# Italian Legal Frame for Separation, Divorce, and Child Custody

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## Table of contents

**List of figures**

# Introduction

This report examines the legal framework with regards to couple separation, divorce and child custody in Italy. It is drafted in the context of the ERC Starting Grant funded research project entitled *MobileKids: Children in Multi-Local, Post-Separation Families* (supervision by Prof. Laura Merla). The problematic is to understand how the lives of children are organized by divorce, mobility and multilocality in the context of shared custody arrangements, and how children adjust to this family situation in two European countries: Belgium and Italy. This report thus emerges in the context of the Italian research.

Italy, which has a relatively stable crude divorce rate (from 1,6 in 2016 to 1,4 in 2019) slightly under the European one (1,9 in 2016, Eurostat), is for many reasons an interesting case study when it comes to examining separation and child custody. As it will be exposed, the way separation, divorce, and child custody are articulated in legal texts tends to be different from other European countries – which is linked to Italy's Family Law history, the social and political debates that have accompanied it, as well as larger (European) debates on the best interest of the child that have influenced national legislations. With regards to this latter aspect, Bernardi and Mortelmans (2021) highlight that while joint legal custody is now widespread across Western countries, it is not systematically followed up by shared physical custody (calculated in terms of a relative equality in residential times in both dwellings) despite the strong advocacy it has received. They further analyze that: "The key turning point in shared physical custody occurred when juridical guidelines for decisions regarding post separation custody arrangements began to be constructed as if the "best interest of the child" was something different from the interest of the child's primary caregiver (the mother until then). The notion is tricky though as the best interest of the child as an autonomous person seems to be at odd with the fact that the child depends on at least one of its parents and the interest of both parents may not overlap with the child's interests. When parents disagree on custody arrangements, judges often have to evaluate a complex set of factors in order to identify the best interest of the child" (Bernardi & Mortelmans, 2021: 3). Italy is no stranger to this phenomenon and this report explores how the larger question of shared legal and physical custody came to take shape in its legal body.

In Italy, family matters have always been at the center of strong debates. As stressed by Auletta, Italian Family Law is the part of private law that has experienced the biggest changes in the last 50 years: "Changes so radical that they make it difficult to understand and share arguments, proposed even by distinguished jurists, to justify institutions of the past now considered completely outdated" (2019: 234). Indeed, there are three major components that have historically had a strong influence on political debates surrounding family matters: (1) the influence of the Catholic Church; (2) the influence of non-profit/ideological associations; (3)

the cultural and normative context, especially related to gender relations, which still imprints family practices today.

First, as it will be highlighted in section 2 of this report, covering the chronological changes in legislation, the Catholic Church has played a prominent role in shaping the substance, or definition, of "the family" that will be at the center of the legislative body regulating family matters. Cavaletto emphasizes that, "by always supporting a traditional view of the family, whose explicit purpose is procreation (…) the Church has not only fueled a debate on the possibility and the chance of regulating other types of union, but has also had a profound influence on the conscience of the people, affecting many political parties, each of which has its own radical Catholic representatives. Even in a secular state like the Italian Republic, the proximity and the pervasiveness of the Church in its societal fabric has already influenced some of the country's crucial social and political moments" (2017: 196). Be it on the introduction of the possibility to divorce, on the voluntary termination of pregnancy, or authorizing the Civil Union of same-sex couples, the Catholic Church was very instrumental in blocking and/or delaying the various legislations that went against its vision of the family (Bernini, 2008).

Second, various non-profit/ideological associations and foundations represent strong lobbies in favor, as well as against, all of the major changes in legislation about family matters. This means that each amendment, modification, suppression, or new law came as a result of extremely passionate societal debates, street protests, petitions, and "under the radar" political advocacy (see for instance Vingelli, 2017 and Bernini, 2008). These various associations and foundations, created by journalists, doctors, psychologists, or other civil society members, thus strive to defend the interests of a variety of "sides" in these debates – from associations of separated fathers deeming laws discriminate them while granting more rights to mothers, feminist associations fighting for the rights of women which have historically been diminished, to other association advocating for the protection of the children's mental health. These groupings have gained a lot of power and influence over the years, produced numerous partisan publications (either in the form of books, press releases, blog posts, conferences, etc.[1]), and are still very instrumental in shaping todays debates, as well as legal and policy agendas.

Third, contemporary Italy is still widely categorized as a conservative regime "characterized by a strong appreciation of family values, encouraging family-based solutions to social problems, with limited State intervention" (Lund & Nilsen, 2020: 9). This is particularly true with regards to gender relations where "women continue to be considered and continue to be the primary caregivers for children, while men continue to act as the main breadwinners of the family" (Cannito & Scavarda 2020: 802; see also Naldini, 2015, and Naldini & Jurado, 2013). Analyzing the Italian National Institute of Statistics' 2016 report on parental involvement in

[1] See for instance: Maglietta 2006, 2010; Loha & Nestola, 2014; Cassano, (2016); Zavattiero, (2012). This list is non exhaustive, as partisan publications abound on this subject, but gives an idea of the very contrasted positions.

work and care practices, Santero (2018) emphasizes that, if men's implication in family work has significantly increased from 2009 to 2014, especially in dual earner couples, gender asymmetries still remain substantial (see also Mencarini & Solera, 2015, and Merla & Murru, 2021). This imprint can also be found throughout the legislative body on family matters and continues to fuel contemporary debates on family law (Martone, 2019; Rubio-Marìn, 2015; Rescigno, 2015).

Taken together, these aspects explain why the spirit of the law has been for long (and to some extent still remains) strongly influenced by a familialistic perspective. Take for example the recent tensions and passionate public debates that have been observed regarding the so-called "Ddl Pillon"[2] – which is the most recent deposition of a proposition of law aimed at reforming the 2006 law on joint custody (Auletta, 2019). Needless to say, the societal and ideological context regarding debates on family matters still remains extremely fragmented today.

However, social science studies on separation, divorce and child custody remain strikingly scarce in this context. Indeed, if many legal scholars have taken time to analyze the new law and its effects in terms of court or jurisprudence decisions, we are generally lacking a sociological perspective on the effects of these laws in terms of family practices. This report on the legal frame for separation, divorce, and child custody is thus written in a sociological perspective. That is to say, it goes into detail on the major legislations and procedures that separating parents are involved in, providing the reader with the necessary context and explanation. But this is not an in-depth account of every single piece of legislation, reform, or jurisprudence that is out there. Law manuals (which represent the main body of references that is mobilized in this report) have extensively covered and commented on these. Whereas this report was elaborated with a twofold aim: to synthetize and clarify regulations and practices with regards to separation, divorce and child custody in Italy, but also, to define and explain Italian legal and administrative terms and procedures and their proper equivalence in English language. In other words, it is designed for an Italian, as well as a foreign audience and presents itself as a useful guide on the legal context for anyone pursuing social science research on the topic of separation, divorce, and child custody in Italy, or wishing to compare the Italian case with other ones.

This report is divided in three main sections. The first one covers the main chronological changes in legislation with regards to separation, divorce and child custody (as well as other connected legislations that influenced these matters). Looking at legislation in a chronological perspective helps to understand where some of the current laws or blockages come from and

[2] Senator Pillon is the first signatory of this proposition of law on "shared custody, direct maintenance and guarantee of shared parenting". Its objective, among other points, is to ensure maximum co-responsibility between parents after separation following the best interest of the child, and proposing measure that ensure a strict equal share between parents of expenses and time that involve the child.

draw a perspective on the spirit of the law and how it evolved over time. The second one clarifies, defines, and translates the various legal and administrative terms and procedures that emerge in this body of law. Finally, the third one goes over some of the recent concrete updates in procedures and the available social sciences studies on the effects of these laws in terms of family practices. On a practical note, all translations from Italian to English are done by the author. However, the law articles that are referred to in this report are also systematically included in Italian in footnotes in case the reader wishes to consult the original terms and formulations. Finally, special complementary information on minor steps, procedures, terms, or elements of context are sometimes provided in a blue indented box. This is done to avoid overcharging the main body of text while still providing the necessary description for the reader in need.

# 1. Laws & regulations for separation, divorce, and child custody: a chronological perspective.

In this section, the report draws the main chronological steps that have led to todays' laws and regulations on separation, divorce, and child custody. Apart from providing some of the historical moments related to family law, this section also helps to understand the progression in legal thinking, how some international treaties and national contexts came to influence shifts in regulations and where some of the actual measures come from (and why they are thought for that way).
As it will be made relevant, the major changes that influenced family laws and regulations happened from 1970 onwards. In what follows, we briefly go over how family matters were approached before 1970, then succinctly detail the various reforms and new laws, starting with the 1970 law legalizing divorce, the 1975 reform of Family Law, the 2006 "joint custody" law, the 2012-2013 reform of filiation, and the 2016 law on Civil Unions.

## 1.1. Pre-1970: a little history of handling family matters.

Before the unification of Italy, laws and customs governing family relations differed from state to state. But generally speaking, they were marked by patriarchal and hierarchical measures; that is, for instance, setting unequal right between husband and wife, or sons and daughters, as well as privileging the first-born son. With Unification, came the so called ***codice Pisanelli* (1865),** inspired by the Napoleonic Code, which initiated a wave of change with regards to family matters. Among other points, this new Code entailed equal succession rights, limiting *patria potestas* (*pater familias*) – that is, limiting the authority of the oldest male in a lineage over all the other adult offspring – but still recognizing the unlimited authority of a husband over his wife (and children) through the principle of marital authorizations (Saraceno & Naldini, 2007). The influence of the Napoleonic Code was also made relevant with regards to marriage, with the creation of the civil wedding as the only one having a formal recognition. However, the religious wedding continued to be generally considered as the only "valid" one in the eyes of the Italian people and was often celebrated in Church before the civil one – or, in some cases, it was the only ones celebrated at all, even if it had no legal significance (Lenti & Long, 2014).

This later changed with the Concordat signed between the Italian state and the Holy See in 1929, which gave civil recognition to the religious marriage. In other words, the religious celebration is now also transcribed in the civil registry, and couples choosing to have a religious wedding no longer have to present themselves at the townhall for their civil union. For this to be possible, the couple has to abide by the civil as well as religious (canonic) prerequisites to

get married (Lenti & Long, 2014). The "**concordat wedding**" (*matrimonio concordatario*) – meaning a catholic religious wedding with civil effects – is still effective today.

***Patti Lateranensi***

The Lateran Treaty (1929) was accompanied by one of the many Concordats (*Concordato*) undertaken by the Holy See. A concordat is a convention between the Holy See and a sovereign state that defines the privileges of the Catholic Church in this state, recognizing and/or allowing it special powers on matters (religious or secular) that impact the Church's interests. The post-World War I era, due to the important remapping of Europe that followed and the establishment of new legal successors, represents the biggest proliferation of concordats in history.

Through the Lateran Treaty (*Patti Lateranensi*), the Kingdom of Italy under Benito Mussolini thus signed in 1929 a series of agreements with the Holy See (under Pope Pius XI). Among other points, this treaty recognized the independent sovereignty of the Holy See over Vatican City – following the principle of "a free Church in a free State" – and Catholicism as the state religion. Also, of interest with regards to family law, the Kingdom of Italy agreed to make its laws regarding marriage and divorce conform to that of the Roman Catholic Church.

The Lateran Treaty will be further recognized in the Constitution of Italy as regulating the relations between the state and the Catholic Church (see below). If the Concordat will later undergo some reforms – among others to remove the mention of Catholicism as the state religion – it is still in place today (Ferrara, 2009).

Apart from the abolition of the marital authorization in 1919, the laws governing family relations did not change until the establishment of the first Penal Code in 1930, or *codice Rocco*. Deeper changes happened in 1942, with the establishment of the **fascist Civil Code** marked by the reinforcement of the authority of the husband/father and the subordination of family interests to national ones. This period is also characterized by a stronger attachment to and legitimization of the power of the Catholic Church – the concordat marriage giving birth to the concept of "legitimate family" which will imprint the legal locus for decades after. In a context of war and drop in natality, the fascist era represents a time of proliferation of family policies and regulations, mobilizing the Concordat, that encouraged fecundity, punished abortion, and generally discouraged the work of women outside of the family house. The political project thus embodied a rigid division of gendered roles, reinforcing the model of the male breadwinner and female caretaker (Saraceno & Naldini, 2007).

Strikingly, while the fascist era ended in 1943 and family matters were later inscribed in the 1948 Constitution (as is discussed hereafter), the laws governing family matters inscribed in the fascist civil code nevertheless remained unchanged until the reform of family law of 1975.

With the creation of the Italian Republic, the **Constitution of Italy** (1948) will mark for the years to come the normative frame with regards to family law. Such as many other European countries, Italy decided to recognize the family at the Constitutional level. The principles inscribed in the Constitution are to be understood as a result of intense political, ideological

debates and compromises between the political parties present in the constituent Assembly, which at the time, entailed strong fractures between catholic, liberal, and Marxist views of society (Sesta, 2011). Among these compromises, was the choice to give constitutional relevance to the 1929 Concordat between the Church and the State (*Patti Lateranensi*).
In other words, articles 29 and 30 of the Constitution, which are the ones of interest with regards to family matters, are to be understood in the frame of these intense compromises.

In substance, these two articles hold the following principles[3]:
**Art. 29**: family is considered as a "natural society founded on marriage", and where "marriage is ordered on the moral and legal equality of the spouses, with the limits established by law to guarantee family unit"."

- Saraceno and Naldini (2007) stress that, after two decades of authoritarian policies very much attached to creating strong ties between the state and the family, the principle of the "natural society" can be read as a declaration of respect, as a recognition of the autonomy of the family with regards to the state.
- Nevertheless, if there was a will to formally acknowledge equality between spouses, Saraceno and Naldini further argue that "the principle of legal equality of spouses is contrasted with two other principles: that of unity and of solidarity. Men and women are equal, except in the case where the family unity is in question. (…) art. 37 also establishes that the legal equality between spouses is subordinated to the fact that women's extra domestic work should not interfere with the fulfillment of her essential function in family" (2007: 223).
- Moreover, the issue of the indissolubility of marriage, at the heart of strong debates, will finally not become a constitutional principle – those in favor of this winning the debate by only three votes (Sesta, 2011).
- Finally, art. 31 stating the responsibility of the state in "protecting maternity, childhood, and youth" will set the base for the further implementation of social security policies (Sesta, 2011).

**Art. 30**: sets forth the principle that "it is the duty and the right of parents to maintain, instruct, and educate children, also if they are born out of wedlock". It further stresses that "the law provides children born out of wedlock with every legal and social protection compatible with the rights of members of the legitimate family".

[3] Art. 29: "La Repubblica riconosce i diritti della famiglia come società naturale fondata sul matrimonio.
Il matrimonio è ordinato sull'uguaglianza morale e giuridica dei coniugi, con i limiti stabiliti dalla legge a garanzia dell'unità familiare."
Art. 30: "E` dovere e diritto dei genitori mantenere, istruire ed educare i figli, anche se nati fuori del matrimonio.
Nei casi di incapacità dei genitori, la legge provvede a che siano assolti i loro compiti.
La legge assicura ai figli nati fuori del matrimonio ogni tutela giuridica e sociale, compatibile con i diritti dei membri della famiglia legittima.
La legge detta le norme e i limiti per la ricerca della paternità."

- According to Sesta (2011), this principle emphasizes the centrality of children and their rights with regards to parents', contrasting with the historic authoritarian power of the father. However, while granting the same right to children born in and out of wedlock, it still sets the "legitimate" family as that of reference.

As it has been stated, the years that follow will be marked by strong ambivalences with regards to family matters following two tensions: one is the fact that, in the spirit of compromises, the articles described above give latitude to interpretation on either ideological stance; the other one is because the relations inside the family continued to be governed by the fascist laws (Code of 1942). This allowed judges to favor more often the principles that aimed at safeguarding the unity of the family, as well as the rights of the legitimate family, than the constitutional principles of gender equality. In this line of thought, Auletta stresses that "it is because of these limits that the implementation of the constitution does not produce a rapid abrogation of the numerous codified norms that give body to the hierarchical structure of the family and guarantee a better treatment to legitimate children than natural ones" (2008: 5). For instance, male and female spouses continued to be ruled differently in case of adultery until 1968 when that specific norm was declared unconstitutional. Also, with regards to contraception and abortion, these matters continued to be ruled by the punitive norms of the fascist Code until the 1978 approbation of the law on voluntary termination of pregnancy (Saraceno & Naldini, 2007).

