

# Marital Contracts and Private Ordering of Marriage from the Italian Family Law Perspective

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### Abstract

The essay is centred on the role played by private ordering in regulating the financial terms of marriage dissolution. The Italian legal scholars' attitude regarding this issue has changed over time. It has transformed from a paternalistic perspective, mostly rejecting the spousal parties' freedom, to a novel view that favours an expanded role for contracts to determine the economic terms of separation and divorce. This process has been prompted by the evolution of family law provisions. Private ordering in marital dissolution poses several issues. It entails the need to establish a clear divide between those aspects that can become the subject of an agreement between the spouses, on the one hand, and what is outside the realm of private ordering, on the other. Private ordering also raises concerns regarding (1) the possible condition of bounded rationality by one of the parties at the time the agreement is concluded and (2) the substantive fairness of the terms agreed upon. The paper shows that scholars tend to tackle those risks by resorting to general contract law rules and principles provided by the Italian legal system.

## I. The Role of Private Ordering of Marriage in Light of the Evolution Undergone by Italian Family Law

Scholars have scrutinized the private ordering of marriage under the Italian legal system, and yet it remains highly controversial. The terms of the debate have significantly changed over time due to the evolution of family law rules since the enactment of legge 19 May 1975, no 151, which amended the family law provisions contained in the 1942 Italian Civil Code.<sup>1</sup> Such change was prompted by legge 1 December 1970, no 898 (as amended by legge 6 March 1987, no 74),<sup>2</sup> concerning marriage dissolution through divorce, and more recently by legge 10 November 2014, no 162 (Arts 6 and 12) on consensual resolution of litigation related to separation and divorce.<sup>3</sup>

A traditional scholarly view regards marriage as a *status* in which the

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<sup>1</sup> A. Zoppini, 'L'autonomia privata nel diritto di famiglia, sessant'anni dopo' *Rivista di diritto civile*, I, 213 (2002).

<sup>2</sup> A. Trabucchi, 'Un nuovo divorzio, il contenuto e il senso della riforma' *Rivista di diritto civile*, I, 131 (1987).

<sup>3</sup> See later.

spouses' rights and duties are set by mandatory rules of law.<sup>4</sup> Those rights and duties are therefore beyond the realm of private ordering and, as a consequence, the spouses cannot structure their lives according to their preferences. However, after the enactment of the Italian Constitution, the main features of marriage have changed. The spouses are held as equal in every respect, monetary and non-monetary (Art 29 Italian Constitution). Moreover, marriage itself is seen as a relationship between two individuals, which is aimed at enhancing their personality and boosting their fundamental rights (Art 2 Italian Constitution). The corollary of this change is the so called 'privatization' of family law, a term which denotes the broader role played in this field by party freedom.<sup>5</sup> Indeed, within the frame prescribed by the mandatory rules of law governing marriage (Art 160 Italian Civil Code), the spouses are allowed to regulate their relationship by resorting to agreements (the so called *accordi d'indirizzo*; Art 140 Italian Civil Code) which, nevertheless, are not qualified as contracts.<sup>6</sup>

## II. The Uncertain Boundaries of Contract Under Italian Family Law

Italian scholars have generally been reluctant to resort to the concept of contract to denote the spouses' agreements relating to the monetary aspects of their relationship. This attitude can be explained as an historical perspective that sees marriage as a *status* and rejects, as a corollary, party freedom in this field. The term *marital contract* was in use under the 1865 Italian Civil Code

<sup>4</sup> A. Cicu, 'Lo spirito del diritto familiare nel nuovo codice civile' *Rivista di diritto civile*, I, 3 (1939), and Id, 'Principi generali del diritto di famiglia' *Rivista trimestrale di diritto e procedura civile*, 1 (1955). The evolution undergone by Italian family law is explained by P. Rescigno, 'Interessi e conflitti nella famiglia: l'istituto della mediazione familiare' *Giurisprudenza italiana*, IV, 73 (1995). On the role played by private ordering of marriage under the Italian legal system see also F. Anelli, 'Sull'esplicazione dell'autonomia privata nel diritto matrimoniale', in F. Anelli et al, *Studi in onore di P. Rescigno*, II, *Diritto privato*, 1. *Persone, famiglia, successioni e proprietà* (Milano: Giuffrè, 1998), 13, 16-17; P. Angeloni, *Autonomia privata e potere di disposizione nei rapporti familiari* (Padova: Cedam, 1997), passim; E. Del Prato, *L'autonomia nei rapporti familiari* (Milano: Giuffrè, 1999), passim.

<sup>5</sup> On the nature of those agreements, see P. Zatti, 'Familia, familiae – declinazione di un'idea. La privatizzazione del diritto di famiglia' *Familia*, 9 (2002); M. Fortino, 'Verso una nuova privatizzazione del diritto di famiglia nella società globale' *Rivista di diritto civile*, I, 170 (2003). Indeed, under the Italian legal system the concept of contract is not wide enough to include the agreements aiming at governing the non-monetary aspects of marriage: under the Italian Civil Code a broader notion of *negozio* can be envisaged, a juridical act characterized by voluntariness and subject to the rules applicable to contracts, upon an assessment of their compatibility. See A.C. Jemolo, 'La famiglia e il diritto' *Annali della facoltà giuridica di Catania*, II, 38 (1948).

