

# Children Born Out of Wedlock: The End of an Anachronistic Discrimination

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### Abstract

After a historical and comparative overview regarding the discrimination of children in the perspective of the European Court for Human Rights, the aim of the paper is to examine an important shift that international standards and conventions have recently brought about in the Italian landscape of filiation: the Italian law reform 2012-13, which is designed to abolish the legal disabilities of all children born from both married and non-married parents. The analysis takes into account the implications entailed by other interventions of the Italian legislator that regulated the variations of society, gradually overcoming the use of obsolete terms. In this study, we ask the question if the combination of old and new legal reforms has entirely resolved the problems tied to the children's legal status.

## I. An overview regarding the discrimination of children in the European perspective

From the 1800s until the early mid 1900s, in many European countries, an unequal treatment of children on the basis of the child's birth prevailed.

In the majority of these jurisdictions, if the children were born within wedlock, only the father was the legal holder of parental responsibilities, on the assumption of his superiority to the mother.<sup>1</sup> On the contrary, if the children were born out of wedlock, parental

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<sup>1</sup> The married parents were placed on equal footing – with automatic and equal parental rights over their children – in Italy in 1948, in Germany in 1949, in the Netherlands in 1947, in France in 1970, in Spain in 1978, in Greece in 1983.

responsibilities belonged to the mother, with the exclusion of the father.

One argument for the discrimination was that illegitimacy was instrumental in buttressing the institution of marriage; it was thought that an illegitimate child brought disgrace on the mother and her family and could not be recognised as a member of her family.

During the second half of the twentieth century, the distinction between children born to married and unmarried parents was gradually abandoned in almost all the European jurisdictions, especially, due to the influence of the European Convention on Human Rights<sup>2</sup> and its applications by the European court in Strasbourg.<sup>3</sup>

According to Art 12 of the European Convention on Human Rights, 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'. This norm was initially interpreted as an expression of the concept of family based on marriage and, thus, non marital children were considered morally unacceptable.

We have to go back to 1979 to find the first case addressed by the European Court for Human Rights with a new approach referred to non marital children. At that time, the European court of Strasbourg made the ruling *Marckx against Belgium*,<sup>4</sup> according to which, the Belgian law infringed the right to private and family life (Art 8, taken in conjunction with Art 14, of the European Convention) when precluded inheritance rights for illegitimate children.

<sup>2</sup> The European Convention on Human Rights and Fundamental Freedoms was signed by the member States of the Council of Europe in Rome on 4 November 1950 and was ratified by the Italian State with a law enacted in 1955.

<sup>3</sup> G. Ferrando, 'Genitori e figli nella giurisprudenza della Corte Europea dei diritti dell'uomo' *Famiglia e diritto*, 1049 (2009); V. Zagrebelsky, 'Corte, convenzione europea dei diritti dell'uomo e sistema europeo di protezione dei diritti fondamentali' *Foro italiano*, IV, 353 (2006); J. Long, 'La Convenzione europea dei diritti dell'uomo e il diritto italiano della famiglia', in P. Zatti ed, *Trattato di diritto di famiglia* (Milano: Giuffrè, 2006), 1.

<sup>4</sup> Eur. Court H.R., *Marckx v. Belgium*, Judgment of 13 June 1979, *Rivista di diritto internazionale*, 233 (1980). For a comment, see F. Uccella, 'La giurisprudenza della Corte europea dei diritti dell'uomo su alcune tematiche del diritto di famiglia e suo rilievo per la disciplina interna' *Giurisprudenza italiana*, IV, 128 (1997).

The illegitimate child was Alexandra Marckx, daughter of Paula Marckx, an unmarried woman who recognized and adopted the child in accordance with the Belgian civil code, under which no legal bond between an unmarried woman and her child resulted from the mere fact of the birth.

Article 8 of the European Convention makes no distinction between legitimate and illegitimate children and provides that: 'Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the protection of the rights and freedoms of others'.

With the decision *Marckx against Belgium*, the European court of Strasbourg confirmed that Art 8 applies both to 'illegitimate' and 'legitimate' family and established that the protection of family life out of marriage had to be extended over the strict area of relationships between parents and child, involving also other relatives, with consequent rights of succession between grandchildren and grandparents. Hence, children born out of marriage could not be considered strangers to their parents' family, having the same inheritance rights as children born within the marriage.

Nevertheless, in various European countries, relationships with non marital children were not protected to the same extent as marital family relationships. In particular, they were precluded from inheriting because considered threatening pretenders to the family's property.

In Great Britain, discriminating treatment regarding illegitimate children by the common law progressed for a long time. As a result, the United States, Canada and Australia followed suit.<sup>5</sup>

In time, the traditional rule condemning these children was discarded in Great Britain, but an unmarried father could only acquire parental rights through specific means enumerated by

<sup>5</sup> C. Retter, 'Introducing The Next Class Of Bastard: An Assessment Of The Definitional Implications Of The Succession Law Reform Act For After-Born Children' *Canadian Journal of Family Law*, 147 (2011).

Children Act in 1989; these means were, basically, marriage or a court order.<sup>6</sup> Eventually, with the Children Act 2002, parental responsibility was given to all those unmarried fathers who registered the birth of their children on the basis of a formal agreement with the mother.

Looking at other decisions released by the European court of Strasbourg, we notice an interesting French case: *Mazurek against France* in 2000 resulted in the violation of Arts 8 and 14 of the Convention by France, which discriminated children born out of wedlock, by giving them only half of the inheritance given to legitimate children.<sup>7</sup>

Article 14 (Principle of discrimination) of the Convention provides that: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

In the case *Mazurek against France*, upon his mother's death, his brother, (the legitimate son) wanted to give him only a quarter of their mother's estate and thus, Mazurek made several attempts to assert inheritance rights in the national courts. The French Court of Cassation refused Mazurek's appeal, who, then, decided to resort to the European court of Strasbourg, claiming the same right of succession as the legitimate child. The court of Strasbourg found a violation of the Convention's principle of discrimination, because France had treated people in the same situation differently, without justifiable reasons.