In conclusion, if the Constitution allowed some major steps forward, the pre-1970/1975 era is generally marked by a legal frame encouraging a hierarchical and authoritarian vision of family relations – impersonated through the husband as the head of the family – as well as a dualism between what was considered the "legitimate family" and the "illegitimate" one, materialized through differentiated legal regulations (Sesta, 2011). The influence of the Catholic Church, in the Italian context, is therefore not to be considered as a mere cultural aspect to be approached as an overarching heritage that would have left its imprints on social relations. Rather, at least with regards to family matters, the evolution of regulations cannot be understood without considering the strong ties the Italian legal system has with canonic law and the powers that the latter has on legal debates (Bernini, 2008).

## 1.2. Law 898/1970 – the Divorce Law

The 1970's mark a turn in the way Italian Family law was applicated. Following societal changes favoring, for instance, the concept of equality between spouses, the Constitutional Court started to intervene more in various decrees and regulations, judging them unconstitutional – which entailed reforming little by little several outdated laws. This was the case, for instance, with regards to adultery which was sentenced differently for men and women.

In this context, despite the strong resistance portrayed by the Catholic Church as well as some political parties, the question of the indivisibility of marriage and the possibility to divorce came

back on the table. In December 1970, unilateral divorce was finally introduced in Italy through the law 898 – *Disciplina dei casi di scioglimento del matrimonio*. Let's note that the law was approved outside of the civil code (so not integrated into it), mainly because of political-parliamentary debates of the time (Lenti & Long, 2014). And having the law voted did not mean that the cleaving debates ceased, as in 1974, its opponents created a referendum aimed at abrogating the law – which was defeated by a large majority (de Blasio & Vuri, 2013).

The 1970 Divorce Law[4] is composed of 12 articles that define the context in which – after a time of legal separation (5 years at that time) and going through a "conciliation" process asked for by the judge – one of the spouses can file for divorce. The initial text laid out the situations in which it was possible to do so; that is, in case the wedding had not been consumed, one of the spouses had been condemned and detained for a long period (the law provides the list of types and durations of condemnations in question), and if the couple had been living apart (*sepparati di fatto*) for at least 7 years (Saraceno & Naldini, 2007).

The law will later undergo some minor revisions. Among which, in 1987, law 74 which holds that:

- The number of years of legal separation that were mandatory before being able to file for divorce went from 5 to 3 years – this will then be lowered in 2015 (law 55) to 1 year in case of judicial separation and 6 months in case of consensual separation
- The premise of a possibility for shared physical custody is inscribed in the following provision: "Where the court deems it to be in the best interests of the children, including in relation to their age, joint or alternate custody may be arranged"[5] – with the use of the Italian words *affidamento congiunto* and *affidamento alternato*. We come back to these definitions in section 3.2. In the meantime, it is worth mentioning that this shared custody option represented an exception, as it was very rarely granted by judges to

[4] Art. 1. "Il giudice pronuncia lo scioglimento del matrimonio contratto a norma del codice civile, quando, esperito inutilmente il tentativo di conciliazione di cui al successivo articolo 4, accerta che la comunione spirituale e materiale tra i coniugi non puo' essere mantenuta o ricostituita per l'esistenza di una delle cause previste dall'articolo 3."
Art. 2. "Nei casi in cui il matrimonio sia stato celebrato con rito religioso e regolarmente trascritto, il giudice, quando, esperito inutilmente il tentativo di conciliazione di cui al successivo art. 4, accerta che la comunione spirituale e materiale tra i coniugi non puo' essere mantenuta o ricostituita per l'esistenza di una delle cause previste dall'articolo 3, pronuncia la cessazione degli effetti civili conseguenti alla trascrizione del matrimonio. »

[5] Art. 11
1. L'articolo 6 della legge 1 dicembre 1970 n. 898, e' sostituito dal seguente: "Art. 6. - 1. L'obbligo, ai sensi degli articoli 147 e 148 del codice civile, di mantenere, educare ed istruire i figli nati o adottati durante il matrimonio di cui sia stato pronunciato lo scioglimento o la cessazione degli effetti civili, permane anche nel caso di passaggio a nuove nozze di uno o di entrambi i genitori.
2. Il tribunale che pronuncia lo scioglimento o la cessazione degli effetti civili del matrimonio dichiara a quale genitore i figli sono affidati e adotta ogni altro provvedimento relativo alla prole con esclusivo riferimento all'interesse morale e materiale di essa. Ove il tribunale lo ritenga utile all'interesse dei minori, anche in relazione all'eta' degli stessi, puo' essere disposto l'affidamento congiunto o alternato."

parents. Moreover, these two terminologies will be abandoned in the 1975 reform (Long, 2014).

The substance and procedures linked to a divorce will be further discussed in section 3.1. For now, let's just note that the default form of custody of children envisaged at this time was sole custody – which also entails at that time, sole parental responsibility.

## 1.3. Law 151/1975 – Reform of Family Law

The 1975 reform of family law (*riforma del diritto di famiglia*) can be viewed as the concretization, in law, of the societal changes previously described. The 1960s and beginning of 1970s in Italy, as well as elsewhere in Europe, had been marked by fights for gender equality (among others) and legal provisions that better exemplify the changes in mentality among its population. The 1975 reform thus represents the major "recent" reform in Italian family law. As a matter of fact, it revised almost all of the family-related regulations (Auletta, 2008; Lenti & Long, 2014; Sesta, 2011). Many of its provisions remained unchanged in the 2006 law on joint custody which is why it is important to pay attention to this reform. The procedure chosen for this reform was the *novellazione* (novellation) meaning that the text of the new norm is inserted in the civil code; that is, in substitution to the previous one (Lenti & Long, 2014). This law is thus presented in the form of a list of reforms of previous norms (240 articles) to be replaced by the new reformed ones.

Generally speaking, the 1975 reform entailed abandoning the hierarchical understanding of family relations and suppressing remaining discriminations between illegitimate and legitimate children. With regards to parity between men and women in marriage, as stressed by Auletta (2008), for long the family model of the male breadwinner and female caretaker was considered to be compatible with the constitutional principle of equality between husband and wife specifically because of the clause framing this equality with regards to the unity of the family (as it has been discussed above). If some regulations were little by little starting to be deemed unconstitutional, courts still sanctioned in favor of the authority of the husband over his wife. This changes with the 1975 reform where, in its art. 24 (reforming art. 143 of the civil code)[6]: "with marriage, husband and wife acquire the same rights and duties" and they are both responsible for decisions regarding family life. Marital authority is thus suppressed and household duty is no longer required from the wife.

[6] Art. 24 : L'articolo 143 del codice civile e' sostituito dal seguente: "Art. 143 - Diritti e doveri reciproci dei coniugi. - Con il matrimonio il marito e la moglie acquistano gli stessi diritti e assumono i medesimi doveri.
Dal matrimonio deriva l'obbligo reciproco alla fedelta', all'assistenza morale e materiale, alla collaborazione nell'interesse della famiglia e alla coabitazione.
Entrambi i coniugi sono tenuti, ciascuno in relazione alle proprie sostanze e alla propria capacita' di lavoro professionale o casalingo, a contribuire ai bisogni della famiglia".

With regards to equality for all children (born in or out of wedlock), the law refers to the best interest of the child as the founding principle (*prioritario interesse del minore*), and more specifically, the right "to be brought up in a family suitable for parental duties" (Saraceno & Naldini, 2007: 232). Moreover, the legal term for children born out of wedlock changes from "illegitimate" to "natural children" (*figli naturali*)[7]. However, as it is emphasized by Saraceno and Naldini, this lexical change does not put an end to the different legal treatment that is conferred to families in and out of wedlock: "natural children are not considered as belonging to a "true" family, almost ignoring collateral kinship relations and not recognizing non-married separated parents the quality of couple, as parents, which on the other hand, husband and wife conserve even after the dissolution of marriage: the non-cohabiting and non-custodian natural parent had in fact less rights, {such as} if separated, parents could not seek joint {legal} custody[8], until the recent legislative modification" (2007: 232). Another example of this difference in legal status lies in art. 122 (reforming art. 280 of the civil code)[9] which sets that in the case non-married parents do end up getting married, they can ask to have the status of "legitimate" granted to their children. Laws regarding filiation will further be at the center of another reform in 2012/2013 (see section 2.5.)

Another change is the instauration of the "communion of goods" (*comunione dei beni*) as the default system once a couple marries (instead of the previous default "separation of goods" - *separazione dei beni*). The couple can choose to opt for the separation of goods but will have to specifically notify it (which is increasingly the case). The aim of this reform was to allow a form of equality between spouses, considering the added value of domestic and family labor of women to a family's patrimony (Saraceno & Naldini, 2007).

With regards to divorce, the 1975 reform will conserve both options of consensual and judicial separations (see section 3.1. for additional information). However, it transforms the nature of the request for judicial separation, which is no longer linked to a sense of "fault" by one or the other, but in the case one of them deems that cohabitation has become intolerable[10]. In this line

[7] Art. 100 : L'intitolazione del capo II del titolo VII del libro I del codice civile e' sostituita dalla seguente: "DELLA FILIAZIONE NATURALE E DELLA LEGITTIMAZIONE"
Art. 101 : L'intitolazione della sezione I del capo II del titolo VII del libro I del codice civile e' sostituita dalla seguente: "DELLA FILIAZIONE NATURALE"
[8] Joint custody is to be understood here as joint parental authority – see section III.2. for more precisions.
[9] Art. 122: L'articolo 280 del codice civile e' sostituito dal seguente: "Art. 280 - Legittimazione. - La legittimazione attribuisce a colui che e' nato fuori del matrimonio la qualita' di figlio legittimo.
Essa avviene per susseguente matrimonio dei genitori del figlio naturale o per provvedimento del giudice".
[10] Art. 32 : L'articolo 150 del codice civile e' sostituito dal seguente: "Art. 150 – Separazione personale. - E' ammessa la separazione personale dei coniugi. La separazione puo' essere giudiziale o consensuale. Il diritto di chiedere la separazione giudiziale o la omologazione di quella consensuale spetta esclusivamente ai coniugi".
Art. 33 : L'articolo 151 del codice civile e' sostituito dal seguente: "Art. 151 - Separazione giudiziale. - La separazione puo' essere chiesta quando si verificano, anche indipendentemente dalla volonta' di uno o di entrambi

of thought, both spouses can freely ask for separation – it thus no longer is the "guiltless" one who is authorized to do so (Saraceno & Naldini, 2007). Moreover, in case of separation, the judge will declare which parent gets custody of the children[11] – thus only sole custody is envisaged – and will decide how the non-custodial parent will assume his/her parental duty (to maintain, instruct and educate the children). The custodial parent is also the only one having parental responsibility (unless decided otherwise by the judge), apart from decisions that regard the best interest of the child which are decided by both parents. Lastly, the custodial parent is in priority given the right to continue to live in the family house – also following the best interest of the child (this is discussed at length in section 3.3.).

Finally, the principle of *parenti tenuti agli alimenti* (relatives reliable for a specific form of support), inherited from the *codice pisanelli*, were not eliminated.

i coniugi, fatti tali da rendere intollerabile la prosecuzione della convivenza o da recare grave pregiudizio alla educazione della prole.
Il giudice, pronunziando la separazione, dichiara, ove ne ricorrano le circostanze e ne sia richiesto, a quale dei coniugi sia addebitabile la separazione, in considerazione del suo comportamento contrario ai doveri che derivano dal matrimonio".

[11] Art. 36: L'articolo 155 del codice civile e' sostituito dal seguente: "Art. 155 - Provvedimenti riguardo ai figli. - Il giudice che pronunzia la separazione dichiara a quale dei coniugi i figli sono affidati e adotta ogni altro provvedimento relativo alla prole, con esclusivo riferimento all'interesse morale e materiale di essa.
In particolare il giudice stabilisce la misura e il modo con cui l'altro coniuge deve contribuire al mantenimento, all'istruzione e all'educazione dei figli, nonche' le modalita' di esercizio dei suoi diritti nei rapporti con essi.
Il coniuge cui sono affidati i figli, salva diversa disposizione del giudice, ha l'esercizio esclusivo della potesta' su di essi; egli deve attenersi alle condizioni determinate dal giudice. Salvo che sia diversamente stabilito, le decisioni di maggiore interesse per i figli sono adottate da entrambi i coniugi. Il coniuge cui i figli non siano affidati ha il diritto e il dovere di vigilare sulla loro istruzione ed educazione e puo' ricorrere al giudice quando ritenga che siano state assunte decisioni pregiudizievoli al loro interesse.
L'abitazione nella casa familiare spetta di preferenza, e ove sia possibile, al coniuge cui vengono affidati i figli.
Il giudice da' inoltre disposizioni circa l'amministrazione dei beni dei figli e, nell'ipotesi che l'esercizio della potesta' sia affidato ad entrambi i genitori, il concorso degli stessi al godimento dell'usufrutto legale.
In ogni caso il giudice puo' per gravi motivi ordinare che la prole sia collocata presso una terza persona o, nella impossibilita', in un istituto di educazione.
Nell'emanare i provvedimenti relativi all'affidamento dei figli e al contributo al loro mantenimento, il giudice deve tener conto dell'accordo fra le parti: i provvedimenti possono essere diversi rispetto alle domande delle parti o al loro accordo, ed emessi dopo l'assunzione di mezzi di prova dedotti dalle parti o disposti d'ufficio dal giudice.
I coniugi hanno diritto di chiedere in ogni tempo la revision delle disposizioni concernenti l'affidamento dei figli, l'attribuzione dell'esercizio della potesta' su di essi e le disposizioni relative alla misura e alle modalita' del contributo".

***Gli alimenti :***
This is a specific type of support that entails "the provision of the means of support necessary for a person to lead a dignified life" (Auletta, 2008: 105) that can be requested, under specific conditions, from one person to another family member: "The legal obligation to provide alimony is, in most cases, the responsibility of the relatives (spouse, relatives, relatives-in-law) and is based on the solidarity deriving from belonging to the same family unit (...). In the normative version, in fact, it is up to the family to help any of its members who find themselves in a situation of need" (Auletta, 2008 : 105).
In the case of previously married spouses, these *alimenti* can still be requested in case of separation and divorce to the ex-partner.
In Italy (as it is also the case in some other European countries), the obligation of child support/preservation/maintenance is also extended to other relatives.
This obligation arises when children's parents are no longer able to afford their basic needs. In other words, instead of conferring child support to the state in this situation, it is required that extended family members take on this obligation. These measures are inscribed in the Civil Code (see art. 147, 148, 439).

Ten years later, in 1985, the Concordat will undergo a reform (law 121/1985) regarding, among others, matrimonial matters in an attempt to better adjust to the civil changes. In addition, in 1991, Italy will ratify the 1989 United Nations Convention on the Rights of the Child, setting forth principles that will guarantee the best interest of the child, imprinting the formulation of future legislations.

## 1.4.Law 54/2006 - the "Joint Custody Law"

After covering the major evolutions in terms of family law throughout Italy's history, we can now go deeper into the 2006 so-called "Joint Custody Law", which is the one that is applicable today. As it is described by de Blasio and Vuri, "The introduction of the law can be considered as largely unexpected. This is not because a political consensus for the new framework suddenly materialized, so to surprise private agents, but for the reason that the reform, surrounded by strong opposition, was stalled for very long: the delay in the approval of the draft of the law caused high uncertainty on whether and when the law would have been finally signed. A first draft of the joint custody law was submitted to the Parliament as early as 1994. Then, for the two next parliamentary terms the draft remained unsigned. Finally, it was endorsed in February 2006, amidst strong opposition from a number of congresspersons (…): the bill was signed in an overnight parliamentary meeting and the law passed without unanimity" (2013: 5).
Once it was voted, it was presented as a major achievement towards a more equitable parental relationship between mother and father after separation. However, as we highlight in what follows, the law appears to be more of a cosmetic law than a true reform (de Blasio & Vuri, 2019).

