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Deflationary measures and the reduction of individual costs in family crises

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Abstract
This paper provides an overview of the legal situation with regard to new family types that differ from legitimate and natural families (such as homosexual, foreign and reconstituted families). A highly complex picture emerges featuring a "new measure of protection", which essentially takes shape in the means and compositional strategies of the conflict. On one hand it defines the need for the relevant legal professionals to be able to act using deflationary and conciliatory methods in cases and family crises. On the other hand, however, it prompts a rethinking of existing practices and measures in force in the light of a different culture of settling family litigation, leading to genuinely endorsed choices and effective reduction of the emotional and individual costs borne by the subjects involved.
Keywords: family, regulations, process.

1. Persons and family law as a theoretical basis for the new social contexts of the family and the new requirements for protection.

When addressing the subject of new family contexts, in particular *de facto* cohabitation, there is an immediate, almost provocative, question about the legal system's need to consider them. This question stems from the (bitter) realization that although the problem summed up by the *de facto* family has been overcome, it has not been solved at a legislative level[1]. The social context now offers new models differing from "classic" cohabitation *more uxorio*, which require additional legal solutions. To some extent these are even more complex than the analogous application of legislation on the legitimate family to the aforementioned context.

The measures taken by the European Parliament are familiar to everyone; in 1994 and thereafter frequently throughout the rest of the decade[2] it urged member countries to act promptly to acknowledge and offer guarantees to the new family types present in European society: single-parent families, extended and reconstituted families, and homosexual unions.

Furthermore, the highly consistent and diversified legislative framework in Europe makes the stance of abstention adopted by the Italian judiciary even harder to defend. Since 1998 Belgium has had legislation on the "legal cohabitation agreement"[3], which regulates the communal life of two unmarried individuals who are not necessarily connected by kinship ties and who have presented, pursuant to art. 1476 of the Civil Code, a written statement of common domicile to the Civil Registrar – who in turn enters it in the population register – concerning their wish to regulate certain patrimonial relations, above all with regard to property rights over the "family" house. Cohabitants can further regulate their cohabitation through a related pact, as long as it does not contravene art. 1477 c.c., public policy, good morals or legislation regarding parental responsibility, protection or legislation on the issue of hereditary succession. These briefly outlined regulations highlight above all the relatively early sensitivity of the Belgian legislator towards the establishment of new family types that are not subject to biological and legal constraints in the same way as those ordinarily acknowledged and regulated.

[1] The numerous draft laws on the matter include the so-called "DiCo" bill, bill no. 1333 "Rights and duties for stably cohabiting people", of 20 February 2007, presented by Ministers Bindi and Pollastrini; for comments see M. Dogliotti and A. Figone, *Famiglia di fatto e Dico: un'analisi del progetto governativo*, in *Fam. dir.*, 2007, p. 416.
[2] The Recommendations of the European Parliament are included in the Resolutions of 8 February 1994, 16 March 2000, 14 July 2001 and 4 September 2003.
[3] The law of 23 November 1998 introduced "cohabitation légale" into Belgian legislation, adding arts. 1475-1479 to the Third Book of the Civil Code under Title V bis, "On the legal cohabitation agreement".

The fact that the traditional family model, defined as "Mediterranean"[4] by a leading academic, has clearly been superseded is shown by the break-up of the relevant dogmatic category through a process that has transformed the family in metaphorical terms from an "island" into an "archi-pelago"[5]. In this way *de facto* cohabitation, which was a long-standing aggregate concept encompassing many different requests for protection and affective needs, has now lost the significant evocative value and summarising character that distinguished it, although the problem of guaranteeing the underlying interests still remains. The situation has become so complex that the study of family law now involves an intricate and complex multiplicity of interpersonal situations, which are indefinable, subject to ongoing amendments and sometimes evanescent.

The effects of these previously unseen family dynamics – the expression and objectification of the personality of individuals – transcend both the typical family and so-called cohabitation *more uxorio* models, sometimes without even reaching the legally relevant threshold. This is the reason why the field of jurisdiction of family law has quite rightly extended to cover the area and the study of the broader sector that includes *persons and family law*[6].

It therefore seems opportune to reflect on the new (or revisited) techniques of protection and the new measures that promote and guarantee the latest family contexts in view of the fact that family law cannot ignore affective and social ties or solidarity.

2. Complex family phenomenology and its tradition in legal categories.

A paper drawn up by ISTAT in 2010 on the *Measurement of family types* highlights how much the typical reference model has diversified, therefore requiring thinking that goes beyond the "traditional" scope of the family classed as *de facto* cohabitation[7].

In this respect, it is an accepted fact that homosexual couples now form an inescapable part of the family archipelago, incontestable from a legal point of view on the basis of the absence of the stability of the relationship or even due to the lack of procreative finalization. It is therefore a fascinating challenge to implement the provisions set forth in art. 29 of the Constitution, to be considered in conjunction with the general clause set forth in art. 2 of the Constitution; a challenge which the national legislator[8] and the Constitutional Court[9] have so far not been able or not wanted to rise to. The privileging of an affective relationship over the deed that establishes it is nevertheless an option of favour that has been promptly underlined in observant legal theory for some time[10].

