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ARTICLES

THE PARABOLA OF FAULT IN THE ITALIAN LAW OF SEPARATION AND DIVORCE

Maria Donata Panforti[1]

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[2] 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 that was much more coherent with the Italian Constitution (1948).
The Italian rules on divorce were 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,

[1] Questo testo riproduce, con alcuni sostanziali aggiornamenti, il report nazionale redatto per la ricerca "Finding Fault? Divorce Law in Pratice in England and Wales", finanziata dalla Fondazione Nuffield, Londra. Un prima versione venne presentata al seminario internazionale "Fault and Divorce Law Reform", Amsterdam, Vrije Universiteit, 24 luglio 2017.

[2] Law 19 May 1975, n. 151

introducing some procedure requirements); and in 2006 (law 8 February 2006, n. 54 settling new rules for children custody in separation and divorce). In 2014, the law 2014 n. 162 added simplified procedures to reach separation and divorce. Later on, the law 6 May 2015 n. 55 further shortened the time between separation and divorce, that is now one year in the case of litigious separation and six months in the case of consensual separation. The following year an important reform introduced an altogether new legal institution, named civil union, for exclusively same sex couples (law 20 May 2016, n. 76) and gave some new rules on informal relationships.

2. THE MAIN FEATURES OF THE ITALIAN LAW OF SEPARATION AND 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 in practice – to file a petition for divorce.
Therefore, the role of fault in separation too must be taken into consideration as well as that in divorce[3]. 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.

Marriage is anyway accessible only to couples composed of a man and a woman. Same sex couples can since 2016 establish a *civil union*. Differently from marriage, civil unions can be solved directly through divorce, without any need for the partners to separate before.
But 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 Italy and of the Holy Seat, which however considers marriage to be indissoluble. Therefore, a divorce declared by a civil Italian court can only solve the civil Italian side of the marriage, while the two spouses remain married against the Catholic Church.

[3] The word "divorce" (*divorzio*) is never employed in the Italian statutory law, where the recurring expression is "scioglimento del matrimonio" (dissolution of marriage).

Coherently the Italian legal system distinguishes between the "dissolution of a civil marriage" (*scioglimento del matrimonio)* that solves all the obligations and bonds of a civil marriage 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 law side of the marriage is solved.
Concordatarian marriages may in fact be annulled under the rules and the conditions of canon law. Such annulment may be effective also for the Italian legal system, but a decision of an Italian court is necessary to this aim. Annulment may be somehow considered a third way to solve a marriage. It is not infrequent that, compared to ordinary Italian discipline for dissolution of marriage, canon law 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 in its original version envisaged legal separation of spouses as the only remedy to the couple breakdown. In this frame fault played a central role because separation was permitted only in the situations listed by the code itself: adultery, voluntary desertion, excesses, tortures, threats, serious insults, and criminal sentencing. In these cases each spouse was allowed to file a petition for separation. But (according to art. 151 c.c. 1942 in the original version) any action for separation based on the husband's adultery was allowed only "if the circumstances are such as to constitute a severe insult to the wife".
Separation was then conceived as the sanction for faulty behaviours. Its consequences were coherent with this assumption: "[t]he spouse who is not at fault in the personal separation keeps the rights inherent in his status" (art. 156 c.c. original version) , while [t]he spouse for whose fault the separation has been pronounced has the right only to alimony". Moreover, he (or she, obviously) lost all profits granted within the marriage contract even if they were entered into on a reciprocity basis.

The legal discipline of separation was remoulded in 1975, within the frame of an overall reform of family law intended to harmonize the civil code rules

with the principle of equality between persons set forth by the Constitution. The parameter of fault was then abandoned.

Separation for fault was in fact abolished and substituted by separation "for intolerability of cohabitation". Besides, the new rules focused on 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 contacts and their relation with the common children.

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[4] intolerable, or cause serious prejudice the issue's upbringing". In practice, while the intolerability of cohabitation has been since then 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. As a consequence, it can be applied for any time after the marriage. Italian law, in contrast with other legal systems, does not require any time interval between marriage and the action for separation.

The judicial proceeding requires the intervention of the court, which in practice have never rejected the separation action with reference to the parameter of intolerability, because courts immediately started to follow the opinion that the mere filing of an action for separation shows that cohabitation is intolerable[5]. Such parameter is in fact interpreted with reference to the way each partner evaluates the relationship[6] from his or her subjective perspective.

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[4] The Italian language distinguishes between *coabitazione* e *convivenza*, which are both inevitably translated into the English cohabitation: the word *convivenza*, which is recurring in 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* derives from the Latin *cohabitare* (to share one's own home). *Convivenza* is therefore more demanding that simple cohabitation. According to art. 151 what should be intolerable is the spouses' *convivenza*.

