

**GROUND FOR DIVORCE AND MAINTENANCE BETWEEN
FORMER SPOUSES**

ITALY

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A. GENERAL

1. What is the current source of law for divorce?

The Law of 1 December 1970, No. 898, as amended by the Law of 1 August 1978, No. 436 and by the Law of 6 March 1987, No. 74, referred to below as the Italian Divorce Law, is the current source of law for divorce.

2. Give a brief history of the main developments of your divorce law?

The introduction of divorce into our legal system, following a series of debates that have taken place for about a century, has been particularly difficult.¹ The Concordat of 1929 between the Italian State and the Catholic Church (Holy See) certainly delayed matters: in the preparatory works for the Italian Civil Code of 1942 the subject of divorce could only be talked about since the Concordat was still relatively recent. Indeed, in the second half of the 1940s various suggestions to introduce the principle of the indissolubility of marriage were even discussed within the Constituent Assembly; although this principle was not adopted, it continued to be viewed as being in the public interest. Many projects were, however, unsuccessfully presented in the period up to 1970.

¹ For an introduction to divorce under Italian law, see Galoppini, 'Profilo storico del divorzio in Italia', in: *Commentario sul divorzio* a cura di P. Rescigno, Milan, 1980, p. 27 *et seq.*

Differing opinions on the subject of 'divorce' presumably induced our legislator to give preference to an option which, even if only apparently, seems to leave the legal system intact,² notwithstanding the radical change made to our system by the Law of 1 December 1970, No. 898, entitled 'Set of rules concerning the dissolution of marriage'. This provoked a radical change of stance, namely from the indissolubility to the dissolubility of marriage.

The general legal position may be found in Article 149 of the Italian Civil Code, which states that 'marriage is dissolved by the death of one of the spouses and in the other cases contemplated by law'.³ At present, however, the only other case provided for is divorce, a term which is never used by the legislator, who prefers to speak of 'dissolution' with precise reference to the effects and not to the structure of the act. In the case of a 'concordatory marriage',⁴ the legislator speaks of 'ending the civil effects of the marriage', thereby underlining that the religious effects of marriage do not end with divorce. The Constitutional Court has repeatedly held⁵ that the Italian Divorce Law is in accordance with the Constitution, pointing out that it influences only the civil effects of marriage, and in no way impairs either the validity of the act of marriage or its religious effects.

A difference thereby emerges between cases of 'dissolution' and cases of 'nullity' of marriage, since nullity does, by contrast, affect the act.

² In this sense, compare Rossi Carleo, 'Il diritto di famiglia', in: *Trattato di diritto privato* diretto da M. Bessone, t. I, vol. IV, Turin, 1999, p. 321.

³ For the text of this rule, which has not been changed by subsequent reforms in divorce law, see the observations by Bonilini, 'Lo scioglimento del matrimonio' (Bonilini-Tommaseo, 'Lo scioglimento del matrimonio'), in: *Codice civile. Commentario* diretto da P. Schlesinger, Milan, 1997, p. 9 *et seq.* and the remarks of Quadri, voce 'Divorzio nel diritto civile e internazionale', in: *Dig. IV, disc. priv., sez. civ.*, IV, 1990, Turin, 1990, p. 510.

⁴ Two types of marriage exist in the Italian legal system: civil marriage and 'concordatory' marriage. The latter, introduced by the Lateranensi Pacts in 1929, is a marriage celebrated by means of a religious rite according to the rules of Canon law (and is as such considered to be a *sacramentum*), but it has also civil effects because it is recorded in the register of acts of Italian marital status.

⁵ Corte cost. 08.07.1971, No. 169, *Foro it.*, 1971, I, c. 19 and Corte cost. 11.12.1973, No. 176, *Dir. fam. pers.*, 1974, p. 11.

However, the legislator has been criticised for not having differentiated between death, nullity and divorce,⁶ all of which have been combined to produce the principal effect: the regaining of single status.

Although it would not be possible here to consider in detail the stages in which divorce law evolved, including in particular its survival intact of an abrogative referendum (12 May 1975) and various challenges on the basis of unconstitutionality, it is obvious from the debates which preceded and followed the introduction of the Divorce Law that the legislator realised that essential options could not be imposed from above and that it was preferable instead to focus on the consequences of the options. Divorce thus came to be treated not as a 'sanction', but rather as a 'remedy' for achieving family unity.⁷ In this way it gave preference to the necessity of striking a new balance between the requirements of the different components of a family in the course of dissolution, without introducing the notion of 'fault' as a matter that could be ruled upon and sanctioned by the judge.

The Divorce Law was amended for the first time in 1978, albeit in a rather limited way. By introducing the provisions, the legislator wished to ensure proper safeguards for the spouse who is in a weaker financial position (maintenance, reversible annuity, allowance to be

⁶ On this topic, see Rossi Carleo, 'Nullità, separazione, divorzio', in: *Commentario sul divorzio* a cura di P. Rescigno, cit., p. 95 *et seq* e Ead., 'Brevi cenni sui diet seicili rapporti tra scioglimento e invalidità del matrimonio', in: *Rapporti personali nella famiglia* a cura di P. Perlingeri, Naples, 1982, p. 363 *et seq*.

On the effect of a spouse's death before the divorce decree, compare the following decisions: Cass. 23.06.1992, No. 7686, *Foro it.*, 1993, I, c. 11 and Cass. 18.08.1992, No. 9592, *Foro it.*, 1993, I, c. 1171, both noted by Cipriani; Trib. Verona 23.07.1994, *Fam. dir.*, 1995, p. 56, with comments by Ciaccia Cavallari, 'Divorzio e cessazione della materia del contendere'; Cass. 19.06.1996, No. 5664, *Foro it.*, 1996, I, c. 2729. In this case the divorce proceedings were terminated.

The problem of the clash between invalidity petitions and divorce petitions is exacerbated in Italian law by the existence of 'concordatory marriage'; see Dossetti, 'Lo scioglimento del matrimonio per pronunzia di divorzio', in: Bonilini-Tommaseo, *Lo scioglimento del matrimonio*, cit, p. 44 *et seq* with particular reference to the competition between the two jurisdictions (the Canon law jurisdiction and the civil jurisdiction), see Maternini, 'Cessazione degli effetti civili', *ibidem*, p. 100 *et seq*

⁷ *Ex plurimis*, see Rescigno, 'Presentazione', in: *Commentario sul divorzio* a cura di P. Rescigno, cit., p. VI.

charged from inheritance). In a second and much more far-reaching amendment in 1987, the legislator introduced various innovations, including divorce by joint petition – separation lasting 3 rather than 5 years – greater consideration of the interests of minors – clearer definition of maintenance – automatic indexing of maintenance – deduction of maintenance at source by the employer – right to benefit for having given up job – measures to coordinate the rules on divorce and separation as far as possible – restriction of the wide powers of the judge. These innovations emphasised the nature of divorce as a ‘remedy’ and stressed the fact that the parties’ wish to dissolve their marriage takes precedence over the judge’s power to prevent the parties from regaining their single status.⁸

3. *Have there been proposals to reform your current divorce law?*

There have been proposals to reform the current Italian Divorce Law. The following legislative proposals can be cited, although the list does not purport to be complete: 26 April 1994, No. 344; 13 February 1995, No. 2017; 9 May 1996, No. 398; 9 May 1996, No. 497; 24 June 1996, No. 1609; 24 July 1996, No. 1977; 17 November 1996, No. 2898; 3 April 1997, No. 3521. Draft proposals: 8 November 1995, No. 2260; 9 May 1996, No. 164; 25 October 1996, No. 1571; 18 March 1997, No. 2234.⁹ A set of legislative proposals culminated in a text of the ‘Limited Committee’ (New rules governing the personal separation of spouses and dissolution of marriage) of 14 May 1998.¹⁰ The most recent proposals include nos. 66/2001, 453/2001, 643/2001 and 1558/2001.

Generally speaking, most relevant amendments to divorce law do not relate either to the problems between the spouses or to the division of assets between separated spouses or ex-spouses, but instead concern

⁸ Compare Quadri, ‘I presupposti del divorzio’, in: *La nuova legge sul divorzio* a cura di Cipriani e Quadri, Naples, 1988, II, p. 1 *et seq* and Barbiera, ‘Divorzio’, Sub Article 1, L. 898/70, in: *Commentario al diritto italiano della famiglia* diretto da Cian, Oppo e Trabucchi, VI, 1, Padua, 1993, p. 101.

⁹ See Bellisario-Mazzoni, *Aet seqido congiunto e mediazione familiare. Linee di riforma nell’aet scjidamento dei figli*, Rome, 1998. See also *Separazione e divorzio. Una nuova legge alle soglie del 2000*, Atti del Convegno-Incontro di Salerno, 3/10/1998, a cura dell’Associazione Italiana Magistrati, *Dir. fam. pers.*, 2000, I, p. 436 *et seq*

¹⁰ The text can be read in *Fam. dir.*, 1998, p. 482. See Dogliotti, ‘Idee per una riforma: breve analisi del progetto’, *ibidem*, p. 489.

the relationship between parents and children. In point of fact, the majority of reform proposals deal with the following questions: measures regarding children, in particular the introduction of joint custody as an ordinary solution; general applications for family mediation; abolition of rulings on the issue of fault during the judicial separation proceedings; abolition of the right of succession for a separated spouse; the inclusion of divorce law in the Civil Code; decree of divorce after three years' continuous separation, starting with the appearance in front of the judge during the separation proceedings (i.e. without waiting for the final decree of separation).¹¹ It should be noted that all of these proposals are intended to resolve the many problems that still exist (despite the partial attempt in the 1987 reforms) in relation to the coordination of the rules on judicial separation and divorce.

