THE IMPORTANCE OF THE DE FACTO RELATIONSHIP
IN THE ITALIAN LAW SYSTEM

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DE FACTO RELATIONSHIP: DEFINITION.

What we say when we talk about De facto relationship? We want to show the situation in which two person, a man and a woman, are living together for a long time and continuously. They act really like they are married, but actually they aren’t.

This situation is today very usual in our society and in all the countries in Europe and USA. This kind of family was born without a formal act of marriage, only for a voluntary act without a legal form; we can distinguish this from other situations like the simulation in an act of marriage, or a false marriage, because this situation presume the existence of a legal document of marriage even if it’s not regular. But we can also distinguish from a simple cohabitation of people that can be founded on different motivation like hospitality, works or vacation; in this kind of situation the “living together” is only because of economical interests.

Authors and lawyers had, for a long, long time, speak about the juridical importance of de facto relationship and about how to regulate the much of the situations between people that live together and between them and other people out of the family. The problem is that in Italy does not exist a complete and general legal regulation of this social issue, but we can only look at a very new group of single Parliament acts, but unfortunately they have not coordinate this laws, so the system is incomplete and we can see only some isolated juridical effects on a few little number of persons.
So the real problem is that in the Italian legal system there are some interesting acts, sometimes also important laws and very effective, but authors, judges and lawyers can’t interpret and recompose in an organic and general view. So in Italy people are very unsatisfied of the legal system about de facto relationship and they are pleading judges to find a solution. Also television and the newspaper speaks about this necessity of our society, because media reflect the most important problems of the people. We want to remember again that the number of people living together without being married is always increasing in Italy. Very often people can’t not meet the big expense of a marriage, or are already married and are waiting for a divorce sentence. We must remember that in Italy people must wait a long time (three years) before they can divorce. So a man or a woman, in this long time, may want to live with someone and he (she) can, but he can’t marry her (him). So we can easily understand that all this people want to be protected by the law in their cohabitation. They have some rights? And who protect this rights? We can think about economical rights, but also personal rights, like the right of assist the loved person in an hospital. So let’s speak about the Italian law.

**NORMATIVE REFERENTS.**

One of the most fundamental law about family is our Constitution, at article n.29, that, solemn, recognize only the importance of the legitimate family. So it says: “Our Republic recognize and guarantee the rights of family considered like a natural society founded on marriage.”
This article was for a long time interpreted like a confirm of the clear disinterest of our system for familiar organizations different from the legitimate family (based on marriage).

But, especially after seventies years, this vision of the de facto relationship like not very important was gradually pushed away by authors, judges and lawyers. Now, even if they recognise again the big difference between marriage and de facto relationship, they also indicate this like an alternative model of family. They have made an effort to find in the acts of family law some dispositions that can be applied to cohabitation. The purpose is to protect at least the single person, even if it’s impossible to protect the situation in itself.

Indeed the article n.2 of our constitution was always considered like a certain referent. It says that “our Republic recognise and guarantee the inviolable rights of a man or woman, both like a single person, and in every social group.” We are sure that a De facto relationship is a familiar organization that is included in this declaration.

So, looking at our Constitution, in De facto relationship, like in a legitimate family, and in every other community of persons, our system guarantee the fundamental rights of the individuals, particularly those of the spouse and of the sons.

Now we can arrive at the same considerations looking at another legal disposition, again looking at the Italian constitution. We talk about the article n.30, that speaks about the right, and at the same time the duty of the parents to support, to give an education, to give an scholastic leaning to their sons, even if they was born out of the marriage; so independent of their status of legitimate sons.

Again at the article n.31 the constitution oblige the members of parliament to make a real effort to give a big support to every family,
without distinctions between legitimate family and de facto relationship.

But now let’s take a look to the ordinary legislation, that is the acts of the parliament. We point to the article n.317 of our civil code. It says that the natural parents, if they are living together, can have both the power to educate and to guide the life of their sons, until they are independent for the law (in Italy it happens at the age of 18).

Some authors have said that this declaration represent a certain reconfirmation of the complete juridical importance of the de facto relationship. Indeed they say that, because of the equality between legitimate sons and natural sons, the law admit a familiar model, not founded on marriage.

Unfortunately, we can do some kind of important critics to this theory. First, the article that we had analysed says exactly that, about the power of parents to educate and guide, it’s necessary that the parents live together with sons, but not live together themselves. In other words the focus is on the sons, not on the de facto relationship in itself.

