

“LOVE WILL TEAR US APART”

SOME THOUGHTS ON INTRAFAMILIAL TORTS AND FAMILY LAW MODERNIZATION BETWEEN ITALY AND CANADA*

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This paper analyzes a specific aspect of the so-called privatization of the family, namely the intersection of family law with the law of torts, as experienced in some European civil law countries like Italy, France and Germany. It also takes into account parallel developments emerged in common law jurisdictions and specifically in Canada.

After a brief introduction about the actual structure of the market/family divide within the domestic domain, I focus on Italian case law and Canadian case law, the former assumed as the cutting edge of the transformation occurred in continental Europe.

The privatization of the family is largely understood as the epitome of the modernization of family law and, more broadly, as a sign of the progressivism of the legal system within which it occurs. It represents a new compromise between patriarchy and individualism in the law of domestic relationships, with a shift toward the latter.

In the context of the privatization of the family, tort law has been recently deployed in combination with traditional family law remedies to sanction breach of marital and parental obligations. In this framework, exceptions to the doctrine of interspousal immunity in tort are justified in the light of a more effective enforcement of individuals' fundamental rights within the family: Family law is no longer to be conceived as a closed, all-encompassing and isolated body of rules. On the contrary, the protection of fundamental rights cuts across the whole legal system. Thus the family should be envisioned as the place of one's personhood's self-fulfilment and development, rather than the site of fundamental rights' defeat.

But, although originally perceived as a way out of family law exceptionalism, the increasing defeat of the interspousal immunity doctrine surprisingly produces quite ambivalent effects on the market/family divide and, eventually, on the identity of the family as a symbol of the modernity of a given legal system.

This paper aims to demonstrate that assessing familial relationships according to tort standards produces heterogeneous outcomes in terms of modernization/tradition in family law. On the one hand, it causes a visible shift of the family toward a market

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rationale, what is currently interpreted as a sign of modernization; on the other hand, this phenomenon has backlashes, which could be soundly appraised as a move backwards to the traditional family.

INTRODUCTION

Family law is today widely perceived as a legal field in deep transformation. As a matter of fact family legal regimes in Western countries have recently undergone dramatic changes that are commonly understood as symptoms of the increasing privatization of the family. Whether or not the idea of a privatized family is to be welcome, some areas of family legal regimes experience a systematic shift toward the law of the market and, particularly, the law of obligations.

These notes are devoted to a specific aspect of the so-called privatization of the family, namely the encounter of family law with the law of torts, as experienced in some European civil law countries such as France, Italy and Germany, and also in some common law jurisdictions, such as USA and Canada¹. Intrafamilial torts are a new issue both in common law and civil law systems; under the pressure of case law, they have caught the attention of legal theory and are now generally depicted as the epitome of family law transformation, where transformation is commonly meant as modernization (and even as democratization).

The lifting of intrafamilial immunity in tort seems actually to exacerbate a tendency in family law to embrace the individualist paradigm of modern law at the expenses of the old communitarian rationale that traditionally has informed this area of the law. Moreover the shift towards individualism approximates family relations to the market realm even if the acknowledgement of the ‘tortious side’ of family bonds is achieved by expanding the area of influence of what is meant to be the opposite of the market, i.e. fundamental rights. In fact intrafamilial torts represents one of the most advanced achievements of the fundamental rights discourse. On the other hand, the perspective of intrafamilial torts makes it possible to investigate new patterns of commodification within the family, namely how familial benefits and values become

¹ The label of “privatization of the family” may appear questionable if referred to the merger of family law with the law of torts. The idea of tort law as public law in disguise, advanced in a renowned article by Leon Green (Tort Law Public Law In Disguise, 38 Texas Law Review 1 1959-1960), spread its influence in critical legal thinking overseas. As I will argue in the next pages, the defeat of intrafamilial immunity in tort has ultimately reinforced state control over family relations, reproducing a public/private tension within the family realm.

valuable goods, assessed according to collective standards. As it will be pointed out in the following pages, this is undoubtedly one of the outcomes of the law of torts when the breach of marital obligations entitles the spouse to damages and, respectively, the child is entitled to sue the parents for breach of parental obligations.

As I am suggesting, the extreme interest of the topic lies on its being at the crossroads of different, and sometimes opposite, tendencies in contemporary law: the persuasive strength of the fundamental rights discourse, the commodification of “what the money can’t buy”, the irresistible process of modernization of the family, the equally irresistible tendency in family law to re-adjust legal change around old pillars.

To begin with, I discuss the exceptionalism of family law and the way in which the relationship between family law and the law of the market structures the regulation of the family domain. In the second part, I illustrate Italian case law as an exemplification of what is going on in continental Europe. Then I briefly analyze the distributive effects as well as other collateral effects (possibly symbolic effects) of such a legal transformation as emerging in Italian law. The fourth part investigates Canadian case law in reference to the issue of intrafamilial torts. A tentative comparative analysis of Italian law and Canadian law concludes this paper.

To introduce my topic, I have selected the following Italian case.

Tribunal of Venice, July 31st, 2006. The case involves a family that the court names as “patriarchal family”. In this patriarchal family, some siblings live together. In particular, the patriarch, who is the big brother, and one sister cohabit in a *more uxorio* ménage and have generated a child, who also lives in the family. Incest! The court’s report points out that this eccentric ménage is acknowledged and accepted in the small town where they all live.

One day the patriarch is killed in a car accident. Members of the family sue the insurance company and the car driver who had caused the accident for pecuniary and non-pecuniary damages.

The brothers recover 20,000 euros each for non-economic loss.

The cohabiting sister recovers 105,000 for non-economic loss and 32,000 for economic loss (including child’s rearing and education).

In the present case tort law constructs family roles whereas family law could have not. In fact, brother and sister could not ever marry; the paternity of the child could not

be acknowledged by *that* father and *that* mother according to the Italian law in force at that time; and, according to Italian law, incest is prosecuted as a crime as far as it turns into public scandal. Nevertheless, tort law treats them *as* family.

I would call it an example of legal constructivism: it shows how the law, the law of torts in this case, gives – prior than recognizes - a specific structure to a certain social setting. In particular, it highlights the specific performativity of tort law, its ability to construct the identities of individuals and social groups and influence relationships between them. A feature which is commonly attributed to family law far more than to the law of obligations.

The recent developments in the Italian law of torts, particularly, the increasing importance of non-pecuniary loss as a means of protection of personal values are the premise for something new to happen: domestic relations are no longer regulated exclusively by family law, they can even be ruled by the law of obligations.

In the case presented above, tort law works as an alternative to family law. It puts into a legal form those family bonds that family law should deny. More frequently, however, it happens that tort law and family law - *combined together* - offer a new regulation to family relationships. The latter tendency represents the topic that I will address in the next pages.

I. THE REGULATION OF DOMESTIC RELATIONSHIPS AS A RESULT OF THE INTERSECTION OF FAMILY LAW WITH *OTHER* LEGAL REGIMES

Classical legal thought construed family law as different from and exceptional to the law of obligations, as the periphery of private law, the core of which is represented by contract law. In spite of the change in legal consciousness over time, this construction still lasts, in the so-called Western Legal Tradition and beyond.

A complex set of legal arguments supports it:

family law embodies a *different paradigm*: communitarian motives, altruism and solidarity, whereas the law of obligations is ruled by individualism; family law deploys *different legal techniques* that have marked its structure and rules until recently: hierarchy rather than formal equality, status rather than contract, state will rather than free will, duties which are not obligations and immunity in tort.

At the same time, family law is understood as eminently national because it embodies local habits, beliefs, values whereas the law of the market, and in particular contract law, are very similar in all modern countries: a distinction based on a tradition of thought that begins with the Savignian *System*².

Because of this complex of reasons it is not difficult to imagine why critical theory sees in family law exceptionalism the source of the patriarchal and hierarchical structure of the family.

Yet, in the process *from status to contract* that characterizes modern private law, family law progressively approaches the law of obligations as long as it embraces a less communitarian and more individualistic paradigm, closer to the law of the market rationale, which inspires the family law reforms occurred in Western countries after WWII: equality of the spouses, no-fault divorce and equal treatment of children born in and out of wedlock are at a certain point perceived as unavoidable factors of modernization and introduced almost simultaneously in most Western and postcolonial legal systems. Among other things, this development puts in the foreground the cruciality of family law as a symbol of the modernity of a given legal system.

By virtue of these reforms, exceptionalism has changed its substance and can be represented today as the outcome of a new compromise between individualism and communitarianism, between contract and status. Nevertheless family law is still understood as exceptional to private law, as a separate and closed body of rules that regulates domestic relationships in an exclusive and exhaustive way, although the distance between the periphery and the core has been fairly reduced. Therefore feminists and libertarians claim that the family is still inherently non-egalitarian, as exceptionalism still prevents family law from being as *formally* egalitarian and libertarian as the law of the market, even if not all critical thinkers believe that the family/market divide has to be wiped out, as I will illustrate in a moment.

More recently, however, family law has undergone major changes and seems to have lost its monopoly in the ruling of domestic relations. Other legal regimes seem to be more suitable to govern family matters. This is clear for example in reference to the economic consequences of family breakdown, where family law combines with contract

² Kennedy, Duncan. “Savigny’s Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought”, 58 *The American Journal of Comparative Law*, 2010, 811-842.

law as far as the enforceability of prenuptial agreements and agreements in contemplation of divorce is admitted. To this limited extent the current family legal regime includes both family law and the law of the market.