B. GROUNDS FOR DIVORCE

I. General

4. What are the grounds for divorce?

Under Articles 1 and 2 of the Italian Divorce Law, which deal with civil marriage and religious marriage respectively, the grounds for divorce are the breakdown of the 'material and spiritual union

¹¹ See Lenti, 'Recenti cambiamenti nel diritto giurisprudenziale della separazione e del divorzio', *Familia*, 2002, p. 404.

between the spouses',¹² as determined by the existence of one of the criteria exhaustively listed in Article 3 of the Italian Divorce Law.¹³

¹² Article 1, Italian Divorce Law: 'The judge pronounces the dissolution of marriage contracted in accordance with the Civil Code. If the attempt at reconciliation in accordance with Article 4 should fail, he verifies that the spiritual and material union between the couple cannot be maintained or revived owing to the existence of one of the causes mentioned in Article 3.'

Article 2, Italian Divorce Law: 'If a marriage has been celebrated in accordance with religious rites and has been recorded in the normal way and if the attempt at reconciliation in accordance with Article 4 should fail, the judge verifies that the spiritual and material union between the couple cannot be maintained or revived owing to the existence of one of the causes mentioned in Article 3, and he pronounces the end of the civil effects of the marriage consequent upon registration'.

¹³ Article 3, Italian Divorce Law: 'Application for dissolution of the marriage or termination of the civil effects of the marriage may be made by one of the spouses if, after celebration of the marriage, the other spouse has been sentenced by final judgment for offences, including offences committed previously:

to life imprisonment or to a term of imprisonment exceeding fifteen years, including cumulative terms imposed by various judgments for one or more crimes committed without malice aforethought, with the exception of political crimes and crimes committed for particular moral or social beliefs;

to any term of imprisonment for a crime defined in Article 564 of the Criminal Code or one of the crimes defined in Articles 519, 521, 523 and 524 of the Criminal Code or for induction, coercion, exploitation or the aiding and abetting of prostitution;

to any judgment for the wilful murder of one's child or for attempted murder of one's spouse or of the child;

to any term of imprisonment imposed by two or more judgments for the crimes defined in Article 582, if there are aggravating circumstances to the detriment of the spouse or the child in the sense of the second § of Article 583 and Articles 570, 572 and 643 of the Criminal Code.

In the cases mentioned at (d) the competent judge who pronounces the dissolution of marriage or the ending of the civil effects of marriage shall verify that there is no prospect of the family continuing to live together or resuming living together, taking into consideration the future behaviour of the spouse.

With respect to all possibilities mentioned in § 1 of the present Article the petition may not be presented by the spouse who has been sentenced for complicity in a crime when married life is resumed;

2) if:

the other spouse has been acquitted of one of the crimes mentioned at (b) and (c) of § 1 of the present Article due to total defect of reason and the judge who pronounces the dissolution of marriage or the ending of the civil effects of marriage verifies that there is no prospect of the family continuing to live together or resuming living together, taking into consideration the future behaviour of the spouse;

This legislative choice has been criticised as a ‘non-choice’,¹⁴ and the legislator has been reproached for being ‘incoherent’. The present situation is that if the alleged irretrievable breakdown of marriage – which is the sole ground of divorce – is not based on one of the criteria exhaustively listed in Article 3, the judge cannot pronounce the decree of divorce.

In fact, the exhaustive list contained in Article 3 of the Italian Divorce Law is much more apparent than real, since the ‘normal’ basis for divorce is the one specified in Article 3 § 2(b), of the Italian Divorce Law, i.e. continuous personal separation lasting for three years (see also the next answer). Under Article 150 of the Italian Civil Code, divorce on this ground may be judicial or consensual: separation is pronounced by judgment in the former case and homologated by decree in the second case.¹⁵

In any case, under Article 151 of the Italian Civil Code, separation may be submitted to a tribunal even where application is made

the judicial separation of the couple has been pronounced by final judgment or the separation by mutual consent has been homologated or a *de facto* separation intervenes and itself begins at least two years before 18 December 1970.

In order to present a petition for dissolution or the ending of the civil effects of marriage it is necessary in the aforementioned cases that the separation should have been continuous and lasted for at least three years from the time the couple appeared before the court for the judicial separation proceedings, even if the judgment concerned is effected by mutual consent.

The eventual interruption of separation has to be pleaded by the respondent.

The penal proceedings held in respect of the crimes mentioned at (b) and (c) of § 1 of the current Article ended with a judgment that proceedings should be discontinued because they are statute-barred, if the competent judge who pronounces the dissolution or the ending of the civil effects of the marriage verifies that the committed offences contained the basic elements and the conditions for liability to punishment in respect of the crimes;

penal proceedings for incest ended with an acquittal or discharge on the grounds that the offence should not be punished in order to avoid a public scandal;

the other spouse who is a foreign citizen obtained the annulment or dissolution of the marriage abroad or has contracted a new marriage abroad;

the marriage has not been consummated.

¹⁴ Barbiera, ‘Divorzio, Sub Article 1, L. 898/70’, in: *Commentario al diritto italiano della famiglia* diretto da Cian, Oppo e Trabucchi, cit., p. 73 *et seq.* and, *ivi*, the numerous references.

¹⁵ It should be pointed out that under Article 158 of the Italian Civil Code, separation by the mere consent of the spouses without confirmation by the judge has no effect.

Italy

independently by one or both spouses or if, on the basis of the facts, continuation of the cohabitation would be intolerable or would seriously jeopardise the education of the children.

5. *Provide the most recent statistics on the different bases for which divorce was granted.*

The most recent statistics¹⁶ show that in the great majority of cases (over 98%) divorce is granted on the grounds of the breakdown of the material and spiritual union between the spouses as reflected in a continuous period of personal separation lasting at least three years. Personal separation must be confirmed by a judgment in the case of judicial separation and homologated by judicial decree in the case of consensual separation (see also the preceding Question and Question 14).

Moreover, the most recent statistics show that the rate of separation and divorce in Italy is constantly rising. The average age is 40 for husbands and 35 for wives:

Separations and divorces in Italy since 1986

<i>Years</i>	<i>Marriages</i>	<i>Separations</i>	<i>Divorces</i>
1986	296,539	35,547 (11.9%)	16,857 (5.6%)
1987	305,328	35,205 (11.5%)	27,072 (8.8%)
1988	315,447	37,224 (11.8%)	30,778 (9.7%)
1989	311,613	42,640 (13.6%)	30,314 (9.7%)
1990	319,711	44,018 (13.7 %)	27,682 (8.6%)
1991	312,061	44,920 (14.3 %)	27,350 (8.7%)
1992	312,348	45,754 (14.6 %)	25,997 (8.3%)
1993	302,230	48,198 (15.9 %)	23,863 (7.8%)
1994	291,607	51,445 (17.6 %)	27,510 (9.4%)

6. *How frequently are divorce applications refused?*

¹⁶ The last available statistical data (ISTAT) until 1994. Cfr. ISTAT, *Statistiche giudiziarie civili*, 1992-1993, tav. 4.5; 1994, tav. 4.16; 1995-1996, tav. 4.17.

No statistics are available. However, divorce applications are hardly ever refused. The most recent statistics on separation proceedings (which almost invariably precede divorce) show that in 1993 99.3% of separation applications were granted and that only 0.7% were refused.¹⁷ Significantly, no data on this subject have been available since 1994.

7. Is divorce obtained through a judicial process, or is there also an administrative procedure?

Divorce can be obtained only through a judicial process. Under Article 4 of the Italian Divorce Law, in conjunction with the rules of the Code of Civil Procedure, divorce proceedings (like separation proceedings) are divided into two phases: the presidential phase and the investigation phase. It finishes with judgment. The process always includes an intervention by the public prosecutor.

Under Article 4, § 7, the couple must appear in person before the president of the court, except where good reasons for non-appearance are shown to exist. The president first hears the spouses separately and afterwards holds a joint hearing to explore the scope for reconciliation. If the spouses reconcile or if the petitioner decides not to continue with the petition, the president will direct that the reconciliation or the decision not to proceed with the petition is recorded in the record of the hearing.

If the respondent does not appear or the reconciliation does not succeed, the president makes an order under § 8 for such temporary and urgent measures as he considers necessary for the couple and the protection of the children's interests and, if he considers it strictly necessary, gives such advice to the minors as is appropriate to their age. Afterwards he designates the investigating judge, sets the case down for hearing and orders the appearance of the parties.

The order made by the president may be revoked or changed by the investigating judge under Article 177 of the Code of Civil Procedure.

¹⁷ ISTAT, *Statistiche giudiziarie civili*, 1993, tav. 4.1.

Italy

This is done pursuant to Article 189, which provides for the application of the Code of Civil Procedure.

If, in accordance with § 9, the proceedings must continue in order to assess maintenance, the court gives a provisional judgment on the dissolution of the marriage or the ending of the civil effects of the marriage. This judgment may be immediately appealed. As soon as the final judgment is given, the provisions of Article 10 are applied.

Under § 10, a court giving a provisional judgment on the maintenance obligation may direct that the obligation is effective from the date of the application.

