Essays

The Italian Marriage: Crisis or Tradition?

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Abstract

Numerous reforms of Italian family law have been enacted in recent years regarding marriage, which reinforce the freedom of the spouses and which have provoked a crisis of the institution itself. The tendency emerging from the new laws reveals an accentuation of the married couple's autonomy and of the public authority's limited role in the different phases of marriage. During the formation of the marital bond, the prospective spouses have greater freedom while the officiating public functionary has a role of mere certification and control. During the marriage itself, the spouses have greater freedom in regulating their personal relations and their property rights. In the event of dissolution, new procedures allow the spouses to separate or divorce without going to court. The 'crisis' of the marital relationship may be also caused by the introduction of laws which provide other models for couples (civil unions between persons of the same sex and cohabitation). Nevertheless, in noting the few yet significant differences in the law between marriage and civil unions, it appears that the legislative intent is to preserve certain 'traditional' aspects of marriage.

I. Introduction

The concept of 'crisis', widely used in various sectors of Italian law, presents an interesting starting point for reflection within the field of family law.

The expression marital crisis is used with reference to the institutions which offer a remedy for the failure of a marriage, which is separation or divorce. The same concept is also resorted to with regard to the nullity of a marriage.

Furthermore, the 'crisis of the traditional family' is mentioned in confronting the emerging and new formations which are recognised as families, even though they lack the typical characteristics of the family founded upon marriage.[1] In addition to persons who cohabit together as a family, the reference includes the same-sex family, the so-called step family, and the single parent family.[2]

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[1] L. Mengoni 'La famiglia in una società complessa' *Iustitia*, 1-14, 3 (1990), uses the term 'crisis of the family' in two senses, which are both directed toward the similarity between the legitimate family and the family of persons who cohabit together.

[2] Regarding the pluality of family models, see, V. Scalisi, 'Le stagioni della famiglia dall'unità d'Italia a oggi' *Rivista di diritto civile*, I, 1043-1061, 1043 (2013); V. Scalisi, *Categorie e istituti del diritto civile nella transizione al postmoderno* (Milano: Giuffrè, 2005), 211; P. Rescigno, *Matrimonio e famiglia. Cinquant'anni del diritto italiano* (Torino: Gappichelli, 2000), 334; P. Rescigno, 'I rapporti personali tra coniugi', in A. Belvedere and C. Granelli eds, *Famiglia e diritto a vent'anni dalla riforma* (Padova: CEDAM, 1996), 28; Corte Costituzionale 15 April

In this article, the term 'marital crisis' concerns the institutional conception of marriage in order to underline the estrangement of the institution of marriage from the field of public law and to highlight the institution as a private fact in the life of the married couple. From this point of view, the word 'crisis' is used in its etymological meaning (from (the Greek) Krisis = choice, change) to verify whether marriage has undergone a change with respect to its original conformation. In this way, the phenomenon is part of a wider concept dealing with the 'privatization' of family law which, beginning with the reform of 1975,[3] was elaborated by Italian literature to show that the institutional and public law conception of marriage was surpassed and that the will of the parties increased in importance, affirming the central and increasingly autonomous role of the married couple's consent.[4]

In the Italian legal system, the interaction between the law and society is evident especially with respect to marriage: the pressing demands arising out of social custom can influence the interpretation of the law even before the social demands are transformed into law. Often the intermediary between the social demands and the law is found in the creative activity of the judiciary, which in family law has a strong impact in supporting social custom, provided that the constitutional principles are respected. Nevertheless, in the face of the privatisation of family law brought about by the reform of 1975, the Italian legal system showed its resistance especially through its case law by continuing to affirm principles designed to maintain public control over marriage (precisely described cases of annulment by error; the relevance of the legitimate family's interest; the objective notion of intolerability in separation; the inadmissibility of premarital agreements in the event of divorce, etc).[5]

Speaking today of the marriage crisis through the concept of privatization requires verifying whether such concept can offer new points for reflection on

2010 no 138, *Famiglia e diritto*, (2010) 42, recognised that even same-sex couples have the right 'to live freely as a couple and benefit from its legal recognition with the connected rights and duties'; Corte di Cassazione 15 March 2012 no 4184, *Foro italiano*, 2727 (2012), recognised the relevance of same-sex unions and excluded that marriage between homosexuals is inexistent while considering it inefficacious; Corte di Cassazione 9 February 2015 no 2400, available at www.italgiure.giustizia.it. The unions between persons of the same sex are now regulated by legge 20 May 2016 no 76, 'Law covering civil unions between persons of the same sex and cohabitation'. Eur. Court H.R., *Shalk and Kopf* v *Austria*, Judgment 24 June 2010, *Nuova giurisprudenza civile commentata*, I, 1337 (2010), with commentary by M. Winkler, 'La famiglia omosessuale nuovamente alla prova della Corte di Strasburgo', recognised that same-sex couples have the right to enjoy 'family life' but that States do not have the obligation to grant same-sex couples access to marriage.

