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1. Introduction

In the ambit of the legal systems of the Countries belonging to the European Union, the system of the sources of law is extremely varied. There are systems where the basic principles governing the family are contained in the constitution (as in the Italian system, for example); while in others, the written constitution (as in France) or the unwritten constitution (as in Britain) ignore the family. Thus, in order to reconstruct the system of sources with regard to agreements involving the family, all of the following need to be taken into account: principles of Community law, and in this regard the Charter of Nice, which has been granted the status of a legally binding document; national constitutional principles; rules laid down in civil codes and statutes; and rules created by judges through case law.

The panorama is clearly very complex, so I shall try to give a simplified description. Its complexity also depends on the fact that the family is a social institution that is strongly rooted in both local and national communities; therefore, the development of legal rules governing the family usually keeps in step with developments in society. Or rather, the legal rules often fall behind social advances, since the law struggles to keep up with the increasingly rapid pace of change enjoyed and displayed by social phenomena.

However, the law is no longer “history’s notary”, as it once was; it now also works as a set of rules promoting social development, so that in almost all Member States it appears as a two-faced Janus: on the one hand, it reflects social evolution; on the other hand, it promotes its development. EC law is one of the motors driving development, aiming to create a set of uniform rules to govern personal and property relations relating to the fundamental freedoms and freedom of movement of persons within the European Union. In this perspective, one of the most interesting focal points is provided by the legal recognition of cohabitation, and, at an even more advanced stage, by the recognition of same-sex unions. So some very different models exist within the European Union.

Agreements relating to the family therefore intersect with constitutional values, social values and, in so far as applicable to such agreements, with the ordinary law of contract.

2. The family in the Charter of Nice

The attention that the law reserves to the family may seem to be almost excessive, today. On the level of drafting legal formulae, just consider the number of provisions devoted to the family in the European Charter of Fundamental Rights (the Charter of Nice). The Charter codifies: the right of privacy, i.e. the right of every individual to respect for his or her family life (Article 7); the right to marry and found a family (Article 9); the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions (Article 14); the right to dispose of and bequeath one’s possessions (Article 17); the right to non-discrimination on grounds of birth (Article 21); the right to equality between men and

women (Article 23); the rights of children to the protection and care necessary for their well-being and to express their views freely (Article 24(1)), while the child's best interest must be a primary consideration in all actions taken by public authorities and private institutions (Article 24(2)), and further, every child has the right to maintain on a regular basis a personal relationship and direct contact with both parents, provided this is not against the child's interests (Article 24(3)); the right of the elderly (Article 25) and of people with disabilities (Article 26) to lead a dignified life and to participate in the life of the community; the right of young people admitted to work to be protected against economic exploitation (Article 32). Besides, the family is granted legal, economic and social protection (Article 33(1)) so that it is possible to reconcile family and professional life with the protection of maternity and parental leave (Article 33(2)). In addition, rights to social security and assistance are covered (Article 34), and protection is given to health, the environment and consumers (Articles 35, 37 and 38).

Each of these provisions is laden with content: by the references to Community law, the European Union is committed to undertaking decisions implementing these principles; while by the references to national laws, Member States are committed to ensuring conformity with these principles.

Further, if we consider the universal declarations on the rights of the child, the common positions concerning assisted procreation and protection of human embryos, the agreements on the position of immigrants at work and uniting of immigrants with their families, the treaties concerning adoption, and so on, we are faced precisely with the phenomenon mentioned above whereby family relations are drawn within the ambit of the law and internationalised.

3. The family in European private law

The theme of European family law only partly coincides with the theme of European Community family law: this is not only a problem of geographical boundaries or levels of legal sources. There is the problem of determining whether it is possible and/or useful to draw up rules in the European ambit designed to govern the family in a uniform way.