The reform of 1987 introduced divorce by joint petition: this is a very simple procedure and is based on the consensual judicial separation procedure (Article 158 of the Italian Civil Code and Article 711 of the Code of Civil Procedure). Under Article 4 § 13, of the Italian Divorce Law, a joint petition by the spouses for dissolution of the marriage or the ending of the civil effects of marriage must include provision for the children and regulation of the financial position. The court gives judgment after hearing the spouses and assessing the provision made for the children's interests. If the court considers that the provision made for the children is not in their best interests, the procedure under § 8 is applied.

8. *Does a specific competent authority have jurisdiction over divorce proceedings?*

There is a specific competent authority, which has exclusive jurisdiction over divorce proceedings: the ordinary tribunal. Article 9 of the Code of Civil Procedure provides that the tribunal has jurisdiction to hear every legal action concerning the *status* and capacity of persons. Under Article 4 § 1, of the Italian Divorce Law, a petition for the dissolution of marriage or the ending of the civil effects of marriage is filed with the tribunal in the district in which the respondent has his/her residence or domicile or, in cases where the whereabouts of the respondent are unknown or the respondent is abroad, with the tribunal in the place where the petitioner has his/her residence or domicile. Where both spouses are resident abroad the

petition may be filed with any tribunal in the Republic. A joint petition may be submitted to the tribunal of the place where either spouse has his/her residence or domicile.

9. *How are divorce proceedings initiated (e.g. is a special form required, does one need a lawyer and can the individual go to the competent authority personally)?*

Under Article 4 § 2, of the Italian Divorce Law, divorce proceedings are initiated by petition which is filed with the tribunal and contains:

- designation of the judge;
- name and surname of the petitioner, plus the residence or domicile of the petitioner in the municipality where the judge to whom the spouses have applied resides, and the name and residence, domicile or abode of the respondent;
- object of the petition;
- statement of the facts of the case and the legal provisions on which the petition for dissolution of the marriage or for the ending of the civil effects of the marriage is based, including the respective conclusions;
- specific indication of the evidence that the petitioner intends to use.

Under § 4, the existence of legitimate or legitimated children or children adopted by both spouses during marriage must be indicated in the petition.

Under § 5, the president of the court must, within five days of the date of the filing of the petition at the court registrar's office, determine by writ of summons appended at the bottom of the petition the date of the sitting at which the spouses must appear and the dates for service of the petition and the decree. A *curator ad litem* is appointed by the president if the respondent is insane or legally incapable.

The petition cannot be filed in person by the petitioner, who must instead be represented by a lawyer.

10. *When does the divorce finally dissolve the marriage?*

Italy

Under Article 5 § 1, of the Italian Divorce Law, the tribunal to which the spouses have applied gives judgment pronouncing the dissolution of marriage or the ending of the civil effects of the marriage after hearing the arguments of both sides in full, after the mandatory intervention of the public prosecutor and after having checked whether one of the grounds under Article 3 exists; afterwards he asks the clerk of the municipality where the marriage was registered to note the judgment.

Under Article 10 § 1, of the Italian Divorce Law the judgment is transmitted by the registrar of the court to the clerk of the municipality where marriage was recorded.

Under Article 10 § 2, of the Italian Divorce Law, the dissolution of marriage (or the ending of the civil effects of marriage) is effective from the day on which the judgment is registered by the clerk of the municipality where the marriage was recorded.

If under your system the sole ground for divorce is the irretrievable breakdown of marriage answer part II only. If not, answer part III only.

II. Divorce on the sole ground of irretrievable breakdown of the marriage

11. How is irretrievable breakdown established? Are there presumptions of irretrievable breakdown?

The presumptions of irretrievable breakdown are exhaustively listed in Article 3 of the Italian Divorce Law. These are as follows:

if, after the celebration of the marriage, the other spouse has been sentenced by final judgment, even for offences committed previously:

- to life imprisonment or to a term of imprisonment exceeding fifteen years, including cumulative terms imposed by various judgments for one or more crimes committed without malice aforethought, with the exception of political crimes and crimes committed on account of particular moral or social beliefs;
- to any term of imprisonment for a crime defined in Article 564 of the Criminal Code or one of the crimes defined in Articles

519, 521, 523 and 524 of the Criminal Code or for induction, coercion, exploitation or the aiding and abetting of prostitution;

- to any judgment for the wilful murder of one's child or for attempted murder of one's spouse or of the child;
- to any term of imprisonment imposed by two or more judgments for the crimes defined in Article 582, if there are aggravating circumstances to the detriment of the spouse or the child in the sense of the second § of Article 583 and Articles 570, 572 and 643 of the Criminal Code.

In the cases mentioned at (d) the competent judge who pronounces the dissolution of marriage or the ending of the civil effects of marriage shall verify that there is no prospect of the family continuing to live together or resuming living together, taking into consideration the future behaviour of the spouse.

With respect to all possibilities mentioned in § 1 of the present Article the petition may not be presented by the spouse who has been sentenced for complicity in a crime when married life is resumed;

2) if:

- the other spouse has been acquitted of one of the crimes mentioned at (b) and (c) of § 1 of the present Article due to total defect of reason and the judge who pronounces the dissolution of marriage or the ending of the civil effects of marriage verifies that there is no prospect of the family continuing to live together or resuming living together, taking into consideration the future behaviour of the spouse;
- the judicial separation of the couple has been pronounced by final judgment or the separation by mutual consent has been homologated or a *de facto* separation intervenes and itself begins at least two years before 18 December 1970.

In order to present a petition for dissolution or the ending of the civil effects of marriage it is necessary in the aforementioned cases that the separation should have been continuous and lasted for at least three years from the time the couple appeared before the court for the

Italy

judicial separation proceedings, even if the judgment concerned is effected by mutual consent.

The possible interruption of separation has to be pleaded by the respondent.

- the penal proceedings held in respect of the crimes mentioned at (b) and (c) of § 1 of the current Article ended with a judgment that proceedings should be discontinued because they are statute-barred, if the competent judge who pronounces the dissolution or the ending of the civil effects of the marriage verifies that the committed offences contained the basic elements and the conditions for liability to punishment in respect of the crimes;
- penal proceedings for incest ended with an acquittal or discharge on the grounds that the offence should not be punished in order to avoid a public scandal;
- the other spouse, who is a foreign citizen, obtained the annulment or dissolution of the marriage abroad or has contracted a new marriage abroad;
- the marriage has not been consummated.

12. Can one truly speak of a non-fault-based divorce or is the idea of fault still of some relevance?

Divorce is described in Italy as a remedy and is not therefore based on fault: the notion of fault has no relevance whatever (see also Question 2).

13. To obtain the divorce, is it necessary that the marriage was of a certain duration?

No, the marriage need not have lasted a given time in order to obtain a divorce.

14. Is a period of separation generally required before filing the divorce papers? If not, go to question 16. If so, will this period be shorter if the respondent consents than if he/she does not? Are there other exceptions?

Before the divorce papers are filed, there must be a period of personal separation – under a court judgment in the case of judicial separation and confirmed by decree in the case of consensual separation - if the criterion listed in Article 3 § 2(b), applies. In such cases (the great majority of petitions for divorce are now instituted on this basis), the personal separation must have lasted for at least three years from the appearance before the president of the court. The rule is valid even if the respondent consents. In the case of judicial separation, it is also necessary that the judgment ordering separation has become final (Article 3 § 2(b), Italian Divorce Law).

Article 3 of the Italian Divorce Law – § 1(a), (b), (c) and (d) and § 2(a), (c), (d), (e), (f) and (g) – also lists a series of circumstances which justify an immediate petition for divorce on the ground of irretrievable breakdown of marriage without the need to await completion of a period of separation.

15. Does this separation suffice as evidence of the irretrievable breakdown?

Under Article 3 § 2(b), of the Italian Divorce Law, personal separation lasting for a continuous period of 3 years (see the two preceding Questions) is sufficient as evidence of the irretrievable breakdown of the marriage.

16. In so far as separation is relied upon to prove irretrievable breakdown:

(a) Which circumstances suspend the term of separation?

Our legislator distinguishes between reconciliation occurring during the separation proceedings and reconciliation occurring after the judicial separation order.

Under Article 153 Italian Civil Code, reconciliation between the spouses leads to the abandonment of an action for separation. Under Article 157 of the Italian Civil Code, the spouses may, in the case of mutual consent, terminate the effects of the decree (or judgment) of separation by express declaration or by unequivocal behaviour incompatible with a state of separation, in other words without the necessity of intervention by the court. Under § 2 of the same Article a

Italy

further decree of separation may be made only in relation to facts and behaviour occurring after the reconciliation.¹⁸ The mutual consent of the spouses, which results from an express statement or an unequivocal behaviour, therefore terminates the effects of separation.

(b) Does the separation need to be intentional?

Separation needs to be intentional and must therefore be deliberately requested by at least one of the spouses.

(c) Is the use of a separate matrimonial home required?

No, the law does not require the use of a separate matrimonial home as evidence of irretrievable breakdown. According to the case law, mere cohabitation is not a sufficient indication of reconciliation if it is due to reasons other than a desire for reconciliation and it is not supported by a serious intention to restore the *consortium vitae*.¹⁹

17. Are attempts at conciliation, information meetings or mediation attempts required?

Attempts at conciliation, information meetings and mediation attempts are not required, but it is evident from the majority of proposals for reform that there is a desire to introduce these elements (see Question 3).