The supersedure of traditional cultural models and subsequent variations were also strongly influenced by the phenomenon summarised by the term *globalisation*, which led to the breakdown of geographical barriers and the spread of widely diversified cultural models. At the same time, *globalisation* has also been one of the causes of the large-scale migration of citizens from Europe and beyond, with cultural, familial, religious and ethnic habits that are far removed from the European context. The richness deriving from *multiculturalism* cannot conceal the clear unease that these migratory phenomena have sometimes caused: even in the field of family law, a discipline which is traditionally nationalistic in scope and usually neutral with regard to models of protection

[4] The definition is by D. Messinetti, *Diritti della famiglia e identità della persona*, in *Riv. dir. civ.*, 2005, p. 137.
[5] On the evolution of the phenomenon see D. Messinetti, *Diritti della famiglia e identità della persona*, cit., p. 137, in note no. 2, where he refers to F.D. Busnelli, *L'isola e l'arcipelago familiare*, in *Riv. dir. civ.*, 2002, I, p. 510.
[6] On the issue of "persons and family law" and the loss of the evocative and synthetic value of the *de facto* family through the break-up of relational family models see again D. Messinetti, *Diritti della famiglia e identità della persona*, cit., p. 138 and note no. 5.
[7] The document *Misurazione delle tipologie familiari*, drawn up in 2010, can be consulted freely on the official ISTAT website: http://www.istat.it/dati/catalogo/20100802_00/.
[8] See the recent work by S. Canata, *La legalizzazione della vita di coppia: panorama europeo e prospettive di riforma in Italia*, in *Fam. pers. succ.*, 2010, p. 198, especially p. 216.
[9] Constitutional Court, 15 April 2010, no. 38, in *Fam. pers. succ.*, 2011, p. 179, with note by F.R. Fantetti, *Il principio di non discriminazione ed il riconoscimento giuridico del matrimonio tra persone dello stesso sesso*. On ECHR jurisprudence on the matter see the recent work by R. Conte, *Convergenze (inconsapevoli o…naturali) e contaminazioni tra giudici nazionali e Corte Edu: a proposito del matrimonio di coppie omosessuali*, in *Corr. giur.*, 2011, p. 573.
[10] N. Lipari, *Riflessioni sul matrimonio a trent'anni dalla riforma del diritto di famiglia*, in *Riv. trim. dir. proc. civ.*, 2005, p. 715.

that are "diversified" in terms of cultural, religious and financial differences, there have been previously unseen cases, such as the polygamous family and repudiation of women, as well as new measures such as *homocultural* custody. Although the latter inevitably prompts perplexity and debate, it is nevertheless an attempt to offer guarantees of protection, support and development to foreign minors, the bearers of interests which are undeniably singular[11]. Foreign families, whose framework encompasses those (so dispassionately) defined as "regular" and "irregular", are now a concept of evocation, a phenomenon which manages to summarise cases that can be translated into a legal context – another major challenge facing *persons and family law* is thorough thinking by family law practitioners, who must be able to read the issues in social policies and be familiar with social measures, as well as communicating on an ongoing basis with their specialist colleagues in the fields of employment, international and Community law.

In addition to the phenomenon of globalisation, the present-day law practitioner has to take two further factors into account. The first of these has been correctly defined as *axiological relativism*[12], while the second is the occurrence of the relevant phenomena inside an *open society*, now defined as a *liquid society*. This happens through the loss of reassuring affective and family models, the result of the continual formation and break-up of *liquid* relations, sometimes evanescent and legally irrelevant, which can even modify the typical standard social network[13].

In this way, the nuclear family (whether or not it is based on a legitimate tie and irrespective of sexual characterization) is joined by another category that is the result of the logic of consumption: the professional *single* adult, often the *single-parent* family model. The *liquidity* of relations also shapes the *reconstituted* family – in which "after the separation of the father and mother of a child, one of the parents marries or cohabits to form a new family nucleus, which takes responsibility for this child on a permanent basis if the parent in question exerts sole parental authority or has determined the habitual residence, or on an occasional basis if the parent has been granted visiting rights and the opportunity to accommodate the child"[14] –, and the *extended* family, a nucleus formed by children, a natural parent and the "*third parent*"[15], as well as those families formed by two ex-spouses with their respective new partners and children from their previous and current relationships[16].

These are essentially relationships created irrespective of biological ties and legal models of reference that need legal acknowledgement, away from traditional categories, based on and legitimised by social and affective relations: a form of acknowledgement quite unlike the protection offered by the law set forth in the provisions for legitimation in art. 252 of the Civil Code. Rather than certifying an extended family *ante litteram*, it effectively means that the legitimate family is offered far-reaching protection through the inviolable dogma of its unity[17].

In addition to reiterating the need for legal acknowledgement of these new family contexts, the considerations set forth prompt a further series of reflections, the first of which consists of the clear supersedure of the traditional inviolable concept of the inalienability of *status*, which decrees, in a way which almost makes legislation on the issue of filiation hallowed ground, that the *status* of a person is only insusceptible to change if the conditions provided for by law are present. In this respect, the legal regime of unrecognised, especially incestuous, children (art. 251 c.c.) is unsatisfactory, notwithstanding and following the pronouncement of the partial unconstitutionality

[11] On this issue see the document *Un'indagine sulle buone prassi nella giustizia minorile*, drawn up by the General Directorate for Juvenile Justice Procedures and the implementation of legal measures, Department of Juvenile Justice, at the Ministry of Justice, at the link http://www.giustiziaminorile.it/rsi/studi/buoneprassi.pdf.