In substance, the 54/2006 law (entitled *Disposizioni in materia di separazione dei genitori e affidamento condiviso dei figli* – but generally known as the "*legge sull'affidamento condiviso*, or the "joint custody law"), is made of only 5 articles, and holds the following principles :

a) The principle that, in case of couple separation, "minor children have the right to maintain a balanced and continuous relation with both parents, to receive care, education, and upbringing from both and to maintain significant relations with relatives from both parental family lines" (Art.1.1)[12]. Moreover, the judge will have **to evaluate in priority the possibility for joint (legal) custody** (see the next point (b) for an elaboration on the term 'joint custody'). With this law, sole custody remains possible but only if one of the parents specifically requires it and proves that it is in the best interest of the child to do so (Art. 1.2.)[13]. The 'interest of the minor' no longer represent on its own a sufficient criterion, the proof of such has to be given (Sassi et al, 2015).

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[12] Art 1.1. L'articolo 155 del codice civile è sostituito dal seguente:
"Art. 155. – *(Provvedimenti riguardo ai figli).* Anche in caso di separazione personale dei genitori il figlio minore ha il diritto di mantenere un rapporto equilibrato e continuativo con ciascuno di essi, di ricevere cura, educazione e istruzione da entrambi e di conservare rapporti significativi con gli ascendenti e con i parenti di ciascun ramo genitoriale.
Per realizzare la finalità indicata dal primo comma, il giudice che pronuncia la separazione personale dei coniugi adotta i provvedimenti relativi alla prole con esclusivo riferimento all'interesse morale e materiale di essa. Valuta prioritariamente la possibilità che i figli minori restino affidati a entrambi i genitori oppure stabilisce a quale di essi i figli sono affidati, determina i tempi e le modalità della loro presenza presso ciascun genitore, fissando altresì la misura e il modo con cui ciascuno di essi deve contribuire al mantenimento, alla cura, all'istruzione e all'educazione dei figli. Prende atto, se non contrari all'interesse dei figli, degli accordi intervenuti tra i genitori. Adotta ogni altro provvedimento relativo alla prole.
La potestà genitoriale è esercitata da entrambi i genitori. Le decisioni di maggiore interesse per i figli relative all'istruzione, all'educazione e alla salute sono assunte di comune accordo tenendo conto delle capacità, dell'inclinazione naturale e delle aspirazioni dei figli. In caso di disaccordo la decisione è rimessa al giudice. Limitatamente alle decisioni su questioni di ordinaria amministrazione, il giudice può stabilire che i genitori esercitino la potestà separatamente.
Salvo accordi diversi liberamente sottoscritti dalle parti, ciascuno dei genitori provvede al mantenimento dei figli in misura proporzionale al proprio reddito; il giudice stabilisce, ove necessario, la corresponsione di un assegno periodico al fine di realizzare il principio di proporzionalità, da determinare considerando:
1) le attuali esigenze del figlio;
2) il tenore di vita goduto dal figlio in costanza di convivenza con entrambi i genitori;
3) i tempi di permanenza presso ciascun genitore;
4) le risorse economiche di entrambi i genitori;
5) la valenza economica dei compiti domestici e di cura assunti da ciascun genitore.
L'assegno è automaticamente adeguato agli indici ISTAT in difetto di altro parametro indicato dalle parti o dal giudice.
Ove le informazioni di carattere economico fornite dai genitori non risultino sufficientemente documentate, il giudice dispone un accertamento della polizia tributaria sui redditi e sui beni oggetto della contestazione, anche se intestati a soggetti diversi".
[13] Art. 1. 2. Dopo l'articolo 155 del codice civile, come sostituito dal comma 1 del presente articolo, sono inseriti i seguenti:
"Art. 155-*bis*. – *(Affidamento a un solo genitore e opposizione all'affidamento condiviso).* Il giudice può disporre l'affidamento dei figli ad uno solo dei genitori qualora ritenga con provvedimento motivato che l'affidamento all'altro sia contrario all'interesse del minore.

The idea of this "balanced and continuous relation" has however been criticized because the law does not provide clear indications on what this entails. It states that the judge will have to determine the times spent with each parent (or acting the consensual accord parents were able to establish). But no indication is given regarding how the "balanced and continuous" relation translates into actual times or nights spent in each dwelling.
In addition, the indication of the right to maintain relations with the children's relatives had never been formally stated before. It is now given legal substance and allows grand-parents, for instance, to request that the judge opens a legal procedure to limit parental responsibility if they estimate that one or both parents do not allow them to enjoy this relationship (Lenti & Long, 2014).

b) What really changes in the 2006 law is the shift from sole parental responsibility (with the possibility to a have a joint responsibility upon request) to a **default joint parental responsibility** (Art. 1.1.). It is generally admitted by scholars and commentators of the law that, with regards to custody of children, this is the only legal and effective change of the 2006 law, and that the legislator subsumed under the appellation *affidamento condiviso* (generally translated as "joint/shared custody") custody *and* parental responsibility (Auletta, 2008; Lenti & Long, 2014; Saraceno & Naldini, 2007; Sesta, 2011; Sassi et al, 2015). With this in mind, de Blasio and Vuri highlight the importance of emphasizing a lexical differentiation between "legal custody" and "physical custody": "This provision, which intends to discipline both **legal custody** and **physical custody**, reflects the statement of the United Nation Convention on the Rights of the Child, adopted on 20 November 1989. Compared with the previous regulation – according to which "the judge decides which parent has custody of the child" – the innovation introduced with the Law 54/2006 is of great relevance. Prior to the reform, **legal custody** was assigned to mothers in the overwhelming majority of the cases. As to **physical custody**, the relation between a child and her/his father was limited to a few weekly hours, one or two weekends every month, and/or a couple of weeks during the summer" (2013: 5, emphasis added). We have chosen to use de Blasio and Vuri's terminology, which entails translating *affidamento condiviso* by "shared legal custody". We elaborate this choice in terminology in section 3.2. In addition, the law also clearly sets that the default option of shared legal custody prevails for the separation of partners previously married as well as those who were not[14].

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Ciascuno dei genitori può, in qualsiasi momento, chiedere l'affidamento esclusivo quando sussistono le condizioni indicate al primo comma. Il giudice, se accoglie la domanda, dispone l'affidamento esclusivo al genitore istante, facendo salvi, per quanto possibile, i diritti del minore previsti dal primo comma dell'articolo 155. Se la domanda risulta manifestamente infondata, il giudice può considerare il comportamento del genitore istante ai fini della determinazione dei provvedimenti da adottare nell'interesse dei figli, rimanendo ferma l'applicazione dell'articolo 96 del codice di procedura civile."

[14] Art. 4. 2.: "2. Le disposizioni della presente legge si applicano anche in caso di scioglimento, di cessazione degli effetti civili o di nullità del matrimonio, nonchè ai procedimenti relativi ai figli di genitori non coniugati."

c) The law sets new rules with regards to **child support**. Where the rule used to be that the non-custodial parent had to pay a sum of money (child support) – related to his/her duty to provide for care, education, and upbringing – to the custodial parent (who was in charge of administrating this money), the 2006 law establishes that it is both parents' duty to provide for child support. This is said to be a form of "direct support". The sum that each parent will have to provide for child support is calculated in proportion to their salary. The amount is also calculated considering: "1) the child's actual needs; 2) the standard of living that the child enjoyed while living with both parents; 3) the decided upon times spent with each parent; 4) the economic resources of each parent; 5) the economic value of domestic and care duties assumed by each parent" (Art. 1.1.).
How this actually translates in accords and jurisprudence, is developed in section 3.4.

d) The **assignment of the family house** is determined by considering, in priority, the best interest of the child[15]. As highlighted by de Blasio and Vuri, "This provides a clear departure from the past, as the house was always assigned to the custodian parent, that is, the mother in the overwhelming majority of the cases" (2013: 6). This assignment is considered in the financial regulations between parents, and can be modified in several situations, including if the assigned parent cohabits or remarries with a new partner (Art. 1.2.) – note that this latter measure was later considered unconstitutional because conflicting with the best interest of the child (which does not cease in case the parent to whom the house is assigned re-partners). This is thus a point to be evaluated, case by case, by the judge (Lenti & Long, 2014). The practical application of this principle is discussed in more details in section 3.3.

e) The law also envisages the **hearing of the child** (*ascolto*) if 12 years and older[16] (also possible for younger children but it is an exception). This was never explicitly set forth before. However, hearings are extremely rare in practice because the law also states that the judge can decide it to be superfluous. Thus, it is the judge that decides on its necessity and

[15] Art. 1.2. Dopo l'articolo 155 del codice civile, come sostituito dal comma 1 del presente articolo, sono inseriti i seguenti:
Art. 155-*quater*. – *(Assegnazione della casa familiare e prescrizioni in tema di residenza).* Il godimento della casa familiare è attribuito tenendo prioritariamente conto dell'interesse dei figli. Dell'assegnazione il giudice tiene conto nella regolazione dei rapporti economici tra i genitori, considerato l'eventuale titolo di proprietà. Il diritto al godimento della casa familiare viene meno nel caso che l'assegnatario non abiti o cessi di abitare stabilmente nella casa familiare o conviva *more uxorio* o contragga nuovo matrimonio. Il provvedimento di assegnazione e quello di revoca sono trascrivibili e opponibili a terzi ai sensi dell'articolo 2643.
Nel caso in cui uno dei coniugi cambi la residenza o il domicilio, l'altro coniuge può chiedere, se il mutamento interferisce con le modalità dell'affidamento, la ridefinizione degli accordi o dei provvedimenti adottati, ivi compresi quelli economici.

[16] Art. 155-*sexies*. – *(Poteri del giudice e ascolto del minore).* Prima dell'emanazione, anche in via provvisoria, dei provvedimenti di cui all'articolo 155, il giudice può assumere, ad istanza di parte o d'ufficio, mezzi di prova. Il giudice dispone, inoltre, l'audizione del figlio minore che abbia compiuto gli anni dodici e anche di età inferiore ove capace di discernimento.
Qualora ne ravvisi l'opportunità, il giudice, sentite le parti e ottenuto il loro consenso, può rinviare l'adozione dei provvedimenti di cui all'articolo 155 per consentire che i coniugi, avvalendosi di esperti, tentino una mediazione per raggiungere un accordo, con particolare riferimento alla tutela dell'interesse morale e materiale dei figli.

if it will not present a prejudice or heavy harm for the child, thus with the child's best interest at heart (Lenti & Long, 2014; Sesta, 2011). On this matter, Bosisio further emphasizes that "Italy's reluctance to comply with the recommendations expressed by the Committee on the Rights of the Child seems to stem from the enduring paternalistic orientation of Italy's professional legal culture, which rests on the conviction that children are fragile and vulnerable subjects who require protection from themselves and from the world. Ascertaining the child's view is therefore regarded with some concern because of the traumas that might result from the direct involvement of the child in situations characterised by family conflict." (2012: 147)

In conclusion, de Blasio and Vuri (2013) highlight that the law can be summarized as holding formal and substantive aspects: the formal one is the standard rule that the judge has to assign in priority shared legal custody to parents; the substantive ones are related to time spent with each parent and post-separation financial provisions – but for these, the judge holds huge discretion on how to apply the rules. It is this flexibility that is criticized with regards to the "joint custody law" and which, as we will further see in section III, leads to a practice of shared custody that is still very much attached to its former principles.

## 1.5. The 2012 - 2013 Law Reform on Filiation

The Italian law reform on filiation profoundly revised the first book of the civil code (here too, following the technique of "novellation"). This happened in two phases. The first one, through the law 219 in December 2012, which included some changes that immediately entered into effect, but generally speaking, represented a wide delegation to the Government to revise the discipline of filiation in the civil code following precise objectives and principles. The second one represents the implementation of these revisions through the Legislative Decree 154 of 2013, which entered into force on the 7th of February 2014. After the 1975 reform described above, this thus represents the second most important legislative intervention with regards to family matters (Giardini, 2017). The major changes are the following:

- The suppression of the separation between "legitimate" and "natural" children (thus the distinction that prevailed between children born in and out of wedlock). The remaining term that is used is "**children**" and, in cases where a distinction has to be made, the term "children born out of wedlock" is used (Lenti & Long, 2014). The 2006 law on shared legal custody had already made a step forward in this way, recognizing the same substantive rules following parental separation for children of married and non-married parents (Giardini, 2017). The 2012/2013 reform definitely removed the distinction between both categories of children by unifying their statuses and "labels" and thus putting an end to the concept of "legitimate" child or family inherited from the fascist era (Truccari, 2017). As stressed by Giardini, "The uniqueness of a child's status does not only mean equality of all children without discrimination arising from birth. It also

means protecting filiation as a value independent of marriage and the irrelevance of marriage in defining the legal status of children" (2017: 6).

- The word *potesta*, "power/authority", which was still in use in previous versions, is replaced everywhere with "parental responsibility". The 1975 reform had made a step forward granting both parents (and not only the father) the "parental authority/power". According to Giardini, "The abolition of the notion of power certainly implies, at an interpretative level, the will of the law to remove from the content of the parent-child relationship those authoritarian elements that have always characterized the parental role with respect to children in different historical periods" (2017:10). Through this reform, the legislator's will be thus to also redefine the relations between family members in a more horizontal way.
- Note that elements concerning the exercise of parental responsibility, as well as custody of children, were moved out of the section on marital separation of the civil code. In other words, the fact that these regulations used to be found in the section on marital separation entailed that marriage continued to be considered as the reference for such provisions and, therefore, children born out of wedlock could not be considered for such provisions (Lenti & Long, 2014). Setting measures regarding parental authority and custody of children outside of the marital section thus further signals the will to grant all children with a unique status, and recognize a plurality of family forms (2017).
- Finally, one last change inside this reform that is of importance with regards to child custody is rendering the Ordinary Court (*Tribunale Ordinario*) the only one competent to regulate family matters – including custody of children. Before this reform, this court was only competent with regards to previously married couples. If a non-married couple separated and needed the judge to statute on the custody of children, it was the Juvenile Court (*Tribunale per i Minorenni*) that was competent for their sentence, while the Ordinary Court was competent with regards to child support (Sesta, 2011). Apart from the bureaucratic none-sense of having to refer to several Courts depending on the matters at play, these two Courts also have totally different methodologies, which further represented a possible unequal treatment with regards to sentences on child custody. Today, this matter is thus unified inside the same Court, whatever the family configuration (Lenti & Long, 2014).

## 1.6. Law 76/2016 on Civil Unions

While the so-called "Cirinnà Law" (76/2016), introducing civil unions for same-sex partners[17], was finally approved by the Renzi government in 2016, it only partially satisfied the requests of the Italian LGBTQ+ movement for two main reasons: one is that they had requested the legalization of same-sex marriage, which a civil union is not entirely (Cipriani, 2017); and the other one was the will to include stepchild adoption in the law, which was in the original draft law but ended up being removed from the text as it provoked fierce opposition[18] (Dana, 2018). So, while the law does not recognize the family unit of same-sex couples, it is still very relevant to pay attention to these recent changes because: (1) many commentators agree that the law on civil union represents a first step towards a larger recognition of marriage and/or adoption of step children (and we will see in section 3.1.2. that jurisprudence is already going a step further); (2) the law also gives a legal status to cohabitating non-married couples which changes some elements with regards to separation.

The 2016 law is important because it signals a step towards the recognition of a plurality of possibilities for couples to formally unite: "there is no doubt that same-sex partnership confers a new family status: marriage is not the exclusive way to formalize a relationship anymore. (…) 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" (Cipriani, 2017: 348; also stressed in Auletta, 2019). The law 76/2016 was not included in the Civil Code and stands as a separate law, as explained by Ferrari: "the reform does not introduce a new Book within the Civil Code, but relegates the field in question to a special law, amending only marginally the Civil Code, the Code of Civil Procedure and the International Private Law (for the necessary related coordination). A similar choice was already made when divorce was introduced into the Italian legal system, and its regulation was precisely set in a special law and not inside the Civil Code, on the assumption that the institution was alien to the Italian legal tradition and culture" (2017: 181).