This inclusion or combination structures itself as a *stratification* in the legal regulation of domestic relationships. In the case of the economic consequences of family breakdown, for instance, the stratification consists of a first layer, represented by family law, a second layer, contract law and a possible third layer, embodied in the enforcement of good faith when the court adjusts unfair or unconscionable terms.

As a result not only family law exceptionalism in itself has changed with a sensible shift toward individualism (now embodying the new compromise between communitarianism and individualism I have described above) but also the very same totem of exceptionalism seems to fade away with reference to some specific aspects of the family regulation, as the legal regime of domestic relations is now drawn to many respects from the overlapping of family law with other bodies of rules – definitely market-related – like contract law and tort law.

Now stratification and, conversely, family law exceptionalism, do not operate homogeneously in all branches of family law, so that the classical market/family dichotomy reproduces itself within family law, according to the typical *nesting* pattern of the CLS analysis³. Unlike the economic consequences of divorce, other areas of domestic relations do not imply in fact any stratification and are entirely under the ruling of the *exceptional* family law. This has been so far the case of interspousal non-economic relations, largely merging with the essentials of marriage, like solidarity, love, affection and even sex, and entailing the fulfillment of marital obligations like fidelity and moral support, which were once conceived rather as moral duties than as legal obligations.

But something has recently changed in European continental law – less importantly in the common law - and even this area of domestic relations is no longer under the monopoly of family law exceptionalism.⁴

³ Kennedy, Duncan. “A Semiotics of Legal Argument”, 42 *Syracuse Law Review*, 1991, 75.

⁴ This critical approach to family law exceptionalism somehow differs from the deconstructive proposal brought about by Janet Halley and Kerry Rittich “Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism”, 58 *The American Journal of Comparative Law*, 2010, 753-776. The latter highlights the ideological roots of family law exceptionalism by showing the direct and indirect influence on the regulation of family relations of a broader range of legal disciplines, including labor law, taxation law, immigration law, etc., which are commonly not listed among family law sources. I totally subscribe to Halley’s and Rittich’s account. My intent here

Stratification settings can be sketched as follows:

- Effects of marriage dissolution on marital property, alimony and financial support after divorce: stratification of family law (1st layer) and law of contract (2nd layer).
- Breach of marital duties and parental obligations, such as, respectively, sexual obligations or children rearing duties: overlapping of family law remedies (1st layer) – such as divorce litigation and custody and parental rights claims - and tort law-based suits to recover damages (2nd layer).

Now, as I mentioned above, not all critical legal theory appraises the decline of family law exceptionalism the same way. Some strands in the legal scholarship contend that the distance between the family and the market should be preserved. Two arguments are raised in support of this standpoint. Firstly, family law exceptionalism may be associated with the image of a soft regulation of family relationships, for exceptional law works as soft law as long as it preserves natural love and affection from being corrupted by the hardness of the law of the market. Feminist critical legal theory has long ago rejected this sort of arguments by deconstructing the family/market dichotomy⁵, highlighting, at the same time, the inherent authoritarianism of a family barely limped, like an island, by the sea of the law⁶. On the other hand, within critical theory itself, the skepticism towards the law, when not the awareness of the violence inherent in it, may suggest a step back from the more stringent regulation of the family that can derive from the binding force of a contract. As far as intimate relationships are concerned, “The legitimacy of the presence of law also derives from its ability to deny itself”⁷.

is definitely more limited. It focuses on the core/periphery (or market/family) distinction within private law and aims to problematize that opposition.

⁵ See Olsen’s reasoning in “The Myth of State Intervention in the Family”, 18 *University of Michigan Journal of Law Reform*, 1985, 835. Ead. “The Family and the Market: A Study of Ideology and Legal Reform”, 96 *Harvard Law Review*, 1983, 1497.

⁶ Jemolo, Arturo Carlo. “La famiglia e il diritto”, in *Annali del Seminario giuridico dell’Università di Catania, facoltà di Giurisprudenza, Università di Catania*, II, 1948, 38; Marella, Maria. Rosaria. “La contrattualizzazione delle relazioni di coppia. Appunti per una rilettura”, in *Rivista critica del diritto privato*, 2003, 57 ff.

⁷ See Rodotà, Stefano. *Diritto d’amore*, Laterza, 2015.

Others perceive the exceptionalism of family law as a hurdle against the commodification of the domestic realm. Here too one might underline the ideology implicit in such a point and evoke Foucault's analysis of the economic family⁸, Frances Olsen's deconstruction of the family/market dichotomy, not to mention the revising of commodification itself put forth by some legal scholars in the perspective of an empowerment of disempowered subjects through the market⁹. On the one hand the ideal of the family as an oasis of affectivity separate and alien from economic interests and values is groundless. On the other one must consider that today commodification processes have gone too far, creating new inequalities and worsening those already existing. The faith in the emancipatory function of the market has dramatically declined and arguments against commodification are currently much more committed with equality claims and the defense of democracy and democratic values, such as human dignity, than with state's paternalism addressed by the advocates of freedom of contract.

The critique of the family/market divide implies nowadays to take into account a complex set of arguments in order to produce such a sophisticated analysis as the complexity of the questions involved requires.

Long before the still enduring economic crisis of 2007, and the consequent loss of confidence in self-determination in market relations, a prominent sociologist and legal scholar, such as Günter Teubner, argued that the market rationale should not prevail in private law; that private law serves multiple social functions and that the many fields within private law are ruled by different values, which should not be misinterpreted or overwhelmed by market motives¹⁰. In no case can Teubner's argument be reduced to the romance of family law separateness or to the defense of the purity of status that proliferate in the reasoning of the opponents of family law privatization. Whether face here a progressive, pluralistic, multi-centered theory of private law.

⁸ Foucault, Michel. *Sécurité, Territoire, Population: cours au Collège de France (1977-1978)*, Leçon du 1er février 1978; Leçon du 8 mars 1978.

⁹ Ertman, Martha, and Williams Joan C. (eds.). *Rethinking Commodification. Cases and Readings in Law and Culture*, NYU Press, 2005.

¹⁰ Teubner, Gotthelf. "After Privatisation? The Many Autonomies of Private Law", in T. Wilhelmsson, S. Hurri (Eds.), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law*. Dartmouth, Aldershot 1999, 51-82 and in, *Current Legal Problems* 51, 1998, 393-424 and in G. Teubner, *Critical Theory and Legal Autopoiesis: Perspectives of Societal Constitutionalism*, Manchester University Press 2017 (forthcoming). Ead. "Ein Fall von struktureller Korruption? Die Familienbürgerschaft in der Kollision unverträglicher Handlungslogiken (BVerfGE 89, 214 ff.)" in *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 83, 1999-2000, 388.

On my part I wish to consider this position certainly not to preserve family exceptionalism from the contamination of the patrimonial core of the law. Teubner's critical account offers the occasion to clarify a point which is essential in the structure of this paper. It suggests to refrain from inferring that any shift of family matters toward a market-like legal regime is a step towards modernized, i. e. libertarian and democratic family relations. The new Italian development of tort law shows a complex range of side effects on gender relations and family roles, which cannot be simply deemed more progressive and libertarian than the traditional (exceptional) family law regulation.

In fact the critique of both the family/market divide and the consequent marginalization of the family from the core of private law is crucial in unmasking the distributive functions of the household, unmasking at the same time the same functions in the market¹¹. Therefore, far from celebrating the marketization of intimate relationships as such, the deconstruction of family law exceptionalism contributes to enlighten the role that the family plays in the making of the modern global legal order. To this regard it is crucial to understand the way in which legal rules structure the relations within the family and the social and the economic power of family members in bargaining both inside and outside the family. In spite of the hierarchical and patriarchal gender stereotypes associated with family law exceptionalism, the bargaining power of family members is not in a linear relation with the supposed modernity or market-oriented character of legal rules. Legal regimes need to be cautiously scrutinized. The case of intrafamilial torts is a fair example to this regard.

II. A NEW CASE FOR STRATIFICATION: RECOVERING DAMAGES FOR BREACH OF MARITAL OBLIGATIONS. THE ITALIAN CASE LAW

In civil law systems the intra-family immunity in tort has never been the subject matter of a specific doctrine.¹² Nevertheless intrafamilial tort suits have long been contrasted for the sake of family unity and harmony. In particular, the mutual structure of marital obligations grounded the general conviction that damages award was not

¹¹ Halley, Janet, and Rittich, Kerry, *note 4*.

¹² According to Salvatore Patti, “Intra-Family Torts”, in *International Encyclopedia of Comparative Law*, Vol. IV, Ch. 9, Moehr Siebeck, Tübingen, 1998, 13, in these legal systems the intra-family immunity in tort was neither the product of “the consistent practice of the courts nor was it due to the application of a specific legal provision. Rather it was brought about by an almost total absence of lawsuits...”. That is, it was basically the offspring of mores, namely the customary habit of not claiming compensation from spouse during marriage.

necessary as the wrong inflicted by a spouse to the other was a specific remedy *per se* (husband will be worse-off from the physical harm suffered by wife). More generally, the prevailing conception of the family was one of a closed community “which does not disclose its internal crisis but resolves them under its own rules”.¹³

Nowadays the family is instead conceived as a group of individuals whose mutual rights and duties are ruled on an equality basis. Therefore their relations need to be “regulated by the ordinary rules of law”.

