

The Italian Regime of Legal Communion Within Matrimony Viewed Through the Prism of Constitutional Principles

Dario Scarpa*

Abstract

The concept of 'legal community' within the Italian property regime is derived from the normative treatment of the property of spouses as community of property, whether immediate or residual, as well as the maintenance of the personal character of the purchase of property. The legal community concept, along with Arts 177-179 of the Italian Civil Code 1942, have created a wide-ranging debate, with supposed links to constitutional principles, to expand or narrow the scope and attractiveness of purchases as being treated as legal community between spouses. Despite doctrinal criticism, the methodological canon supporting the normative interpretation of the Civil Code with reference to constitutional principles has absolute relevance, and does not assume infallibility of the indivisible ability of princes to penetrate the positive discipline in matters of legal communion.

I. Legal Communion as a System of Values in the Evolution of Matrimonial Discipline: Relationship Between Rule and Exception in the Determination of the Nature of Legal Communion

Legal thought over time on the regime of legal communion between spouses has been the subject of wide-ranging doctrinal and jurisprudential debate in the search for principles underlying the concept. Opposing lines of interpretation based on different references to different constitutional principles have been the basis for the introduction of a capital regime.¹

The concept of legal community within the Italian regime for distribution of property upon dissolution of marriage is derived from the normative provisions of property of spouses being generally being as community property, whether immediate or residual, as well as maintaining the personal character of the

* Associate Professor of Private Law, University of Milano-Bicocca.

¹ See: P. Perlingieri, 'Sui rapporti personali nella famiglia' *Il diritto di famiglia*, 1262 (1979); F. Grasseti, *sub* Art 156 Civil Code, in G. Carraro, G. Oppo and A. Trabucchi eds, *Commentario alla riforma del diritto di famiglia*, (Padova: CEDAM, 1996), 303; M. Dogliotti, 'Separazione, addebito, affidamenti: criteri interpretativi e valutazioni di merito' *Giurisprudenza italiana*, I, 686 (1982); furthermore, F. Santoro-Passarelli, *sub* Art 143 Civil Code, in G. Carraro, G. Oppo and A. Trabucchi eds, *Commentario alla riforma del diritto di famiglia* (Padova: CEDAM, 1977), II, 223; A. and M. Finocchiaro, *Diritto di famiglia*, I (Milano: Giuffrè, 1984), 245; S. Alagna, *Famiglia e rapporti tra coniugi nel nuovo diritto* (Milano: Giuffrè, 1979), 339.

purchase. The legal community concept, along with Arts 177-179 of the Italian Civil Code 1942, have created a wide-ranging debate, with supposed links to constitutional principles, to expand or narrow the scope and attractiveness of purchases as being treated as legal community between spouses.²

The requisite systematic reflection on the discipline of legal communion requires correctly framing the institution within the various and distinct principles of constitutional rank that govern the fundamental rights of the person. After all, the system of extensive capacities of the matrimonial property regime of the legal community does not originate from the³ alleged existence of an uncontested *communio* in the categorization of goods and purchases which, in the absence of explicit prescription, must be included in the legal community.⁴

Research suggests that there is an inclination to extend the attractiveness of the community regime, but care must be exercised to correctly identify the principles (including constitutional ones) that should underpin it. Favoring community property, better expressed in the concept of *favor personae coniugis*, must be reconsidered with respect to the outcome of the orderly arrangement of the legal regime of community property as a dispositive and autopoietic structure for the regulation of property relations between spouses, who, as an expression of their private autonomy, can not only opt for other regulatory regimes, but can also flex the rules of communion to serve their own needs and those of their family.⁵

² On the concept of joint ownership, see: Corte costituzionale 17 March 1988 no 311, *Nuova giurisprudenza civile commentata*, I, 561 (1988); Corte di Cassazione 4 August 1998 no 7640, *Giurisprudenza italiana*, 741 (1988); Corte di Cassazione-Sezioni unite 24 August 2007 no 17952, *Famiglia e diritto*, 12 (2008); Corte di Cassazione-Sezioni unite 22 April 2010 no 9523, *Redazione Giuffrè* (2010). See more, Corte di Cassazione 19 March 2003 no 4033, *Foro italiano* I, 2745 (2003), with commentary by De Marzo; Corte di Cassazione 7 March 2006 no 4890, *Giustizia civile* I, 1485 (2007); Corte di Cassazione, 11 June 2010 no 14093, *Notariato*, 607 (2010); Corte di Cassazione, 21 December 2001 no 16677, *Giustizia civile*, I, 2820 (2002); Corte di Cassazione 14 January 1997 no 284, *Il diritto di famiglia e delle persone*, 26 (1998).

³ To grasp the requisite research on the role of legal interpretation, see P. Perlingieri, 'Applicazione e controllo nell'interpretazione giuridica' *Rivista di diritto civile*, 318 (2010); Id, 'Produzione scientifica e realtà pratica: una frattura da evitare' *Rivista di diritto commerciale*, I, 455 (1969), Id, *Scuole tendenze e metodi. Problemi del diritto civile*, (Napoli: Edizioni Scientifiche Italiane, 1989), 15; G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli, 2015), 10. Inoltre, G. Capograssi, *Studi Sull'esperienza Giuridica* (Roma: 1932), 9; E. Paresce, 'Interpretazione (filosofia del diritto e teoria generale)' *Enciclopedia del diritto* (Milano: Giuffrè, 1972), XXII, 203; E. Betti, *Interpretazione della legge e degli atti giuridici* (Milano: Giuffrè, 2nd G. Crifò ed, 1971), 287. The latter denies the arithmetic nature of the interpretative operation, inspired not only by the ideal objectivity of values, but also by the real objectivity of the sensible world; see Id, *Teoria generale dell'interpretazione* (Milano: Giuffrè, 1955), 33.

⁴ See A. Trabucchi, 'Il ritorno all'anno zero: il matrimonio come fonte di disparità' *Rivista di diritto civile*, II, 488 (1975); G. Ferrando, 'In tema di famiglia di fatto' *Giurisprudenza di merito*, II, 133 (1977); M. Dogliotti, 'Famiglia legittima, famiglia di fatto e principi costituzionali' *Giustizia civile*, III, 192 (1978); M. Bessone, 'Convivenza 'more uxorio' e tutela della famiglia di fatto in una giurisprudenza non conformista' *Giurisprudenza di merito*, I, 717 (1979).

⁵ See N. Punzi, 'L'intervento del giudice nei rapporti familiari' *Rivista di diritto civile*, I, 166 (1978); V. Roppo, 'Ipotesi vecchie e nuove di intervento del giudice nella famiglia' *Il diritto di famiglia*, 311 (1979); P. Zatti, 'I diritti e i doveri che nascono dal matrimonio e la separazione dei coniugi', in P.