One orientation in scholarly writings stems from an exploration of a range of elements: the rules of private international law governing family relations, the fundamental rights recognized in international and European Charters, and the initiatives of the European Institutions. Scholars adopting this line arrive at a first conclusion with which one can only concur: in the universe of European law, family law is a marginal subject marked by a significant degree of localness. This orientation does, however, take cognizance of the fact that the phenomena mentioned above, which are economic, social and technological in nature, tend to simplify relations, to globalize them, assimilating the families in which European citizens live in uniform models of life. Coming to examine some of the central nerve-centres of family law present in all the legal systems of the Member States – such as the law of persons, marriage law, and the law relating to children, including adoption – Martiny highlights the considerable divergences that still exist between the different models. He then observes that none of the supranational organizations has ever tried to delineate a «model family law»: the results that have been achieved at procedural level only cover a segment of the entire subject, albeit a significant one. The first step could therefore be to draw up a «restatement», that is a framework of principles drawn from national sources, which sets itself the aim of accomplishing a «convergence» of the single legal systems. The external forces that affect the development of legal systems must also be acknowledged: the circulation of models (consider the influence the French family law reform had on the Italian reform of 1975, we Italians would remark), the role of self-regulatory codes, the physical movement of families for reasons of work, the movement of individuals for reasons of education and training.

Another orientation in scholarly writings – once the objectives of the Commission on European Family Law (CEFL) are defined – pauses to reflect on some of the problems that have afflicted the harmonization of contract law: namely, the competence of the European Community, and therefore whether it is entitled to introduce rules that belong in the realm of civil law (in the different sectors of competition and the four freedoms on which the Union is founded); the possibility of imposing uniform rules for all Member States; the difficulty, precisely, of drawing up such rules (or principles); whether it is opportune to draw up a model code; or the possibility of making such rules binding.

Beyond these underlying problems, Antokolskaia pauses to reflect on one of the biggest obstacles, the singularity of which particularly distinguishes family law: the cultural obstacle. The European Council itself highlights the cultural obstacles standing in the way of the harmonization of civil law and commercial law in the Community ambit, in its document of 16.11.2001 concerning the Resolution of the European Parliament adopted the previous day (COM 2001 298) and the European Commission Communication of 11.7.2001 (2001 398).

Following on from this, again, there is the problem of the differences between the legal systems, which some parties take up as a value. There is no point underlining the historical origins of the divergences in family law in the different legal experiences: they are part of the cultural heritage of us all, descending as they do from medieval law, traversing the opposing religious regimes in the modern period, and experiencing the difficulties of building a body of secular law, secularized also in relation to marriage, the legal position of children, relations between the sexes, and same-sex unions. But family law, taken to include not only written law and living law applied through rules of case law, but also law effectively practiced, is also subject to the weight of social legacies, conceptions of the family that are professed and defended in the ambit of different social categories. The different rules of mixed marriages also weigh on family law, as do conceptions brought by non-Community subjects who live, work and operate in Europe. It appears difficult in the post-modern State to elaborate harmonized rules – in Antokolskaia's view – and is easier perhaps to draw up new rules, which are the same for everybody. But the process of drafting such rules must be cautious, since it is not possible to set a faster rhythm for bringing the legal systems closer together than the speed of naturally developing social relations. The conclusion leading on from the above, favors the attempt to bring closer first and foremost the rules relating to property relations, while waiting for the time to be ripe to promote further attempts, rather than advancing the project of creating a unitary, complete legal *corpus*.

The two studies examined above set the scene to return to the questions I raised at the outset, and to reflect on the alternatives available to the jurist, concerned to safeguard national identities, but also to facilitate the process of European integration; the pathway ahead inevitably involves convergence, harmonization, and, to the extent possible, the unification of all branches of the law, including family law. Various alternatives can be singled out from the spectrum of possible choices.

The simplest option – but also the most simplistic – limits itself to abstention: bearing in mind that family law is closely linked to (national) citizenship, the decision may be to leave things as they are, not to take any initiatives, and to entrust every task of every kind concerning the family to the national legislature. This choice implies a premise: that, from the legal standpoint, the European Union legal order is only devoted to the protection of economic interests; such interests, though, should arise and develop «outside the home», so as not to touch on the family in any way. In addition, in the case of conflict between legal systems, the solution would remain entrusted to the rules of private international law.

The choice just outlined is not only simplistic, but it is also damaging: the many documents of the Community institutions demonstrate that the interests of families (including economic interests) are intertwined with the interests of wider communities and of single individuals (one need only think of work, consumers, health and the environment, and the movement of persons); they show

that *man cannot live by economic interests alone* because in the Community ambit, the social and cultural dimensions are accorded equal dignity.

So, if the choice of non-intervention is to be rejected, how should the opposite choice of intervention be handled? Should a gradual drawing together be contemplated, conducted through «nuclei» of norms, creating a sort of legislative patchwork? Or should a chapter be planned in the series for the unification of European private law, a sort of additional book to Ole Lando's program for European contract law and Christian von Bar's program for the other sources of obligations?