[5] 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. See Leonardo Lenti, *Diritto di famiglia e dei servizi sociali*, terza edizione, 2020, Torino, Giappichelli, pp. 180.

[6] See Cass. 15 October 2019, n. 26084; Cass. 16 February 2012, n. 2274.

Consensual separation on the other hand depends only on the spouses' will, and it will be become effective after the court's decision (*omologazione*) that validates the procedure and makes the separation effective.
The role of fault is therefore null in *awarding* separation. Fault can however play a quite important role only in a specific circumstance connected with judicial separation, because such 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 the marriage, when such behaviour has made cohabitation impossible (art. 151 par. 2 c.c.). The declaration of charge must be expressly requested by the other spouse and cannot be originated by the judge's initiative. When awarded, it results into the loss of any possible right to maintenance right vis-à-vis the spouse and the loss of the succession rights of the charged person. 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 declared against both the parties when both are held responsible for such a behaviour.

Fault is then relevant only when the cohabitation of the spouses is made intolerable by a behaviour "contrary to the marriage duties" kept by one or even two of the partners. Its relevance is confined to the area of the financial obligations of the "faulty" ex-spouse vis-à-vis the other. Courts have constantly stated that the link between such conduct and the breakdown 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[7]. Faulty 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 such charge.
At present, as it can be easily imagined from the picture we have sketched, declarations of charge in Italy are very rare. Their effect is anyway to bar a right to maintenance, that can accrue only in favour of non-charged spouses. The exact quantification of maintenance is determined in relation to the circumstances and income of the obligor. "The judge, pronouncing the

[7] See Cass. 3 December 2001, n. 15248 and several other decisions.

separation, establishes for the benefit of the spouse who is not responsible for the separation the right to receive from the other spouse what is necessary for his maintenance, if he/she does not have adequate income of his own" (art. 151 c.c.).
A huge number of decisions have been devoted to the aim of calculating "what is necessary" to the ex-spouse maintenance. Courts have always interpreted this article as implying a reference to the specific parameter of the standard of life enjoyed during marriage [8], although more recent judgements show a tendency to abandon this long-lasting criterion. The new trends recognize that maintenance should rather be a compensation for the contribution given by the ex-spouse to the common life of both. It should therefore perform a supporting and compensatory function with a reference to the actual conditions of the beneficiary[9].
Spouses against whom separation is charged but who are however in a state of need can however receive alimony (*alimenti*) from their ex-spouses, like any other member of the family who is in such condition.

As a general rule, separated spouse are still married. Because of this principle, if one of the spouses dies the other has the same succession rights than he/she would have in an enduring marriages. On the contrary, the charged ex-spouse loses every succession right against his/her partners' patrimony. Only the surviving spouses entitled to alimony has a right to a periodical sum that has to be paid by the heirs of the deceased person.

Before leaving the topic of the role of fault in separation a reference must be made to an interesting trend which has made its way since the '90s of last century. Italian courts have slowly but steadily begun to recognize that the violation of matrimonial duties can ground an action for compensation of damages on the basis of the general rule of art. 2043 c.c. ("Any malicious or negligent act that causes an unjust damage to another obliges the person who has committed the act to pay damages"). To this aim the Court of Cassation considers that the "unjust" damages must consist of a violation of a personal right having Constitutional relevance. Up to now such violation has been detected in many cases of diverse nature: total lack of assistance to an insane

[8] The leading case was Cass. 29 November 1990, n. 11490.
[9] See Cass. 15 October 2019, n. 26084.

wife[10], violent behaviours, conducts aimed at denying dignity to the spouse[11] and a few others. Rules on the matter are yet debated and not fully clear, but on the whole it appears that damages are awarded only when the harmful conducts are very serious and intentional.

4. DIVORCE IN THE ITALIAN LEGAL SYSTEM

Since its introduction in 1970, divorce in Italy has been conceived as a "remedy" for the couple's breakdown, 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 way each spouse behaves may be relevant 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 and by no means connected to fault: 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. The only possible cause for direct divorce which has some statistic relevance is the divorce obtained abroad by the other spouses who is a foreign citizen. However a recent reform of the international private law has reduced the interest of this provision because it allows to register and enforce the foreign decision without the need of a legal proceeding in front of an Italian court. Change of sex, which also was in the past a cause for direct dissolution of marriage, nowadays turns the marriage into a civil union. The new rule was introduced by the 2016 Law on Civil Unions and Cohabitations (law 20 May 2016, n. 76).
The far most common condition (more than 99% of the cases) for divorce is personal separation that 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).