[3] Legge 19 maggio 1975 no 151 amended the statutory family law contained in the Italian civil code to make it conform to the Constitution.

[4] L. Mengoni, 'L'impronta del modello canonico sul matrimonio civile nell'esperienza giuridica e nella prassi sociale attuale nella cultura europea' *Jus*, 451-467, 457 (1998); M. Trimarchi, 'Il matrimonio nel quarantennio successivo alla riforma del diritto di famiglia' *Famiglia e diritto*, 985-990, 985 (2015).

[5] P. Rescigno, *Matrimonio e famiglia. Cinquant'anni del diritto italiano* n 2 above, 1.

the 'crisis' of marriage or whether a new phase of 'privatization' has begun with a greater recognition for the freedom of the married couple.

In this regard, the article will seek to ascertain whether marriage has changed with respect to its original conformation to become a 'private fact', or whether marriage still appears to resist in its public law aspects.[6]

Having gone beyond the public law conception, according to which marriage constituted an act of state power,[7] the majority of legal scholars in Italian literature agree as to the private character of marriage, even though its legal qualification as a private act remains an open question.

The emphasis on the private individuals' autonomy and freedom makes it evident that the formation of the marriage bond is left to the will of the prospective spouses. However, the nature of marriage still appears controversial due to the peculiarities in Italian law which has devised various reconstructive theories of marriage. The preferred theory considers marriage as a juridical act, which expresses a free choice emanating from the private autonomy of the married couple.[8] The public role, although necessary, is reduced to a mere formal function for purposes of certification and of control, as will be discussed below.

This function of public participation can be verified in each phase of the marital relationship: its formation, the marriage relationship itself, and its dissolution. In each phase, the public authority's role is to ensure that the legal limits are respected in relation to the formation of the bond, the management of the relationship, and its dissolution in order to guarantee certainty regarding legal situations and *status,* as well as to protect the general and the particular interests involved in the various phases.

II. Formation of the Marriage Bond

Beginning with the marriage act, the idea of marriage understood as an act of public law which degraded the will of the spouses to a mere prerequisite in order for the civil servant to consent to the marriage on behalf of the State has now been surpassed. Today a private law concept prevails in which the prospective spouses form their marriage bond as an expression of their private autonomy. Marriage is thus qualified as a juridical act which signifies the free choice of the

[6] Regarding the concept of resiliance, see, C.S. Holling, 'Principles of insect predation' *Annual Review of Entomology*, 163-182, 163 (1961).

[7] A. Cicu, *Il diritto di famiglia – Teoria generale* (Roma: Forni, 1914), 213.

[8] Regarding the transactional theory of marriage, see, among others, C.M. Bianca, *Diritto civile*, 2, I, *La famiglia* (Milano: Giuffrè, 2014), 31; F. Santoro Passarelli, *L'autonomia privata nel diritto di famiglia. Saggi di diritto civile* (Napoli: Jovene, 1961), 383; R. Scognamiglio, *Contributo alla teoria del negozio giuridico* (Napoli: Jovene, 1969), 206, 342; F. Finocchiaro, 'Del matrimonio, Artt. 79-83', in A. Scialoja and G. Branca eds, *Commentario del codice civile*, (Bologna-Roma: Zanichelli, 1971), 30; R. Fadda, 'Delle prove della celebrazione del matrimonio, Artt. 130-133', in F.D. Busnelli ed, *Il Codice civile. Commentario* (Milano: Giuffrè, 2016), 8.

married couple and which is meant to produce its effects essentially within the legal sphere of the married couple.[9]

Of course, the presence of the State whose function is to control and protect cannot be denied because marriage, although constituting a private fact subject to the free will of the parties, involves interests of the public, third parties and the entire collectivity to ensure the certainty of *status* and the control of the act's regularity and validity. Due to these needs, interference by the public authority is justified, given the importance of the act performed by the prospective spouses. The interference by the public authority ensures that the legal limits providing for the formation of marriage are respected.

In this manner, the law intends to avoid the celebration of invalid marriages and to reduce the number of legal controversies as to whether marriages were celebrated in accordance with the law.

As pointed out above, the debate concerning the nature of marriage is still open and, especially, the role of the officiating state functionary who, according to the majority of legal scholars in the literature, is supposed to control and certify in order to provide public certainty as to the existence of the marriage bond created by the parties.

In this sense, the declaration by the state official of the matrimonial union can be considered an act by which the official declares, but does not establish, the *status* of spouse which depends on the will of the prospective spouses. The official's declaration constitutes an administrative act by which the public official does not express the will of the State but is limited to ascertaining the existence of the necessary elements in order to recognise a person's married state.

In the formation of the marital relationship the parties' consent is the only volitional element upon which the creation of the marriage bond depends, whereas the public official may neither express their intention nor refuse to officiate the marriage. The public official is limited to carrying out a formal procedure designed to guarantee the regularity of the act and to certify, for evidentiary purposes, the formation of the bond.