[17] Art. 1.1. La presente legge istituisce l'unione civile tra persone dello stesso sesso quale specifica formazione sociale ai sensi degli articoli 2 e 3 della Costituzione e reca la disciplina delle convivenze di fatto.
2. Due persone maggiorenni dello stesso sesso costituiscono un'unione civile mediante dichiarazione di fronte all'ufficiale di stato civile ed alla presenza di due testimoni.

[18] It is also worth noting that surrogacy is still banned in Italy and struggling to find legal recognition. However, some judges are inceasingly using the possibility of adoption "under special circumstances" (which is inscribed in the law on adoption) in order to recognize the adoption "in favor of the partner of the biological parent of a child born abroad out of surrogacy" (The Court of Appeal of Rome, upholding the judgment of the Juvenile Court of Rome, with the decision of November 23rd 2016; see Ferrari, 2017 for further information).

### 1.6.1. *Civil unions for same-sex couples*

If the initial will was to allow same-sex couples to marry, the last draft that was approved through the law 76/2016 created a specific legal status apart from that of marriage. The biggest difference between both statuses is that they refer to different articles of the Constitution to define the couple's union. As stressed by Ferrari, "the legal recognition of civil unions and of cohabiting partnerships is based on the reference to the social groups protected by Art 2 of the Constitution, and not instead on Art 29 of the Constitution, which continues to take care only of the family founded on marriage. Therefore, the reform does not extend the institute of marriage to same-sex couples, but it establishes ex novo a different institution, also constitutionally protected" (2017: 181). Indeed, since Art 29 uses the terms husband and wife, it implicitly defines marriage as a union between a man and a woman. Moreover, the new law almost hardly uses the word "family" (Cipriani, 2017; Dana, 2018).

Nevertheless, many of the law's provisions resemble those thought for in marriage: the declaration of the union at civil register with the presence of two witnesses, a mutual duty of moral and material assistance as well as a duty to contribute (financially or in terms of house work) to their common needs[19], default patrimonial system of communion of goods[20], and partners become legitimate successors in case of death (mutually heirs). The differences, however, include the option to have a common last name[21] (where in marriage there still exists the obligation for the wife to take the husband's last name), there is no obligation to fidelity, no step-child adoption is possible, nor does there exists a legal relation between partners and their "step-families" (Cipriani, 2017; Dana, 2018). Finally, the legal consequences of separation of Civil Unions also are of a specific nature[22], which we come back to in section 3.1.2.

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[19] Art. 1.11. Con la costituzione dell'unione civile tra persone dello stesso sesso le parti acquistano gli stessi diritti e assumono i medesimi doveri; dall'unione civile deriva l'obbligo reciproco all'assistenza morale e materiale e alla coabitazione. Entrambe le parti sono tenute, ciascuna in relazione alle proprie sostanze e alla propria capacita' di lavoro professionale e casalingo, a contribuire ai bisogni comuni.

[20] Art. 1.13. Il regime patrimoniale dell'unione civile tra persone dello stesso sesso, in mancanza di diversa convenzione patrimoniale, e' costituito dalla comunione dei beni. In materia di forma, modifica, simulazione e capacita' per la stipula delle convenzioni patrimoniali si applicano gli articoli 162, 163, 164 e 166 del codice civile. Le parti non possono derogare ne' ai diritti ne' ai doveri previsti dalla legge per effetto dell'unione civile. Si applicano le disposizioni di cui alle sezioni II, III, IV, V e VI del capo VI del titolo VI del libro primo del codice civile.

[21] Art. 1.10. Mediante dichiarazione all'ufficiale di stato civile le parti possono stabilire di assumere, per la durata dell'unione civile tra persone dello stesso sesso, un cognome comune scegliendolo tra i loro cognomi. La parte puo' anteporre o posporre al cognome comune il proprio cognome, se diverso, facendone dichiarazione all'ufficiale di stato civile.

[22] Art. 1.23. L'unione civile si scioglie altresi' nei casi previsti dall'articolo 3, numero 1) e numero 2), lettere a), c), d) ed e), della legge 1° dicembre 1970, n. 898.
24. L'unione civile si scioglie, inoltre, quando le parti hanno manifestato anche disgiuntamente la volonta' di scioglimento dinanzi all'ufficiale dello stato civile. In tale caso la domanda di scioglimento dell'unione civile e' proposta decorsi tre mesi dalla data della manifestazione di volonta' di scioglimento dell'unione.
25. Si applicano, in quanto compatibili, gli articoli 4, 5, primo comma, e dal quinto all'undicesimo comma, 8, 9, 9-bis, 10, 12-bis, 12-ter, 12-quater, 12-quinquies e 12-sexies della legge 1° dicembre 1970, n. 898, nonche' le

### 1.6.2. *Legal cohabitation for non-married couples*

In Italy, the number of couples cohabitating without being married never ceased to increase and are now five times higher than in the 90s (Crisci et al, 2019). However, for long, there was no possibility for Italian couples that lived together without being married to have any form of legal recognition of their status if they wished to do so. Following other countries that installed various legal statuses to which couples can choose to conform – such as the "pacs" in France or the "legal cohabitant" status in Belgium – the 2016 law also included the possibility for any couple to have a legal recognition of cohabitation (*convivenza di fatto*)[23]. Moreover, as stressed by Cavaletto, an important point to note is that legal cohabitation is available for any couple (heterosexual or homosexual): "The second part of the Cirinnà law deals with another type of family. Although it created a fairly limited public debate, this section of the legislation is of enormous social significance, for it in fact regulates – on a national level and for the first time – both heterosexual and homosexual de facto couples, that is, all those who decide to live together without getting married or without resorting to a civil union" (2017: 204). The idea is thus that any couple formation is worthy of protection with regards to certain aspects of their joint life.

Practically, both partners must declare that they are a couple and that they live together in the same house to the registry office (*anagrafe*), which will allow them to obtain a certificate of family status. Once they are legal cohabitants, the partners are granted with a series of rights and duties[24] towards each other, such as: the reciprocal right of visit, assistance and access to personal information in case of illness, the possibility of appointing the partner as their representative, of replacing a deceased partner in a rent contract, or the right to continue living in the house of residence for two years after the death of the cohabitant owner of the property, or for a period equivalent to the time of cohabitation but not more than 5 years – in case of the

disposizioni di cui al Titolo II del libro quarto del codice di procedura civile ed agli articoli 6 e 12 del decreto-legge 12 settembre 2014, n. 132, convertito, con modificazioni, dalla legge 10 novembre 2014, n. 162.

[23] Art. 1.36. Ai fini delle disposizioni di cui ai commi da 37 a 67 si intendono per «conviventi di fatto» due persone maggiorenni unite stabilmente da legami affettivi di coppia e di reciproca assistenza morale e materiale, non vincolate da rapporti di parentela, affinita' o adozione, da matrimonio o da un'unione civile.

37. Ferma restando la sussistenza dei presupposti di cui al comma 36, per l'accertamento della stabile convivenza si fa riferimento alla dichiarazione anagrafica di cui all'articolo 4 e alla lettera b) del comma 1 dell'articolo 13 del regolamento di cui al decreto del Presidente della Repubblica 30 maggio 1989, n. 223.

[24] Art. 1.38. I conviventi di fatto hanno gli stessi diritti spettanti al coniuge nei casi previsti dall'ordinamento penitenziario.

39. In caso di malattia o di ricovero, i conviventi di fatto hanno diritto reciproco di visita, di assistenza nonche' di accesso alle informazioni personali, secondo le regole di organizzazione delle strutture ospedaliere o di assistenza pubbliche, private o convenzionate, previste per i coniugi e i familiari.

40. Ciascun convivente di fatto puo' designare l'altro quale suo rappresentante con poteri pieni o limitati:

a) in caso di malattia che comporta incapacita' di intendere e di volere, per le decisioni in materia di salute;

b) in caso di morte, per quanto riguarda la donazione di organi, le modalita' di trattamento del corpo e le celebrazioni funerarie.

presence of minor children this time can be no less than 3 years[25]. However, this benefit ends if this partner enters in a new formal couple relationship (marriage, civil union, or new legal cohabitation) (Ferrari, 2017). Financial aspects regarding legal cohabitation and the couple's family unit can be regulated by a "cohabitation contract"[26] (*contratto di convivenza*), also registered at the *anagrafe* (Dana, 2018). The choice of common or separated goods will be inscribed in this contract.

In case of separation, ex-partners are required to provide *gli alimenti* in case the other one finds him/herself in a situation of great need (see section 3.1.2.). This entitlement prevails during a time equivalent to the time of cohabitation – after this time, the provision of *alimenti* falls onto his/her relatives[27] (Ferrari, 2017).

[25] Art. 1.42. Salvo quanto previsto dall'articolo 337-sexies del codice civile, in caso di morte del proprietario della casa di commune residenza il convivente di fatto superstite ha diritto di continuare ad abitare nella stessa per due anni o per un periodo pari alla convivenza se superiore a due anni e comunque non oltre i cinque anni. Ove nella stessa coabitino figli minori o figli disabili del convivente superstite, il medesimo ha diritto di continuare ad abitare nella casa di comune residenza per un periodo non inferiore a tre anni.
44. Nei casi di morte del conduttore o di suo recesso dal contratto di locazione della casa di comune residenza, il convivente di fatto ha facolta' di succedergli nel contratto.

[26] Art. 1.50. I conviventi di fatto possono disciplinare i rapporti patrimoniali relativi alla loro vita in comune con la sottoscrizione di un contratto di convivenza.

[27] Art. 1.65. In caso di cessazione della convivenza di fatto, il giudice stabilisce il diritto del convivente di ricevere dall'altro convivente e gli alimenti qualora versi in stato di bisogno e non sia in grado di provvedere al proprio mantenimento. In tali casi, gli alimenti sono assegnati per un periodo proporzionale alla durata della convivenza e nella misura determinata ai sensi dell'articolo 438, secondo comma, del codice civile. Ai fini della determinazione dell'ordine degli obbligati ai sensi dell'articolo 433 del codice civile, l'obbligo alimentare del convivente di cui al presente comma e' adempiuto con precedenza sui fratelli e sorelle.

# 2. Central Legal and Administrative Terms and Procedures

After going through the major changes in legislation regarding separation, divorce, and child custody, this report takes the time to further look into specific legal and administrative terms and procedures inherent to these legislations. Indeed, as stated in the introduction, the Italian case is quite particular when it comes to divorce/separations and custody of children in the sense that it uses some of the same terms that are widely mobilized in other languages, while conferring to them a (slightly) different legal meaning.
This has had the tendency to create ambivalences, especially in sociological publications with regards to family matters that are not written in Italian. This section thus aims at clarifying the meaning behind these terms and procedures and their legal effect in the Italian case, in order to avoid further confusion and the deliberate use of terms without explaining their contextual/national meaning. Also in that aim, the corresponding Italian term is always mentioned in italics so the reader can find further useful information in the Italian literature. Finally, this section concludes with a summary (Figure 3) of the main legal terms and the suggested English translation.

## 2.1. Separation – Divorce

The most striking example of a difference of legal significance with regards to terms linked to separation, precisely concerns the terms “separation” and “divorce”. In other countries, divorce entails the legal procedure for separating spouses (thus previously married), whereas separation refers to the procedure for legal cohabitants (never previously married). Elsewhere, divorce and separation might also mean different choices (a separating couple either choses one or the other legal avenue for separating).
In Italy, however, separation and divorce both represent **steps** of a legal procedure for previously married spouses. In other words, “separation” is a legal step (with specific legal proceedings) that precedes the legal act of divorce (Lenti & Long, 2014). Sesta (2001) even refers to separation as the antechamber for divorce. We clearly describe this hereafter. We start with procedures applied to previously married couples (3.1.1.)[28]. Remember that marriage can either be concordatarian/religious or strictly civil. Then, we examine what legal provisions are possible (or not) for non-married couples (3.1.2.). Each sub-section is ended with a summary of the procedures involved in each case (Figure 1 and 2).

[28] Are not taken into account here, procedures of annulment of marriage – which concern very specific cases and legal requirements. For more information, see for instance Lenti & Long (2014).

### 2.1.1. *Legal separation and divorce for married couples.*

The term "**legal separation**" (*separazione legale*) refers to the legal proceedings leading to the termination of cohabitation between spouses. As highlighted by Auletta, "legal separation entails the cessation of spouses' common living and affects marital duties, extinguishing some and modifying others" (2008: 206). There exists two possible avenues for legal separation in Italy: the consensual avenue or the judicial one.

**Consensual legal separation** (*separazione consensuale)* represents a formal agreement between spouses covering all of the terms of the separation (such as custody of children, child support, entitlement of the house, etc.), in the form of an accord (*accordo*) that is then homologated by the court (art. 158cc). This accord does not have any legal recognition unless it is homologated by the court (Sesta, 2011). This represents the large majority of legal separations in the country (around 85% in 2014 according to Lenti & Long, 2014). The Court will examine the legality of the accord and has the power to refuse a homologation only if it admits that some measures are conflicting with the best interest of the children – thus only with regards to measures related to child custody and support (Sesta, 2011). In the consensual path, the judge does not have the right to make any changes in the accord, and can only point to the parents the (eventual) necessary modification in order to be homologated.

The **judicial legal separation** (*separazione giudiziale*) represents a legal sentence that is pronounced when spouses cannot find an agreement on the terms of their separation. Judicial legal separation only happens upon request from one of the spouses, when he/she deems that cohabitation has become intolerable, or if some elements represent a prejudice for the children. Since the 1975 reform, the legislator's will has been to suppress the attachment of legal separation to a sense of fault, allowing legal separation to be asked when cohabitation is deemed intolerable. Intolerability is however never judged based on previous acts. In other words, it is not the "events that led to" the intolerable situation that are of importance, but just the "intolerability". Jurisprudence has made it clear that this intolerability is considered such based on the spouses' subjective experience. However, the judicial system did not entirely get rid of the sense of 'fault'. This is materialized through the concept of *addebito* ("charge"), that can be asked by one or both of the spouses, and which upholds a sense of sanction (Sesta, 2011).

***Legal separation with and without "charge"*** (in the sense of 'fault') (*Separazione con/senza addebito*)
*Without charge – senza addebito*: this can be the case for consensual as well as judicial legal separations. In this regime, spouses remain legitimate successors of each other. In addition, the spouse that cannot afford to maintain the same standard of living then while in the marriage has the right to receive a financial contribution from the other one.
*With charge – con addebito*: this is only possible for judicial legal separations and happens upon request. In other words, when a spouse asks that the legal separation be made the charge ('fault') of the other, if he/she is considered to have violated the rights one has in marriage, and which have rendered cohabitation intolerable (art. 151cc). If the charge is imputed to a spouse, he/she loses the right to legitimate succession and no longer qualifies for a financial contribution from the other. The only financial contribution still possible in this case are called *gli alimenti* (see section 2.3.) and is a periodic amount that the other spouse is entitled to give when he/she is in a situation of great need – that is to say, when he/she does not have sufficient means to lead a free and decent life.
Note that the "charge" can be imputed to both if requested and demonstrated (or considered such after examination by the Court). Also, after 1994 when the demonstrations became stricter, the number of sentences "with charge" have strongly diminished – the procedure of proving the allegations being very difficult (Lenti & Long, 2014; Sesta, 2011).

The different steps of this judicial procedure are the following:

- First the president of the Court (or a delegated judge) has the duty to try to 'reconcile' the parties – which today represents more of a step to see if the spouses will agree on a consensual accord or not. If they do, then they fall into the "consensual" procedure outlined above. If they do not, the president issues an "anticipated urgent" order on the terms of legal separation, which is provisional until the second phase (Auletta, 2008; Lenti& Long 2014).
- Second, the parties will meet in front of the examining magistrate and will have to demonstrate (prove) the pertinence of their contentious requests. If in this phase, they are able to reach a consensual agreement, then here too, the procedure falls into the "consensual" one outlined above.
- At the end of this process, the Court decides on a sentence – the terms of which will continue until the divorce is pronounced. This provision establishes the conditions of the spouses' separation: the presence and amount of child support (and eventually financial provisions for one of the spouses – see section 3.4.), custody of the children and its terms, how the parental responsibility will be exercised, to whom the family house is assigned, etc. It also puts an end to the "common goods" (*comunione dei beni*) regime.