In France as a result of this transformation two different causes of action in tort are available. Art. 266 of the Civil Code provides compensation for moral and material harms suffered in consequence of divorce in addition to the provision of Art. 1382, the general cause of action in tort. The latter is currently enforced by courts in intrafamilial contexts to remedy to harms deriving from adultery, physical injuries and abandonment.

In Germany the monopoly of family law still resists with few exceptions¹⁴. The typical structure of the German law of torts, based on a closed list subjective rights, seems to be a major hurdle to the enforcement of § 823 BGB in intra-family relations, insofar as courts do not identify any of the subjective rights protected by that provision in the breach of mutual marital or parental duties. However severe physical injuries, not infrequently linked to adultery, allow actions in tort in addition to ordinary family law remedies.

In the Italian legal system courts uphold tort suits for breach of marital obligations – like solidarity, moral support, material support and fidelity – which not only causes marriage dissolution, but also results in the infliction of emotional distress and the violation of fundamental rights such as human dignity, personal self-fulfillment and self-development. As a consequence, the *stratification* in the legal regime of personal – non patrimonial - relations between spouses is structured as following.

Layer 1. Art. 143 c.c. regulates mutual rights and duties of the spouses: fidelity, moral and material support, cooperation and cohabitation. Art. 160 states that such obligations cannot be derogated by any agreement between the spouses.

The breach of such obligations by one spouse may ground the separation claim of the other. In a regime of no-fault divorce, the family law remedy here is the

¹³ *Ead.*, 22.

¹⁴ See Diurni, Amalia. “Gli illeciti tra familiari nel diritto tedesco” in R. Torino (ed.). *Illeciti tra familiari, violenza domestica e risarcimento del danno*, Giuffrè Editore, 131.

declaration of responsibility of the misdemeanant spouse for the separation (art. 151 II co., c.c.), which implies the loss of financial support during the time of separation that may precede divorce and the loss of succession rights (plus, usually, charge of trial expenses). So far courts have upheld such claims when the breach of a marital duty is so severe that makes cohabitation unbearable.

Here we see family law exceptionalism in its quintessence at work: the charge of responsibility for separation might be totally ineffective, which happens every time the (misdemeanant) disloyal spouse is the wealthier spouse. In this case family law mimics soft law, in that the remedy it provides is – or can be - substantially symbolic, but still able to preserve the ‘nature’ of the family as affective unit, located at the margins of the hardness of the law.

Italian courts have recently started to combine tort law with traditional family law remedies in sanctioning breach of marital obligations¹⁵. Yet still in 1993, the Italian Supreme Court¹⁶ reiterates the force of family law exceptionalism by stating the principle “*inclusio unius, exclusio alterius*”, which means that the provision of specific family law remedies by the legislator excludes the enforcement of general remedies on the case.

The specific meaning of family law exceptionalism here, in a case of husband’s adultery, is the guarantee of personal liberty, specifically the spouse’s freedom to get off the marriage, which – according to the Supreme Court - should never be assumed as the foundation of an action in tort. Clearly exceptionalism plays here the role of *soft law* by limiting itself to a kind of warning function with no effective sanction.

Layer 2. But in 2005 the Supreme Court’s view has radically changed¹⁷. The decision concerns a case of male sexual impotence not disclosed to the wife before wedding. The wife sues her husband for divorce (non consummation of the marriage) *and* damages for emotional distress. Here another family law remedy had been possible: annulment of marriage for substantial error concerning the essential qualities of the spouse, including compensation award in accordance with the putative marriage rule (art. 129 bis c.c.).

¹⁵ This is also the outcome of a relatively recent and peculiar development in the Italian law of torts, according to which courts award damages for (kind of) loss of enjoyment of life, very broadly understood (so-called *danno esistenziale*).

¹⁶ Cass. Civ., sez. I, April 6, 1993, n. 4108, in *Mass. Giust. Civ.*, 1993, 624.

¹⁷ Cass. Civ., sez. I, May 10, 2005, n. 9801 in *Giur. It.*, 2006, 4, 691.

However, the Supreme Court abandons the exceptionalism/immunity in tort doctrine and upholds the tort claim: In the Supreme Court's wording, family law is not to be conceived as a closed, all-encompassing and isolated body of rules. On the contrary, the protection of fundamental rights cuts across the whole legal system. Thus, the family should be envisioned as the place of one's self-actualization and fulfillment, rather than the site of fundamental rights' setback. Here the wife's right to a fulfilling, gratifying sexuality and her motherhood's expectation are at stake. They cannot be jeopardized in the name of family bonds. This is the first argument.

The second argument deployed by the Supreme Court relies upon the ineffectiveness of family law remedies. The charge of separation's responsibility displays no effects on the wealthier spouse as to the entitlement to financial support, while succession rights are lost in any case after divorce.

Therefore, the entry of tort suits into the family realm relies on two different, apparently unrelated reasons: the protection of fundamental rights on the one hand, the will to impose a legal sanction on unfair marital behaviors, on the other.

At the end of the day the claim for individualism in family law turns into a shift toward a *hyper-regulation of domestic relations*.

What has happened in these 12 years? Between 1993 and 2005 Italian case law has completely changed perspective. An important piece of the story is to be identified with the law of non-pecuniary damages, in particular with the *existential harm* doctrine, a peculiarity of Italian tort law which, by a gross comparison, can be located in between emotional distress and the loss of enjoyment of life of American common law, and was broadly enforced by Italian courts in those years¹⁸.

As an effect, in the view of Italian courts, the essentials of marriage such as love, affection, sexual intercourses, loyalty and solidarity have become immaterial goods, 'assets', to which the spouses as such are entitled. Courts conceptualize them as objects of mutual *rights to performance* bestowed on individuals in the marriage and because of the marriage.

So the essentials of marriage are no longer just inalienable goods, moral duties rather than legal entitlements, and instead of being protected by an inalienability rule,

¹⁸ Ziviz, Patrizia and Bilotta, Francesco. *Il nuovo danno esistenziale*, Zanichelli, 2009.

they are now *enforced by a liability rule*¹⁹. As such, they are submitted to collective assessments made by courts and evaluated according to shared standards that, although indirectly, involve the market rationale.

This approach clearly arises from the decisions of several Italian local courts. Here are some examples:

Tribunal of Milan, June 4, 2002²⁰. The husband breaks his marital obligations of fidelity, moral and material support when he is told his wife is pregnant: he first tries to induce her to abortion, and then he stops being supportive and caring to his wife. He never asks about her pregnancy and health conditions, leave her basically alone and even omits to go to the hospital for the delivery. After childbirth he leaves the home and starts cohabiting with another woman. The court holds him responsible for separation and for infliction of emotional distress on his wife. She recovers damages for 10 millions lire (about 5,000 euros), in consideration of the short time she was subjected to her husband’s offensive behavior.

Tribunal of Florence, June 13, 2000²¹. In the first years of marriage the wife progressively shows mental troubles. In fact she is paranoid schizophrenic and after this diagnosis her mental illness worsens rapidly. Her husband does not take care of her illness, stops relating to her and let her recluse herself in the living room where she lives four years in the dark, lonely and derelict. At the end he is sued for responsibility in the separation because of breach of the marital obligations of moral and material support. At the same time his behavior is supposed to have caused the irreparable worsening of his wife’s health conditions and he is sued for damages too. The court upholds both the claims. The wife recovers damages for 142.350 millions lire (about 70,000 euros) plus the interests charge.

Tribunal of Brescia, October 14, 2006²². A case of husband’s breach of fidelity obligation: he has sexual intercourses with another man. Homosexual sex adultery! The wife sues her husband for responsibility for separation (dissolution of marriage) and for

¹⁹ Favilli, Chiara. *La responsabilità adeguata alla famiglia*, Torino, 2015, 367 ff.

²⁰ Nuova giur. civ. commentata 2003, I, 278.

²¹ Famiglia e diritto, 2/2001, 161.

²² Giust. civ. 2007, 4, I, 987.

damages for emotional distress. The court upholds both claims. As to the damage claim, it stresses that the husband's 'particular kind of' infidelity offends her dignity as a woman and wife (after 14 years marriage!), and that dignity is a fundamental right that shall not be overlooked in the name of interspousal immunity. As to the assessment of damages, the intensity of emotional distress inflicted by the husband is due to her fear of having caught a severe sexual disease, as she had had sexual intercourses with her husband while he was having a same-sex relationship. On this basis the husband is condemned to pay 40,000 euros damages plus 4,700 euros for trial expenses.

This trend is increasing in the most recent case law²³.

III. INTRAFAMILIAL TORTS: A WAY TOWARD MODERNIZATION?

Although originally perceived as a way out of family law exceptionalism, the increasing defeat of the interspousal immunity doctrine surprisingly produces quite ambivalent effects on the market/family divide and, eventually, on the identity of the family as a symbol of the modernity of a given legal system.

