'Act' and 'Bill' should always have initial capitals.

## Command papers

The full title should be italicised and cited, as follows:

(Title) Cm 1000 (20--) NB Authors should check the precise citation of such papers the style of reference of which varies according to year of publication, and similarly with references to Hansard for Parliamentary material.

Contributions in edited books should be cited as eg J Bloggs, 'Chapter title' (unitalicised and enclosed in single quotation marks) in J Doe and K Doe (eds) 'Book title' (Oxbridge University Press, 2010) followed by a comma and 'at p 123'.

## Journals

Article titles, like the titles of contributors to edited books, should be in single quotation marks and not italicised. Common abbreviations of journals should be used
whenever possible, e.g.

J.Bloggs and J. Doe 'Title' [2010] Fam Law 200

However where the full name of a journal is used it should always be italicised.