

“THE DETERMINATION OF PATERNITY MUST BE ADMISSIBLE”.
POST-UNIFICATION CIVIL LAW THEORY AND PRACTICE
AND THE FAMILY LAW REFORMS. TRANSITORY LAW ISSUES

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Abstract: The rule set in the Italian civil code of 1865 forbidding investigation about paternity out of wedlock was deeply innovative in comparison with judiciary practices in the Middle and Modern ages, as well as in comparison with early-XIX-century, pre-Unity legislation on the matter.

The rule raised therefore a wide debate in doctrine, with a strongly engaged field of civil lawyers demanding a reform of the code; however, it was also the occasion of a florid casuistry, with special regard the solution of problems in the application of transitory rules. The situation in the territories formerly belonging to the Lombardo-Veneto was particularly complex, given that they had been subjected to the quite different rules provided by the Austrian ABGB.

Keywords: paternity out of wedlock; bastardy; civil code (1865); transitory rules; Lombardo-Veneto

The almost absolute ban on inquiries on natural paternity, which the unification Civil Code of 1865 had borrowed from the French¹, was defined by Giuseppe Pisanelli as “a safeguard for the stability and decorum of families”². Even the Senate Commission responsible for the revision of the draft Civil Code, considered it a “legal [principle] common” to the civilised peoples³. But it was also harshly criticised. Many proposals were put forward to have it amended, both during the preparatory works as well as during the years following the entry into force of the Code⁴.

Indeed, despite the affirmations made by the law’s redactors, the choice had not been unequivocal. Always with its eye on comparison, legal doctrine had noted that obtaining legislative systems around the world were divided in two or three classes, depending on whether the natural child had the right freely to look for the father, whether that right was completely banned, or whether the search was allowed only in certain cases⁵.

¹ Art. 189 of the 1865 Civil Code lays down: “Scrutiny as to paternity is forbidden, except in the case of rape, when the period of such rape shall refer to that of conception” (cfr. Article 340 of the *Code Napoléon*).

² Cfr. *Relazione sul Progetto del primo libro del Codice Civile presentato in iniziativa al Senato dal Ministro Guardasigilli (Pisanelli) nella tornata del 15 novembre 1862*, in S. Gianzana (ed.), *Codice civile preceduto dalle Relazioni Ministeriale e Senatoriale, dalle Discussioni Parlamentari e dai Verbali della Commissione coordinatrice*, I, *Relazioni*, Turin 1887, p. 28.

³ *Relazione della Commissione del Senato sul Progetto del Codice Civile presentato dal Ministro Guardasigilli (Pisanelli) nelle tornate del 15 luglio e 26 novembre 1863*, in Gianzana (ed.), *Codice civile*, I, *Relazioni* [nt. 1], p. 210.

⁴ The matter has already been studied, in particular by the historiography dealing with social and women issues in addition to that dealing with law. An essential bibliography can be found in the Note at the end. To keep to the limits of this essay, the following recent titles can be cited by way of example: B. Montesi, *Questo figlio a chi lo do?: minori, famiglie, istituzioni (1865-1914)*, Milan 2007, particularly pp. 97 – 103; G. Galeotti, *In cerca del padre. Storia dell’identità paterna in età contemporanea*, Rome-Bari 2009, particularly pp. 57-87, in which the ban on the inquiries relating to paternity is considered as the logical consequence of the principle whereby “father is only he who decides to be such”. The author’s chapter is therefore entitled “Paternity as punishment”.

⁵ G. Leoni, under *Filiazione*, in *Digesto Italiano*, 11.2, Turin 1892-1898, pp. 207-301 (253). A wide scansion of the legislations of Europe, America and elsewhere is found also in C. F. Gamba, *La dichiarazione della paternità illegittima e l’articolo 189 del Codice civile italiano*,

As a consequence, many were those in Italy who proposed new rules which allowed, at least in certain cases, the possibility to ascertain paternity judicially. This line, already espoused by the Roman Rota, had been recently followed by some pre-Unification states, and the imitation of the French example met with strong opposition frequently based on claims of autonomy and of the marked superiority of the Italian legal tradition with respect to the model on the other side of the Alps.

Then the Coordinating Commission, entrusted with the fine-tuning of the Civil Code, decided to follow the example of the Kingdom of Savoy. During its meeting of April 27, 1865, a comfortable majority of its members decided to introduce an exemption to the ban in the case of “a written document signed by the person indicated as father of the child”, expressly recalling the rule found in the Albertine Code⁶.

The addition does not however appear in the final text. At promulgation stage, Minister Vacca clarified that there had been “a serious discussion” on this point. He himself considered the proposed change worthy of study, and acknowledged that many favoured it. But he then admitted that “We do not dare follow this new path”, so as not to trespass the limits of the delegated power. The Minister’s proposal to listen to public opinion and to carry out “new inquiries and new studies” on the matter in order then to present them to Parliament⁷, was accepted with regard to the first aspect, but not with regard to possible legislative outcomes.

