Judicium
IL PROCESSO CIVILE IN ITALIA E IN EUROPA
Pacini Giuridica

SANDRO NARDI

DIVORCE AND THE HOPED-FOR CESSATION OF ALL CIVIL EFFECTS OF MARRIAGE DESPITE ALIMONY: AWAITING NEW LEGISLATION ON AGREEMENTS TO REGULATE PERSONAL AND PROPERTY RELATIONSHIPS, INCLUDING PRENUPTIAL AGREEMENTS.

The following comment is based on a recent essay that was highly critical of a ruling on the issue of alimony from the United Sections of the Italian Court of Cassation.[1]

While the debate on this issue began after the 1987 reform of the divorce Act,[2] it was further developed in the literature[3] and case law following an about-face by the Supreme Court that echoed the aforesaid ruling of the United Sections of the Italian Court of Cassation.[4]

The issue is about the function of alimony, that is whether it is intended to guarantee a divorced spouse without adequate means the same standard of living he/she had during the marriage or to guarantee a life of dignity if he/she is not economically self-sufficient.

---

[1] VECCHIO, *L'assegno divorzile. Anatomia di un'ipostasi*, Rome, 2019. The ruling in question is Unit. Sect. Ct. Cass. 11 July 2018, no. 18287, in *Giur. it.*, 2018, p. 1843 et seq., with note by RIMINI, and in *Corr. giur.*, 2018, 10, 1186, note by PATTI.

[2] Cf. for example the contributions of MIRANDA, *The maintenance of the former spouse in a new judicial reconstruction: let's go living in the past*, in *Cardozo Law Bulletin*, 2018/6; MORACE PINELLI, *L'assegno divorzile dopo l'intervento delle Sezioni Unite*, in *Foro it.*, 2018, p. 3615 et seq.; CASABURI, *In tema di assegno divorzile. Funzione perequativa e compensative*, in *Foro it.*, 2018, p. 3735 et seq.; BIANCA, GABRIELLI and PADOVINI, *L'assegno di divorzio in una recente sentenza della Cassazione*, in *Riv. dir. civ.*, 1990, II, respectively at pp. 537 et seq., pp. 539 et seq., and pp. 544 et seq.; BIN, *I rapporti di famiglia. Sentenze d'un anno*, in *Riv. trim. dir. proc. civ.*, 1989, pp. 325 et seq.; LUMINOSO, *La riforma del divorzio: profili di diritto sostanziale (prime riflessioni sulla legge 6 marzo 1987, n. 74)*, in *Dir. fam.*, 1988, pp. 455 et seq.; BARBIERA, *Il divorzio dopo la seconda riforma*, Bologna, 1988, p. 97; SPADAFORA, *Il presupposto fondamentale per l'attribuzione dell'assegno divorzile nell'ottica assistenzialistica della riforma del 1987*, in *Giust. civ.*, 1990, I, pp. 2390 et seq., QUADRI, *Il superamento della distinzione tra criteri attributivi e determinativi dell'assegno di divorzio*, in *Fam. dir.*, 2018, p. 971 et seq.; BIANCA, *Le Sezioni Unite sull'assegno divorzile: una nuova luce sulla solidarietà postconiugale*, in *Fam. dir.*, 2018, p. 955 et seq.; AL MUREDEN, *L'assegno divorzile e l'assegno di mantenimento dopo la decisione delle Sezioni Unite*, in *Fam. dir.*, 2018, p. 1019 et seq.