[12] C. Salvi, *La famiglia tra giusnaturalismo e positivismo giuridico*, in *Studi in onore di Davide Messinetti* edited by F. Ruscello, I, Naples, 2008, p. 883.

[13] D. Messinetti, *Diritti della famiglia e identità della persona*, cit., p. 144.

[14] According to M.T. Meulders-Klein e I. Théry, *Quels repères pour les familles recomposées?*, Paris, 1995. Contrastingly, for S. Mazzoni, *Nuove costellazioni familiari: le famiglie ricomposte*, Milan, 2002, reconstituted families are "new constellations", which include all the nuclei formed after separation or divorce, acquiring different levels of complexity depending on the choices made by the adults. By the same author see also Eadem, *Le famiglie ricomposte: dall'arrivo dei nuovi partners alla costellazione familiare ricomposta*, in *Dir. fam. pers.*, 1999, p. 369; C.M. Bianca, M. Malagoli Togliatti and A.L. Micci, *Le famiglie ricomposte. Presa in carico e consulenza*, Rome, 2005.

[15] A. Oliviero Ferraris, *Il terzo genitore. Vivere con i figli dell'altro*, Milan, 1997.

[16] For all these cases see P. Di Nicola, *Famiglia: sostantivo plurale*, Rome, 2010, especially p. 164.

[17] P. Perlingieri, *Riflessioni sull'"unità della famiglia"*, in Aa.Vv., *Rapporti personali nella famiglia* edited by P. Perlingieri, Naples, 1982, p. 8.

of art. 278 c.c., as it provided for unrecognised filiation by parents, although this can also be declared by a judge on the child's request. Indeed, the whole system of incestuous filiation needs to be reconsidered in depth, as it presumes that the "guilty" parent is totally incompatible with parental functions and responsibilities.

The law set forth in art. 253 c.c. can also be examined with a similar suspicion of unconstitutionality, as it provides for the inadmissibility of acknowledgement for a subject that has already acquired the *status* of legitimate child. The law might be amended as a result of the latest draft law (Draft law S-1412 "Amendment to provisions on the subject of parental responsibility and natural filiation", approved by the Chamber on 30 June 2011 and deferred to the Senate for discussion), on the matter of the equality of filiation, acknowledgement of natural kinship and amendments to parental responsibility, in order to create equality in the filiation system.

Just like the principle of the inalienability of *status*, which should be seen as the *synthetic definition of the relational effects produced by the law with regard to the rights and duties of individuals*, the classic dichotomous division between *favor legitimitatis* and *favor veritatis* must also be seen as almost completely superseded. As a result of this division, legitimate filiation and, in a more general sense, family relationships based on the conjugal family are in a hierarchically superior position to the real biological facts. However, it is not only a question of the aforementioned supersedure favouring reality and biological truth to the detriment of relational models based on formal legal *status*[18]. The question must instead focus on the relevant issues in a different way: art. 28 of the reformed law on the adoption of minors explains this alternative line of reasoning clearly. The right to know one's genetic origins, which art. 28 l. on adoption grants to adoptees as long as they are twenty-five years old, does not only grant access to information, in this sense an assertion of *favor veritatis*, but goes as far as acknowledging the right to adapt the information circuit, which is essentially objectification of the right to identity and self-determination which the subject holds[19].

This consideration confirms the idea that the study of family law should be able to engage with the categories and rules of the *law of persons* in a complex global vision of interpersonal relations. In the final analysis it makes it particularly difficult to defend the right of the mother to remain unknown, which, by safeguarding the right of the mother not to be named in the birth declaration, even prevails over a request from a child to learn his or her biological origins, thereby preserving the right to privacy. The undisputed worthiness of the latter should perhaps be remedied in the complex balance[20].

Although a reform process is clearly needed, it would first be opportune for the legislator to make more general considerations in order to consequently be able to implement "mild"[21] measures, with "open" legislation "for principles"[22], through which personal relationships acquire legal relevance and necessary protection, irrespective of biological ties and formal restrictions of law. Affective and social ties should be foregrounded, where the family is not so much the place where *status* is certified as the place for the assertion of identity[23]. However, the phenomenological proliferation of the affective and family existent does not extend to inductive logic, based on axiological relativism and justified by new utilitarianism. Instead, it requires strong dogmatics, which at the same time is able to avoid the pitfalls of pure dogmatism with its categorizing ideology.

[18] On the higher-level *favor minoris*, Constitutional Court, 14 May 1999, no. 170, in *Dir. fam. pers.*, 1999, p. 1032.
[19] See D. Messinetti, *Identità personali e processi regolativi della disposizione del corpo*, in *Riv. crit. dir. priv.*, 1995, p. 197.
[20] Court of Cassation, 23 April 2010, no. 9727, in *Dir. fam. pers.*, 2011, p. 23.
[21] The reference is to G. Zagrebelsky, *Il diritto mite. Legge, diritti, giustizia*, Milan 1992.
[22] S. Rodotà, *Tra diritto e società. Informazioni genetiche e tecniche di tutela*, in *Riv. crit. dir. priv.*, 2000, p. 576; Id., *Il corpo e il post–umano*, in *Studi in onore di Davide Messinetti* edited by F. Ruscello, I, Naples, 2008, p. 821.
[23] D. Messinetti, *Circolazione dei dati personali e dispositivi di regolazione dei poteri individuali*, in *Riv. crit. dir. priv.*, 1998, p. 339; S. Rodotà, *Persona, riservatezza, identità. Prime note sulla protezione dei dati personali*, in *Studi in onore di P. Rescigno*, V, Milan, 1998, p. 592. See A. Cordiano, *Identità della persona e disposizioni del corpo. La tutela della salute nelle nuove scienze*, Rome, 2011, p. 64, p. 240.