The above perspective for investigating the regime of legal communion *manifestly* leads to a rethinking of the relationships between codicistic prescriptions and oft-invoked constitutional principles that represent, as a whole, a prism that allows for an updated interpretation of legal safeguards in favor of the community and individual spouses.⁶

Without prejudice to⁷ considering the legislative deficiency in the list of purchases⁸ that do or do not fall under the ambit of legal communion between the spouses, and given the rejection of any form of dogmatism in the resolution of hermeneutic perplexity, the research is grounded in the flexibility of the categories of purchases as chosen by the legislators of the 1975 reform of Family Law. It is the duty of the judge deciding on the division of property to balance the interests underlying various empirical hypotheses that, must be studied through the application of the principles of reasonableness and proportionality in the choice of the resolving regulatory criterion, although this is not based on any express legislative determination.

Despite doctrinal criticism, the methodological canon that supports the normative interpretation of the Civil Code with reference to constitutional principles is relevant, and does not assume infallibility of the indivisible ability of princes to penetrate the positive discipline in matters of legal communion. On reflection, equality and solidarity between spouses in the expression of legal community must be the hermeneutical sources of the application of the matrimonial property regime, especially in cases of contested resolution. Furthermore, the codicistic indications of the equality of spouses in the management of common property and their family obligations appear to respect the maximum amount of solidarity being recognized

Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1982), 90.

⁶ On this interpretative tendency, see A. Falzea, 'La prassi nella realtà del diritto', in Id. et al, *Studi in onore di Pietro Rescigno*, I, *Teoria generale e storia del diritto* (Milano: Giuffrè, 1998), 409, and P. Perlingieri, 'Norme costituzionali e rapporti di diritto civile' *Rassegna di diritto civile*, 95 (1980).

⁷ Cf U. Scarpelli, 'Gli orizzonti della giustificazione' *Etica e diritto*, 5 (1986); H. Kelsen, *Reine Rechtslehre* (Wien: F. Deuticke Verlag, 1934), Italian translation by R. Treves, *La dottrina pura del diritto* (Torino: Einaudi, 1956), 73; V. Cotta, *Giustificazione e obbligatorietà delle norme* (Milano: Giuffrè, 1981), 10; furthermore, A. Falzea, 'Efficacia giuridica', in *Enciclopedia del diritto* (Milano: Giuffrè, 1965), XIV, 4; Id, *Voci di teoria generale del diritto* (Milano: Giuffrè, 1970), 266. Finally, for a complete view of the role of the legal norm, see also: N. Bobbio, *Teoria della norma giuridica* (Torino: UTET, 1958), 23; Id, 'Norme primarie e norme secondarie', in Id et al, *Studi per una teoria generale del diritto* (Torino: Giappichelli, 1975), 195.

⁸ For a clearer understanding of the roles that reasonableness and the balancing of interests play in the work of the person/body applying the law, see: G. Perlingieri, *Profili applicativi* n 3 above, 10; also see: G. Cosco, 'Convivenze fuori dal matrimonio: profili di disciplina nel diritto europeo' *Diritto di famiglia*, 349 (2006); F. Romeo, 'Famiglia legittima e unioni non coniugali', in Id ed, *Le relazioni affettive non matrimoniali* (Torino: UTET, 2014), 18; R. Amagliani, 'Autonomos e contratti di convivenza', in A. Busacca ed, *La Famiglia all'imperfetto?* (Napoli: Edizioni Scientifiche Italiane, 2016), 305; L. Balestra, 'La convivenza di fatto. Nozione, presupposti, costituzione e cessazione' *Famiglia e diritto*, 919 (2016), M. Dogliotti, 'Dal concubinato alle unioni civili e alle convivenze (o famiglie?) di fatto' *Famiglia e diritto*, 868 (2016).

between them.⁹

We now reflect on the subject with a brief systematic analysis of the norms. It is indisputable that the regime of legal community between spouses must be read in light of a relation of equality and solidarity between them.¹⁰ This is because the relevant normative expression (Art 160 of the Civil Code) prescribes the spouses cannot derogate from either the rights or the duties of marriage as prescribed by the law. Moreover, the period of limitation for the performance of actions by spouses in excess of ordinary administration of duties, as well as the conclusion of contracts guaranteeing the personal rights of enjoyment and representation for these actions, are granted in court or acquired together by both spouses.

However, the lack of conceptualization by the legislator in the definition of the goods that are treated as legal communion, and the derivative listing technique, must not lead to dogmatic categories as a set of pre-emptive rules aimed to resolve the difficulties of subsumption of concrete facts into the rule of law. In hermeneutic terms, whether distinct classes of purchases fall under the ambit of legal communion (as in Arts 177-179 of the Civil Code) are defined by categories of the reconstructed patrimonial events of the spouses' married life according to the regulation of the economic relations between them.¹¹

The categorization of facts must not result in dogmatism but, on the contrary,¹² in the exaltation of an interpretative canon that is based on constitutional principles that may be used to determine the inclusion of a given fact or event in the rule of law from time to time. We use this line of argument to approach the best solution of each concrete case, following balancing the interests of the parties (the spouses) involved based on reasonableness and proportionality.¹³

However, if the canon of the correct interpretation is as described above, we first need to identify the degree of connection and the capacity of intervention of the constitutional principles, in their many spectra, with respect to the regime of

⁹ P. Schlesinger, 'La legge sulle unioni civili e la disciplina delle convivenze' *Famiglia e diritto*, 846 (2016); A. Torrente and P. Schlesinger, *Manuale di Diritto Privato* (Milano: Giuffrè, 22th ed, 2019), 9; G. Ferrando, *Diritto di famiglia* (Torino: UTET, 2016), 22; G. Alpa, 'La legge sulle unioni civili e sulle convivenze. Qualche interrogativo di ordine esegetico' *Nuova giurisprudenza civile commentata*, 1718 (2016).

¹⁰ See F.D. Busnelli, 'Il principio di solidarietà e «l'attesa della povera gente», oggi' *Rivista trimestrale di diritto e procedura civile*, 413 (2013).

¹¹ See: E. Russo, 'L'oggetto della comunione legale e i beni personali', in P. Schlesinger ed, *Commentario. Codice Civile* (Milano: Giuffrè, 1999), 48-49.

¹² See once again: P. Perlingieri, 'Equilibrio normativo e principio di proporzionalità nei contratti' *Rassegna di diritto civile*, 334 (2001); P. Perlingieri, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 441.

¹³ N. Lipari, 'Spirito di liberalità' e «spirito di solidarietà' *Rivista trimestrale di diritto e procedura civile*, 17-18 (1997); F.D. Busnelli, 'Solidarietà: aspetti di diritto privato' *Iustitia*, 435 (1999); M. Delmas-Marty, *Pour un droit commun* (Paris: Seuil, 1994), 273, 283; C. Mancina-Ricciardi, *Famiglia italiana: vecchi miti e nuove realtà* (Roma: Donzelli editore, 2012), 23. See also F.D. Busnelli, 'Prefazione', in D. Amram and D'Angelo eds, *La famiglia e il diritto fra diversità nazionali ed iniziative dell'Unione Europea* (Padova-Milano: CEDAM, 2011), IX.

legal communion.