[3] Cf. for example BIANCA, *L'ultima sentenza della Cassazione in tema di assegno divorzile: ciao Europa?,* in *giustiziacivile.com*, Editorial, 9 June 2017, pp. 1 et seq.; QUADRI, *I coniugi e l'assegno di divorzio tra conservazione del tenore di vita e autoresponsabilità*, in *Corr. giur.*, 2017, pp. 885 et seq.; DI MAJO, *Assistenza o riequilibrio degli effetti del divorzio?,* in *Giur. it.,* 2017, pp. 1299 et seq.; RIMINI, *Assegno di mantenimento e assegno divorzile: L'agonia del fondamento assistenziale*, id., pp. 1799 et seq.; ROMA, *Assegno di divorzio: dal tenore di vita all'indipendenza economica*, in *Nuova Giur. civ. comm.*, 2017, pp. 1001 et seq.; CASABURI, *Tenore di vita ed assegno divorzile: c'è qualcosa di nuovo oggi in Cassazione, anzi d'antico*, in *Foro it.*, 2017, I, pp. 1859 et seq.; VECCHIO, *La Suprema Corte decide di aderire alle scelte legislative in tema di assegno di divorzio*, in *Vita not.*, 2017, pp. 685 et seq.; AL MUREDEN, *L'assegno divorzile tra autoresponsabilità e solidarietà post coniugale*, in *Fam. dir.*, 2017, pp. 636 et seq.; FIGONE, *Assegno divorzile e valutazione ponderata dell'autosufficienza economica: un "Apripista" per le Sezioni Unite*, id., 2018, pp. 326 et seq.; DANOVI, *La Cassazione e l'assegno di divorzio: en attendant Godot (ovvero le Sezioni Unite)*, id., 2018, pp. 51 et seq.; DOGLIOTTI, *L'assegno di divorzio tra innovazione e restaurazione*, id., 2018, pp. 964 et seq.

[4] This refers, respectively, to Cass. 10 May 2017, no. 11504, in *Nuova giur. civ. comm.*, 2017, p. 1001, with note by ROMA; in *Giur. it.*, 2017, p. 1299, with note by DI MAJO; in *Corr. giur.*, 2017, p. 885 with note by RIMINI, in *Fam. dir.*, 2017, pp. 636 et seq., with note by AL MUREDEN and DANOVI, and Cass. Unit. Sect. 11 July 2018, no. 18287, cit.

From the 1990s on, and specifically after four pronouncements of the United Sections of the Court of Cassation, case law was quite uniform in upholding the first of these functions, that is that the standard of living during married life is the parameter used to determine whether the spouse requesting alimony has adequate means.[5]

But in a ruling pronounced in May 2017, the high court struck down a request for alimony from a spouse who was self-sufficient, holding that the inability to maintain the standard of living enjoyed during the marriage through the other spouse's economic contributions was irrelevant.[6]

To settle this conflict, the United Sections again intervened in a decision of July 2018 which, as we will see, reconstructed alimony to be composite, both welfare-oriented and compensatory in nature.[7]

In our opinion, the ruling of the United Sections of the Court of Cassation[8] might be subject to criticism from the standpoint of legal policy, but not in terms of statutory law.

One could certainly criticize the ruling of the United Sections of the Court of Cassation[9] that "dissolution of the marriage affects status but does not cancel all effects and consequences of a family's decisions on how to structure itself." We in fact are of the opinion that when the civil effects of the marriage cease, all such effects ought to cease.[10]

It could be considered illogical and in any case unjust for someone to enjoy, for a possibly indefinite time, the support of the other simply based on post-marriage solidarity. The decisions and possible sacrifices that each spouse makes during the marriage should in fact be considered made in a spirit of profound generosity. Otherwise, any sacrifice that either of the spouses makes for the other and for the family in general would no longer be a sacrifice if they then benefit from a payment when the marriage is dissolved. From this perspective, no alimony would be due even to a spouse who is in difficult financial straits, unless this is limited to a determined period after the divorce. Similarly, an ex-spouse in need should not have the right to an allowance from the estate pursuant to Art. 9 *bis* of the Italian Divorce Act.

---

[5] Cf. Unit. Sect. Cass., 29 November 1990, nos. 11849, 11490, 11491, 11492, in *Corr. giur.*, 1991, pp. 335 et seq., with note by CECCHERINI, and in *Nuova giur. civ. comm.*, 1991, pp. 112 et seq., with note by QUADRI. Along the same lines, see Cass. 12 October 2014, no. 21597, in *Fam. dir.*, 2014, p. 1136; Cass. 3 July 2013, no. 16597, in *Fam. dir.*, 2013, p. 1079, with note by ALCARO; Cass. 30 March 2012, no. 5177, in *Guida dir.*, 2012, 25, p. 65; Cass. 27 December 2011, no. 28892, in *Fam. dir.*, 2012, p. 304; Cass. 24 March 2010, no. 7145, in *Fam. dir.*, 2010, p. 606, and in *Fam. pers. e succ.*, 2010, p. 832, with note by ZAULI; Cass. 12 July 2007, no. 15611, in *Fam. e dir.*, 2007, p. 1092; Cass. 2 July 2007, no. 14965, in *Guida dir.*, 2007, 38, p. 54; Cass. 12 February 2003, no. 2076, in *Fam. dir.*, 2003, p. 344.