3. Legislative provisions and jurisprudential practices: new family types in existing law.

It is an onerous task to discuss new family contexts and new protection needs as the relevant social framework is so highly complex. Many different issues are involved at the same time, as well as references to numerous legal measures. Some of these are new, while others are "familiar", although they need to be reread in the light of previously unseen cases and new interests.

Everyone is now familiar with the numerous legislative indices and consistent applicative procedure of jurisprudence, which makes it possible to grant a certain degree of conceptual autonomy to the *de facto* family and to the new family types in some respects. In addition to the classic issues regarding analogous application of legislation with regard to the legitimate family (arts. 143, 145 147, 148 c.c.)[24] and questions concerning the classification of patrimonial dispensations between cohabitants, the different legislative provisions that acknowledge the *de facto* family in legal terms are also well known: art. 342 *bis* (protection orders for domestic violence) and art. 404 (guardianship for mentally disordered persons)[25] of the Civil Code, art. 23, second paragraph, l. 91/1999 on the matter of the donation of organs *post mortem*, and art. 93, second paragraph, Presidential Decree 285/1990 on family sepulchres, in which the cohabitant is mentioned in a different capacity in the subjective scope of application for the relevant regulations.

Similarly, the subjective scope of the law on artificial insemination also includes the *de facto* family, the result of a choice that was perhaps not thought out in full, as it features just as many dubious elements as noteworthy aspects. While the legislator chose to extend the law to include cohabiting couples in 2004 without any prescription with regard to the requirements that they must satisfy, a restriction was instead prescribed with regard to the *single* person[26] and, closely connected, to insemination with gametes from a third-party donor. These restrictions could clearly lead to the formation of *partnerships of convenience*, established in order to have access to artificial insemination techniques – another family type that derived from the need to compensate for legislative preclusions.

Moreover, a crucial element is the fact that the remedial standpoint of the law is restricted to the final regulation set forth in art. 235 c.c. (disclaimer of legitimate paternity in the event of heterologous fertilization) and to provisions for penalties, without any regard for issues regarding withdrawal from an artificial insemination contract and the fate of remaining embryos[27]. Furthermore, the choice made in the regulations seems discordant with the contrasting provisions of the amendment to the law on adoption, which opted solely for the married couple, bypassing the cohabiting couple *more uxorio* with the stratagem of a three-year period of cohabitation before marriage and thereby debasing the process of legal acknowledgement of the *de facto* family.

To this end, the extension implemented by the legislator in 2006 has to be welcomed favourably. It introduced an amendment to the law on custody of offspring in the event of separation and divorce for the complete range of family pathologies, therefore also including a crisis in a *de facto* family. Although it is true that the new regulations have not resolved the matter of shared jurisdiction between ordinary courts and juvenile courts[28], they have raised some crucial elements of compatibility between the law set forth in art. 317 *bis* c.c., which governs the exercise of

[24] On the application of art. 145 c.c. on the termination of cohabitation, Court of First Instance of Genoa, 21 May 1981, in *Foro it.*, 1982, c. 1452; Court of Reggio Calabria, 17 October 1994, in *Dir. fam. pers.*, 1995, p. 611. On the matter of the extension of the provisions set forth in arts. 147, 148 and 261 c.c., Court of Naples, 8 July 2000, in *Fam. dir.*, 2000, p. 501.

[25] Paradoxically, in the new code of protection it is mandatory for the cohabitant to continue in the role of guardian for a period of no less than ten years, while there are no restrictions or constraints of form on the freedom to interrupt the cohabitation.

[26] F. Ruscello, *La nuova legge sulla procreazione medicalmente assistita*, in *Fam. dir.*, 2004, p. 628 *et seq*., especially p. 634.

[27] No importance is given to *breach of contract* of an artificial insemination agreement, both with regard to relations between couple and body, and between the couple themselves, for devaluation of the parental aspirations of the other partner, as well as with regard to the fate of remaining embryos. See F.D. Busnelli and E. Palmerini, under the entry *Bioetica e diritto privato*, in *Enc. dir.*, Agg., V, Milan, 2001, p. 148; A. Cordiano, *Identità della persona e disposizioni del corpo. La tutela della salute nelle nuove scienze*, cit., p. 295 *et seq*.

[28] Constitutional Court, 30 July 1980, no. 135, in *Foro it.*, 1980, I, c. 2961; Constitutional Court, 5 February 1996, no. 23, in *Fam. dir.*, 1996, p. 207; Constitutional Court, 30 December 1997, no. 451, *ivi*, 1999, p. 1.

responsibility in natural filiation, and the regulations set forth in arts. 155 c.c. *et seq*., with regard to this exercise in the context of family pathology.

