The privatization of the divorce in Italy

In Italy, the Christian idea of the marriage being indissoluble, came to an end in 1970, when the law no. 898 was enacted, finally introducing the divorce in Italy; this law has been profoundly modified first in 1987, introducing a combined application of the spouses to obtain the divorce. The idea still was that the dissolution of the marriage was outside the scope of negotiating autonomy and, thus, only a judicial intervention could dissolve the marriage. In 2014, this scenario has been profoundly modified in following an intervention of the legislator, who – in the context of a "simplification" of the civil justice system – has introduced two proceedings that in some ways are alternatives that overlook from a judicial sentence.

1. The divorce in the Italian legal system.

Putting a centuries-old tradition, inspired to the Christian idea of the marriage being indissoluble, the divorce has been introduced in the Italian legal system with the Law no. 898 of December 1, 1970. This Law has been significantly modified in 1987 (Law no. 74 of March 6, 1987); the most relevant modification concerns the possibility of a (more) rapid proceeding in case of a "combined application" of the spouses, in which the economical aspects and eventually the conditions regarding the children have to be defined, under the personal as well as the economical aspect. The Court decides through a sentence after having heard the spouses.

Nonetheless this significant innovation, neither the Law of 1987 has introduced the principle of the dissolution of the marriage based (solely) on the spouses will, being the existence of the marriage, once constituted, taken from the negotiating autonomy.

The definitive lack of spiritual and material communion and, thus, the impossibility of a cohabitation suitable to realize the mutual assistance and cooperation, is considered to be the cornerstone of the divorce

The impossibility of a spiritual and material communion shall be the result of one of the grounds specifically indicated by the law. Among those, the most frequent one is the personal separation of the spouses that, in the Italian legal system, does not represent a mere factual situation, but a legal institution (until the moment of the entry into force of the law that will be examined) in the two forms of the consensual separation and the judicial separation.

1.1. The introduction of the non-judicial divorce.

The briefly described scenario, that considered the judge's decision necessary in any case, has been profoundly modified in 2014 following an intervention of the legislator, who – in the context of a "simplification" of the civil justice system – has introduced two proceedings that in some ways are alternatives that overlook from a judicial sentence. In this sense, one talks about the "privatization" of the divorce.

The Law no. 162 of November 10, 2014, that converted the Decree Law no. 132 of September 12, 2014, is, in fact, based on the consent of the spouses and on their agreement concerning the conditions of the divorce and, above all, for the dissolution of the bond a constituting sentence is not needed anymore. The latter, in the past, had been considered necessary as it affected the *status* of spouse, namely a sphere which was considered not to be disposable.

Therefore, it is a non-judicial divorce, whose foundation is still a time of personal separation (and not the other grounds for divorce foreseen by the law), furthermore recently shortened from three years to six months (Law no. 55 of May 6, 2015). In the light of the abovementioned assumption, part of the doctrine underlines that the new regulation did not introduce a consensual form of divorce, but it cannot be doubted that the agreed decision of the spouses, to terminate the marriage, plays a key role.

2. The two new proceedings.

The first proceeding is foreseen by art. 6 of Law no. 162 of November 10, 2014, according to which the spouses, after having entered into an arrangement by means of assisted negotiation[1], both with their attorneys, can reach a "consensual solution" of dis-

[1] The law requires the attorney to inform the client, in the moment he receives the mandate, about the possibility to use the proceeding of assisted negotiation.

solution of the marriage[2]. The arrangement of assisted negotiation, regulated in art. 2 of the law, therefore represents a first step, to which the rising of obligation is related, first of all the one to cooperate in good faith and behave fairly, to be borne by the parties and the attorneys.

The abovementioned article also stipulates the duration of the proceeding, which cannot be less than one month nor more than three months, extendable up to thirty days based on an agreement of the parties, as well as the subject of the controversy, which cannot be inalienable rights. However, in derogation from the latter stipulation, art. 6 foresees that the assisted negotiation can be applied to the consensual separation, to the combined application for divorce and to the modification of the conditions of separation and divorce, unless one wants to assume that with the new regulation the legislator implicitly considered the matter of divorce subject to the availability of the parties[3].

Based on the abovementioned arrangement, the negotiations are conducted with reference to the arrangement of (separation or of) divorce and its signing[4].