[10]Trib. Firenze 13 giugno 2000, published in *Fam. e Dir.* 2001, 161

[11]App. Torino 21 February 2000, in *Foro It.* 2000, I, 1555.

Previously, separation had to last for three years without exceptions. 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 presented to the Civil Status officer[12].
De facto separation has no effect to this aim.

According to the black letter of law, however, spouses who want to divorce must not only have separated, but should also show "the impossibility of keeping or reconstructing the community between the spouses" themselves (art. 1 law 1970/898). The Italian legal system then tries to combine a substantial condition - irretrievable breakdown of the marriage – with other factual requisites as necessary conditions to start legal proceeding. Courts have however consistently held that the very fact of filing a petition for separation or divorce (joint or even contentious) shows that "the community between the spouses" cannot be kept or reconstructed. In practice, then, and in most cases, separation is the only real condition to divorce.
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. In practice, the conditions for divorce are very simply satisfied when the party, or the parties, have been separated for the required period of time and apply for divorce.

Fault then does not represent 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 very different principles than fault, as it will appear in the following paragraph.

[12] The actual Italian law provides for four different kinds of proceedings for separation and 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. The other kinds of proceedings are assisted negotiation and a proceeding in front of the Civil Status officer. Both follow the same steps already described above with reference to separation.

5. THE (VERY SMALL) ROLE OF FAULT IN DIVORCE LAW

Art. 5 par. 6 of the Law on dissolution of marriage states that the judge may oblige an ex-spouse to pay a periodical sum of money (*assegno di divorzio*) to the other, when the latter "has no adequate means or it is anyway impossible for him or her to earn them for objective reasons". In assessing maintenance no direct reference is then made to fault or to the reasons that brought to the couple's dissolution. Only when it comes to calculating the exact sum to be paid faulty behaviours may play a role, albeit small.

In Italian law maintenance after divorce is related to the need of the ex-spouse and fault therefore has very little relevance indeed. Maintenance must be specifically petitioned for[13] so that if none of the parties does it, the judge will not grant it.

For almost thirty years case law consistently held that the judicial decision on maintenance consists of two steps. The first is an evaluation of the applicant's need, following art. 5 of the Law on divorce. The second - 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" (art 5 already quoted). 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[14]. According to a uniform case law, the judge shall not take into account all these elements in every case, but only those relevant for that specific action.

Since 1970 many decisions focused on the interpretation of art 5 of the Law and especially on the criteria to assess whether a right to maintenance accrues to the benefit the weaker part of the relation. In particular 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" [15], thus establishing an analogy with the corresponding rules for separation.

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[13] For instance see Cass. 26 September 1991, n. 7203.

[14] See for instance, among many other concurring decisions, Cass. 11 November 2009, n. 23906.

[15] See for instance Cass. 29 November 1990, n. 11490.

But then more recent decisions of the Court of Cassation[16] have 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 and to the contribution given by each spouse to the common life. The yardstick of the standard of living during matrimonial life shall no longer be followed because divorce causes the final end of the marriage both as for the personal status of the spouses – who must 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 (art. 191 c.c.). The parameter of the standard of living caused a kind of survival of the marriage beyond its very existence and cannot be considered adequate to the actual way of understanding marriage in the Italian society, where it is considered as an expression of freedom and self-determination and therefore dissoluble [17]. Maintenance should perform the function to support the ex-spouse in need, but above all the task of bridging the gap between the different amount of contributions offered by the spouses, and to compensate the ex-spouse in a disadvantaged state. In this frame, a pre-eminent role must be attributed to the "personal and economic contribution to the common life" of the family, that is what the spouse in fact did to the benefit of the family and the household.

These extremely important decisions speak about the judges' talent to fill the gaps left by a legislator who is too often reluctant to hold in due consideration the swift changes happened in the Italian society. However, all the criteria listed in art. 5 par. 6 do not appear sufficiently defined by the law and each of them has needed considerable interpretation by the courts over the years. The "conditions of the spouses" is nowadays finally 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 [18]. The "reasons of the decision", which is also unclear, implies,

[16] Cass. Sez. I civ., 10 May 2017, n. 11504 and Cass. 11 July 2018, n. 18287.

[17] These judgments, being related to a divorce claim only, do not affect the way of assessing the amount of maintenance after separation. As in the Italian legal system separated couples are considered still married, although their bond is considerably weakened, a reference to the marriage standard of life can appear reasonable.

[18] Cass. 4 September 2004, n. 17901.

according to the Court of Cassation [19], 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 how also long the couple was married and the time when it separated. The judge may take a decision with or without reference to the possible charge awarded in the separation judgment. 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[20]. Moreover, every kind of contribution must be weighted, even housework, care of children, elderly persons, and home maintenance.