Jurisprudence and doctrine have used analogous application for the task of bringing the two family types – founded on marriage or not – closer together. With sentence no. 6 of 1977, the Constitutional Court enjoined the legislator to acknowledge *de facto* cohabitation for purposes of the extension of guarantees in criminal proceedings: art. 199 of the Code of Criminal Procedure (c.p.p.), which is limited to evidence heard by the defendant during conjugal cohabitation, also applies to a person who lives or has lived with the defendant, but is not married to him or her[29]. It is also important to highlight a well-known favourable pronouncement, which has equalised cohabitation between heterosexual couples and homosexual couples as a basis for the right to abstention from testifying (art. 199 c.p.p.). This recognises the same requisites in a stable affective relationship and reciprocal acknowledgement of collaboration and mutual support between spouses, together with the psychological situation determined by the affective tie, the basis of the provisions of art. 199 c.p.p.[30]

Jurisprudence has also assimilated relationships on the issue of hereditary succession in a letting contract of the surviving cohabitant[31] and division into equal amounts of the sum deposited in a joint current account, particularly in the event of a local court using analogous reasoning to the arguments used on the issue of the annulment of the community property of spouses, referring to the contribution provided through the domestic work carried out by the cohabitant and re-echoing the judgement set forth in the third paragraph of art. 143 c.c.[32]. Finally, the pronouncements on the issue of subjective moral damage compensation for the loss of a partner are well known and sound[33].

The pronouncements that deny this kind of extension show an opposing tendency, making it impossible to apply the suspension of the prescription between cohabitants – ratified between spouses by the law set forth in art. 2941 c.c., first paragraph, no. 1[34] – to cohabitants, and excluding family reunification to a cohabitant of the same sex[35]. In the same way, in the event of the termination of a relationship of cohabitation *more uxorio*, the pronouncement that grants the cohabitant who is the sole owner of the property used for cohabitation the right to make the other cohabitant vacate it rejects any claim of entitlement to use the relevant property[36].

The numerous jurisprudential interventions on the subject foreground the issue of the acknowledgement of *de facto* couples and families; on closer examination this attention extends to another significant area summarised by the term "family arrangements". This alludes to the contractual type with regard to break-up and/or hereditary succession in the family patrimony, in order to segregate and (sometimes also) manage funds as a parallel alternative to the remedial system, which is characteristic of separation and divorce[37].

Unlike agreements stipulated on the margin (*a latere*) of the record of separation and divorce, which meet the limit of lawfulness and worthiness of arts. 160 and 1322 c.c., if subsequent to it, and that of the judge's assessment of the separation (art. 158 c.c.), if antecedent or

[29] Constitutional Court, 12 January 1977, no. 6, in *Giur. cost.*, 1977, p. 33.
[30] Court of Assizes of Turin, 19 November 1993, in *Arch. nuova proc. pen*., 1994, p. 230.
[31] To this end, Court of Rome, 20 November 1982, in *Temi rom.*, 1983, p. 379; Constitutional Court, 7 April 1988, no. 404, in *Foro it.*, 1989, I, c. 2515. Contrastingly, Constitutional Court, 14 January 2010, no. 7, in *Giust. civ.*, 2010, p. 12.
[32] Court of Bolzano, 20 January 2000, in *Giur. mer*., 2000, p. 818.
[33] Among the first pronouncements, Criminal Cassation Court, 12 June 1987, in *Cass. Pen.*, 1988, p. 1926, on compensation (only) for subjective moral damage deriving from the offence deriving from the killing of a partner; compensating for all categories of damage, Court of Cassation, 28 March 1994, no. 2988, in *Giur. it.*, 1995, I,1, c. 1366. For an unusual incident, see Court of Venice, 31 July 2006, in *Nuova giur. civ. comm.*, 2007, I, p. 864 *et seq*., on the matter of damage compensation for the loss of an incestuous relationship (regarding this see G.G. Greco, *Gli accordi di convivenza ed i diritti dei singoli nella giurisprudenza*, in *Rapporti familiari e regolazione: mutamenti e prospettive*, edited by M. Francesca and M. Gorgoni, Naples, 2009, p. 344).
[34] To this end, Constitutional Court, 29 January 1998, no. 2, in *Guida dir*., 1998, no. 8, p. 50.
[35] Court of Cassation, 17 March 2009, no. 6441, in relation to art. 30, first paragraph, letter c), Legislative Decree 286/1998; similarly, on the right to non-expulsion of an irregular immigrant cohabiting *more uxorio* with an Italian citizen, Criminal Cassation Court, 22 May 2008, no. 24710; accordingly Constitutional Court, 20 July 2000, no. 313, in *Foro it.*, 2002, I, c. 355.
[36] Court of Genoa, 23 February 2004, in *Guida dir*., 2004, no. 22, p. 61.
[37] S. Sicchiero, *Strategie contrattuali finalizzate alla tutela dei patrimoni personali*, in *Obbl. contr*., 2010, p. 599.

contemporaneous to it[38], these different contractual types are formed by new measures (the *atto di destinazione* – the ability to specify the destination of property –, set forth in art. 2645 *ter* c.c., the *trust*, the *patto di famiglia* – a contract establishing hereditary succession among living persons) and by adapting typical provisions of family law negotiations (indirect donations, fictitious and real interposition, contracts for the benefit of third parties, *fondo patrimoniale* – funds established by spouses or a third party to cater for family needs), which are applied obliquely to different family types. On one hand, the widespread use of these measures attests to the insufficiency of judicial guarantees offered by art. 156 c.c., granting eventual "secondary" protection after the establishment of conflict with regard to the guarantee of maintenance, which is often not effective[39]. On the other hand, the protection clause of the second paragraph of art. 158 c.c. is inadequate, as it sees assessment of the separation agreement by a judicial authority as the only guarantee of the rights of the offspring[40].