Alongside legal separation, there is also the option for a married couple to separate without any legal proceeding – which is called ***separazione di fatto*** (de facto separation) – and entails the couple no longer cohabitates but still implies that the spouses are entitled to the rights and duties inherent to the marriage. Once they are de facto separated, any violation of marital rights and duties cannot be mobilized to ask for a further *addebito*, in the sense that these elements can no longer be taken into consideration towards producing intolerability of cohabitation (since the cohabitation is already ceased). Moreover, if one of the spouses was to be in a situation of need, he/she can ask the other for a form of alimony – in the case the other refuses, the request can be upheld to a judge that will rule on the alimony without ruling on the separation (Auletta, 2008; Lenti & Long, 2014).

**During the time in-between a legal separation (consensual or judicial) and a divorce** – which, as we saw, used to be 5, then 3, and now 1 year in case of judicial legal separation and 6 months in case of consensual legal separation – the "spouses" are still referred to each other as such (*coniugi*) and still hold some rights and duties towards each other. For instance, in case one of them deceases, the other one is still entitled to succession rights (as a legitimate successor) and still holds the right to live in the family house and use all of its furniture and equipment. Another example is the fact that the spouses are not allowed to remarry while they are legally separated. The Italian system thus upholds a long path towards divorce, as it is emphasized by Saraceno and Naldini: "This 'anomaly' of the Italian legislation (one has to bear in mind that to the 3-years waiting period {which have since then been reduced} have to be added the long bureaucratic times of proceedings with regards to divorce) has been underlined by various political parties, also through legislative initiatives that foresaw a reduction of the waiting time between separation and divorce, but which have never completed the parliamentary process or were blocked by one or two branches of parliament" (2007: 230).

After the necessary time has passed, one or both spouses can then file for a **divorce** (*divorzio*). This legal act definitely and completely ceases all of the effects of the marriage (except for some few aspects of economic assistance). Interestingly, the word "divorce" is never used in Italian legal texts. The equivalent in meaning *scioglimento del matrimonio* (dissolution of marriage) is used in case of a civil marriage, and *cessazione degli effetti civili del matrimonio* (termination of the civil effects of marriage)[29] in case of the concordat marriage. However, both procedures (whichever the termination) entail identical legal proceedings – and we will make use of the term divorce hereafter for the sake of convenience.

With regards to procedures, as stressed by Auletta (2008), this entails in practice:

- The necessary premise of the legal separation (in more than 99% of cases) – other avenues but that are very rarely mobilized represent, for instance, a divorce or

[29] Underlying, is thus entailed that divorce cannot terminate a religious, spiritual bond

annulment obtained outside of Italy or in the case of a crime and penal sentence happening closely after the marriage.

- At least 6 months or one year of legal separation uninterrupted (starting from the date of the first legal hearing).
- Divorce can be asked by one or the other partner – the causes leading to the legal separation are not taken into account in the divorce procedure.

As for the legal separation, there are two avenues for divorce: the contentious avenue (*contenzioso*) or upon a joint request (*a domanda congiunta*).

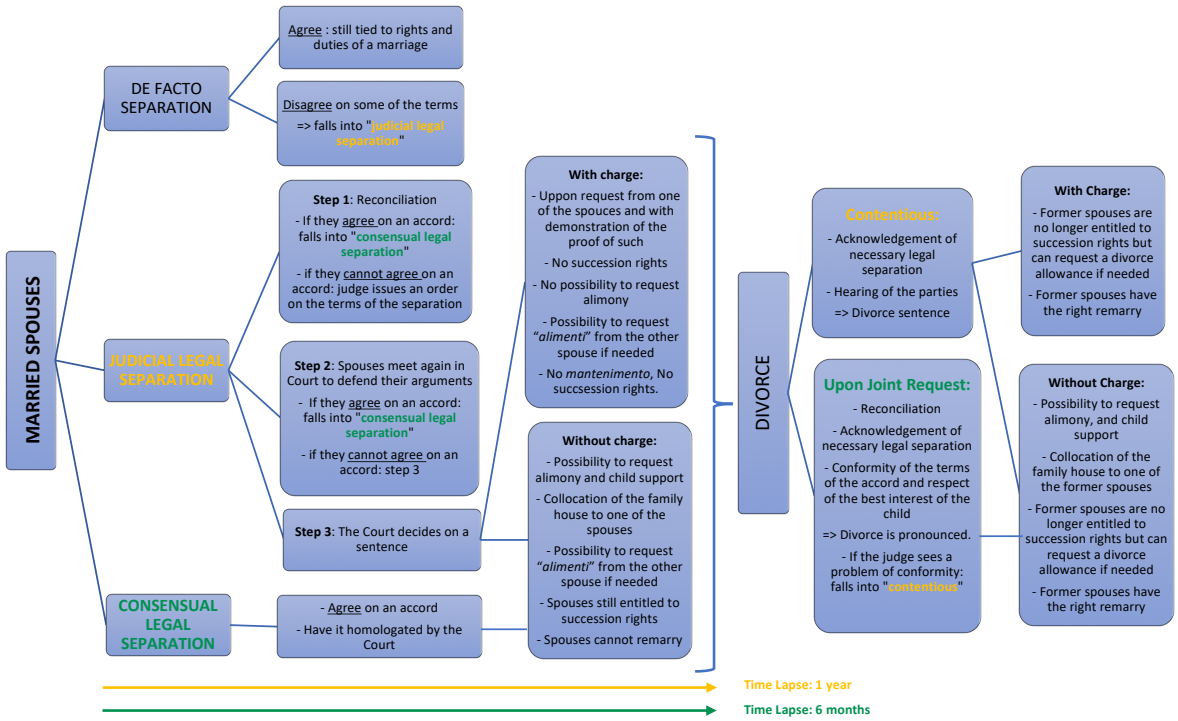
- The **divorce upon a joint request** is very similar in substance to the consensual legal separation: legally separated spouses need to present the agreed upon conditions of all the terms of the divorce (economic/maintenance provisions, custody of children, assignment of the family house, etc.). In this case, the hearing starts with the attempt to "conciliation" from the President of the court (or a delegated judge) – since this step was not present in the consensual legal separation it is performed at this point. Then the procedure follows with the acknowledgement of the necessary legal separation, the conformity of the terms of the accord as well as the respect of the best interest of the child. If everything is in conformity, divorce is pronounced. Otherwise, the procedure falls into the "contentious" avenue.
- The **contentious proceeding** is similar in substance to the judicial legal separation and is performed following the same two phases already outlined above.

Once the sentence is inscribed in the civil status registry, the former spouses own anew a "free status" (*stato libero*) and are legally free/apt to remarry if wished. Moreover, ex-spouses no longer hold any judicial family tie – among others, the right to succession in case one deceases. However, it can be decided that one of the former spouses is entitled to pay the other a "divorce allowance" (*assegno di divorzio*), which in theory "replaces any obligation of a pecuniary nature previously existing between them" (Lenti & Long, 2014: 179).

***Assegno di divorzio*** **:**
If one of the ex-spouses finds him/herself in need, and cannot objectively address this need, he/she can obtain from the other a sort of "divorce benefit" *(assegno di divorzio)* – as long as the "giving ex-spouse" has the means to provide for such a benefit. This benefit is thus of a welfare/relief nature (Sesta 2011). This benefit can be in the form of money or of patrimony. For instance, "the transfer of a property in bare ownership to the children, burdened by a usufruct in favor of the former spouse, or in ownership to the latter" (Lenti & Long, 2014: 181).
Moreover, the spouse entitled to the divorce benefit may also be entitled to (part of) the severance package (*pensione di reversibilità)* in case he/she never remarried (Lenti & Long, 2014).

In the end, the Italian system with regards to ending matrimonial relations is marked by overlaps and heavy bureaucratic procedures. As emphasized by Lenti and Long, “the fact that, unlike in all other European countries, two judicial proceedings are necessary in a row (…), results in almost inevitable but essentially pointless delays. These do not seem to be respectful of the principle of *reasonable duration of the trial*, which according to art. 6 ECHR {European Convention on Human Rights} must be guaranteed by every State, and produces an unreasonable increase in legal costs for the parties. A further inopportune consequence of this is a purely bureaucratic workload for the courts, which could do less, without prejudice to the stability of families” (Lenti & Long, 2014: 159).

*Figure 1: Summary of legal procedures for previously married couples.*




### 2.1.2. *Separation for couples that never married*

To end this section, after extensively describing the process of legal separation and divorce for married couples (civil and religious/concordat), we look into the procedures that concern couples who never married.

In Italy, these couples are interchangeably called *more uxorio* (following matrimonial custom), *convivenza senza matrimonio* (cohabitation without marriage), *unione libera* (free union), *coppia non sposata* (non-married couple), *famiglia di fatto* (de facto family). In this report, we will use the terminology "**free union**" (*unione libera*) to make reference to unmarried cohabiting couples that have not opted for any legal recognition. On the other side, since 2016, for couples that have opted for the legal recognition of their status (under law 76 – see section 2.6.), a translation dilemma appears again. This legal recognition of cohabitation is called *convivenza di fatto* which literally translates into English as "de facto cohabitation". However, in English (or in French: "cohabitation de fait"), this terminology refers to couples who have chosen to not have any legal recognition of their status. Therefore, we contend that *convivenza di fatto* should be translated in English by the term "**legal cohabitation**" which is the one we use in this report (also to avoid the confusion, in case of separation, with "de facto separation" which is a status that concerns previously married couples – see previous section). As it is

specified by Truccari, in the 2016 law, "regulation of domestic partnership {legal cohabitation} applies to couples composed of two individuals over 18 who are stably bound by the emotional ties of a couple and by ties of mutual moral and material assistance, not bound by family ties, kinship, adoption, marriage or civil union. The Cirinnà law – albeit in an unsystematic and incomplete way – finally grants *more uxorio* partners a set of rights and duties. In particular, the reciprocal right – in case of illness or hospitalization – to visit, to assist and to access the personal information held by hospitals or public care structures is guaranteed and the possibility for the partner of taking over the other partner's lease agreement on their common residence, in the event of death or withdrawal of the tenant, is recognized. Moreover, the law extends the same criteria established for compensation of the surviving spouse to the case of death of a partner due to the illegal act of a third party (paragraphs 39, 44 and 49)" (2017: 340).

We cover here the three possible avenues for the separation of non-married couples: (1) free unions; (2) legal cohabitants; (3) and civil unions of same-sex partners.

First, **free union couples (*unione libera*) that choose to separate** are the ones that benefit the less from any legal pronouncements on the terms of their separation. The legislator has generally put forth the need to respect the autonomy of cohabitants, who have chosen to refuse the effects that the law conveys in the case of marriage and its dissolution. This means that, without an agreed upon accord, things get complicated because jurisprudence has up to now refused to extend similar norms of matrimonial separation to free unions, for instance with regards to alimony – which, some commentators stress, is contrary to the principle of protection of the weakest one in the couple (generally the woman) that finds him/herself in a greater economic difficulty after the separation (Lenti & Long, 2014; Patti, 2015). Also, in the case of a free union, if one of the partners deceases, the law does not grant the right to the other to live in the family house or to use its furniture and equipment. Some of the only regulations that apply to a free union couple in case of separation are if the "family house" in which the couple was living was being rented by them while only one of them had signed the rent contract: in case of separation, if they decide that it is the person that had not signed the contract that will continue to live there, then they can have that person replace the former in the rent contract – and the landlord cannot refuse.

One of the only aspect that the judge might pronounce on, and which is similar for free unions as well as legal cohabitants, is related to child custody. Indeed, lets recall that the relation between parents and children born outside of marriage is governed by the regulations regarding filiation – which are since the 2012-2013 reform no longer linked to a marital status. Interestingly, the 2006 law indirectly recognized (in legal prescription) non-married couples through **granting their children the same rights as separating married parents** – that is, in terms of shared parental responsibility, custody, or child support (Sesta, 2011). In other words, if the parents are able to achieve an agreed upon accord, including about the custody of their

children and child support, they will not have to pass before a judge – which is different than previously married couples who nevertheless still need to have their accord homologated by a judge. Only in case they cannot find an agreement, will they have to pass in Court so a judge can sentence on child custody and child support (favoring shared legal custody, per law, as the default option). Moreover, in case of a consensual separation, for instance, the parties can agree that one of them will pay the other a sum of money (periodically or in a one-time payment), or give the other a patrimonial good (which will have the legal status of *donation*) (Lenti & Long, 2014).

Second, for **the separation of legal cohabitants** (*convivenza di fatto*), the 76/2016 law does not regulate the modalities of dissolution of legal cohabitants but only those of the cohabitation contract (*contratto di convivenza*). That is to say, upon separation, ex-partners will have to respect any eventual measures that were inscribed in the cohabitation contract which might include provisions on who will enjoy staying in the family house, how the contribution to the needs of the family will be calculated (based on professional work or house work), or how they will treat the patrimonial regime of the communion of goods. With regards to alimony, the rules that apply for legal separation and divorce apply as well to civil unions and legal cohabitants since the 2016 reform (Cavaletto, 2017). As it is further emphasized by Truccari, "in the event of termination of the de facto cohabitation {legal cohabitation}, there is a provision granting each partner, provided that he or she is in need and unable to meet his or her needs, the right to receive maintenance for a temporary period determined by the duration of the domestic partnership {legal cohabitation}(paragraph 65)" (2017: 340-341). Unless stipulated otherwise in the cohabitation contract, the default treatment is no right to stay in the family house (with a minimum of 90 days' notice to leave the house from the landlord partner), unless the couple has children, the judge can then decide on a right to stay in the family house (case to case) (de Filippis & Pisapia, 2017).

In addition, when the couple has children, they form a *famiglia anagrafica* ("registered family") which is defined as a group of persons that live together and are linked by an "affective tie" (art. 190cc). As explained by Lenti and Long, "The registered family – i.e. the simple fact of living together as declared to the municipal registry office – is taken into consideration to regulate access to a series of public services, in particular in the fields of health, education and public housing. The fundamental instrument for this purpose is the ISEE (indicator of equivalent economic situation): it uses parameters that take into account not only the economic data concerning the components of the registered family (income and assets), but also the numerical and qualitative composition of the family group; it takes into account above all the presence of minor children, the disabled, the non-self-sufficient elderly and persons entitled to maintenance or *alimenti*" (2014: 195).

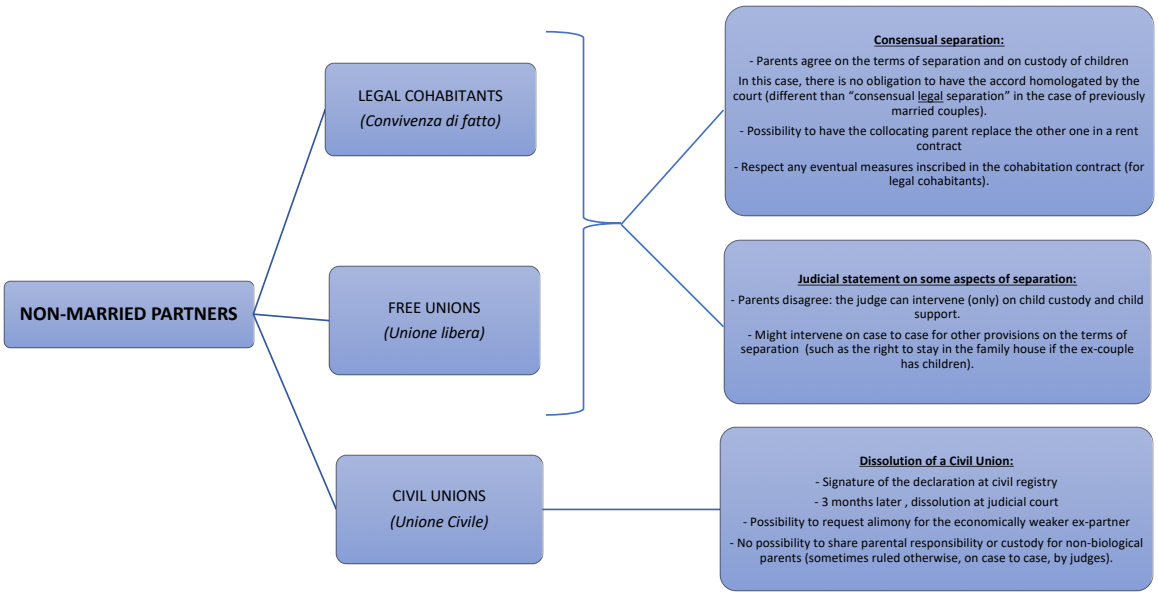
Third, one could have wondered why we did not include the description of **the dissolution of a civil union of same-sex couples** (*scioglimento dell'unione civile*) in the section on the dissolution of marriage. This is explained by the fact that, even if its provisions resemble those thought for in marriage, the law clearly sets a difference in status between marriage and civil unions. The word divorce does not apply for the dissolution of a civil union and the procedures involved in the dissolution of a civil union are very different from those involved in a legal separation and divorce, which justifies describing them here.