<sup>6</sup> P. Rescigno, 'I rapporti personali tra i coniugi', in A. Belvedere and C. Granelli eds, *Famiglia e diritto a vent'anni dalla riforma* (Padova: Cedam, 1996), 34. M. Paradiso, 'I rapporti personali tra coniugi', in P. Schlesinger ed, *Il Codice civile, Commentario, Artt. 143-148* (Milano: Giuffrè, 1990), 77; F. Ruscello, 'Relazione introduttiva', in F. Ruscello ed, *Accordi sulla crisi della famiglia e autonomia coniugale* (Padova: Cedam, 2006), 1.

with regard to agreements concluded either between the spouses or between the latter and a third party, characterized by the so-called *causa familiare*<sup>7</sup> the intention to settle the spouses' monetary interests related to marriage. Such term could be found in the 1942 Italian Civil Code provisions, but later was abandoned by legge no 151 of 1975, which, in amending those provisions, adopted instead a different terminology.<sup>8</sup>

Currently, the Italian Civil Code contains specific rules regarding agreements on marital property, known as *convenzioni matrimoniali*.<sup>9</sup> Their scope has been conceived narrower than envisaged under the former provisions. Indeed, those agreements, though qualified by the majority of scholars as contracts, are nevertheless subject to an *ad hoc* legal treatment aimed at achieving financial equality between the spouses and promoting a fair division of property at marriage dissolution. Community property is the default regime which cannot be altered either unilaterally, nor by spouses' agreements. And yet party freedom in this field is given a significant place, at least by the majority of commentators. Not only may the spouses contract out of this regime and opt for the separation of property, they may also establish a regime not recognized by the law, as long as it is consistent with the mandatory law rules (Art 210 Civil Code).<sup>10</sup> Any agreement that modifies or varies the legal regime is not valid unless it is concluded before a notary, and it cannot alter the statutory prescriptions regarding entitlement, assets management and property division. Contrarily, agreements that regulate the duty of economic support set by the law on the wealthier spouse, which in other legal systems are included in the broad category of marital contracts,<sup>11</sup> are not subject to a definite set of rules. Rather, they are referred to by several statutory provisions on separation and divorce proceedings.

Notably, Art 158 Italian Civil Code provides that, in separation proceedings based on the spouses' consent, the latter are allowed to agree on the terms of separation. And, in such case, the court's scrutiny is limited to the parts of the agreements regarding child custody and support, consequently entailing broad freedom of the spouses in determining the economic aspects of their relationship under separation. Nonetheless the majority of scholars have long refused to

<sup>7</sup> G. Doria, *Autonomia privata e "causa" familiare* (Milano: Giuffrè, 1996), 51.

<sup>8</sup> F.D. Busnelli, 'Convenzione matrimoniale' *Enciclopedia del diritto* (Milano: Giuffrè, 1962), VIII, 264, 512; E. Bargelli and F.D. Busnelli, 'Convenzione matrimoniale' *Enciclopedia del diritto. Aggiornamento* (Milano: Giuffrè, 2000), IV, 467.

<sup>9</sup> E. Russo, 'Le convenzioni matrimoniali', in F.D. Busnelli ed, *Commentario, Sub art 159* (Milano: Giuffrè, 2004), 35; E. Quadri, *Famiglia e ordinamento civile* (Torino: Utet, 1999), 135.

<sup>10</sup> G. Oppo, 'Autonomia negoziale e regolamento tipico nei rapporti patrimoniali tra coniugi' *Rivista di diritto civile*, I, 19 (1997). On the same issue, see N. Irti, 'Della comunione convenzionale', in L. Carraro, G. Oppo and A. Trabucchi eds, *Commentario* (Padova: Cedam, 1<sup>st</sup> ed, 1977), 453; M. Confortini, 'La comunione convenzionale tra coniugi', in G. Bonilini and G. Cattaneo eds, *Trattato*, II, *Il regime patrimoniale della famiglia* (Torino: Utet, 1997), 15; G. Oberto, *I contratti della crisi coniugale* (Milano: Giuffrè, 1999), I, 144.

<sup>11</sup> F. Fantetti, 'I contratti matrimoniali' *Famiglia persone e successioni*, 537 (2010).

regard such agreements as contracts,<sup>12</sup> though admitting that they can be deemed subject to the contract law rules regarding defects of consent and incapacity affecting one of the parties.<sup>13</sup> Furthermore, Italian case law and scholars qualify as valid separation agreements transferring (or planning to transfer) property from one spouse to the other, in order to: fulfill the duty of maintenance set by the law on the wealthier spouse; or to compensate the other for loss in her/his earning capacity occurred during marriage (see discussion below); or to settle any economic dispute over division of marital property, etc. These agreements, more generally, may be characterized as the so-called *causa familiare* mentioned above.

At the same time, Arts 4 and 5 legge no 898 of 1970 provide that the spouses may agree on both personal and financial aspects of divorce, in order to remove the divorce proceeding from the adversarial process. In such case, those terms shall be taken into consideration by the court in quantifying the post-marital support due by the wealthier spouse upon divorce.

### **III. The Spousal Parties' Freedom to Regulate Economic Support upon Marriage Dissolution**

Originally, agreements on financial support were deemed valid and binding by legal scholars and courts, but only within the limits prescribed by the mandatory provisions of law regarding such duty. And those limits were seen as stringent, in order to protect the disfavoured spouse. The duty to support a spouse during marriage (Art 143 Italian Civil Code) and upon marriage dissolution (Arts 155 Italian Civil Code and 9 legge no 898 of 1970) was conceived as an inherent and long-lasting feature of the marital relationship. It was a responsibility which could not be waived.<sup>14</sup> Rather, it was regarded as an expression of the principle of solidarity underpinning marriage.

Indeed, this paternalistic perspective almost entirely rejected party freedom, fearing that it would exacerbate socio-economic inequality between the spouses and eventually lead to more people in need of public assistance.<sup>15</sup> Consequently,

<sup>12</sup> See, among others, P. Zatti, 'I diritti e i doveri che nascono dal matrimonio e la separazione dei coniugi', in P. Rescigno ed, *Trattato di diritto privato* (Torino: Utet, 1996), III, 138, and E. Russo, 'Negozio giuridico e dichiarazioni di volontà relative ai procedimenti "matrimoniali" di separazione, di divorzio e di nullità' *Diritto di famiglia e delle persone*, 1079 (1989).

<sup>13</sup> See Corte di Cassazione 4 September 2004 no 17902, *Guida al diritto*, 38 (2004), stressing that in separation proceedings based on the spouses' agreements the latter consent is essential, while on the contrary the judicial order is needed only in order to make those agreements enforceable.