2.1. The control by the state's attorney.

The agreement, that has the effect of the judicial measures that define the divorce proceedings, is subject to the control of the "public prosecutor of the Republic at the competent Court", to whom the agreement has to be sent. In the lack of the criteria foreseen by the law, art. 706 of the Italian Code of Civil Procedure and art. 4 of the Law on divorce, which refer to the spouses' last common place of residence, are held to be applicable and part of the doctrine holds art. 4 of the Law on divorce, giving the competence on the divorce based on common application to the Court of the place of residence or domicile of one of the spouses[5], to be preferable.

In case the spouses do not have minor children or incapacitated or not self-sufficient adult children, the public prosecutor only needs to verify that there are no irregularities (for example, the signing of the parties – the signature being certified by the attorney, the attorneys signatures –, etc.) and thus to grant his authorization: thus, it is a mere formal control. On the contrary, in case the agreement concerns also minor children or incapacitated or not self-sufficient adult children, the control of the public prosecutor is extended

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[2] In the opinion of many authors, the model of the regulation that is here being examined, has to be identified in the "*procédure partecipative*" introduced in the French legal system by art. 37 of the law of December 22, 2010, nr. 1609, (art. 2062-2067 *Code civil*): see P. Farina, *La negoziazione assistita dagli avvocati: da* preambolum ad litem *ad* outsourcing *della decisione del giudice*, in *Riv. dir. proc.*, 2015, 516; D. Dalfino, *La procedura di negoziazione assistita da uno o più avvocati, tra collaborative Law e procédure partecipative*, in *Foro it.*, 2015, V., 28 ff.

[3] See B. Poliseno, *La convenzione di negoziazione assistita per le soluzioni consensuali di separazione e divorzio*, in *Foro it.*, 2015, V, 34.

[4] The negotiation can also cover the modification of the conditions of the separation or the divorce that have been agreed upon in the agreements regulated by the present law and – it is held – also of those that have been established by a decision or agreed upon during the approved consensual separation according o art. 711 of the Italian Code of Civil procedure: see F. Tommaseo, *La tutela dell'interesse dei minori dalla riforma della filiazione alla negoziazione assistita delle crisi coniugali*, in *Fam. e dir.*, 2015, 161 f.

[5] Cfr. F. Tommaseo, op. cit., 163.

to the merit. If the interests of the children are held to be sufficiently protected, the public prosecutor authorizes; otherwise the file is sent to the president of the court within five days.

2.2. The eventual litigation.

The law states nothing on the phase that begins in front of the president of the court and, in this respect, the opinions of the doctrine are not unanimous. Indeed, some authors held that the president, who has to summon the parties within thirty days, can consider the agreement to be adequate and thus approve it or suggest modifications and, in case those are accepted, he can approve whereas, on the contrary, the proceeding comes to an end. Other held, instead, that in case of a lack of agreement, a judicial litigation stage starts with the spouses' consent.

Of course, one has to wait until case law is formed: however, a first indication is offered by the Court of Turin, according to which, when the spouses do not declare to adhere to the public prosecutor's points, the president of the Court invites them to hand in, in a timely manner (in the present case, ten days before the court appearance), the common application for consensual divorce, so that the passing from the new proceeding to the ordinary one takes place.

2.3. The attorney's role.

The attorney, who has to certify that the agreement is not in contrast with mandatory rules and the public order (no mention is made to the morality), has to sent a copy of the agreement – concluded in writing[6] – to the registry officials within ten days, that run from the date of the communication of the clean bill or the authorization.

3. The proceeding in front of the major.

Even more simple – and more affordable, as the presence of attorneys is not necessary – is the proceeding regulated in art. 12 of the new law, moreover usable only by the spouses who do not have minor children or incapacitated or not self-sufficient adult children. In fact, the spouses can conclude «*an agreement of dissolution or termination of the*

[6] «*The agreement that settles the dispute, signed by the parties and the attorneys who represent them, constitutes an enforcement order and is suitable to register the judicial mortgage (art. 5); however, as regards the specific enforcement, considering that the enforcement to obtain the delivery or the release can be based only upon enforcement orders that are judicial in their nature or upon notarized acts or acts by registry officials according to art. 474, paragraph 3 of the Italian Code of Civil Procedure, it is held that an act of public authority is needed*», see P. Farina, op. cit., 525. On this topic, see also E. Fabiani, *Iscrizione di ipoteca giudiziale e conciliazione della controversia*, in *Foro it.*, 2015, V, 40 ff.