II. Search for the Correct Classification of the Matrimonial Property Regime in Constitutional Principles in the Context of the Tension Between Protecting the Individual and Balancing Familial Interests

The dispositive nature of the legal community leads to a limitation of the application of constitutional principles to the choices made by the spouses and, consequently, to regulation of the scope of implementation of the matrimonial property regime adopted. Therefore, the ontological dyscrasia invoked between the legal communion,¹⁴ with the related *favor communionis*, and the principles of equality¹⁵ and constitutional solidarity, inferred as absent in different property regimes (ie separation), loses persuasive and methodological force. This is because, once the will of the spouses (operative effect) has been expressed within the legal community (or, in the absence of a contrary indication, the regime in question has been indicated as legal), this implies that the principles of the equality of spouses and the solidarity between them must be applied within the framework of the individual property regime adopted.

It is appropriate to speak of a microsystem of the legal community of property between spouses within the discipline of family law. However, this does not lead to the isolation of the regime from the necessary forms of interpretative support provided by constitutional principles and values.¹⁶

If the mechanism of interaction between constitutional values and the application of the regime of legal communion is well understood, it is possible to derive the correct framework of individual principles in the internal dynamics of the management of legal communion.¹⁷

Solidarity between spouses, as an orderly value, is widely applied in the property regime in the legal community when community property is liable for all the burdens on it at the time of purchase-the burdens of administration, the

¹⁴ See S. Cassese, 'L'eguaglianza sostanziale nella Costituzione: genesi di una norma rivoluzionaria' *Le Carte e la Storia*, 5-13 (2017); M.S. Giannini, 'Profili costituzionali della protezione sociale delle categorie lavoratrici' *Rivista giuridica del lavoro*, no 6 (1952).

¹⁵ Cf. A. Falzea, 'Le couple non marié', in Id. et al, *Scritti d'occasione, Ricerche di teoria generale del diritto e di dogmatica giuridica* (Milano: Giuffrè, 2010), 101.

¹⁶ Cf E. Russo, 'L'oggetto della comunione legale e i beni personali', n 11 above, 20-21. Also see: A. Donati, *La concezione della giustizia nella vigente Costituzione* (Napoli: Edizioni Scientifiche Italiane, 1998), 343-344; F. Gauthier, *Triomphe et mort du droit naturel en Révolution* (Paris: 1992), 19; J.E.S. Hayward, 'Solidarity» and the Reformist Sociology of Alfred Fouillée' *American Journal of Economics and Sociology*, XXII, 216 (1963). 'Finally, in the course of rightly destroying privileges and monopolies, the Revolution in France, like the Reformation in England, allowed itself to be carried away to the extent of destroying the very principle of association.'

¹⁷ Cf M. Gorgoni, 'Le convivenze di fatto meritevoli di tutela e gli effetti legali tra imperdonabili ritardi e persistenti perplessità', in *Le unioni civili e convivenze di fatto L. 20 maggio 2016, n 76*, (Sant'Arcangelo Romagna: Maggioli, 2016) 191, and F. Tassinari, 'Il contratto di convivenza nella L. 20.5.2016 n 76' *La nuova giurisprudenza civile commentata*, 1738 (2016).

costs of maintaining the family, the education and upbringing of children, any obligations undertaken by the spouses separately in the interests of the family, and any obligations undertaken jointly by them.¹⁸ It is therefore evident that the drive for solidarity is present in the management of the estate in legal communion to protect the interests of the¹⁹ (unusual placement of footnote after ‘the’ you could put both footnotes at the end of the sentence) family²⁰ and the spouses.

¹⁸ Read C. Grasseti, ‘I principi costituzionali relativi al diritto di famiglia’, in P. Calamandrei and A. Levi eds, *Commentario sistematico alla Costituzione italiana* (Firenze: Barbera, 1950), 285; G. Azzariti, *Problemi attuali di diritto costituzionale* (Milano: Giuffrè, 1951), 106; G.B. Funaioli, *L’evoluzione giuridica della famiglia e il suo avvenire al lume della Costituzione* (Firenze: 1951), 44.

¹⁹ This calls for a brief historical and philosophical remark on the family. ‘The family is the natural society, whose members are united by love, trust and natural obedience, It is a natural society because everyone belongs as a member to a family not by their own will but by nature and because the relationships and mutual behavior of family members are not based on reflection, but on feeling. The family is an organic whole. The trust that family members have in each other consists in the fact that everyone has no interest in themselves, but in general for the whole [...]. The first natural relationship in which the individual enters with others is the family relationship. It has, indeed, also a legal side, but this is subordinated to the side of feeling, love, trust [...]. Every member of the family does not have its essence in his own person, but only the whole of the family constitutes his personality [...]. The union of people of the two sexes, which is marriage, is essentially neither a merely natural union, nor a pure civil contract, but a moral union of feeling, in the mutual love that makes her a single person [...]. The duty of the parents towards the children is to provide for their maintenance and education, that of the children is to obey them, until they become independent, and honor them for life’ (G.W.F. Hegel, *Philosophische Propädeutik, Herausgegeben von Karl Rosenkranz* (Berlin: Duncker & Humblot, 1840). Hegel’s philosophical reflection is aimed at establishing the unconditionality of the ethical instance. In this theoretical context, it becomes problematic to harmonize the moral value with the dynamism of the affective life. We thus reflect on what the French philosopher Jean Francois Lyotard claimed on the question of human rights: ‘What makes human beings similar to each other is the fact that each person carries within him the figure of the other’ (J.F. Lyotard, ‘The Rights of the Other’, in S. Shute and S. Hurley eds, *Human Rights*, (Milano: Garzanti, 1994). One cannot say ‘I’ without contemplating a ‘you,’ another in which one recognizes oneself. Knowledge and understanding must be the basis of civil co-existence. The Western family with regard to law and principles respects the equal dignity of its members, in particular women and minors. In an axiological vision, it is necessary for a communion of life to overcome every attitude of division and incompatibility. The family is a constitutive element of a creative design, an expression of conjugal love. Family life has the chance to grow day by day on the condition that the persevering commitment of the spouses never fails.’ ‘Spouses,’ the Second Vatican Council warns, ‘will fulfill their duty with human and Christian responsibility, with reflection and common commitment a right judgment will be formed, taking into account both the personal good and that of the children [...] [while] evaluating the living conditions of their time and safeguarding the scale of the values of the good of the family community, and of temporal society.’ Finally, we focus on Kierkegaard’s perspective, which requires redefining the very categories by which existence can be thought of: the individual and possibility. These categories can be applied only to one’s life from within. Kierkegaard can be thus placed in the Augustinian perspective of inner reflection. The individual, is faced with alternatives attributable to two existential models of an aesthetic or an ethical life. To them is added a third: religious life. These three models of life can be considered to be states of existence. The ethical stage is characterized by choice.