<sup>14</sup> C. Coppola, 'Le rinunzie preventive all'assegno post-matrimoniale' *Famiglia, persone e successioni*, 54 (2005).

<sup>15</sup> F.D. Busnelli, 'Libertà e responsabilità dei coniugi nella vita familiare' *Rivista di diritto civile*, I, 119, 131 (1973); M. Bin, *Rapporti patrimoniali tra coniugi e principio di uguaglianza* (Torino: Utet, 1971), 149; G. Gabrielli, 'Indisponibilità preventiva degli effetti patrimoniali del divorzio: in difesa dell'orientamento adottato dalla giurisprudenza' *Rivista di diritto civile*, I,

regulating the economic aspects of marriage and marriage dissolution was regarded as a prerogative of public ordering through mandatory operation of legal rules. Conversely, marriage-like relationships (same sex or opposite sex couples) were almost entirely governed by party freedom. Cohabitation contracts were the only means to which those couples could resort in order to regulate the monetary aspects of their relationship (entitlement and division of property, support during the cohabitation and upon its dissolution, etc).<sup>16</sup> Given the historical lack of statutory provisions (until recently, when those provisions have been introduced by legge 20 May 2016, no 76 on same sex civil unions and *de facto* relationships)<sup>17</sup> scholars called for the enactment of rules to protect the economically disadvantaged party, especially upon the relationship's dissolution.

More recently such a view has been questioned by an emerging perspective that favours the role of contracts in regulating the financial aspects of marriage. Party freedom is seen as an expression of marriage equality and as a means to promote gender justice (see discussion below). Indeed, some argue that the statutory provisions on separation and divorce proceedings allow the spouses to agree on the economic terms of separation and divorce (Art 158 Italian Civil Code and Arts 4 and 5 legge no 898 of 1970).<sup>18</sup> In addition, agreements regarding the support obligation upon marriage crisis can be deemed valid and binding even though they are concluded after separation or divorce.<sup>19</sup> As previously stated, separation agreements are regarded as an expression of party freedom, and consequently they are binding irrespective of a judicial order. Such conclusion suggests that the spouses are allowed not only to implement the terms agreed upon during the separation procedure, but also to vary or modify them.<sup>20</sup>

Nevertheless, any such agreement must be consistent with the mandatory provisions of law regarding marital support.<sup>21</sup> Italian legal scholars have long

695, 689 (1996); C. Rimini, 'La tutela del coniuge più debole fra logiche assistenziali ed esigenze compensative' *Famiglia e diritto*, 412 (2008).

<sup>16</sup> F. Gazzoni, *Dal concubinato alla famiglia di fatto* (Milano: Giuffrè, 1983), 172; P. Perlingieri, 'La famiglia senza matrimonio tra l'irrelevanza giuridica e l'equiparazione alla famiglia legittima' *Rassegna di diritto civile*, 601 (1988); E. Quadri, 'Rilevanza attuale della famiglia di fatto ed esigenze di regolamentazione', in Id, *Famiglia e ordinamento civile* (Torino: Utet, 1998), 27; E. Roppo, 'Come tutelare la famiglia di fatto?' *Politica del diritto*, 26 (1980).

<sup>17</sup> See M. Sesta, 'Unione civile e convivenze: dall'unicità alla pluralità dei legami di coppia' *Giurisprudenza italiana*, 1792 (2016).

<sup>18</sup> T. Auletta, 'Gli accordi sulla crisi coniugale' *Famiglia*, I, 45, 56 (2003); L. Barbiera, *I diritti patrimoniali dei separati e dei divorziati* (Milano: Giuffrè, 2001), 120; F. Anelli, 'Sull'esplicazione dell'autonomia privata nel diritto matrimoniale' n 4 above, 50.

<sup>19</sup> P. Pollice, 'Autonomia dei coniugi e controllo giudiziale nella separazione personale: il problema degli accordi di separazione non omologati' *Diritto e giurisprudenza*, 112, 116 (1988); G. Ceccherini, 'Separazione consensuale e contratti tra coniugi' *Giustizia civile*, II, 378, 398 (1996); T.V. Russo, 'Divorzio "consensuale" e revoca del consenso' *Rassegna di diritto civile*, 853, 865 (1999).

<sup>20</sup> L. Balestra, 'Autonomia privata e crisi coniugale: gli accordi in vista della separazione', in F. Ruscello ed, *Accordi sulla crisi della famiglia e autonomia coniugale* n 6 above, 77, 83.

<sup>21</sup> P. Rescigno, 'Autonomia privata e limiti inderogabili nel diritto familiare e successorio'

argued over the role played by private ordering in this field, particularly in relation to the limits imposed by the statutory family law provisions concerning marital support over marriage crisis. This uncertainty implies a need to establish a clear divide between those aspects which can become the subject of an agreement between spouses and those residing outside the realm of private ordering.

Many scholars do agree on the theoretical premise that party freedom cannot alter the available grounds for claiming marital support under separation or divorce. Nor can they change the criteria set by the law for the quantification of such support. The spouses may only 'agree on the determination' of the support obligation.<sup>22</sup> However, despite this traditional distinction, the boundary between agreements that settle the parties' rights based on the law and those that conversely alter the rules of law (and therefore are void) cannot be easily drawn.<sup>23</sup> This ambiguity demonstrates the need to devise a clearer line between what may be contracted and what may not.

