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Italy
The role of fault in separation and divorce

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1. Historical summary

The Italian Civil code passed in 1942 - still in force, although extensively modified - did not envisage divorce but only spousal separation, in the framework of a very traditional conservative family model. Divorce was introduced in 1970 (Law 1 December 1970, n. 898), arousing a huge debate in both society and politics, and was followed by a referendum won by a majority of "no" to the abrogation of the law amounting to 59,3% of the voters. In 1975 a comprehensive reform of family law was passed (Law 19 May 1975, n. 151) not altering divorce law - which was not inserted in the Civil Code - but changing the old rules of the Civil Code on separation and providing for a family model which was much more coherent with the Italian Constitution (1948).

The Italian law on divorce was modified for the first time in 1978 (Law 1 August 1978, n. 436); then in 1987 (shortening the time spouses had to be formally separated in court before applying for divorce from five to three years: law 6 March 1987, n. 74); in 2005 (through the law n. 80 of 14 May, introducing new procedural rules); and in 2006 (law 8 February 2006, n. 54 settling new rules for shared children custody in separation and divorce).

In 2014, the Law 2014 n. 162 has added new simplified procedures to reach separation and divorce that have indirectly impinged anyway, as we will see, on the very notion of marriage. Later on, the law 6 May 2015 n. 55 further shortened the time between separation and divorce, which is now one year in the case of litigious separation and six months in the case of consensual separation.

2. **A few preliminary remarks on the main features of the Italian law of divorce**

- In the Italian jurisdiction *separazione* e *divorzio* should be considered together as parts of the two-steps "Italian way" to dissolve a marriage. Separation is almost always the first leg of the way leading to divorce. It is a condition – not the only one, but far the most common – to file a petition for divorce.
Therefore the role of fault in separation too – besides than that in divorce - must be taken into consideration. As we will see, the legal discipline for the two institutions is different, and the role of fault, when there is one, is different too.

- In the Italian statutory law the word "divorce" (*divorzio*) is never employed. Rather it is used the expression "scioglimento del matrimonio".

- Marriage is possible only between a man and a woman. Same sex couples can since 2016 establish a civil union, which is a new legal institution to the Italian legal system. Differently from marriage, civil unions can be solved directly through divorce, without any need to separate before.

- The Italian legal system includes a Concordatarian marriage beside the ordinary civil marriage. Since 1929 the former produces its binding effects at one time in both the legal systems of the Italian Republic and of the Holy Seat, which however considers marriage to be indissoluble. Therefore, a "scioglimento del matrimonio" declared by an Italian court can only dissolve the civil side of the marriage, while the two spouses will remain married against the Catholic Church. Coherently, the Italian legal system and language distinguish between the "dissolution of marriage" that solves all the effects of marriage and involves only civil marriages and the "cessation of the civil effects" of a marriage stipulated according to the Concordat (*cessazione degli effetti civili del matrimonio concordatario*), where only the civil effects are solved.

- Concordatarian marriages may be annulled under the rules and the conditions of canon law, but the annulment is valid also for the Italian legal system. The decision of the Catholic Church judge normally needs a decision of the Italian court to be effective in the national legal system, but it may also happen that an Italian court directly declares the annulment under the canon law.

  Annulment can be considered a third way to solve a marriage. It is not infrequent that, compared to ordinary Italian discipline of dissolution of marriage, annulments produce more favourable consequences for the stronger party of the couple to the detriment of the other.

3. The role of fault in separation

The 1942 Italian Civil Code envisaged legal separation of spouse as the only remedy to the couple breakdown. Fault played a central role in this discipline. Legal separation was permitted only in the cases listed by the code itself: adultery, voluntary desertion, excesses, tortures, threats, serious insults, and criminal sentencing. In these cases one single spouse was allowed to file a petition for separation. But (art. 151 c.c. 1942 in the original version) the action for separation caused by the husband's adultery was allowed only "if the circumstances are such as to constitute a severe insult to the wife".
Separation by consent of the spouses was possible only under judicial homologation.

In 1975, within the frame of an overall reform of family law (Law 19 May 1975, n. 151) intended to harmonize the civil code rules with the principle of equality between sexes set forth by the Constitution, the legal discipline of separation was remoulded and inspired to completely different parameters that fault.
The basic distinction between judicial separation (petitioned for by only one of the spouses while the other opposes either to separation or to the conditions proposed by the other party) and consensual separation (petitioned for by both the spouses who also propose a discipline for their future relation and their relation with the common children) received more importance.