- The major difference for this type of dissolution is that it has an almost immediate effect. In other words, there is no required legal separation prior to the dissolution. The only laps of time that is required is three months between the declaration to the civil registrar – *anagrafe* – (which is different than marriage that requires the intervention of the ordinary court) of the intention to dissolve the union – which is immediately put in written form and signed, eventually with the help of a lawyer – and the request to the judicial court to dissolve the union (Cavaletto, 2017; Ferrari, 2017, Truccari, 2017). As it is further highlighted by Ferrari, "only after dissolution, the common property regime and the assets' fund for the needs of the family are extinguished, may each party use only the personal surname given at birth, and may alimony be ordered in favor of the economically weaker partner for solidarity purposes" (Ferrari, 2017: 185).
- With regards to alimony, the rules that apply for legal separation and divorce apply as well to civil unions and legal cohabitants since the 2016 reform (Cavaletto, 2017).
- The major issue with regards to the dissolution of civil unions regards the custody of children. Indeed, since the law does not provide the possibility for step-parents to adopt their partner's child, there is technically no legal provision that allow them to share responsibility or custody of the child. However, (and even before the 2016 law) jurisprudence has used some other legal tools to take some steps further in this direction. For instance, " there has been for some years a broad interpretation of the provisions of Law No 183/1984, and in particular of the specific institute of adoption under special circumstances referred to in Art 44(d). Adoption under special circumstances is in fact accessible even to single individuals, on the grounds that the adopter is linked by strong emotional bonds with the child. Thus this institute was invoked on several occasions by the courts of all levels to declare the adoption in favour of the cohabiting partner of the biological parent (…) It is obvious that there is still an open legal issue, which must be solved by the legislative in order to avoid legal uncertainty between opposing judgments released by domestic courts" (Ferrari, 2017: 194-196) – which has actually received a recommendation by the United Nations Committee for Human Rights (for more examples of jurisprudence's decisions to grant custody or parental responsibility to same-sex couples, see Cavaletto, 2017 and Ferrari, 2017). Seeing how jurisprudence is already making big steps forward in the absence of specific laws, we can formulate the hypothesis that the legal provisions regarding civil unions will continue to be reformed in the years to come.

Finally, we would like to end this section by stressing that several scholars, such as Ferrari (2017) and Cipriani (2017), have raised concerns with regards to the ability to remain a free union after the 2016 law – that is a couple cohabitating without being governed by any legal status. Indeed, with the use of the term *convivenza di fatto* for legal cohabitation, and the impression it gives to formally recognize what was before the free union, Ferrari states that "The new law of 2016 entrusts civil effects even to those relationships between persons who have not shown any willingness to formalize and regulate their bond. It is patent that if Italian courts will opt for the widespread recognition of cohabitation (even after short periods of cohabitation), there will be legal uncertainty. In fact, as cohabiting partnerships cannot be objectively detected because of parameters defined ex ante, and can still have binding effects for the parties (and even patrimonial effects), there will be a real risk of interpretative drift. In the event the parties do not sign any cohabitation agreement, it will be up to the judge to assess whether the cohabitation pleaded by a party is per se sufficient to conclude that both parties have intended to live together in a cohabiting partnership as provided by the 2016 law. Consequently, it could happen that one court deems cohabitation for a month sufficient and another instead requires at least one year of cohabitation to apply the provisions of the 2016 law, with obvious divergence in the outcomes across Italy" (2017: 188). It appears however that jurisprudence continues to treat free unions and legal cohabitation separately (even when free union couples are registered in a same dwelling), but this means that the law might undergo some modifications in the future to better adjust to these two different statuses (Patti, 2015).

In conclusion, what the 2016 law has opened up to, is the possibility to consider a plurality of family forms, especially outside of the marital path. As it is emphasized by Trucarri, "The recent rules on filiation, on new procedures for separation and divorce, on "quick divorce," on civil unions and on domestic partnerships consist of steps toward progressive privatization of family law. These reforms, on the one hand, strengthen the rights of individual family members through the introduction of new rights in favor of the parties to a civil union or domestic partnership {legal cohabitation}, as well as through the implementation of children's rights; on the other hand, they enhance the role of personal autonomy through the introduction of new procedures for separation and divorce or, otherwise, through the provisions on the cohabitation contracts. Such a narrative of family law – pandering the most recent social developments – seems, therefore, to endorse a retreat of the system from the public sphere to the strictly private and individual sphere, while laying the foundations for a new system based on the multiplicity of family models and the central role of the rights of individual family members and of personal autonomy" (2017: 343).

*Figure 2: Summary of legal procedures for non-married couples.*




## 2.2. Joint parental authority and custody of children – "bigenitorialità", "affid(ament)o condiviso"

With the advent of the idea that it is in the interest of the child to maintain stable and continuous relations with both parents, the law progressively started to propose possibilities for this as well (Saraceno & Naldini, 2007). In Italian literature, several terms are used when speaking of custody of children: *affidamento condiviso*, *affido condiviso*, *affido alternato*, *bigenitorialità*,… These are too often simplified in English translations under the generic terms of shared/joint custody. However, they do hold some elements of variation which are important to make reference to when translating. This is clarified in what follows.

Parent's obligations towards their children emanates from the **relation of filiation** (established by law) and not from their matrimonial or relational couple situation, nor does it come from a previous cohabitation. Moreover, as we have seen through the various reforms, parents and children's relationship after a couple separation is now governed by the same regulations weather the couple was previously married or not (in modo *unitario*). In other words, "the legislator has given the matter a different systematic placement: no longer among the consequences of spouses' personal separation (where it was previously placed: art. 155), but as an autonomous chapter, inserted among the rules on the exercise of parental responsibility" (Lenti & Long, 2014: 251). In other words, a balanced custody becomes **a right of the child**

with the 2006 law, which also entails that children have a right to this balanced relationship whatever couple configuration their parents were previously in (married or not, if they are separated, divorced, or the marriage has been annulled, etc.) (Sesta, 2011).

After a couple (legally) separates, it is the parent's duty to regulate their personal and patrimonial relationship with their children, that is to say their ***affidamento***; which translate to English as "foster care" or "custody". In Italian legislation this entails "identifying with which parent they will live most of the time, how parental responsibility will be exercised, and when and how the other parent will continue to fulfill his/her duties and exercise his/her right to have relationships with the children" (Lenti & Long, 2014: 251). Lenti and Long further emphasize that "the moral and material interest of the children is the only criterion which the judge must take into account when deciding on their custody, their residential placement and the times and modes of their stay with each parent. Cannot have any weight on the decision, of course, any responsibility of each spouse in the breakup of the relationship, even if they consist of violations of marital duties. Nor can the fact that a parent lives with another person have any weight, even if it is a homosexual cohabitation" (Lenti & Long, 2014: 254).

As we have seen, with the 2006 law, parents have to consider in priority sharing custody of their children – which entails in the Italian case, sharing parental responsibility. In other words, the Italian word *affidamento* has the exact same legal significance as *esecizio della responsabilità genitoriale* (parental responsibility). Therefore, with the 2006 law, what the Italian court has put forth is a common right to ***bigenitorialità***, that is the right for the children to have an equal and continuous relation with both parents (and both parental relatives). This concept existed before in Italian law but had no explicit ruling. As stated by Lenti and Long, "the novelty consists in the fact that today it is proclaimed from an *explicit* statutory provision, drafted in general terms, forcing a greater focus on compliance than in the past" (2014: 253). Legally speaking, the exercise of joint parental responsibility entails that both parents need to take together (and agree upon) every decision regarding the children, "as if they were still together" (Lenti & Long, 2014: 252). However, as further highlighted by Lenti and Long, "it is evident that with regards to everything strictly related to everyday life (…), daily decisions can only be taken in an exclusive way by the parent with whom the children are living with *at that moment*" (2014: 259 – a similar argument can be found in Sesta, 2011).

What is striking for commentators on the 2006 law, is that this balanced relationship (and the concept of *bigenitorialità*) does not translate in Italian law to an **equality of residential time at each parent's house**. However, social science literature on separation and divorce defines shared physical custody as a care arrangement in which children reside, over a one-year period, from 30 to 70% of the time in each dwelling. These residential times are generally calculated in terms of nights spent in each home and two typical examples of this arrangement include weekly shifts between the parents' homes, or periods of 9 days in one place, and 5 days in the

other one (Bernardi & Mortelmans, 2021; Merla, 2018). In this perspective, *affidamento condiviso*, as stated in the 2006 law, cannot be translated to joint/shared physical custody (or the French terms "résidence alternée", or "hébergement alterné"). Rather, we contend that *affidamento condiviso* should be translated in English, following de Blasio and Vuri (2019), as "**joint/shared legal custody**". This formulation better captures the idea that parents are both entitled legal custody of their children (in the form of parental responsibility), but it is however not set in stone if they are required to **share physical custody** of their children (in the form of a relative equality of residential times at each home) (Lavardera et al, 2012; Merla & Murru, 2021).

In addition, it is worth noting that the 1987 reform of the divorce law had introduced the terms *affidamento congiunto* and *affidamento alternato*, which literally translate to "joint custody" and "alternated custody". The first term referred to cases in which parents had to take every single decision (minor or major) regarding the children together. The second one came closer to the definition of shared physical custody but, as stressed by Lenti and Long, "judicial practice had not welcomed this novelty: recourse to *affidamento congiunto* was limited to cases of specific request made by both parents and in the absence of any conflict between them, so it had a very limited application. *Affidamento alternato*, was almost never admitted, thus remaining an exceptional case: it was and is widely believed that it is not a suitable option to guarantee the minor stable and secure existential references" (2014: 253). These terms were later abandoned in legal texts (Sassi et al, 2015) and thus do not have any legal meaning today.

## 2.3. "Collocamento (residenziale) presso uno dei genitori" – repercussions in terms of housing

When parents (legally) separate, the idea set forth by the Italian legislator is that it is in the best interest of the children to maintain a sense of "continuation" with regard to their pre-separation living conditions, for their psychological and affective balance and wellbeing (Saraceno & Naldini, 2007). Within this principle, it is understood that it is the children's right to continue to live in the family house after their parents separate. This house is thus assigned by the judge (or agreed upon by the parents) to one of the parents – the children being "**collocated**" to this parent (*il genitore **collocatario***). The Italian word *collocatare* translates to English as "to place, to locate", but with regards to child custody, it relates to the parent with whom the child will spend the most time, will live the most, or will officially reside with (the residence of the child being inscribes at that parent's place of residence – in the *anagrafe*). For the sake of clarity, we will use the English word "collocation" which is closest to the Italian one – the parent to whom the child(ren) is collocated – to refer to the lawful definition of *collocamento* (Lenti & Long, 2014). The assignment of the house was already practiced before the 2006 law, the house being assigned to the custodial parent. With joint legal custody (*affidamento condiviso*), the house

can in theory be assigned to either one of them – but statistics show that the family house continues to be assigned to mothers with a large majority (around 90%) as it was already the case before the 2006 law (de Blasio & Vuri, 2013; Lenti & Long, 2014; Merla & Murru, 2021).

In practice this translates as such:

- **Collocation** is attributed with regards to the following principles: a) in priority, by taking into account the interest of the child, which leaves a lot of power to the judge in evaluating what the interest of the child actually is; b) both parents' economic situation; c) and the eventual title of property (Law 54/2006, Art. 1.2.). In the case the time spent at each parent's house is equally distributed (and set this way in the formal accord or sentence), then the question regarding collocation is to be made with regards to the most economically vulnerable parent, the parent that is considered to be the more "suitable" one to live with the child, or if a "nesting" configuration is possible – meaning the children continue to live in the family house and the parents alternate residing with them. Various commentators of the law have stressed that, with the aim to prioritize the interest of children to remain in the dwelling they grew up in, especially in the case of very young children, judges tend to privilege the placement of minors with their mother (de Blasio & Vuri, 2013; Gaglione & Malfettani, 2008). Moreover, the term *genitore non convivente* (literally "non-cohabiting parent") is often used to qualify the "other parent", the one to which the child is not collocated (Long, 2014), which further emphasized the fact that there remains a difference in parental status even after implementation of the 2006 law.
- The "**family house**" is considered to be the one in which the united family has spent the most time. It will be assigned to one of the parents, following the principles described above, only if the family was still living in this house before the separation. It is considered that if, for instance, the family had just moved into a new place and resided in it for a short period of time before the couple decided to separate, it might not be considered as falling into the conditions to be assigned to one of the parents. Also, of importance, "the family house" englobes as well all of the furniture and equipment that compose it. If, for instance, the parent to whom the house is not-assigned was to take with him/her most of the furniture after moving out – in other words, if the family house has to be entirely remodeled – then it no longer *is* the family house and this could interfere with the principle of the right of the child to "continuation" (Auletta, 2008). De Blasio and Vuri further emphasize that "the decision on who keeps the family house is very relevant, as the wealth invested in the house represents almost 60% of the net family wealth (Bank of Italy, 2011) and the expenditures related to housing amount to 25% of the income of the family of the tenant (Bank of Italy, 2012)" (2013: 6).
- Moreover, collocation happens weather parents are owners or renting the family house. If they were renting it, then the rent contract is modified so that only the collocating parent sings it – and the landlord cannot refuse this amendment to the contract. If,

however, one or both of the parents were owners, things can get a bit touchy. Indeed, if the house is assigned to a non-owner (or co-owner) parent, he/she is attributed jouissance of the house free of charge. The only charges imputed to the parent having jouissance of the house concern charges of ordinary maintenance and use – while the costs of extraordinary maintenance are charged to the (co-)owner. To put it bluntly, the parent living in the house will pay for gas and electricity bills but if a window has to be replaced, or big isolation works have to be done, these are imputed to the (co-)owner (Lenti & Long, 2014). This thus entails a sacrifice for the (co-)owner since he/she is deprived of the jouissance of the house – while still potentially be paying mortgage and other fees for it. According to Auletta, "this sacrifice finds justification in the art. 42 Cost. that consents the ordinary legislator to introduce a limit to the right of property in order to secure its social function" (2008: 246).