18. Is a period for reflection and consideration required?

No, a period for reflection and consideration is not required.

19. Do the spouses need to reach an agreement or to make a proposal on certain subjects? If so, when should this agreement be reached? If not, may the competent authority determine the consequences of the divorce?

The spouses do not need to reach an agreement, but they may submit a joint petition during the presidential phase, or at any time during the

¹⁸ For a consideration of the constitutional legitimacy of this §, see Corte cost. 21/5/1983, No. 104, *Giur. it.*, 1984, I, 1, p. 217.

¹⁹ Compare for example Cass. 26/11/1996, No. 10465; Cass. 9/5/1997, No. 4056.

investigation phase provided that the divorce judgment has not yet been pronounced. If they do not reach an agreement, the court determines the consequences of the divorce by judgment.

20. To what extent must the competent authority scrutinise the agreement that has been reached?

Under Article 4 § 13, of the Italian Divorce Law, once the court has verified that the agreement meets the existing legal criteria, it merely has to check that the conditions of the agreement are in keeping with the children's interests (see also Question 7).

21. Can the divorce application be rejected or postponed due to the fact that the dissolution of the marriage would result in grave financial or moral hardship to one spouse or the children? If so, can the competent authority invoke this on its own motion?

No, the divorce application cannot be rejected or postponed due to the fact that the dissolution of marriage would result in grave financial or moral hardship to a spouse or the children. No such provision exists either under the Italian Divorce Law or in the case law.

III. Multiple grounds for divorce

Part III, including Questions 22-54, is not relevant.

C. SPOUSAL MAINTENANCE AFTER DIVORCE

I. General

55. What is the current source of private law on the maintenance of spouses after divorce?

The Law of 1 December 1970, No. 898, as amended by the Law of 1 August 1978, No. 436, and by the Law of 6 of March 1987, No. 74, referred to below as the Italian Divorce Law, is the current source of private law on the maintenance of spouses after divorce.

Italy

56. Give a brief history of the main developments of your private law on the maintenance of spouses after divorce?

The original text of Article 5 § 6, of the Italian Divorce Law provided that the court should, when deciding on maintenance, take account of the 'financial position of the spouses', the 'reasons for the decision' and the 'personal and financial contribution made by each of the spouses to the welfare of the family and the creation of their joint assets'. On the basis of this rule, the courts formulated the theory that maintenance has three functions: i.e. assistance, compensation and refund (in the sense of a form of reimbursement half-way between consideration and indemnification). Particular emphasis was placed on the aspect of assistance.²⁰ However this theory was criticised for several reasons, especially because of the difficulties caused by the almost unlimited discretionary power given to the judge.²¹

The reform in 1987 introduced some detailed provisions. The new Article 5 § 6, states that maintenance will be paid to the spouse only 'when the latter does not have appropriate means or is unable to provide for himself/herself for objective reasons'.

On the basis of this wording, which clearly emphasises that maintenance is provided first and foremost as support, legal theory has developed the current prevailing view that the prime purpose of maintenance is to provide assistance, and that the possible refund and compensation functions can be of relevance only in relation to the liquidation of the allowance.²² Even the Supreme Court, which

²⁰ The first elaboration of this theory, upheld later by the Constitutional Court (judgment 10/7/1975, No. 202, *Foro it.*, 1975, I, c. 1575), can be found in Cass., sez. un., 26/4/1974, No. 1194, *Foro it.*, 1974, I, c. 1335.

²¹ For a review of legal literature and legal practice before the 1987 reform, see Vincenzi Amato, 'I rapporti patrimoniali', in: *Commentario sul divorzio* a cura di P. Rescigno, cit., p. 328; Quadri, *Rapporti patrimoniali nel divorzio. Esperienze giurisprudenziali e prospettive di riforma*, Naples, 1986, p. 28 *et seq*; Rimini, 'L'assegno di divorzio tra tenore di vita e stato di bisogno', in: *Nuova giur. civ. comm.*, 1991, II, p. 1 *et seq*; Bonilini, 'L'assegno post-matrimoniale', in: Bonilini-Tommaseo, *Lo scioglimento del matrimonio*, cit., p. 446 *et seq*.

²² See also Bonilini, 'L'assegno post-matrimoniale', in: Bonilini-Tommaseo, *Lo scioglimento del matrimonio*, cit., p. 446 *et seq*; Dogliotti, *Separazione e divorzio. Il dato normativo. I problemi interpretativi*, 2nd Edition, Turin, 1995, p. 221; A. Finocchiaro e M. Finocchiaro, *Diritto di famiglia*, III, *Il divorzio*, Milan, 1988, p. 400.

intervened in the case of United Sections,²³ has confirmed that the exclusive purpose of maintenance is to provide assistance, adding that the sole function of the other elements of the rule was that of quantified *criteria*.²⁴

Once the dilemma of the nature of the allowance was resolved, the discussion shifted to possible parameters for assessing the lack of 'appropriate means', an ambiguous concept resulting from the lack of political agreement on how to strike a balance between two opposing demands: on the one hand, the need to protect the spouse in the weaker financial position, and on the other the need to minimise the adverse effect of divorce on the assets of the parties.²⁵

The position of the courts has fluctuated: at times they have interpreted the insufficiency of means in an absolute and rigorous way, namely as a situation in which it is impossible for the claimant to lead an independent and dignified life,²⁶ at other times they have adopted a more relaxed and relative approach, namely as a lack of proportion between the means of the claimant (who may even be self-sufficient) and the means of the other spouse,²⁷ and, finally, they have sometimes interpreted it as the inability of the claimant to maintain the standard of living to which he or she was accustomed during the marriage.²⁸ Such an assessment, which was based on the other *criteria* of quantification indicated by the rule and on the specific facts of the case, could in practice result in reduction of the maintenance or even outright refusal of the claim.

²³ Cass., sez. un., 29/11/1990, No. 11490, *Foro it.*, 1991, I, c. 74, conf. Cass., sez. un., nn. 11489/90, 11490/90, 11491/90.

²⁴ Cass. 17/4/1991, No. 4098, *Foro it.*, 1991, I, c. 1472; Cass. 6/6/1997, No. 5194, *Mass. Giur. I.*, 1997, p. 502; Cass. 5/8/1997, No. 7199, *Giur. it.*, 1998, c. 416; Cass. 4/11/1997, No. 10791, *Dir. fam. pers.*, 1998, p. 891; Cass. 26/2/1998, No. 2087; Cass. 20/3/1998, No. 2955.

²⁵ On the parliamentary history of the rule see Quadri, 'Profili patrimoniali', in: *La nuova legge sul divorzio* a cura di Cipriani e Quadri, cit., p. 1 *et seq.*

²⁶ Cass. 2/3/1990, No. 1652, *Dir. fam. pers.*, 1990, p. 437.

²⁷ Trib. Milan, 27/1/1988, *Dir. fam. pers.*, 1988, p. 1050.

²⁸ Cass. 4/4/1990, No. 2799, *Foro it.*, 1990, I, c. 2533, which upheld Cass. 17/3/1989, No. 1322, *ivi*, 1989, I, c. 2512; Cass. 1/12/1993, No. 11860, *Fam. dir.*, 1994, p. 12; Cass. 6/3/1997, No. 1984.

Italy

This last interpretation seems to command the most support, even if the discretionary power of the judge means that the amount of maintenance awarded is ultimately more generous, despite the fact that aim of the reform was to limit the maintenance.

57. Have there been proposals to reform your current private law regarding maintenance of spouses after divorce?

Not really. See the answer to Question 3.

58. Upon divorce, does the law grant maintenance to the former spouse?

Upon divorce, the law grants maintenance to the former spouse. Article 5, § 6, of the Italian Divorce Law,²⁹ provides that 'in the judgment dissolving the marriage or ending the civil effects of the marriage, the tribunal orders a spouse to pay periodical maintenance to the other spouse if the latter has no financial means or is unable to provide for himself/herself for objective reasons'. At the same time, the judge has to take into consideration the circumstances of the spouses, the reasons for the decision, the personal and financial contribution made by each of the spouses to the welfare of the family and the creation of their personal and joint assets. Finally, the judge has to assess all these factors in the light of the duration of the marriage.

59. Are the rules relating to maintenance upon divorce connected with the rules relating to other post-marital financial consequences, especially to the rules of matrimonial property law? To what extent do the rules of (matrimonial) property law fulfil a function of support?

At present, the rules relating to maintenance upon divorce are not connected with the rules relating to other post-marital financial consequences.

²⁹ Article 5, § 6, Italian Divorce Law: 'In the judgment dissolving the marriage or ending the civil effects of the marriage, the tribunal, after taking account of the financial position of the spouses, the reasons for the decision and the personal and financial contribution made by each of the spouses to the welfare of the family and the creation of their joint assets, orders a spouse to pay periodical maintenance to the other spouse if the latter has no financial means or is unable to provide for himself/herself for objective reasons'.