The need for conflict prevention measures to settle family disputes, especially those concerning patrimony, also originated from the notable expenditure that procedures entail. The urgency to formalise means of segregation and management of wealth is primarily directed towards this end, at the same time implying the extensive worthiness of contractual autonomy "for family purposes" in terms of preventing conflicts, which are consequently transformed into extrajudicial strategies and solutions. This element further enjoins that legal professionals are able to help the family move towards a new post-crisis equilibrium, also by using these contractual, preventive and alternative measures for settling disputes.

One fresh element in the framework of new family types is "regional family law", which refers to the set of regional legislation that acknowledges and supports non-conjugal family forms in different ways, through participation in rankings for the allocation of council houses, for council kindergartens, and through concessions for the construction and restoration of residential properties. The consistency and importance of this context, consolidated by council regulations, which provide for the establishment of lists of civil unions, once again testifies that the dichotomous perspective between public and private law has been superseded. Therefore, familiarity with legislative sources traditionally extraneous to the family-based scope of civil law is essential.

Similarly and as alluded to previously, the questions raised by "regular" and "irregular" foreigners and families of foreigners assign family law practitioners the task of being familiar with social policies and the social service system for citizens[41]. By way of example, with reference to foreign minors[42], whether accompanied or unaccompanied, there have already been numerous cases of so-called *homocultural* custody orders, some of which have already been implemented. Although there is still some perplexity on the matter, these cases show that an attempt has been made to supply an answer to a certified and highly problematic situation[43]. The critical issues and difficulties typically experienced by foreign families, with whom comparisons must now be made,

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[38] For this distinction, Court of Cassation, 8 November 2006, no. 23801, in *Foro it.*, 2007, I, c. 1189; Court of Cassation, 10 October 2005, no. 20290, in *Fam. dir.*, 2006, p. 157.

[39] C. Rimini, *La tutela del coniuge più debole fra logiche assistenziali ed esigenze compensative*, in *Fam. dir.*, 2008, p. 766 *et seq*.

[40] On the guarantee clause set forth in art. 158 c.c., see A. Cordiano, *Attualità dell'art. 148 c.c. e affidamento condiviso della prole*, in F. Ruscello (edited by), *Studi in onore di Davide Messinetti*, , I, Naples, 2008, especially p. 319.

[41] On the "foreign" natural family, see G.G. Greco, *Gli accordi di convivenza ed i diritti dei singoli nella giurisprudenza*, in *Rapporti familiari e regolazione: mutamenti e prospettive*, cit., p. 354.

[42] On the issue of immigration and the protection of minors see Court of Cassation, 17 March 2009, no. 8159, in *Fam. dir.*, 2009, p. 995: "Pursuant to art. 31, Legislative Decree no. 286/1998, the Court may authorise the entry and period of stay of a family member of a foreign minor for a determined length of time for serious reasons related to psychophysical development and having taking account of the age and health condition of the minor who is in Italian territory, with the obligation to revoke the authorization when the aforementioned serious reasons cease to apply"; assenting Court of Cassation, 11 January 2006, no. 396, in *Dir. giust.*, 2006, p. 22; and Court of Cassation – Joint Chambers, 16 October 2006, no. 22216, in *Nuova giur. civ. comm.*, 2007, I, 908. Contrastingly, Court of Appeal of Rome, 19 April 2004, in *Fam. dir.*, 2004, p. 492: "On the question of the legal condition of the foreigner, authorization for a period of stay, for a determined length of time, for the parents of a foreign minor who is in Italian territory may be issued – pursuant to art. 31, paragraph 3, Legislative Decree no. 286 of 1998 – by assessing the concrete imminence of the detriment to the minor and taking account of the global personal situation of the latter"; similarly, Court of Appeal of Perugia, 10 April 2002, in *Giur. mer.*, 2003, p. 1260.

[43] M. Fornari and C. Scivoletto, *Affido omoculturale nell'accoglienza dei minori stranieri non accompagnati*, in *Min. giust*., 2007, p. 97 *et seq*.; C. Arnosti and F. Milano, *Affido senza frontiere*, Rome, 2006.

require a minimum endowment of intercultural expertise. This has traditionally been extraneous to the judicial world, but is now indispensable for being able to settle conflicts while offering guarantees.

There are currently numerous gaps in Italian legislation. In addition to the questions already mentioned on the issue of the equality of legitimate and natural filiation[44] and shared jurisdiction between the relevant judicial bodies, there are still numerous other crucial issues with regard to the family that is not based on marriage: the lack of legal acknowledgement of natural kinship[45], the exclusion of cohabitants (and *single* people) from access to legitimising adoption and the problems of the family surname and patronym, only partially solved by the critical content of art. 262 c.c. on the surname of natural children. This implies that our legislation is deeply backward and translates into clear disparity in applied practice.