Before turning to Canadian law, I wish to take into account some of the effects that the entry of tort suits produce on family relations. My aim is to demonstrate that assessing familial relationships according to tort standards produces heterogeneous outcomes in terms of modernization/tradition in family law. On the one hand, it causes a visible shift of the family toward a market rationale, what is currently interpreted as a sign of modernization; on the other hand, this phenomenon has backlashes, which could be soundly appraised as a move backwards to the traditional family.

In interpreting the combination of family law and tort law as a move toward the modernization of the family, we assume modernization, as described above, as basically

²³ This orientation has not decreased even after the 2008 Supreme Court revirement on tort liability for non-pecuniary loss (Cass., Sez. Un., 11/11/2008, nn. 26972, 26973, 26974, 26975) aiming at restricting cases and amount of damage awards. See for instance Trib. Venezia, May 14, 2009 (in Resp. civ. prev. 2009, p. 1885): a case of breach of fidelity duty by husband. Wife sues husband for responsibility in separation (dissolution of marriage) claiming damages for emotional distress: in particular, notwithstanding the adultery, she had kept on taking care of her mother-in-law as a caretaker. The court holds the defendant liable for infliction of emotional distress on his wife, due to the infringement of her dignity and her sexual wellbeing (21,200 euros). See also Trib. Busto Arsizio, February 5, 2010 (in Data Base De Jure): wife finally discovers the long association of husband with an erotic community on the internet and sues him for breach of marital duties and infliction of mental suffering and emotional distress. The court awards damages in consideration of husband's virtual erotic business and 'real' adultery relationships (10,000 euros).

characterized by individualism, individual liberty, proximity to the market, subversion of patriarchal elements. More specifically, I would identify four arguments in favor of the modernization hypothesis.

1. *Constitutionalization of family law*: exceptions to the doctrine of interspousal immunity in tort are justified in the light of a more effective enforcement of individuals' fundamental rights within the family²⁴.

2. *Closeness to the market rationale*: the stratification of different legal regimes in the regulation of non-patrimonial interspousal relations turns care, love and affection into entitlements that are quantifiable in money.

3. *(Partial) Decline of family law exceptionalism*: the law of obligations challenges and even supersedes the monopoly of family law in the governance of domestic relations.

4. *Power redistribution to women*: interspousal torts produce a new equilibrium between richer and less wealthy spouses, the latter being mainly represented by women.

Let's consider now some of the effects of intrafamilial torts from a close-up view.

- *Distributive Effects*

Tort law is effectual (as a punishment?) with respect to the wealthier spouse, who, on the contrary, is basically *not* economically affected by specific family law remedies, such as the attribution of responsibility for marriage breakdown and the resulting loss of financial support during separation. As case reports show, damages for interspousal torts are assessed in important amounts. Case law also shows that plaintiffs in tort are mostly wives – i.e. (generally) less wealthy spouses. So the law of interspousal torts empowers women rather than men. How should we interpret these data? It doesn't seem to me that, in Italy at least, we can ascribe this outcome to a straight success of the so called governance feminism, a definition by which it has been described that (or those) strand(s) of feminism that makes a ineludible distinction between women and men (or male and female, or masculine and feminine = m/f), assumes *f* as a subordinated or disadvantaged element ($m > f$), carries a brief for *f*, and, most importantly, has moved off the street and into the state - and beyond, up to the sites of global governance like the World Bank and the United Nations – from where it runs feminist justice projects, such

²⁴ See Marella, Maria Rosaria, and Marini, Giovanni. *Famille*, in M. Troper - D. Chagnollaude, *Traité International de droit constitutionnel*, tome 3, Dalloz, 2012, 480 f.

as antiprostitution and antipornography policies, rape shield rules, and the like²⁵. In the United States this feminism has scored several victories in family law too, with courts and legislators that prefer the wife to the husband and the mother to the father and the subsequent rise of alimony, the shift to equitable division of property upon divorce, maternal preference in child custody decisions and the revitalization of intimate or amatory torts like alienation of affections, criminal conversation and seduction as *women's* lawsuits²⁶. As far as Italian law is concerned, the impact of feminism on the regulation of family relations is certainly of less momentum, thus I would rather read the fortune of intrafamilial torts as the outcome of a complex variety of factors, including courts' paternalism and the downsizing of social security systems, but also specific legal factors, like the critical relevance of the doctrines of non-pecuniary loss and existential harm in Italian tort law, and the persuasive (and normative) power of the Italian constitution on the fundamental rights discourse.

It may be the case, for instance, that courts use the 'intrusion' of tort law into family relationships as a proxy of those public welfare measures which are no longer granted by the state. In fact, with the retreat of the welfare state, the family, especially in South Europe²⁷, becomes 'eligible' to channel and fulfill those financial needs and material support calls previously carried out by the state. On family breakdown, however, family law remedies are frequently ineffective to this respect. Hence the entry of tort law can play a role²⁸. In other words, the spouse *as wrongdoer* becomes the cheapest social cost bearer in this pattern!

²⁵ Halley, Janet. *Split decisions. How and Why to Take a Break from Feminism*, Princeton University Press, 2008, 17 f.

²⁶ *Ead.*, 20 f.

²⁷ Tsoukala, Philomila. "Household Regulation and European Integration: The Family Portrait of a Crisis", 63 *The American Journal of Comparative Law*, 2015, 747.

²⁸ Article 709 *ter* of the Code of Civil Procedure, enacted with the new law on child joint custody (l. 54/2006), provides damages award in the event of seriously disregarding or harming conducts by parent on minor child or the other parent in reference to custody and/or attendance. In the Article both compensatory damages and punishing measures are provided. In this respect, courts offer two interpretative lines: one which frames damages awards prescribed by art. 709 *ter* c.p.c. within the law of tort of the *ius commune* (Arts. 2043 and 2059 of the Civil Code) and another that relates to punitive damages. According to the latter, the remedies introduced by Art. 709 *ter* represent "indirect coercive measures", which go beyond the system of civil liability provided by Arts. 2043 and 2059 and the assessment of economic or non-pecuniary losses. They are rather to be recognized as a kind of punitive damages 'Common Law Style', aiming at punishing the perpetrator of an unlawful conduct in order to dissuade him/her or others from reproducing it.

- *Commodification Effects*

Generally speaking, tort law is a mechanism of resources allocation. The wrong produces an involuntary transfer of resources from the victim to the wrongdoer. The entitlement protected by a liability rule is allocated to the tortfeasor, who will ‘pay’ for it by compensating the plaintiff²⁹. Damages are basically the price of a non consensual transfer that the court assesses in accordance with market or market-like standards. Hence, through tort law, marital obligations, such as care, moral and material support, loyalty, etc.– previously interpreted mostly as moral duties - turn into immaterial resources that receive an indirect pecuniary evaluation by the assessment of damages. At the end we have solidarity, moral support and sex indirectly, maybe ‘softly’, commodified.

To be sure, the way toward the commodification of solidarity, sexuality and fidelity within marriage had already been entered since courts in many civil law (but also common law) jurisdictions sanctioned third parties’ liability for, respectively, loss of household services (in housewives’ wrongful death actions), loss of consortium and tortious interference in others’ spousal relations.

a) Both civil law and common law courts normally value the loss of household services occasioned by the death of a spouse engaged in the performance of such an activity as an autonomous head of damages. But the Italian Supreme Court³⁰ has recently awarded compensation even to a single woman for the loss of household services resulting from the physical injury suffered by the plaintiff in consequence of a car accident and previously performed by herself on her own behalf.

b) In 1986 the Italian Supreme Court³¹ upheld an action in tort for medical malpractice conducted against a surgeon by the husband of the victim. In fact, the surgery had made the woman unable to coital sex. The husband alleged the violation of his right to sexual intercourse with his wife, a right that he was entitled to by the law of marriage. Here sexuality within marriage is precisely described as a resource, on which

²⁹ Calabresi, Guido and Melamed, A. Douglas, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral”, 85 Harvard Law Review, 1972, 1089.

³⁰ Cassazione civile, sez. III, 03/03/2005, n. 4657, Foro it. 2005, I, 2756. See also Cassazione 10/01/2017, n. 238, Guida al diritto 2017, 10, 61.

³¹ Cassazione civile, sez. III, 11/11/1986, n. 6607, Giust. civ. 1986, I,3031.

spouses have an entitlement – a kind of *jus in corpus*, a claim to the partner’s sexual body³² – protected by a liability rule. An analogous case in common law is *Rodriguez v. Bethlehem Steel Corp*³³.

c) Italian courts have so far rejected actions in tort against third parties involved in the adultery of the plaintiff’s spouse. On the contrary, German law allows such claims, as far as aspects of marriage are vulnerable only by third parties, as for damages to the health of a spouse through infection resulting from adultery³⁴. More generally anti-matrimonial conducts by third parties are ruled under the law of torts (§ 823 BGB) when adultery results in physical or psychic injury to the loyal spouse. Even *Schmerzensgeld* (damages for emotional distress) may be awarded in such a case. The corresponding amount reflects, although indirectly, the value of fidelity or the matrimonial community of living altered by adultery.