Between the 1860s and the 1890s, the legal publications with the widest circulation frequently carried opinions requesting a reform of the Code.

For instance, writing in the “Archivio Giuridico”, Emilio Bianchi, on the basis of his first-hand knowledge and experience, proposed previous

in “Annuario delle scienze giuridiche, sociali e politiche” 1881, pp. 178-240, in particular pp. 190 *et seq.*, and in V. Mori, *Appunti su l'azione di paternità naturale nel diritto antico e moderno*, in “Il Filangieri” (1890), pp. 569-584, 594-631, 622-708.

⁶*Verbali della Commissione di coordinamento*, procès-verbal no. 12 – Sitting of April 27, 1865, in S. Gianzana (ed.), *Codice civile* [nt. 1], III, *Verbali*, Turin 1887, pp. 93-94.

⁷*Codice civile del regno d'Italia*, Turin 1866, pp. XIII *et seq.*. The text has been republished also in A. Aquarone, *L'unificazione legislativa e i codici del 1865*, Milan 1960, pp. 370-371.

Tuscan case law⁸ as model, even suggesting the introduction of a “prudent and moderate use of the inquiries on paternity”⁹.

In the prestigious “Filangieri”, Vittorio Mori devoted an in-depth historical and comparative study to the natural paternity action, in which he proposed that the obtaining Italian law be reformed to allow at least some exceptions to the ban¹⁰.

“Circolo giuridico” and “Antologia giuridica”¹¹, both published in Sicily, “Foro italiano”¹², “La Legge”¹³ and others¹⁴, all carried numerous essays and commentaries on judicial decisions dealing with this subject.

⁸ The Tuscan Courts constantly allowed the paternity action in the case of the so-called “*ad ventrem* custody” (that is to say in the case of *more uxorio* cohabitation, when the “civil status” of the woman and her honest behaviour subsist, and when the man exercises a “jealous oversight”) and in the case of the awareness and opinion openly shown by the presumed father, that is to say when he openly showed to consider himself the father, not only with words but also by “deeds expressing the sentiment of paternal duties and affection in such a way as to establish a corresponding opinion in neighbours and acquaintances”. E. Bianchi, *Le indagini sulla paternità naturale*, in “Archivio giuridico”, 24 (1880), pp. 162-183, citations at pp. 173-174.

⁹ Bianchi, *Le indagini* [n. 8], p. 178. The same periodical carries an essay on the subject penned by Torquato Cuturi. This author too favoured a reform of the Code (T. Cuturi, *Studi sulla dichiarazione giudiziale della paternità dei figli naturali*, in “Archivio giuridico” 24 (1880), pp. 385-426). Cuturi came back to this point in his review of a French monograph (T. Cuturi, *Di una recente pubblicazione degli avv. Paul Coulet ed Albert Vaunois (Étude sur la recherche de la paternité, avec une préface de Renault, Paris, Marescquiné)*, 1880, in “Archivio giuridico” 26 (1882), pp.186-196. He took up the subject again in another piece (*vide infra*, n. 44).

¹⁰ Mori, *Appunti su l’azione di paternità naturale* in “Il Filangieri” (1890), [nt. 5]: most importantly the conclusions at pp. 620 *et seq.*

¹¹ On the first, for instance, see V. Tuzzolino, *Dei diritti della prole illegittima e delle indagini sulla paternità*, in “Il Circolo giuridico” 1881; on the second, among others, B. Brugi, *La riforma della nostra legislazione civile*, in “Antologia giuridica” 3, issue 3-4 (Feb-Mar 1889), pp. 295-296; I. Santangelo Spoto, *I nati fuori matrimonio e la proibizione di ricerca della paternità*, in “Antologia giuridica” 3, issue 9-12 (Aug-Nov1889), pp. 186-211; as well as G. Leonardi-Mercurio, *La seduzione e l’art. 189 del cod. civ. ital.*, in “Antologia giuridica” 4, issue 8-12 (Dec. 1890-Apr 1891), pp. 690-727. Opinions in the opposite direction were also expressed: P. Delogu, *Codice privato e codice sociale*, in “Antologia giuridica” 5, issue 1 (May 1891), pp. 5-28 (cfr. G. Speciale, *Antologia Giuridica. Laboratori e rifondazioni di fine Ottocento*, Milano 2001, pp. 61 *et seq.* This book is also useful for a comprehensive evaluation of the Catania periodical, as well as the parallel Palermitan “Circolo Giuridico”).

Although divided on both political position and several aspects of their legal thinking, a liberal such as Carlo Francesco Gabba¹⁵ and a socialist such as Enrico Cimbali¹⁶, as well as many others¹⁷, agreed on this point.

Despite the numerous nuances, therefore, many authoritative voices proffered various hypotheses in which the proof of paternity, though always very difficult, could be deemed reasonably certain.