Again we can say that the legislation doesn’t want to regulate the phenomenon in general, but in particular, the interest is based exclusively on sons, to protect them in every situation, in marriage and not. So we can say that the importance of having sons is not the importance of de facto relationship.

But, out of the civil code we have a lot of recent acts, that give single juridical effects to the more uxorio cohabitation. Those effects are sometimes very important; especially we can point to this matters: registry office, social assistance (welfare), taxes.

So, looking at the Italian legal system, about the de facto relationship, we can analyse the importance of this familiar model, under many point of view. The fundamental are: relationship with sons, relationship
between those who live together, and relationship between these and the other persons.

RELATIONSHIP WITH SONS.
In Italy in 1975, we have introduced a big reformation of the family law. This reform has introduced the article 317 of the civil code that we have already cited. This important article has made a total equality in parents-sons relationship between de facto family and legitimate family. This equality concern not only the personal matter (to guide, to protect, to educate, but also the patrimonial matter (property’s administration, representative function, or the use on son’s goods). Well, every kind of power-duty is indifferently given to the parents, both the married and those who simply are living together.

RELATIONSHIP BETWEEN THOSE WHO LIVE TOGETHER.
Talking about how a family based on de facto relationship start up, we have already said that it’s not founded on a formal voluntary declaration, that is instead the fundamental thing in marriage. So it’s obvious that it’s not possible to apply the law formulated about marriage, for example talking about the many things that made a marriage not valid, not true for the law. This kind of impossibility has not importance speaking about de facto relationship.

In the Italian civil code the article 143 enunciate that are the rights and the duties between spouses. They are: to be faithful, to give always moral and material assistance, to collaborate, to live together, to give a contribute to family life. Can we apply those categories to the de facto relationship? Authors think many different things. Someone exclude this. They underline that even if the living together is very durable and steady, a relation ship more uxorio is always not
certain. We can better understand if we think that actually every act of
reciprocal solidarity between those who live together without being
married is not a duty, an obligatory act, but it’s a voluntary act, so law
can’t protect this. This interpretation is maybe a little cynical, but it’s
so!
However, the necessity to protect the weak person in de facto
relationship does exist. To find a remedy authors say that we can take a
look at the category of “natural obligation”. It’s a kind of obligation that
we can find again in our civil code at article n. 2034. Here the law talk
about a general social and moral duty. It’s based on the importance
given by almost all the society to the de facto relationship.
Unfortunately using this article the weak person in the cohabitation has
a few little power; like the power to leave home whenever he (or she)
wants.
But someone wants to give more guarantees to the weak person. Some
other authors actually, are more favourable to consider the de facto
relationship like a real family. We want now to remember that speaking
about this situation is impossible without thinking at our own social
value, at the things we believe in. So it’s easy to be wrong in the
interpretation of an article, making an effort to take the law to our
ideas, maybe conservative or progressive.
Anyway, some authors think that also the de facto relationship can
make a real sharing together of life and feelings; so the reciprocal
commitments are more meaningful and important, even if they are not
prepared by law. Actually these are the *conditio sine qua non* (the
necessary thing) for the existence of the leaving together like a family.
So we can think at this difference in the Italian family law. In marriage
the violation of rights and duties listed in article 143 c.c. can not
produce the end of the legitimate family, because the causes to dissolve
a marriage are strictly prepared by law.
Instead in the de facto relationship the violation of those rights or duties
is a real cause that can dissolve ipso iure the de facto relationship,
because those things are exactly the fundamental of living together. For
example, if one of the partners leaves home definitively it’s clear that
it’s the end of living together; it’s a fact. But the same thing in marriage
is not the end of this; there’s a long procedure that can say the marriage
is dissolved; it’s a law-dependent fact.
However, there’s a thing on which everybody are agree. It’s the
impossibility to apply the patrimonial dispositions about family based
on marriage to the de facto relationship; and it’s because these acts
was especially and uniquely formulated for marriage.
This largely shared point of view has a lot of legal effects, especially
when a cohabitation more uxorio can finish; because the person that,
during the de facto relationship, has given his contribute with his own
money, or other kind of contribute, is for Italian law without any kind
of protection.
We know that in common law the solution for this problem is the Trust.
Judges of common law in this situation admit the existence of a trust
between those who lives together. So the law gives, implicitly, a
beneficial interest to the weak person that, in the de facto relationship,
has given a part of their goods or money. But, unfortunately, in our
system it’s impossible to admit implicitly a trust. This must been made
with a formal declaration of the subjects.
So how can we protect the weak person in the de facto relationship?
There is a solution, even if it was hardly criticised, but it’s the only
possible in Italian law. The weak person can claim to the court for
“unjustified enrichment” of the other person.
It’s an action of general and residual kind in our system, and it’s about contracts matter in general, not about the family law.