According to the new text of art. 151 (still in force without any further change) "[judicial] separation may be required when such facts happen – even if independently from the will of any or both the spouses – that make the prosecution of the cohabitation[1] intolerable, or cause serious prejudice the issue's upbringing". In practice, while the intolerability of cohabitation has always been the ordinary cause of action for separation, the prejudice to children has never been used to this aim and is mere dead letter.

Separation therefore depends on the quality of the relation of the spouses to each other, not on fault. The judicial proceeding requires the intervention of the courts, which in fact have never rejected the separation action because the case law, immediately after the passing of the law, followed the opinion that the mere filing an action for separation shows the intolerability of cohabitation[2]. Such yardstick is in fact interpreted with reference to the way each partner evaluates the relationship[3] from his or her subjective perspective.

Consensual separation on the other hand depends only on the spouses' will who jointly declare to the judge that their cohabitation is intolerable. The separation, which does not require any further inquiry by the court, will be become effective after the court's homologation.

The role of fault is therefore null in awarding separation. Fault can however play a rather important role only in the following specific circumstance connected with judicial separation. This contented separation may in fact be followed by a charge (*addebito*) on the part of the spouse who has behaved contrarily to the duties imposed by marriage, when such behaviour has made cohabitation impossible (art. 151 par. 2 c.c.). The

[1] The Italian language distinguishes between *coabitazione* e *convivenza*, which are both inevitably translated into the English cohabitation: the word *convivenza*, used in this context by the code, comes from the Latin *cum vivere* (to live together, to have a life in common, to share one's live with another person), while *coabitazione* comes from the Latin *cohabitare* (to share one's own home). *Convivenza* is therefore more demanding that simple cohabitation. According to the art. 151 of the code, separation comes after the former.

[2] According to a leading scholar, decisions rejecting separation because the cohabitation was denied the qualification of intolerable, have been only five from 1975 to 2017. None of them was issued after 1993.

[3] Cass. 2007, n. 21099.

declaration of charge must be requested by the other spouse and cannot be originated by the judge's initiative. When awarded, it results into the loss of the succession rights of the charged person and the loss of any possible right to maintenance right vis-à-vis the spouse. Only a right to ailments may be granted in favour of the spouses who is charged with the *addebito* and is however in state of need. The charge may be declared against both the parties, when both are held responsible for a behaviour having these features.

Fault is then relevant only when the breaking of the community between the spouses is due to behaviour "contrary to the marriage duties". The link between such conduct and the failure of the relationship must be direct and immediate, and must be proved by the party who alleges it – an evidence which not easy at all to give. Moreover, the violating action must be the only cause, or at least the main and decisive, for the intolerability of cohabitation[4].

Conducts not resulting into intolerability, therefore, cannot lead to a declaration of charge as it may happen for instance when the spouse has tolerated, or expressly pardoned them. Even actions put into practice anytime after the couple has already broken down cannot constitute a cause for a charge.

At present declarations of charge in Italy are very rare mainly because of the bitter difficulty to give convincing evidence of the causality link between demeanours and intolerability of cohabitation.

The effect of the declaration of charge is then to bar a right to maintenance, which can accrue only in favour of non-charged spouses: "The spouse, to whom separation has not been charged, has a right to obtain what is necessary to his/her maintenance, when he/she has no adequate income. The amount of this payment is determined with relation to the circumstances and to the income of the obliged person" (art. 156 par. 1 c.c). A huge number of decisions have been devoted to the aim of calculating the "what is necessary" to the ex-spouse maintenance. Courts have always interpreted this article as

[4] Cass. 2006, n. 5061; Cass. 2014, n. 12147; Trib. Cassino 21 February 2013, n. 281.

implying a reference to the specific parameter of the standard of life enjoyed during marriage[5].

However spouses to whom separation can be charged for having been held responsible of marriage duties but who are however in a state of need, can receive alimony from the ex-spouse, like any other member of the family who is in such condition.

"Faulty" behaviours in the end are not directly relevant as such, but only when they produce the intolerability of cohabitation.

4. The new procedures for separation and divorce

Up to 2015, the only way to get separation – no matter whether consensual or judicial - was through a judicial proceeding in front of a court (*Tribunale ordinario*). A recent reform (Law 10 November 2014, n. 162) has introduced two other procedures for consensual separation and, as we will see below, joint divorce: assisted negotiation and the proceeding in front of the Civil status officer. Judicial separation and contentious divorce can only be awarded through a judicial proceeding.