As I observed in my introduction, family law, unlike other branches of private law, sinks its roots in an extraordinarily rich breeding ground of values and ideals. It has become secularized (*although the history and reality of this process of secularization of family law is very complex indeed*) but it has not lost all touch with religious experiences, which affect different aspects: the moment a family is founded; marriage; the upbringing and education of children; choices regarding the separation of spouses and the dissolution of marriage; the admissibility of alternative families not founded on marriage; and the legal dignity of same-sex unions. In most cases, it is not a question of individual choices, entrusted to the sensibility, culture, belief and liberty of single individuals; it is instead a question of choices guided by the collectivity, whose history, tradition, feelings and capacity to modernize are reflected in the rules of internal law. Nonetheless, many people now believe and affirm that in the Countries currently belonging to the European Union, lifestyle models and ways of thinking have become uniform, or at least much closer than they once were. But it is also true that there are still gulfs that divide Countries or communities within Countries. It is difficult to predict the effects that enlargement of the Union will have on the process of harmonization of national family law rules: will we find that there is a slowing down or an acceleration of convergence?

The principles of a European family law, precisely because they are rooted in different ground from Country to Country, should not – in my view – either codify the Christian tradition or embrace passively the rules originating from Roman law. On the contrary, the European principles should express the highest level of secularity, obviously leaving to the individual, and therefore to individual families, the *entirely private and unchallengeable* choice to follow, profess or divulge their religious faith. The family of *civil* law does not coincide with the family of *canon* law, or with the family of the law of religions arising from the Reformation, of *Jewish* law, or of *Islamic* law. The problems of mixed marriages, children's religious education, and polygamy, can be entrusted to national legislators, to agreements between States or autonomous Communities and Churches, affecting Community law and European private law only from the viewpoints of *public order* and of *common constitutional principles*. Put another way, the issue must first be resolved at constitutional and state level and only after that, at the level of relations belonging in the private law sphere.

Various arguments militate against the Roman tradition. On the level of legal methodology, this tradition stands out from the perspective of the historicist, but not of the scholars who believe in the contemporary application of Roman law, in the sense that the same categories that founded the science of the study of Pandects can hardly be proposed in the third millennium. This argument is all the more valid with regard to the law of the *familia*, since the Roman *familia* had a structure and behavioral rules, both with regard to personal and property relations, that are by now in open conflict with gender equality, the equality of spouses and children, the rights of the person within the family, work both within and for the family, the upbringing of children, and so on. The fact that some terms, concepts and even institutions are identical or similar in certain legal systems, to those attributed to Roman law (or better, to Byzantine law rather than Roman law) is a consideration that cannot lead us to conclude that European common rules should be based on Roman law (classical or Byzantine?).

The question of compatibility between a common European family law and regional - as opposed to national - laws, is more difficult. Local traditions must certainly be safeguarded, but this

choice cannot be at the expense of establishing common, uniform cores or nuclei of law governing family relations.

We thus get to the central problem that concerns both family law and the other branches of private law. If we proceed «patchwork-style», what nuclei should be identified and what level of harmonization should be set for the process of bringing state or regional rules closer together?

For identifying the nuclei of law, a practical, realistic approach could be taken, following the family policies formulated by the Community Institutions.

For the level of harmonization, the opposite method could be adopted to that followed or proposed for property law. In that area, harmonization has been set at a medium level: it has not been attempted to harmonize at the maximum nor yet at the minimum level (with the exception of some sectors, such as competition or the law relating to the four freedoms laid down in the Treaty of Rome). In the case of family law, two phases could be envisaged: trying a minimum level during the first phase and then gradually proceeding to a medium level.

Caution and realism are the precepts that must inform every law-making design in this sector. It is accepted and considered by all to be the best-devised prospect, considering the political and social circumstances that distinguish the single Countries of the European Union. However, going beyond the process of harmonization *already underway*, documented by the enormous profusion of provisions referred to at the beginning of this discussion, it appears to me that the values we must insist on are the *fundamental rights*, for the moment considered in their individual dimension, but liable to be reappraised in the light of the family grouping; in truth, not so much a reappraisal tending to recognize the family as an entity in itself, vested with supra-individual rights, but more precisely, acknowledging it as the seat of affections, solidarity, and collaboration where those individual rights come up against each other in a dialectical manner and are reconciled.