But we can remember that in the Italian system there is the chance to make a private convention, that is a real contract in which they can regulate their relationships. In this contract they can also make reference to family law in the civil code, about the property regime.

We can continue in this description about what happens in the living together more uxorio, talking about the ending of the De facto relationship. It may happen because of the death of one of the family members, or a voluntary act of one (or of both) of these; it’s a simple act; the only fact can make the ending of the family. They don’t absolutely need any kind juridical act, or judge’s declaration. There’s no need of formality.

Instead, in marriage, there must be a court’s sentence for the separation and for the divorce.

Someone says that it’s possible to think about a particular kind of compensation for the poorer individual in the relationship, because of the actions and the contributes given to the life of the de facto family, or maybe also for the job’s opportunity loosen by one person.

However, in Italy, until this moment, this kind of compensation was never given by judges. So we must prefer to recur to the action for “unjustified enrichment” that we’ve already talked about.

Speaking about relationship mortis causa between those who live together, the Italian court of Cassazione (the supreme level in our civil jurisdiction), in a sentence in 1989 has excluded the equality between de facto relationship and marriage. Even if the law admit, in the Constitution, the importance of de facto relationship, it’s impossible for the person who lived together with the deceased to take his inheritance. Indeed in Italian law prevail the necessity to protect some
kind of heirs i.e., parents, sons, some kind of relatives and spouse, when a person die his property and his goods must be transfered only to the “legitimate heirs”. This “legitimate heirs” must have necessarily something; the law wants so because this persons had relationship disciplined by law with the deceased. So we have no absolute freedom of traslation. This juridical relationship are certain and incontestable. Besides we can say that even in the Constitution is written that people can’t deny and damage the inviolable rights of those who live together, the right to take something mortis causa is not considered an inviolable right. Actually the Parliament has a lot of freedom to regulate this matter.

RELATIONSHIP WITH OTHER PEOPLE.

The Italian law, in this matter, admit for those who are not married, some acts that are often incomplete. We can take some juridical consequences from the existence of concrete situation, like de facto family. This consequences come out for personal and social responsibility. They are sometimes similar to those that came out from marriage. But, law doesn’t admit that the situation in de facto relationship is a social value to regulate and protect in his on the whole. It’s interesting to look in particular at the rent contract. When two person live together in an rented house, and the person, between these, that had registered the rent contract was died ,can the other person take the house with the same contract and the same terms of condition? Have those who live together this right? In the fist time our Constitutional Court, on 1980, has denied this right. The court said that the de facto relationship is a simple factual relationship; that it hasn’t stability and certainty and these things exist only within
marriage. So the court denied the right to continue the rent contract between those who live together.

But in 1988 the same Court has completely change its opinion. The court declared wrong the art.6 of an act (the n.392 of 1978) in which law deny the right for the person that is alive to take the rent contract. Also it’s possible now to take this contract in the case in which one person (who subscribed the contract) leaves home; but there must be sons born within the de facto relationship.

Now we want to talk about the situation in which one of the partner in cohabitation is divorced, and he must give or receive every month some money to or from the ex-spouse. In the first case, that is when the person must give money, law consider as important the money that the person give already to contribute to the maintenance of the living together with another person, different from the spouse.

Instead if the person has the right to take money from his ex-spouse, law consider how much money he, or she receive from the other person that live together with him or her. But we can observe that in this matter, for the Italian law it’s not important the De facto relationship in itself, but the economical contribute given and taken and the duration of this, even if it’s not a legal duty.

The incompleteness of this legislation is hardly criticised by those who could like a global regulation of this situation, like the marriage life model.

The real fear of those who, instead, approve, is that people could choose almost always to live together and not to marry, if they were protected by law in the same way. They also say that person who choose to not marry and to only live together they clearly want to be not protected and regulated by law. So it would be wrong to fight a voluntary choice with a legal intervention.
It could be true, but it’s also clear that sometimes this argument doesn’t work. Sometimes people choose to not marry because it’s not possible for them. There must be some reasons for this: we may think at the expansive cost of marriage, or at the situation in which a person is waiting for a divorce sentence. Professors and lawyer, and the Parliament of course, should reflect on this.
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