This decision induced the French legislator to enact law no 1135 on 3 December 2001, in order to establish the equality between legitimate and natural children; but only after the *Ordonnance* no 2005-759 dated 4 July 2005,<sup>8</sup> the different terminology was definitively cancelled in the law 2009.

Under the German law 1969, children born out of wedlock were

<sup>6</sup> See, generally, Rt. Hon. Mrs Justice Hale, DBE, 'The 8<sup>th</sup> ESRC Annual Lecture 1997' 20 *Journal of Social Welfare and Family Law*, 125 (1998).

<sup>7</sup> Eur. Court H.R., *Mazurek v. France*, Judgment of 1 February 2000 (App no 34406/97), available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it).

<sup>8</sup> In general, see S. Patti and M.G. Cubeddu, *Introduzione al diritto di famiglia in Europa* (Milano: Giuffrè, 2008), 359.

still discriminated, at multiple levels.

With the German Reform 1997 the situation changed, but a disadvantage remained with regard to illegitimate children born before 1949. Even if recognized by their parents, those children could not be their statutory heirs. This unjust regulation induced the European court of Strasbourg to grant the request of *Brauer against Germany* in 2009.<sup>9</sup>

Mrs Brauer was born in 1948 out of marriage and immediately recognized by her father. She lived in the former German Republic until 1989, while her father lived in the Federal Republic of Germany. Both before and after the reunification of Germany, father and daughter had had regular contact. When the father died in 1998, Mrs Brauer applied for a certificate of inheritance attesting that she was entitled to at least half of her father's estate. The application was unsuccessful and she made an appeal to the European court of Strasbourg: she claimed that her exclusion from any entitlement to his estate was disproportionate. The court did not find any ground on which such discrimination could be justified and, therefore, declared the violation of Art 14 of the Convention, taken in conjunction with Art 8.

Despite this progress, the exclusion from inheritance of children born out of marriage before 1949, remained in force in Germany until law 12 April 2011, where eventually their legal status became equivalent to that of children born within marriage.

## **II. The initial developments of the Italian family law in the field of filiation**

Like other European nations, the Italian society has evolved gradually.

The first step towards the non-discrimination of illegitimate children was made in 1948 by the proclamation of the Constitution, according to which parents have the same rights and obligations with

<sup>9</sup> Eur. Court H.R., *Brauer v. Germany*, Judgment of 28 May 2009 (App no 3545/04); Eur. Court H.R., *Anayo v. Germany*, Judgment of 21 December 2010 (App no 20578/07), both available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it).

respect to their children, even if born out of wedlock (Art 30 Constitution).

Nevertheless, the old text of the Italian civil code – dated 1942 – reflected archaic prejudices and discriminated children of unmarried parents in several ways.

Firstly, they were punished with the legal name of ‘illegitimate’ or ‘adulterine’ and were precluded from inheriting property from their parents.

Secondly, they were deemed to be ‘nobody’s children’ and the civil code did not recognize a relationship with them except when parental rights and duties were conferred through legitimisation by subsequent marriage between the mother and the father.

In order to fight against this unjustifiable situation, the member States of the European Council signed in 1975 the European Convention on the Legal Status of Children born out of Wedlock,<sup>10</sup> according to which maternal affiliation of every child born out of wedlock should be based ‘solely on the fact of the birth of the child’ (Art 2). This Convention served as a frame of reference and inspiration for national legislators and the adoption of certain common rules concerning children born out of wedlock contributed to a harmonisation among the laws of the member States.

Thus, the content of family law has been transformed in all European systems, included Italy, adopting a more child law-centred approach on an international scale.<sup>11</sup> This legal evolution is also due

<sup>10</sup> The European Convention on the Legal Status of Children born out of Wedlock was signed by the member States of the Council of Europe in Strasbourg on 15 October 1975. This Convention aims to achieve total equality between children born in wedlock and those born out of wedlock in respect of relations with their parents, integration into each parent’s family and inheritance rights.

<sup>11</sup> G. Piepoli, ‘Individuo e gruppi sociali. Il gruppo familiare’, in N. Lipari ed, *Diritto privato. Una ricerca per l’insegnamento* (Bari: Laterza, 1974), 173; P. Rescigno, ‘Il diritto di famiglia a un ventennio dalla riforma’ *Rivista di diritto civile*, I, 109 (1988); V. Roppo and A.M. Benedetti, ‘Famiglia, III) Famiglia di fatto’, *Enciclopedia giuridica* (Roma: Treccani, 1999) vol XV, 1; M. Dogliotti, ‘Famiglia di fatto’, *Digesto discipline privatistiche, Sezione civile* (Torino: Utet, 1992) vol VIII, 188; E. Del Prato, ‘Patti di convivenza’ *Familia*, 959 (2002); A. Scalisi, ‘La famiglia nella cultura del nostro tempo’ *Diritto di famiglia e delle persone*, 701 (2002); C.M. Bianca, *La famiglia, Diritto civile* (Milano: Giuffrè, 2014) vol 2.1, 3; P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 673; F. D’Agostino, ‘Riconoscere

to the fundamental role played by the authority of the case-law and the dialogue between the European court of Strasbourg and the Italian courts, in order to safeguard the human rights and improve the tools for their protection.<sup>12</sup> Through this method,<sup>13</sup> which aims at approaching different judgements in giving interpretations of the norms, in accordance with the European Convention for Human Rights, the promotion of the system's consistency and its compliance with the Constitution can be achieved.

As first great Italian family reform, the law dated 1975 abolished the legal designation of 'adulterine' and 'illegitimate' children and made the possibility of the unmarried couples to obtain parental responsibilities under certain conditions to become a reality.