²⁰ See M. Bin, *Rapporti patrimoniali tra coniugi e principio di eguaglianza* (Torino: UTET, 1972), 113, and Esposito, ‘Famiglia e figli nella Costituzione italiana’, in *Scritti in onore di A. Cicu* (Milano: Giuffrè, 1951), 560. P. Rescigno, ‘L’eguaglianza dei coniugi nell’ordinamento della Comunità Europea’, in Id et al, *Eguaglianza giuridica e morale dei coniugi* (Napoli: Jovene, 1974), 20; P. Barile, ‘L’eguaglianza morale e giuridica dei coniugi nella giurisprudenza costituzionale’, in Id. et al,

In this context, the application of the interpretative canon to balance the interests between spouses to identify the legal limits to the solidarity between them in the exercise of their personal and economic activities comes into play. The classes of facts that determine the maintenance of the personal ownership of a good, with the impediment of entry into communion, are an expression of the constitutional value of the freedom of the economic initiative of individual subsidiaries. It is evident that the axiologically oriented reading of the discipline of the legal communion between spouses leads to a natural emphasis on a continuous weighting of the degree of application of ordinal values by striking the necessary balance between the interests (patrimonial and personal) of the subjects involved.²¹

The degree of flexibility and extension in the categories of goods and purchases that may or may not enter into the legal communion between spouses will be examined by men in future studies. Here, I examine the limits of the interaction between the principle of solidarity between spouses and the principle of freedom of economic initiative to understand how, from a legal perspective, there is no real conflict in the determination of property rights within the regime of legal community.

Consider that solidarity is applied to the management of property in legal community, with the related effect of prompting the participation of the spouse, creditors, and debtors relating to the needs of the family. On the contrary, a spouse's freedom of economic and entrepreneurial initiative concerns the stage prior to the management of the common property, before determination of the class into which any purchase is categorized.

The balancing of interests between spouses necessarily envisages an axiological interaction between the constitutional values described above without any limitation on the fields of their application to the positive discipline of legal community. Within the stages and development of the matrimonial property regime distinct constitutional and legal values have been progressively identified that find their correct translation into the property relations of the spouses.

If solidarity during the management of community property leads to the expression of a mutuality in the pursuit of family interest, with the participation of both spouses in support of the superior aim of protecting the needs of the family unit, self-determination by either spouse in different expressions of their economic initiative in the genetic phase of the purchase is one apt instance of the need to protect the autonomy of the individual in the transformation and

Eguaglianza giuridica e morale dei coniugi (Napoli: Jovene, 1974), 42.

²¹ Cf L. Mengoni, 'Fondata sul lavoro: la Repubblica tra diritti inviolabili dell'uomo e doveri inderogabili di solidarietà', in C. Castronovo, A. Albanese and A. Nicolussi eds, *Mengoni, Scritti I. Metodo e teoria giuridica* (Milano: Giuffrè, 2011), 143; E. Rossi, 'La fraternità fra 'obbligo' e 'libertà'. Alcune riflessioni sul principio di solidarietà nell'ordinamento costituzionale', in A. Marzanati and A. Mattioni eds, *La fraternità come principio di diritto pubblico* (Roma: 2007), 86-87; F. Pizzolato, 'Appunti sul principio di fraternità nell'ordinamento giuridico italiano' *Rivista internazionale dei diritti dell'uomo*, 762 (2001).

progression of their assets.

The interpretative path continues in the observation of important data in circumscribing the perimeter of the actions of a single spouse in legal community. Accompanied by the affirmation of the principle *nemo inuitus locupletari potest* (a maxim meaning that a claimant seeking relief may not be awarded damages greater than their loss), the exceptional nature of the effectiveness of the legal community of property between spouses lies in the automatic transfer of property to a non-German spouse, of communion without quotas in the face of the mere presence of status.

If, naturally, the acquisition of property (of any economically valuable asset) derives from the teleologically oriented personal activity of the spouse, the special characterization of the microsystem of legal community consists in partial derogation from this etiological model in order to exalt the marital status. This, in compliance with the system of the automatic acquisition of communion, creates a situation of co-ownership that is in open contrast to the legal value of the right to property, and manifests the tension in the transience of legal scenarios of co-ownership (through the exercise of division).

However, the exceptional nature of the regulation of legal community between spouses must be subjected to a deeper axiological analysis from the perspective of the relevant protections, including constitutional ones, of individual spouses. Precisely, it is the affirmation of the character of the exceptional, pursuant to and for the effects of preliminary provisions of Art 14, and must be concretely assessed in the various classes of facts supporting the inclusion of the property in community, or allowing the maintenance of full ownership of the property in favor of the individual spouse who purchases the property.

I will now examine the final details of the initial hermeneutic approach to the regime. This is done in light of the fact that recognition of the normativity of legal communion and the relative incompleteness of the relevant categories of facts, which modify the patrimony of the community property and the individual spouse, obligate the person/body applying the law to trace the order of values beyond those expressed in the regime's microsystem to finalise a systematic and orderly concept.

It is useful to undertake a historical excursus of the constitutional dynamics involved regarding the interactive relationship between spouses. The plurality of interventions of the Constitutional Court in the field of family law is a clear expression of the balance between the protection of individual rights and the safeguarding of family unity, in compliance with Arts 29 and 30 of the Constitution. The apparent persistence of the aforementioned equilibrium is confirmed in the traditional reading of the Constitution in the sense of the pre-eminence of the family based on marriage and the rights of the parties to it. This suggests a concept of the family in an extensive and axiological sense for the configuration of competing institutions, such as civil unions.

The constitutional principles express and support men and women being treated equally. However, participation of a married woman in a marriage, as a bearer and producer of income for the family, in the historical sense has tended to be recognized as integrative and marginal. At the same time, the contribution of assets and economic resources by the male spouse has taken clear primacy. This tendency is the result of a static and inconclusive reflection that cannot lead to any valid systematic or normative data. On the contrary, the reflection on legal communion between spouses and the emergence of new criteria of interpretation for individual cases manifests a natural tension toward the evolution of the hermeneutic technique, and should be able to grasp the changed needs and ways of life of people in compliance with the principle of equality (Art 3 of the Constitution).²²

From a constitutional point of view, the starting point based on the initial discussion of this subject can now progress with respect to the correct application of the principles of constitutional rank within the regime of legal communion. If the legal regime constitutes a penalty default rule for which communion determines a dispositive rule that is, however, systematically derogated (as practice clearly indicates), it can be inferred that the regulatory and interpretation-related tension must progress toward the maximum flexibility of the regulatory mechanism along with the sought-after willingness of spouses to meet their personal and familial needs of life.

There are no family interests that transcend the individual interests of the various components of it. It follows that the family can be classified as an institution in an organic sense, in which all the family aims pursued by the spouses in the constancy of *affectio familiaris* (family affection), are not subject to legal protection.²³

In the system of the constitutional pluralism of social formations, the Constitutional Charter offers a graduation of values in identification of the relationship of 'gender to species' that runs between Art 2 of the Constitution - that protects every social formation for its realizing function - and Art 29 of the Constitution, which identifies the family as deserving of protection in the realization of a social function.