[6] Cass. 10 May 2017, no. 11504, cit., followed by, for example, Cass. 21 July 2017, no. 18111, in *Fam. dir.*, 2017, pp. 1028 et seq.; Cass. 29 August 2017, no. 20525, in *Fam. dir.*, 2018, pp. 573 et seq., with note by GIORGIANNI; Cass. 26 January 2018, no. 2042 and no. 2043, in *Fam. dir.*, 2018, p. 321 with note by FIGONE; Ct. Milan 22 May 2017, in *Quot. Giur.*, 2017; Ct. Rome 23 June 2017, in *Quot. giur.*, 2017.

[7] Cf. MIRANDA, *The maintenance of the former spouse in a new judicial reconstruction: let's go living in the past*, cit.

[8] VECCHIO, *L'assegno divorzile*, cit. *passim*.

[9] Unit. Sect. Cass., 11 July 2018, no. 18287, cit.

[10] Furthermore, it is no coincidence that when the marriage is dissolved, any family endowment the spouses have established according to art. 167 of Italian civil code is extinguished, unless there are minor children, in which case it is extinguished when they reach the age of majority. But the family needs that the family endowment is established for must be considered dissolved when the marriage is dissolved, and if appropriate, these needs should be the children's needs and certainly not the spouse's.

Moreover, even separation cancels all personal obligations between the spouses, including, significantly, the obligation to contribute to the family's needs pursuant to Art. 143 of the Italian Civil Code. This duty is in fact replaced with a potential obligation to provide maintenance for a separated spouse who does not have their own adequate income (Art. 156 of the Italian Civil Code). So, as a result of the separation, the solidarity between the spouses ceases, and this certainly cannot be restored after the divorce.[11] And in effect, the law on alimony (Art. 5, paragraph 6, of the Italian Divorce Act) does not refer to a maintenance payment (it is no coincidence that an ex-spouse is not one of the parties required to pay maintenance pursuant to Art. 433 of the Italian Civil Code), but at best, following the Court of Cassation's interpretation of May 2017, an allowance aimed at guaranteeing the ex-spouse's economic self-sufficiency, which is not in fact based on need, but rather on guaranteeing a life of freedom and dignity, which includes the ex-spouse's other needs (beyond material assistance).[12]

Indeed, the foresaid law expressly provides that "the court's decision pronouncing the dissolution or cessation of the marriage's civil effects considers the conditions of the spouses, the reasons for the decision, each one's personal and economic contribution to running the household and the formation of each one's assets or their joint assets, and their incomes; and having assessed all said elements, including based on the length of the marriage, it orders one spouse to periodically pay an allowance to the other if the latter does not have adequate means or for objective reasons cannot obtain them."

The adequacy of means to which the law refers is clearly a relative concept, and case law commonly anchored it to the standard of married life[13] until the Court of Cassation's truly seismic and now oft-mentioned about-face[14] of May 2017. That decision instead affirmed that the concept of adequate means refers to the self-sufficiency of the spouses without regard to the standard of living they enjoyed during the marriage, and constituted the ground for subsequent intervention by the United Sections of the Supreme Court.

Case law prior to the United Sections of 2018 had always affirmed the welfare-oriented nature of alimony and that the Judge, in order to grant it, had to first verify that alimony was due and then, if appropriate, determine its amount based on the criteria in Art. 5 of the Italian Divorce Act. Nevertheless, as noted, case law prior to the about-face of

---

[11] In this sense, cf. DOGLIOTTI, *L'assegno di divorzio tra innovazione e restaurazione*, cit., p. 969, which notes that "Ex-spouses are now unrelated (except, obviously, in terms of the need to cooperate in handling relationships with the children), but legislators, taking into account their past common history, decided, as a complete exception, that the ex-spouse should have an obligation (solely economic) to the ex-spouse who lacks adequate means: a periodic allowance or lump sum contribution, if the parties so agree (and quite significantly, in this case, no financial request may be made thereafter, not even for alimony, due to the ex-spouse's state of need, which request can instead be directed to ascendants, descendants, and even siblings...)."