If both elements – the consent of the spouses and the participation of the state official – are essential and preordained for the production of certain legal effects, their functions and roles are different. The public official's act is formal and has the purpose of certifying the marriage. The private individuals' act is substantive and has the purpose of forming the marital bond.[10]

[9] Regarding marriage, see, A. Renda, *Il matrimonio civile. Una teoria neoistituzionale* (Milano: Giuffrè, 2013), passim; F. Finocchiaro, 'Matrimonio', I, II, in F. Galgano ed, *Commentario del codice civile Scialoja-Branca* (Bologna-Roma: Zanichelli, 1971, 1993), passim; G. Ferrando, 'Il matrimonio', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2015), passim; A.C. Jemolo, 'Il matrimonio', in G. Vassalli ed, *Trattato di diritto civile italiano* (Torino: UTET, 1961), passim; E. Giacobbe, 'Il matrimonio. L'atto e il rapporto', in R. Sacco ed, *Trattato di diritto civile* (Torino: UTET, 2011), passim.

[10] Regarding partecipation of the state official, see, R. Fadda, 'Delle prove della celebrazione

In fact, only the private individuals affect the act's contents. This means that even if the legal effects are preordained by the law, complete assent by the prospective spouses to the act's contents and their free decision to want these effects are necessary.

The State's role, which is marginal and merely one of control and certification for the purpose of providing a guarantee, is found throughout the course of the relationship and in the dissolution of the bond.

III. The Marriage Relationship

In concomitance with the reform of family law of 1975, the presence of the State is reduced with respect to the marriage relationship, which justifies an individualistic conception of the family.[11]

There is a less legislation concerning spousal duties, which in turn accentuates the freedom of the spouses and reduces the ever more marginal role of the State. This process has induced some authors to express doubts regarding the legality of spousal duties by affirming that such duties are merely moral in character. This opinion is not shared by most authors in the Italian literature but is coherent with the emphasis of the role of private autonomy and the changing attitude of the legal system toward the family. The fulfilment of spousal duties is not left to the law's coercive force but to the spontaneous observance and to the intimate conscience of those who choose the matrimonial family model. The sanction for the violation of spousal duties consists in determining who is responsible for the separation, assuming there is the required causation of intolerability of the cohabitation (Art 151 of the Italian *Codice Civile*). The payment of damages is admitted when there is a particularly grievous violation, which harms a relevant constitutional right, while the mere inobservance of spousal duties is insufficient.[12] It follows that 'non-grievous' violations of spousal duties must be tolerated, and at the same time the spouses are free to terminate the marriage relationship with a decision which can even be unilateral and not necessarily based on objective reasons.

Nevertheless, as authoritative scholars have pointed out in the literature, family autonomy which is protected by private law is not without limits in as much as such limits are recognizable in the principle of solidarity expressed by Art 2 of the Italian Constitution.[13]

The issue is still current, since even today limits upon the private autonomy of the spouses have their foundation and find their justification in the principle

del matrimonio' n 8 above, 16; A. Renda, 'Il matrimonio civile' n 9 above, 361.

[11] L. Mengoni, 'La famiglia in una società complessa' n 1 above, 11.

[12] Corte di Cassazione 10 May 2005 no 9801, *Giurisprudenza italiana*, 949 (2006); Corte di Cassazione 15 September 2011 no 18853, *Foro italiano*, 2038 (2012).

[13] L. Mengoni, 'La famiglia in una società complessa' n 1 above, 11.

of solidarity in addition to the protection of the inalienable rights of the person. In this regard, the limits in the absolute binding nature of spousal rights and duties (Art 160) and in certain provisions in statutory community property law (Art 210) are relevant.

It is necessary to evaluate whether the same phenomenon of 'privatization' can also be found in the marriage relationship itself where, as indicated above, privatization is understood as an accentuation of the spouses' autonomy and a reduction of the public presence in marriage.

Private autonomy is manifested in the agreements with which the spouses regulate their personal and property relations by expressing their choices relating to the direction of their family life or to their property rights (Arts 144 and 162). In this area, the freedom of the parties certainly encounters limits given that the spouses cannot deviate from legal rights and duties that arise from the marriage, nor can they avoid certain principles provided in the statutory community property regime.

However, public control does not interfere in the marriage relationship if the marital duties are incoercible and in some cases devoid of sanctions.

The limits and the absolute obligatory character of certain statutory provisions of community property law have been explained through the affirmation of the nature of public law within the statutory community property regime which is intended to satisfy the family's needs.[14] However, as the Italian literature has been correctly replied, the absolute obligatory character of the community property regime (frequently substituted by the separate property regime) refutes the theory of the presumed function of public law. The legal limits and the restrictive interpretations in the case law regarding the regulation of the property rights can be explained, as in the personal relationship, by reason of the principle of solidarity and the inviolable nature of personal rights protected by the Constitution.[15]

However, the affirmation of freedom and autonomy of the spouses in marriage, combined with the reduction of interference via public law visible in case law, has existed for some time. Despite this, these results do not appear to have marked the beginning of a new phase of privatization.[16] Some obstacles exist, preventing this new phase of privatisation. For example, the refusal by a spouse regarding the joint purchase of property within the statutory community property regime is still inadmissible, a concept which has been upheld by the courts. Denying a spouse who intends to refuse the joint ownership of community property, where the other spouse makes a separate purchase in absence of the requirements for a purchase of separate property, certainly limits the transactional

[14] Corte di Cassazione 27 February 2003 no 2954, *Famiglia e diritto*, 599 (2003); Corte di Cassazione 24 February 2004 no 3647, *Notariato*, 233 (2004).

