Theme II – Non-contentious proceedings: new roles at the service of the public
Round table n° 4: Outside Perspectives

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THE JUDICIARY'S POINT OF VIEW ON THE TRANSFER/SHARING OF COMPETENCIES WITH NOTARIES IN FAMILY LAW

[Speaking notes]
(10 MIN)
Round Table – 3rd October -- afternoon

In the framework of the written essay that I prepared for the forum of tomorrow on the contractualisation of family law I dedicated a paragraph to the issue of the relations between contractualisation and de-judiciarisation. The title of it is:

3.4. Where Contractualisation Meets De-Judiciarisation: When Contract Can Shape Status.

In recent times, a new phenomenon has emerged within several major European legal systems. Under the pressure of de-judiciarisation and the need to reduce court workloads and backlogs, parties have been allowed not only to stipulate agreements on the effects of a marital crisis (as has long been the case), but also to address the very core of the proceedings that traditionally governed legal separation and divorce. In other words, we are witnessing a shift whereby divorce and separation by mutual consent are becoming fully "dejudiciarised"—not only with respect to their effects, but also with regard to the dissolution (in the case of divorce) or loosening (in the case of separation) of the marital bond itself—in many legal systems across Europe and beyond.
For instance, Italy introduced the so-called *negoziazione assistita* (assisted negotiation) in 2014, allowing couples to resolve marital crises without judicial intervention in a wide range of cases.

I describe this process in detail in my written report, as we do not have time to explain it fully at present.
In essence, it must be noted that—unlike in France—notaries have been excluded from the procedure, except in cases where the parties choose to regulate their financial relations by transferring one or more immovable assets or real estate. In such circumstances, the parties' legal representatives—who are the principal actors in this type of agreement—must involve a notary, both for legal and practical reasons. Legally, this is required by the relevant reform; practically, the conveyance of real estate in Italy has become such a complex matter that only a notary possesses the requisite expertise to carry it out.

Regrettably, the adoption of "negoziazione assistita" remains statistically limited. Unlike the situation in France, legal separation and divorce by mutual consent in Italy may still be pursued via traditional means—either before the Court or, where no property transfer is envisaged, directly before the Civil Status Registrar.
The statistical data (referred to 2023) are as follows:
Consensual Separations
- Total consensual separations: approximately 82,392
- Assisted negotiation by lawyers (under Article 6): 11.8%
- Filed before the Court: approximately 64.7%
- Registered directly with the Local Civil Status Registrar (under Article 12): 16.8%
Joint Divorce Petitions
- Total consensual divorces: approximately 79,875
- Assisted negotiation by lawyers (under Article 6): 9.1%
- Filed before the Court: approximately 53.4%
- Registered directly with the Local Civil Status Registrar (under Article 12): 23.8%
The limited success of this procedure is largely attributable to lawyers' reluctance to risk procedural errors. They tend to favour traditional consensual separation or divorce proceedings before the Tribunal. Paradoxically, in those settings, real estate transfers are permitted without the involvement of notaries, which frequently leads to significant issues—since Italian lawyers are not always familiar with the technical complexities inherent in such transactions.

Since 1 January 2017, France has permitted *divorce par consentement mutuel* to be finalized through a simple agreement between the parties, countersigned by their lawyers and incorporated into a notarial deed (see Article 229-1 of the French Civil Code).

In this context legal scholars are increasingly deriving the regulation of divorce and separation agreements from general contract law. As one French author observed: "What other tool than a contract can give binding force to the agreement of the spouses on the principle and effects of divorce, when the judicial decision is set aside?" (*See* e.g. FRÉVAL, *Droit des contrats et divorce par consentement mutuel extrajudiciaire*, Nantes, p. 10, in https://irdp.univ-nantes.fr/medias/fichier/memoire-emma-freval-m2-dpg-droit-des-contrats-et-divorce-par-consentement-mutuel-extrajudiciaire_1661244695299-pdf?ID_FICHE=1448620&INLINE=FALSE).

Unlike other forms of divorce, the entire process of divorce by mutual consent is, by definition, based on the spouses' agreement. It is precisely their shared will—regarding both the principle and the consequences of the divorce—that triggers the legal effect (MALAURIE and AYNÈS, *Droit de la famille*, 7th ed., Paris, 2020, p. 46 ; POURE, *La convention de divorce par consentement mutuel : un contrat à part, mais un contrat tout de même*, in *Droit de la famille*, 2018, n° 3,

https://droit.cairn.info/article/CDLJ_1701_0161/pdf?lang=fr, p. 1). As another author aptly put it, this is *"un contrat à part, mais un contrat tout de même"* ("a particular kind of contract, but a contract nonetheless") (POURE, op. cit., p. 1).