In the attempt to reach some clarity, a scholarly perspective argues that, considering the wide scope granted to private ordering by family law rules, in principle the spouses should be regarded as free to determine the financial consequences of marriage dissolution, although within the limits set by such rules. According to this view, contracts that settle one spouse's right to claim economic support upon separation are valid, unless they result in a substantive waiver (either explicit or implied) of such right. This is the case, when the spouse is left in a condition of financial need. This doctrine imposes the same limit on contracts regulating the support obligation of one of the spouses towards the other upon divorce. Under the relevant statutory provisions, in case of separation or divorce, the spouse who lacks adequate assets and income and has little or any earning capacity, in the absence of his or her fault, shall be granted by the court the same economic standard of living enjoyed during marriage (the so called right to maintenance).<sup>24</sup> Conversely, being in a condition of financial need is the requirement set by the Italian Civil Code to claim alimony. In marriage relationships such right is granted to satisfy the basic economic needs of the spouse whose behaviour contrary to the marriage duties has caused the marriage's crisis. The right to seek alimony represents a minor form of solidarity (compared to the right to claim maintenance) and a limit to the spouses' party freedom.<sup>25</sup> Given its function, it cannot be waived neither unilaterally nor by

*Familia*, 439 (2004).

<sup>22</sup> See G. De Nova, 'Disciplina inderogabile dei rapporti patrimoniali e autonomia negoziale', in G. De Nova et al, *Studi in onore di P. Rescigno, Diritto privato* (Milano: Giuffrè, 1998), II, 259, 263, and E. Russo, 'Le convenzioni matrimoniali' n 9 above, 39.

<sup>23</sup> As argued by E. Bargelli, 'L'autonomia privata nella famiglia legittima: il caso degli accordi in occasione o in vista del divorzio' *Rivista critica di diritto privato*, 303, 323 (2001).

<sup>24</sup> See Corte di Cassazione-Sezioni unite 29 October 1990 no 11490, *Foro italiano*, I, 67 (1991), annotated by M.C. Bianca, 'Natura e presupposti dell'assegno di divorzio: le Sezioni Unite della Cassazione hanno deciso' *Rivista di diritto civile*, II, 221 (1991).

<sup>25</sup> F. Anelli, 'Sull'esplicazione dell'autonomia privata nel diritto matrimoniale' n 4 above,

agreement.

Simultaneously, another prominent view advocates a change in the terms under which the agreements should be regarded. It emphasizes the evolution undergone by family law rules and also underscores the fact that party freedom manifests the equality between the spouses.<sup>26</sup> It is no longer questionable that spousal parties are allowed to settle the financial terms of their relationship in case of marriage crisis.<sup>27</sup> Nonetheless those terms shall be scrutinized by the courts in order to assess, not only whether they comply with public policy principles and rules, but also whether they are fair and reasonable under relevant principles, notably, under the concept of solidarity.<sup>28</sup> This perspective signals a significant departure: the debate over party freedom in marital contracts is no longer centred on their consistency with public policy principles; instead it is focused on the issue of their fairness (see *ultra*).

#### IV. The *Rebus Sic Stantibus* Principle Underpinning Marital Contracts

Most scholars share the opinion that agreements regarding the financial support obligation are subject to revocation or modification in case of subsequent, material change of the circumstances existing at the time those contracts were made.<sup>29</sup> According to the law, the judicial order settling the economic terms of separation or divorce can be subsequently reviewed by the court when review is deemed reasonable. The right to seek revocation or modification should be granted upon every and any variation of the circumstances which were taken into account by the court when it determined the support obligation under the criterion of the standard of living enjoyed during marriage (Art 156 Italian Civil Code and Art 9, para 1, legge no 898 of 1970).<sup>30</sup> This right cannot be waived.<sup>31</sup>

44 and M. Comporti, 'Autonomia privata e convenzioni preventive di separazione, di divorzio e di annullamento del matrimonio' *Foro italiano*, V, 115 (1995), according to whom, unlike the right to maintenance, the right to seek alimony cannot be waived.

<sup>26</sup> This opinion is shared by G. De Nova, 'Disciplina inderogabile dei rapporti patrimoniali e autonomia negoziale' n 22 above, 263 and M. Comporti, n 25 above, 113.

<sup>27</sup> M.R. Marella, 'La contrattualizzazione delle relazioni di coppia. Appunti per una rilettura' *Rivista critica di diritto privato*, 57 (2003) and G. Ferrando, 'Il matrimonio', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2015), 131, both of them calling for a stringent scrutiny of fairness by the courts.

<sup>28</sup> P. Rescigno, 'Autonomia privata e limiti inderogabili nel diritto familiare e successorio' n 21 above, 439; G. Autorino Stanzione, *Diritto di famiglia* (Torino: Giappichelli, 2003), 199; T.V. Russo, 'Il potere di disposizione dei diritti inderogabili. Riflessioni sul giudizio di meritevolezza degli accordi prematrimoniali regolativi della crisi della famiglia' *Rassegna di diritto civile*, 458, 474-483 (2014).

<sup>29</sup> See T. Auletta, 'Gli accordi sulla crisi coniugale' n 18 above, 58; F. Anelli, 'Sull'esplicazione dell'autonomia privata nel diritto matrimoniale' n 4 above, 54.

<sup>30</sup> G. Bonilini, 'L'assegno post-matrimoniale', in G. Bonilini and F. Tommaseo eds, *Lo scioglimento del matrimonio* (Milano: Giuffrè, 3<sup>rd</sup> ed, 2010), 585; L. Barbiera, *I diritti patrimoniali dei separati e dei divorziati* (Torino: Giappichelli, 2001), 31.

<sup>31</sup> P. Angeloni, *Autonomia privata e potere di disposizione nei rapporti familiari* n 4 above,

This statutory provision is explicitly addressed to the adversarial procedures of separation and divorce. Nevertheless, scholars and courts also deem it applicable to the spouses' agreements regarding financial support upon marriage dissolution. According to this view, a principle (the so called *rebus sic stantibus* principle) underpins every contract between spouses: each party has the right to seek revocation or modification of the terms in case of subsequent material change of the circumstances under which those terms were agreed upon, irrespective of the presence of an explicit hardship clause. Traditionally, such principle has been regarded as evidence that marital agreements are inherently different from contracts concluded between ordinary parties. While the latter have the same binding force of the law (Art 1372 Italian Civil Code), conversely the former are not able to reach the goal of finality and predictability.