In light of this observation, we can derive the concept, axiological or purely

²² S. Patti, 'Il diritto al mantenimento e prestazione di lavoro nella riforma del diritto di famiglia' *Il diritto diritto di famiglia*, 1368 (1977); P. Vecchi, 'Obbligazioni nell'interesse della famiglia e responsabilità solidale dei coniugi' *Rivista di diritto civile*, II, 623 (1991).

²³ F. Corsi, 'Il regime patrimoniale della famiglia', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 1979), 110. Furthermore, see A. Palazzo, 'Tipologie e diversità degli acquisti personali dei coniugi in comunione dei beni' *Rivista del notariato*, 1127 (2006). See also P. Schlesinger, 'Commento all'art. 179 c.c.', in G. Carraro, G. Oppo and A. Trabucchi eds, *Commentario* n 1 above, 159; E. Del Prato, 'L'esclusione dell'acquisto dalla comunione ex art. 179, comma 2, codice civile' *Rivista di diritto civile*, I, 460 (2002). It is worth remembering the idea in G. Beccara, 'I beni personali', in P. Zatti ed, *Trattato di diritto di famiglia*, III, *Regime patrimoniale della famiglia* (Milano: Giuffrè, 2002), 199.

orderly, whereby participation by spouses in the family may not constitute a reason for limiting or denying the ownership of inviolable rights. Instead, it may result in the compression of certain capital rights which, in a reasonable sense and on the basis of the correct balance of interests, can be limited in the best interests of the family.

The recognized teleology of the family presupposes the unavailability of only certain subjective family situations of a personal nature, and provides a *de facto* autonomous importance to marriage as a contract. In ontological terms, the Constitutional Charter assumes a notion of contentiously and axiologically oriented marriage in which each individual spouse must have room for patrimonial action in the pursuit of their own interests and those of the family.

Of course, the choice and application of the above principles and reasoning is the matrimonial property regime of legal community as a system that allows spouses to divide their property-related choices in relation to the family.

A reconstruction that aims to establish the category of family interest according to an organic and individual conception of the family by virtue of its location as a community is appropriate and still timely. In this sense, the interest of the family coincides with that in the community of life, rightly given that the interest in the development of family life (in the case of a legal community regime) represents the fulcrum of the action of individual spouses. Then the interpreter/body/person applying the law too can consider the superiority of family interest in the solution to hermeneutic contradiction.

If we reflect on the role of the family within the Italian legal system, we can argue according to a naturalistic view related to happiness that every social formation of a couple (in this case, the family) is characterized on the basis of the phenomenological evolution of its subjective composition. While family formation in the absence of offspring is, in the axiology of the discipline, at the center of the patrimonial and existential interests of only the spouses, the social formation of the couple with children provides an 'other' for the interaction of interests in the relations between spouses and their children. This gives rise to the related need to re-read the concept of legal communion in a close way with the rules to protect behavioral and patrimonial obligations to protect children.²⁴

In the application of norms, the law must follow the principle of reasonableness in its expression of the criteria and reasoning aimed at solving cases and events that are constantly changing from both a scientific and a sociological point of view. Legal science is confronted by other sciences, and follows them by proposing reasonable legal structures that can balance the social, existential, and patrimonial interests of the persons involved.

²⁴ For the German doctrine, see: J. Prutting and P. Schirmacher, 'Die Auslegung von familiengesellschaftsbezogenen Rechtsgeschäften' *Zeitschrift für Unternehmens- und Gesellschaftsrecht* bd. 46, 833 (2017); see also, A. Koeberle, Schmidt, H. Witt, and P. Fahrion, *Family Business Governance*, 2. Aufl. (Berlin: 2012), 41.

III. Expansive Capacity of the Discipline of Spouses' Legal Communion: Interest Compression in the Community Property Regime and Expression of the Constitutional Principle of the Economic Initiative of the Individual Spouse

As indicated above, the interpretative evolution of the regime of legal community between spouses must abandon any fixation on mere dogmatism in absolute terms to crystallize a categorization of community property and personal property. The regime of communion requires an axiological reading of the provisions in a combined sense to enhance the interests and safeguards of the family.²⁵

The phenomenology of family practice shows that changes in the subjective and patrimonial situations of spouses can occur during marriage. As an examination of the hypotheses of entry into legal community, the fundamental normative provision (Art 177 of the Civil Code) indicates that purchases made by the spouses together or separately during marriage are treated as coming under the community regime, with the exception of those relating to personal property: ie the fruits of the property of each spouse received and not consumed at the dissolution of community property; the proceeds of the separate businesses of the spouses if they have not been consumed on dissolution of the community property; and the holdings managed by both spouses and established after marriage.²⁶

The expansive capacity of legal community is appreciated in the activity of the spouses during marriage in the automatic acquisition of co-ownership of the property purchased regardless of the actual participation of the spouse, despite the natural principle of *pacta sunt servanda* (agreements must be kept) and the relativity of the effects of negotiations between the contracting parties.

The statutory provision of a legal clause determining co-ownership requires close interaction between legal values, and it is essential to respect the principle of balancing interests with proportionality.

²⁵ On the subject, see: P. Stanzione, 'Diritti fondamentali dei minori e potestà dei genitori', in P. Perlingieri ed, *Rapporti personali nella famiglia* (Napoli: Edizioni Scientifiche Italiane, 1979), 92; Id, *Capacità e minore età nella problematica della persona umana* (Napoli: Edizioni Scientifiche Italiane, 1975), 332. Read F.D. Busnelli, 'Capacità e incapacità di agire del minore', *Rivista di diritto civile*, 54 (1982); F. Ruscello, 'La potestà dei genitori. Rapporti personali', in P. Schlesinger ed, *Codice civile. Commentario* (Milano: Giuffrè, 1996), 38; M. Giorgianni, 'In tema di capacità del minore di età' *Rassegna di diritto civile*, 103 (1987).

²⁶ Read: T. Auletta, 'Modelli familiari, disciplina applicabile e prospettive di riforma' *Nuove leggi civili commentate*, 615 (2015); G. Iorio, 'Il disegno di legge sulle 'unioni civili' e sulle 'convivenze di fatto': appunti e proposte sui lavori in corso' *Nuove leggi civili commentate*, 1014 (2015); F. Romeo and M.C. Venuti, 'Relazioni affettive non matrimoniali: riflessioni a margine del d.d.l. in materia di regolamentazione delle unioni civili e disciplina delle convivenze' *Nuove leggi civili commentate*, 971 (2015); see G. Casaburi, 'Il disegno di legge sulle unioni civili tra persone dello stesso sesso: verso il difficile, ma obbligato riconoscimento giuridico dei legami familiari' *Il Foro italiano*, IV, 10 (2016); G. Oberto, 'I contratti di convivenza nei progetti di legge (ovvero sull'imprescindibilità di un raffronto tra contratti di convivenza e contratti prematrimoniali)' *Famiglia e diritto*, 165 (2015); M. Trimarchi, 'Il disegno di legge sulle unioni civili e sulle convivenze: luci e ombre' *Juscivile*, 1 (2016), and G. Ferrando, 'Le unioni civili. La situazione in Italia alla vigilia della riforma' *Juscivile*, 38 (2016).