[12] Cass. 10 May 2017, no. 11504, cit.

[13] Cf. the case law cited in footnote no. 5.

[14] In agreement, DANOVI, *La Cassazione e l'assegno di divorzio: en attendant Godot (ovvero le Sezioni Unite)*, cit., p. 51. In reality, the Court of Cassation was already in agreement in its decision no. 1652 of 2 March 1990, in *Foro it.*, 1999, I, par. 1165 et seq. with notes by MACARIO and QUADRI.

2017 was based on reconstructing the standard of married life, while case law after 2017 focused on determining economic self-sufficiency, i.e. guaranteeing a life of freedom and dignity, with the consequence that the allowance must not create unjust enrichment.

Moreover, in this regard, following the Court of Cassation's judgment of May 2017, the Court of Appeal of Milano specified that although economic self-sufficiency must be assessed independently of the characteristics of the marriage and the spouses' living conditions, it cannot ignore the situation of the "single person applicant." In other words, according to the Court, "we must thus scrutinize the variables of the concrete cases, with the parties held to a greater burden of proof and the courts required to show grounds for their decisions (...) the focus must be first and foremost the position of the weaker ex-spouse requesting the support, their actual living conditions, their plans as a single person, their age and health, and other factors, assessing the nature and quality of their weaker position."[15]

Finally, alimony aimed at guaranteeing the weaker spouse economic self-sufficiency must consider the ex-spouse's actual situation as a single person, without regard to the past marriage. But upon examination, this solution becomes tautological, given that the single person's situation cannot help but depend on the prior marriage as well.[16]

The solution the United Sections offered in 2018 has been described as a Copernican-level revolution. This is because the assessment of adequacy does not focus on an evaluation factor extraneous to the law being interpreted, but rather on criteria in the law itself that require the court to "take into account" each spouse's contribution to family needs and the length of the marriage. It follows that this set-up requires alimony to adapt to changes in contemporary society: no longer a welfare-oriented income that unjustifiably extends the solidarity-based bonds of marriage after its dissolution, but an equitable compensation for the sacrifices each spouse made to meet family needs while they were living together.[17]

Finally, the United Sections of the Supreme Court have decided to make alimony not only welfare-oriented, but also compensatory, based not on the lost standard of living enjoyed during the marriage, but on the sacrifices that the plaintiff shows he/she made in order to ensure that standard. For example, this would include the sacrifice of

---

[15] Milan App. Ct., 16 November 2017, no. 4793, in *Corr. giur.*, 2018, pp. 319 et seq.

[16] Cf. RIMINI, *Assegno di divorzio: non è solidarietà, non è assistenza ciò che l'ex coniuge va cercando*, cit., p. 330, who justly observes that "the weaker spouse cannot expect to maintain the same standard of living after the divorce, but has the right to an allowance that takes into account the situation and social context in which he – or more frequently she – lives due to the past marriage."

[17] RIMINI, *La nuova funzione compensativa dell'assegno divorzile*, in *Nuova giur. civ. comm.*, 2018, p. 1697. According to the United Sections decision no. 18287 of 11 July 2018, cit., "the reference to the present-day situation, noted in decision no. 11504 of 2017, based on assessing the personal responsibility of each of the ex-spouses, must therefore focus on the predominance of the balancing/equalizing function of alimony (…). The determining criteria, in particular the one that regards the ex-spouse's contribution to running the household, which the Bench feels is of primary and special importance (...)."

professional and income expectations by assuming a role exclusively or primarily within the family and the consequent active contribution to forming joint assets and the assets of the other spouse.[18]

In this regard, it is clear that the duration of these sacrifices (and thus the duration of the marriage) must be considered, along with their causal link to the economic fortunes of the other spouse, as elements that demonstrate the weaker spouse's reliance on the marriage and its effectiveness in redistributing resources. This reliance should be protected when the marriage is dissolved, by rebalancing the spending power of the ex-spouses.[19]

Moreover, even if we accept the composite nature of alimony (both welfare-oriented and compensatory), such an issue does not seem to consider the unanimously agreed predominance of the former, which was also reiterated by the 1987 divorce reform law.[20]