[15] T. Auletta, 'Comunione legale: oggetto', in Id ed, *I rapporti patrimoniali fra coniugi*, III, *Trattato di diritto privato diretto da Mario Bessone* (Torino: Giappichelli, 2011), 465.

[16] F. Ruscello, 'Il rapporto coniugale. I diritti e i doveri nascenti dal matrimonio', in P. Zatti ed, *Trattato di diritto di famiglia* (Milano: Giuffrè, 2002), 781.

freedom of the spouses. In this case, there are also social demands and trends in the scholarly literature which favour recognising greater autonomy of the parties in the regulation of statutory community property law, and there are occasionally some openings in the case law, but there have not been any significant turning points.[17]

Further, the law provides for the possibility of judicial intervention in the event the spouses disagree, but the judge can intervene only where the disagreement concerns the exercise of parental responsibility and the judge must take into account the paramount interest of the children (Arts 145 and 316) in determining which spouse can decide. In other cases, the judge can only rule if there is a joint request by both spouses and if the question is of essential importance. The possibility of judicial intervention has been defined as 'symbolic', in that it shows that the family is not impervious to institutional intervention when such intervention is necessary for the protection of paramount interests.[18]

Moreover, it should be pointed out that the interests of children will always justify a judicial intervention. In the event the interests concern essential matters of the spouses or of the family, the judicial intervention must be requested by both spouses, which confirms their autonomy and freedom.

IV. Separation and Divorce

The private autonomy of the spouses is also expressed in regulating the consequences of separation, divorce, and annulment.

In this regard, the agreements made by the spouses are important, such as the agreements made during separation or divorce to regulate their personal and economic relations. This also includes any agreements regarding the children which the judge takes into consideration, if these are not contrary to the interests of the children in accordance with Art 337 *ter* of the *Codice Civile*.

With respect to divorce, the reform of 1987 (legge 6 March 1987 no 874) increased the importance of spousal autonomy with the provision for joint divorce, allowing both parties to request the judge to decree the dissolution of the marriage bond. The spousal agreement is then relevant to determine their post-divorce relations. The same law made it possible for the spouses to determine the amount of any spousal liability, which can be liquidated in a single payment, precluding any additional economic demands.[19]

Further, case law has acknowledged the validity of spousal agreements

[17] Corte di Cassazione-Sezioni Unite 28 October 2009 no 22755, *Nuova giurisprudenza civile commentata*, 249 (2010, I); Corte di Cassazione 2 February 2012 no 1523, *Famiglia persone e successioni*, 493 (2012).

[18] G. Ferrando, *Diritto di famiglia* (Bologna: Zanichelli, 2015), 86.

[19] Corte di Cassazione 17 June 2004 no 11342, *Giustizia civile*, I, 415 (2005); Corte di Cassazione 8 November 2006 no 23801, *Foro italiano*, I, 1189 (2007); Corte di Cassazione 14 March 2006 no 5473, *Nuova giurisprudenza civile commentata*, 371 (2007).

which are usually made during separation, and which are intended to regulate the effects of a future and possible annulment.[20]

The array of judicial interventions which recognise the spouses' autonomy and freedom during a marital crisis has been increased by the legge no 162 of 2014. This law introduced new forms of separation and the so-called 'rapid' or consensual divorce. This includes instances in which the parties come to an agreement to separate or divorce following negotiations in which they are counselled by attorneys

> 'for the consensual solutions of personal separation, cessation of the civil effects or dissolution of marriage, or modification of the conditions of separation' (Art 6),

or through an agreement to separate or divorce reached by the parties 'before a state official' (Art 12). In this way, spousal autonomy is broadly recognised in the decision to separate or to divorce as well as in the regulation of the ensuing relations, as will be discussed below.

However, signs of resistance from the public law perspective can still be found regarding agreements which have been made during the marital relationship in view of separation or divorce, to regulate a future marriage crisis.

Italian case law is consistent in holding that agreements made by the spouses intending to regulate their relations in the event of a future and possible divorce are null because the cause of such agreements is considered illegal. According to the Court of Cassation, such agreements would be in conflict with the fundamental principles of the inalienability of *status* and the right to economic maintenance given the beneficial nature of the maintenance payment.[21] However, with respect to such decisions, there are dissenting voices in the literature. Recently, the case law has shown more flexibility, even if the Court of Cassation has not yet ruled on the admissibility of the agreements described above.

