BREACH OF INTERSPOUSAL OBLIGATIONS: LIABILITY OR IMMUNITY?

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Lots of thanks to the society that gave me the great opportunity to be here today.

I hope to be clear enough to explain a rather complex relation: that between family law and tort law in Italian legal system, and in particular the recent judicial development in the analysis of consequences of the breach of interspousal obligations.

In other words, in which case can the spouse, who has suffered a wrong caused by adultery, by loss of society with the other, by indifference of his/her partner toward the family life, consider this damage unlawful, and for this reason claim a compensation? Or differently, in which case should those behaviours be considered inside the ordinary ménage of the couple, inside the normal assumption of the risk descending from marriage, and consequently irrelevant for the law (“keep off the grass” solution)? What kind of remedy is granted to the spouses: an action for damage or only an action for divorce?

The interspousal rights and duties are regulated in Italian legal system by art. 143 of civil code. It provides, according to the constitutional principle of equality and solidarity (1), that “a mutual obligation to loyalty, moral and material support, cooperation in the interest of the family and cohabitation derives from marriage” (2) (something similar to the common lawyer’s idea of “consortium” deriving from marriage).

Therefore, either spouse has a “right” to expect that the other will fulfil his or her duties.

Recent articles and sentences have explored the legal nature and foundations of these mutual duties from different perspectives: are those only moral norms, a sort of behavioural model of “fair and good spouse”, (not legally binding for spouses) (3)? Or, differently and more deeply, legal norms (with specific judicial remedies) (4)?

Although it’s a common notion that inside the family relationship there are certain juridical situations worthy of protection and preservation, there are still conflicting theories about the consequences of the breach of those situations.

The fact that there are some situations deserving juridical respect and consideration doesn’t necessarily mean that the same situations, and in particular the duties ex art. 143 c.c., can be object of legal submission, sanctions or whatever form of compensation.

Perhaps, it is no accident that in legal discourse it is commonly said “breach of interspousal obligations” and not “breach of interspousal rights”.

It is important to remember that the regular consequence of violation of inter-spousal duties is the declaration of separation.

In fact, according to art. 151 c.c., II par., “the judge, in adjudicating the separation, declares, (…), to which of the spouses the separation is chargeable (“addebito”), in consideration of his behaviour contrary to the duties deriving from the marriage” (5).

This does mean that adultery and/or other forms of matrimonial misconduct could be valued by the judge in order to reduce or eliminate the amount of financial support (assegno di

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1 Art. 29, Italian Constitution: “Family is recognized by the Republic as a natural association founded on marriage. Marriage entails moral and legal equality of husband an wife within legally defined limits to protect the unity of family”.
4 See S. PATTI, Famiglia e responsabilità civile, Milano, 1984.
mantenimento), or, differently, to impose the payment of this support to the party which has been responsible for the breach of duties. (7).

Consequently, the reduction or elimination of financial support was traditionally seen (7) as a sort of specific codified relief within family bond; and for this reason, following the principle of lex specialis derogat generalis, other juridical remedies, different from divorce, were not allowed.

Having said that, the interspousal obligation, ex art 143 c.c., was considered a moral duty rather than a juridical duty.

Nevertheless It seems that the idea that the divorce is not the only remedy for the violation of interspousal obligations is going to spread.

However, many authors have observed (8) that the fact that the victim of wrong can compel the other spouse responsible for the irretrievable breakdown of marriage (having breached the interspousal duties) to pay the financial support, could not be an effective measure: for instance, when the person obliged to pay has not enough money, or more precisely, has modest economic and financial capacities.

An answer to such a weakness of the system has been recently found by the judiciary, and some scholars in giving a relevant impulse to the “juridification” (to give a juridical foundation to) of the interspousal duties (8), using civil liability as a paradigmatic remedy to these breaches (10).

Not only it has been remarked the juridical nature of reciprocal rights and duties of both spouses, but also it has been affirmed the constitutional value of the interspousal rights.

Indeed, some have argued that the exclusion of remedy of tort (in order to compensate the victim of interspousal wrong), is contrast with articles 2 (11) and 29 of Italian Constitution, which guarantee the inviolable rights of human being, either alone or in social groups, expressing their personality and with reference to the juridical and moral equality of husband and wife.

Therefore, this growing tendency towards the expansion of tort law in the field of family relationships comes from the idea (has its basis on the idea) that the constitutional principles entailing family relationships can be effective only with the recourse to the tort system (12).