What is new about the law of interspousal torts is the transformation of marital obligations from moral duties into ‘family assets’ even *inside* the spousal relationship. With an exception: so far courts have never awarded compensation for non-performance of housework on behalf of a spouse vis-à-vis the other. This strengthens the idea that housework is the true core of family law exceptionalism, as long as it proves impenetrable to both tort law and contract law³⁵.

- *Further Side Effects*

In reference to interspousal torts, damages rates are fairly high. Hence the new law may have an effect of deterrence on certain marital behaviors, particularly on libertine (or libertarian!) attitudes but also on decisions concerning separation and divorce.

³² For a fascinating reconstruction of the legal history of the law of sexual intercourse within marriage see Madero, Marta. *Le loi de la chair. Le droit au corps de conjoint dans l’oeuvre des Canonistes (XIIe – XVe siècle)*, Publications de la Sorbonne, Paris, 2015.

³³ *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal.3d 382. L.A. No. 30271. Supreme Court of California. August 21, 1974. It is mentioned by Alan Hyde in *Bodies of Law*, Princeton University Press, 1997. He overtly speaks of (the husband’s) reproductive capacity protected (on his wife’s behalf) by a liability rule.

³⁴ Markesinis, Basil S., and Unberath, Hannes. *The German Law of Torts. A Comparative Treatise*, Hart Publishing, 2002, 369.

³⁵ *State v. Bachmann*, 521 N.W. 2d 886 (Minn. Ct. App. 1994). See Marella, Maria Rosaria. “Il diritto delle relazioni familiari fra stratificazioni e ‘resistenze’. Il lavoro domestico e la specialità del diritto di famiglia”, in *Rivista Critica del diritto privato*, n. 2/2010, 233 ff.

In the same perspective, further examples are offered by a group of Italian cases, concerning the interference of tort law into parent-children relations, which also prove to be punitive of parents' abandoning behaviors but also of those conducts which deviate from the 'normal' standard or challenge the most conventional habits.

Case law offers several examples in this regard:

Tribunal of Venice, June 30, 2004³⁶. A case of breach of parental obligations sanctioned by tort law. Defendant, whose paternity had been established by court, had persistently refused to consider his daughter as such, denying her any kind of care and material and moral support. For this misconduct – also criminally prosecuted – are awarded damages to mother and daughter for pain and suffering up to 40,000 euros each. Additionally the daughter recovers 50,000 euros damages for loss of enjoyment of the filiation relationship, including frustration of her right to education and parental (moral and material) support. In the court's wording, the latter head of damage is based on the whole and unreasonable deprivation of her father's involvement in her life and is related to her awareness of being procreated as an animal rather than a human being!

Court of Appeal Bologna, February 10, 2004³⁷. Another case where paternity has been legally established but the father refuses to fulfil his parental obligations. Up to 2,582,284.50 euros damages are awarded to the son. Only one fifth of the total amount is due for loss of financial support, the rest of damages are assessed in consideration of the plaintiff's loss of enjoyment of life, resulting from his father's disengagement. In fact it turns out from the trial that defendant is one of the most powerful and wealthy entrepreneur in town.

Supreme Court n. 5652/2012³⁸. In another case of parental breach of the duty of child material and moral support and education, the Italian Supreme Court emphasized the direct genesis of parental obligations from procreation: they originate from birth, even before any judicial determination of paternity. When the breach of an

³⁶ *Dir. famiglia* 2005, 116.

³⁷ *Famiglia e diritto*, 5/2006, 511.

³⁸ *Cassazione civile*, sez. I, 10/04/2012, n. 5652, *Giust. civ. Mass.* 2012, 4, 467. In a more recent case, the Supreme Court stated that the action may also be brought against the heirs of the parent. *Cassazione civile*, sez. VI, 16/02/2015, n. 3079, *Giustizia Civile Massimario* 2015.

obligation violates constitutional rights, the wrongdoer can be sanctioned under the law of torts and non-pecuniary damages can be awarded.³⁹

As a tentative conclusion, one may argue that the way toward individualism or, to put it differently, the way out of family law exceptionalism, while emphasizing the role and power of individuals within the family, reinforces familial ties and stereotypes.

Also this sort of backlash highlights the operation of both tort law and fundamental rights as *that public* that most projects of family law modernization wish to supersede. The protection under the law of torts of one family member's fundamental rights against the other significantly expands the court's control over family matters. Intimate relationships are scrutinized according to general standards that, by definition, overlook the peculiarities of the single emotional context. Eventually, the Italian case law on intrafamilial torts seems animated by a disguised punitive intent with regard to disloyal marital behaviors, which conflicts with the policy considerations underpinning the abolition of fault separation and the introduction into Italian law of no fault divorce.

IV. INTRAFAMILIAL TORTS IN CANADIAN LAW

Compared with Italian law, the Canadian experience of tort doctrines enforcement in the family sphere is not restricted, but certainly more controversial. This is mostly due to the doctrine of intrafamilial immunity in tort, which has only relatively recently been abrogated in most common law jurisdictions. According to the doctrine of intrafamilial immunity, family members owed no duty in tort to one another. They may have mutual duties by virtue of family law, but not in tort.⁴⁰

At the core of this rule is the doctrine of *interspousal* tort immunity. At common law, a husband and wife were regarded as one person, and the legal existence of the wife, during marriage, was regarded as merged into that of the husband. This “doctrine of

³⁹ See also Trib. Messina, September 11, 2009 (in *Corriere del Merito*, 2010, 1, 26): The court holds father's breach of parental duties of child education, material and moral support as a source of tort liability, as it clashes with constitutional values and principles, such as those protected by Articles 2, 29 and 30 of the Constitution. Most recently (Trib. Milan, March 13, 2017, n. 2938, *Guida al Diritto* 2017, 6 September) father's tort liability for breach of parental duties has been established even in the absence of a specific scrutiny concerning the infringement of a subjective legal right of the child. It can be argued that intrafamilial tort liability in Italian law reveals an increasing punishment vocation. At the same time, the role of tort liability as a more efficient proxy for family law remedies seems to be reinforced and definitely indispensable.

⁴⁰ See Patti, Salvatore, note 12, 7 ff.

unity” formed the basis of two rules. First, as a matter of substantive law, a tort committed by one spouse against the other could not be a source of liability. Second, as a matter of procedure, neither spouse could sue the other during marriage: you cannot sue yourself! The first rule precluded any action for a tort committed by one spouse against the other during marriage, regardless of when the suit was instituted, even if it were after divorce. The second rule enjoined all litigation between husband and wife during the marriage for torts committed before the marriage as well as torts committed during the marriage.

In the late nineteenth century these rules were modified in England by the Married Women’s Property Act 1882. According to its provisions, a married woman was capable of binding her separate estate by contracts, and of suing and being sued either in contract or in tort, or otherwise, in all respects as if she were a single woman. In particular, the English Married Women’s Property Act stated “every married woman shall have in her own name against all persons, *including her husband* (emphasis added), the same remedies for the protection and security of her own separate property as if the property belonged to her as a single woman”.

Largely based on the English legislation, Married Women’s Property acts were enacted in several Canadian jurisdictions. They remained in substantially the same form showed above till the early 1980’s. They provided a limited exception to the doctrine of interspousal immunity in tort as long as the protection of the wife’s property was concerned.

Interspousal immunity in tort was abolished in England and Scotland in 1962. The court, however, has a discretion to stay an action in tort between husband and wife under certain circumstances, such as if “no substantial benefit would accrue to either party from continuation of the proceedings”, or if the issue could more conveniently be dealt with on an application under other legal provisions⁴¹.

In Canada, interspousal immunity was firstly abolished in Ontario, Manitoba and Prince Edward Island and later in British Columbia, Saskatchewan and Newfoundland. Alberta was the last province to remove the immunity in 1983.

Given the patriarchal rationale for the immunity doctrine, its abrogation has been regarded as a step toward women’s equality in private law. However the exclusion of the family realm from tort scrutiny may reflect also the awareness of the complexities of

⁴¹ Lowe, Nigel and Douglas, Gillian. *Bromley's Family Law*, Oxford University Press, 1998, 63 f.

assessing familial relationships according to tort standards. “In fact, the immunity was primarily invoked to defend against claims of violence inflicted by men on women and children and to deny liability for injury inflicted on family members in the course of operating a motor vehicle. It requires no subtle interpretation to decide whether these behaviors were correctly classified as wrongdoing”.⁴² It is not by chance that in *Landstrom v. Ringrose* (cited by the Law Reform Commission of British Columbia) Lambert J.A. of the British Columbia Court of Appeal stated that the law was “crying out for reform”. However outright abolition of the immunity rule was carefully weighed up in the light of the persuasiveness of the arguments advanced in support of its retention. One was the argument of domestic harmony – that immunity was necessary in order to preserve harmony in the family. A second argument pointed out that intrafamilial immunity protected insurance companies against collusion between family members⁴³.

In fact the abolition of intrafamilial immunity in tort gave rise to an intense debate, which involved also Canadian legislatures. It is possible to appraise this intensity by going through the *Report on Interspousal Immunity in Tort* produced by the Law Reform Commission of British Columbia in 1983, which carefully took account of the traditional rationale, by scrutinizing the argument of domestic harmony and the issue of insurance contracts, with specific reference to the collusion issue and the potential increase of insurance premiums.