It must also be said that the system of hereditary succession should be rethought as a whole in the light of the verification of new and different family models, which, as previously mentioned, prescind from biological ties and sometimes even from legal obligations.

Finally, a trend has been apparent for some time in the field of persons and family law, confirmed by the recent law no. 7/2006, which introduced the offence of genital mutilation into the criminal code. This trend can be summarised as the use of the criminal system in areas of an existential and family-based nature that instead require completely different approaches and measures to prevent and settle pathological issues[46]. This method of intervention – lawmaking through criminal provisions – is already provided for in the regulations on the interruption of pregnancy and revisited in the legislation on artificial insemination. When it is abused and, most of all, not suitably provided with informative and educational initiatives with a preventive and conciliatory aim (such as an intercultural mediator in the crime of genital mutilation), it not only strips the criminal measure of meaning and degrades its function, but also produces the effect of scant acceptance of the criminal penalty, especially in situations highly characterised by financial, cultural and social distress.

4. Mediation approaches and the culture of conciliation: new measures of protection for the settlement of family conflicts and the supersedure of the criterion of efficiency.

The latter aspect prompts further reflection on the new measures of protection in the latest family contexts that cross-reference the many different types identified above.

It is a hard fact that the final aim and hermeneutic criterion of the legal context of the family law practitioner is to provide protection and advancement for minors and the weakest individuals in the family structure, whether it is a question of a couple in crisis (married or *de facto*), legal proceedings for separation and divorce, a request for a custody order for a child or situations of distress, neglect and difficulty for the minor, regardless of his or her nationality.

To this end, even though doctrine and jurisprudence have often adopted opposing positions with regard to protecting the *weak spouse*, it is clear that the legal professional is required to tackle the issues in question, supported by strong empathic skills – though they should not create confusion – which make it possible to understand the emotional, cultural and social fragilities of the individuals

[44] See Draft Law S-2519 "Amendment to the code on the issue of parental responsibility and natural filiation", approved by the Chamber on 30 June 2011 and referred to the Senate for discussion, on the issue of the equality of filiation, the acknowledgement of natural kinship and an amendment to parental responsibility. This intervention mostly affects arts. 74 (Kinship), 250 (Acknowledgement), first, second and fifth paragraphs, 258 (Effects of acknowledgement) c.c.; introduces 315 (Legal *status* of filiation) and 315 *bis* (Rights and duties of the child) c.c. and abrogates the entire section on the legitimation of natural children (art. 280 c.c. *et seq.*) and eliminates the words "natural children" and "legitimate children", substituting them with the word "children". Finally, the legislator delegates the Government to adopt a consistent series of legislative decrees aimed at eliminating all existing forms of discrimination in our legislation on the issue of filiation.

[45] Juvenile Court of Milan, 5 October 2010, in *Dir. fam. pers.*, 2011, p. 243 *et seq.*, on the lack of legitimation to act of grandparents in judgements of custody of minor offspring; Constitutional Court, 23 November 2000, no. 532, in *Fam. dir.*, 2001, p. 361.

[46] There is criticism of the repressive model in G. Ferrando, *Libertà, responsabilità e procreazione*, Padua, 1999, p. 303.

involved[47]. In particular, the legal professional is obliged to provide advancement and protection of the interests and inviolable rights of the offspring as the primary aim of his or her fiduciary mandate (for a lawyer) or function (in the case of a judge). This distinctive characteristic, taken for granted for whoever has experience of theoretical expertise in persons and family law, is a prerequisite for affirming the need to spread a conciliatory culture and a mediation approach with regard to family-related procedure. The latter term refers not only to the family "process", covering all the procedures that involve the relevant individuals in different ways, but also situations of conflict, distress and potential danger, which professionals in the legal field and beyond have to deal with, even in extrajudicial and informal settings.

On one hand, this "new measure of protection", which essentially takes shape in the means and compositional strategies of the conflict, defines the need for the relevant legal professionals to be able to act using deflationary and conciliatory methods in cases and family crises. On the other hand, it leads to a reconsideration of existing practices and measures in force in the light of a different culture of settling family litigation.

The "family process" is a complex structure consisting of legal institutions, municipal procedures and informal relations between the relevant subjects, in which the paradigms of efficiency (banally ascribable to the issue of the *cost* of justice), the right process (or the *time* justice takes) and the adversarial principle cannot be developed using the same methods adopted in other sectors of law, most notably in civil law. Sometimes the same concepts lose meaning if they are compared and combined with protection of a minor. Good examples of this are mediation in the civil process, recently introduced for reasons of cost saving and to reduce procedural expenses, and family mediation, a measure with fundamentally free access aimed at reconstituting the parental partnership, even to the detriment of procedure times, as shown by the new art. 155 *sexies* c.c.: before the issuance of the preliminary measures set forth in art. 155 c.c., the judge may suspend proceedings and defer the adoption of such measures if he or she recognises the opportunity to do so, in order to allow the parties to attempt to reach an agreement that best protects and represents the interest of the offspring, with the support of experts consulted to this end[48].

As previously mentioned, another distinctive feature of family litigation is that it is characterised by and grounded in the protection and advancement of the interests of the offspring, recently confirmed by the introduction of the minor's lawyer into adoption and *de potestate* proceedings through law 149/2001. Despite some reservations, it has been said that such litigation also appears to be aimed at protecting the most fragile individuals in the family structure, irrespective of age – it is a common statement of fact that the family lawyer must be careful of his or her client's emotional frailty, cultural weaknesses and financial problems.