¹² See F. Ferrucci, *Nota* to the Court of Cassation of Turin, decided on 16 December 1879, in "Foro italiano" 1880, I, p. 298; Id., *Intorno alle indagini sulla paternità promosse da uno straniero davanti i tribunali italiani*, in "Foro italiano" 1882, I, p. 31; P. Casini, *Dell'indizio nascente dalla rassomiglianza fra il supposto padre ed il supposto figlio nelle indagini sulla paternità*, in "Foro italiano" 1887, I, p. 296; F. S. Gargiulo, *Azione e prova della paternità naturale nei casi di sequestro di persona, ratto o stupro violento*, in "Foro italiano" 1887, I, p. 693.

¹³ Especially relevant is the essay penned by E. Precerutti, *Si debbono ammettere le indagini sulla paternità?*, in "La legge" 5 (1865), I, pp. 567 et seq.

¹⁴ By way of example one may cite the contribution made by Domenico Giuriati in "Temi veneta" (D. Giuriati, *Il divieto delle indagini sulla paternità*, in "Temi veneta" 1881, p. 1641); the two contributions made by Pasquale Nasca carried by the Neapolitan periodical "Diritto e giurisprudenza in materia civile, penale, commerciale ed amministrativa" (P. Nasca, *Dell'abrogazione dell'art. 189 contenente il divieto delle indagini sulla paternità*, in "Diritto e giurisprudenza" 6 (1890), p. 205 e Id., *Se e quali riforme sieno da introdursi nel codice civ. relativamente alla ricerca della paternità ed alla condizione giuridica dei figli illegittimi*, in "Diritto e giurisprudenza" 7 (1891), p. 158, who answers, like many other jurists, the question posed by the Third National Law Conference, about which see immediately *infra*). Many other essays are enumerated in Leone's ample bibliography under *Filiazione*, [n. 3], pp. 208-211, to which the reader is referred for the sake of brevity.

¹⁵ Gabba, *La dichiarazione della paternità illegittima* [n. 5], in particular pp. 222 et seq.

¹⁶ His views on matters of family law are aired in some essays of the 1880s, gathered in a volume called, not casually, *Due riforme urgenti: il divorzio e la ricerca della paternità naturale*, Turin, 1902, published posthumously (the author had passed away in 1887) on the occasion of a new debate of these two themes.

¹⁷ In favour of the reform one finds, for example, the widely-cited essay penned by Tommaso Traina, *Il riconoscimento e la legittimazione dei figli naturali secondo il diritto civile*, Turin 1883; as well as C. Cavagnari, *Nuovi orizzonti del diritto civile in rapporto colle istituzioni pupillari. Saggio di critica e riforma legislativa*, Milan 1891, pp. 21 et seq. and U. Sorani, *Della ricerca della paternità*, Florence 1892; for the opposing views see E. Masè Dari, *Un'accusa infondata al divieto della indagine sulla paternità*, Turin 1891. For other examples, refer again to Leoni, under *Filiazione*, [n. 3], pp. 208-211.

The Third National Law Conference (Florence, September 1891) discussed this subject during its Civil Law session¹⁸. It almost unanimously proposed the abolition of the ban, affirming the opposite principle whereby “the search for paternity has to be allowed”, not only in the cases of abduction and rape, but also when “paternity transpired indirectly from a civil or criminal judicial decision which has become *res judicata*, or depends on a marriage which was declared null ... or else transpires from a written, explicit declaration of the father”¹⁹. The search had also to be allowed in the case of the seduction of the woman, *more uxorio* cohabitation, and lastly, “if the father treats the child paternally in an unequivocal manner”²⁰.

The strong determination to return to the *ius commune* legal position is here abundantly clear.

But the opinion of those Italian civil lawyers favouring the amendment of art. 189 was also swayed by the practical problems of the long and complex transition from Restoration law to Unification law.

In particular, the passage to the Kingdom of Italy of the territories which had previously been under Austrian rule, called for a legislative intervention, expressly to regulate the case of inquiries on paternity. Art. 7 of the Royal Decree of 30 November 1865 no. 2606 for Lombardy and art. 6 of the transitory provisions of 25 June 1871 for Veneto declared the inapplicability of the bans contained in Articles 189, 190 and 193 of the new Code to citizens born or conceived in those regions before the Code’s entry into force²¹.

¹⁸ The Conference, subdivided according to four themes (civil law and civil procedure, and two on criminal procedure) took place over one week. The first civil law thesis dealt with “if and which reforms are to be introduced in the Civil Code relating to the search for paternity, and the condition of illegitimate children” (*Atti del III Congresso Giuridico Nazionale tenutosi in Firenze l’anno 1891 pubblicati per incarico della Commissione esecutiva dall’Avv. Camillo de Benedetti, direttore della “Cassazione Unica”, Turin 1897, pp. 13, 23-24, 32-51, 210-236*).