The Supreme Court has affirmed the validity of a contract stipulated by the prospective spouses prior to the marriage which provides that, in the event of failure of the marriage, one of the spouses will transfer to the other spouse his or her real property. This is to be used as an indemnity for the expenses paid by the other spouse for the restructuring of the real property used as the conjugal home. In this case, the Court of Cassation recognised the validity of the agreement, rejecting the idea that it was an agreement in view of divorce. Instead, the court qualified it as a transaction intended to transfer real property in satisfaction of a

[20] Corte di Cassazione 13 January 1993 no 348, *Nuova giurisprudenza civile commentata*, 950 (1993); Corte di Cassazione 20 March 1998 no 2955, *I Contratti*, 472 (1998); G. Ferrando, 'Il matrimonio' n 9 above, 127.

[21] Corte di Cassazione 11 June 1981 no 3777, *Foro italiano*, I, 184 (1982); Corte di Cassazione 28 January 2008 no 1758, *Famiglia e diritto*, 297 (2008); Corte di Cassazione 10 March 2006 no 5302, *Giurisprudenza italiana*, 1826 (2006, 10); Corte di Cassazione 14 June 2000 no 8109, *Foro italiano*, I, 1318 (2001).

pre-existing debt according to the scheme of the *datio in solutum* (Art 1197 of the *Codice Civile*).[22]

Finally, with respect to the agreements made by the spouses during divorce, the case law has confirmed the line of cases which give greater recognition of spousal autonomy in the regulation of personal relations and property rights. These cases acknowledge such agreements (eg, decree of ratification or joint divorce) as a mere external control to protect the inalienable rights of the weaker spouse or the children. The source for regulating the relation arises from a juristic act of the spouses, with the consequence that such act would have legal effect according to Art 1372 *Codice Civile* that does not allow an appeal of the court decision which acknowledges the agreement.[23] In the event that the agreement is invalid, the spouses may contest its defects in a separate legal action, which confirms that the decision regulating the relation is left to the private will of the spouses and the judicial intervention is given the role of control.

Further, the inalienability of the ex-spouse's right to maintenance has been questioned on the grounds that the current law contains certain unreasonable provisions in the area of maintenance. The criteria to determine the standard of matrimonial life, elaborated by the case law in applying Art 5 para 6, has raised doubts of constitutionality due to the 'anachronism' of a standard which refers 'to a hierarchy of values which are no longer adapted to contemporary constitutional law'.[24] Notwithstanding the judgement of the Constitutional Court which denied relief, the reasoning in the Order of the Tribunal of Florence which mandated the case to the Constitutional Court bolsters the position which favours the admissibility of agreements in the event of divorce, in pursuance of a privatization of the couple's relation even in the area of maintenance. Noteworthy, in particular, is the increased importance of the principle of self-sufficiency, particularly in cases of short-lived relations. This goes beyond the old criteria which were established to ensure that the ex-spouse the same standard of matrimonial life. From this perspective, there is a tendency in several European countries to put a time limit on the right to maintenance in cases of marriages having a brief duration. There are also cases in which it is the intention to define the economic consequences of divorce by means of a single payment in order to allow the spouses to definitively close their previous relation and to begin a new family life. Even the Italian case law has recognised in the area of consensual separation the admissibility of agreements to put a time limit on the right of maintenance[25] and has recently abandoned the 'standard of matrimonial life'

[22] Corte di Cassazione 21 December 2012 no 23713, *Foro italiano*, I, 864 (2013); Corte di Cassazione 21 August 2013 no 19304, *Nuova giurisprudenza civile commentata*, 94 (2014).

[23] Corte di Cassazione 20 August 2014 no 18066, *Corriere giuridico*, 777 (2015).

[24] Corte Costituzionale 9 February 2015 no 11, *Famiglia e diritto*, 537 (2015).

[25] Corte di Cassazione 6 June 2014 no 12781, *Famiglia e diritto*, 685 (2015); but see E. Al Mureden, 'La solidarietà post-coniugale a quarant'anni dalla riforma del diritto di famiglia' *Famiglia e diritto*, 991-1007, 1000 (2015).

criteria admitting instead the principle of self-sufficiency for the purposes of determining post matrimonial maintenance.[26]

Additional arguments in favour of the admissibility of agreements in view of divorce are found in the law which provides new forms of separation and 'extrajudicial' divorce introduced by legge no 162 of 2014. If the referenced law allows the spouses to agree to a separation or to divorce without going to court, thus giving maximum space to spousal autonomy in the decision to separate or to divorce and in the regulation of the related effects, there should no longer be any reason to deny the admissibility of agreements in view of a future separation of divorce.[27]

V. Dissolution of the Marriage Bond

During the phase of separation and dissolution of marriage, it seems that Italian legislators has recently granted more space to the freedom of the spouses and that the institution of marriage has shown itself to be more vulnerable (and less resistant) to the pressing social demands for change.

In the past, the decision to separate or to dissolve the marital relationship was conditioned by a high degree of state interference, primarily because it was insufficient to petition for separation or divorce if only the spouses agreed.