Similarly, in many countries of Europe and of the world it is now possible to divorce in a "contractual" manner—without a judge—provided that certain formalities are respected. These vary from country to country and typically involve the intervention of a public official. European countries that allow this include Denmark, Iceland, Norway, Sweden, Estonia, Lithuania, Russia, Ukraine, Moldova, Portugal (since 1995), Spain (since 2015), and Romania (since 2010).
Legal doctrine tends to group these systems into two categories:
a) Notarial divorce (e.g., Baltic countries, France, Spain);
b) Administrative divorce (e.g., Scandinavian and Eastern European countries).
The case of former Soviet republics is particularly interesting, as several of them have retained administrative divorce even after the fall of the USSR (e.g., Estonia, Lithuania, Moldova, Russia, and Ukraine).

According to a recent study by the Commission of European Affairs of the International Union of Notariat (UINL), more than 32% of European countries now provide for notarial divorce—a mechanism that was virtually unknown just two decades ago (*See Union Internationale du Notariat - Commission des Affaires Européennes - Législature 2023-2025*, *Les competences notariales en matiere non contentieuse. Etude de la Commission des Affaires Européennes (CAE)*, 2024, Sous la responsabilité de Me Bertrand Basseville (Notaire en France) et la Présidence de Me Valentina Rubertelli (Notaire en Italie), p. 2 (the study is in the process of being published).

Some legal systems remain firmly anchored to the principle that marriage can only be dissolved by judicial order,

This is the case, for instance, of Germany. Actually, the German Civil Code (BGB) states in its § 1564 that "Eine Ehe kann nur durch richterliche Entscheidung auf Antrag eines oder beider Ehegatten geschieden werden" ("A marriage can be dissolved only by a judicial decision upon the request of one or both spouses"). This is maybe the reason why the German language does not have a word equivalent to "De-judiciarisation." The legal doctrine prefers rather using long sentences, like e.g., "Justizentlastung durch Aufgabenverlagerung von den Richtern auf andere Organe" ("Reducing the burden on the judiciary by shifting [some of its] tasks from judges to other bodies": KAMPMANN and ZWICKEL, *Zivil- und zivilprozessrechtliche Aspekte der großen Justizreform in Frankreich (Justice du 21ème siècle)*, in *Civil Procedure Review*, https://www.civilprocedurereview.com, p. 14.

Yet, there is little doubt that the trend described here is expanding. It is supported by both national and supranational initiatives aimed at improving the efficiency of justice across Europe.

De-judiciarisation in family law is stricly related to contractualisation (the theme of tomorrow's forum). Well, it is true that, as a French scholar rightly noted, contractualisation does not necessarily imply de-judiciarisation, because allowing parties to sign contracts opens the door to possible judicial disputes on the validity or enforceability of said contracts.

However, as explained in my written presentation, this argument cannot be used against e.g. the use of prenuptial agreements in contemplation of divorce. Actually, that remark does not imply that prenuptial agreements are useless or that they lead to increased litigation—particularly when one considers the number of potential disputes they prevent, or the extent to which they reduce the complexity of legal questions that may arise between the parties.

Indeed, we should avoid the conceptual trap of denying the clear link between these two phenomena (namely: contractualisation and de-judiciarisation). To "dejudiciarise" a given aspect of life means that it is no longer governed by judicial authority (or by a hybrid of private autonomy and judicial oversight), but rather by the will of the parties involved. While this may still lead to subsequent judicial intervention, such intervention is no longer a necessary precondition for the legal effects of separation or divorce by mutual consent. The judge is simply no longer part of the process. Thanks to premarital and separation agreements, judicial involvement becomes the exception rather than the rule—and that makes a significant difference.

In this context, we may mention an opinion issued in 2023 by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, based on the work of the CEPEJ-GT-SATURN Working Group, which I have the honour to chair. On 16 June 2023, the CEPEJ Plenary Assembly approved a draft prepared by this Group to update Recommendation (86)12 of the Committee of Ministers to member states concerning "Measures to prevent and reduce the excessive workload in the courts". Once the proposal adopted by the Plenary Assembly of CEPEJ in June 2023, it has been sent to the European Committee on Legal Co-operation (CDCJ), which is the official "engine" of any initiative of that kind in the Council of Europe, especially when official recommendations of the Council of Ministers are concerned. So, among other things, the Opinion emphasizes the need to Update the list of non-judicial tasks from which judges could be relieved. This last point includes a comprehensive list of tasks that could be delegated to professionals other than judges—most notably, notaries.