The recently introduced assisted negotiation procedure requires the spouses to be assisted by two lawyers who shall deliver the agreement reached by the parties to the Public Minister. If the couple has children under age or over eighteen but not yet financially independent, or disqualified, or severely disabled, then the Public Minister will control whether the agreement is conform to their interest. If so, he/she will authorize it. In other cases, when the couple has no children, or no children in the conditions just described, then the Public Minister will only control that the legal procedure has been followed and will authorize the agreement. The agreement, after such control, has the same effect than the court decree homologizing separation.

[5] Leonardo Lenti, *Diritto di famiglia e dei servizi sociali*, 2017, Torino, Giappichelli, pp. 186-7.

On the contrary, when the Public Minister holds the agreement against the children's interest or otherwise illegitimate, he/she will convey it to the court and a judicial proceeding will start following the rules provided for consensual separation.

The other kind of machinery introduced in 2014 is the proceeding in front of the Civil status officer, which can be addressed by childless couples, or couples having no child under age or over eighteen but not yet financially independent, or disqualified, or severely disabled. The agreement in this case cannot imply any transfer of immovable assets. The agreement reached by the spouses must be endorsed in a written document prepared by the officer, and must be confirmed by each partner after at least thirty day. After the confirm, the act has the same effect than the courts decree in consensual separation in front of a judge.

The separation must in all cases be enrolled in the act of marriage and it is enforceable without further accomplishments.

The great majority of separations in Italy are consensual (more or less 85%). It is yet early to consider whether the reform of separation and divorce procedure will gain their proposed results, which were those of easing the task of courts and their amount of work while, at the same time, simplifying the fulfilments and reducing the costs for separating couples. On the part of the spouses, all we can say by now is that assisted negotiation does not allow a substantial reduction of costs to make it competitive against a court proceeding, while separation in front of the civil status officer, having required other decrees for its practice application which were issued only in the following months, is yet in its beginning.

5. Divorce in the Italian legal system

Since its introduction in 1970, divorce in Italy has been intended as a "remedy", not as a sanction for failure to comply with matrimonial duties. The notion of fault was – and

still is - altogether absent from the Law on dissolution of marriage (Law 1 December 1970, n. 898).
The behaviour of each spouse may be of some relevance only in a specific situation, as we will see below.

Divorce can be applied for directly only in some very specific cases, not at all frequent: unconsummated marriage; conviction to sexual crimes; attempted, committed or repeated crimes against one's own family members; spouses' discharge from such crimes for being totally insane or for time expiration; sentence to life imprisonment or to detention for more than 15 years. Another possible cause for direct divorce is the divorce obtained abroad by the other spouses who is a foreign citizen, although a recent reform of international private law has reduced the interest of this provision. Change of sex, who also was a cause of direct dissolution of marriage, nowadays turns marriage into a civil union as an affect of the 2016 Law on Civil Unions and Cohabitations.

The far most common condition (more than 99% of the cases) for divorce is personal separation, which must have lasted for six months in the case of consensual separation and twelve months for judicial separation. These time limits have been settled by a 2015 law reform (Law 6 May 2015, n. 55). Formerly, separation had to be extended for three years in all cases. The passing of time is counted from the day of the hearing when the spouses have first appeared in front of the judge in the separation proceeding; or from the day the agreement was reached through the assisted negotiation or in front of the Civil Status officer.
De facto separation is irrelevant.

According to the law on divorce, provided the parties satisfy the requisites listed above, the unique ground for divorce is "the impossibility of keeping or reconstructing the community between the spouses" (art. 1 Law 1970/898).
Courts have however consistently held that the very fact of filing a petition for divorce (joint or even contentious) shows that "the community between the spouses" cannot be kept or reconstructed. The Law on divorce does not address the issue of the means through which the judge must satisfy him- or herself that the breakdown is irretrievable.

It is only prescribed however that during the first hearing the judge will listen to both parties, separately and then together. This will allow him or her to decide on that point.

The divorce law in the Italian legal system then follows more than just one criterion because it combines a substantial condition - irretrievable breakdown of the marriage –, with other factual requisites as necessary conditions to start legal proceeding. Fault then is not a ground for divorce, as it is not for separation. But while in separation, as we have seen, a conduct in breach of the marriage duties can lead to a charge having economic consequences, in divorce law no such charge may be declared and maintenance is awarded – when it is - on the basis of rules depending on completely different principles. Art. 6 par. 6 of the Law on dissolution of marriage states that: the judge may oblige a spouse to pay a periodical sum of money (*assegno di divorzio*) to the other, when the latter "does not have adequate means or is however unable to earn them for objective reasons"[6].