In other words, the United Sections of the Court of Cassation seem to want to give the weaker spouse alimony, already considered due, in accordance with the criteria of Art. 5 of the Italian Divorce Act that are in fact considered its prerequisites. Contrary to what the law provides, the decision ranks them to give priority to each spouse's personal and economic contribution to the family assets.[21] In other words, the spouse's sacrifice to meet the needs of the other spouse and the family in general would in itself be grounds for awarding alimony, which is aimed at economically rebalancing the positions of the two ex-spouses, when the one who made sacrifices while relying on continuation of the marriage then ends up not being in a position to enjoy the possibilities they could have relied on if the marriage had not fallen apart. With the understanding that if the spouse had made no contribution to the household, upon divorce they would only have the right to an allowance that permits self-sufficiency.[22]

So we can see the composite nature of the allowance, which moreover seems to vary based on the importance attributed to the contribution the spouse made to the family, thus allowing the other spouse to move ahead in their professional career.

One may or may not agree with the legislative decision to award the ex-spouse an allowance that gives them a life of freedom and dignity or the same standard of living they had during the marriage. We might also venture to say that, in terms of future legislation, it would be desirable for any right between the spouses to cease when the civil effects of the marriage cease.

---

[18] Once again Unit. Sect. Cass. 11 July 2018, no. 18287, cit.
[19] RIMINI, *La nuova funzione compensativa dell'assegno divorzile*, cit., p. 1699.
[20] BIANCA, *Diritto civile. 2.1. La famiglia*, Milan, 2014, p. 297.
[21] DOGLIOTTI, *L'assegno di divorzio tra innovazione e restaurazione*, cit., p. 970.
[22] Cf. AL MUREDEN, *L'assegno divorzile e l'assegno di mantenimento dopo la decisione delle Sezioni Unite*, in *Fam. dir.,* 2018, p. 1028; RIMINI, *Assegno divorzile e rilievo delle pregresse attribuzioni patrimoniali*, in *Nuova giur. civ. comm.*, 2019, p. 126.

Or, at least, if the ex-spouse is granted the right to alimony that is adequate to guarantee a life of dignity, it should be limited to a determined period after the divorce, as occurs in other European countries.

In Germany, for example, § 1569 BGB provides that "after the divorce, each spouse must provide for their own maintenance. If they are not able to do this, they may demand maintenance from the other spouse" under the conditions provided by said code. In particular, they may request "maintenance for their child's upbringing and education for at least three years after its birth," (§ 1570 BGB) or if they cannot engage in gainful employment by reason of old age (§ 1571 BGB) or illness or other infirmity (§ 1572 BGB).

In France, alimony cannot continue for more than eight years; in Spain, the duty of reciprocal assistance ends upon divorce, so that generally speaking, there is no obligation to maintain the ex-spouse; in Portugal, alimony is provided only in exceptional cases in the form of an allowance in the event of need; in Sweden, the principal of self-support rules, and alimony is granted only in very special cases and only if the marriage was lengthy; in Hungary, the ex-spouse may only request an allowance if they are in a state of need due to no fault of their own; in England, if one does not opt for a lump sum, only provisional contributions may be requested, mostly in the form of maintenance only.[23]

These aspirations aside, the law still exists, and for better or worse, the courts can only obey it.

On the other hand, we cannot ignore the legal origins of Art. 5 paragraph 6 of Italian Divorce Act, as amended by Act 74/1987. Significantly, an analysis of the preparatory work on reforming the divorce law shows that a passage from the "Lipari" report, which affirmatively stated that "the allowance is to ensure the economically weaker spouse not the same standard of living as during cohabitation, but rather a dignified maintenance", was expunged from the bill.

As noted, we must conclude that elimination of that passage, which would certainly have anchored alimony to self-sufficiency, is an admission that legislative intent was precisely the opposite, that is to link adequacy of means to standard of living.

Moreover, if legislative intent was to ensure support only to a divorced spouse who was not in a position to lead an existence of dignity, it would become difficult to explain why the reasons for the marriage's failure, the contribution of each spouse to forming the other's assets and joint assets, and the length of the marriage should be mentioned as considerations. On the contrary, it can only seem reasonable to hold that these criteria serve to quantify the amount of the allowance once it has been recognized that an applicant who does not have sufficient assets to ensure a life of dignity similar to their life during the marriage has a right to it.