CEPEJ-SATURN Draft Opinion on the Updating of Rec. (86) 12 – Proposed new Annex –
Proposal for the update: examples of non-judicial tasks that judges in some States could be relieved of, depending on each country's specific circumstances   ***1. Law of persons***   *- Declaration of absence and death*

- *Decision to authorise or record consent for organ donation*
- *Decision to authorise the protection to safeguarding the rights of children and people with incapacities*
- *Court approval or authorisation for the performance of acts of disposal, encumbrance or other acts relating to the property and rights of children or adults with incapacity*
- *Granting powers of representation, such as "future protection mandate"*
- *Judicial grant of emancipation and of the benefit of legal age*
- *Gender reassignment*
- *Non-litigious cases concerning the status of physical persons:*
    - *Appointment of tutors, curators, and other administrators*
    - *Administration of the property of those lacking legal capacity*

2. Family law

- *Divorce and legal separation by mutual consent for couples without children or with adult children only*
- *Change of matrimonial regime*
- *Conclusion and registration of civil partnerships*
- *Granting alimony and determining issues arising from it*
- *Adoption / consent to adoption of people over the age of majority*
- *Approval or authorisation in non-litigious proceedings of the declaration of parenthood in respect of children born out of wedlock*
- *Collection of consents in the context of medically assisted procreation*
- *Handling non-litigious proceedings for the administration of common property when one of the spouses is unable to act*

3. Real estate, property and succession law

- *Supervision of real estate records*
- *Supervision of property records relating motor vehicles, ships, boats, and aircrafts*
- *Non-litigious proceedings in the field of succession law:*
    - *Presentation and publication of secret wills*
    - *Declaration of an opening of succession*
    - *Setting up of inventories*
    - *Issuance of a national or European certificate of succession*
    - *Acceptance of an inheritance with the benefit of inventory*
    - *Issuance of an authorisation for accepting or waiving an inheritance or a legacy, when such acts are submitted for authorisation*
    - *Submission of executors' accounts and removal of executors, authorisation of acts of disposition by executors (except for children and people with incapacity)*
    - *Authorisation of the sale and purchase inheritance goods*
    - *Liquidation and property division in the context of non-litigious and litigious cases*

4. Commercial and contract law

- *Issuing payment and injunction orders*
- *Decision to authorise the establishment and registration of legal persons*
- *Production of accounts by persons required to keep accounting records, or otherwise bound to produce accounts*
- *Small claims relating to consumer disputes*
- *Non-litigious proceedings concerning trusts:*
    - *Approval of particular "arrangements" on behalf of any person who may have an actual or contingent interest in a trust (including unborn children)*
    - *Varying or revoking all or any of the terms of the trust*
    - *Approval of transactions considered expedient but cannot otherwise take place for lack of power of the trustee or for any other reason*
    - *Issuance of declarations as to the validity or enforcement of a trust, the existence of any resulting or constructive trust, breach of trust or failure of a trust, etc.*
    - *Non-litigious proceedings concerning debt relief or debt settlement for natural persons*

5. Criminal law

- *Authorisation of payment or delayed payment of fines*
- *Transcription of testimonies or depositions given during hearings and subsequently proofreading of related court documents*

6. Procedural law

- *Control of payment of judicial fees*
- *Participation in out-of-court settlement disputes/conducting mediation/conciliation processes*

7. Enforcement procedures

- *Judicial sales by auction*
- *Declaration of enforceability of court decisions*

8. Others

- *Appointment and participation of judges as members or presidents of disciplinary or selection boards/committees regarding persons who are not members of the judiciary (e.g. notaries, lawyers accountants)*
- *Administering oaths for non-judiciary professionals (auditors, notaries), collection of testimonies and written evidence*

-	*Legalisation or apostille of documents*

It is worth noting that the area most affected by these "winds of change" is that of so-called "voluntary jurisdiction" (*juridiction gracieuse*, *volontaria giurisdizione*, *freiwillige Gerichtsbarkeit*, etc.). This refers to activities typically performed by judges that do not involve resolving disputes between opposing parties, but rather consist in evaluating the appropriateness or convenience of a legal act.