4. The family as a «natural association founded on marriage»

In Italian law, the family is contemplated in the Constitution as a <natural association> (Article 29). The formula «natural association» must not be construed as founding a superior interest of the institution, but more simply as a «constitutional guarantee of respect for family autonomy, in the tangible interest of the single members to order their family relations in a free and original manner»¹.

The Constitution awards the legitimate family a privileged position, indicating in the matrimonial union a «legal form for the cohabitation of a couple objectively unsurpassable for guarantees of certainty, stability of relations and seriousness of commitment». But this does not mean that certain safeguards offered to the legitimate family, whose members are protected more intensely, cannot be extended also to the *de facto* family, significant not only as a «family», that is, as the union of a group with a shared patrimony of values and affections, but also, more simply, as a «social group» (under Article 2) in which the members can express their personality.

The principle of consent and respect for the dignity and personality of the single members is fully confirmed in the provisions of Article 29, paragraph 2 of the Constitution, which removes the obstacles placed by a long-standing tradition in the way of equality between spouses. In other words, the hierarchically ordered family system has been demolished and the once indisputable supremacy of the husband eroded at its roots. The constitutional dictate extends the woman-wife's rights still further, since it ensures not only legal equality, but also <moral equality>. This precept constitutes an extra dimension beyond formal equality, indicating specifically that a woman must be granted a «dignity» that goes beyond the nucleus of powers and rights with which she is endowed, a dignity that may not be oppressed or lacerated by her husband's supremacy. The Constitution

¹ Bessone, *Commentario della Costituzione*, artt. 29-31, Bologna, 1976.

itself makes the principle of equality (guaranteed in general to all by Article 3) subject to the limit of unity; however, this limit must not be construed as an obstacle to founding a family based on equal rights, but rather as the instrument needed to achieve that very legal and moral equality.

5. The legal situation of children and their protection

The rules contained in Articles 30 and 31 of the Constitution concerning the rights of minors are also innovative in scope of the traditional system; traditionally, the «minor» has tended to be viewed as a subject without capacity to act, necessarily subjugated therefore to the indisputable will of the parents (and in particular, the «head of the family»), according to authoritarian models of upbringing. Confronted by legislation that «hides the harsh reality of effective incomprehension of the real needs of minors behind a façade of widespread sentimentalism towards children», the dictates of the Constitution not only exclude the legitimacy of authoritarian methods of upbringing, but also aim to establish a system in which minors must be accorded the maximum «assistance», in the plainest meaning of the word.

A minor finds his or her first social group in the family, where the child's personality necessarily develops and matures, in a climate of freedom and autonomous choice of values. And it is in the family, again, before taking place in wider social groupings, that each citizen's civil rights as laid down in the Constitution must be guaranteed: respect for inviolable human rights (Article 2); for religious opinions (Article 8); for political opinions (Articles 17, 18 and 19); free expression of opinion (Article 21). These are just some of the directives that also endow minors with rights; but in addition, there is the right to health (Article 32); to the free and dignified existence of the working family (Article 35 *et seq.*); and to a free and complete education (Articles 33 and 34). In this way, the Charter of Constitutional rights of children and young people transcends the boundaries of the family and ultimately becomes part of the «the program to transform institutions that qualifies the entire Republican order, in a political sense».

In this sense, the «right and duty» of parents to provide for the upbringing, education and maintenance of children, which the Constitution acknowledges to parents as an «*officium*» (a service), cannot be considered an absolute individual right, but rather, being an «*officium*», must be performed by seeking the best forms of upbringing to ensure that the minor benefits from the full development of his or her personality.

The limit set by the Constitution on total equalization of protection for children born outside marriage, for reasons of «compatibility» with the rights of the legitimate family, must be read in a very restrictive way; and more exactly, as indicating that if children born outside marriage are to bear some sacrifice, this is only permissible in so far as it is necessary to safeguard the unity of the legitimate family; only in this way is a distinction between children's prerogatives that derives from their different *status* acceptable. On the other hand, the expression «every protection» referred to in Article 30, paragraph 3, indicates unequivocally as a particular purpose of the Republic the removal of every obstacle in the way of providing the widest protection to children born outside marriage. To be interpreted along the same lines is the «combative» expression of Article 30, paragraph 4, which provides that the limits for determining paternity must be prescribed by a law enacted by Parliament. Precisely because natural children are entitled to every protection, their legal position cannot be sacrificed by ordinary law (and in effect law reform has admitted the use of every means in the search for paternity, so as to facilitate respect for the rights of minors and the corresponding assumption of responsibility on the part of natural parents).