Since then, the Italian State guaranteed the recognition of paternity and maternity through adequate legal means based on mandatory provisions.<sup>14</sup> From that moment on, the filiation of every child born out of wedlock could be established by voluntary acknowledgement or judicial decision. As a consequence, the child acquired the status of 'natural recognized' child and both parents had the same responsibilities towards him, as if he was born in wedlock.

The acknowledgment always requires a public form as it must be included in the birth certificate or made by a specific declaration written in the Registry of Civil Status or in a will or in another public document. If nobody acknowledges the child, he results to be a 'child of no one' without any kinship relation, but he can initiate a legal action to ascertain maternity or paternity even against the will of the concerned parent.

le convivenze?' *Iustitia*, 1 (2006); F. Prospero, 'La famiglia nell'ordinamento giuridico' *Diritto di famiglia e delle persone*, 790 (2008); A. Palazzo, 'Matrimonio e convivenze' *Diritto di famiglia e delle persone*, 1300 (2009).

<sup>12</sup> Reference is made to a prominent school of thought. In particular, see P. Perlingieri, *Leale collaborazione tra Corte Costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008), 54-64; L. Ruggeri ed, *Giurisprudenza della Corte Europea dei Diritti dell'Uomo e influenza sul diritto interno* (Napoli: Edizioni Scientifiche Italiane, 2009), *passim*.

<sup>13</sup> P. Perlingieri, 'Il principio di legalità nel diritto civile' *Rassegna di diritto civile*, 164-201 (2010).

<sup>14</sup> R. Pane, 'Il nuovo diritto di filiazione tra modernità e tradizione', in R. Pane ed, *Nuove frontiere della famiglia. La riforma della filiazione* (Napoli: Edizioni Scientifiche Italiane, 2014), 17.

In spite of the achievement obtained through the Reform 1975, the status of children born out of wedlock was still inadequate and required further expansion of the regulations.

Precisely, the Reform was not totally in compliance with the Italian Constitution, that claims the principle of parental responsibility for the solely fact of procreation.

The Reform 1975 did not remove all the discriminations, because the general rule of legal equality between children, regardless of the status of their parents, was subjected to some exceptions.

Firstly, a disadvantage was that children born out of marriage could be obliged to take the settlement of their inheritance in the form of equivalent value if the children born within marriage so desired and chose to give them the money or some real estate property.

Another privilege was granted in favour of the legitimate children.

Even if both legitimate and natural children inherited in the same parts from their parents, the natural children were only heirs from the single parent who made the acknowledgement, but not from his entire family (eg they could not inherit from natural grandfathers, natural siblings, natural cousins, etc).

For this reason, 'natural children' remained in an unfavourable legal position in comparison with 'legitimate' children. Even though the Reform 1975 was an important stage in the civil progress, the real equality between children was reached almost forty years later.

Principles of European Family Law regarding Parental Responsibilities drafted in 2001 facilitated the task of the Italian legislator, as they could be used as a frame of reference.<sup>15</sup> According to Art 3:5 of these Principles, children should not be discriminated on grounds such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, sexual orientation, disability, property, birth or other status, irrespective of whether these grounds refer to the child or to the holders of parental responsibilities.

<sup>15</sup> These principles have been drafted by the Commission of European Family Law, which was established in September 2001 with the scope to provide the most suitable means for the harmonization of family law within Europe. See [www.utrechtlawreview.org](http://www.utrechtlawreview.org).

### **III. The results of the latest Italian family law reform: a unique status of children and a wide notion of parentage**

The attention recently paid by the European Union to the increasing need for judicial cooperation in private law produced in 2003 the European Regulation no 2201 on 'Jurisdiction and Recognition of Judgments', that provides uniform rules for the enforcement of national decisions relating to marriage, separation, divorce, annulment and parental responsibilities.

Furthermore, important modifications to the Italian civil code came into operation when legge 8 February 2006 no 54 ('Separation and joint custody of children') entered into force in order to maintain the relationships between children and parents after separation, divorce, marriage annulment or dissolution of *de facto* couples.<sup>16</sup>

After this law, concepts like 'authority' and 'guardian' have been left behind opting for the broader concept – used in many international instruments<sup>17</sup> – of 'parental responsibility', that must be always exercised for the children's benefit in accordance with their personalities. It consists of a collection of rights and duties, such as raising, taking care, education, maintenance, determination of residence, administration of properties and representation of the child in legal matters.

In the frame of the previous regulation, if the parents were not married and lived separately or if they were married but separated or divorced, the children usually remained in the care of the mother, because normally they were living with her, while in the current legal system parents have joint custody, whether they are married or not, whether they live together or not and regardless of where the children live. Cooperative parenting is the norm fixed by the Reform 2006: it applies in every case, unless the judge decides otherwise for special reasons favourable to the child.

<sup>16</sup> On the point see L. Rossi Carleo, 'La separazione e il divorzio', in M. Bessone ed, *Trattato di diritto privato* (Torino: Giappichelli, 1999) vol IV, 238.

<sup>17</sup> See, for example, the Convention on the Rights of the Child (1989), entered into force on 2 September 1990; the Hague Child Protection Convention (1996), entered into force on 1 January 2002. Today the notion of parental responsibility is defined by Art 2, no 7, of the Council Regulation (EC) no 2201/2003 of 27 November 2003 concerning 'Jurisdiction, Recognition and Enforcement of Judgements in Matrimonial Matters and Parental Responsibility'.

In fact, according to the current text of the civil code, in order to give one parent the sole custody, a specific judicial order needs to be made. In proceedings regarding the separation of married and unmarried couples, shared responsibility is considered the best choice, so beneficial to children that it is preferred to the exclusive custody even when parents are in continuous conflict.<sup>18</sup> The objective is to guarantee the right of the child to dual parenting, that is to have a direct relationship and contact with two parents and not only with one.

