Essays

Unioni Civili: Same-Sex Partnerships Law in Italy

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Abstract

This essay analyzes the main aspects of legge 20 May 2016 no 76, which allowed same-sex partnership in Italy. In particular, it seeks to reflect upon the elements that most differentiate the regulation of same-sex partnerships from that of marriages, in order to better understand whether these differences are entirely justified and reasonable. Further, the work aims to investigate the possible future rapprochement of the two institutions and the possibility of a future opening towards same-sex marriages in the Italian legal system.

I. Foreword. The Situation Before the Approval of Legge no 76 of 2016

Legge no 76/2016, allowing same-sex civil partnerships in Italy, entered into force on 5 June 2016. A year later, the topic remains controversial. The significant amount of scholarly commentary suggests that heated debates over non-juridical matters regarding same-sex partnerships are still ongoing.

This article seeks to encourage reflection upon the elements that most differentiate the regulation of same-sex partnerships from that of marriages, in order to better understand whether these differences are entirely justified and reasonable. Further the article wants to investigate the possible future rapprochement of the two institutions and the possibility of a future opening towards same-sex marriages in the Italian juridical system, as has been seen elsewhere.

Section 2 of the article outlines the most important aspects of the regulation of same-sex partnerships, while section 3 examines early scholarly reactions. In sections 4 and 5 it looks more deeply at some of the most controversial issues, paying particular attention to the most remarkable differences from the regulation of marriage. Finally, in section 6, it will analyze the modifications the matter underwent with the 'maxi-amendment' approval of January 2016 immediately before the adoption of the definitive text.

Certainly, the problem of the regulation of same-sex partnerships has been debated for quite some time now, and action on the matter could not wait any longer. Since the beginning of the 2000s, there were a series of draft laws that all sunk in Parliament while in other European countries and elsewhere, same-

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sex partnerships were accepted and, even though with different degrees of intensity, they found validation in many cases.

Italy has delayed legalization of same-sex partnerships mainly for cultural reasons. However, over time, the movement for the introduction of such regulations gained momentum, consensus, and political space. The contribution of supranational judgments was important, if not decisive, particularly European Court of Human Rights (ECHR) rulings regarding Arts 8, 12 and 14 of the European Convention on Human Rights regarding respect for private and family life, the right to marry and to found a family, and the prohibition of discrimination, respectively. These rights are also enshrined in Arts 7, 9 and 21 of the Treaty of Nice, which adopted structural reforms for the European Union.[1]

Italian legislators' inertia delayed the adoption of such regulations. In recent years, however, there have been several attempts – supported by repeated rulings in national and European courts regarding same-sex couples' rights – to remove the impasse by going directly to the judiciary. The judges, however, did not adopt a firm position on the matter, but strongly solicited Parliament to provide a solution.

The Constitutional Court, with judgment no 138 of 2010[2] (ruling on the legitimacy of the part of the norms of the Civil Code regarding marriages that disallow same-sex marriages), for the first time recognized that even same-sex couples are social formations protected by Art 2 of the Constitution. For this reason, members of the couple are granted the fundamental right to live freely in the condition of being a couple, obtaining juridical recognition within the boundaries of the law.

However, the Constitutional Court has also clarified that for this reason the aspiration towards this recognition cannot be made by merely declaring same-sex partnerships equivalent to marriages. Still, the Court established the possibility of intervening to protect specific situations in which there could be the need for an equal treatment of married and same-sex couples.

The ECHR's 2010 ruling in *Schalk and Kopf* v *Austria*[3] is similar to that of the Italian Constitutional Court with regard to interventions and attempts to combat discrimination on the basis of sexual orientation. The complainants, two Austrian citizens, alleged a violation of Arts 12 and 8 of the Convention (the right to marry and found a family and the right to respect for private and family

[1] For a comprehensive overview E. Crivelli, *La tutela dell'orientamento sessuale nella giurisprudenza interna ed europea* (Napoli: Edizioni Scientifiche Italiane, 2011), 73, 85; A. Schuster, *Le unioni fra persone dello stesso genere nel diritto comparato ed europeo*, in B. Pezzini and A. Lorenzetti eds, *Unioni e matrimoni* same-sex *dopo la sentenza 138 del 2010: quali prospettive?* (Napoli: Jovene, 2011), 255. For the previous part, read G. Ferrando, 'Il contributo della Corte europea dei diritti dell'uomo all'evoluzione del diritto di famiglia' *Nuova giurisprudenza civile commentata*, II, 263 (2005).

