A contractual analysis of sexual relations inevitably brings one to discuss something that is, apparently, together with faith, the most removed element of legal interest, and that is love.

It is commonly said that one cannot “buy” love or affection. And therefore no contract can bind a person to love another one. One could therefore conclude that whenever a relation of love includes one of sex, both elements cannot form part of a contractual relationship. The statement, however, appears to be a truism. If one looks at the state of the law the conclusions are quite different.

On the one hand, love and affection are an obligation which is generated by marriage, family relations (mostly between parents and children), donor and donee. Even if one cannot obtain specific performance of these obligations, the violation of the duty has numerous legal sanctions: spouses can be divorced; children removed from their families; deeds of gift revoked.

On the other hand, sentimental relations between adults quite often involve sexual desire and practices. People are attracted to each other by sex. Sexual well-being has a stabilizing effect on personal relations. And the end of a sexual entente often marks the end of a relationship. These aspects are quite indistinguishable from other aspects of a sentimental relationship and it makes little sense – at least from a legal point of view – to separate the platonic love sphere from the carnal love sphere.\(^1\)

This is not without legal consequences. Among the duties that spring from marriage, that of conjugal fidelity has an obvious corollary in a spouse’s duty of physical consummation owed to the other. Even though the law and decided cases are extremely cautious when it comes to laying down how and in what degree the duty is to be fulfilled,\(^2\) it seems a well established principle that an

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1 The argument, it must be noted, has also been used by those opposing the enforceability of cohabitation agreements: “It would seem more candid to acknowledge the return of varying forms of common law marriage than to continue displaying the naïveté we believe involved in the assertion that there are involved in these relationships contracts separate and independent from the sexual activity, and the assumption that those contracts would have been entered into or would continue without that activity” (Hewitt v. Hewitt, 394 N.E.2d 1204) (1979) (Ill. S. Ct.)

2 See Honoré, Sex Law in England, Archon Books, Hamden, Ct., 1978, p. 23 ff (“This duty, which I shall call the mutual duty, was hardly recognised until recently and even now is nowhere set out in so many words”). For some Italian cases see those decided by Cass. civ. 7.3.2006, n. 4876; and Cass.civ. 20.1.2006, n. 1202 (in Foro it. 2006, 1406).
absolute refusal to do so is grounds for separation and dissolution of the bonds of marriage.³

The fact that the law is expressed in very broad language opens the way to private agreements which fill in the gaps and specify the content of what can be called the sexual obligations of the parties.

a. Cohabitation, premarital, marital, and post-marital agreements

Most Western legal systems have, for a long time, declared cohabitation agreements invalid. The reasons given are a mixture of public policy and public morality.⁴ The only recognised form of union – and only between a man and a woman – was marriage. Other unions were considered as instrumental to circumventing all the procedures, consequences and legal remedies surrounding marriage. To recognise cohabitation agreements meant granting the protection of the law to people who could have not entered into a proper marriage because of a previous marital bond, or because of a blood relationship between themselves.⁵ As to property rights, while general law established the way in which the assets between the spouses were to be allocated and divided, with cohabitation the conferral, on a daily basis, of property rights between the parties clashed against one of the taboos of Western private law, and that is gratuitous promises.

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³ The opinion is shared in both common law and civil law jurisdictions: compare the Canadian case Lewis v. Lewis (1983) (44 N.B. Rep.(2d) 268) (“refusal to have sexual relations, starting in the first year, progressively increasing refusals and refusing to explain or even to discuss any reason” considered “mental cruelty”, irreparable injury to the husband’s deep religious feelings and, therefore, grounds for divorce) with the Italian ones, Cass. civ. 10.5.2005, n. 9801 (in Giust. civ. 2006, 93); Cass. civ. 23.3.2005 n. 6276 (“The persistent refusal to engage in affective and sexual relations with one’s spouse is a serious violation of the dignity and personality of the partner”). One would be mistaken to think that non-performance is only on the wife’s side: see the Canadian case Hock v. Hock (1971) 3 Rep. Fam. L. 353 (B.C. C.A.) (“The persistent and strong advances made by the wife for the sexual act could not(...) amount to cruelty. (...) I am unable to find that she had other than a healthy appetite for sex” (Branca J.)).

⁴ For a long list of English cases see Barton, Cohabitation Contracts, Gower, Aldershot, 1985, p.38ff. French case law has been for nearly two centuries poised on a rigid position of defence of the legitimate family. Therefore any gift between non-married persons living together was supposed to have had a sexual consideration and therefore was immoral. Only recently has there been a revirement by the Cour de Cassation (Cass. 1re civ., 3.2.1999, in JCP G 1999, I, 143) and confirmed by its plenary session (Cass. ass. plén., 29.10.2004, n. 519 P, Galopin v. Floréal, in JCP G 2005, II, 10011).

⁵ Hewitt v. Hewitt, 394 N.E.2d 1204 (1979) (“Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as “illicit” or “meretricious” relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society?” The answer given the court is “yes”). For English law see the cases cited by Freeman, Lyon, Cohabitation without Marriage. An Essay in Law and Social Policy, Gower, Aldershot, 1983, p.184ff.