- The right to live in the family house can extend even if the children are over 18 years old, as long as they are still economically dependent on the parent to whom the house is assigned. Once adult children become economically independent they are considered to be able to make their own life choices and the right to remain in the family house ceases (Auletta, 2008). However, as stressed by Lenti and Long (2014), because the law does not define specifically what is understood by "cohabitation", jurisprudence has faced several problems in determining exactly when the moment of assignation stops. For instance, the assignment of the family house stops when children do not live in it anymore, or if they do not all live together in it (that is, if some children live with one parent and others with the other one). But what happens when there are multiple children and one or more become financially independent but younger children are not yet? This shows how complicated this matter can be when getting into details.
- What is important to recall is that the right to live in the family house is a **right of the children** (not of the parents). This entails that jurisprudence will tend to leave the situation unchanged as long as there is one child still living in it. This also holds if the assigned parent was to re-partner (and thus potentially have an increase in level of comfort with an added revenue). The law used to state that in this case the assigned parent would lose assignment of the house, but this was later judged unconstitutional since it would nevertheless deprive the right of the child to "continuation" (Auletta, 2008). In this case, it is now thus up to the judge to statute, case by case, on the opportunity to remain assigned to the family house if a parent re-partners – taking the best interest of the child as a central point (Lenti & Long, 2014).
- Finally, there used to be a measure stating that if one of the parents changed residence, the other one could ask that the accord/sentence be re-examined to evaluate if this change of residence does not interfere with the modalities of custody. If it does, the accord/sentence could be re-negotiated, including its financial aspects. This had a tendency to discourage parents from moving with fear of having a diminution of their

financial support which motivated the suppression of this matter in the the 2012-2013 reform (Lenti & Long, 2014).

## 2.4.“Assegni e Mantenimento” – Alimony and Child Support

As we have seen, when spouses legally separate in Italy, they are still entitled to respect some duties towards each other. Among these, remains the right to economic solidarity among each other (as long as the separation and later divorce is not pronounced at the charge of one or both of them – *senza addebito*) (Patti, 2015). In English, the sum of money that is given to an ex-spouse after separation is interchangeably called alimony, maintenance (UK English mainly), or “benefit of the spouse”. Money that would be then given by one or both parents for the needs of a child is called “child support”. In Italian, the word *mantenimento* is used for both support systems, which can be confusing. *Mantenimento* generally means “support”, which can be in the form of a money sum or also in the form of care. To specifically mention a transfer of money, the term *assegno (di mantenimento)* is used – which often refers to alimony, but not only (Gaglione & Malfettani, 2008). Hereafter, we clarify the regulations regarding these two support systems.

### 2.4.1. *Child support – mantenimento (diretto) dei figli, mantenimento della prole*

Before the 2006 law, the non-custodial parent was required to pay child support to the custodial one in proportion to his/her revenues and the child’s needs. With this perspective, it is entailed that the custodial parent “directly” puts his/her resources to the child’s benefit, whereas the non-custodial one contributes to an “indirect” support in the form of a payment. With the new 2006 law and joint legal custody, enters the formal concept of “direct child support” (*mantenimento diretto)* for both parents. In theory, the principle is that they contribute to the child’s expenses when they have the child and, if necessary, an additional payment (*assegno*) can be made from one spouse to the other (Gaglione & Malfettani, 2008).
The idea motivating this choice for direct child support is, according to Lenti and Long (2014), an ideological position in the chief of the legislator to make sure that the parent with whom children live the most cannot take advantage (financially) from this situation. De Blasio and Vuri further acknowledge that direct child support was set “to address the agency-cost problem arising from the fact that, in case of non-targeted financial support {meaning in case of the payment of money sums}, the non-custodial parent cannot perfectly monitor how his financial contributions are spent, and therefore assumes that some money will be misspent” (2013: 6).

However, in practice, things do not unfold quite the same. As we have said, the law sets that “if necessary”, an additional payment can be made. This mainly happens in case of disproportion in terms of revenue and patrimony, to “re-equilibrate” the expenses. Gaglione and Malfettani (2008) call this system *assegno diretto perequativo periodico*, meaning the principle of direct

child support punctuated by a payment designed to equilibrate the means parents dispose of to care for their children. This payment is calculated based upon (art. 337-ter):

- Children's actual needs
- The living standard enjoyed by children when parents were together
- Time spent with each parent
- The economic resources each parent disposes of
- The economic value of care and domestic work performed by each parent

This system thus entails, again in theory, that with direct child support, there should be no bills sent to the other parent to get the reimbursed of the half of it (unless the judge decides otherwise). This contribution has to be re-evaluated annually based on ISTAT indications. And children continue to be entitled to child support even after reaching majority, as long as they are still economically independent. The only difference is that it can be decided that this support will be paid directly to the child instead of the parent (Gaglione & Malfettani, 2008).

Scholars have stressed that the formulation of this possibility for an additional payment "if necessary", leaves a lot interpretation power to the judges. Moreover, the way direct child support was thought for was in the frame of two parents equally sharing time spent with children during a week-time period (shared physical custody). In this configuration, if parents had different revenues or one parent spent more time on domestic care than the other, then the additional payment served to re-equilibrate parents' means. However, since the law on *affidamento condiviso* does not include a specific distribution of actual time spent between parents – and, as we will see in the next section, research has demonstrated that strict equality of times spent with both parents only happens in a minority of separated families – the application of "direct support" is complicated (de Blasio & Vuri, 2019; Gaglione & Malfettani, 2008; Lenti & Long, 2014).
Lenti and Long (2014) emphasize the objective impossibility of application of direct support in the Italian context, and highlight that in the huge majority of cases, the payment of child support prevails over a direct form of support. If we take into account, they stress, that children are collocated in majority to mothers, that fathers generally enjoy higher revenues than mothers, and that culturally, mothers dedicate more time than fathers to the care of children (negatively impacting their careers and salaries), then most cases enter in the frame set forth by law to receive a moneyed support.

#### 2.4.2. *Alimony – assegno di mantenimento*

The introduction of direct child support was also accompanied by a will to limit alimony. However, the provision of alimony was not included in the 2006 reform, which entails that the laws with regards to alimony in the context of legal separation and divorce still prevail (de Blasio & Vuri, 2019). That is, the spouse (*senza addebito*) has the right to receive from the other one "what is necessary for his/her maintenance, considering that he/she does not have the necessary income" (art. 156). In this perspective, jurisprudence has traditionally favored the

principle, for the economically weakest spouse, to maintain a level of life similar to the one enjoyed during marriage. Meaning that if his/her revenues and patrimony do not allow to live such an analogous lifestyle, he/she is entitled to a periodic amount of money payed by the other spouse (alimony) – if this other spouse has the revenue or economic means to afford such a payment (Patti, 2015). As highlighted by Lenti & Long, "The right to maintain a standard of living similar to that enjoyed during marriage now seems to be a remnant of another era, the legacy of a tradition in which marriage was the ultimate social "accommodation" of the woman, the husband was obliged to maintain her, female non-domestic work was limited to cases of strict economic need and marriage was indissoluble. None of this survives today; yet jurisprudence continues to recognize this right, deriving it from the formula of art. 156 c.1" (2014: 169).

It used to be the case that, even if he/she re-partnered, the parent receiving alimony continued to perceive it. This has recently changed, jurisprudence estimating that in case of re-partnering, the sentence on alimony can be revised, following the principle that the post-separation solidarity is replaced by a new relation of solidarity (Lenti & Long, 2014).

Moreover, it is envisaged that a spouse who remains inactive while considered to be able to find work, will no longer be entitled to an allowance. However, it is specified that this work "must not have negative repercussions on the care of children who still have the right to be maintained with whom they live: for example, it is not absolutely necessary for the wife to have a job, even part-time, if she has to take care of small children who live with her or a severely disabled child" (Lenti & Long, 2014: 171).

In the end, two issues have for consequence to leave great interpretation power to judges: one is the fact that the rules regarding alimony do not specify to what extent unemployment designed for domestic care work enters into play; the other one is the fact that it hasn't been made clear if alimony is still perceptible (cumulative) in case of child support. This is highlighted by de Blasio and Vuri who state that: "A change in alimony might reveal something on the judge preferences over the degree to which the provisions of the law have to be translated in actual court decisions. For instance, judges who are not happy with indirect support, but feel that they have nevertheless to obey to the law principles, might act using alimony to counterbalance the negative impact of indirect support on the money received by the custodial parent" (2013: 13). Their study further analyzes and compares the presence and amount of alimony pre and post law on joint legal custody (data from 2000 to 2010). It demonstrates that alimony does not weaken with the introduction of the new law. They stress that "one would expect that both the fraction of husbands obliged to provide a sum of money to the wife and the amount of money provided decrease substantially. Again, this does not seem to be the case. The probability that the father is obliged to provide a sum of money to the mother for child maintenance (…) decreases after the reform but only very modestly. (…) Even more surprisingly, the amount of money that the father is obliged to provide to the mother (…) remains unchanged with respect to the pre-reform situation" (2013: 13).

*Figure 3: Summary of terminology and suggested English translation.*

| ITALIAN | SUGGESTED ENGLISH TRANSLATION | COMMENTS |
|---|---|---|
| **Separazione legale (separazione di coniugi sposati)** | Legal separation (separation of previously married spouses) | Importance of specifying when it is a "legal" separation – that concerns a step towards divorce for previously married spouses – in order to avoid the confusion with "separation" that concerns non-married couples (free unions or legal cohabitants). |
| **Separazione di fatto** | de facto separation | |
| **Scioglimento del matrimonio; cessazione degli effetti civili del matrimonio ; divorzio** | Divorce ("dissolution of marriage for civil marriages" and "termination of the civil effects of marriage" for concordat marriages). | |
| **More uxorio, convivenza sense matrimonio, unione libera coppia non sposata, famiglia di fatto** | Free union | |
| **Convivenza di fatto** | Legal cohabitation | |
| **Unione civile** | Civil unions of same-sex partners | |
| **Mantenimento; mantenimento dei figli/della prole; assegno di mantenimento** | Alimony and/or Child support<br><br>*Mantenimento* is used for both support systems, which can be confusing. *Mantenimento* generally means "support", which can be in the form of a money sum or also in the form of care. To specifically mention a transfer of money, the term *assegno (di mantenimento)* is used – which often refers to alimony, but not only. | It is thus important to specify which type of support is considered (alimony or child support) when translating "mantenimento" from Italian to English. When writing in Italian, we would advise to specifically use "mantenimento dei filgi/della prole" for child support and "assegno di mantenimento al…{spouse, ex-spouse, ex-partner}" for alimony in order to avoid the confusion with the solo term "mantenimento". |
| **Affid(ament)o condiviso; Bigenitorialità ; esecizio della responsabilità genitoriale** | Shared legal custody | Concerns shared parental responsibility |
| **Affido materialmente condiviso** | Shared physical custody | Concerns a relative equality of shared residentiality between both dwellings; which is not used in legislations at the moment |
| **Collocamento** | Collocation | Assignment of the "family house" to one of the parents |

# 3. The law in practice

After going extensively into the various law reforms with regards to separation, divorce, and child custody, as well as presenting additional information and clarifications of some of its central legal and administrative terms and procedures, we end by shortly looking into the data available with regards to the actual applications of the law and its consequences. First, we present some of the few studies that have analyzed the effects of the 2006 law; second, we specify some recent updates with regards to procedures; third, we cover these implications for recomposed families; and fourth, we explain the introduction of family mediation.

## 3.1. The effects of the 2006 law

Official statistics with regards to shared legal custody (*affido condiviso* as in the 54/2006 law) inform us that it is applied in the vast majority of cases (89% in 2015, Istat). However, this entails that shared parental responsibility is applied, not necessarily shared physical custody, since no information is collected about the children's shared residential times. The only information on residential times that is available concerns the time the non-custodial parent spends with the child(ren) in case of sole custody. Also, of importance, is understanding that the Italian National Institute of Statistics (*Instituto Nazionale di Statistica* – Istat) surveys only include data on previously married couples or Civil Unions of same-sex partners. When they talk about "separation" in their various national reports (either consensual or judicial) they mention in their glossary that these separations concern "spouses" – signaling that we are indeed strictly in the case of "legal separations" of previously married couples. There are thus no numbers about the separation of free unions or legal cohabitants, and custody of their children. As of today, we have not found any quantitative works that specifically study the effects of the 2006 law on the practice of shared physical custody in Italian families.

However, there are some studies that have tried to tackle this shortage by interpreting and drawing research hypothesis based on the available statistics. First, Lavardera, Caravelli, and Togliatti (2011, 2012) studied the practices of "joint custody" and "shared parenting" in the Civil Court of Rome. Starting from the similar observation of a lack of analysis of shared physical custody we made, they highlight that "There are only two studies about management of child custody after divorce in Italy (Dell'Antonio & Vincenzi Amato, 1992; Malagoli Togliatti et al., 2004). These studies were conducted before Law 54/2006; they examined the data with regard to custody, motivations, and visit planning in the Rome Court. Results have shown that before the introduction of Law 54/2006, in the opinion of parents and experts alike, the mother was held to be the "custodian" par excellence. (…) The studies do not examine matters concerning child support and socioeconomic status" (Lavardera et al, 2012: 1537). This study thus analyzes the similarities and changes in decisions on judicial divorces, as well as

accords by parent's mutual consent (thus judicial or consensual avenues) happening the year before and the year after the entry in force of law 54/2006. Their results highlight that, in the year 2006-2007, even if the request for sole maternal custody remained high, they observe a significant increase in the request for joint (legal) custody by parents as well as ordered by the judges. With regards to the still high request for sole maternal custody, they note that divorce procedures were still very long at that time so "it is very probable that some proceedings concluded in 2007 began prior to the introduction of the new law on shared custody. The absence of changes in the preliminary parental requests made during the early stages of judicial divorce can be attributed to this phenomenon" (2012: 1549). They conclude that the entry in force of the 2006 law signals a tendency towards a change in co-parenting culture, emphasizing a greater importance of coordination in parental roles. However, the authors do stress that visiting plans provided in these sentences are similar to the ones decided before the law (with a slight increase in "free" visiting plans where the non-residential parent can see the children "whenever he/she wants") and do not lead to culture of shared physical custody – or at least it is impossible to observe based on the available statistics (Lavardera et al, 2012).

Second, de Blasio and Vuri's study (2013, also republished in 2019) "The effects of the joint custody law in Italy" analyzes the statistics on a longer time frame and on a national scope. Their study examines judges' sentences from 2000 to 2010 (database, Istat) – which entails that their data only concern effects with regards to previously married couples (judicial or consensual legal separations) or eventually some of the non-married couples that saw a judge regarding custody of their children. Noting that there was unfortunately no information in their database on the times spent at each parents', they formulate hypothesis based on other provisions such as the presence or not of financial supports (child support and alimony) and the assignment of the family house. This allows them to draw some conclusions on how shared legal custody is implemented. Their study highlights that the family house continued to be assigned in majority to mothers (in similar proportions as before the reform), child support is in majority set in terms of money sums, and alimony continues to be perceived in large majority by women. Considering that the assignment of the house, as well as child support have to be decided taking into account, among others, the times spent with each parents (as decided by law), and that these parameters resemble the one that were observed before the implementation of the 2006 law, they are able to conclude that children from separated parents continue to spend most of their time at their mothers (to whom they are officially collocated); the time spent with their parents remaining similar to what was practiced in sole custody pre-2006 (de Blasio & Vuri, 2013, 2019).

This has led several scholars to emphasize that the law on shared legal custody only brought cosmetical changes because the way judges sentence on how the custody of children will be put into practice is finally very similar to what was sentenced before the application of the 2006 law, and concerns more a division of the parental authority, than a division of the calendar

between both parents (Sassi et al, 2015; Sesta, 2011; Lenti & Long, 2014). In this regards, Lenti and Long highlight that "the rules on the times and modes of permanence with each one can be constructed in very different ways, which lie in-between two opposite possibilities: from the extreme of leaving it entirely up to the parties to specify them from time to time, by mutual agreement, to the opposite extreme of defining in a prefixed, analytical and rigid way the rhythm of the children's movements between one parent and the other, with a precision that can reach establishing not only the days, but also the hours. In most cases the judge determines the times and modes with a relative precision, so as to avoid reasons for daily conflict between the parents. (...) In the case of shared legal custody as well as in the case of sole custody, however, jurisprudence following the entry into force of the new law has shown a certain tendency to continue to establish the previously most common time frames, such as, for example, staying with the non-collocated parent for one weekend every other week, one afternoon during the week, a few weeks during school vacations" (2014: 259).