[2] Corte costituzionale 15 April 2010 no 138, *Foro italiano*, I, 1361 (2010).

[3] Eur. Court H.R., *Schalk and Kopf* v *Austria,* Judgment of 24 June 2010, *Nuova giurisprudenza civile commentata*, I, 1137 (2010).

life) because Austrian law did not allow them to get married. The ECHR clarified that Art 12 of the Convention must also protect the right to same-sex marriage; however, this right must be granted in compliance with the limits fixed in each national juridical system. In this way, it cannot be said that the States are required to introduce norms to protect this right. For the first time though, the Court affirmed that same-sex partnerships are protected under Art 8 of the Convention, and therefore they have been grouped under the family-like unions.

A growing body of cases citing *Schalk and Kopf* dealt with an even more complex and delicate problem: the recognition of same-sex partnerships formalized abroad. Such cases also gave rise to questions regarding freedom of movement of people.[4] The main problem was the denial of the retention of a family status for those who acquired it in other European countries.

The Court of Cassation was called upon to decide such a case in 2012 with judgment no 4184.[5]

In that case, the particular situation and the difficulty of 'squaring the circle' clearly emerged since the Court of Cassation, taking into account the *Schalk and Kopf* judgment, had to draw upon arguments that, in some parts, risked becoming mere dialectic artifices. This happened, for example, when the Court affirmed that a same-sex marriage validated abroad does exist juridically, but it is ineffective, and that the right of same-sex couples to marry should have been considered, in our judicial system, 'recognized but not granted'. Now, these differences are questionable, especially when discussing fundamental rights. However, these cases certainly demonstrate how hard it is to confront a phenomenon that has spread and is now acknowledged in all the judicial systems with which we share judiciary traditions. It is no coincidence that this ruling of the Court of Cassation, far from closing the debate, has been called upon to provide grounds also for subsequent decisions which, on the contrary, have admitted the validity of same-sex marriages celebrated abroad.[6]

[4] With regards to this, read M. Meli, 'Il matrimonio tra persone dello steso sesso: l'incidenza sul sistema interno delle fonti sovranazionali' *Nuova giurisprudenza civile commentata*, II, 451 (2012); V. Scalisi, '«Famiglia» e «famiglie» in Europa' *Rivista di diritto civile*, I, 21 (2013).

[5] Corte di Cassazione 15 March 2012 no 4184, *Famiglia e diritto*, 665 (2012).

[6] In particular, Tribunale di Grosseto 3 April 2014, *Giurisprudenza italiana*, 1610 (2014) accepted the appeal of a gay couple for the officialization of a marriage celebrated in New York. In the same way, Corte d'Appello di Napoli, decree 13 March 2015, *Quaderni di diritto e politica ecclesiastica*, 844 (2015); Corte d'Appello di Napoli, decree 8 July 2015, *Foro italiano*, I, 297 (2016), which accepted a claim of a lesbian couple for the officialization of a marriage celebrated in France reforming the decision of Tribunale di Avellino 9 October 2014; Tribunale di Grosseto, decree 26 February 2015, *Corriere giuridico*, 911 (2015); Tribunale di Milano 2 July 2014, *Diritto di famiglia*, 1528 (2014); Tribunale di Milano 17 July 2014, available at https://tinyurl.com/yayc2mae (last visited 25 November 2017); Tribunale di Pesaro 14 October 2014, 2 *articolo29.it*, 257 (2014); Tribunale di Pesaro 21 October 2014, *Guida al diritto*, 47, 15 (2014); Corte d'Appello di Milano 16 October 2015, *Nuova giurisprudenza civile commentata,* 725 (2016); Corte d'Appello di Milano 13 March 2015, 1 *articolo29.it*, 76 (2016); Corte d'Appello di Milano 9 November 2015, *Foro italiano*, I, 297 (2016); Corte d'Appello di Milano 10 December 2015, *Foro italiano*, I,