After the Reform 2006, the annulment of a marriage and the partnership break-down have no effect on the attribution of parental responsibilities and no influence on the quantity and quality of children's rights. In prospect of simplicity and uniformity, the judicial competence has been unified in the hands of the ordinary court in all proceedings concerning the maintenance of all children – including those born out of wedlock – in the family crisis (thus depriving the court of minors).

Following this trend, all the pre-existent disparities between 'legitimate' and 'natural' children have been removed by the legislator during the last two years in a European perspective.

On 10 December 2012 Italian Parliament enacted an historic reform titled 'Legal Provisions on the Recognition of children born out of wedlock',<sup>19</sup> that we call 'Reform 2012-13'. This recent intervention starts with legge 10 December 2012 no 219 and ends

<sup>18</sup> For a comparison with the Shared Parental Responsibility Act 2006 in Australia, see H. Rhodes, 'The dangers of shared care legislation: why Australia needs (yet more) Family Law Reform', 36 *Federal Law Review*, 279 (2008). With reference to Spanish family law, see T. Picontò Novales, 'The Equality Rights Of Parents And The Protection Of The Best Interest Of The Child After Partnership Breakdown in Spain' 26 *International Journal of Law, Policy and the Family*, 378 (2012).

<sup>19</sup> Legge 10 December 2012 no 219 (in Gazzetta Ufficiale 17 December 2012, no 293), titled 'Regulations regarding the recognition of natural children'. See M. Bianca, 'Tutti i figli hanno lo stesso stato giuridico' *Nuove leggi civili commentate*, 507 (2013); A. Palazzo, 'La riforma dello status di filiazione' *Rivista di diritto civile*, 245 (2013); F. Prosperi, 'Unicità dello "status filiationis" e rilevanza della famiglia non fondata sul matrimonio' *Rivista critica di diritto privato*, 273 (2013); M. Sesta, 'I disegni di legge in materia di filiazione: dalla diseguaglianza alla unicità dello status' *Famiglia e diritto*, 962 (2012).

with decreto legislativo no 154 issued by the Italian Government on 28 December 2013.

As amendments to the civil code, labels such as ‘natural’ and ‘legitimate’ children, which suggested notions of superiority and inferiority, have been cancelled. Every child is simply a ‘child’ without any privilege in case of married parents and both the father and the mother have automatic and equal parental responsibilities over him.

In particular, a child born out of wedlock has the same right to his father’s and mother’s succession of any other member of their family, as if he had been born in wedlock.

In the current text of the civil code, children have a unique legal status and the circumstances of their birth are not relevant. These amendments mirror the profound change in family structures that leads governments in many countries, including Italy, to legislate in favour of the interest of the child, which has become the paramount consideration.

If we compare the Italian legal system with others, we notice the delay of the legislator, that should have intervened many years before. This delay is due to the slow process of transformation that was implemented during a long and complex cultural revolution. In fact, it took a long time to amend several articles of the Italian civil code, making them compliant with the Italian constitution.

Subsequently, the terms ‘legitimate’ and ‘natural’ children have been replaced by the denominations of children born ‘inside marriage’ and children born ‘outside marriage’.<sup>20</sup>

The persisting use of these latter terms depends on the necessity that still remains to regulate the procedure of recognizing children born outside marriage.

On one hand, if the mother is not married, the filiation can be established by the acknowledgement or the judicial action.

Like the ante-reform regulation, each parent of a child born outside marriage remains free (even though morally obliged) to decide to recognize that baby as his or her own child. If only one parent makes the acknowledgement, he or she has the sole parental responsibility. On the contrary, when both the mother and the father

<sup>20</sup> M. Paradiso, ‘Unicità dello stato di filiazione e unificazione delle denominazioni’ *Nuove leggi civili commentate*, 589 (2013).

recognize maternity and paternity, they take on parental responsibility together.

On the other hand, if the mother is married, there is still a legal presumption regarding paternity, as every child is considered her husband's child: precisely, the husband is presumed to be the father of the child born during marriage, until proven otherwise. All means of evidence, both biological and scientific, may be used in this legal proceeding.

A questionable point was represented by the possibility for the married woman to avoid the presumption of paternity through the acknowledgement of children procreated with different men. In the past, despite the openings of the jurisprudence, there were disputes in case-law regarding the issue, but today, after the Reform 2012-2013, a mother can acknowledge a child conceived out of wedlock with a man other from her husband.

#### **IV. The increasing importance of the child as rights holder**

The Italian Reform 2012-13 represents the fruit of a major effort to innovate the children's regulation.

The new article introduced in the civil code (Art 315 *bis*) envisages a real statute of children's rights. The first is the child's right to be morally – and not only materially – assisted by the parents.

If one parent does not look after his child, he can be condemned to damages, even if in the meantime the obligation has been fulfilled by the other parent.<sup>21</sup> This is the position of the recent Italian case-law,<sup>22</sup> according to which, when a father does not acknowledge immediately a child (born out of marriage) and paternity is ascertained subsequently during adolescence, his legal duties are considered existent since the time of the birth.

<sup>21</sup> For a comparison among three European Civil law countries, see H. Xanthaki, 'The judiciary-based system of child support in Germany, France and Greece: an effective suggestion?' *Journal of Social Welfare and Family Law*, 295 (2000).

<sup>22</sup> Corte di Cassazione 10 April 2012 no 5651, *Giurisprudenza italiana*, 1 (2013); Corte di Cassazione 20 December 2011 no 27653, *Giustizia civile Massimario*, 1796 (2011); Corte di Cassazione 3 November 2006 no 23596, *Foro italiano*, I, 86 (2007).