However, let us reflect further. From the perspective of a hermeneutically correct distinction between the legal clauses of the regime of communion and constitutional principles, the co-ownership clause incorporates the principles of equality (in terms of the contributions of the spouses) and solidarity (of family needs). These are generally recognized in various legal systems, and further attenuate the principle *pacta sunt servanda* by way of derogation from the general rule in them.²⁷

It follows that the rules governing legal community of the property regime regard as a cause for the attribution of joint ownership not just any form of increase in the property of the individual spouse, but purchases or proceeds that do not have the character of the close organizational personality related to the legal-patrimonial sphere of the individual. This is determined through a valuation that is not abstract, but is made in light of the judgment that, *ex ante*, the division and weighting of the interests involved are formulated.

If we consider the evolution of the principle of relativity, overcoming any form of dogmatism is derived from recognition of the generated legal effects that are directed toward third parties not participating in the formulation of the agreement. It is precisely the matrimonial property regime of the legal community that allows such an extensive effect on an entity (ie the spouse) that does not participate in the transaction for the purchase of the property and, nevertheless, is the beneficiary of the translational effect, *pro rata*, of the object of the purchase.²⁸

²⁷ On the doctrine, see: F. Macario, 'Nuove norme sui contratti di convivenza: una disciplina parziale e deludente' *giustiziavivile.com*, 9 (2016); U. Perfetti, 'Autonomia privata e famiglia di fatto. Il nuovo contratto di convivenza' *Nuova giurisprudenza civile commentata*, 1761 (2016); F.D. Busnelli, 'Il diritto della famiglia di fronte al problema della difficile integrazione delle fonti' *Rivista di diritto civile*, 1476 (2016); Id, 'Il diritto della famiglia di fronte al problema della difficile integrazione delle fonti' *Juscivile*, 183 (2017); F.P. Luiso, 'La convivenza di fatto dopo la L. 76/2016' *Diritto di famiglia*, 1085 (2016); E. Quadri, 'Convivenze e contratto di convivenza' *Juscivile* 108-109 (2017); G. Alpa, 'La legge sulle unioni civili e sulle convivenze. Qualche interrogativo di ordine esegetico' *Nuova giurisprudenza civile commentata*, 1179 (2016); P. Zatti, 'Introduzione al Convegno' *Nuova giurisprudenza civile commentata*, 1663 (2016); L. Lenti, 'Convivenze di fatto. Gli effetti: diritti e doveri' *Famiglia e diritto*, 933 (2016); P. Schlesinger, 'La legge sulle unioni civili n 9 above, 845; A. Arceri, 'Unioni civili, convivenze, filiazione' *Famiglia e diritto*, 958 (2016); G. Buffone et al, *Unione civile e convivenza. Commento alla l. 20 maggio 2016, n 76 aggiornato ai dd.lgs. 19 gennaio 2017, nn 5, 6, 7 e al d.m. 27 febbraio 2017* (Milano: Giuffrè, 2017); V. Carbone, 'Riconosciute le unioni civili tra persone dello stesso sesso e le convivenze di fatto' *Famiglia e diritto*, 848 (2016); L. Balestra, 'Unioni civili, convivenze di fatto e 'modello' matrimoniale: prime riflessioni' *Giurisprudenza italiana*, 1779 (2016); Id, 'Evoluzione e approdi della convivenza more uxorio: dialogo con Alberto Trabucchi' *Giustizia civile*, 59 (2017).

²⁸ See: A. Fusaro, 'Profili di diritto comparato sui regimi patrimoniali' *Giurisprudenza italiana*, 1789 (2016); M. Dogliotti, 'Dal concubinato alle unioni civili e alle convivenze (o famiglie?) di fatto' *Famiglia e diritto*, 868 (2016); R. Pacia, 'Unioni civili e convivenze' *Juscivile*, 195 (2016); G. Bonilini, 'La successione mortis causa della persona 'unita civilmente' e del convivente di fatto' *Famiglia e diritto*, 980 (2016); G. Iorio, 'Il disegno di legge sulle 'unioni civili' e sulle 'convivenze di fatto': appunti e proposte sui lavori in corso' *Le nuove leggi civili commentate*, 1022 (2015); M. Sesta, 'Unione civile e convivenze: dall'unicità alla pluralità dei legami di coppia' *Giurisprudenza italiana*, 1792 (2016); Id, 'L'unione civile: una speciale formazione sociale d'istituzione legislativa?' *Lo Stato*, 6, 261 (2016); A. Ruggeri, 'Unioni civili e convivenze di fatto: 'famiglie' mascherate? (nota minima su una questione controversa e sulla sua discutibile risoluzione da parte della legge n. 76 del 2016)' *Consulta Online*,

The source of the binding effect of the act of autonomy must be found in the volitional element of the subject. Given this, the granting (according to a canon of legal exception) of the translation extension in favor of a third party, beyond the limit of the legal order in the intangibility of the legal sphere of others, wants the presence of the asset advantage in favor of the subject who (stops the faculty of refusal) receives the transference attribution.

The above-mentioned order of values has absolute importance for the resolution of questions concerning the exact delimitation of the mechanism of acquisition of the legal community of spouses. The Italian Court of First Instance held, *inter alia*, claims and contractual positions in which a spouse takes over while maintaining the regime of community property. As noted below, the principle of relativity and the operational limit on the certainty of an increase in property in favor of the person (spouse) not participating in the contract for its purchase are the indices used to determine the operation (or lack of it) of the regime of legal communion.

The 'constitutional' comparison of interests in the regime of communion leads us to trace how the principle of substantial equality between subjects of the legal system can influence the patrimonial dynamics of legal community (Art 2 of the Constitution).

IV. Necessary Balancing of Underlying Interests as a Moment of Synthesis Between the Systematization of the Legal Regime and the Exception of the Same

The mere appearance of an infringement of the principle indicated by the extension of the application of the community of property between spouses must be reassessed against the principle of reasonableness that seeks a natural coordination of the principle of substantive equality with that of marital equality, referred to in Art 29, para 2 of the Constitution.