With respect to separation, the recognition of no-fault separation and the introduction of consensual separation with the reform of the *Codice Civile* of 1975 attributes greater weight to the will of the spouses. Judicial control is exercised through the judge's ratification which is necessary to produce the effects of the separation agreement. The judicial ratification is reduced to a mere verification of the regularity of the decision – final and absolute – of the spouses to separate, but it can affect the merits of the decision concerning the children to ensure that the decision is in their interest. The judicial ratification is an instrument whose purpose is to protect a person's civil and constitutional rights and which, according to case law, performs a mere controlling function and renders the private agreement effective as an external judicial force.[28]

[26] Corte di Cassazione 10 May 2017 no 11504, *Famiglia e diritto*, 636 (2017); Corte di Cassazione-Sezioni Unite 11 July 2018 no 18287, available at www.cortedicassazione.it.

[27] Regarding agreements in view of divorce, see, G. Oberto, *I contratti nella crisi matrimoniale* (Milano: Giuffrè, 1999), passim; E. Al Mureden, *Nuove prospettive di tutela del coniuge debole* (Milano: Giuffrè, 2007), passim; L. Balestra, 'Autonomia negoziale e crisi coniugale: gli accordi in vista della separazione' *Rivista di diritto civile*, II, 277-296, 287 (2005); G. Ceccherini, *Contratti tra coniugi in vista della cessazione del mènage* (Padova: CEDAM, 1999), passim; F. Angeloni, *Autonomia privata e potere di disposizione nei rapporti familiari* (Padova: CEDAM, 1997), 417; G. Doria, *Autonomia privata e 'causa' familiare: gli accordi traslativi tra coniugi in occasione della separazione e del divorzio* (Milano: Giuffrè, 1996), passim.

[28] Regarding homologation, see, F. Danovi, 'Il processo di separazione e divorzio', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2015), 771; C. Lumia, 'La separazione consensuale', in P. Zatti ed, *Trattato di diritto di famiglia*, I, *Famiglia*

Moreover, a steady line of cases excluded the idea that a spouse could freely decide to separate from the other spouse because the judge was required, except in cases of consensual separation, to determine that the cohabitation was objectively intolerable. It is true that no decisions have been reported which have denied petitions for separation in application of this principle, but in this line of cases the judges expressed their opinions on the relation between spousal autonomy and state interventions in the family relationship and claimed control over the marriage crisis.[29]

The recognition of social demands favouring a greater freedom in marriage is due to the case law that granted to a single spouse the right to separation where the judge was no longer required to find that the cohabitation was objectively intolerable.[30]

The control of the private autonomy of the spouses is especially evident in divorce. Even the joint form of divorce introduced by the legge of 1987 was admissible only if the judge ascertained the failure of the material and spiritual union between the spouses and if the facts fell into one of the cases precisely described by the law. This reduced divorce by mutual consent to a more expedited procedure, but one which was not left entirely to the will of the spouses.

Finally, a greater recognition of the freedom of the spouses and of the centrality of their will in the institution of marriage can be found in the new law concerning the marriage crisis, which was introduced by the legge no 162 of 2014. It provides two new forms of separation and of the so-called consensual divorce. The first form consists of a separation or divorce agreement reached by the spouses as a result of negotiations in which they are assisted by one or more attorneys. The second form consists of a separation or divorce agreement reached by the spouses before a state official.

The law has had a mixed reception in the Italian literature. Some define the reform as 'legislation without courage', while others speak of a 'further step on the road to privatization' of marriage. Others say that the rules have an 'epochal relevance' rendering marriage a 'private affair'.[31]

e matrimonio, t. II, *Separazione – Divorzio* (Milano: Giuffrè, 2002), 990; M. Mantovani, 'Separazione personale dei coniugi, II) Separazione consensuale' *Enciclopedia giuridica* (Roma: Treccani, 2007), XXVIII, 3; Corte di Cassazione 8 March 1995 no 2700, *Diritto e famiglia*, 1390 (1995); Corte di Cassazione 18 September 1997 no 9287, *Vita notarile*, 217 (1998); Corte di Cassazione 8 March 2001 no 3390, *Nuova giurisprudenza civile commentata*, I, 422 (2002); Corte di Cassazione 20 November 2003 no 17607, *Corriere giuridico*, 307 (2004).

[29] G. Ferrando, *Diritto di famiglia* n 18 above, 178.

[30] Corte di Cassazione 16 February 2012 no 2274, *Famiglia e diritto*, I, 50 (2013); Corte di Cassazione 9 October 2007 no 21099, *Famiglia persone e successioni*, 10 (2008); Corte di Cassazione 21 January 2014 no 1164, *Famiglia e diritto*, 38 (2015).

[31] F. Danovi, 'Il processo di separazione e divorzio' n 26 above, 867; Id, 'I nuovi modelli di separazione e divorzio: una intricata pluralità di protagonisti' *Famiglia e diritto*, 1141-1149, 1144 (2014); G. Ferrando, *Diritto di famiglia* n 18 above, 173; M. Sesta, 'Negoziazione assistita e obblighi di mantenimento nella crisi della coppia' *Famiglia e diritto*, 295-305, 296 (2015); F.