60. *Do provisions on the distribution of property or pension rights (including social security benefits where relevant) have influence on maintenance after divorce?*

It is possible for provisions on the distribution of assets or pension rights to influence maintenance after divorce. Although the law makes no provision for this, the judge may take it into account when establishing the amount of the maintenance. Under Article 5, § 6, of the Italian Divorce Law for calculating the amount of maintenance the judge can take into account the 'circumstances of the spouses' and 'the income of both spouses'. The case law too has specified that the judge must consider the spouses' income. There is an ongoing discussion as to whether only the effective income has to be taken into account or whether the judge should consider all assets that can be estimated or by which income can be gained, including real property and capital assets. The Supreme Court takes the latter view.³⁰

61. *Can compensation (damages) for the divorced spouse be claimed in addition to or instead of maintenance payments? Does maintenance also have the function of compensation?*

The law makes no provision for claims for compensation (damages) for the divorced spouse in addition to or instead of maintenance. Under Article 5, § 6, of the Italian Divorce Law, the judge may consider the 'reasons for the decision' together with all the other elements of the rule (see Question 70). i.e. the 'circumstances of the spouses', the 'personal and financial contribution made by each spouse to the welfare of the family and the creation of personal and joint assets' and 'the income of both spouses'. Moreover, the judge may also assess all the above-mentioned elements 'in the light of the duration of the marriage' in order to establish the amount of the maintenance, although he is not obliged to apply this criterion.³¹ It follows that the assessment of the 'reasons for the decision' is superfluous if the claimant has appropriate means.³² Accordingly, maintenance cannot

³⁰ See Cass. 20/3/1998, No. 2955, *Mass. Giur. it.*, 1998.

³¹ Cass. 7/5/1998, No. 4617, *Mass. Giur. it.*, 1998, p. 482.

³² See Cass. 2/9/1996, No. 7990, *Mass. Giur. it.*, 1996, p. 721.

Italy

by law be in the nature of a refund (see Question 56 and the reported *ivi* cases).

62. *Is there only one type of maintenance claim after divorce or are there, according to the type of divorce (e.g. fault, breakdown), several claims of a different nature? If there are different claims explain their bases and extent.*

Since the 1987 reform there has only been one type of maintenance claim, namely maintenance whose nature and function is assistance (see Question 56 again and the reported *ivi* cases).

63. *Are the divorced spouses obliged to provide information to the other spouse and/or to the competent authority on their income and assets? Is this right to information enforceable? What are the consequences of a spouse's refusal to provide such information?*

A divorced spouse is obliged to provide information to the other spouse and/or to the competent authority on his or her income or assets, unless the petition for divorce is a joint petition (see Questions 8 and 20 (Book I, ABC)). Under Article 5, § 9, the spouses must produce their own income tax return and all documentary evidence concerning their income and their personal and joint assets at the hearing before the president of the court. Where the evidence is contested, the tribunal orders its own inquiries into the income and assets of the spouses and their real standard of living. If necessary, the tribunal even cooperates with the tax inspectors.

Moreover, the judge may treat a refusal to allow an inspection as evidence under Article 116 of the Code of Civil Procedure. Under this provision the judge may draw conclusions from the answers of the parties during formal questioning, from their unjustified refusal to allow inspections and, generally, from their behaviour during the proceedings.

II. Conditions on which maintenance is paid

64. *Do general conditions such as lack of means and ability to pay suffice for a general maintenance grant or are there specific conditions such as age, illness, duration of marriage and the raising of children? Please explain.*

If a maintenance order is to be made, it is necessary and sufficient under the Italian Divorce Law for the claimant to lack appropriate means or to be incapable of obtaining them (Article 5, § 6, Italian Divorce Law).³³ In evaluating this second requirement - and establishing the amount of maintenance too (when this is due) - the judge is required under Article 5, § 6, of the Italian Divorce Law to take into consideration the 'circumstances of the spouses'. The reform of 1987 dropped the adjective 'financial', but introduced as an element of valuation the 'income of both spouses'. The generic reference in law to the 'circumstances of the spouses' means that it is certainly within the discretionary power of the judge to take account of the personal and specific circumstances of the spouses such as age, illness, social conditions, professional qualifications and duration of the marriage, because all these factors can in practice affect the ability of the claimant to obtain appropriate means. Naturally, this assessment will be made strictly on the facts of the specific case³⁴ (see also Question 61).

65. *To what extent does maintenance depend on reproachable behaviour or fault on the part of the debtor during the marriage?*

As we have already explained, in our legal system maintenance depends only on the lack of appropriate means of the claimant or, in any case, on the claimant's inability to provide for himself/herself for objective reasons (Article 5, § 6, Italian Divorce Law). The burden of proving the lack of appropriate means rests on the claimant. The behaviour of the parties during the marriage and/or the fault of the debtor may affect only the amount of the maintenance (see Questions 2 (Book I, ABC) and 56, 61 and 70).

³³ See the position aet seqirmed by Cass., sez. un., 29/11/1990, No. 11490, cit.

³⁴ Cass. 2 luglio 1998, No. 6468, *Studium iuris*, 1998, p. 1256.

Italy

66. *Is it relevant whether the lack of means has been caused by the marriage (e.g. if one of the spouses has given up his/her work during the marriage)?*

It is not really relevant whether or not the lack of means has been caused by the marriage. Nonetheless, such a circumstance may have a bearing on the amount of the maintenance.³⁵

67. *Must the claimant's lack of means exist at the moment of divorce or at another specific time?*

The lack of means and the inability of the claimant to provide for himself/herself for objective reasons must exist at the moment of divorce.³⁶ Nevertheless, if the lack of means becomes apparent immediately after the divorce, it is possible to institute special proceedings in order to have the terms of the divorce modified. Under Article 9, § 1, of the Italian Divorce Law, where evidence emerges shortly after the judgment dissolving the marriage or ending the civil effects of the marriage, the tribunal will decide in closed session on an application by the parties for alteration of the provisions concerning child custody or the amount and terms of the maintenance, in accordance with Articles 5 and 6 (see also Question 77). The public prosecutor is a party to any such proceedings.

III. Content and extent of the maintenance claim

68. *Can maintenance be claimed for a limited time period only or may the claim exist over a long period of time, maybe even for life?*

The claim exists for a given period of time, which may be even for life. Article 5, § 6, of the Italian Divorce Law provides that a spouse has an obligation to pay periodic maintenance to the other spouse if the latter does not have appropriate means or is unable to provide for himself/herself for objective reasons.

³⁵ See Cass., sez. un., 29/11/1990, No. 11490, cit.

³⁶ See once again Cass., sez. un., 29/11/1990, No. 11490, cit. and Cass. 8/10/1997, No. 9758, *Mass. Giur. it.*, 1997, p. 980.

69. *Is the amount of the maintenance granted determined according to the standard of living during the marriage or according to essential needs or other criteria?*

The law does not require maintenance to be determined in relation to the standard of living during marriage, but in practice applications of such a kind³⁷ have often been made (see also Question 56 and the reported *ivi* cases).

70. *How is maintenance calculated? Are there rules relating to percentages or fractional shares according to which the ex-spouses' income is divided? Is there a model prescribed by law or competent authority practice?*

As already explained (see Question 64), the determination of maintenance is a matter for the discretion of the judge, who applies the rules contained in Article 5, § 6, of the Italian Divorce Law. Under these rules, the amount of the maintenance is geared to various concrete situations.

With reference to the criteria it is necessary to add the following explanations:

As regards the criteria of the 'circumstances of the spouses' and the 'income of both spouses', the case law has provided that not only the current income has to be taken into account but also all assets capable of valuation and assets by which income can be earned, including real property and even assets that are temporarily unproductive.³⁸

As regards the criterion of 'the personal and financial contribution made by each spouse to the welfare of the family and the creation of personal and joint assets', the case law has provided that every kind of contribution must be taken into account, including domestic work and

³⁷ Cass. 4/4/1990, No. 2799, *Foro it.*, 1990, I, c. 2533, which upheld Cass. 17/3/1989, No. 1322, *ivi*, 1989, I, c. 2512; Cass. 1/12/1993, No. 11860, *Fam. dir.*, 1994, p. 12; Cass. 6/3/1997, No. 1984.

³⁸ See Cass. 20/3/1998, No. 2955, *Mass. Giur. it.*, 1998.

Italy

care taken of the other spouse, children and the home,³⁹ including any contribution made during the period of personal separation.⁴⁰

As regards the criterion of the 'reasons for the decision', it should be noted that the notion of sanction is excluded. Under Italian law, maintenance does not have the function of compensation – a rule which is justified by reasons of material justice. The judge may – but is not obliged to – consider fixing the amount of the maintenance.⁴¹ It follows that the assessment of the 'reasons for the decision' is superfluous if the claimant has appropriate means.⁴² Accordingly, maintenance cannot by law be in the nature of a refund (see Question 56 and the reported *ivi* cases; see also Questions 61 and 100).

According to the case law, the 'duration of the marriage' is not relevant as autonomous criterion because it is a factor in the assessment of all other criteria, which must always be viewed in the light of the duration of the marriage in a specific case. However, it may have a marked effect on the calculation of maintenance and may indeed even result in the total refusal of a claim⁴³ (see also Question 99). Moreover, the relevance of the criterion of the 'duration of marriage' can differ according to the period under consideration: it is a presumption during the period until separation (since there is still a real 'material and spiritual union between the spouses'), but during the period from separation to divorce it can be relevant only if one of the issues regarding the circumstances of single status is proved.⁴⁴

The judge must therefore consider all the circumstances of a specific case. For this reason there are no rules governing the percentages or fractional shares for the division of the income of the ex-spouse, except in the (different) case of termination of employment (retirement bonus) received by the spouse after divorce: in such a case, Article 12-

³⁹ Cass. 29/11/1990, No. 11490, cit.