The present Italian law provides for four different kinds of proceedings for divorce. Two of them take place in a court: the first is contentious, and the plaintiff is only one of the spouses; the second is joint and is applied for by the two spouses together. Other kinds of proceedings to divorce are the assisted negotiation and the proceeding in front of the Civil Status officer, which follow the same steps already described above about separation.

Up to 2015 divorce by consent was not envisaged by the Italian law. It was always the result of a court decision issued when the judge was convinced that the community of life between the spouses was irretrievably broken. After the introduction of the new procedures of assisted negotiation and proceeding in front of the Civil status officer, that do not require any external examination over the parties' own decision, but only a possible control over the children related clauses, we can conclude that consensual divorce has in fact been introduced into the Italian jurisdiction.

[6] This topic will be addressed more specifically in the following paragraph.

6. The (very small) role of fault in divorce law

The maintenance issue in the divorce is related to the need of the ex-spouse and fault plays a very small role indeed. Maintenance must be specifically petitioned for (for instance Cass. civ. 26 September 1991, n. 7203) so that if none of the parties does so, the judge will not grant it.

According to consistent case law, the judicial decision on maintenance follows two steps. The first is an evaluation of the applicant's requisites, following the art. 5 of the Law on divorce: maintenance can be granted only when the spouse has "no adequate means or it is anyway impossible for him or her to earn them for objective reasons". The second step in the decision making process - according to the same article - is the assessment of the exact amount of the sum to be paid for maintenance. To this aim, the judge has to consider "the conditions of the spouses; the reasons of the decision; the personal and economic contribution given by each of them to the family running and to the building of a personal or a common patrimony; the income of both". These elements must be related to "the marriage length" and may lead to a refusal of the maintenance petition and therefore to discharging a wealthier spouse from providing allowance to the other (for instance see, among many other concurring decisions, Cass. civ. 11 November 2009, n. 23906). According to a uniform case law, the judge will not have to take into account all these elements in every case, but only those relevant for that specific action.

Since 1970, many decisions have focused on the interpretation of art 5 of the Law on dissolution of marriage and especially on the criteria to assess whether a right to maintenance accrues or not to the benefit the weaker part of the relation. The much debated expression “adequate means” has always been constructed as meaning "adequate means to keep up a standard of living which is similar to the one enjoyed during marriage" (many decisions speak in this sense[7]), thus establishing an analogy with the similar rules in separation.

[7] See for instance, among plenty of concurring decisions, Cass. civ., united sections, 29 November 1990, n. 11490.

But a very recent decision of the Court of Cassation[8] has expressly overruled this long-standing principle. The amount of maintenance must from now on be linked only to the ex-spouse's state of need; the yardstick of the standard of living during matrimonial life shall no longer be followed because it is not adequate to the meaning of divorce in the Italian society. The divorce causes the final end of the marriage both as for the personal status of the spouses – who must from then on be considered as "single persons" – and as for the their economic and patrimonial relations, especially with regard to their reciprocal duty of moral and material support imposed by the rules (art. 191 c.c.). The parameter of the standard of living causes a kind of survival of the marriage beyond its very existence. It is time, after almost twenty-seven years from its adoption, to leave this interpretation behind: so the decision runs, literally[9].
This extremely important decision could lead us for its innovative content to comment on the Italian judges' talent to fill the gaps left by a legislator who is too often reluctant to hold in due consideration the changes happened in the society.

The legal doctrine notes that the criteria listed in the other part of art. 5 at the par. 6 are not sufficiently defined. The meaning of "the conditions of the spouses" is anyway identified in the whole of their conditions: reference must then be made not only to the economic status, but also to their health, age, social position, capacity of work, qualification (Cass. civ. 4 September 2004, n. 17901). The "reasons of the decision", which is also unclear, implies, according to Cass. civ. 9 September 2002, n. 13060, an investigation over the whole of the family life and not only over the decision to divorce. Appreciating this yardstick, however, the judge may give some relevance to faulty behaviours, or behaviours against the marriage duties, taking into account the time when the couple was married and the time when it was separated.
As for "the contribution of both" the spouses, it must be evaluated taking into consideration the whole of their substances and not only their mere income (for instance

[8] Cass. Sez. I civ., 10 May 2017, n. 11504. The decision has been followed by Tribunale di Varese, 30 June 2017, and Court Appeal of Salerno, 7 July 2017.
[9] The mentioned decision, being related to a divorce claim, does not affect the way to assess the amount of maintenance after separation. The reason for this is that separated couples are still married, although their bond is considerably weakened. The duty to assist each other, however, survives to separation and forms the rational of the maintenance allowance.