In our opinion, the law has taken a new step in the process of privatization of marriage and has attenuated public control over the marriage crisis by giving greater importance to the agreement of the spouses. The affirmation must be verified, and the subject matter must be distinguished as to whether separation or divorce is being considered and whether there are minor children or whether the children are not self-sufficient.

With respect to separation, it is evident that the decision is left entirely to the spouses, which was already true with consensual separation, but now it is no longer necessary even to take legal action. The spouses can stipulate a separation agreement before a lawyer or a mayor (in the event there are no children) without taking any legal action in court, circumventing even the least invasive participation by a judge who ratifies the agreement.

Nevertheless, even in these cases, a form of public control remains, albeit a reduced one. In the case of negotiations where the spouses are assisted by attorneys to find a 'consensual solution of separation', public control is exercised through the intervention of the public prosecutor to whom the parties must forward the agreement. The public prosecutor then may grant an authorisation (in cases where there are children) or a permit (in cases where there are no children). Only in the first case would the public control address the merits of the agreement in order to verify that the interests of the children are respected. In the second case, where there are no children, the public prosecutor is limited to exercising a control to verify the formal regularity of the agreement.[32]

If the public prosecutor's control is one of mere formal regularity (Art 6), it shows that there is the same kind of relation between public law and private law in cases where the attorney has assisted in the negotiated separation agreement, in a similar way to the officials who take part in the formation of the marriage bond. The decision is left to the spouses, and the public intervention does not affect the centrality and the constituent character of consent but performs a function of control and protection.

Further confirmation of the above affirmations can be found in the second form of separation, that which is reserved to couples who mutually consent, who are without children, and whose procedure unfolds before the mayor. The public presence is reduced to the participation by a state official who, as in the moment of the formation of the marriage bond, intervenes to play a role which is neither substantive nor has the purpose of forming the marital bond. Instead, it merely controls the formal regularity of the agreement for purposes of providing a guarantee. In this case, the centrality of consent is evident. The agreement is free from judicial control and from any consideration concerning

Danovi, 'Crisi della famiglia e giurisdizione: un progressivo distacco' *Famiglia e diritto*, 1043-1052, 1045 (2015).

[32] Regarding the role of the public prosecutor, see, F. Danovi, 'I nuovi modelli di separazione e divorzio: una intricata pluralità di protagonisti' n 29 above, 1143.

the merits of the decision. The mayor exercises the same function which he carried out during the formation of the marriage bond: ensuring the regularity of the act, the certainty of the relationship and the publication of notice of the changed relationship in order to protect third parties and the public interest.

With respect to divorce, the agreement to dissolve the matrimonial bond is admitted only if the spouses are already separated. In this regard, certain authors in the literature have pointed out that the legge no 162 of 2014 is limited to simplifying the procedure without introducing a form of 'consensual' divorce.

However, the situation is not so different because a divorce decree is not always necessary in order to divorce; separated spouses, whatever the type of separation, even judicial separations, can stipulate a divorce agreement with the assistance of attorneys or before a mayor. In such cases, the formal control of regularity is performed by the public prosecutor or by the mayor. In particular, the mayor plays a role analogous to the one assigned to him during the celebration of marriage: controlling the regularity of the act and guaranteeing the certainty of *status*.

It is true that the parallel is not perfect because in the formation of the marriage bond the choice of the parties is free, whereas in the dissolution of the marital bond the spouses cannot decide to dissolve the marriage relationship in the absence of a previous separation.

However, at least in the case where both spouses have already decided to dissolve the marital bond, the necessity of a preceding separation, which may also be consensual, can be interpreted in the sense of requiring that the will of the spouses be sufficiently verified, thus revealing that the true meaning of the law seems to be one which increase the importance of the spouses' consent.

It could be said that the source of the effects of the divorce is the consent of the spouses. In the case of a preceding consensual separation, the consent of the spouses has already been expressed during the separation process and is confirmed with the divorce agreement. Thus, the consent is deferred in time because the law allows for the dissolution of the marriage following a requisite period of reflection, beginning with the separation. At most, it can be pointed out the uselessness of dividing into two phases a procedure intended to obtain the dissolution of the marriage bond. There appears to be little purpose to a previous separation which is meant to guarantee that the spouses reflect upon their decision for a certain period of time given that the timing of it has been shortened and that it is often superfluous where the marital relation has been irreparably damaged.

The referenced law has certainly taken a new step in the direction of the privatization of marriage. The new law confirms the parallelism between the phase of the formation of the marital bond and the phase of its dissolution, recalling the Roman maxim *consensus facit nuptias*. In both cases, the decision can be left to the spouses, without taking legal action in court, with a control of

mere formal regularity conducted by the public prosecutor or by the mayor.

VI. Civil Unions

Another kind of marriage crisis can be observed in the law covering civil unions introduced by the legge 20 May 2016 no 76. In reality, the crisis affects not so much marriage as much as the concept of family, which no longer finds its exclusive foundation in marriage. Moreover, the plurality of family models has been evident for some time, even in the absence of legal recognition of unions between homosexuals.