---

[23] Cf. SCARSELLI, *Sull'assegno di divorzio e sulla sentenza delle sezioni unite Cass. 11 luglio 2018 no. 18287*, in *Judicium* (http://www.judicium.it/wp-content/uploads/2018/10/Scarselli.pdf).

So given the law, apart from the criticisms noted above, in this sense we must essentially agree with the ruling of the United Sections of the Court of Cassation of July 2018, which attempted to grade the admissibility of alimony based on the actual economic contribution one spouse made to the other and to the family in general.

In addition, the decision on the merits also recognized that the rights of the divorced spouse are largely waivable. Indeed, in this case, having abandoned the idea that alimony is exclusively welfare-oriented and thus not part of any dispositive agreement, its composite and primarily compensatory nature makes the relative right waivable. The person who has made or is about to make a sacrifice and must be compensated for it, is perfectly capable of assessing his/her own interests and can validly waive his/her rights.[24]

Because of these changes in case law on the nature of alimony, the obstacle that case law has traditionally raised to such agreements[25] must be removed,[26] as it happened in many other Countries around the world.[27] And the legal scholars who provide the basis for these comments seem to agree on this.[28] [29]

---

[24] In agreement RIMINI, *Funzione compensativa e disponibilità del diritto all'assegno divorzile. Una proposta per definire i limiti di efficacia dei patti in vista del divorzio*, in *Fam. dir.*, 2018, p. 1042. Also see FUSARO, *La sentenza delle Sezioni Unite sull'assegno di divorzio favorirà i patti prematrimoniali*, id., pp. 1031 et seq. This possibility now seems even clearer in light of the bill (of 12 December 2018 "*Delegations to the Government for simplifications, regulatory reforms and sector codifications*") enabling the Government to regulate agreements aimed at governing personal and property relationships upon marital dissolution.

[25] Recently, cf. Cass., 30 January 2017, no. 2224, in *Nuova giur. civ. comm.,* 2017, p. 955 with note by GRAZZINI, according to whom "prenuptial agreements that regard alimony are null and void due to their unlawful purpose, as they are in violation of the principle of non-waivable marriage rights pursuant to Art. 160 Italian Civil Code, as well as the non-waivable right to request alimony."

[26] FUSARO, *La sentenza delle Sezioni Unite sull'assegno di divorzio favorirà i patti prematrimoniali*, cit., p. 1039.

[27] It is in fact known that prenuptial agreements are permitted in other legal systems. Consider, for example, common law countries that permit them, or Germany's *Ehvertraege*. The way the legal system in the People's Republic of China governs consensual divorce is quite distinctive. In this case, Art. 31 of the marriage Act of the People's Republic of China expressly states: "Spouses who voluntarily both decide to divorce may be granted a divorce. The parties must go to the Marriage Registration Office to present an application for divorce. After the Office verifies their intention and the existence of appropriate dispositions with regard to children and assets, it issues the divorce certificate." It is thus clear that consensual divorce is granted not by the Court but by the office responsible for consensual divorce, whose duties are governed by Articles 14-19 of the Regulation on registration of marriages. The spouses must also present the Divorce Agreement (离婚协议书), which must contain the declaration that both parties intend to divorce and provisions on child support, on measures for the economic support of a spouse in financial difficulty, on the division of family assets, and on contractual obligations. This mechanism is similar to what is contemplated in Italy by Act 162/2014, which is only applicable to divorces that do not include the transfer of assets.

[28] VECCHIO, *L'assegno divorzile*, cit., p. 79.

[29] Now cf. Disegno di legge n. 506-A "*Modifiche all'articolo 5 della legge 1° dicembre 1970, n. 898, in materia di assegno spettante a seguito di scioglimento del matrimonio o dell'unione civile*" approved on 14.5.2019 by the Camera dei deputati, that provides for: "*Tenuto conto di tutte le circostanze indicate nel settimo comma, il tribunale può predeterminare la durata dell'assegno nei casi in cui la ridotta capacità reddituale del richiedente sia dovuta a ragioni contingenti o comunque superabili*".