It is also important to note the Constitutional Court's judgment no 170 of 2014 regarding so-called 'imposed divorce' (the legal, automatic divorce in the case of a gender transition on the part of one of the spouses). The Court judged as constitutionally illegitimate the norm that imposed the dissolution of the marriage if the spouses did not want to dissolve the conjugal bond.[7]

Consequently, the Court of Cassation, in 2015 established 'the removal of the effects of the automatic dissolution of marriage vows'.[8] At that moment there was at least one fully juridically validated same-sex marriage (or partnership) in the Italian system. This situation created many problems. The worst case scenario when dealing with fundamental personal rights is handling similar cases unevenly.

Finally, the ECHR ruled again with the 2015 *Oliari* judgment.[9] The ECHR sanctioned Italy for a violation of Art 8 of the ECHR code because of its failure to grant the claimants, a same-sex couple, a juridical instrument that acknowledged their right to officialize their partnership.

After this ruling, it became clear that Italy could not waste any more time in legalizing same-sex partnerships.

II. Essential Traits of Same-Sex Partnerships Law

In this context, Parliament was requested to approve the Cirinnà bill. This bill acknowledged and consolidated other bills by re-elaborating them and introducing a system that included same-sex partnerships and cohabitation. It is important to note that while it was urgent to regulate same-sex partnerships, the need to officialize cohabitation was not urgent at all.

It will be interesting to observe how many times the new regulation regarding cohabitation will be used (it is not clear whether the automatic application of this new norm also happens without the willingness of the cohabitants or not).

After a complicated parliamentary process,[10] the Cirinnà Bill became legge no 76/2016, with a few important modifications. Much like Italian finance laws, this law is made up of one article divided into 69 paras. It is in part made up of norms often referring to the Civil Code or special legislation and in part of

338 (2016); Tribunale di Ascoli Piceno 17 December 2015, *Vita notarile*, 544 (2016) have all deemed legitimate the refusal of the officialization.

[7] Corte costituzionale 11 June 2014 no 170, *Foro italiano*, I, 2674 (2014). On this topic, see L. Bozzi, 'Mutamento di sesso di uno dei coniugi e «divorzio imposto»: diritto all'identità di genere vs paradigma della eterosessualità del matrimonio', *Nuova giurisprudenza civile commentata*, II, 233 (2014).

[8] Corte di Cassazione 21 April 2015 no 8097, *Foro italiano*, I, 2385 (2015).

[9] About this, see M. Trimarchi, 'Il disegno di legge sulle unioni civili e sulle convivenze: luci ed ombre' *jus.vitaepensiero.it*, 1 (2016); F. Romeo, M.C. Venuti, 'Relazioni affettive non matrimoniali: riflessioni a margine del d.d.l. in materia di regolamentazione delle unioni civili e disciplina delle convivenze' *Nuove leggi civili commentate*, 5, 971 (2015).

[10] Eur. Court H.R., *Oliari and others* v *Italy*, Judgment of 21 July 2015, *Foro italiano*, I, 2385 (2015).

amended provisions of other laws. Improvement of the text would be highly desirable.

Regarding the regulation of same-sex partnerships, the first drafts of the Cirinnà bill foresaw a regulation that very closely resembled traditional marriage. Many commentators observed that the differences between the two institutions were merely lexical. However, then, as it is known, things changed. While at the end of 2015 the text was quite similar to the original one, in January 2016 parliamentarians worked on the so-called 'maxi-amendment' which profoundly modified some parts of the bill.