We can conclude that the place of fault in the dissolution of marriage discipline is definitely interstitial. It does not possess any autonomous relevance and it can not emerge as a direct parameter in the judge's evaluation, but only as a feature of the spouse's behaviour that the court may or not find relevant in each specific case.

The right to maintenance anyway expires when the assignee remarries (art. 5 par. 10 of the Law on divorce). Its amount is automatically revised year by year according to the official index of devaluation (art. 5 par. 7 of the same Law). If the economic conditions of one or both the ex-spouses substantially change, the court may be required to adjust the amount of the allowance "when justified reasons overcome after the divorce" (art. 9 par. 1). Until recently this provision had to be coordinated with the criterion of the standard of life kept during the marriage[21] and to the need to keep a balance between the conditions of the spouses[22]. At present, after the decisions 2017 and 2018 of the Court of Cassation quoted above, no petition for revising the amount can rest upon the yardstick of the standard of life enjoyed during marriage.

[19] Cass. 9 September 2002, n. 13060.
[20] For instance Cass. 16 July 2004, n. 13169.
[21] Cass.3 August 2007, n. 17041.
[22] Cass. 21 January 2008, n. 1761.

6. FAULT IN THE DISSOLUTION OF CIVIL UNIONS AND COHABITATIONS

Rules about the dissolution of a civil union are similar to those provided to divorce from a marriage, even if with a few meaningful differences. The most important among them is that separation is not needed and civil union partners can therefore divorce directly. Parties can have resort to the recently introduced non-judicial proceedings, choosing between assisted negotiation and appeal to the Civil status officer. In the latter case both the civil partners or only one of them – according to the art. 1 par. 24 of the law 2016, n. 76 – must first declare their will to dissolve the union to the officer. After three months from this statement, each partner can finalize his/her petition for dissolution of the union.

The steps to divorce from a civil union are clearly more immediate, simpler and faster that those required to divorce from a marriage. We may therefore wonder, just as part of the legal doctrine does, whether this sequence can be considered in line with the principle of equality endorsed in art. 3 of the Italian Constitution.

If the machinery is different, the effects of dissolution of marriages and of civil unions are on the contrary similar. Maintenance can be granted under the same conditions provided for divorce after marriage, and its amount is calculated though the same parameters provided by the art. 5 of the law 1970 on divorce as interpreted by the courts in the opinions we have referred to above. These principles were applied for instance in the only published decision[23] about the dissolution of a civil union, where the court declared the right of the weaker party to an *assegno di mantenimento* grounded on the contribution given to the family life and to the duration in time of the union. No reference was made in that specific case to the conducts of the partners.

No reference to fault can be found in the rules for the break-up of de facto relationships. For these couples a right to economical contribution between the ex-partners may only be confined to ailments, which are calculated with exclusive reference to no other parameter than the state of need. No action for maintenance is allowed: "In case of cessation of de facto cohabitation, the judge may establishes the partner's right to receive an alimony from the

[23] Trib. Pordenone 13 March 2019.

other if he/she is in state of need and is not able to provide for his/her own maintenance" (art 1 n. 65 Law 2016/76).

7. Conclusion - The parabola of fault

In the recent history of Italian law and in connection with the rules about the couple's breakdown, fault describes a parabola where it initially plays a leading role but later on is bestowed a more and more marginal task. Determinant as it was in the 1942 code, which considered fault as the cornerstone for the couple's crisis, it is confined today only to the scope of quantifying maintenance after separation in the few cases where a charge is granted.
On the other hand the decline of fault has corresponded, and could not be otherwise, to an evolution of the construction of the couple as a product of the renewed will of the partners rather than as a result of the adherence to behavioural patterns set forth once and for all by the legislator. Since the adoption of divorce in 1970 Italian law has gradually, albeit with great difficulty, left behind the idea that marriage is forever, to replace it with the idea that marriage lasts as long as the partners want it to continue.

But the parabola of fault is also related to the decline of the relevance of adultery, or, in other words, to the very slow but inexorable decline of the relevance of the marital betrayal in the eyes of the civil law[24]. The closer we get to our time, the less relevant the partners' conduct appears outside their personal relationship toward each other. The rules the couple gives itself and the effects of their violation are increasingly considered a private province where the legal rules do not tread. Autonomy, self-determination and in some specific areas contractualization, that represent the characteristic feature of the couples of today, are incompatible with an idea of fault established from someone outside the couple itself. We might even wonder whether they are compatible with any role played by fault at all.

[24]P. Passaniti goes back to XIX century statutory law to find the roots of this path: *Diritto di famiglia e ordine sociale. Il percorso storico della "società coniugale" in Italia*, Milano, Giuffrè, 2011, esp. p. 260 ff.