If the duties that the family naturally takes on and carries out are not performed, the Republic assumes the burden of substituting the family in order to protect the rights and therefore the whole personality of minors. Article 30, paragraph 2, provides: «Should the parents prove incapable, the

law provides for the fulfilment of their duties». With this important constitutional provision, immediately linked to Article 31, paragraph 1 («The Republic furthers . . . the fulfilment of related tasks with special regard to large families») and Article 31, paragraph 2 («The Republic protects maternity, infancy, and youth; it supports and encourages institutions needed for this purpose»), the legislator means to prefigure a system of «assistance» marked (not so much by charitable thinking, but) by principles of respect for the freedom and personality of the minor, so as to secure the same treatment and benefits that he or she would have received from a real family. These provisions lead to the onerous and complex task of organising social assistance facilities (also at regional and local level) and making them functional for these purposes.

In 1975, in conformity with the principles established by the Constitution, radical law reform was carried out to the law of the family founded on marriage, until then regulated by the Civil Code of 1942 in an authoritarian, pyramid structure, with all the power centred on the husband-father.

By contrast, no provision has been enacted that covers *de facto* families.

6. The *de facto* family

The Constitutional Court, however, has pronounced on the *de facto* family on various occasions. Obviously, it has affirmed the pre-eminence of the legitimate family over the *de facto* family, and has conferred the privilege of full protection on the legitimate family²; but it has affirmed that the *de facto* family is among the social groups protected by Article 2 of the Constitution and therefore has «constitutional dignity».

For example, in Judgment no. 237 of 18.11.1986, concerning the legitimacy of excluding a woman cohabiting *more uxorio* from among the next of kin exonerated from criminal liability for (among other things) the offence of aiding and abetting (under Articles 307, paragraph 4 and 384 of the Criminal Code), the Court observes – by way of *obiter dictum* – that «an established relationship, although *de facto*, does not appear – even after only a brief review – constitutionally immaterial, when regard is had to the weight given to the recognition of social groups and to the intrinsic displays of solidarity resulting from them (Article 2 of the Constitution)».

The Court has also maintained that Article 29 of the Constitution does not in itself «deny dignity to natural forms of relations between a couple other than the legal structure of marriage»³.

It is, however, a type of cohabitation that the Court considers unstable.

For example, in Constitutional Court Judgment no. 423 of 7.4.1988, in which the Court dismisses the challenge to the constitutional legitimacy of Article 649 of the Criminal Code in so far as it does not provide for exclusion of criminal liability for persons committing some of the acts provided by Title XIII of the Criminal Code, and this is to the detriment of a partner cohabiting *more uxorio*, the Court observes that a distinction must be drawn between cohabitation within marriage, legal separation of spouses and the *de facto* family. The latter is by its very nature «founded on day-to-day *affectio*, freely revocable at any time by either party».

But such cohabitation – on a *de facto* basis – is set on the same level as the situation arising when the cohabiting partners are united by a religious wedding not followed by civil registration. For the purposes of cohabitation, meant as the shared use of the dwelling-house, the Court observes that although the situations of matrimonial union and cohabitation are to be distinguished, under Article 3 of the Constitution it does not make sense, meaning it is not reasonable, to fail to envisage that a partner should succeed to the cohabiting partner as tenant to a lease on that partner's death.⁴

² Sent. 26.5.1989, n. 310.

³ Sent. 26.5.1989, n. 310.

⁴ Corte cost., 7.4.1988, n. 404.

In the same judgment, the Court deemed illegitimate the norm failing to envisage the possibility for a cohabiting partner to succeed as tenant to a lease when the cohabitation ceases (and the union has been blessed with children).

But the Court has not gone so far as to admit equalisation of treatment purely and simply for reasons of succession between *de facto* spouses: according to the Constitutional Court, the relations between the two partners cannot create legal rights and duties (for instance, besides succession, the duty to provide maintenance or to be faithful) because that «would be contradictory to the very nature of cohabitation outside marriage, which is a factual relation that by definition eschews legal qualifications of reciprocal rights and duties».