The most remarkable issue is the clarification contained in the first paragraph where the legislation makes clear that same-sex partnerships are social units compliant with Arts 2 and 3 of the Constitution. The intention is clearly to exclude any link with Art 29 of the Constitution,[11] which recognizes and safeguards families founded on marriages. However, it must be considered that law sources are organized hierarchically in Italy. The source at a hierarchically lower level (in this case the State law) cannot exclude the application of a hierarchically superior source (in this case, the Constitution). Rather, we should ask whether the interests envisaged in the same-sex partnerships law are analogous to those in marriage law.[12]

Additionally, the final version of legge no 76/2016 regulates nullity of the partnership differently than marriage nullity: it removes a general referral to Arts 117 et seq of the Civil Code, and it specifies which articles it refers to, excluding Art 122. Specifically, the amended law (Art 1, paras 5-7) seeks to eliminate the reference to the presence of a sexual deviation as an error regarding the qualities of a person that legitimates the upholding of the validity of the act (Art

[11] The intent is even clearer by observing that the referral to Arts 2 and 3 of the Constitution is made explicit for same-sex partnerships and not for the unofficial co-habitations for which the same importance is given for granted.

[12] On this topic G. Ballarani, 'La legge sulle unioni civili e sulla disciplina delle convivenze di fatto. Una prima lettura critica' *Diritto delle successioni e della famiglia*, 623 (2016). The construction of the author, however, is not sharable when he claims the juxtaposition between the axiological foundation of the same-sex partnership and the one of the marriage. This happens because 'while the protection granted by law to the same-sex partners with Art 2 of the Constitution (…) it is directed towards the individual, disregarding if the individual is considered as part of a context where their personality takes place, the object of their constitutional rights in a family environment cannot be elicited only in the rights of each member of the family but also and most of all in the whole familiar community itself, in a perspective of rights' protection not only of the individuals but also super-individuals'. The analysis concludes that 'Art 29 recalls explicitly the general interest of the State towards family unity which, ultimately, is the reason for *favor matrimonii* and specifically, the protection of the spouse *status*'. On the other hand, quite some time ago the best scholars have clarified that the family is 'protected by the Constitution (Art 29, para 1) not as bearer of superior and over-individual interests, but as the place where the person develops themselves (Art 2 Constitution)', P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 919. Therefore, it is not in an non-existing over-individual interest that one must search the justification for an axiological foundation of the marriage and the registered partnership.

122 Civil Code).[13] The obligation of faithfulness in personal relationships is removed (para 11). With regard to the dissolution of the partnership, the law recalls only part of the norms established for marriages (paras 22-25). Legge no 76/2016 does not provide for separation; it allows the applicability of the divorce law, but it does not include prolonged separation among valid causes. There is, however, a new reason for the dissolution of the partnership which is the unilateral decision of one of the partners. The partner who wants to dissolve the partnership can file a divorce request to the Court or resort to one of extrajudicial management methods for family crises. Para 20 is crucial. It removes the stepchild adoption which was initially included; this issue monopolized political debates even before the approval of the law.

In the end, we have a new family model. Not only a social model but also a juridical one.[14]

It seems that lawmakers of legge no 76/2016 carefully avoided the use of the word 'family'. They included it only once, in para 12, where the parties agree upon the chosen dwelling for family life. The impression, once more, is that there was a strong need to distinguish same-sex partnerships from families as natural gatherings as per Art 29 of the Constitution.[15] However, taking into consideration the indications of the 2010 judgment of the Constitutional Court, there is no doubt that same-sex partnership confers a new family status:[16] marriage is not the exclusive way to formalize a relationship anymore.

If we consider these norms together with the parenthood reform (which must be done),[17] we have to acknowledge that the traditional relationship is inverted. Before this law, we only had one institution allowing the formalization of the relationship of a couple and many parenthood statuses. Now we have the opposite situation: a partnership can be formalized by several juridical institutions while there is only one parenthood status.

Undoubtedly, there was a clear intent to protect the primacy of the heterosexual

[13] This is probably the most grotesque aspect of the 'maxi-amendment': as pointed out by F. Dell'Anna Misurale, 'Unioni civili tra diritto e pregiudizio. Prima lettura del nuovo testo di legge' *giustiziacivile.com*, 27 June 2016, 12, 'One gets the impression that the lawmaker wanted to confuse sexual preference with sexual deviation'. About this, also read V. Barba, 'Unione civile e impugnazione per errore sulle qualità personali' *Diritto delle successioni e della famiglia*, 315 (2016).