As expressly provided by the Reform (new Art 337 *septies* Codice Civile), the child's right to be assisted by both parents does not end when he reaches the adult age, but continues until he becomes independent of the family. The prominent jurisprudence<sup>23</sup> is characterized by the growing conviction that only an unjustified refusal of work, expressed by the child over eighteen, is able to extinguish the parents' obligation of maintaining him.

Another important child's right provided by the Reform is the right to be heard – when he has the capacity of understanding and willing and if he is older than twelve – within all proceedings concerning care, adoption and any other issue relating to his position.<sup>24</sup> In fact a direct or indirect meeting with the child allows the judge to assess his personality and enhances his ability to make a correct judgement.

Article 12 of the United Nations Convention on the Rights of the Child gives children the right to express their views freely in the proceedings affecting them, but expressing views is not an obligation for children, so they can refuse to be heard. Among the methods of hearing children, we remember: accounts of a child's views through a report provided by an expert, a written communication by the child

<sup>23</sup> P. Morozzo della Rocca, 'Il mantenimento del figlio: recenti itinerari di dottrina e giurisprudenza' *Famiglia e diritto*, 385 (2013).

<sup>24</sup> See Corte di Cassazione 10 June 2011 no 12739, *Famiglia e diritto*, 37 (2012), with comment of F. Tommaseo, 'Per una giustizia 'a misura del minore': la Cassazione ancora sull'ascolto del minore'. In jurisprudence, see, among others, P. Stanzione, 'Potestà dei genitori e diritti fondamentali del minore' *Rassegna di diritto civile*, 460 (1980); E. Quadri, 'L'interesse del minore nel sistema della legge civile' *Famiglia e diritto*, 80 (1999); F. Bocchini, 'L'interesse del minore nei rapporti patrimoniali' *Rivista di diritto civile*, I, 277 (2000); C.M. Bianca, 'Il diritto del minore all'ascolto' *Nuove leggi civili commentate*, 592 (2013); A. Finocchiaro, 'L'audizione del minore e la convenzione sui diritti del fanciullo' *Vita notarile*, I, 834 (1991); A. Palazzo, *Contributo alla ricostruzione della tutela del principio di vita*, in A. Palazzo and I. Ferranti eds, *Etica del diritto privato* (Padova: Cedam, 2002) vol II, 96; R. Pane, *Le adozioni tra innovazioni e dogmi* (Napoli: Edizioni Scientifiche Italiane, 2003), 125; A. Sassi, 'La tutela civile nei contratti con prestazione medica', in A. Palazzo, A. Sassi and F. Scaglione eds, *Permanenze dell'interpretazione civile* (Perugia: Iseg, 2008), 377 and 407; L. Lenti, *Il consenso informato ai trattamenti sanitari per i minorenni*, in S. Rodotà and P. Zatti eds, *Trattato di biodiritto* (Milano: Giuffrè, 2011), 420.

to the court, a representation of the child by a lawyer and a direct confrontation between the judge and the child.

Also during the normal family life, the child with sufficient awareness has to be listened before taking decisions which may affect them.

The idea is that the child is the chief protagonist of his own interests and, even if he does not have full capacity until the age of eighteen, he enjoys a plethora of rights which demand respect and protection:<sup>25</sup> the right to freedom of thought, to be protected from drugs, exploitation and torture, to education, to development and to an adequate standard of living, to know his identity and true paternity, to respect for his family life.

A central role is attributed to the wishes of the child approaching the age of majority:<sup>26</sup> in particular, the child born out of wedlock, when adolescent, is considered capable to decide about his legal relationship with the parent. In fact, as provided by law, an acknowledgement of a child who is fourteen years old (sixteen, before the Reform 2012-13) is not effective without his consent.

A modern meaning of the minor's competence emerges in the legal system: it coincides with the capacity for rational choice, which is not absolute, unchangeable and necessarily tied to the age, but relative, alterable and strictly related to the maturity, skill and ability of understanding.<sup>27</sup>

According to the Italian case-law, teenagers with a concrete attitude for a reasonable decision can exercise the rights available to

<sup>25</sup> G. Ferrando, 'Il controllo giudiziale sulla potestà dei genitori' *Nuova giurisprudenza civile commentata*, 21 (2004); P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 12 above, 944; F. Ruscello, 'La potestà dei genitori', in M. Sesta and V. Cuffaro eds, *Persona, famiglia e successioni nella giurisprudenza costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 429; A. Palazzo, 'La filiazione', in A. Cicu, F. Messineo and L. Mengoni eds continued by P. Schlesinger ed, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2007), 544.

<sup>26</sup> F. Carimini, 'Il binomio potestà-responsabilità: quale significato?', in R. Pane ed, *Nuove frontiere della famiglia, La riforma della filiazione* n 14 above, 116.

<sup>27</sup> For the concept of incompetence in the *common law*, see E. Jackson, *Medical law, Text, Cases and materials* (Oxford: Oxford University Press, 2010), 216; A.E. Morris and M.A. Jones, *Medical Law* (Oxford: Oxford University Press, 2011), 203; F. Burton, *Family law* (Padstow, Cornwall: TJ International Ltd, 2012), 277; J. Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' 69 *The Modern Law Review*, 299 (2006).

adults different solutions with regard to the personal sphere, provided that their choice is not irrational and harmful.

We can think about the right to consent to medical treatment: the law does not simply impose on doctors the task of hearing the child, but leaves him the decisions regarding personal health: when the child is a mature minor, with sufficient understanding, the parents' right to consent to medical care is replaced by the minor's right to make his own choices.

The only exception to this principle is when those choices might be life-threatening, starting from the assumption that a child – even though approaching adult age – has no right to refuse a life-saving treatment. The analysis of the jurisprudence and case-law shows that the child is free to choose religion, but not to refuse a life-saving blood transfusion on religious grounds. The right to refuse a medical treatment is abrogated if the child seeks to make a decision that might harm him: in this case the parents cannot oppose, while the doctors apply to the court asking for an approval.

