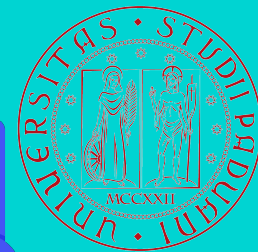


DIGITAL DATA AND PRIVACY BETWEEN PARTNERS



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A critical approach to a technological Family Law issue

BACKGROUND

More than 70% of people in a relationship share passwords, PINs or fingerprints to access their personal devices but, at the same time, at least 61% of them admit that they do not want their partner to know about some of their activities, including online activities (1).

86% of people in a relationship share at least one account with their partner, and up to 39% in some circumstances; the median number of accounts shared is four. Many also make new accounts specifically to use together (2).

People used shared accounts more during Covid-19 quarantine, especially entertainment accounts (3).

WHAT ABOUT THE **LEGAL CONSEQUENCES** OF THE **NEW BEHAVIORS** THAT THE USE OF TECHNOLOGY BRINGS WITHIN **FAMILY DYNAMICS**?

PROBLEMS

PRIVACY WITHIN MATRIMONY



- Q Is there, within spouses, the same right to privacy that occurs between non-related people?
- Q Shall the consideration of privacy within matrimony be different with reference to shared or personal devices / accounts?

DIGITAL ADULTERY



- Q Are digital devices relevant just in order to uncover adultery or can adultery also be perpetrated solely through them?

DIGITAL EVIDENCES IN FAMILY PROCEEDINGS



- Q Can the evidences collected accessing the spouse's devices and accounts be judicially acquired in family proceedings?

APPROACH

As Glossators and Postglossators taught us *ex facto oritur ius*. This means that the legal practitioner cannot escape the **continuous confrontation with reality** and its multifaceted evolution in customs, values and social feeling.

This is especially true in the area of family law, as issues related to the use of technologies require a verification of the **adequacy of each domestic legal system**, in terms of its ability to **provide answers to new juridical questions** that rise from the interaction between the spread of digitalization and family life. And the situation in which family relationships are challenged the more by the digital context is the **family crisis**.

Therefore, it is necessary to verify the adequacy of the Italian legal system and its suitability to respond to the requests for protection and justice related to the use of new technologies.

More specifically, it is important to understand **whether an effort must be made to innovate**, necessarily with the intervention of the legislator, or **whether it is possible to identify effective means in the already existing rules**, the contents of which can be enhanced through interpretation.

RESULTS

! **Marriage** creates a *consortium omnis vitae* which is a relationship where the expectation of privacy between couples is low as the partners share many intimate spaces, especially in the home.

! Even if local courts adopted different approaches, they agree that **cohabitation lessen the right to privacy**.

! The doctrine insists on the **subjective and personal dimension of the right to privacy**: each spouse has a full right to privacy and it is up to them, in order to preserve the family cohesion and to respect the family duties, to share all the personal data and information that they consider appropriate.

! The concept of "**fidelity**" as a matrimonial duty (Art. 143 Italian Civil Code) has faced an evolution by means of interpretation.

! Nowadays it is undisputed that infidelity does not require any sexual or physical intercourse because loyalty is a commitment **not to betray each other's trust and devotion**:

- ✓ Any circumstance objectively suitable to undermine loyalty and faithfulness
- ✓ Any virtual intercourse
- ✓ The mere virtual attempt to organise an intercourse
- ✓ Romantic chat lines

! In civil proceedings the evaluation upon the **admissibility** and considerability of the **evidences collected by a spouse violating the right to privacy of the other is remitted to the Judge**.

✓ Posts, pictures and data shared on Facebook by the spouse do not fall under any right to privacy as they represent information deliberately published by the subject to everyone (if the social profile is public) or, however, a group of people (if there is any kind of restriction).



On the substantial level, the existent legislative framework already provides a discipline that can be fully applied, through interpretation, to the emerging technological issues in family law.



Does the community property regime affect the regulation of digital goods such as social accounts? Is Art. 178 Italian Civil Code applicable?

Does the absence of an explicit provision, in the Italian Code of Civil Procedure, regarding the (in)admissibility of illegally acquired evidences, require a legislative intervention?