[14] G. Ferrando, 'Le unioni civili. Prime impressioni sulla riforma' 2 *articolo29.it*, 6, 16 (2016).

[15] About this, read T. Auletta, 'Disciplina delle unioni non fondate sul matrimonio: evoluzione o morte della famiglia?' *Nuove leggi civili commentate*, 3, 367, 377 (2016).

[16] G. Casaburi, 'La costituzione dell'unione civile tra persone dello stesso sesso' 2 *articolo29.it*, 62, 64 (2016). In an opposite way G. Ballarani, n 12 above, 628.

[17] The parenthood reform, enshrined in legge no 219 of 2012 and in the decreto legislativo 28 December 2013 no 154, has definitively granted equal status to children born *in marriage* and those born *out of marriage*, erasing even the lexical distinction between legitimate and natural children. The new Art 315 Civil Code states that 'all children have the same legal status'. On the subject, see P. Morozzo della Rocca, *La nuova disciplina della filiazione* (Bologna: Maggioli Editore, 2015).

marriage and to create a parallel, secondary path to access family status for homosexual couples which are qualified (only) as distinct social formations.

Nevertheless, accepting the distinction on a social basis, it is necessary to ask how much the two phenomena are indeed distinct on an interest basis. The answer to this question will determine what might happen in the future. We should not forget that other countries, in particular, the ones that have juridical systems similar to the Italian one, adopted the secondary path solution. This solution provided a temporary phase which then led, within a few years, to a regulation of same-sex marriages identical to the traditional marriage; such was the case, for example, in France, Spain, and Germany. This process happened in these countries in part because there was a series of rulings by constitutional judges who based their decisions on the similar interests of same-sex partners and married individuals, and found that discrimination could not be permitted in the face of similar interests.

Thus it is important to understand if the structural difference, basically a gender difference, can be translated into a functional and teleological difference and, for this reason, justify different legal treatment. From this point of view, on the one hand, the Constitutional Court's warning in judgment no 138 of 2010 should be taken into account. On the other hand, we must recognize that we are confronted with rules that, even if we consider different axiological referrals (since Art 29 of the Constitution is not mentioned in the law), appear to be almost identical.[18]

III. Scholars' First Reactions

To simplify, by observing how interpreters act when dealing with legge no 76/2016, we can point out two trends. The first is to lessen the importance of the differences between marriages and same-sex partnerships since lawmakers were anxious to diversify and to avoid equating the two institutions.[19]

The second trend seeks to highlight such differences. Sometimes, the champions of this trend tend to exaggerate, as in instances when they write that

> 'it is necessary to get rid of a merely critical and axiological approach which would bring to a sterile stigmatization of the law. At the same time, it is also necessary to avoid a corrective interpretation (…) not justified by the presence of a text that has to be correctly interpreted to preserve its purpose'.[20]

[18] About this topic read the reflection by P. Schlesinger, 'La legge sulle unioni civili e la disciplina delle convivenze' *Famiglia e diritto*, 845 (2016).

[19] M. Dogliotti, 'Dal concubinato alle unioni civili e alle convivenze (o famiglie?) di fatto' *Famiglia e diritto*, 868 (2016).

[20] R. Fadda, 'Le unioni civili e il matrimonio: vincoli a confronto' *Nuova giurisprudenza civile commentata*, 1386, 1393 (2016); G. Ballarani, n 12 above, 623, is not embraceable since,

This approach is not acceptable since it is linked to the intention of the legislators and, in particular, to the intentions of the legislators of the so-called maxi-amendment.

An in-depth analysis of legge no 76/2016 helps us to understand that, among the several differences in regulation between same-sex partnerships and marriages, some, instead of depending on the particularities of same-sex relations, represent to a certain extent more modern and advanced normative options which could be used for heterosexual couples as well. For other differences, it is evident that they are politically tied to the fact that they deal with same-sex couples. Finally, there are other disputable aspects.