Advocates of an outright abrogation insist that the “domestic harmony” argument was nothing more than a veiled assertion of male dominance over the family and that the “collusion issue” justified the unfair outcome of excluding deserving plaintiffs in order to avoid payment to undeserving ones.

Now the core question arising from the abrogation of the doctrine is how and to what extent it is feasible and desirable to treat relations among family members as subject to tort law standards and, specifically, to the same broad duty of care governing other relationships. As it has been vividly highlighted⁴⁴, this takes the family “under the tort microscope”.

A brief overview of Canadian case law reveals the tension between two opposite perspectives.

⁴² Réaume, Denise and Van Praagh, Shauna. “Family Matters: Mothers as Secondary Defendants in Child Sexual Abuse Actions”, in 17 *Supreme Court Law Review* (sd), 2002, 198.

⁴³ *Ibidem*.

⁴⁴ *Ibidem*.

V. CANADIAN CASE LAW

The general tendency in Canadian case law is to award tort damages as an extraordinary remedy in domestic violence cases, where one spouse has suffered assaultive behavior from the other. In these cases, damages awards usually follow a criminal conviction for the assault alleged.⁴⁵ Courts award general and aggravated damages, the latter intended as compensatory damages that redress the defendant for the additional personal suffering caused by the manner in which the injury has been inflicted⁴⁶. In domestic violence cases also punitive damages can be awarded as an exception to the principle that punitive damages are not awarded when the defendant has already been convicted by the criminal court for the same conduct.

Domestic violence includes also emotional and financial abuse. Therefore damages are awarded in family disputes also under the tort of intentional infliction of mental suffering and emotional distress.

The basic idea, as expressed by Justice Monique Metivier of the Ontario Superior Court of Justice, is that damages awards for abusive behaviors in the family context are meant to “indicate society’s outrage at this conduct and to compensate the wife for the loss she has suffered”.⁴⁷ In fact, in the cases considered in this framework, plaintiffs are almost exclusively wives.

Another group of cases refers to situations of matrimonial litigation in which one spouse threatens or bullies the other in an effort to intimidate her and prevent her from litigation proceeding. In such cases damages can be awarded for the intentional infliction of mental suffering and emotional distress.⁴⁸ The tort of intimidation has also been extended to the family context in such circumstances.⁴⁹ Another kind of ‘abuse of process’ which gives rise to tort claims between litigant spouses somewhat mirrors the former group. This is the case of malicious prosecution, where one spouse alleges that the other set in motion the criminal charges made against him or her with malice and without reasonable cause. Cases mostly originate from husbands seeking damages for

⁴⁵ On the relationship between civil actions in tort and criminal prosecution in sexual battery cases see Feldthusen, Bruce. “The Civil Action for Sexual Battery: Therapeutic Jurisprudence?”, in 25 *Ottawa Law Review/Revue de droit d’Ottawa*, 1993, 203.

⁴⁶ Aggravated damages are meant to “give expression to the natural indignation of right-thinking people”, see Carson Georgina L. and Stangarone, Michael, “Tort Claims in Family Law – The Frontier”, 29 *Canadian Family Law Quarterly*, 2010, 253, 255.

⁴⁷ Ead., 254.

⁴⁸ *McLean v. Danicic* (Ont. S.C.J.) 2009.

⁴⁹ *Scherf v. Nesbitt* (Alta. Q.B.) 2009.

malicious prosecutions resulting from wives' allegations of assault (suffered from wife or children). However burden of proof is particularly onerous for plaintiff and damages claims are often dismissed. In one case the husband obtained a judgement against wife for malicious prosecution (the wife's false accusation was that he had sexually assaulted his daughters); he recovered damages of \$ 50,000, costs and interest.⁵⁰

Generally speaking, requirements in intentional torts such as intimidation or intentional infliction of emotional distress are difficult to meet. They are also not suitable for ordinary family disputes. To overcome this sort of inconvenience one possibility is to resort to 'breach of fiduciary duty'. Here too requirements are quite strict. This legal scheme firstly requires the establishment of a fiduciary relationship between husband and wife or parent and child; the fiduciary relation has to be such that one party can unilaterally exercise a power or discretion that affects the other and the latter is particularly vulnerable or at the mercy of the former. As to the line of cases concerning spouse-to-spouse relations, the fiduciary relationship has been envisaged particularly with reference to disputes concerning the division of marital property at divorce or other financial issues related to family assets. Damages claims under breach of fiduciary duty have seldom been successful. More precisely: courts are reluctant to embrace it in family matters. The idea of imposing a fiduciary-like relationship between spouses upon marriage dissolution clashes with the favor for contractualization of family relations and fair bargaining capability of spouses, as the fiduciary relation requires an imbalance of power and knowledge between husband and wife; in fact it undermines the possibility of enforceable marital agreements, which on the contrary lies on the presumption of spouses substantive equality.

The tort of negligence is ultimately the action in tort that allows a closer comparison with Italian case law, as it is suitable to provide relief in each case designed to protect legal rights. In Canadian law the investigation of the duty of care issue and the standard of reasonableness in intrafamilial torts are framed by few 'hard' cases, which to this extent differ from the more 'routines' Italian cases I have illustrated above.

In *J. (L.A.) v. J. (H.)*⁵¹ a mother is sued as secondary defendant for the sexual abuse perpetrated against her daughter by the spouse (the daughter's stepfather). It was alleged that the mother had full knowledge of the incest, but failed to protect her daughter from this persistent abusive behavior. The plaintiff sought compensation both

⁵⁰ *Starr v. Starr* (B.C. S.C.) 2008.

⁵¹ *J.(L.A.) v. J.(H.)*, (1993), 13 O.R. (3d) 306 (Gen. Div.).

in law and equity. The Ontario Court of Justice held the mother liable for breach of fiduciary duty. More specifically, the court considered that there was a private law duty of care owed by a parent to her child-in-charge, based on both the foreseeability of risk of harm and the special relation of proximity between parent and child. On this basis the mother ought reasonably to have known or foreseen that her daughter was being sexually assaulted and had to take reasonable steps to protect her from those assaults. The mother’s fear of destroying the family unit did not constitute a significant counterbalance to her obligation to protect her daughter. Jury found her liable and awarded against her punitive damages of \$ 45,000.

Few years later, in a similar case – *M. (M.) v. F. (R.)*⁵² – the British Columbia Court of Appeal absolved a foster mother of liability for failure to detect sexual abuse committed by her adult son against her foster daughter.

In the first case the court applied the normal negligence standards based on reasonableness. It took no account of the difficulties the mother may have to face in dealing with a severe family dysfunction. By contrast, in the second case the court “radically subjectivized the standard of care” by restricting the evidence of liability to the actual knowledge of her son’s behavior and ultimately treating the case’s circumstances as peculiar to her. Neither approach moves toward a better understanding of the complex dynamics among family members in cases of child sexual abuse. Commentators remark that apparently broader structures and ideologies that support sexual coercion and abuse tend to be obscured by the parameters of private law⁵³. Although redress through monetary compensation is identified as a proper need of institutional abuse victims in a Law Commission’s Report significantly titled *Restoring Dignity* (1997), resolution through civil liability or tort law might be particularly problematic in cases of intrafamilial child abuse, as the cases above show.

In another hard case, *Dobson (Litigation Guardian of) v. Dobson*⁵⁴, where a pregnant woman’s liability for negligent driving causing injury to her fetus was ruled out, the definition of an adequate standard of care is once again focal point in the judgment. The Supreme Court of Canada recognizes the difficulties of submitting every waking moment of a pregnant woman’s life to the scrutiny of the duty of care in the name of her child’s

⁵² *M. (M.) v. F. (R.)* (1997), 52 B.C.L.R. (3d) 127.

⁵³ Réaume, Denise and Van Praagh, Shauna, note 42.

⁵⁴ *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753.

sake. In addition, one could argue, to impose a legal duty of care upon a pregnant woman towards her fetus or subsequently born child would give rise to a gender-based tort, in contravention of s. 15 (1) of the Canadian Charter of Rights and Freedoms. In an earlier case⁵⁵ concerning a pregnant mother addicted to glue sniffing, the Supreme Court had dealt with the questions of whether a court's order of detention and treatment of mother to prevent harm to the unborn child were to be considered lawful under the law of torts and whether the law of torts should be extended to permit the order. The question ultimately faced by the court was whether it were appropriate for a court to change the law of tort. The Supreme Court stated that the common law, as then extant, did not permit such an order and that "Courts will not extend the common law where the revision is major and its ramifications complex".⁵⁶ Not only the problem of the legal status of the unborn child was at stake, but also the fundamental liberties of the mother, whose lifestyle choices would have been severely affected by the recognition of a fetal action against the woman. In particular the recognition of a duty of care owed to the fetus in utero would reverse a long-standing principle of tort law that remedies against negligent behavior can be pursued only if a cause of action is brought by a juridical person, which the unborn child is not. Moreover, given the principle that the unborn child and its mother are not separate juristic persons, to permit an unborn child to sue its pregnant mother-to-be would introduce a radical new principle into the common law, which would have adverse consequences on others, not to mention the liberty of the pregnant mother, intimately and inescapably bound to the fetus. "To recognize a duty of care in such situations would constitute yet another marked extension of the common law which would affect a large segment of society. It follows that the Court must approach the issue with great caution". "Taken together, the changes to the law of tort that would be required to support the order at issue are of such magnitude, consequence, and difficulty in policy terms that they exceed the proper incremental law-making powers of the courts. These are the sort of changes which should be left to the legislature" the court concluded.