⁴⁰ Cass. 2/4/1985, No. 2261, *Giur. it.*, 1985, I, 1, p. 1320.

⁴¹ Cass. 7/5/1998, No. 4617, *Mass. Giur. it.*, 1998, p. 482.

⁴² See Cass. 2/9/1996, No. 7990, *Mass. Giur. it.*, 1996, p. 721.

⁴³ This principle, affirmed by Cass. 22/11/1990, No. 11490, cit., has been upheld by Cass. 29/10/1996, No. 9439, *Fam. dir.*, 1996, p. 510, which refused maintenance on account of the short duration of the marriage.

⁴⁴ Cass. 5/2/1995, No. 1616, *Dir. fam. pers.*, 1995, p. 1388.

bis of the Italian Divorce Law provides that the ex-spouse, as recipient of the maintenance, is granted 40% of the total bonus for the years of employment coinciding with the marriage.

71. *What costs other than the normal costs of living may be demanded by the claimant (e.g. necessary training for further professional qualifications, costs of health insurance and costs of insurance for old age or of health insurance, costs of insurance for old age or disability)?*

As regards the application for costs of living, it is for the judge to decide on the basis of the facts in the specific case. In any case, any additional costs over and above the usual costs of daily life are all contained in the maintenance. Moreover, under Article 5, § 11, of the Italian Divorce Law, a spouse who has no health provision is entitled to cover by the other spouse's health insurer.

72. *Is there a maximum limit on the maintenance that can be ordered?*

There is no maximum limit on the maintenance which can be ordered.

73. *Does the law provide for a reduction in the level of maintenance after a certain time?*

Under Italian law there is no reduction in the level of maintenance after a certain time. On the contrary, the law provides that the judgment should establish a form of automatic adjustment of the maintenance (Article 5, § 7, Italian Divorce Law), which should in any event amount to inflation-proofing (see also Question 76).

74. *How is the maintenance to be paid (periodical payments, payment in kind or lump sum)?*

Usually, maintenance is paid periodically (per month). However, Article 5, § 8 of the Italian Divorce Law provides that if the parties agree, payment may be effected in a lump sum, but only on condition that the court considers it fair. In this case, no further financial claim may be made (see also the following Question).

Italy

75. *Is a lump sum prescribed by law, can it be imposed by court order or may the claimant or the debtor opt for it?*

Under Article 5, § 8, of the Italian Divorce Law, payment in the form of a lump sum (known as a *una tantum* payment) is possible only where agreed by the parties. A right to a lump sum is definitely acquired only if the court considers it fair. In this case, no further financial claim may be made.

76. *Is there an (automatic) indexation of maintenance?*

Maintenance is automatically index-linked. The law provides that the judgment must also establish a standard for at least the automatic inflation-proofing of the allowance. This is the *minimum criterion* for the indexation ordered by the court.⁴⁵ Under Article 5, § 7, of the Italian Divorce Law, the court may, in the case of an obvious inequity, exercise its discretion and exclude this provision, provided that it gives reasons for its decision.⁴⁶ However, it is not really clear how the judge can do this.

77. *How can the amount of maintenance be adjusted to changed circumstances?*

In its judgment the tribunal dictates the divorce conditions, which are effective *rebus sic stantibus*. The law provides for the possibility of requesting modification of the conditions if good grounds occur after the divorce judgment. The tribunal may alter the maintenance only at the request of the interested party. Under Article 9, § 1, of the Italian Divorce Law, where evidence emerges shortly after the judgment dissolving the marriage or ending the civil effects of the marriage, the tribunal will decide in closed session on an application by the parties for alteration of the provisions concerning child custody or the amount and terms of the maintenance, in accordance with Articles 5 and 6 (see also Question 77). The public prosecutor is a party to any such proceedings.

⁴⁵ Cass. 8/9/1993, No. 8570, *Mass. Giur. it.*, 1993, p. 807; Cass. 16/10/1991, No. 10091, *ivi*, 1991, p. 964.

⁴⁶ Cass. 19/12/1996, No. 11340, *Dir. fam. pers.*, 1998, p. 25.

The court specifies the reasons for an order increasing or reducing the amount of maintenance, for example a worsening of the financial position of the debtor⁴⁷ or an improvement in the financial position of the claimant (see also Question 97)

IV. Details of calculating maintenance: financial capacity of the debtor

78. *Do special rules exist according to which the debtor may always retain a certain amount even if this means that his/her maintenance obligations will not be fully discharged?*

No. There are no special rules according to which the debtor may always retain a certain amount, even if this means that his/her maintenance obligations will not be fully discharged.

79. *To what extent, if at all, is an increase in the debtor's income a) since the separation, b) since the divorce taken into account when calculating the maintenance claim?*

When determining the amount of the maintenance the judge has to assess the criteria specified in Article 5, § 6, of the Italian Divorce Law, such as the 'circumstances of the spouses' and of the 'income of both spouses', in the light of, among other things, the 'duration of the marriage'.

Moreover, the relevance of the criterion of the 'duration of marriage' can differ according to the period under consideration: it is a presumption during the period until separation (since there is still a real 'material and spiritual union between the spouses'), but during the period from separation to divorce it can be relevant only if one of the issues regarding the circumstances of single status is proved⁴⁸ (see Question 70).

⁴⁷ See Cass. 16/1/1982, No. 268, *Giust. civ.*, 1982, I, p. 946 involving the bankruptcy of the debtor, in which only the claim for maintenance would remain. According to some legal theorists (A. Finocchiaro, in: A. Finocchiaro e M. Finocchiaro, *Diritto di famiglia*, III, cit., p. 458; Dogliotti, *Separazione e divorzio. Il dato normativo. I problemi interpretativi* cit., p. 249) the right to maintenance should be charged against the bankruptcy assets.

⁴⁸ Cass. 5/2/1995, No. 1616, *Dir. fam. pers.*, 1995, p. 1388.

Italy

According to the case law, an increase in the debtor's income since separation, whether *de facto* or *de jure*, may be taken into account in the calculation of maintenance if such an increase constitutes a natural and foreseeable development of the activity carried on by the debtor during the marriage. By contrast, an increase in the debtor's income after divorce is of no relevance as the right to obtain maintenance starts with and is calculated at the moment of divorce.⁴⁹

80. *How far do debts affect the debtor's liability to pay maintenance?*

By law, debts do not affect the debtor's liability, although the judge may possibly take them into account when calculating the maintenance claim. If a debtor's financial position deteriorates after divorce, he or she may apply to the court for the maintenance to be altered in accordance with the procedure provided for by Article 9, §, 1, of the Italian Divorce Law (see Question 77). Naturally, if the debtor does not have 'appropriate means' at the moment of divorce, he or she will not be under any obligation to pay maintenance.

81. *Can the debtor only rely on his or her other legal obligations or can he or she also rely on his or her moral obligations in respect of other persons, e.g. a de facto partner or stepchild?*

The prevailing view taken by the courts is that possible moral obligations with respect to third persons (for example with respect to a *de facto* partner) do not have any effect. However, the judge may not ignore a legal obligation, and must take it into account when calculating maintenance. It follows that possible (legal) obligations to pay maintenance for, say, children born outside marriage or for needy parents may be relevant.⁵⁰

⁴⁹ See Cass. 8/10/1997, n. 9758, *Mass. Giur. it.*, 1997, p. 980 and Trib. Catania 30/7/1993, *Dir. fam. pers.*, 1994, p. 650.

⁵⁰ According to Cass. 24/4/2001, No. 6017, *Familia* 2001, p. 864, a moral obligation in respect of a *de facto* partner is not relevant when calculating the maintenance claim in separation proceedings; by contrast, the legal obligation to pay maintenance for a child born outside marriage is relevant.

82. *Can the debtor be asked to use his or her capital assets in order to fulfil his or her maintenance obligations?*

In assessing the 'circumstances of the spouses' and the 'income of both spouses' the judge may take into account not only the effective income but also all assets which can be valued or used to earn income, including real property and even assets which are temporarily unproductive.⁵¹ It is therefore possible that the debtor may be required to use capital assets in order to fulfil his/her maintenance obligations.

83. *Can notional income be taken into account where the debtor is refusing possible and reasonable gainful employment or where he or she has deliberately given up such employment?*

Italian law does not provide for the calculation of notional income where a debtor refuses possible and reasonable gainful employment or has deliberately given up such employment. The judge should not therefore take it into account.⁵² However, the position is different with regard to the valuation of assets, since the judge must here include assets which could produce a notional income.⁵³

84. *Do the debtor's social security benefits which he or she receives or could receive have to be used for the performance of his/her maintenance obligations? What kinds of benefit have to be used for this purpose?*

Italian law does not provide that social security benefits received by the debtor have to be used in the performance of his/her maintenance obligations. However, it is possible that the debtor may be asked to use them for this purpose if the claimant lacks 'appropriate means' and is unable to provide for himself/herself for objective reasons.

⁵¹ See Cass. 20/3/1998, No. 2955, *Mass. Giur. it.*, 1998.

⁵² See Cass. 5/6/1997, n. 5024, *Dir. fam. pers.*, 1997, p. 305, which held in an application for alteration of the divorce conditions under Article 9, § 1, Italian Divorce Law that the decision of the debtor (a doctor) to give up practising privately and take a job in the public sector was a relevant factor.