However, more recently some scholars claim that a similar principle applies to every contract. Under the general duty of good faith, in case of subsequent unforeseeable events resulting in a disadvantage to one of the parties, the disadvantaged party has the right to claim modification of the contract terms.<sup>32</sup> Such argument undermines the doctrine advocating that marital agreements do not belong to the area of general contract law.

On the other hand, finality is not a goal that is beyond the reach of marital agreements. Indeed, the spouses are allowed to agree on terms purporting to be a 'final' settlement of the support obligation and to exclude the possibility of future variation or modification. Nevertheless, under the law (see Art 5, para 8, legge no 898 of 1970), contracts that provide for a single lump sum payment from one spouse to the other (or a transfer of property, a waiver, etc) shall undergo a judicial fairness test in order to secure finality.<sup>33</sup> Only a positive fairness assessment by the court prevents each spouse from obtaining the revocation or modification of the economic support agreed upon. Hence, the parties' intention to reach a final agreement can be fulfilled, but is still subject to judicial scrutiny.<sup>34</sup> Such a provision cannot *per se* be regarded as proof of the peculiarity of marriage contracts in comparison with every other sort of contract. According to a prominent scholarly view, the judicial review of contractual terms should be envisaged under the general duty of good faith and those contractual terms should be rejected any time they cannot be considered as fair and equitable.<sup>35</sup>

355; A. Zoppini, 'Contratto, autonomia contrattuale, ordine pubblico familiare' *Giurisprudenza italiana*, I, 1323, 1319 (1990); G. Ceccherini, 'Separazione consensuale e contratti tra coniugi' *Giustizia civile*, II, 378, 398 (1996).

<sup>32</sup> See F. Macario, 'Rischio contrattuale e rapporti di durata nel nuovo diritto dei contratti: dalla presupposizione all'obbligo di rinegoziare' *Rivista di diritto civile*, I, 63 (2002).

<sup>33</sup> E. Quadri, 'Autonomia dei coniugi e intervento giudiziale nella disciplina della crisi familiare' *Famiglia*, 6 (2005).

<sup>34</sup> T. Auletta, 'Gli accordi sulla crisi coniugale' n 18 above, 56; A. Nardone, 'Autonomia privata e controllo del giudice sulla disciplina convenzionale delle conseguenze del divorzio' *Famiglia*, 133 (2003).

<sup>35</sup> See F.D. Busnelli, 'Note in tema di buona fede ed equità' *Rivista di diritto civile*, I, 537



Those doctrinal arguments show a clear trend: on the one hand, party freedom has a broad scope in regulating the economic aspects of marriage; on the other hand, marriage contracts can be deemed as subject to the same rules that are applicable to any contract<sup>36</sup> and to the principles that underpin every manifestation of party freedom (eg the duty of good faith).

## V. Prenuptial (or Post-Nuptial) Agreements and the Evolution of Family Law

The enactment of legge no 162 of 2014 (Arts 6 and 12) prompted the view described above. This law adjoins to the spouses' separation and divorce agreements certain legal effects that are similar to those deriving from a judicial order. It also pre-supposes that the bargaining process has taken place with the assistance of an independent legal representative. In such case the judicial scrutiny is limited to the contract terms affecting the interests, either personal or monetary, of the children that are minor, disabled or not economically self-sufficient.<sup>37</sup>

Legal scholars have not yet explored the impact that such law has had on the role of private ordering in the field of marriage dissolution. The fact that spousal agreements can entirely govern a marriage crisis enhances the proximity of family law to general contract law rules. Furthermore, this fact is also relevant to the controversial issue of the validity of prenuptial (or postnuptial) agreements in contemplation of divorce.<sup>38</sup> These contracts aim at settling the financial consequences of marriage dissolution before it occurs. In practice, such contracts are often entered into during separation and in view of divorce, given that under Italian law separation and divorce represent different stages of marriage dissolution. Traditional doctrinal opinion and the relevant case law qualify prenuptial or postnuptial agreements as void. They are regarded as contrary to the public policy principle that forbids any form of bargaining related, either directly or indirectly, to marital *status*. Under this principle, consent to

(2001); see Corte di Cassazione 18 September 2009 no 2010, *Contratti*, 5 (2010) and, more recently, Corte Costituzionale ordinanza 21 October 2013 no 248, *Contratti*, 927 (2014), annotated by G. D'Amico.

<sup>36</sup> G. Oberto, 'Simulazione e frodi nella crisi coniugale (con qualche accenno storico ad altri ordinamenti europei)' *Famiglia*, 774 (2001); A. Arcieri, 'Il consenso nella separazione personale, tra diritto al ripensamento, impugnazione per vizi della volontà e procedimento di modifica' *Famiglia e diritto*, 1131 (2008).

<sup>37</sup> M.N. Bugetti, 'Separazione e divorzio senza giudice; negoziazione assistita da avvocati e separazione davanti al sindaco' *Famiglia e diritto*, 515, 521 (2015); Id, *La risoluzione extragiudiziale del conflitto coniugale* (Milano: Giuffrè, 2015), passim.

<sup>38</sup> G. Oberto, *I contratti della crisi coniugale* n 10 above, 493; Id, '«Prenuptial agreements in contemplation of divorce» e disponibilità in via preventiva dei diritti connessi alla crisi coniugale' *Rivista di diritto civile*, II, 171 (1999). See also E. Bargelli, 'L'autonomia privata nella famiglia legittima: il caso degli accordi in occasione o in vista del divorzio' n 23 above, 303.

separation or divorce shall be given by both spouses freely, in other words, without coercion or exchange of consideration. Again, according to this position, such contracts are inconsistent with the statutory family law provisions on post-marital support, which are heavily laden with mandatory rules.