The problem with the standard of care by intrafamilial torts is that, according to negligence law, individual characteristics peculiar to the defendant are not to be taken into account. The law requires a certain average of conduct, which corresponds to the characteristic of a reasonable person, i.e. to the standard of the reasonable man. Now,

⁵⁵ *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.* (1997) 3 SCR 925.

⁵⁶ *Winnipeg Child and Family Services v. DFG.*

intrafamilial dynamics imply the consideration of gender-specific factors – like case law shows – that might not be included in the reasonableness standard. On the other hand, the tort system tends to fall back to subjectivist instincts whenever the law confronts hard cases⁵⁷ – the contrasting extreme we have seen before, the subjectivization of the standard. When tort law intersects family law the result could be to introduce inconsistency into standard of care doctrine⁵⁸.

The challenge the case of intrafamilial torts gives rise to represents an opportunity to move towards a better understanding of the ways in which private law is shaped, both by alternative co-existing responses and rationales and by the internal dynamics of the parties and their relationships. This is a point worthy of an in-depth analysis that however cannot be carried out in this few pages. The commodification effect I have illustrated above is part of one alternative, co-existing rationale within private law. Another merging rationale may be represented by the constitutionalization of family law, with the resulting legal regime of the family being attracted to the area of public law rather than being located in the realm of private law.

Interestingly, where torts suits depart from the terrain of hard cases and approach routine family relationships Canadian courts barely allow exceptions to the monopoly of family law in the regulation of domestic affairs⁵⁹. Courts are reluctant to award damages to one spouse against the other to resolve issues arising from family breakdown where there is a family law statutory scheme in place. The idea is that the statutory scheme provides the entire remedy. In fact family law statutory obligations do not deal with damages for pain and suffering. As a result litigants resort to seeking damages in tort. In a case in which the custodial parent cut the non-custodial parent off from the child⁶⁰, the Supreme Court of Canada denied the cause of action in tort (“The torts of conspiracy, intentional infliction of mental suffering and of unlawful interference with another’s relationship should not extend to the family law situation”, while the dissenting opinion had allowed a cause of action for breach of fiduciary duty). The plaintiff had been

⁵⁷ Réaume, Denise and Van Praagh, Shauna, note 42.

⁵⁸ Réaume, Denise and Van Praagh, Shauna, note 42.

⁵⁹ A ‘detour’ from this orientation is represented by *Raju v. Kumar* (B.C. S.C.) 2006, where the court awarded general damages to the wife under the tort of deceit, as it found that the plaintiff, a Canadian woman, had been induced to marry the defendant, a Fijian citizen, by the fraudulent misrepresentation that he honestly intended to stay married and not to use her to come to Canada.

⁶⁰ *Frame v. Smith* (1987) 2 S.C.R. 99.

deliberately denied access to the child notwithstanding court orders specifying access. The custodial parent's behavior had caused to the plaintiff severe emotional and psychic distress, thus the latter filed a claim for damages. The court found that no tort action existed in this case. The old actions that gave some protection to the father's interest in his children had been abolished by the recent family law reform and the tort of alienation of affection of a spouse did not exist in Canada. Nor there were pecuniary interests involved in the case. The legislature intent was to provide a comprehensive scheme for dealing with the consequences of family breakdown, custody and access to children, and no additional support by civil action of other sort had been contemplated. One could easily derive from this fact "the undesirability of provoking suits within the family circle".⁶¹ In particular, according to the court, an action in tort could be against the best interest of the child, as it "could cause the child to suffer from the knowledge that one parent has taken such drastic action against the other".⁶² In fact the parents' interest in the love and companionship of their children and the children's reciprocal interest in the love and companionship of their parents did not receive a specific protection at common law.⁶³

One may argue that *Frame v. Smith* was decided 10 years before the *J. (L.A.)* leading case, which firstly recognized a cause of action in tort against a nuclear family member in Canadian law. However the arguments deployed by the Supreme Court in *Frame v. Smith*, which widely draw on the separateness of family law from the *ius commune*, have been referred to in later cases. Opening to separating couples "the arsenal of tort law" would serve to only "muddy the waters" according to the Ontario Superior Court in

⁶¹ *Frame v. Smith*, 9.

⁶² *Supra*.

⁶³ It is interesting to compare the arguments deployed in this case by the S.C.C. to the European Court of Human Rights case law on interference in parental relationships. By enforcing Art. 8 ECHR the Court of Strasbourg has widely and persuasively juridified the (access to a sound) parent-child relationship.

The reference is to a recent case concerning a judicial decision limiting the father's right of access to his daughter because of accuse of sexual abuse (*Solarino v. Italy*, Application n. 76171/13, ECHR, February 9, 2017). Even if two expert investigations established that Mr Solarino was innocent, the Court of Appeal decided to prohibit all contact between the child and her paternal grandparents and to limit the contacts between the father and the daughter. Only when she was older than ten years old, a local Court granted Mr Solarino right of access and accommodation and recognized that the daughter had suffered a prejudice because of the deterioration of the relationship with her father, her paternal grandparents and her step brother. The European Court stated that the Italian Courts exceeded the limits of their discretion and infringed Article 8 ECHR. Even if it excluded a causal connection between the infringement and the material damage, it has been recognized a satisfaction as non-pecuniary damage. See also *D'Alconzo v. Italy*, Application n. 64297/12, ECHR, February 23, 2017.

*Leopold v. Leopold*⁶⁴. Even in reference to parent-child relationship, where father egregious conduct had led to ignore children emotionally and financially for 30 years, the cause of action in tort of the latter was dismissed because it would compromise the legislative schemes for child support and resolution of family disputes⁶⁵.

The same line of reasoning is followed by the Ontario Superior Court of Justice in *Joudrey v. Joudrey*⁶⁶, a most recent case. In the latter the harm alleged affects the harmony of family relationships beyond the parent-child tie. At the end of an intricate family dispute, the court dismisses a Third Party Claim made by the grandchildren of the main proceeding’s plaintiffs against their aunts. The latter were accused to have turned an otherwise cordial, close and loving relationship between the main parties into ruin. According to the defendants, the aunts (the “third parties”) turned the plaintiffs against the defendants through a malicious, defamatory campaign that caused emotional suffering and loss of enjoyment of life and property. The defendants ask that these actions should be sanctioned under the heading of punitive damages and/or aggravated damages and/or exemplary damages, but the Court states that although the law of torts “hovers over virtually every activity of modern society, it does not regulate or seek to oversee family relationship or interactions. It is not a vehicle to compensate family members for bruising feelings, or disrupted or damaged family relationship”⁶⁷.

VI. SOME COMPARATIVE REMARKS AND A CONCLUSION

At present, it seems hard to articulate a conclusive comparative analysis of Canadian and Italian laws in reference to the phenomenon of intrafamilial torts. This issue is relatively new and still in development in both legal systems.

However, it is possible to make a few closing remarks.

The two experiences exhibit important differences under many respects, ranging from the typology of the cases adjudicated to the policy pursued by intrafamilial torts, and from the structure of tort liability to the impact of the bill of rights on private law adjudication.

⁶⁴ *Leopold v. Leopold*, 2000 (Ont. S.C.J.)

⁶⁵ *Louie v. Lastman*, 2001 (Ont S.C.J.).

⁶⁶ *Joudrey v. Joudrey et al*, 2012 ONSC 3316.

⁶⁷ In the Court’s wording (17) “The closest the Third Party Claim can come to a tort is the tort of alienation of affection which never covered the relationship between grand-parents and their children, and which, in any event, was abolished in Ontario in 1978”.

From a legal-sociological point of view, Italian and Canadian cases are quite heterogeneous. The former mainly generate from ordinary situations of family breakdown. In fact, in Italian case law, intrafamilial torts seem to play the role of an alternative to family law traditional remedies. Tort liability is here deployed to adjust or enhance redress for harms caused by intrafamilial conflicts, whose resolution has so far been ascribed to and governed by family law, but is no longer perceived as fully satisfactory. On the contrary, Canadian cases are mostly ‘hard cases’, related to traumatic family dysfunctions, like domestic violence or child sexual abuse, which family law is traditionally not mandated to solve.

This outcome is partly owed to the specific structure of both tort liability and the doctrine of intrafamilial immunity in tort in common law. In civil law, and particularly in the Italian legal system, the core element of a civil action in tort is the proof that the wrongdoer has violated a subjective right or otherwise vested interest of the injured party. Unlike civil liability in civil law, tort liability at common law either is grounded on specific requirements or finds its core factor in the duty of care. To a certain extent this made the extension of tort liability in civil law easier, as prerogatives like bodily integrity or psychic wellness ought to be protected, regardless the context within which they are injured. On the contrary, the definition of a standard of care within the family realm gives rise to difficulties, which make the intersection of the law of torts with family law quite complicated, notwithstanding the abrogation of the immunity doctrine in the Canadian legal system.