IV. The Problem of the Applicability of Arts 78 e 108 Civil Code to Same-Sex Partnerships

While focusing on these last aspects, we must recall that para 20 of Art 1, legge no 76/2016, on the one hand, establishes that norms contained in special laws (not included in the Civil Code) related to marriage must also be applied to same-sex partnerships. On the other hand, this extension does not apply to 'the norms of the civil code that are not mentioned in this law and (…) for the dispositions of Law 4 May 1983 no 184' (adoption law).[21]

Among the Civil Code norms that are expressly applicable to same-sex partnerships, there are some notable omissions: eg, Art 78 Civil Code is not mentioned so that the relationship between one of the partners and the relatives of the other does not have juridical importance. In this regard, it has been observed that same-sex partnerships have effects which are strictly tied to the couple while the condition of being a 'relative in law' is a feature of marriages.[22]

Further, in the norms regulating the celebration (more correctly 'constitution') of same-sex partnerships, which are simpler than the marriage ones, there is no mention of Art 108 Civil Code which forbids the insertion of terms and conditions, such that scholars have considered the possibility of a conditional same-sex

for example, he denies that the same-sex partnership assigns a *status* to its members (628) and excludes the nature of a non patrimonial agreement of the registered partnership deed, stating the need to 'reflect upon the possible greater ascribability of same-sex partnerships to the rules governing patrimonial agreements between members. In other words the same-sex partnership can be a mere contract' (642).

[21] With regards to this, the proposal of V. Barba, 'Unione civile e adozione' *Famiglia e diritto*, 381 (2017), is quite interesting. He underlines how the limitation posed by the second paragraph of para 20 has the mere effect to exclude, for the norms of the Civil Code and of the Adoption Law, the functioning of the 'normo-genetic mechanism', in other words the creation for members of same-sex partnerships of norms identical to the ones established for spouses, but it does not exclude an analogical application of the same norms.

[22] M. Sesta, 'La disciplina dell'unione civile tra tutela dei diritti della persona e creazione di un nuovo modello familiare' *Famiglia e diritto*, 881, 885 (2016).

partnership.[23]

Indeed, these omissions look more like an oversight[24] rather than an informed choice of the lawmaker, so that the most appropriate solution would be a corrective interpretation, or, in case it is deemed impossible, to be ruled constitutionally illegitimate. In particular, the condition of being a relative in law represents a consequence-laden issue either for internal relationships (among relatives in law) and external ones (towards third parties). For internal relationships, this omission has effects, not only for the discipline of alimony (Arts 433 and following of the Civil Code) but also the rules concerning the so-called 'Imprese familiari' (family ran businesses, Art 230 bis Civil Code). As regards the impact of the condition of being a relative in law for third parties, for example, the relationship might be a reason for restraint from a public tender where there is a relationship between participants and members of the judging committee. In all these hypotheses, denying the juridical relevance of relations among relatives of one of the partners and the other partner of a same-sex partnership in a situation of substantial identity of interests causes obvious problems of equal treatment.

Finally, with regard to the application of terms and conditions, we can opt for an interpretation which prohibits their insertion in same-sex partnerships even without an explicit reference to Art 108 Civil Code because of the nature of the interests we are dealing with.

V. Regulations Regarding Surnames and the Dissolution of the Partnership

Some details of the regulation of same-sex partnerships appear to be more advanced compared to the ones of marriage. Among these details, one can include the subject of the common family name,[25] which, in same-sex partnerships can be freely chosen by the partners.[26] This diversity of solutions could have easily posed legitimacy problems pertaining to the Constitution and Art 143 *bis* Civil Code. This article provides that in marriages the wife may add to her family name her husband's family name, but it does not allow for the opposite. This situation partly changed with the recent introduction of decreto legislativo 19 January 2017 no 5, which introduced modifications and additions to marital status. It gave a restrictive interpretation of Art 1, para 10 of legge no 76/2016, establishing that the common family name choice would not imply any General Registry formality. The arguments given by the Government for this restrictive interpretation do

[23] M. Trimarchi, 'Unioni civili e convivenze' *Famiglia e diritto*, 859, 864 (2016).