Notably, in the past, Italian courts considered such agreements as invalid, based on the above described grounds. Under this outlook every agreement concluded in contemplation of divorce is void, irrespective of its content and even though it may set economic terms that are advantageous to the spouse having the right to claim maintenance.<sup>39</sup> Only more recently has Italian case law partially phased out of this approach. On the one hand, courts have ruled that the wealthier spouse is not entitled to claim the invalidity of the agreement;<sup>40</sup> on the other hand, judges have deemed valid the agreements aimed at settling disputes between the spouses arising from facts that occurred before the marital crisis started (for example, transfer of property from one spouse to the other agreed in exchange for the money lent by the latter to the former during marriage, etc).<sup>41</sup>

The prevailing scholarly view criticizes those arguments, claiming that regulating the financial consequences of marriage dissolution does not constitute bargaining over the marital *status*, given the fact that those type of agreements do leave each spouse free to deny his or her consent to divorce. Furthermore, the assumption that regulating the duty of post-marital support is beyond the realm of party freedom shall be rejected, for the reasons above mentioned.

On the contrary, more substantial is the scholarly opinion fearing that the spouses, when negotiating with each other, are not fully aware of the rights and duties arising from the marriage dissolution or that the terms agreed upon may be unfair in light of changed circumstances, given the fact that those agreements have been entered into (sometimes long) before the crisis. Such argument, however, is not persuasive. Party freedom implies the risk of exploitation of one spouse's vulnerabilities and the inequality of bargaining power; still, this only entails that those risks shall be addressed by resorting to the available remedies under the legal system.

In addition to these arguments, the view that claims the invalidity of the

<sup>39</sup> See Corte di Cassazione 11 June 1997 no 5244, *Giurisprudenza italiana*, 218 (1998) and, more recently, Corte di Cassazione 30 January 2017 no 2224, in [www.dejure.it](http://www.dejure.it).

<sup>40</sup> See Corte di Cassazione 14 June 2000 no 8109, annotated by L. Balestra, 'Gli accordi in vista del divorzio: la Cassazione conferma il proprio orientamento' *Corriere giuridico*, 1023 (2000) and F. Angeloni, 'La cassazione attenua il proprio orientamento negativo nei confronti degli accordi preventivi di divorzio: *distinguishing o perspective overruling?*' *Contratto e impresa*, 1136 (2000).

<sup>41</sup> See Corte di Cassazione 21 December 2012 no 23713 (on the duty of one spouse, upon separation, to return the money borrowed from the other), *Famiglia e diritto*, 321 (2013), annotated by G. Oberto, 'Gli accordi prematrimoniali e la Cassazione, ovvero quando il *distinguishing* finisce nella *haarspaltemaschine*' *Contratti*, 221 (2013); Corte di Cassazione 21 August 2013 no 19304, *Diritto di famiglia e delle persone*, 577 (2014) and Corte di Cassazione 20 August 2014 no 18066, *Foro italiano*, I, 567 (2015).

spouses' agreements in contemplation of divorce can no longer be considered as grounded in law. After the enactment of legge no 162 of 2014, agreeing on the existence of the requisites of separation or divorce and regulating the economic terms of marriage dissolution cannot *per se* be regarded as being against any public policy principle; the spouses are free to express their consent either before or after the crisis occurred.

It follows that a contract in contemplation of the marriage crisis can be deemed void as contrary to public policy only when it is proved that the spouse's consent was not given freely.<sup>42</sup> In every other respect, these sorts of contracts are subject to the same limits set by the law with regard to every marital contract. As a consequence, clearly spouses may settle the financial consequences of separation or divorce and agree on terms that seek to be final and therefore cannot be subsequently modified nor varied. At the same time, the parties may agree on the economic aspects of the marriage crisis, contemplating both separation and divorce. This may be held true because under the Italian legal system, separation and divorce represent two different stages of this crisis and yet recently legge 6 May 2015 no 55<sup>43</sup> drastically reduced the duration of separation in order to secure divorce (requiring a year length in case of separation through adversarial process and six months in the opposite case), consequently blurring the difference between those stages.

In addition, such agreements may be seen as an indispensable means to arrange the consequences of marriage dissolution before the marriage or before the crisis occurs, as seen in several foreign legal systems. Notably, the spouses may resort to those agreements, in order to plan a transfer of property from one party to the other or to assign to one of the spouses financial support which is greater than that to which the disfavoured spouse would be entitled under the law. In practice, those agreements compensate the latter for any loss in earning capacity, due to an unequal distribution between the spouses of the burden related to child rearing and, more generally, to family caretaking. Indeed, a common feature of marriage has one of the spouses investing in increasing his or her earning capacity, while the other is primarily involved in children rearing and domestic jobs.<sup>44</sup> Since the role of primary children or family caretaker is often held by women, such issues normally result in a matter of gender inequality.<sup>45</sup> The statutory provisions regulating the support obligation upon divorce are not adequate to award full compensation for such loss. The right to claim support aims at securing the economically disfavoured spouse the same

<sup>42</sup> M.R. Marella, 'La contrattualizzazione delle relazioni di coppia' n 26 above.

<sup>43</sup> R. Lombardi, 'Si abbrevia la distanza tra separazione e divorzio' *Diritto di famiglia e delle persone*, 325 (2016).

<sup>44</sup> R. Leckey, 'Relational Contracts and Other Model of Marriage' 40(1) *Osgoode Hall Law Journal*, 1-47 (2002).

<sup>45</sup> See, M. Ertman, 'Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements' 77 *Texas Law Review*, 17, 18-20 (1998).

standard of living enjoyed during marriage (Art 5, para 6, legge no 898 of 1970). In quantifying the amount due, the court does not consider the lack of investment in earning capacity by one of the spouses and the related increase in this capacity by the other, for the reason that such increase normally results in incomes that do not yet exist at the time when the divorce terms are settled.<sup>46</sup> Concurrently, community property, which represents a means to promote financial equality between the spouses through a fair division of property upon marriage dissolution, is a default regime from which the spouses may opt out. And the experience shows that a vast majority of the couples do resort to this option.