In addition, unlike the common law, the civil law has never recognized to the doctrine of intrafamilial immunity in tort the authority of a black letter rule⁶⁸. This explains why the abolition of the doctrine required the intervention of the legislature in the Canadian system, whereas in Italian law we can consider the recognition of intrafamilial torts a ‘natural’ development of the law, in particular one of the many outcomes of the constitutionalization of private law, which has been realized by courts.

However, all these features together only partially explain the self-restraint attitude of Canadian courts. As we have seen, the Supreme Court refused to extend the law of torts to cases of conflicts between family members when the changes to the law required in order to adjudicate the case in terms of tort liability would be of “such magnitude ... in policy terms” that should be left to the legislature. Here we eventually

⁶⁸ See *above* note 12.

come to the focal point of this paper: what *exactly* are the changes in policy terms introduced by the law of intrafamilial torts? We have seen at the outset that the extension of tort liability to family matters is commonly understood as a symptom of family law modernization. I have enucleated four arguments in favor of this thesis: 1. Constitutionalization of family law; 2. closeness to the market rationale; 3. (partial) decline of family law exceptionalism; 4. power redistribution to women.

Now the attitude of the Canadian courts seems to suggest a different reading. Unless we conclude that Canadian family law is more traditional (= less modernized) than Italian family law⁶⁹, we must take into account other interests and policy considerations that are evidently at stake in this context. As I have briefly illustrated above, Canadian courts not only entrust the legal changes underpinned by intrafamilial torts to the legislature. They also maintain that some dysfunctions in family relationships are not matter of specific protection at common law. Compared with the Canadian case law, Italian courts seem instead to trust the virtues of a hyper-regulation of family matters. This orientation may be the unintended consequence of the power of the constitutional rights discourse in the Italian judiciary. As noted above, the Italian case law on intrafamilial torts develops at the crossroad of the constitutionalization of private law and a particular set of doctrines concerning tort liability for non-pecuniary loss.

The constitutionalization of family law is also an issue in Canadian law. Scholars maintain that the Canadian Charter of Rights and Freedoms enacted in 1982 has deeply influenced family law, especially as far as values of equity and equality are concerned. The influence of the Charter would be instantiated in the regulation of marital support and division of marital property at divorce, in the equal treatment of children born inside and outside wedlock, etc. This would make family law a matter of public law, for the judicial methodology legitimated by the Charter openly relies on policy considerations and leads to imagine reforms as constitutional remedies, all in an institutional framework in which state interest in the family is perceived as more pervasive. In fact, the legal changes attributed to the Charter implementation are rather the outcomes of the profound transformation of Canadian family law occurred in the 70's and 80's. This change is rather to be framed within a private law rationale; therefore the thesis of a shift of family

⁶⁹ A conclusion that is at odds with the *communis opinio* that Italian family law suffers the conservative influence of the Roman Catholic Church, as the hurdles to the introduction of same-sex show.

law towards public law would prove unnecessary and probably strongly misleading. Understanding ideals of equity, dignity and justice in family law as a matter of constitutional law, hence of public law, jeopardizes some of the most relevant achievements in modern family law, as far as it tends to enhance individualism in family disputes at the expenses of the distributive items in the family law agenda⁷⁰.

This Canadian debate is extremely interesting even if it does not directly entrench the intrafamilial torts issue⁷¹. As a matter of fact it encroaches on this paper's thrust: the departure from the specific family law rationale may have unintended consequences. It is *not* good per se. Nor it is necessarily a symptom of modernity/progressivism. As it commonly happens in law, a legal principle or framework, given its indeterminacy, may serve different goals and achieve divergent outcomes.

In the case of intrafamilial torts, the assumption that they represent a step forward the modernization of family law, with the defeat of the traditional doctrine of family members immunity in tort, may be easily flipped: it is possible to enucleate other four arguments that instantiate the non-progressive effects of the new law, in parallel with the four ones that militate in favor of the modernizing thesis.

1. On the one hand intrafamilial torts are suppose to promote the constitutionalization of family law as far as they provide a higher protection of individual family members' human dignity and fundamental rights. Beneath the surface of the rights discourse the outcome is rather that *family bonds are strengthened and personal liberty is strongly restricted* as a consequence of the threat of high damages rates for disloyal conducts. In this, the new law contradicts the 70's and 80's reforms of family law with the indissolubility of marriage superseded by no fault divorce. The intrafamilial torts case law, on the contrary, seems animated by a (un)disguised punitive intent. An interesting point to investigate in a further comparative analysis is actually the role that the breach of marital obligations plays on the structure of the action in tort in both systems. Italian case law suggests that that factor is somehow embodied in the element of the violation of the subjective right. However, there is evidence that Italian courts award damages against the

⁷⁰ For this discussion in Canadian legal scholarship see Leckey, Robert. "Family Law as Fundamental Private Law", 86 *The Canadian Bar Review*, 2007, 69.

⁷¹ This fact may be due to the Supreme Court of Canada holding, according to which the Charter does not apply directly to disputes between private parties (*RWDSU v. Dolphin Delivery Ltd.* - 1986). According to Leckey (note 70), Family law scholars "sensibly took this holding" to narrow the impact of the Charter on disputes between family members (p. 72).

family member/tortfeasor on the ground of a scrutiny, which seems somehow close to the definition of a standard of care.

2. Another element of modernization is commonly envisaged in the approximation of family law to the law of the market, namely to that *ius commune* which is quintessentially private law. Whereas the doctrine of immunity in tort represents an exception to the *ius commune* and a hurdle to the fully inclusion of family law into private law, intrafamilial torts remove the exception and integrate family law into the *ius commune*. In point of fact, however, the law of intrafamilial torts seems on the contrary to *reiterate the public/private divide*: within family law, because tort law plays the role of public law as a proxy of the public welfare system in contrast with the contractualization of intimate relations⁷²; within private law *in general*, because, due to intrafamilial torts, family relations require a stronger intervention of the judicature on private actors conducts.

3. On the way to the complete overcoming of family law exceptionalism, tort law and the law of obligations challenge and even supersede the monopoly of family law in the governance of domestic relations. This should mark the (at least partial) decline of family law exceptionalism, with family law that becomes almost unnecessary as far as the *ius commune* regulates family intimacy. However Italian case law shows how the introduction of tort law into the family realm produces a *hyper-regulation of domestic matters*, with the old family law that acts like a kind of soft law, if compared with the hardness of the new law, the law of the market. The paradoxical effect is that the patriarchal and authoritarian genealogy of family law exceptionalism is now set aside by a much stronger discipline of intimacy.

4. We have seen that one of the reason that thrusts the Italian Supreme Court to overrule the old principle *inclusio unius, exclusio alterius*, which set the monopoly of family law in domestic relationships, is the ineffectiveness of family law remedies when marital and/or parental loyalty and fairness are at stake. This standpoint is not gender neutral. As far as intranspousal torts are concerned, damages awards turn into a means of redistribution of wealth within the couple which mainly makes women better off. The disloyal husband is identified with the cheapest cost bearer in a marital dissolution situation where family law remedies do not or may not provide sufficient livelihood for his wife. In addition marital (namely husbands’) conducts sanctioned by courts in

⁷² See above, § 3, *Distributive Effects*.

intrapousal tort cases are particularly hideous, what seems to justify high damage rates with an implicit punitive sanction.

As a result, the discourse that this law produces is one of women's subordination and victimization that the law should overcome. Within feminist theory, this marks a victory for governance feminism, identified with that feminism that emphasizes women's sexual and economic subordination and ultimately depicts women as victims of a given social (and legal) system. On the other hand it is the sign of the *defeat of post-structuralist feminism*, which rejects this picture and aims to produce a more sophisticated account, where women are neither definitely victims nor fully equal to men and the law plays a much more complex role, with legal rules producing female stereotypes which reinforce women's subordination, while, at the same time, constituting the background for negotiation between women and men, which may subvert or change that social order for women's benefit.

If anything, the comparative analysis of intrafamilial torts in Italian and Canadian law serves to unmask the ideology lying beneath the rhetoric of family law modernization. The different approach of Italian and Canadian courts to the problem of family members immunity in tort is certainly due to structural (juridical-technical) characteristics of the two legal systems. But at the same time it sheds light on other factors, such as the persistence (and the pervasiveness) of the public/private dialectics in the regulation of the family in both systems, and the fallacy of the tradition/modernization dichotomy in analyzing legal change in family matters, while unveiling the close connection between a given conception of adjudication, the distributive effects of legal change – whatever its content - on social actors, and the redefinition of relations of power between social groups and genders. In particular, the analysis of Canadian case law allows to shed light, by comparison, on the judicial activism of Italian courts in the field of fundamental rights, revealing little awareness about the impact of the rights discourse on family relations and, ultimately, a simple-minded faith in the regulatory power of the law.

In conclusion the topic of intrafamilial torts proves to be worth of further investigation. Its implications go far beyond the specific subject matter and expanding the analysis to other legal systems such as the U.S.⁷³, France and Germany, would help to test - consolidate or refute - the soundness of the policy analysis I have developed in

⁷³ Nicola, Fernanda. "Intimate Liability: Emotional Harm, Family Law, and Stereotyped Narratives of Interspousal Torts", *William & Mary Journal of Women and the Law*, 2013.

these pages. It promises to be a fascinating enterprise, but it exceeds the aim of this paper.