As discussed above, the child has the right to maintain contact with relatives, regardless of being born in or out of wedlock.

The relationship between child and relatives shall not be obstructed without sufficient grounds; particularly, parents cannot deny grandparents access to their grandchildren, considering that grandparents are primary caregivers for their grandchildren in many situations, such as divorce, death, inability, or incompetence of the couple. This can be also observed in cases where the basic family unit is the extended family, with two or three generations helping each other in nurturing the children and caring for the elderly.

Without any doubt, grandparents have great benefits on their grandchildren's lives in terms of stability and, for this reason, the Italian legislator provides that grandparents can initiate a judicial action to protect their visitation right.

## **V. Critical remarks**

The new dispositions have been effective for some time, but it is already possible to evaluate their first impact on society.

The Italian Reform 2012-13 simply deals with parental responsibility and does not take into consideration the issue of

regulating *de facto* couples.<sup>28</sup> This lack of domestic law might depend on the tendency to keep the children's and the couple's regulations separate one from the other and might be linked with ethical concerns and religious canons of the Roman Catholic doctrine; nevertheless, times are mature for a legislative intervention and this topic remains one of the most important requirements in the scenario of the modern family law.

The Reform 2012-13 can be seen as a ringing declaration of the right of all children to the same legal treatment, as they cannot be disadvantaged for the circumstances of their birth. To summarise, it extends the effects of the acknowledgement of a child born out of wedlock even to the relatives of the parent that has acknowledged the child. Through this novelty, the relationship with grandparents (or siblings, uncles, aunts etc) is guaranteed also to the child born out of marriage, who can inherit from them. As a consequence, the parenthood is defined in a broader sense than in the past legal framework, where the children born out of wedlock, if recognized, became relatives only of the person who acted the recognition and not of his own family.

Family law in Europe is facing the challenge of privatisation, offering family members the possibility to assess their relationships freely.<sup>29</sup>

Nevertheless, the Italian legislator does not accept the freedom of regulating parental status. The family is mainly considered a matter of nation states' sovereignty: even though partners can regulate some of their reciprocal duties in the area of property, this freedom disappears in the field of parental responsibilities. In fact, when the agreement involves children, couples must respect mandatory rules, as this matter is not considered exclusive to the private sphere, but

<sup>28</sup> On the issue see, in general, F. Prosperi, *La famiglia 'non fondata' sul matrimonio* (Camerino: Edizioni Scientifiche Italiane, 1980); F.D. Busnelli e M. Santilli, 'La famiglia di fatto', in G. Cian, G. Oppo and A. Trabucchi eds, *Commentario al diritto italiano della famiglia* (Padova: Cedam, 1993) vol IV, 757; V. Franceschelli, 'Famiglia di fatto', *Enciclopedia del diritto* (Milano: Giuffr , 2002) vol VI, 369.

<sup>29</sup> P. Zatti, 'Familia, *familiae* – Declinazione di un'idea, I, La privatizzazione del diritto di famiglia' *Familia*, 11 (2002); M. Sesta, 'Diritti inviolabili della persona e rapporti familiari: la privatizzazione arriva in Cassazione' *Famiglia e diritto*, 370 (2005).

dependent on protecting the child's welfare and, therefore, a topic of public interest that must be safeguarded by both individuals and groups.

A specific issue that could be renewed by the Reform 2012-13 regards the attribution of children's surname, which reflects a male chauvinist concept of family that is not coherent with the social evolution. In fact, if children are born in wedlock, they take the surname of the father.<sup>30</sup> A better solution would have been approaching the different regulations and allowing parents to identify the surname of their future child in a joint statement.<sup>31</sup>

In case of birth out of wedlock, they have the surname of the parent that first recognizes them – often the mother: the surname of the father will be given in substitution, added or put before, only with the consent of the mother and, in case of opposition, with the authorization of the judge.

The solution of equal position of children born in and out of wedlock has been chosen in order to put into effect the harmonisation of family law in the European Union and to make both the father and the mother liable for supporting and maintaining children, for upbringing and care.

Nevertheless, the problem regarding the insertion of a child born out of wedlock into an existing family founded on marriage, remains also in the renewed legal system. In fact, the civil code (Art 252) still foresees a favourable position to the members of the matrimonial family: children whose father is married to a person other than their mother cannot become members of the conjugal household without the consent of the father's wife and those children born within the marriage. If they do not give consent, it's up to the judge to resolve the conflict: he shall authorize children to live all together only if it is beneficial for them, as the central scope is to satisfy their interest

<sup>30</sup> See Corte costituzionale 16 February 2006 no 61, *Famiglia, persone e successioni*, 898 (2006), which refused the issue of unconstitutionality of the norm that provides, in the matrimonial family, the automatic attribution to the children of the father's surname (Art 143 *bis* Codice civile). On the subject see C. Di Marco Gentile, *Il nome della persona: tra mezzo di individuazione e segno di identificazione* (Napoli: Edizioni Scientifiche Italiane, 1995), *passim*.

<sup>31</sup> On this point see M. Fini, 'Il cognome dei figli: il silenzio della legge n 219 del 2012', in R. Pane ed, *Nuove frontiere della famiglia, La riforma della filiazione* n 14 above, 73.

of living in a tranquil atmosphere. This norm highlights that the well-being of families founded on marriage needs to be protected if a child born out of wedlock is included inside them, but this situation is not a good reason for depriving him of fundamental rights.

A careful observer of the Italian scene can see that public opinion continues to have some prejudices against children born of unmarried parents.

In order to achieve the best practical outcomes for all children, a radical and different effort is required by the moral attitude of the society as a whole. What should become usual among people is the firm conviction that protecting the interests of the child is the first priority.

As a crucial point, we notice that the Reform 2012-13 does not offer any provision recognizing a child's relationship with one of the same-sex partners. In Italy these couples, on one hand, continue to play the role of parents after the breakdown of their previous heterosexual relationships; on the other hand, they can become parents going abroad where they access to human assisted reproduction.