⁵³ Cass. 24/3/1994, n. 2873, *Mass. Giur. it.*, 1994, which also involved an application to alter the conditions of divorce.

Italy

85. *In respect of the debtor's ability to pay, does the income (means) of his or her new spouse, registered partner or de facto partner have to be taken into account?*

The judge may take into account the income or means of a new spouse, registered partner or *de facto* partner of the debtor when determining the debtor's ability to pay. This is within the discretionary power of the judge.

V. Details of calculating maintenance: the claimant's lack of own means

86. *How will the claimant's own income reduce his or her maintenance claim? Is it relevant whether the income is derived from employment which can be reasonably expected or from employment which goes beyond what can be reasonably expected?*

If the claimant does not lack 'appropriate means', his or her income (no matter what the source) may influence the amount of the maintenance, even to the point of excluding entitlement altogether.⁵⁴ Under Article 5, § 6, of the Italian Divorce Law, the judge may take into account the 'circumstances of the spouses' and the 'income of both spouses' when calculating the amount of maintenance. The case law shows that not only the current income but also all assets which can be valued or can be used to earn income can be taken into account, including real property and assets that are temporarily unproductive.⁵⁵

87. *To what extent can the claimant be asked to seek gainful employment before he or she may claim maintenance from the divorced spouse?*

It is for the judge to decide whether and to what extent the claimant may be required to seek gainful employment before being entitled to claim maintenance from his or her ex-spouse. This depends on the facts of the specific case, because the possibility of finding employment is strictly dependent on the objective situation and the objective and subjective circumstances of the person: age, professional skills, children, etc.

⁵⁴ See also Cass., sez. un., 29/11/1990, No. 11490, cit.

⁵⁵ See Cass. 20/3/1998, No. 2955, *Mass. Giur. it.*, 1998.

As regards assessment of a claimant's incapacity to obtain 'appropriate means' (i.e. provide for himself/herself) for objective reasons, the Supreme Court has held that not every occupation or means of earning money is 'appropriate'. In addition, the court must consider whether the employment is comparable, in financial and social terms, to the activity carried on during marriage.⁵⁶

88. *Can the claimant be asked to use his or her capital assets before he or she may claim maintenance from the divorced spouse?*

In assessing the 'circumstances of the spouses' and the 'income of both spouses' the judge may take into account not only the effective income but also all assets which can be valued or used to earn income, including real property and even assets which are temporarily unproductive.⁵⁷ It is therefore possible that the debtor may be required to use capital assets in order to fulfil his/her maintenance obligations.

89. *When the claimant's income and assets are calculated, to what extent are maintenance obligations of the claimant in relation to third persons (e.g. children from an earlier marriage) taken into account?*

The law makes no provision for this. However, when calculating the claimant's income and assets, the judge may take into account the maintenance obligations of the claimant in relation to third persons (for example children from a previous marriage).

90. *Are there social security benefits (e.g. income support, pensions) which the claimant receives and which exclude his need according to the legal rules and/or court practice? Where does the divorced spouse's duty to maintain rank in relation to the possibility for the claimant to seek social security benefits?*

Social security benefits received by the claimant could possibly exclude his or her need for maintenance, but there are no legal rules about this. According to the legal rules and/or case law on maintenance, a person claiming maintenance must demonstrate that

⁵⁶ Cass. 13/4/1994, No. 3429, *Dir. fam. pers.*, 1994, p. 1227.

⁵⁷ See Cass. 20/3/1998, No. 2955, *Mass. Giur. it.*, 1998.

Italy

he or she lacks appropriate means and does not have the capacity to obtain them. If this cannot be demonstrated, there is no entitlement to maintenance.⁵⁸ In any event, the maintenance obligation takes precedence over the right of the claimant to obtain social security benefits (income support, pensions).

VI. Questions of priority of maintenance claims

91. How is the relationship of different maintenance claims determined? Are there rules on the priority of claims?

Article 5, § 6, of the Italian Divorce Law provides that in the divorce judgment, the tribunal orders a spouse to pay periodical maintenance to the other spouse if the latter has no financial means or is unable to provide for himself/herself for objective reasons'. Article 6, § 3, of the Italian Divorce Law, provides that the tribunal should determine by the same judgment how much the parent not having custody of the children must contribute to their maintenance and how this should be done. The duty to pay maintenance for the children, including children born outside marriage, is also provided for by Article 30 of the Constitution.

At present our divorce law does not have any specific rules on the priority of claims. However, the Italian legal system does have rules on the priority of alimony claims (Articles 433 et seq. Italian Civil Code). Alimony claims differ from maintenance claims in respect of the conditions on which they are accepted. Under Article 438, § 1, of the Italian Civil Code, alimony may be claimed only by a person who is indigent and unable to provide for himself/herself. This shows that the function of alimony is to provide support and not just mere assistance.

Under Article 442 of the Italian Civil Code, where there are competing maintenance claims against the same debtor, the judge makes such orders as he considers opportune, taking into account the closeness of the relationship, the needs of each claimant and any possibility for a claimant to obtain alimony from someone else. Article 433 Italian Civil

⁵⁸ See Cass., sez. un., 29/11/1990, No. 11490, cit.

Code provides that alimony may be claimed from persons in the following order:

- the spouse;
- legitimate or legitimated or natural or adopted children and, if there are none, the nearest descendants, even if illegitimate;
- parents and, if there are none, the nearest ascendants; adoptive parents;
- sons-in-law and daughters-in law;
- the father-in-law and the mother-in-law;
- brothers and sisters of the whole or of the half blood, those of the whole blood taking precedence over those of the half blood.

The above rules of divorce law can be applied in the case of competing claims. Since the 'proximity of the relationship' should, under Article 442 of the Italian Civil Code, be assessed with regard to the enumeration indicated in Article 433 of the Italian Civil Code, it is safe to say that under Italian law the maintenance claims of the ex-spouse (who lacks 'appropriate means' and is incapable of providing for himself/herself) and of the children always take precedence over other claims.

92. Does the divorced spouse's claim for maintenance rank ahead of the claim of a new spouse (or registered partner) of the debtor?

The law does not provide for any priority between the divorced spouse and the new spouse. This is decided at the judge's discretion. In any event, the result of the assessment cannot be that the spouse's first family is worse off than the second family.⁵⁹

The only rule specifically provided for by law regards the competition between an ex-spouse who is in receipt of maintenance and the surviving spouse in respect of a reversible annuity in the case of the debtor's death.

⁵⁹ Cass. 19/10/1981, n. 5446, *Dir. fam. pers.*, 1982, p. 409.

Italy

Article 9, § 3, of the Italian Divorce Law makes provision for the case where a surviving spouse is entitled to a reversible annuity and an ex-spouse is in receipt of maintenance. In such a case, part of the pension and of the other allowances (the amount depends on the duration of the relationship) is granted by the tribunal to the divorced spouse who is in receipt of maintenance under Article 5. If several people are in this position, the tribunal allocates the pension and other allowances among them, and also shares out among them such parts as are allocated to people who later die or remarry.

As far as assessment of the 'duration of the relationship' criterion is concerned, there is currently an ongoing discussion as to whether only the strict duration of the marriage has to be considered (i.e. including the period of separation)⁶⁰ or whether, as seems more appropriate, any period of cohabitation before the second marriage should also be included.⁶¹

93. Does the claim of a minor child of the debtor rank ahead of the claim of a divorced spouse?

Under Italian law, maintenance is always payable for children. By contrast, maintenance is payable to an ex-spouse only if he/she lacks 'appropriate means'. There is no provision for priority between minor children and a divorced spouse who lacks 'appropriate means' (see Question 91).

94. What is the position if that child has reached the age of majority?

In the case law, children of full age continue to be entitled to receive maintenance from their parents until they are financially self-sufficient.⁶²

⁶⁰ Cass., sez. un., 12/1/1998, No. 159, *Foro it.*, 1998, I, p. 392.

⁶¹ See Cass. 10/1/2001, No. 282, *Giur. it.*, 2002, p. 1128, which provides that pre-matrimonial cohabitation may be taken into account by the judge in his overall valuation.

⁶² Cass. 18/2/1999, No. 1353, *Fam. dir.*, 1999, p. 455.

95. *Does the divorced spouse's claim for maintenance rank ahead of the claims of other relatives of the debtor?*

Under Article 442 of the Italian Civil Code, where there are competing maintenance claims against the same debtor, the judge makes such orders as he considers opportune, taking into account the closeness of the relationship, the needs of each claimant and any possibility for a claimant to obtain alimony from someone else.

It follows that under Italian law a divorced spouse's claim for maintenance always ranks ahead of the claims of other relatives of the debtor, but competing claims may be taken into account by the judge when determining the amount of the ex-spouse's maintenance (see also Questions 81 and 91).

96. *What effect, if any, does the duty of relatives or other relations of the claimant to maintain him or her have on the ex-spouse's duty to maintain him or her?*

According to the current case law, the obligation of other relatives of the claimant to maintain him/her does not have any effect on the obligation of the ex-spouse to pay maintenance.⁶³ This is because the bond (*vinculum*) between spouses is regarded by law as the strictest of all bonds. The duty of maintenance deriving from marriage is thus regarded as the first and strongest one. However, the courts may take into account the contribution made by the claimant's original family if it was periodic and not just occasional.⁶⁴

VII. Limitations and end of the maintenance obligation

97. *Is the maintenance claim extinguished upon the claimant's remarriage or entering into a registered partnership? If so, may the claim revive under certain conditions?*

Under Article 5, § 10, of the Italian Divorce Law, the obligation of maintenance ends when the spouse in receipt of maintenance

⁶³ Cass. 7/5/1998, No. 4617, *Nuova giur. civ. comm.*, 1998, p. 482.