¹⁹ The Italian legislator had already paid attention to these cases. In terms of Article 193 of the Civil Code, in such circumstances, the natural child could file a suit for alimony, even if acknowledgement was forbidden and investigations on maternity excluded.

²⁰ *Ibidem*, pp. 221-222.

²¹ The choice, after all, followed perfectly the line established also in the case of preceding legislative transitions, before and during unification. For instance, when the Albertine

These still fell under the regime of the Habsburg Civil Code, which held sway in Lombardy-Veneto from 1816, in particular §§. 163 *et seq.* of the A.B.G.B. which allowed with a certain latitude the judicial action for the ascertainment of paternity.

However, the difference between the Austrian and Unification regimes with regard to the judicial effects of natural paternity, whether spontaneously acknowledged or judicially pronounced, was significant. On account of this, the application of transitory provisions became difficult. Court cases and theoretical approaches varied to considerable degrees, and authors debated them openly, at times even lambasting them.

The Lombard Courts had been faced with this problem already since the 1860s. Soon after, the Venetian Courts found themselves having to face it too. But not even certain rulings of the Courts of Cassation of Florence and Turin were enough to do away with all the lingering doubts.

The fundamental norm, thus, was §. 163 of the Austrian Code, according to which

“only he who, in the manner provided for in the Regulation of Civil Procedure, shall prove having engaged in amorous congress with the mother of the issue in the period of time which, reckoned till the delivery, shall not be less than six months and not more than ten months, and equally only he who admits to this also extra-judicially, shall be presumed to have generated the issue”.

As observed by the more eminent commentators of the A. B. G. B., this norm was a clear choice to grant children the highest degree of protection. It not only paved the way to the proof of paternity through all possible means contemplated generally by Austrian civil procedure. It also added the simple extra-judicial admission, made to whomsoever.

Code was promulgated, Article 3 of the Patents Royal of 6 December 1837; or the act whereby the Piedmontese Civil Code was extended to the Romagna on 26 November 1860; and so on. Curiously enough, Amilcare Della Carlina expressed a contrary opinion to this legislative solution on the Milanese “*Monitore dei Tribunali*”. He aired his views in the last phase of the preparatory works of the Unification Civil Code. In his view, the strong reasons adopted by the Minister to justify the ban on inquiries suggested the applicability of the new law “also to children generated under the previous regime, which did not contemplate a similar ban” ([A. Della Carlina], *Diritto transitorio*, I. *Questione intorno all’indagine della paternità naturale*, in “*Monitore dei Tribunali*” 1865, pp. 362-365).

According to §. 166 of the Regulation of Civil Procedure, such admission would usually have probative value only if made to somebody who has interest in knowing the truth²².

Furthermore, in the light of the *ratio* attributed to the legislative text, the case law of the first half of the 19th century had held that admitting to being the father of an illegitimate child and admitting to having “engaged in amorous congress with the mother” were the one and same thing, and had even considered it a valid proof if the admission was made by a youth who was still a minor²³.

To balance out the evident bias in favour of the offspring, Austrian civil law gave the possibility to the defendant always to provide the proof to the contrary²⁴. In addition, there was also the rule found in §. 165, which excluded all illegitimate children from the enjoyment of family rights, including the use of the father’s surname²⁵.

These were allowed only to demand from the parents, alimony, “education and placement according to the parents’ means”²⁶.

The evident disharmony between the Austrian and the 1865 Italian legislations, as we have already seen, gave rise to a significant debate.

The most relevant issue which both authors and Courts had to deal with was whether the judicial declaration of paternity, obtained through a suit lodged after 1865, or after 1871, on the basis of the transitory provision, “was equivalent to legal acknowledgement done under the new law”²⁷.

²² Cfr. on this point, for example, the unambiguous observations made by J. Mattei, *I paragrafi del codice civile austriaco avvicinati dalle leggi romane, francesi e sarde*, Venice 1852, p. 502 along with the bibliography referred to therein. The A.B.G.B. was also eulogised by Cavagnari, *Nuovi orizzonti* [n.17], pp. 32 *et seq.*

²³ Mattei refers in particular to certain rulings of the 1840s (Mattei, *I paragrafi* [n. 22], p. 502).

²⁴ Doctrine insisted clearly on this, even clarifying that § 163 provides for merely simple presumption (*ibidem*).

²⁵ §. 165 of the A.B.G.B.: “illegitimate children shall not enjoy all family and kinship rights; they shall not lay claim to the family name of the father, or to his noble title, or to his heraldic device, or to any other prerogative of parents, but shall only take the family name of the mother”.

²⁶ Così il § 166 che si concludeva precisando che gli illegittimi non sono “propriamente soggetti alla patria potestà di chi li ha generati, ma sono assistiti e rappresentati da un tutore”.

²⁷ The matter was widely discussed, with the endorsement of a length bibliography, by Leoni under *Filiazione* [n. 3], pp. 263-275.