To give a good example concerning voluntary jurisdiction unrelated to relations between spouses or cohabiting partners: in Italy, Legislative Decree No. 149 of 10 October 2022, effective as of 18 October 2022, repealed Article 375 of the Civil Code. This reform transferred the responsibility for issuing relevant authorisations from the Court to the Tutelary Judge, including authorisation for the continuation of business activity (formerly governed by Article 320, paragraph V of the Civil Code). Here, we refer to authorisations for the performance of acts of extraordinary administration concerning the assets of minors or of individuals lacking capacity, whether due to interdiction, disqualification, or being subject to a support administration order. As a result, authorisations under Article 374 of the Civil Code may now be issued by a notary (specifically, the notary responsible for drawing up the deed), whose jurisdiction is now complemented by that of the Tutelary Judge—who remains the *dominus* of the matter.
This replaces the previous arrangement, in which the Court, sometimes in collegial composition, held jurisdiction. The authorisation is granted upon written request by the parties (parents of the minors, guardians, curators, or support administrators), either personally or through legal counsel, and is communicated by the notary to the clerk of the Tutelary Judge competent for issuing the homologation order, as well as to the Public Prosecutor at the same court.
If I may add a personal remark: this reform was long overdue. Judicial attitudes towards such matters were often overly cautious. The mentality—sometimes even prejudices and a particular fondness for procedural complexity—of many Italian judges frequently led them to search for hidden motives behind such requests, suspecting intra-family fraud. In reality, what lay behind these requests was often nothing more than the urgent and desperate need of a family to sell assets belonging to an elderly relative in order to provide for their care.
The result was frequently intolerable delays, with the unfortunate consequence that the contractual counterpart would withdraw, or the concerned individual would pass away before the transaction could be completed. For this reason, this reform should be welcomed as a modernising step forward—one that brings Italy's cumbersome and outdated procedural framework closer to the standards of a civilised legal system.

On the subject of voluntary jurisdiction in Italy, it is worth noting that a similarly wise legislative solution was adopted in 2000, with the abolition of the so-called homologation review by the courts and the subsequent transfer of responsibility for the

establishment of companies and corporations to the notary. To give a sense of the impact: prior to 2000, the homologation process for company deeds required approximately 150 days from execution to effective operation. Today, such deeds may become operative on the same day, or within a matter of days.

Finally, it is important to recognize that the trend toward contractualisation and de-judicialisation has also been acknowledged by the European Union. Indeed, the EU has shown growing interest in this phenomenon through a project undertaken by the European Law Institute (ELI), entitled "Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters."
This initiative is informed by a notable trend among Member States to transfer competences in family and succession law from judicial bodies to alternative authorities—including notaries, civil registry officials, child protection agencies, judicial officers, legal practitioners, and, in some cases, the private parties themselves. As a result, a central question arises: to what extent are existing rules on jurisdiction, applicable law, and the recognition and enforcement of foreign judgments suitable for addressing this process of de-judicialisation?

See https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/eli-principles-extra-judicial-administration-of-justice-in-cross-border-family-and-succession-matters/.

The first output of the project will be a policy statement addressed to both the European legislator and the CJEU. Rather than suggesting detailed solutions to the several questions surrounding non-judicial authorities at both national and EU level, it will aim at the elaboration of recommendations and interpretative guidelines. A starting policy option would be to consider a more open definition of "court" in the European instruments and the extension of the provisions on jurisdiction to other non-judicial authorities. In the second phase of the project, the Team will aim at the detection of crucial questions and practical problems and the identification of best practices at national level, in order to improve the application and implementation of out-of-court proceedings, and, in doing so, at the protection of the fundamental rights of the parties involved.

Some noteworthy responses have already emerged at the legislative level of the European Union. One illustrative example is found in the Brussels II-*ter* Regulation, which expressly provides in Article 65 that recognition and enforcement mechanisms extend not only to judicial decisions, but also to "authentic instruments and agreements concerning legal separation and divorce".
See Council regulation (EU) 2019/1111 of 25 June 2019 on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (recast), Article 65: "65 *Recognition and enforcement of authentic instruments and agreements* 1. Authentic

instruments and agreements on legal separation and divorce which have binding legal effect in the Member State of origin shall be recognised in other Member States without any special procedure being required. Section 1 of this Chapter shall apply accordingly, unless otherwise provided for in this Section. 2. Authentic instruments and agreements in matters of parental responsibility which have binding legal effect and are enforceable in the Member State of origin shall be recognised and enforced in other Member States without any declaration of enforceability being required. Sections 1 and 3 of this Chapter shall apply accordingly, unless otherwise provided for in this Section."

In this way, we can confidently affirm that party autonomy now has the power not only to regulate the consequences of personal status, but to shape personal status itself—through the instrument of contract, what clearly shows the relevance of the role played by notaries in this framework.