[24] In relation with the missed link to Art 108, ibid 859, 864 points it out that, only in a subordinate way, norm legitimacy doubt arises.

[25] Highlighted by M. Dogliotti, n 19 above, 880.

[26] On this topic, M.N. Bugetti, 'Il cognome comune delle persone unite civilmente' *Famiglia e diritto*, 911 (2016).

not seem to have a firm foundation. It is likely that the regulation might undergo amendments by the Constitutional Court.

In certain respects the regulation of the dissolution of the partnership also seems to be more up to date. The law on same-sex partnership does not envisage a separation: in marriages, the two-step process – separation/divorce – made sense when it required seven and then five years of separation to be able to divorce. Nowadays, in case of consensual separation, six months are enough to apply for divorce (Art 3, divorce law). The regulation of registered partnerships eliminates the requirement of separation and establishes a three-month period after the unilateral decision to end the relationship. This represents a simplification which effortlessly lightens the burden Courts have to deal with.

VI. The Developments Following the 'Maxi-Amendment'. In Particular, the Repeal of the Duty of Fidelity and Stepchild Adoptions

The most sensitive elements of the discussion are the ones discussed in the so-called maxi-amendment: the duty of fidelity; the problem of eliminating sexual deviation as a cause of error; and the elimination of stepchild adoption. These topics will trigger the real debate about the functional diversity of the two institutions. These items will determine the possibility of a further rapprochement of the relevant regulations, or they might eventually push towards real same-sex marriages.[27]

The majority of scholars and judges are of the opinion that the duty of fidelity must not be tied to sexual fidelity. Rather the primary consideration is what consolidates the common life of the couple. It is what reinforces family harmony, and in this sense, it represents the motivation to participation, to solidarity and as such it is similar to the duty of a more moral than material assistance (which remains in the same-sex partnership as per legge no 76/2016).[28]

Some scholars argued that the removal of the fidelity duty for same-sex partnerships is justified because this duty should be intended as directed not only towards the other spouse but also towards the entire family community including children. In this understanding it constitutes a duty of coherence towards a bond like marriage which is naturally directed towards procreation, even in an abstract way.[29]

This proposal is confusing. Indeed, it is not methodologically correct to modify the interpretation of the duty established by Art 143 Civil Code because it is not extended over same-sex partnerships. Not to mention that children can also be present in same-sex partnerships, as discussed further below.

It thus makes more sense to adopt the opinion of those who argue that the

[27] M. Sesta, n 22 above, 888, does not exclude this possibility.
[28] M. Dogliotti, n 19 above, 879.
[29] R. Fadda, n 20 above, 1393.

duty of fidelity exists in same-sex partnerships since it must be thought as a form of solidarity, respect, and dignity.[30] Furthermore, it is undoubtable that the violation of the duty of fidelity is important as a possible cause of indemnifiable family-limited damages.[31] Moreover, since divorce law applies to same-sex partnerships, the breach of the duty of fidelity might become a parameter to calculate alimony.

The need for some political parties to differentiate between marriages and same-sex partnerships has led to the exclusion of stepchild adoption, which was included in a previous version of the bill.

The harsh political debate resulted in the introduction of para 20 which is a perfect symbol of lawmaker's psychodrama. In a first sentence it affirms the applicability of the norms made for married couples to same-sex partnerships. Then, the following sentence excludes the automatic extension over same-sex partnerships of norms for spouses in adoption law. Finally, it affirms 'what is provided and allowed by in-force regulations regarding adoptions'. The result is that the courts, which have started admitting adoptions by same-sex couples since 2014, still do it, and after the entry into force of legge no 76/2016, they also received the backing of the Court of Cassation.[32]

Moreover, validation of birth certificates with same-sex parents are increasing, and this leads to an opening of surrogate maternity and makes same-sex parenthood a widespread phenomenon. Further, theoretically, it is possible that partners might have common biological children: this might happen in the case of a 'conversion' of the marriage into a same-sex partnership in compliance with Art 1, para 27, legge no 76/2016.