On the other hand, a *de facto* cohabiting partner may be endowed with benefits by means of dispositions made by the other party during life or by testamentary disposition (within the limits placed by succession law and without prejudicing the quota destined for the spouse, if there is one).

Recent case law tends to put *de facto* cohabitation and cohabitation within marriage on an equal footing, as regards certain aspects.

Firstly, it has been held that a cohabiting couple is stable when the cohabitation has lasted for at least two years⁵, while the contention that a long engagement may follow the same model as cohabitation *more uxorio* has been rejected⁶.

While the provisions of Article 143 of the Civil Code are not considered to extend *tout court* by analogy to the *de facto* family, the courts nevertheless show particular regard to the cohabiting partner (usually the woman) who is in an economically weaker position.

It has thus been held: that the contribution made by a cohabiting partner in the course of cohabitation to the running of the family household is legally material⁷; that it is legitimate to grant an interest by way of free usufruct in favour of a cohabiting partner, also in order to compensate that partner's contribution to family life⁸; that the heirs of a defunct cohabiting partner cannot recover the sums bestowed on the other partner during the course of their life together, provided that such sums are not disproportionate⁹; that a cohabiting partner – who has custody of the children after the cohabitation has ceased – may be granted the right to live in the family home, even where this is owned by the other partner¹⁰; that a cohabiting woman surviving her partner may be awarded his reversible pension¹¹, even where the wife is still alive, if the widow enjoys a more favourable economic position than the cohabiting woman.

Conversely, it has been held that a cohabiting partner does not have the right to maintenance or other alimony¹², or the right to succeed to a lease contract.¹³ On the other hand, it remains controversial whether a divorce allowance may be preserved¹⁴ or not¹⁵ where the ex-spouse to whom the allowance is awarded has established cohabitation *more uxorio* with another person.

7. Marriage as a juridical act («negozio giuridico»)

The description of marriage, both in civil and canon law, raises analogous questions for jurists: what legal scheme can marriage be fitted in to?

⁵ Trib. Brescia, 10.4.2003.

⁶ Trib. Milano, 13.7.2001.

⁷ Trib. Torino, 11.6.2002.

⁸ Trib. Savona, 7.3.2001.

⁹ Trib. Monza, 18.11.1999.

¹⁰ Cass. 26.5.2004, n. 11975.

¹¹ Cass. 10.10.2003, n. 15148.

¹² Trib. Napoli, 8.7.1999.

¹³ Corte cost. 11.6.2003, n. 204.

¹⁴ Cass. 8.8.2003, n. 11975.

¹⁵ Cass. 12.12.2003, n. 19042.

Scholarly writings in the civil law have for some time now introduced a revision of the categories handed down by tradition in the dogma, and this has also had an impact on the idea of marriage and its legal portrayal.

Different opinions clash, again, in this field. Some scholars, while admitting that we can (or must) continue to use the notion of «juridical act» (*negozio giuridico*) and the terminology deriving from it, think that it is no longer possible to accept and use this notion as in times past when the effects of the study of Pandects remained unchanged and were firmly rooted. In other terms, setting the notion of «juridical act» in the recess of its historical tradition absolves the function of exorcising terminology that is antiquated and regarded with suspicion, while at the same time permitting its use in a more aware and judicious way¹⁶.

Other scholars, instead, assert the inevitable twilight, or decline of this notion, the pointlessness of its use, essentially, the need to abandon it to a historical period closed on itself, which can no longer be reproduced in its modern experience; aside from its ideological implications, they maintain that it is a dangerous notion, overly generic and fundamentally repetitive¹⁷.

The above leads to the conclusion that it should be replaced, where possible, by the notion and terminology of contract or of the unilateral act, and where there is no basis in a consensual fact in the strict sense, it should be replaced by the notion and terminology of the legal act. From here, we again encounter the difficulties in which scholarly writings on civil law are caught up, since marriage cannot be treated like a simple fact, or an «act» devoid of consent, as the majority of enacted rules governing marriage are devoted precisely to (free and valid) consent; besides, it is clear that if marriage is an «act» or «juridical act», it is nevertheless a quite peculiar one.