In technical terms, the family process does not consist of a three-way relationship with the parties and a judge, as is traditionally the case; these subjects are joined by the figure of the minor, recently strengthened and formalised as a *procedural party*, who must be guaranteed the right to be heard and personal self-determination. The minor is supported by the local social services, a court-appointed expert witness, sometimes supported by other expert witnesses, and public and private mediators[49].

The relationship between the different legal bodies is a complex one, not only because of the familiar problem of shared jurisdiction *between* legitimate and natural filiation and *in* natural filiation, but above all because of the frequent overlapping of procedures and jurisdiction between the separation and divorce judge – which is also the competent court for custody provisions for natural children –, the tutelary judge – who is assigned the task through the legislation set forth in

[47] G. Galuppi, *La conflittualità nelle separazioni e il danno che ne consegue su genitori e figli*, in *Dir. fam. pers.*, 2011, p. 329.

[48] Instead, referral to mediation centres is not a workable option, although it may be provided for in accordance with the second paragraph of art. 342 *ter* c.c., as these cases are often characterised by a situation of high-level conflict and concrete risk.

[49] A debatable intervention is the amendment to law 149/2001, which chose to preclude the social services from any procedural legitimation (as still happens for the opening of the provision of guardianship for a mentally disordered person, with regard to which see F. Tommaseo, *Amministrazione di sostegno e difesa tecnica*, in *Fam. dir.*, 2004, p. 607, in note of Court of Padua, 21 May 2004), as well as the Juvenile Court, also denying the latter an independent power of initiative for opening adoption proceedings; this therefore remains subject to activation by the Public Prosecutor at the Juvenile Court, who is nevertheless not obliged to implement the recommendation from social services.

art. 337 c.c. of monitoring the performance of the trial judge and "maintaining" relations with the relevant social fabric – and the juvenile court.

In addition to these characteristic "interlocking" jurisdictions, it must also be said that the problem of costs and the duration of legal proceedings in a family crisis is supplemented by other types of cost: the emotional and individual costs of the subjects involved and the social costs of *welfare*, with regard to the support structures required to guide the family towards and through post-crisis equilibrium.

5. The reduction of individual costs and the support of welfare costs in family crises.

As an emblematic case of the latter, some considerations can be made with regard to the recent amendment of art. 155 c.c., which in this sense constitutes a litmus test to verify what has been claimed thus far.

The introduction of law no. 54 in 2006 decreed the ordinariness of shared parental responsibility, thereby relegating – through an *a priori* choice which is perhaps not completely in keeping with the issue in question – exclusive responsibility to residual mode, if and when the sharing of parental responsibility seems to contrast with or prejudice the interests of the offspring. Furthermore, jurisprudence has often expressed itself in this way, in the sense of denying that the mere existence of conflict between parents constitutes a discriminating premise for granting requests for exclusive custody of the offspring, infringing the principle of co-parenting.

The introduction of shared parental responsibility and its application on an extremely wide scale have led to an apparent reduction in the length and cost of the legal process, reducing the dispute to just one hearing presided over by a judge, at least with reference to litigation regarding children and custody issues.

However, this matter has not influenced the costs connected to subsequent related proceedings, except perhaps in the sense that they have sometimes increased. Indeed, it is probable that the reduction and "compression" of the judicial stage assigned to the conflict to a single hearing leads to a rise in the costs related to the proceedings that are subsequently established: requests to amend the conditions of separation, *ex* arts. 710 c.p.c. and 155 *ter* c.c., appeals for litigious divorce, appeals to the Juvenile Court or even "only" intervention by a tutelary judge due to lack of compliance with the provisions of the trial judge. The procedures in question originate as a result of hidden conflicts and measures that are only "apparently consensual".

In addition to providing guidance for awareness and balanced application of the (always useful) measure of shared parental responsibility, these considerations aim to promote a collaborative relationship between professionals in the legal sphere and beyond, encouraging reciprocal acknowledgement of languages, and to sustain the support of related social costs (local social services, family consultories, local health and welfare services) and existing legal measures (above all the extremely profitable tutelary judge, who monitors enforcement), which provide families with strategies to control and settle conflicts. In brief, the aim is to spread a conciliatory and deflationary culture of family conflicts.

The increase at a national level in the number of legal proceedings for separation and divorce, the reduction in the duration of marriages and the age of spouses who gain access to the process, the drop in the age of the minors involved[50] and, finally, the significant number of resident foreign minors (whether accompanied or not) are all objective facts that encourage the drive towards a conciliatory culture, for example by enhancing existing measures (the tutelary judge and his or her ongoing fruitful relationship with services) and promoting profitable interdisciplinary collaboration aimed at creating memoranda of understanding, guidelines for virtuous application and permanent working groups among the different components of family litigation. This set of legal institutions and informal practices with a network of relationships and measures will hopefully lead to genuinely endorsed (general) legal choices and effective reduction of the emotional and individual costs borne by the subjects involved.

[50] See *Dossier Famiglia 2010*, drawn up by ISTAT, which can be consulted on their official website at the following link: http://www.istat.it/societa/DossierFamigliaInCifre.pdf.

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