The idea that same-sex partnerships must necessarily be families without children does not have substantial grounds. Therefore, it will likely be eliminated.

VII. Conclusions

[30] M. Dogliotti, n 19 above, 879; E. Falletti, 'Quando l'assenza è più forte di una presenza: lo stralcio del dovere di fedeltà tra matrimonio e unione civile' 2 *articolo29.it*, 131 (2016).

[31] T. Auletta, n 15 above, 384.

[32] For an extended dissertation of the topic of the adoption in same-sex families, as well as for all the other references, please see N. Cipriani, 'Le adozioni nelle famiglie omogenitoriali in Italia dopo la l. n. 76 del 2016', in B.E. Hernández-Truyol and R. Virzo eds, *Orientamento sessuale, identità di genere e tutela dei minori. Profili di diritto internazionale e di diritto comparato* (Napoli: Edizioni Scientifiche Italiane, 2016), 249; also see R. Pane, 'Unioni *same-sex* e adozioni in casi particolari', in Id, *Orientamento sessuale, identità di genere e tutela dei minori. Profili di diritto internazionale e di diritto comparato* (Napoli: Edizioni Scientifiche Italiane, 2016), 221. Further, see also the reflection of V. Barba, *Unione civile e adozione* n 21 above, 386, who, once affirmed the possible analogical application to members of registered partnerships of norms made with reference to spouses in special laws, and therefore to Adoption Law, does not deem existing juridical obstacles (except the verifying also with a psycho-pedagogical investigation, the existence of an interest of the minor) also for the access to legitimating adoptions by same-sex couples.

These latter considerations focus on the crucial point of the relation between same-sex partnerships and marriages. The potential presence of children constitutes the most significant issue regarding the establishment of family interests and also concerning the possible functional diversity between same-sex partnerships and marriages that might justify regulation differences.

It is a widespread opinion that a particularly important element of Art 29 of the Constitution is represented by para 2, where there is a reference to the need to guarantee family unity. In this perspective, the family that originates from the marriage is considered as bound to have children. This element cannot be found in same-sex partnership regulations. Moreover, this might explain not only the elimination of the duty of fidelity but also the absence of the responsibility of collaborating in the interest of the family as well as the greater ease in dissolving the relationship.[33]

This perspective surely encompasses an important item that must, however, be treated with extreme caution. Not only because parenthood is not essential in marriage but also, as we have seen, because parenthood cannot be excluded in same-sex partnerships.

Rather, more importantly, the centrality of parenthood in the structure and function of the married family has been diluted by the parenthood reform of 2012-13. The reform eliminated the distinction between legitimate family and the natural family, thus partially nullifying the contents of para 3 of Art 30 of the Constitution.

In other words, the parenthood reform has shifted the focal point of the regulations of couple relationships. At the moment of the codification (1942), and even in the Constitution itself (1948), as well as in the 1975 reform, the married family constituted the natural environment in which parenthood could be established. Therefore, the marriage regulation was naturally full of rules that related to the responsibility towards children. This intertwined relationship has been called the two-way bond between marriage and parenthood.[34] Nowadays, the terms of this relationship have changed. Responsibility towards children is not tied to the social or juridical model that regulates the relationship between parents. This makes it understandable that the regulation of relationships between couples mainly regards the couple not because the presence of children is irrelevant but because it has its own regulation, free from the typology and the grade of officialization of the relationship among parents.

If this is the case, when focusing on couple relationships, the differences between sets of interests of same-sex partnerships and marriage decrease significantly. Consequently, it is not unlikely that legge no 76/2016 might become the first step towards a further regulation of same-sex partnerships and towards

[33] For example, G. Ballarani, n 12 above, 636.

[34] P. Zatti, 'Tradizione e innovazione nel diritto di famiglia', in Id, *Trattato di diritto di famiglia* (Milano: Giuffrè, 2nd ed, 2011), I, 1, 5.

their gradual equalization to marriage.