The express reference in Art 29 to marriage as a synthesis of the moral and legal equality of the spouses prompts us to assess how the substance of equality between spouses is related to the governance of family property as a guarantee of

251 (2016); G. Oberto, 'I regimi patrimoniali delle unioni civili' *Giurisprudenza italiana*, 1797 (2016); F. Padovini, 'Il regime successorio delle unioni civili e delle convivenze' *Giurisprudenza italiana*, 1817 (2016); G. Casaburi and E. Grimaldi, *Unioni civili e convivenze* (Pisa: 2016), 1; P. Morozzo della Rocca, 'Il diritto alla coesione familiare prima e dopo la legge n. 76 del 2016' *Giurisprudenza italiana*, 584 (2017); M. Blasi et al, *La nuova regolamentazione delle unioni civili e delle convivenze* (Torino: UTET, 2016), 43; C. Romano, 'Unioni civili e convivenze di fatto. Una prima lettura del testo normativo' *Notariato*, 333 (2016); E. Giusti and F. Vettori, 'Famiglia di fatto ed unioni civili: verso un nuovo modello di famiglia?' *giustiziacivile.com*, 1 (2016); G. Dosi, *La nuova disciplina delle unioni civili e delle convivenze* (Milano: Giuffrè, 2016); M. Sesta, *Codice dell'unione civile e delle convivenze* (Milano: Giuffrè, 2017), 1; L. Dell'Osta and G. Spadaro, *Unioni civili e convivenze: tutte le novità* (Milano: Giuffrè, 2016), 34.

the family unit. In such a case of orderly coordination, the regime of community property properly fits with constitutional values only if the temporal progression of the explication of the principles is evaluated including an examination of the following: the (substantial) equality of spouses, such as natural persons; the phase preceding the choice of the regime; and the exercise of free private initiative. Meanwhile, the equality (moral and legal) of the spouses within the matrimonial context is exalted in the governance of legal community and the effectiveness of the co-ownership regime for purchases subject to entry into legal communion.²⁹

The validity of the perspectival framing of constitutional values in the legal community regime is also supported by the further interpretation of the principle of equality in the context of the professions of the spouses. The principle that identifies the maintenance of the personal character of the goods acquired for their profession confirms the correctness of the hermeneutic path along which the regime of legal community must manifest the maximum amount of flexibility and adaptability to the professional and personal initiatives of the spouse with respect to the value of constitutional rank. In this way, equality in this case substantiates the freedom of initiative of each spouse in the self-determination of their life choices. The moment of instrumentality of the activity and the consequent purchases constitute the discriminating factor in determining the entry of property into common property, or the maintenance of the personal ownership of the acquiring spouse.³⁰

The acquisition of the axiological imprint leads us to consider the canon of reasonableness as a concept of absolute relevance in the correct application of the limits of the exclusive ownership of the spouse who performs professional activity. A professional activity (manual and/or intellectual) is that which the spouse carries out mainly with an economic intent.

Note that it is precisely in this passage of assessing the concrete case that reasonableness assumes a decisive weight in the resolution of the matter. This is

²⁹ See, in Italian jurisprudence: Corte di Cassazione 6 May 1957 no 1529, *Giustizia civile*, 244 (1958); Corte di Cassazione 18 May 1953 no 1047, *Giustizia civile*, 1632 (1953); Tribunale di Trani 26 November 1957, *Corti Bari, Lecce e Potenza*, 102 (1958); Pretura di Roma 23 February 1959, *Temi romana*, 499 (1959); Pretura di Manfredonia 29 December 1959, *Daunia giudiziaria*, 52 (1961); Corte d'Appello di Trieste 13 July 1957, *Giustizia civile Massimario*, 35 (1957); Corte d'Appello di Torino 1 February 1957, *Giustizia civile Massimario*, 17 (1957).

³⁰ Cf A. Davì and A. Zanobetti, 'Le obbligazioni alimentari tra parti di un'unione civile e tra conviventi nel diritto internazionale privato' *Rivista trimestrale di diritto e procedurale civile*, 197 (2017); V. Carbone, 'Riconosciute le unioni n 27 above, 854. On the difference between the right to maintenance and the right to alimony, cf C. Majorca, 'Degli alimenti' *Commentario D'Amelio-Finzi* (Firenze: 1940), I, 772; G. Tedeschi, 'Alimenti (dir. civ.)' *Novissimo digesto italiano*, I, 490 (Torino: UTET, 1957); G. Tamburrino, 'Alimenti' *Enciclopedia del diritto*, (Milano: Giuffrè, 1958), II, 33; D.V. Amato, *Gli alimenti* (Milano: Giuffrè, 1973), 28; Id, 'Gli alimenti', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1997), III, 929; L.C. Pisu, 'Prestazioni alimentari del terzo e strumenti di regresso' *Il Foro italiano*, I, 713 (1971); A. Di Majo, 'Doveri di contribuzione e regime dei beni nei rapporti patrimoniali tra coniugi' *Diritto di famiglia. Scritti in onore di Nicolò* (Milano: Giuffrè, 1982), 313; A. Falzea, 'Il dovere di contribuzione nel regime patrimoniale della famiglia' *Rivista di diritto civile*, 609 (1977); A. Trabucchi, 'Alimenti (dir. civ.)', in *Novissimo digesto italiano*, Appendice (Torino: UTET, 1980), I, 227.

because the decision maker will have to make a clear distinction between activities that can be attributed to the profession (or professions) of the spouse, according to the natural instrumentality between the acquired property and the profession, and other activities that do not have this character. Such activities fall within legal community in terms of the translational effectiveness of property.³¹

As a corollary of interpretation, labor protection, as an expression of the principle of private economic initiative, limits: the participation of the spouse in the product of the work initiative through the restriction of certain purchases or to the remaining not consumed gain. The nature of the deferred legal community on the earnings of the spouse not consumed during the period of the regime provides evidence of respect for the principle of self-determination of the individual spouse who maintains the full use of the asset and rightly of the gains deriving from the working activity with the limit of the fall in communion of the residual.

The balancing of interests between the activation of legal community and the affirmation of the ownership of the individual spouse provokes reflection on the principle of property protection to deny automatic expropriation of it under the legal community regime without compensation from the acquiring spouse. Following an axiological line, the restriction on the principle of property derives from the alteration of ownership in favor of the non-participating spouse to a subjective acquisitive situation by virtue of the automatism of the phenomenon of legal community. However, the principle of reasonableness, when applied to legal community, warrants the correct weighting of the property rights of the spouse against the solidarity and egalitarian values of the community property regime as a regulatory model freely chosen by the spouses.³²

The harmony of constitutional and legal values is confirmed by the finding that the compression (*pro quota – proportional share*) of ownership in subjective and patrimonial situations is the normative result of a dispositive option desired by the same spouse who, therefore, does not see their protection of constitutional rank altered or denied in any way.

The rule of law provides that assets intended for the operation of an enterprise

³¹ Read T. Auletta, *Alimenti e solidarietà familiare*, (Milano: Giuffrè, 1984), 43; Id, 'Alimenti (dir. civ.)' *Enciclopedia giuridica* (Roma: Treccani, 1988), I, 1; R. Pacia, 'Decorrenza degli alimenti legali e natura costitutiva del provvedimento giudiziale' *Rivista di diritto civile*, I, 53 (2011); M. Dogliotti, 'Gli alimenti', in M. Bessone ed, *Trattato di diritto privato - Il diritto di famiglia*, III (Torino: UTET, 1999), 502; Id, 'Doveri familiari e obbligazione alimentare', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 1994), 147; C.G. Terranova, *Contributo ad una teoria unitaria delle prestazioni alimentari* (Napoli: Edizioni Scientifiche Italiane, 2004), 51; G. Ferrando, 'Alimenti' *Digesto discipline privatistiche. Aggiornamento* (Torino: UTET, 2000), I, 487; C. Rolando, *Alimenti e mantenimento nel diritto di famiglia* (Milano: Giuffrè, 2006), 21-22.