⁶⁴ Cass. 11/7/1990, n. 7211, *Mass. Foro it.*, 1990.

Italy

remarries (or enters into a registered partnership). The claim can never revive.

The legislation contains no provisions relevant to cohabitation *more uxorio*, and the case law on this subject is still in a state of flux. According to the first decision on this subject (which has been followed in a series of other decisions), cohabitation *more uxorio* can reduce the amount of maintenance payable or even result in refusal of a claim for maintenance if the claimant no longer lacks 'appropriate means'. For this purpose, the new financial position of the claimant must be stable and lasting way and provide a real and certain income.⁶⁵ By contrast, the Supreme Court has held that the right to maintenance exists even if the cohabitation has a positive influence on the real financial situation of the claimant.⁶⁶

98. *Are there rules according to which maintenance may be denied or reduced if the claimant enters into an informal long-term relationship with another person?*

There are no specific rules according to which maintenance may be denied or reduced if the claimant enters into an informal long-term relationship with another person. However, the existence of an informal long-term relationship between the claimant and another person could be a justified reason for the debtor to apply to the court for alteration of the conditions under Article 9, § 1, of the Italian Divorce Law, but only if such relationship can in itself influence the financial circumstances of the claimant, by reducing or excluding his/her lack of 'appropriate means'⁶⁷ (see the previous Question).

⁶⁵ App. Naples 9/10/1979, *Dir. giur.*, 1980, p. 580. According to the relevant case law, the birth of children evidenced the stability of marriage. This position has been upheld by Cass. 11/5/1983, No. 3253, *Giur. it.*, 1983, I, c. 1225; Cass. 17/10/1989, No. 4158, *ivi*, 1990, I, 1, c. 587; Cass. 27/3/1993, No. 3720, *Dir. fam. pers.*, 1994, p. 844; Cass. 5/6/1997, No. 5024, *Fam. dir.*, 1997, p. 305.

⁶⁶ Cass. 30/10/1996, No. 9505, *Fam. dir.*, 1997 p. 29, with critical comment by Ferrando, *Assegno di divorzio e convivenza more uxorio*; Cass. 22/4/1993, No. 4761, *Dir. fam. pers.*, 1994, p. 486.

⁶⁷ See Cass. 5/6/1997, No. 5024, *cit.*; Cass. 27/3/1993, No. 3720, *cit.*

99. *Can the maintenance claim be denied because the marriage was of short duration?*

The law makes no provision for this. Under Article 5, § 6, of the Italian Divorce Law, the 'duration of marriage' is only a criterion for determining the amount of maintenance and not for deciding whether it should be granted. However, in a specific case its influence in determining the amount of maintenance may be very strong and could even lead to the total dismissal of a claim. In some cases the courts have refused maintenance on account of the shortness of a marriage⁶⁸ (see also Question 70).

100. *Can the maintenance claim be denied or reduced for other reasons such as the claimant's conduct during the marriage or the facts in relation to the divorce ground?*

The maintenance claim can never be denied for other reasons such as the claimant's conduct during marriage or the facts in relation to the divorce grounds. Under Italian law the notion of sanction is excluded: maintenance does not have the function of compensation and the criterion of the 'reasons for the decision' is justified by reasons of material justice. By contrast, maintenance may occasionally be reduced because of the claimant's conduct during marriage or the facts in relation to the divorce grounds. The judge may – but is not obliged to – consider the 'reasons for the decision' only in establishing the amount of the maintenance.⁶⁹ This kind of assessment is superfluous if the claimant has 'appropriate means'⁷⁰ (see Question 70).

101. *Does the maintenance claim end with the death of the debtor?*

The maintenance claim does not necessarily end with the death of the debtor. Under Article 9-*bis* of the Italian Divorce Law, the judge may, after the debtor's death, assign a periodical allowance payable from the inheritance to an ex-spouse who is entitled to maintenance under Article 5 and is in need of financial support.

⁶⁸ See Cass. 29/10/1996, No. 9439, *Fam. dir.*, 1996, p. 510, with critical comment by CARBONE, *Matrimonio eet seqimero: l'assegno non è dovuto*.

⁶⁹ Cass. 7/5/1998, No. 4617, *Mass. Giur. it.*, 1998, p. 482.

⁷⁰ See Cass. 2/9/1996, No. 7990, *Mass. Giur. it.*, 1996, p. 721.

Italy

VIII. Maintenance agreements

102. May the spouses (before or after the divorce or during the divorce proceedings) enter into binding agreements on maintenance in the eventuality of a divorce?

The maintenance claim does not necessarily end with the death of the debtor. According to Article 9-bis of the Italian Divorce Law, the judge may, after the debtor's death, assign a periodical allowance payable from the inheritance to an ex-spouse who is entitled to maintenance under Article 5 and is in need of financial support.

103. May a spouse agree to renounce his/her future right to maintenance? If so, are there limits on that agreement's validity?

Whether the spouses can enter during marriage into binding agreements on maintenance in the eventuality of a divorce is a subject of debate at present. Although there are no provisions on this in legislation, the case law is clear.⁷¹ Prenuptial or other agreements regulating maintenance in the event of divorce (for example at the moment of marriage or at the moment of separation) are considered invalid because they may influence the will and behaviour of the parties in proceedings on marital status. Moreover, there is no right to maintenance in the form of assistance.

This uniform and strict position, which sets seemingly insuperable obstacles to 'private self-management' and in fact means that the validity of prenuptial agreements is always subject to the principle of *rebus sic stantibus*, is considered unjustified by the great majority of legal theorists.⁷² There are signs of a small opening since the Supreme

⁷¹ Cass. 18/2/2000, No. 1810, *Corr. giur.*, 2000, p. 1021; Cass. 7/9/1995, No. 9416, *Dir. fam. pers.*, 1996, p. 931; Cass. 28/10/1994, No. 8912, *Fam. dir.*, 1995, p. 14; Cass. 4/6/1992, No. 6857, *Corr. giur.*, 1992, p. 863; Cass. 11/12/1990, No. 11788, *Giur. it.*, 1992, I, 1, c. 156; Cass. 11/6/1981, No. 3777, *ivi* 1981, I, c. 1553.

⁷² Angeloni, *Autonomia privata e potere di disposizione nei rapporti familiari*, Padua, 1997, p. 427; Doria, *Autonomia privata e 'causa' familiare. Gli accordi traslativi tra i coniugi in occasione della separazione personale e del divorzio*, Milan, 1996, p. 184; Ceccherini, *Contratti tra coniugi in vista della cessazione del ménage*, Padua, 1999, p. 142; Oberto, *I contatti della crisi coniugale*, Milan 1999, p. 459; Comperti, *Autonomia privata e*

Court has upheld the validity of an agreement providing for the transfer of property⁷³ or the spouse's right to income for life in the event of divorce.⁷⁴

By contrast, the conditions agreed upon by the parties in a joint petition are always valid, with the exception of the limitation designed to ensure that the conditions are in keeping with the children's interests⁷⁵ (see Question 10 about the proceedings on the joint petition of the spouses under Article 4, § 12, Italian Divorce Law).

104. Is there a prescribed form for such agreements?

Such agreements do not need to be in a particular form. They are entered in the proceedings and are, in broad outline, subject to the assessment of the judge.

105. Do such agreements need the approval of a competent authority?

Such agreements have to be approved by the court. Approval is needed both for agreements in contemplation of divorce and for agreements at the moment of divorce (see Question 102), but in the latter case (provided for by Article 4, § 13) the court evaluates them solely in the light of the children's interests. If they are in keeping with such interests, the court gives judgment accordingly; otherwise the procedure under § 8 of the current Article 4 is applied (the president issues such temporary and urgent orders as he deems appropriate in order to safeguard the interests of the spouses and the children, and directs that the legal proceedings be continued in front of the

convenzioni preventive di separazione, di divorzio e di annullamento del matrimonio', *Foro it.*, 1995, I, c. 110; Morelli, 'Autonomia negoziale e limiti legali nel regime patrimoniale della famiglia', *Fam. dir.*, 1994, p. 184; Carbone, *Autonomia privata e accordi tra coniugi (in crisi)*, *ivi*, 1994, p. 148; Zoppini, 'Contratto, autonomia contrattuale, ordine pubblico familiare nella separazione personale dei coniugi', *Giur. it.*, 1993, I, 1, c. 1321; Rimini, 'Il problema della validità dei patti in vista della cessazione del vincolo matrimoniale', *Nuova giur. civ. comm.*, 1993, I, p. 965;

⁷³ Cass. 15/5/1997, No. 4306, *Nuova giur. civ. comm.*, 1999, I, p. 278, with regard to an agreement concluded at the moment of the separation proceedings.

⁷⁴ Cass. 14/6/2000, No. 8109, *Famiglia*, 2001, p. 245.

⁷⁵ Cass. 11.06.1997, No. 5244, *Giur. it.*, 1998, I, 1, c. 218.

Italy

investigating judge, who is usually the president himself (see also Question 7 (Book I, ABC)).