As provided by Art 3 para 3 of the Treaty regarding the European Union, 'the European Union fights against the social exclusion and the discriminations and promotes the social justice and protection, the equality between women and men, the solidarity among generations and the protection of the children's rights'. In the aim of coordination among different legal systems, the European Union requires the recognition of the children's status as a necessary precondition to assert human rights to equality.<sup>32</sup> On these grounds, a discrimination against children on the basis of the sexual orientation of the parents should not exist.

Nevertheless, the law does not recognize parental rights of gay

<sup>32</sup> The human rights guaranteed by the European Convention for Human Rights and Fundamental Liberties and resulting from the common constitutional traditions of the member States are now parts of the European Law as general principles of law (Art 6, paras 2-3, of the European Charter of Fundamental Rights and Liberties). See also Art 67 of the Treaty regarding the Functioning of European Union. About the topic see N. Ferreira and P. O'Callaghan, 'Evaluating the 'New Culture' of Human Rights in Europe' *European Review of Private Law*, 657 (2008).

couples. Some Italian law courts<sup>33</sup> define the homosexual couples as families, but they are firm in denying them the right to adopt a child. The rationale behind reflects the opinion that children might be at a disadvantage if raised by same-sex couples, but this fact remains the most discussed point that has been criticized recently.

In June 2014, the court of minors in Rome had a radical different approach, showing Parliament the direction it should choose in reforming the law.<sup>34</sup>

This court declares the first stepchild adoption for a couple of lesbians who conceived a daughter – biological child of one – through assisted procreation carried out abroad. The adoption is decided because the two lesbians had lived together for ten years and one of them was the parent of the five years old child. Since immediately after the birth, the daughter had lived permanently and happily in the homosexual family, so that the principles of *favour minoris* led the court to consider the preservation of the relationship established from birth with the two women as a priority.

This ruling is influenced by an important decision issued in 2013 by the Italian Corte di Cassazione<sup>35</sup> with reference to case of a Muslim immigrant couple where the mother of a young son had left her male partner for a lesbian relationship. According to Corte di Cassazione, the mere fact the mother is in a gay relationship does not demonstrate any damage for the child. In conclusion, also a gay couple is able to care for children and protect their well-being.

In the same direction, the European Court for the protection of

<sup>33</sup> Corte di Cassazione 15 March 2012 no 4184, *Famiglia e diritto*, 665 (2012); Corte costituzionale 15 April 2010 no 138, *Famiglia, persone e successioni*, 179 (2011), where the difference between the family founded on marriage and the other kinds of free families is highlighted on the basis that Italian Constitution refers only to the marriage between a man and a woman with procreative purpose; Tribunale di Milano 12 September 2011, *Nuova giurisprudenza civile commentata*, I, 205 (2012). In recent literature see B. Pezzini and A. Lorenzetti, *Unioni e matrimoni same sex dopo la sentenza n. 138 del 2010: quali prospettive* (Napoli: Jovene, 2011), *passim*.

<sup>34</sup> Tribunale dei minori di Roma 30 June 2014 no 299. For the first comment see F. Caccia, "Adozione non vietata' La coppia lesbica ottiene il sí dei giudici' *Corriere della Sera*, 20 (30 August 2014).

<sup>35</sup> Corte di Cassazione 11 January 2013 no 601, *Giurisprudenza italiana*, 1036 (2013), where the high Court gave the exclusive right of custody over a child to a mother cohabiting with a person of the same sex and mentioned a family centered on a homosexual couple.

Human Rights<sup>36</sup> asserts that the relationship of a cohabiting same-sex couple living in a stable relationship falls within the notion of 'family life', but observes that there is no standard followed in the European Union on the issue and every State has a wide margin of appreciation.

Despite the headway made by the Italian and European courts, nowadays the law-maker prefers to 'skate over' the issue of same-sex parenthood, but the delicate question shall be inevitably faced in the next future.

Some critical observations have to be made with reference to a new terminology used by the Reform 2012-13 to indicate the relationship between parents and children.

The elimination of the term 'potestà', replaced by 'responsabilità' is not an appreciable result of the Reform, because the legislator did not consider its real significance on the upbringing of children, starting from their birth until a certain age.<sup>37</sup>

Harmonization among various legal orders, in order to ensure an effective protection of human rights does not mean to abolish all the

<sup>36</sup> See Eur. Court H.R. Grand Chambre, Judgment of 19 February 2013, *Nuova giurisprudenza civile commentata*, I, 519 (2013). Here the case originated in an application (no 19010/07) against the Republic of Austria. The two applicants alleged that they had been discriminated against in comparison with different-sex couples, as second-parent adoption was legally impossible for a same-sex couple. According to the Grand Chambre, inside a same sex couples each person has the same right to adopt the child of his partner, as the couples of different sexes and 'there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention when the applicants'situation is compared with that of an unmarried different-sex couple in which one partner wishes to adopt the other partner's child'. On the same issue see J. Long, 'I giudici di Strasburgo socchiudono le porte dell'adozione agli omosessuali' *Nuova giurisprudenza civile commentata*, I, 676 (2008).

<sup>37</sup> Regarding the issue of parental responsibility see P. Perlingieri, 'Sui rapporti personali nella famiglia' *Diritto di famiglia e delle persone*, 24 (1979); M. De Cristofaro and A. Belvedere eds, *L'autonomia dei minori tra famiglia e società* (Milano: Giuffrè, 1980), 319; P. Stanzone, 'Scelte esistenziali e autonomia del minore' *Rassegna di diritto civile*, 1145 (1983); F. Giardina, *La condizione giuridica del minore* (Napoli: Jovene, 1984), *passim*; G. Dosi, 'Dall'interesse ai diritti del minore: alcune riflessioni' *Diritto di famiglia e delle persone*, 1604 (1995); E. Quadri, *L'interesse del minore nel sistema della legge civile* n 24 above, 80; M.E. Quadrato, *Il ruolo dei genitori dalla 'potestà' ai compiti* (Bari: Cacucci Editore, 1999), 119.

different terminologies: what the European Union names ‘parental responsibilities’, in Italian legal language is ‘potestà’, while the term ‘responsabilità’ usually indicates the notion of ‘liability’, being so far from the scope of the legislative intervention.