It would seem that at first, practitioners and professors agreed on the limitation of the effects of the rule. They held that that legislator's objective had simply been to preserve acquired rights. Like the Court of Appeal of Milan, they decided that

“the judicially-made declaration of natural filiation in proceedings lodged in Lombardy in terms of Article 7 of the transitory provisions on the application of the Civil Code, does not grant the natural offspring but the benefits given him by the discontinued Austrian legislation, certainly not the decidedly more significant rights granted by Italian legislation in the case of natural filiation, whether acknowledged or judicially declared”²⁸.

Confusion, however, started to reign from the 1870s onward, on account of certain rulings of the Lombard courts.

The same Milanese Court of Appeal was the first to distance itself from its own previous decisions, allowing a natural offspring (even if thus declared in terms of Article 7 of the transitory provisions) to carry the paternal surname²⁹. It also ordered to enrol the birth in the civil status registry³⁰ as provided for by the new Code, but precluded by Austrian law.

The way was thus paved for an interpretation favourable to the offspring. According to these decisions, Article 7 not only kept alive the former law, giving rights to the search for one's paternity, but also gave the declaration of paternity thus obtained the same effects of a formal acknowledgement on the basis of Article 192 of the 1865 Civil Code. The judicially-declared offspring thus had personal, family and even successory

²⁸ Court of Appeal of Milan, decision of 14 November 1867, confirming the decision of first instance delivered on 7 January of the same year. The maxim is found in “*Monitore dei Tribunali*” 1869, p. 195. At the same time, the Court of Appeal of Brescia followed the same line in a decision of 6 February 1869, also published by “*Monitore dei Tribunali*” 1869, pp. 195-196. The two rulings were followed by a long editorial note which openly contested the interpretation and embraces the more child-friendly approach, which at first was not appreciated by the greater part of civil lawyers but was later accepted by the Lombard courts (see in particular the arguments found on pp. 197 *et seq.*).

²⁹ There is an 1873 decision in this sense (in “*Monitore Giudiziario*” 2 (1873), p. 272

³⁰ In virtue of a decision of 6 August 1872, Camillo and Beatrice, children of Angela Beretta, were declared by the Milan Court of Appeal natural children also of Carlo Pastore. This decision is recalled by Leoni, under *Filiazione* [n. 3], p. 263, and was quoted often in the decision of the Castiglione delle Stiviere Court which had intervened in the same case, about which immediately *infra*.

rights, from the moment that the 1865 Civil Code gave him a portion of the legitimate succession and a reserved portion of the testamentary succession³¹. All of this was based on the principle that “succession is regulated by the law obtaining at the time of the demise”³².

It turned out that this very last point was to prove the most controversial and delicate. As a matter of fact, doctrinal positions ultimately agreed that for questions of status only the previous law had to be applied. Those born in Lombardy-Veneto were thus excluded from kinship ties, titles of nobility and the paternal surname. Successory rights were a much more delicate issue which touched upon the general principles of the legal system and as a consequence divided the approaches of magistrates and even professors.

This was the climate of uncertainty in which a highly complex case began in March 1871 before the Court of Castiglione delle Stiviere, close to Mantua. It went on for many years, with appeals, counter appeals and applications made to the Court of Cassation, ending up attracting the attention of press and authors alike.

The estate of the late Carlo Pastore was claimed by his brother, on the one hand, and his companion and her two children, on the other. The children had been formally acknowledged by the mother. With regard to their paternity, the deceased himself had expressly confirmed it in numerous letters and, above all, in a declaration of last will duly enrolled in the deeds of a notary. This testament had been considered sufficient to prove the paternity on the basis of Article 7 of the transitory provisions by both the local court and the Court of Appeal of Milan.

³¹ The successions of natural children were regulated by the Code in Title II of Book Third, respectively in Chapter I, Section IV (Articles 743-752) and Chapter II, Section IV, §. II (Articles 815-820). The provisions lay down that in legitimate succession, natural children, whether acknowledged or declared (Article 743) received one moiety of the portion they would have received had they been legitimate (Article 744), acquiring a larger portion in the absence of legitimate children (Article 745) and being preferred even to collateral relatives (Article 747). The same proportions were to apply also in the case of testamentary succession (Articles 815-816).

³² Leoni, under *Filiazione* [n. 3], pp. 263 *et seq.*, refers to it polemically. Carlo Francesco Gabba, on the other hand, subscribes to it wholeheartedly, see *infra*, n. 50 *et seq.* and relative text.

In April 1871, the Court thus granted the two minor children, Camillo and Beatrice, the one-quarter share of their father's estate. The decision carried a long rendering of reasons, recalling even the fundamental principles of the legal system and of the law of succession³³.

This decision, which for some jurists was criticisable and even absurd³⁴, was not to remain isolated. Others followed in its steps, such as the decision delivered some months later, in September 1874, by the Court of Appeal of Venice, which cited exactly the same principles.