civil effects of the marriage» in front of the major, as registry official, of the municipality of residency in which the marriage has been celebrated. The major receives the declaration from the spouses, according to which they intend to divorce, given the conditions (prior agreed upon) and he «*invites them to appear in front of him not prior to thirty days starting from the receipt for the confirmation of the agreement*». Thus, a period of time is foreseen, during which the registry official can control the trustworthiness of the spouses' declarations and the spouses themselves can reflect and, eventually, change their minds.

The agreement "takes the place", i.e. it is equivalent to the judicial decisions that define the proceedings of dissolution of the marriage. The registry official thus has to register the agreement into the registry of the marriage certificates in accordance with art. 63, paragraph 1, g-*ter* of the provisions regarding the national registration and to note it at the margin of the marriage certificate, as foreseen at art. 69, d-*ter* of the provisions regarding the national registration.

3.1. The scope of application.

The proceeding in front of the major, generally welcomed with favor because – as pointed out by many – what began in front of the registry official can come to an end in front of the same official – has nonetheless given rise to many interpretive problems. The most relevant one concerns the possibility that the agreement also contains dispositions of economic nature, given that the law excludes that the agreement can contain «*arrangements of transfer of assets*». In case of a positive solution, still excluding the possibility that the agreement can provide for the transfer of real estate, the question arises whether an agreement, concerning the one-off payment of an amount of money instead of a regular divorce maintenance allowance. Some of the first commentators where oriented in negative sense given the optional nature of the legal assistance, with the consequent possibility of the absence of legal assistance for the weaker spouse, as well as for the lack of control (at least) comparable to the one undertaken by the state's attorney in the proceeding for assisted negotiation, regulated by art. 6. By accepting these critics, the proceeding seems to be intended for the divorce of couples without children, married for a short time and thus without mutual economic demands.

3.2. The circulars of the Ministry of the Interior.

Being aware of the lack of clarity of the norms, the Ministry of the interior has issued two circular letters, with the second one refuting what has been said with the first one, and still not being able to overcome the interpretive problems. In fact, whereas the first circular letter (November 28, 2014 no. 19) substantially accepts the restrictive interpretation described above, excluding the possibility to close agreements having an economic content, the second one (April 24, 2015 no. 6), by expressly declaring that «*it appears appropriate to revisit the already mentioned orientation*», affirms that the provision contained in art. 12 forbids «*agreements on transfer of property*» that have effect to transfer rights in rem, but

that does fall within the prohibition set forth by the norm regarding the obligation to pay a sum of money as periodical allowances (*assegno divorzile*). Moreover, according to the circular letter, the parties can agree upon the modification of conditions previously laid down, whereas the possibility of a single payment with reference to the allowance for the future (*liquidazione* una tantum) is excluded «*as it constitutes a transfer of assets*».

Regardless the poor conceptual stringency, as the payment of a periodic divorce check represents a property allocation, the abovementioned interpretation given by the Ministry – that is, moreover, not binding – and that expanded the area of the agreements, determined a reaction from the attorneys' association who claimed, in front of the administrative court of Lazio, the violation of the defense right of the weaker spouse in case of lack of assistance by an attorney. The administrative court upheld the action[7], providing that broad interpretation of the law would be in contrast with art. 12 of the Constitution for «*violation of the right of defense of those persons who, being in a position of weakness and subjection towards the spouse or towards the social environment in which they live and in which the registry official, authorized to certify the agreements, operate, could be induced to agreements of a patrimonial type that damage the own interest in an area where adequate guarantees are lacking and where, in actually, the registry official cannot get into the merits of the sum that has been mutually decided upon, nor of the adequacy of the same*». In the light of the abovementioned decision, any agreement that, lacking the technical assistance of an attorney, determines a «*financial increase of the subject in favor of which the transfer is made*» seems to be precluded.

[7] Administrative Court of Lazio, Section I-ter, May 3, 2016, nr. 7813.