Cass. civ. 16 July 2004, n. 13169). Every kind of contribution must be weighted, even housework, care of children, elderly persons, and home maintenance.
In any case, the right to maintenance expires when the assignee remarries (art. 5 par. 10 Law on divorce).

The amount of maintenance as fixed in the divorce decision is automatically revised year by year according to the official index of devaluation (art. 5 par. 7 Law on divorce).
In other cases the judge may be asked to vary the amount of the allowance because the economic conditions of one or both the ex-spouses has changed. According to the art. 9 par. 1 of the Law, in fact, the amount may be altered "when justified reasons overcome after the sentence". Until recently this provision had to be coordinated with the criterion of the standard of life kept during the marriage (Cass. civ. 3 August 2007, n. 17041) and to the need to keep a balance between the conditions of the spouses (Cass. civ. 21 January 2008, n. 1761). After the decision 10 May 2017 n. 11504, however, no petition for adjusting the sum can rest upon the yardstick of the standard of life enjoyed during marriage.

The claim to change the allowance amount can be based both on the improvements as well as on the worsening in the partners' conditions, even when the latter is due to a choice of the obliged person who, for instance, has freely decided to dismiss his or her job for a less paid occupation (e.g. Cass. civ. 11 March 2006, n. 5378).
Many decisions have given relevance - in the silence of the law - to the position of an assignee who benefits of contributions from a cohabitant in the context of a new relation begun after divorce. In these cases, courts have reduced or even excluded maintenance from the ex-spouse (Cass. civ. 20 January 2006, n. 1179, among many others).

Maintenance is usually paid periodically, but the court may allow a one-time payment when it is satisfied that such payment is equitable for the parties in that specific controversy. When this happen, no further request may be put forward against the ex-spouse at a later time (art. 5 par. 8 Law 1970/898).

The holder of a right to maintenance deriving from divorce can take advantage of two other benefits of much importance. First, he or she may be entitled to a proportional share of the ex-spouses' severance payment (*trattamento di fine rapporto*) calculated with reference to the number of years the marriage has lasted (art. 12 bis Law 1970/898). Secondly, the surviving ex-spouse can also have a right to receive part of the widow's pension (*pensione di reversibilità*), provided of course he or she has the requisites set by the law and the job relation has started before the divorce (art. 9 Law 1970/898).

7. Divorce in civil unions

The conditions to dissolve a civil union are similar to those provided to divorce from a marriage, but there are a few meaningful differences. Separation for civil partners is not needed and both the members of the couple or only one of them – according to the art. 1 par. 24 Law 2016/76 – must first declare their will to dissolve the union to the civil Status officer. After three months each partner can then start a judicial action to solve the union. Parties can also make use of the recently introduced non-judicial proceeding to divorce (assisted negotiation and proceedings in front of the Civil status officer).

Other differences toward the legal discipline of marriage concern the impossibility for civil partners to divorce for not having consumed the relation; and the effects of a change of sex or, more precisely, the effects of the judicial decision altering the civil status qualification of the partner's sex. In this latter case, while the civil union can – according to the Law - be formed only by same sex couples, when one the partners changes his or her sex the union would become formed by a man and a woman. According to the art. 1 par. 26 of the Law 2017/76, then, the union is automatically solved.

On the contrary, if one of the spouses changes his or her sex, the marriage transforms itself automatically into a civil union. We could expect that the reverse might happen when a civil partner changes his or her sex: being marriage (only) opposite sex, the civil union could transform itself into a marriage. But the Law is silent as for this effect.

Several Italian authors have noted that the steps to divorce from a civil union are more "immediate, simpler and faster"[10] that those required to divorce from a marriage.

The introduction of civil unions being rather recent, no decision on divorce between same sex couples has yet been published.

[10] Among them Gilda Ferrando, *Diritto di famiglia*, *Appendice*, Bologna, Zanichelli, 2015-2016, p. 9.