The Court expressed itself thus:

“the economy of the transitory provisions was meant to maintain undisturbed as much as possible the observance of the legal situation created and acquired by the law which was discontinued and to assimilate the effects of the new law which took its place”

concluding that

“equally, there can be no doubt that even offspring born and conceived before Unification are entitled judicially to seek the succession of their father according to the cases contemplated by the new Code, when the succession itself was opened under its regime”³⁵.

At the same time, the judges of the Brescia Court of Appeal went so far – albeit indirectly – as to acknowledge even children born of adultery, provided that they were born when the A. B. G. B. obtained. They even

³³ The very long decision delivered on 14 April 1874 by the Castiglione delle Stiviere Court was published in its entirety by “*Monitore dei Tribunali*” 1874, pp. 969-977.

³⁴ It was criticised by, for instance, M. A. Salom, *Sui diritti dei figli illegittimi nati e concepiti sotto l'impero del codice austriaco in relazione colle disposizioni transitorie per l'attuazione del codice civile italiano*, in “*Archivio Giuridico*” 16 (1875), pp. 586-597. Leoni opposed it forcefully, under *Filiazione* [n. 3], p. 263.

³⁵ The reasons for the judgment were thus formulated: “because it is a basic legal principle that both manner and ability to succeed are measured in terms of the law which obtained at the time of the demise of the deceased who leaves the estate the inheritance of which is the subject-matter [of the action]; because the former too are to be deemed acknowledged children, and because if a different hypothesis were to be contemplated, in legitimate succession the former law should be followed even with regard to any other person who can be succeeded now finding themselves in a condition different to the previous one – which would be absurd”. Court of Appeal of Venice, decision of 22 September 1874, in “*Monitore Giudiziario*” 3 (1874), pp. 647-649.

granted the faculty to succeed, if these children were mentioned in a testament³⁶.

The approach which was taking form was however opposed by the judges partisans of legitimacy. The Supreme Court of Florence, in fact, overturned the Brescia decision. The Court of Cassation held that Article 6 of the transitory provisions of the 1871 decree had only one objective, namely to ensure that

“Article 189 would not have retroactive effects harming those born under a different legal regime. This objective would be defeated if they were allowed to submit proof in accordance with the former methods in order for them to accrue the highest possible benefit from the succession allowed by the new Code”.

In such a way, actually, they would be “in a new position, quite exceptional and privileged, which would however have no basis in either the former nor the present law”³⁷.

Already the year before, in July 1874, the Court of Cassation of Turin had expressed itself in similar terms. Even if it had markedly different premises, the decision was clear and precise, and was widely known in legal circles and by authors³⁸.

According to the civil lawyers, the strongest interpretative argument used by the supreme judges of Turin to understand the meaning of the transitory provisions was found in the declarations made by the proposing Minister in his report to the King, namely:

³⁶ The decision of the Brescia Court of Appeal, which insists on the idea of a very marked position in favour of the child as the inspiring criterion of the transitory law, was published with ample excerpts by “*Monitore dei Tribunali*” 1873, pp. 149-150, where it is indicated as delivered in December 1872. Its contents were then summarised also on the Venice-published “*Monitore Giudiziario*” 2 (1873), dated 6 August 1873. This is the same date Leoni cites under *Filiazione* [n. 3], p. 263.

³⁷ Court of Cassation of Florence, decided on 17 June 1875, in “*Monitore Giudiziario*” 4 (1875), pp. 507-508. A favourable commentary had been published by the Venetian periodical in an issue of a few days before (cfr. c 4 (1875), p. 361).

³⁸ Court of Cassation of Turin, decided on 16 July 1874. It was transcribed by both “*Monitore dei Tribunali*” (1874), pp. 920-922, (which carried it in its entirety, defining it as “one of the best-worded published during this year”), as well as “*Annali della giurisprudenza italiana*” 8 (1874), I, p. 430, with a synthesis of the legal bases. It received stout praise from Leoni, under *Filiazione* [n. 3], p. 264.

*“it stands to reason that the proof of a fact which gives rise to rights and obligations falls under the law which governed that fact, thereby openly demonstrating that the reference to the previous law meant to indicate the legislation obtaining at the moment of the birth”*³⁹

It followed, therefore, that this law was to be applied in its entirety and not only in its more favourable aspects.

The search for the intention of the legislator through the preparatory works seemed, even to a significant number of authors, to be the best way to avoid misunderstandings caused by too literal an approach to the interpretation of the provisions. This had been where the former magistrates of Lombardy-Veneto had erred, when invoking a scrupulous observation of the dictates of the written rule⁴⁰.

In reality, as we shall presently see, not even this approach managed to cast away all doubts.

According to a certain interpretation, thus, the minutes of the commissions charged with the drafting and correction of the draft code, in particular the minutes of the Coordinating Commission, would be a useful implement to clarify the objectives and limits of these norms.