## **VI. Marital Contracts and the Issue of Procedural and Substantive Fairness**

Many scholars express concerns regarding the possible lack of information and bounded rationality by one of the parties at the time the prenuptial agreements are concluded, which can lead to inequality of bargaining power or inability to foresee subsequent events that may render the agreement substantially disadvantageous to one of the parties.<sup>47</sup> More generally, the broader role given to private ordering in regulating the financial aspects of marriage and marriage dissolution raises concerns about the possible distortion of bargaining power due to the unique emotional dynamics between spouses. Indeed, contracting between spouses creates the risk that one may be the victim of coercion and overreaching by the other. One party may threaten the other with a tough position regarding the issue of child custody in order to obtain an unfair advantage over the other spouse (eg a waiver of the right to claim maintenance) or may exchange the other's consent on the same issue with the promise of a generous financial support.

Beside the concern that such agreements may be contrary to public policy (and therefore void), spouses, when contracting with each other, may act with less caution than they would ordinarily exercise with a different contracting party. It is likely that most parties enter marriage ignorant of the rights and duties of marriage, and that they are unaware of the rules governing separation and divorce. Therefore, their consent to alter those rules or waive their rights cannot be deemed informed and knowing. This is often the case with agreements wherein spouses opt out of the community property regime. In addition, the

<sup>46</sup> Corte Costituzionale 11 February 2015 no 11, *Famiglia e diritto*, 537 (2015), annotated by E. Al Mureden, 'Assegno divorzile, parametro del tenore di vita coniugale e principio di autoresponsabilità' *Famiglia e diritto*, 538 (2015).

<sup>47</sup> A. Zoppini, 'L'autonomia privata nel diritto di famiglia, sessant'anni dopo' n 1 above, 213, 234; M.R. Marella, 'La contrattualizzazione delle relazioni di coppia' n 27 above, 100 and T. Auletta, 'Gli accordi sulla crisi coniugale' n 18 above, 58.

parties' bounded rationality at the time of the conclusion of the agreement may prevent them from taking into proper account subsequent events that are likely to occur, like unemployment, birth of a child, illness, etc.<sup>48</sup> In essence, the unique context of the spouses' bargaining position (their 'inherent vulnerabilities') calls for high standards of procedural and substantive fairness.

Given those risks, as already stated, many scholars advocate the invalidity of agreements concluded in contemplation of marriage dissolution, but similar concerns arise in case of separation and divorce agreements.<sup>49</sup> This is due to the lack of specific statutory family law provisions, particularly of the kind that have been enacted in other legal systems.<sup>50</sup> Moreover, there are no procedural safeguards in place in the Italian legal system with regard to agreements (the so-called *convenzioni matrimoniali* above mentioned) through which spouses opt out of the legal regime of community property. This is unlike other systems where those safeguards are in place.<sup>51</sup>

Such concerns suggest a need for careful scrutiny of marital agreements for procedural and substantive fairness. In essence, the broad role of private ordering of marriage requires an accommodation between party freedom (whose undoubted benefits are efficiency and predictability) and the need to set limitations and constraints on such freedom, given the special context in which bargaining over the terms of family relationships tends to occur. It follows that in marital contracts the weaker party should be allowed to resort to the remedies available – in every case of inequality of bargaining power and lack of substantive fairness – under general contract law, as interpreted by Italian scholars.<sup>52</sup> In the Italian legal system, procedural constraints on party freedom and safeguards to protect the vulnerable spouse, even though not explicitly prescribed by any statutory family law provision, can be identified on the basis of general contract rules that govern party freedom, irrespective of the area where the latter is expressed.

Alongside the rules governing defect of consent, every party bears a duty of

<sup>48</sup> B.A. Atwood, 'Marital Contracts and the Meaning of Marriage' 54 *Arizona Law Review*, 11 (2012).

<sup>49</sup> E. Bargelli, 'L'autonomia privata nella famiglia legittima' n 23 above, 324-328.

<sup>50</sup> E. Al Mureden, 'I prenuptial agreements negli Stati Uniti e nella prospettiva del diritto italiano' *Famiglia e diritto*, 543 (2005); M. Panforti, 'Gli accordi patrimoniali fra autonomia dispositiva e disuguaglianza sostanziale. Riflessioni sul *Family Law Amendment Act 2000* Australiano' *Familia*, 153 (2002).

<sup>51</sup> N. Dethloff, 'Contracting in Family Law: A European Perspective', in K. Boele-Woelki et al eds, *The Future of Family Property in Europe* (Cambridge: Intersentia, 2011), 65, 76.

<sup>52</sup> G. Ferrando, 'Il matrimonio' n 27 above, 132, claiming that, under the duty of good faith (Arts 1337 and 1375 Italian Civil Code), the spouse who exploits the other's condition of inequality of bargaining power may be deemed liable. This conclusion is grounded on the principles underpinning the European private law: Art. II.-7:207 of the Draft Common Frame of Reference (available at <https://tinyurl.com/3kldjxf> (last visited 15 June 2017)), on the 'Unfair Exploitation', and Art 4:109 of the Principles of European Contract Law (available at <https://tinyurl.com/yc33n8r8e> (last visited 15 June 2017)) on Excessive Benefit or Unfair Advantage. See also F. Anelli, 'Sull'esplicazione dell'autonomia privata nel diritto matrimoniale' n 4 above, 48.

good faith and fair dealing (Art 1337 Italian Civil Code).<sup>53</sup> In addition, in contracts between a trader and a consumer or between traders, in case of inequality of bargaining power, the law explicitly requires the party that lacks information or awareness to be informed by the other party in clear language and in writing about the factual aspects and rights which are the subject matter of their agreement. Similarly, when contracting with each other, the spouses have a duty of good faith and fair dealing. Such duty is paramount, given that the special relationship between them shall be based on the principle of solidarity (Art 2 Constitution), which underpins marriage even at the time of its dissolution.<sup>54</sup> It follows an obligation of full financial disclosure and frankness. At the same time, it can be argued that each spouse bears a duty of care towards the other, at least where the former knew or should have known that the latter was not aware of his or her rights under family law rules.