Therefore, there was no reason to deny the concept of ‘potestà’, on the basis of its authoritative content; in fact, it has a positive sense of complex of powers and duties, both important in educating and bringing up children. The principle of putting the child’s best interests<sup>38</sup> in first place entails, in some circumstances, putting aside the child’s opinion and making a decision with authority; it is obvious that this ‘authority’ should be widely used in the first years of children’s life and reduce gradually, in a flexible way, during their growth and development.<sup>39</sup>

## VI. Conclusion

As we have seen in paragraph 4, when the Reform 2012-13 introduces in the Italian civil code a new article (Art 315 *bis*), it strengthens the bond existing between parent and child by means of a duty of cooperation:<sup>40</sup> while the child lives together with the family, he must contribute to its maintenance in relation to his assets, income and to his personal abilities.

Within the new context, the child has certainly more rights rather than obligations.

In particular, the Reform does not mention the child’s duty to obey the mother and the father, which was a norm in the previous text of the civil code. Furthermore, it omits a specific child’s duty of assisting parents during old age.

We wonder what can be the consequences of this outline for the society.

The legislator has lost the chance of resolving the serious problem

<sup>38</sup> L. Lenti, ‘Best interest of the child’ o ‘best interest of children?’ *Nuova giurisprudenza civile commentata*, II, 157 (2010).

<sup>39</sup> On the flexibility of the concept see P. Perlingieri, *La personalità umana nell’ordinamento giuridico* (Napoli: Edizioni Scientifiche Italiane, 1972), 34.

<sup>40</sup> A. Bellelli, ‘I doveri del figlio’ *Nuove leggi civili commentate*, 550 (2013); A. Bellelli, ‘Le ragioni di sopravvivenza della norma di cui all’art. 147 c.c.’, in M. Bianca ed., *Filiazione. Commento al decreto attuativo* (Milano: Giuffrè, 2014), 167.

that many elderly citizens live on a limited income and public programs are not often sufficient to assist them financially.<sup>41</sup> In recent years, the increasing life expectancy and the growth of the Italian senior population has resulted in a need of providing care to the indigent elderly from sources other than the state. A specific norm which imposes in Italy, like some American countries,<sup>42</sup> a statutory duty on adult children to support their elderly parents would have been beneficial to the population, relieving the public treasury of its financial difficulties. Within a new regulatory framework concerning this subject, the filial responsibility should be avoided only when children do not have the economic means or when they demonstrate that the parent abandoned them during childhood.

Apart from the mentioned critical remarks, we can assert – on the basis of the data from this study – that the social, economic and political change of the traditional family has led to a positive convergence of the laws in the Europe with regards to the children born out of wedlock and the relationship with their parents.

The key factor running through current family law is parentage, as parental responsibilities are a consequence of parenthood, not a consequence of marital status: marriage or blood relationships alone no longer define the family<sup>43</sup> and the model of family life has become more complicated by divorces, remarriages and cohabitation agreements.

The most important legal criterion is that facts regarding marriage can not have prejudicial effects for the children, because

<sup>41</sup> S. Casabona, *Il dovere di assistenza verso il genitore in stato di bisogno. Un'indagine di diritto comparato* (Napoli, Edizioni Scientifiche Italiane, 2008), 96.

<sup>42</sup> There are twenty-eight states with filial responsibility statutes: Alaska, Arkansas, California, Connecticut, Delaware, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia and West Virginia. See, eg, M. Lundberg, 'Our Parents'Keepers: the Current Status of American Filial Responsibility Laws' 11 *Journal of Law and Family Studies*, 533 (2008-2009).

<sup>43</sup> F. Prospero, 'Matrimonio, famiglia, parentela' *Rassegna di diritto civile*, 389 (1983); F.D. Busnelli and M.C. Vitucci, 'Frantumi europei di famiglia' *Rivista di diritto civile*, 767 (2013); G. Ferrando, 'Il diritto di famiglia oggi' *Politica del diritto*, 39 (2008); L. Balestra, 'L'evoluzione del diritto di famiglia e le molteplici realtà affettive' *Rivista trimestrale di diritto e procedura civile*, 1115 (2010).

family responsibilities endure even when the adults' relationship does not.

One clear trend of the process is abandoning the unjustifiable discrimination towards a group of children for no reason above and beyond the way in which they came into this world. This is the objective laid down by the European Charter of Fundamental Rights and Liberties,<sup>44</sup> where the 'birth' is considered one of those circumstances that do not justify a different legal treatment for children (Art 21).

A further contribution to the implementation of this principle derives from the Convention of New York regarding the Rights of Disabled People,<sup>45</sup> which declares the children's right to be 'registered immediately at the moment of birth', the right to know their parents and to receive care from them (Art 7).

In conclusion, today only the fact of 'birth' of a child creates family life, as a family can be founded simply through procreation.

<sup>44</sup> At a community-law level, the European Charter of Fundamental Rights and Liberties, signed in Nice in 2000, obtained its mandatory character – after its inclusion in the Constitutional Treaty sealed in Rome on 29 October 2004 – with the entry into force of the Lisbon Treaty in December 2009.

<sup>45</sup> The Convention regarding the rights of disabled people, signed in New York 13 December 2006, was ratified by Italy with Arts 1 and 2 of legge 3 March 2009 no 18.