That group of eminent jurists and politicians had already dealt with family issues in the autumn of 1865. During the meeting of 5 October, the members of the Commission had discussed an amendment, proposed by Pasquale Stanislao Mancini, according to which “the acquisition, the loss and the recovery of a civil or family status are regulated by the law which governed them at the time of the facts which caused them”. The rejection

³⁹ The decision reproduced in italics the words of the Minister (Court of Cassation of Turin, decision of 16 July 1874, in “*Monitore dei Tribunali*” (1874), p. 921).

⁴⁰ Indeed, the Court of Appeal of Venice had declared, in good faith, to be desirous of observing the dictates of a law which provided debatable solutions. As a matter of fact, the Venetian magistrates wrote: “one could even question the intrinsic goodness of the measure at issue, but this lies completely outside the competence of the judge, whose duty is only to apply the law and not to review it. Whereas it cannot be doubted that for the aforesaid the favour of an exception was done so as not to harm those born and conceived before the coming into force of the new law, it is necessary to conclude that they too, given their relationship, have a character equivalent to the declaration”. Court of Appeal of Venice, decision of 22 September 1874, in “*Monitore Giudiziario*” 3 (1874), p. 648.

of this formulation was not due to any disagreement with its contents. It was actually rejected because it was deemed superfluous: “it enunciates a proposition which does not need to be enunciated”⁴¹.

On the basis of this principle, then, if the declaration of natural filiation made according to the law obtaining at the time of the birth or conception, did not grant the child any family or successory rights, it was clear that “such rights could not be acquired by means of a subsequent law”⁴².

The Turinese Supreme Court kept constantly to this line in its decisions during the following years⁴³. But this confirmed the uncertainty still common among judges⁴⁴ and others⁴⁵.

Between the end of 1879 and the beginning of 1880, Piedmontese magistrates proceeded to overturn certain decisions through which the Court of Appeal of Milan persisted in granting ample rights to natural children. Moreover, these magistrates felt it necessary to carry out a detailed comparison between the natural filiation regime provided for by Austrian law and the Italian Unification counterpart in order to bring to the

⁴¹*Verballi della Commissione di coordinamento, procès-verbale* no. 67 – Hearing of 5 October 1865, in Gianzana (ed.), *Codice civile* [n. 1], III, *Verballi* [n. 6], pp. 615-616.

⁴² Leoni, under *Filiazione* [n. 3], p. 263.

⁴³ For example, the Turin Cassation’s decision of 16 December 1879 (published in both “*Foro italiano*” 1880, I, p. 298, and “*Il Filangieri*” 1880, I, pp. 78-80) and the same Court’s decision of 5 February 1880, in “*Annali*” 14 (1880), I, 1, pp. 277-280.

⁴⁴ The approach of the Turin Cassation was not followed, say, by the Parma Court of Appeal, before which appeared the case decided on 16 December 1879 (see preceding note). Cfr. Parma Court of Appeal, decision of 30 April 1880, in “*Annali*” 14 (1880), III, p. 185. The Venice Court of Appeal tackled another aspect of the problem, relating to evidence, by applying the law obtaining at the time in which the proceedings had begun, not when the original fact had taken place (Court of Appeal of Venice, decision of 15 October 1874, in “*Annali*” 8 (1874), II, pp. 319). Authors reacted very negatively to this decision (cfr. for example, F. Ricci, *Corso teorico-pratico di diritto civile*, I, *Della pubblicazione ed interpretazione delle leggi e delle persone*, Turin 1886, p. 206; Traina, *Il riconoscimento* [n. 17], pp. 78-79; T. Cuturi, *Studi sulla dichiarazione della paternità dei figli naturali, con particolare riferimento al diritto civile francese ed al diritto civile italiano*, Perugia 1892, p. 102).

⁴⁵ A different approach was taken, for example, by the Cassation of Rome in its decision of 5 January 1878, published in “*Annali*” 12 (1880), I, 1, pp. 122-123, praised by Carlo Francesco Gabba (see *infra*, n. 49 and relative text).

fore “the large difference in principles and objectives which inform the two legislations”.

On the one hand, the former, they remarked, granted all illegitimate issue the right to seek “the authors of their days”, but it did so clearly “for the sole and clear purpose of obtaining from them alimony, education, and placement”. The latter, on the other hand, perceived these searches as “dangerous for the almost impossibility of obtaining proof”. It discouraged them but, if paternity was ascertained, “equat[e] declared issue to acknowledged issue”, defending their rights “in such a way as to conciliate the sentiments of humanity and civil progress with the respect due to the *decorum* and interest of the legitimate family”.

These rights thus included “in addition to the right to alimony, the protection granted to the father, the right to carry his family name”. Furthermore, there was also “the significant part left to the acknowledged or declared natural issue in legitimate succession, and the reserved portion in testate succession”⁴⁶.

Thus, it followed that “when there is such disparity between the intrinsic characteristics and the legal consequences of the two declarations, granting to one the effects of the other would be tantamount manifestly to running counter to the will of both legislators”⁴⁷.