Legge no 162 of 2014 contains provisions regarding independent legal counselling in negotiations leading to the conclusion of separation or divorce agreements (Arts 4 and 6). Those provisions' main purpose is encouraging private consensual resolution by imbuing those agreements with the same legal consequences arising from judicial orders of separation and divorce. This law reflects a specific policy prompted by the need to reduce the substantial backlog affecting civil courts. Legge no 162 of 2014 does not explicitly set any procedural requirement, nor provides any judicial review of the parts of the agreements that delineate the spouses' economic rights. Such a feature represents a major difference between legge no 162 of 2014 and the provisions contained in Art 2067 of the French Civil Code (which is the model that inspired Italian legislators). According to this provision the enforcement of the spouses' agreements is subject to the courts' scrutiny of their voluntariness and substantive fairness regarding not only child custody and child support, but also the spouses' financial rights and obligations.<sup>55</sup>

Nevertheless, the fact that legge no 162 of 2014 (Art 6, para 1) requires that each party be advised by an independent legal representative also implies that the same representative has a duty to transfer knowledge about the assisted spouse's legal rights and to explain the consequences of any waiver of the latter's rights under the law. Moreover, this law requires the legal representative to act pursuant to a duty of good faith, entailing, as a consequence, a duty of

<sup>53</sup> M.N. Bugetti, 'Nuovi modelli di composizione della crisi coniugale tra *collaborative law* e tutela della libertà negoziale' *La nuova giurisprudenza civile commentata*, II, 282 (2013).

<sup>54</sup> P. Zatti, 'I rapporti personali tra coniugi e la separazione', in P. Rescigno ed, *Trattato di diritto privato* (Torino: Utet, 1999), III, 36.

<sup>55</sup> G.A. Parini, 'La negoziazione assistita in ambito familiare e la tutela dei soggetti deboli coinvolti' *La nuova giurisprudenza civile commentata*, II, 602, 603-605 (2015); G. Giaino, 'Stato coniugale e volontà delle parti nella crisi della famiglia. Brevi note comparatistiche in tema di negoziazione assistita' *Diritto di famiglia e delle persone*, 1515 (2015). See also M. Ryznar and A. Stepień-Sporek, 'To Have and to Hold: Premarital Agreements in the Comparative Context' *13 Chapelle Law Review*, 27, 42-62 (2009).

care not only towards the assisted spouse, but also towards the other. The breach of those duties may result in the legal representative's liability.<sup>56</sup>

This law seems to suggest a duty of transparency underlying negotiations between the spouses, similar to the duty provided by the law on commercial contracts. However, a duty of transparency can already be partially envisaged under Art 161 Italian Civil Code, which requires that in agreements on marital property, the parties may choose the governing law, on condition that the provisions of such law are not merely referred to, but are included in the drafting by the notary, so that both spouses can be fully aware of their rights and duties under this law.<sup>57</sup> Consequently, it can hardly be denied that similar or major safeguards are in place with respects to contracts negotiated under legge no 162 of 2014, given the role played by the legal representative and the duties imposed on the parties.

As to the issue of substantive fairness of marriage contracts, it has been argued that those contracts are subject to the *rebus sic stantibus* principle (see discussion above), to ensure that they are equitable at the time of the execution.

With regard to agreements purporting to be final, as previously mentioned, judicial review is provided by Art 5, comma 8, legge no 898 of 1970. This provision enables courts to assess the proportionality of the terms agreed upon, considering not only the circumstances and the parties' condition at the time when the agreement was concluded, but also their fairness in light of a possible change of circumstances that are foreseeable.<sup>58</sup> By doing so, the court can tackle the risk of bounded rationality by one of the parties, due to information asymmetry or lack of bargaining skills, which might prevent the same party from foreseeing subsequent predictable events.

## VII. Conclusion

Considering the evolution of family law provisions in Italian law, it is no longer questionable that spouses may negotiate the financial terms of their relationship in case of marriage crisis. As explained herein, such an outcome is a corollary of the change in the main features of marriage, prompted by those provisions. Furthermore, private ordering represents a means to pursue the

<sup>56</sup> S. Delle Monache, 'Profili civilistici della negoziazione assistita' *Giustizia civile*, 105 (2015).

<sup>57</sup> F. Bocchini, 'Autonomia negoziale e regimi patrimoniali familiari' *Rivista di diritto civile*, 431, 453 (2001).

<sup>58</sup> According to a scholarly view, the court, in assessing whether the terms agreed upon by the spouses are fair, shall base its scrutiny on the current conditions of the recipient (age, illness, earning capacity, education, likeliness of being engaged in a future marriage, etc), in order to evaluate whether in light of the foreseeable evolution of those conditions, the terms are adequate to ensure her/him a decent standard of living. On this issue, see V. De Paola, *Il diritto patrimoniale della famiglia coniugale* (Milano: Giuffrè, 2002), 297 and A. Finocchiaro and M. Finocchiaro, *Diritto di famiglia* (Milano: Giuffrè, 1988), 452.

equality between the spouses that may have been altered during marriage, especially due to the distribution burden related to child rearing and family caretaking.

However, the broader role given to party freedom brings about the need to set a clear line between what parties' may freely negotiate and what may not. Italian civil law continues to limit the parties' freedom in order to ensure that marriage dissolution does not lead one of the spouses to an economically disadvantageous condition.

Party freedom also potentially risks the exploitation of one spouse's vulnerabilities and inequality of bargaining power. This requires a change of perspective by courts and legal scholars. In the realm of private ordering, their attention should be centred on the issue of procedural and substantive fairness of marital contracts, in line with an analogous trend that can be registered in other legal systems.<sup>59</sup>

<sup>59</sup> See M. Martin Casals and J. Ribot eds, *The Role of Self-Determination in the Modernization of Family Law in Europe* (Girona: Documenta Universitaria, 2006), and J.M. Sherpe ed, *European Family Law. Family Law in a European Perspective* (Cheltenham, UK, and Northampton, MA, USA: Edward Elgar, 2016).