8. Community property regimes declared by law and accorded regimes

As regards property relations between husband and wife, the Civil Code provided in the past for the property regime of separation of estates. This situation was overturned by the reform, which introduced the community property system, except where the will of the spouses determines otherwise. By agreement, the spouses may therefore modify the community regime declared by law, giving rise to an accorded community property regime. The accord, however, may not derogate from the rules on administration of property and equality of quotas (Article 210, Civil Code). An example of accorded communion is the inclusion as part of the joint property of the husband's professional proceeds: as a rule, professional income is personally owned property, and the savings left over are shared between the spouses at the end of the communion; but spouses who choose regulation by accord may determine differently¹⁸. Accorded matrimonial regimes must be stipulated by means of a notary's act, otherwise they are null (Article 162, Civil Code). They may be stipulated at any time, subject to the provisions of Article 194, as substituted by Article 1 of Law no. 142 of 10.4.1981. Accorded matrimonial regimes, as provided in Article 162, paragraph 4, cannot be used to oppose third parties, unless specified particulars are annotated in the margin of the marriage certificate: the date of the contract, the notary stipulating the deed, the particulars of the contracting parties, or the choice under paragraph 2 made in the act celebrating the marriage.

Statistical surveys published in recent years show that in 60% of cases, however, spouses choose the property regime of separation of estates.

¹⁶ For this view, see G.B. Ferri, *Il negozio giuridico tra libertà e norma*, Rimini, 1987; Alpa, in *Contratto e Impresa*, 1987, pp.572 *et seq.*

¹⁷ See Galgano, *Crepuscolo del negozio giuridico*, in *Contratto e Impresa*, 1987, pp. 733 *et seq.*

¹⁸ T. Udine, 23.12.1977.

9. Family agreements

Save for the rules briefly outlined above concerning accorded matrimonial regimes, Italian law does not have special laws designed to govern marital accords. The rules applicable to them are therefore those covering agreements governed by the general law, always provided these are compatible with the rules of the constitution envisaging special protection for the “weaker” spouse and for children born from the union or from marriage.

Different cases therefore need to be distinguished.

First and foremost, let us consider agreements between spouses in case of separation. Where the spouses reach agreement before the court has laid down rules pertaining to their personal and property relations, such agreements are considered to be <atypical contracts>, which are only deemed valid if they offer better terms than those laid down by the Civil Code in the matter of separation; otherwise, spouses are not allowed to modify agreements that have been approved by the court in the course of separation proceedings¹⁹. Such agreements cannot be treated like gifts, since they have the specific aim of settling relations between the spouses that have accrued during their lives together²⁰. An agreement between spouses is valid where it is directed at transferring real property from one to the other so as to contribute to the maintenance of children who are minors; the agreement is considered an atypical contract deserving of protection²¹.

The same principles are applicable where accords are reached after separation and during the divorce procedure.

In the case law, the courts will not uphold preventive agreements reached before marriage or after marriage, having as their object relations between the parties in case of future separation or future divorce. This is because marital freedom - considered both in the positive sense of the right to decide to enter into a marriage, and in the negative sense of deciding not to enter into a marriage, or in the sense of accepting or rejecting conditions tied to separation or divorce – cannot be limited by agreements, whose reason (*causa*) would be unlawful²².

The aim is always to protect the weaker spouse, whose will might be coerced by the stronger spouse; therefore the principle of <prior inability to dispose of property rights consequent on the dissolution of the marriage bond> is applied. It is considered valid, however, to offset credit claimed by a spouse against debts correlated with the divorce allowance²³.

As regards agreements between cohabiting partners, these are always valid provided marital freedom is not at stake. Since it is widely thought that in Italy, too, *de facto* unions should be regulated following the models now established in other Countries of the European Union (as in France, with the so-called “pacs”, or in Spain), some proposals of law designed to resolve the issue are currently pending before Parliament. But it is difficult to predict the outcome, considering the complicated debate held in the course of the previous Legislature, and the ideological clash that has emerged.

For these reasons, I believe that Community intervention in this matter is to be hoped for, at least in order to govern relations of a transnational nature, while it is also desirable that common legal rules should be drawn up which, as proposed for contract law, may also cover the family law of European Union citizens.

¹⁹ Cass. 8.11.2006, n. 23801.

²⁰ Cass. 14.3.2006, n. 5473.

²¹ Cass. 17.6.2004, n. 11342.

²² Cass. 18.2.2000, n. 1810.

²³ Cass. 21.2.2001, n. 2492.