³² Cf G.F. Palermo, 'Obbligazioni solidali nell'interesse della famiglia?' *Rivista del notariato*, 488 (1979); A. Finocchiaro, *Diritto di famiglia* (Milano: Giuffrè, 1984), I, 292. See also, E. Perego, 'Se in regime di separazione dei beni un coniuge risponda delle obbligazioni contratte dall'altro nell'interesse della famiglia' *Rassegna di diritto civile*, 351 (1987); P. Stanzione, 'Comunione legale tra coniugi e responsabilità per le obbligazioni assunte' *Il diritto di famiglia*, 1101 (1984).

of one of the spouses established after the marriage, and their expansion will be considered the object of community property only if it exists at the time of its dissolution. The classes and categories of assets to be considered in terms of the maintenance of the subjective situations of the spouse include those: pertaining to strictly personal goods of each spouse and their accessories; assets used for the pursuit of the profession of the spouse other than those intended for the operation of a holding forming part of the community property; property obtained as compensation for damage (and any pension relating to the partial or total loss of working capacity); and assets acquired by payment of the price for the transfer of personal assets listed above or by their exchange, provided that this is expressly stated at the time of purchase.

In purely private terms, the above means that spouses voluntarily accept the legal clause of alteration in the ownership of the goods and subjective situations of which they are bearers, through the transposition of the matrimonial property regime of legal community. This is evident from the flexibility of the regime of matrimonial property for immediate and deferred legal community. It is founded on the volition of both spouses, and involves the coexistence of the values of common property law with the principles of constitutional rank where it is not possible to attribute to the community characteristics and protections contrary to those in the Constitution.³³

Starting from evidence of the volition of the subjects in determining the effects of the regime, the flexibility of legal community of property between spouses allows us to consider how the structure of family values within the relationship between them sits perfectly well with constitutional principles. Systematic reflection is the consequence of the finding that the mechanism of legal community arises from the will of the spouses who, in compliance with the rules of redistribution of wealth, decline the application of constitutional principles without any possibility of deviation from their related safeguards.

Based on the above, it is necessary to abandon any hypothesis of a dogmatic reconstruction of the phenomenon of legal communion. Above all, we need to shun the drift of the formation of categorizations based on acquired facts that would determine an excessively expansive capacity of legal community of the spouses (to the detriment of constitutional protections for the position of the individual). On the contrary, we also need to discourage a maximum dispositive self-determination of the individual spouse (in defiance of the principle of solidarity that permeates family life).

Importantly, the error that generates such an approach is the failure to investigate

³³ See: C.D.B. Maioli, 'Dovere di contribuzione e solidarietà tra coniugi' *Rassegna di diritto civile*, 481 (1984). Read F. Santoro-Passarelli, *Commentario al diritto italiano della famiglia* (Padova: CEDAM, 1992), I, 497; F. Santosuosso, *Il matrimonio* (Torino: UTET, 1989), 250; R. Perchinunno, *Le obbligazioni nell'interesse familiare* (Napoli: Jovene, 1982), 94; A. Falzea, 'Il dovere di contribuzione' n 30 above, 623; S. Alagna, 'Il principio patrimoniale primario della famiglia' *Vita notarile*, I, 862 (1977).

all of the consequences of protected interests, protection of subjective positions, and potential legal effects. If we think about the place of the microsystem of legal communion in the overall system of legal values, we can deduce the necessity of applying the criterion of balancing the interests underlying the individual case as a moment of synthesis between the systematic and dispositive nature of the legal regime, and the protection of subjective rights.³⁴

The flexible (legal and conventional) nature of legal community allows us to evaluate individual cases and facts of acquisitions of goods with due attention and thoughtfulness. It then becomes possible to grasp how, and to what extent, it is flexible with respect to individual prescriptions, and the interests of the family and spouses. This characterization of communion must be understood by the interpreter when resolving various subjective situations in a reasonable manner and according to the balance of interests.

The attempt to categorize the classes of facts or purchases that may or may not enter into legal communion is incorrect by virtue of the clear difficulty of reconstructing the legal system in this context. This is to say, it is capable of framing a varied and, above all, complete range of acts and facts (in the present case, of purchases) as included in it and, of as it turns out, under the validity of the statute of limitations. But this reconstructive hypothesis is not feasible in the microsystem of the legal community involving spouses in cases where, in the case of limited normative data, the classes of facts and purchases envisaged at the regulatory level are incomplete in the determination of the perimeter of application, and are too fragmentary for effective empirical reconstruction.³⁵

Moreover, the objection that the categorization may be the result of interpreting activities incorrectly is based on an indisputable contradiction in terms. If categorizing is an activity carried out by the body/person applying the law, it is not clear how they can avoid balancing of interests in individual cases. This is because determination of

³⁴ See: R. Calvo, 'I diritti successori del coniuge', in Id and G. Perlingieri eds, *Diritto delle successioni e delle donazioni* (Napoli: Edizioni Scientifiche Italiane, 2013), I, 633. See Corte di Cassazione 27 January 2016 no 1588, *Giurisprudenza italiana*, 1328 (2016), with comment by I. Riva, 'Diritto di abitazione del coniuge superstite – Il possesso della casa familiare da parte del coniuge superstite ai fini dell'acquisto della qualità di erede'; see also L. Carraro, *La vocazione legittima alla successione* (Padova: CEDAM, 1979), 114; E. Perego, 'I presupposti della nascita dei diritti d'abitazione e d'uso a favore del coniuge superstite' *Rassegna di diritto civile*, 714 (1980); G. Frezza, 'Appunti e spunti sull'art. 540, comma 2, c.c.' *Diritto di famiglia*, 966 (2008); G. Tedesco, 'Successione legittima e diritti del coniuge superstite sulla casa familiare fra legato con dispensa dall'imputazione, prelegato e legato in conto' *Rivista del notariato*, 425 (2013); A. Tullio, 'I diritti successori del coniuge superstite' *Famiglia persone e successioni*, 290 (2012); V.E. Cantelmo, 'La situazione del coniuge superstite' *Rassegna di diritto civile*, 51 (1980); A. Mirone, *I diritti successori del coniuge* (Napoli: Jovene, 1984), 143.

³⁵ Cf A. Mirone, *I diritti successori* n 34 above, 110; C. Trinchillo, 'Il trattamento successorio del coniuge superstite nella disciplina dettata dal nuovo diritto di famiglia', in *Studi in onore di Guido Capozzi* (Milano: Giuffrè, 1992), I, 2, 1214; G. Vicari, 'I diritti di abitazione e di uso riservati al coniuge superstite' *Diritto di famiglia*, 1314 (1978); A. Ravazzoni, 'I diritti di abitazione e di uso a favore del coniuge superstite' *Diritto di famiglia*, 222 (1978); L. Mezzanotte, *La successione anomala del coniuge* (Napoli: Edizioni Scientifiche Italiane, 1989), 43.

a single category of facts which to apply an identified discipline means, in axiological terms, to search for the protections and interests underlying the category in comparison (balancing) with other categories of facts that are close to it in an empirical and legal sense.