Only if the decision on paternity in terms of Articles 6 and 7 conserved the simple characteristics of the alimony action – some other eminent civil lawyers added – could the “indulgence on a large scale of the transitory law” be justified⁴⁸.

⁴⁶ The first ruling, dated 16 December 1879 and published in “*Foro italiano*” 1880, I, p. 298 and in “*Il Filangieri*” 1880, I, pp. 78-80, is transcribed almost in full by Leoni, under *Filiazione* [n. 3], pp. 265-267, as a model for a correct reasoning; in similar fashion are the quotations taken from the Cassation of Turin, decision of 5 February 1880, in “*Annali*” 14 (1880), I, 1, p. 279.

⁴⁷ “of the Austrian, who, while permitting the action for alimony, did not grant more rights than the Italian Code keeps for legally acknowledged or declared children – these rights the Austrian legislator actually expressly denies; of the Italian, who does not even allow the possibility of a judicial declaration save in the cases of abduction or carnal knowledge with violence”. *Ibidem*.

⁴⁸ See Cuturi, *Studi sulla dichiarazione della paternità* [n. 44], p. 106, supported by Leoni, under *Filiazione* [n. 3], p. 264. Equally explicit is the position taken by Salom, *Sui diritti dei figli illegittimi* [n. 34] and Carlo Francesco Gabba.

Nevertheless, when dealing with inheritances, solutions could never be easy. Indeed, according to many, this part of the law was regulated by principles which did not admit of exceptions, foremost among which the principle whereby successions were to be regulated by the law obtaining at the time of the demise of the deceased. This was emphatically affirmed by Carlo Francesco Gabba, who agreed with the Cassation of Rome that had followed this principle even in the case of citizens born before the unification of Italy⁴⁹.

On the basis of this fundamental rule of transitory law concerning successions, it followed, in the opinion of the author, that it was “beyond the shadow of a doubt” that the declared child

“there being a preceding law, would have the same right to inherit that the Italian law grants to acknowledged children, where the succession of the parents, of the father in particular, is opened under the regime of this law”⁵⁰.

The solution therefore held also for the cases then being examined.

It was true, as a matter of fact, remarked Gabba, that the Legislator, when calling back into effect “the provisions of the previous laws” did not specify if the intention was to call back “all kinds of law” or only those concerning matters similar to those treated by the discontinued rules. The author however indicated that Article 3 of the Patent of 6 December 1837 for the implementation of the Albertine Civil Code, from which the transitory rule in question was copied, qualified the words “provisions of the preceding law” with the words “in this respect”. He argued that if that clause was not repeated in the Italian transitory law, it was only because

⁴⁹ In the opening part of his essay dedicated expressly to this subject, Gabba openly declared his preference for the solution embraced by the Cassation of Rome in its decision of 5 January 1878 (see *supra*, n. 45), according to which “successory rights of simply natural issue, declared as such in terms of Italian transitory civil law, must be regulated ... according to Italian law” (C. F. Gabba, *La successione ereditaria del figlio adulterino o incestuoso ai genitori suoi nel giure transitorio*, in Id., *Questioni di diritto civile*, II, *Diritto ereditario e Diritto delle obbligazioni*, Milan-Turin-Rome 1911, pp. 7-13).

⁵⁰ Gabba, *La successione ereditaria*, p. 10.

“our legislator considered it superfluous for the purpose of rendering comprehensible such a clear thing”⁵¹.

Though defended with authority, the favourable line of interpretation succeeded to sway neither authors nor Courts. From the 1880s onward, in fact, the Courts tended to toe the contrary line, both at first instance and at Cassation stage. The same applied for contributions by jurists of repute⁵².

Natural children born in Lombardy-Veneto had by now to be content simply with alimony and could no longer reasonably hope for a sizeable portion of the estate.

REFERENCES

- G. Cazzetta, *Praesumitur seducta. Onestà e consenso femminile nella cultura moderna*, Milano, Giuffrè, 1999
- M. Cavina, *Il padre spodestato. L'autorità paterna dall'antichità a oggi*, Roma, Laterza, 2007
- P. Montani, *Madri nubili e tribunali. Legislazione e sentenze in età liberale*, in «Italia contemporanea» 200 (1995), pp. 455-468
- G. Conti Odorisio, *Il divieto di ricerca della paternità nello Stato liberale*, in *Paternità e maternità nella famiglia in transizione*, a cura di M. Ferrari Occhionero, Milano, UNICOPLI, 1997, pp. 127-152 e in Ead., *Ragione e tradizione. La questione femminile nel pensiero politico*, Roma, Aracne, 2005, pp. 175-200
- Donne tra Otto e Novecento. Progetti culturali, emancipazione e partecipazione politica*, Macerata, EUM, 2007

⁵¹ *Ibidem*.

⁵² Leone cites on a wide scale both judicial decisions and authors – under *Filiazione* [n. 3], p. 267 to which, for the sake of brevity, the reader is referred.