With the legge no 76 of 2016, the Italian legislator followed the supranational trend which has gone beyond the idea of 'family' being founded solely on marriage and has recognised that all individuals have the fundamental right to form a family on the basis of unions different from marriage.

The Italian State, following in the footsteps of other European countries, and in particular the German model of *eingetragene Lebensparnterschaft*, has differentiated the same-sex couple from the heterosexual couple. Both have chosen an intermediate solution, inspired by the so-called double track principle. The law on civil unions is modelled on the law covering marriage without, however, assimilating the two institutions.[33] At the same time, the civil union is distinguished from cohabitation, which is separately regulated by a law which also applies to heterosexual couples.

The two models – marriage and civil unions – present a handful of significant differences. The principal differences regard the absence of the duty of fidelity and the duty of cooperation in the civil unions and the absence of any extension of the law covering adoptions.

These differences are significant in that they reveal a different model based on the couple's relation which excludes children as the basis for the relationship. In fact, the duties of fidelity and of cooperation in marriage are tied to the procreative purpose of marriage, and they have their foundation in the necessity to ensure the stability of the relation (fidelity) and to act in the interests of and satisfy the needs of the children (cooperation). In the same sense, it is noted that there is no provision regarding the invalidity of the civil union based on the

[33] S. Patti, 'Le unioni civili in Germania' *Famiglia e diritto*, 958-960, 958 (2015); P. Passaglia, 'Matrimonio e unioni omosessuali in europa: una panoramica' *Foro italiano*, IV, 275 (2010); J. Wasmuth, 'La convivenza registrata tra persone dello stesso sesso in Germania e l'orientamento giurisprudenziale della Corte costituzionale tedesca' *Familia*, 503-519, 503 (2003); F. Saitto, *La giurisprudenza tedesca in materia di* eingetragene Lebenspartnerschaft *tra garanzie d'istituto e* Abstandsgebot. *Spunti di comparazione con la sent. n. 138 del 2010 della Corte costituzionale italiana*, available at www.forumcostituzionale.it; P. Passaglia, 'Matrimonio e unioni omosessuali in Europa: una panoramica' *Foro italiano*, IV, 273 (2010). Other countries have extended marriage to persons of the same sex: Holland, Belgium, Denmark, Finland, Spain, Norway, England, Portugal, France, Iceland and Luxemburg.

error that one party believes that the other party is pregnant and there is no reference to the law on affinity (the legal bond between one party of the union and the relatives of the other party). The irrelevance of the bond of affinity confirms that the law intends to regulate a relationship whose effects are limited to the parties of the same relationship, unlike marriage where the law can affect persons other than the married couple.[34] It is possible that the new law may influence the interpretation of the law concerning marriage or may stimulate a reform of certain aspects of the law covering marriage.[35]

In any case, a similarity between the two models can be recognised at least in the case of marriage without children. Such similarity can be observed in the law regarding separation and dissolution of marriage, which was simplified in the case of spouses without children (legge no 162 of 2014), as was shown above. The procedural simplification of the dissolution of the bond is particularly emphasised in civil unions where no separation is required and the decision to end the relationship may be made by only one party.

The similarity between the two models also derives from numerous court decisions written by Italian judges who, even in the absence of a specific law covering the adoption in civil unions, have allowed the adoption of a child of the partner in a civil union by applying the law of the so-called adoption in particular cases as provided in Art 44 letter d) of the legge no 184 of 1983.[36]

Moreover, even if the two institutions appear especially close, their differences are not irrelevant but show the Italian legislator's intention to introduce a new model which is different from marriage. The failure to provide for the duty of fidelity and the duty of cooperation in civil unions proves the variation between the two institutions. Only marriage is finalised to form a family which includes children. Even if procreation is not an essential element of marriage, it characterises its nature and its law.

The exclusion of children as a fundamental reason for the partnership in civil unions prevents the assimilation between the two models and, in this way, reinforces marriage as being the only model in which children are raised. From this point of view, it can be stated that marriage is not in crisis but conserves its essential purpose of being a stable bond to which is assigned the formation of a family with children.

[34] M. Sesta, *Manuale di diritto di famiglia* (Padova: CEDAM, 2016), 29.

[35] Progetto di legge 24 February 2016 no 2253: changes of Art 143 Civil Code, concerning the suppression of the mutual obligation of fidelity between spouses.

[36] Corte di Cassazione 22 June 2016 no 12962, *Famiglia e diritto*, 1025 (2016); see also Tribunale di Roma 30 July 2014 no 299, *Famiglia e diritto*, 574 (2015); Corte d'Appello di Roma 23 December 2015 no 7127, available at www.articolo29.it; Tribunale di Roma 30 December 2015, *Famiglia e diritto*, 584 (2016); Tribunale di Palermo, decreto 6 April 2015, available at www.altalex.com; Corte d'Appello di Palermo 30 August 2015, *Famiglia e diritto*, 40 (2016); Corte d'Appello di Milano 1 December 2015, *Famiglia e diritto*, 271 (2016).