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6 There was something similar in old English law, based as it was upon the concept of the “matrimonial offence”.


10 Interesting leading cases in this sense are Tribunale Firenze, 13.06.2000; Tribunale Milano, 04.06.2002; Tribunale Milano, 10.02.1999; Corte di Appello Torino, 21.02.2000.

11 Art. 2 Constitution: “The Republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity”.

There is a massive case law on this issue, but the extent of discretion given to the courts results in a lack of general principles recognizable in some cases.

Indeed, two situations are worth of mention:

1. the violation of family duties involves a criminal act (like, for a sample, family ill treatment): the compensation in this case is commonly admitted by both judges and scholars;
2. the violation of family duties does not involve a criminal act: in this case, can the violation of the above mentioned interspousal duties be read as a civilly illicit act (a tort in the English sense), producing an obligation to compensate the damages?

At this points the questions are those following: In which sense can we consider the breach of matrimonial duties an illicit act? Moreover, must any wrong caused by the violation of interspousal duties be compensated? Which kind of damages are we talking about? And finally, how much is the price of the unfaithfulness, or better, which are the standards to value this sort of damage?

To be more clear, it is useful to remember the essential elements of a civilly illicit act within Italian legal system (13):

1. fact, which may be either an act or an omission;
2. damage caused by that fact and which is considered “unjust” by the legal system;
3. causation, which is the nexus between cause (imputable fact) and effect (damage);
4. intent (“dolo”), in the sense of the voluntary transgression of any legal norms; or
   fault (“colpa”), in the sense of violation of a duty of diligence, care or prudence.

The “injustice” of the damage, therefore, functions as a real clamp which holds tightly the matrimonial duties ex art. 143 c.c., and the remedy for damages descending from the breach of these duties.

The damage is refundable when “unjust”, that is, when it is caused by an injury to one’s legal sphere (in our case, either husband’s or wife’s legal sphere).

Following the case law, it seems that not all wrongs descending from a breach of interspousal duties should be compensated, but only those which are particularly reprehensible and offensive.

For example, it was judged “particularly scornful” the behaviour of a man who, having been informed about the pregnancy of his wife, first invited her to terminate pregnancy, then left her throughout the gestation period, running away with another woman.

The judge compelled that man to pay the expenses necessary for the treatment of his wife’s depression as a consequence of husband’s misconduct (14).

At this point, it has to be highlight that what, it is the infringement of the superior fundamental rights, like dignity, health, privacy, freedom of speech, and so on, which count more than the mere violation of duties (relevant to detach the intent or the fault of the wrongdoer’s conduct).

Coming back to the main issue, the breach of the interspousal duties of moral and material support and loyalty does not cause a tort. In other words, the fact that the wife’s legitimate expectation to respect the interspousal duties from her husband is betrayed is not enough for a tort action to start. Rather, the gross violation of the wife’s human rights like her health and her dignity is the necessary element for the configuration of an interspousal illicit act.

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13 See article 2043 c.c.: “A deliberate or negligent act of any sort, which causes an unjust harm to another, obligates the person who committed it to compensate for the harm” (translation of T. G. Watkin, The Italian legal tradition, Ashgate, 1997, p. 247); or in an other translation of M. Beltramo, G. E. Longo, J. H. Merryman, The Italian civil code, Oceana Publication, 1969: “Any fraudolent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages”.
14 Tribunale Milano, Sez. IX, 7.03.2002
Indeed, the legal boundaries between liability and immunity lie on the identification of superior personal interest and right that were infringed as a consequence of the breach of art. 143 c.c., therefore causing a biological and/or psychological damage to the family unit.

As it is evident, not only conflicting opinion about the role and the weight of the law for the regulation of the family relationship hide behind this debate, but also different frameworks to value conflicting interests.

The question is how to balance between rights, between freedom of the single and responsible cohabitation, between individual needs and family needs, autonomy of each spouse and shared responsibility, between respect of personal rights and freedoms on the one hand, and equality, solidarity, mutual support and liability on the other hand.

Having said that, the position of those who fear that the application of civil responsibility to family relations runs the risk of losing its close “compensative nature” of the “unjust” damage suffered, consequently becoming a far more dangerous means of “deterrence”, seems fairly well-grounded.

Indeed, the choice of Italian judiciary on the way of civil liability, and consequently the embarrassing and often interfering presence of the law inside family questions, reminds us of the Shakespearean: “But what’s so blessed fair that fears no blot” (15).

15 W. SHAKESPEARE, Sonnets, n. 92.