Meggiolaro and Ongaro's (2015) study "Non-resident parent-child contact after marital dissolution and parental re-partnering: Evidence from Italy", analyzes the 2003 and 2009 Family and Social Subjects database to see if re-partnering has an incidence on the frequency of parent-child contacts. However, the type of contacts that are provided in this database are either face-to-face or by phone – without any information on what "face-to-face" entails. So, we do not know if, for instance, this includes sleepovers or not. The authors also stress that the type of custody is not provided in this database. Analyzing the same database, Solera, Tomatis and Tosi (2020) look at the link between the mother's level of education and father-child frequency of contact. But, here again, the frequency of contact does not tell us if children sleepover at their fathers or if they just meet for a few hours.

Finally, to the best of our knowledge, there are no qualitative studies that analyze how shared physical custody is implemented in Italy since the 2006 law, or that document the effects of the entry in force of shared legal custody on (legally) separated and divorced family practices. Some works however touch upon some connected questions. Naldini and Solera, in a special issue of the Italian Journal of Social Policy (*La Rivista delle Politiche Sociali*), published the results of a wide study they conduced (also with others) on the topic of how Italian institutions (such as day care, kindergarten, primary school, and social services) adjust (or not) to changing family practices (including homoparental families, separated families, migrant families, …) (Naldini & Solera, 2020). Moreover, Mercuri and Naldini's (2020) paper in this issue "shows that the question of conflict, its genesis and how it can be contained is crucial in designing the forms of co-parenting. Drawing on interviews and focus groups (…) both with families and with operators, Mercuri and Naldini show how services and professionals (social workers, educators and psychologists) work hard to offer support to situations of family crisis, but also contribute (albeit not always consciously and not always in a coordinated way) to consolidate a discourse on good divorce in which conflict is strongly stigmatized, the well-being of children

is placed at the center and the needs of adults are neglected" (Naldini & Solera, 2020:13). In addition, Merla and Murru's recent publication on "Families facing the Italian lockdown: Temporal adjustments and new caring practices in shared physical custody arrangements" is a qualitative study that analyzed how 12 separated families practicing shared physical custody adjusted to the Spring 2020 lockdown. Through their observations, they highlight among other points the need to further document how Italian families practice shared physical custody and, especially, with regards to "care work" and the various family members involved in caring practices, as well as siblings' relationship in this context (Merla & Murru, 2021).

This report thus highlights the need to further engage in studies and statistics in order to make sense on how the implementation of the 54/2006 law has impacted (or not) the practice of shared physical custody. In particular, there is a need to further deepen national statistics on separation and divorce, to include more questions about child custody, especially on the amount of residential time in each dwelling, as well as broadening the surveyed population to include non-married couples.

## 3.2. Recent updates on procedures

Some recent updates in terms of administrative procedures have had big impacts on the numbers of legal separations and divorce. One of these lies in the Law 55/2015 that introduced what is deliberately called "the fast divorce" (*divorzio breve*) by significantly reducing the required interval between legal separation and divorce – which is now 12 months in case of judicial legal separation and 6 in case of a consensual legal separation. The other one, for consensual legal separations, implies that spouses no longer have to physically go themselves get their accord homologated by the Court, their lawyer(s) can do so for them (Law Decree 132/2014). As it is emphasized by Truccari, the latter "provided for the possibility of obtaining legal separation, the dissolution or termination of the civil effects of marriage, as well as the possibility of changing the conditions of separation or divorce, (almost entirely) without the intervention of judicial authorities, through a procedure of negotiation assisted by lawyers or by means of a declaration by the spouses to be submitted to the Mayor" (2017: 328).

First, the introduction of the so called "fast divorce Law" caused a considerable increase in the number of divorces in 2015 (82,469 compared to 52,355 of the previous year with an increase of 57%). The growth in the number of legal separations was less relevant (91,706 with an increase equal to 2.7% compared to 2014) (Istat, 2015). If we compare with the numbers of 2019, there were 85,349 divorces, 3.5 percent fewer than in 2018 and 13.9 percent fewer when compared to 2016, the year of relative maximum (99,071 divorces) – which highlights how important the administrative facilitation, having simplified and reduced the costs of the separation/divorce process, were in finalizing divorce procedures. In 2019, there were 97,474 legal separations. After the increase that occurred between 2015 and 2016 (from 91,706 to

99,611, +8.6%), legal separations then remained on that same level showing only small fluctuations. Compared to 2008, they have increased by 15.8%. Legal separations still represent in Italy the most explicative event of marital instability, considering that not all legal separations are subsequently converted into divorces. With regards to legal separations, in 2019, 85.0% of them are concluded consensually; a stable percentage, with slight fluctuations, over the last decade. In contrast, the share of consensual divorces appears smaller (70.1% in 2019). After the peak of 2016 (78.2%), the proportion of consensual divorces decreases to return to the level of the beginning of the decade (72.4% in 2010) (Istat, 2019).

Second, the aim of introducing this type of agreement – with the so-called *degiurisdizionalizzazione*, which we could translate to the introduction of out-of-court consensual paths – was precisely to simplify and speed up the process of terminating one's union and, at the same time, lighten the workload of the Courts. According to the most recent Istat survey, considering the total of consensual agreements, "more than one out of four consensual separations and almost one out of two consensual divorces take place outside the court. For those who choose out-of-court agreements to separate or divorce, the shares of attorney-assisted negotiations (Article 6) are 37.7% and 24.9%, respectively, both up from 2015 (32.2% and 19.2%). However, the component that is increasingly consolidating its importance in recent years is that of out-of-court settlements directly at the Civil Status Offices (art. 12). In 2019, 14,693 separations and 20,222 divorces were carried out directly at the municipality (with much less time and cost than in other cases): this is 15.1% of all separations and 23.7% of all divorces" (Istat, 2019).

One last observation from the latest Istat survey concerns geographical distribution of the practices. It is observed that consensual (extrajudicial) divorces are more frequent in the Northern Regions than in Southern ones.

This has thus served to show the impact of the weight of legal and administrative procedures on ex-couple's choices. Seeing how the numbers evolved after facilitating legal separation and divorce processes helps to understand the extent to which heavy bureaucracy impacts on ex-couple's choices.

## 3.3. Recomposed families

Something we have not mentioned up to this point is the legal provisions with regards to step-parents/siblings and recomposed families in general. Several scholars, such as Sesta (2011) and Auletta (2008) have noted that, in Italian language, there does not even exist a proper vocabulary term to define the roles of members of a recomposed family, "except those which evoke the negative characters of fairy tales, such as patrigno and matrigna, figliastro, fratellastro, or sorellastra" (Sesta, 2011: 196). In this context, it is observed that journalists will

tend to follow with the use of *famigliastra*, whereas sociologists will prefer the term "social parent" (*genitore sociale*) or use the English term of "step family" (Sesta, 2011).
Legally speaking, there are thus at the moment no provision specifically covering the status of step-parent. With the changes in the legal proceedings of filiation and parental responsibility, the concept of indissolubility moved from couple relations to parent-child relations (Sesta, 2011). This means that, in the Italian context, the implication of a step-parent becomes tricky, especially with regards to support systems and entitlement of the family house, since the only relations taken into account concern parent-child filiation. Moreover, the constitutional definition of the family presents family solely as a relation between parents and children.

However, some of the recent changes in procedures we described, as well as the 2016 law, have had implications in considering relations within recomposed families. First, the introduction of the "fast divorce" procedures has had an impact on the increase in number of second marriages after 2015. Remember that, while still legally separated, spouses are not allowed to remarry. Thus, it is interesting to observe that, following the administrative speeding up to get divorced, (and lowering the cost of it), a number of legally separated spouses finalized their divorce, further leading to an increase in second marriages, and generating new family types. According to the latest Istat survey, "in 2019, 20.6% of marriages involve at least one spouse at a second (or subsequent) wedding (13.8% in 2008). The evident increase – especially in the two-year period 2015-2016 – derives significantly from the introduction of the short divorce; the value recorded in 2019 (37,938), on the other hand, is entirely in line with that of the previous two years, thus assuming a substantial stabilization of the share of second marriages" (Istat, 2019).

Second, the 2016 law on Civil Unions allowed for the legal recognition of the *famiglia anagrafica* (registered family) and the possibility to become legal cohabitants. This means that the only administrative place where a recomposed family can be recognized as such is precisely linked to the relation between its members as cohabitants, in the definition of the registered family, which envisages "a set of persons bound by bonds of marriage, kinship, affinity, adoption, guardianship or emotional ties, cohabiting and having habitual residence in the same municipality" (law 223/1986, art. 4).

Finally, an important precision highlighted by Ferrari concerns the status of new couples and recomposed families when one of the new partners is still involved in a legal separation: "It should also be highlighted that reconstituted families formed by persons legally separated but not divorced are totally excluded from all the rights {involved in law 76/2016 about legal cohabitation}. For reconstituted families, as the previous marriage is not dissolved (or cessation of its civil effects have not been decreed, in case of a religious marriage), even though the new couple is durably living together, there is no benefit from the protections provided for by the 2016 reform. Statistical data show that in 2014, there were 89,303 legal separations and 52,355 divorces, echoing a constant trend begun in 2008. In fact, many people, even though legally

separated, are not divorcing for various reasons: to keep mutual inheritance rights, to avoid further legal expenses, for sentimental reasons. To these many reasons, the 2016 law could add a new and further one: namely to avoid being bound by law to pay alimony to the former cohabiting partner. If one lives durably with the same partner, but is still bound by a previous valid marriage, the provisions of Law No 76/2016 on cohabitation do not apply" (2017: 188-189).[30]

## 3.4. Family Mediation

In recent years, with the increase in couple (legal) separation and the huge amount of judicial bureaucratic work that dealing with all of these demands represents, the need for new professional figures came to surface in order to alleviate the work of the traditional ones held by judges and lawyers. In this perspective, family mediation was developed to provide an alternative to the "war for victory" of (legally) separating partners. In other words, the scope is to find a way to convince them "to renounce battling with each other in search for a judicial victory in financial terms (alimony and child support) or personal terms (custody of children)" (Sesta, 2011: 135). Family mediation thus does not aim at replacing the judicial phase of legal separation (and it does not have the legal ability to do so). Rather, with the help of trained professionals, and in line with the Strasbourg Convention on the rights of children (1996) and the European Commission's resolution of 1998 encouraging the promotion of family mediation, it has specifically at heart to find solutions satisfying the interests of the parties involved, especially with regards to the best interest of the minor children involved. In other words, the aim is to increase the number of parents that will draft and agree upon an accord in order to quickly go through the consensual legal separation procedures. After the update in procedures we described, this path entails less legal administrative work for the Courts and guarantees the fastest treatment of demands.

In practice, separating partners can either solicit public family mediation services, which are free of charge but, therefore, have a huge waiting list, or private family mediation services, which are costly but quickly available. Private family mediation services are usually provided by lawyers (but not only) that have been certified to do so alongside their practice. Some commentators have raised concerns about the ability (and ethics) of having someone who is professionally trained to defend and battle for its clients' interests, switch to a mediation stance where the interest lies in finding a compromise. As it is further stressed by Lenti and Long, "mediation is facultative: it can be ordered by the judge only with the consent of both parents.

[30] Ferrari stresses a precision with regards to the new provisions of the 2016 law: "In this regard, although not specified, it is patent that the law of 2016 deals exclusively with cases of cohabitation dissolution in the presence of children born from previous relationships of one of the partners (step-parent families), since if the children are in common, the enjoyment of the family home is regulated by Art 337 sexies Civil Code." (2017: 189).

It is not required that the family mediator holds a particular professional qualification: usually it is a self-employed, of psychological, sociological, or juridical formation, but it can also by an employee of social services" (2014: 256).

Finally, the introduction of family mediation as a new profession has led to the implementation of a number of trainings of all sorts and the publication of abundant literature on best practices for mediation – especially centering around the protection of children's mental health (Mercuri and Naldini, 2020). We have noted that these publications and trainings tend to resemble, in ideological scope, to the socio-political and religious cleavages we described in the introduction – based on various definitions and conceptions of the family, the role of parents, the centrality of the best interest of the child, or what equality and fairness entail[31]. This is to say that we can see how yesterdays' ideological fights are still very much present today and permeated not only the public debates, but also contribute to shaping professional best practices.

[31] A non-exhaustive list of examples include: Mazzamuto, 2019; Giannella et al, 2007; Macrì & Zoli, 2009; Camerini, 2018.

# 4. Conclusion

While social science studies (quantitative and qualitative) are still scarce on the topic of shared physical custody in Italy, but are increasingly attracting scholarly attention, this report on the Italian Legal Fame for Separation, Divorce and Child Custody aimed at putting together a useful guide on the legal context surrounding these questions for social sciences. For this purpose, it presented, in a chronological perspective, the various legislations that concern family matters and especially the questions regarding couple unions, separation and the custody of eventual children. This first section helped understand how the spirit of the law evolved and has been impacted by religious, as well as cultural, normative views and how policy advocacy has influenced the formulation of various articles over the years. The second section was dedicated to clarifying central legal and administrative terms and procedures inherent to separation, divorce and child custody, especially with regards to proper translations from Italian to English. We emphasized the various steps that married and non-married couples have to undertake when separating, and the particular nature of "legal separations" in this context, explained the confusion that translating *affidamento condiviso* to "joint custody" represents, and detailed the implications of collocation, child support and alimony in the Italian context. And finally, the last section stated the art of the various surveys and studies that have analyzed the effects of these legislations on today's family practices, further specifying the impacts on recomposed families and the advent of family mediation. Of course, legal manuals cover all of these topics in more details but the aim here was to simplify their contents and, by analyzing procedures in a sociological perspective and clarifying proper definitions of Italian terms, this report stands as one of its kind and will, hopefully, help to engage in more studies on shared physical custody in Italy.

In a context where marriage used to be the only recognized basis for family life in Italy, to the recognition of the plurality of family forms, Italy has come a long way. As Bernini highlights, "Contemporary family life in Italy is characterized by a combination of continuities and changes that makes it a seemingly elusive object of analysis. (…) Long term transformations coexist with resilient continuities that still set it apart, at least in the Western European context. (…) At the same time, the alarmist tone with which transformations in family life have been confronted has underplayed the significant continuities that still characterize Italians' approach to family life. The prevalence of an ideological approach motivated by political interests, has led to polarized readings of the family that have obscured the complex interaction of continuity and change characteristic of contemporary family life and have so far precluded the possibility of engaging with the social implications of the changing way in which men and women come to view the family and their place in it" (2008: 309-310, 321). In this context, this report has highlighted the importance for future studies on separation, divorce, and child custody, to pay attention to three elements.

First, there is a crucial need to include a more precise description of the distribution of residential times between parents. As we have understood, the law does not provide pre-requisites for this distribution, leaving it up to parents if they can find an accord, or to judges if they cannot. Moreover, we are lacking this information in official statistics which renders it almost impossible to draw generalized conclusions on the ways Italian families practice shared physical custody today.

Second, alongside the laws that have been drafted, it is interesting to pay attention to jurisprudence and how judges actually make use of these laws. As Ferrari aptly remarks, "The time schedule of these three milestones in the reform path of the Italian family law, with the adoption of the Civil Code in 1942, the great reforms of 1970/19754 and the last one in 2016, are clear evidence of the difficulties faced by the legislature in attempting to modernise and update the field. Beyond the political reasons for this slowness, traced by certain authors to the equal bicameralism, by others to the electoral law that would prevent the full governability, and sometimes even to the location (and its alleged influence) of the State of the Vatican City as an enclave in the territory of the Italian Republic, what is important for the purposes of the present analysis is the solution that was adopted in everyday life, pending the said reforms. In view of the above described deadlock of the legislative power, in fact, on several occasions the judiciary has anticipated parliamentary reforms, legitimizing factual situations not yet recognised by statutory law" (2017: 171).

Third, we are in need of more studies that cover these new family forms' practices, such as within civil unions, free unions, legal cohabitants, or recomposed families. These family forms often tend to be invisible in statistics as well but, as Auletta (2019) further notes, couples are increasingly navigating outside of cohabitation, sometimes in an aim to avoid assuming any of its duties, mostly for economic consequences inherent to cohabitation, and for the times and procedures that are necessary for its dissolution. There is thus a need to document the everyday practices of those couples increasingly choosing to write their story outside of the traditional path in marriage.

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