

MARRIAGE CONTRACTS

Regulating the Patrimonial Regime of the Family The Position under Italian Law

DAVID SCICLUNA

THE specific object of the marriage contract is that of establishing the patrimonial or property regime which is to govern the relations between husband and wife. It is favourably looked upon by positive law, which grants to the parties the liberty to regulate their relations in the way which is more convenient to them and dispenses them from certain legal conditions.

Italian law as it stands today deals with the patrimonial regime of the family in Chapter VI of Title VI of Book I of the Civil Code. The first article of this Chapter (art. 159) declares that the patrimonial relationships between the spouses are regulated (i) by those agreements ('convenzioni') into which the parties have entered, and (ii) by the law. The contents of these matrimonial agreements can be freely fixed by the parties, so long as they are destined to regulate the patrimonial situation of the spouses during marriage, so that even donations in contemplation of marriage can form the object of such an agreement (art. 785). Hence the Italian Courts have also considered as a valid matrimonial convention that in which the parents of the spouses promise to provide for the patrimonial interests of the new family (Corte di Cassazione, 7 February, 1952).

Matrimonial conventions or marriage contracts, however, are not too frequent. In fact, in many regions in Italy it is today rare to come across stipulations of solemn nuptial pacts dealing either with the traditional institute of dowry or the more recent creation of the family patrimony ('patrimonio familiare') which has scarcely entered into practice. Rather there exists a *legal regime* consisting of the separation of goods ('separazione dei beni'). The husband may do what he wants with his patrimony and the wife retains full autonomy

over her own personal goods, saving her obligation to contribute to the expenses of marriage. Nevertheless, it is a fact that the husband still often administers his wife's goods, even without an express stipulation to that effect. In such an eventuality and so as to safeguard the wife's rights, the law provides that the husband is subject to the obligations of a usufructuary (art. 213); if, as usually happens, the husband has enjoyed his wife's goods without a 'procura' and without any written opposition on her part, he is bound, on the dissolution of the marriage, to give up merely those fruits still in existence (art. 212).

But as regards the conventional regimes, the law is still in force and is in some respects similar to and in others completely different from ours dealing with marriage contracts. Thus, the spouses, in their marriage contract, cannot derogate any of the rights due to the head of the family, nor any rights as the law attributes to either of the spouses (art. 160). No mention is made, as in our section 1282, of tutorship, minority, emancipation of children, or prohibitory rules of law, derogation from the rules of which is forbidden. Noteable also is the absence of any norm stipulating that agreements whereby all or some of the children are to be brought up in the mother's religion are valid. But then follows a general principle that the spouses cannot agree in a generic way that their patrimonial relationships are to be regulated wholly or in part by laws to which they are not subject or by usage, but must declare in a concrete manner the contents of the agreements by which they intend to regulate their relations (art. 161).

Marriage agreements must be stipulated by public deed, under pain of nullity. They CANNOT be AMENDED after the celebration

of the marriage, though the modification may be more favourable, but CAN be STIPULATED after the celebration of the marriage *in such cases as the law contemplates, provided they do not alter marriage agreements already established* (art. 162), and in such instance the presence of both spouses is not essential. The cases contemplated by the law relate to the constitution of a family patrimony (art. 167), the constitution of a dowry (art. 178) and the constitution of a community of profits and acquisitions (art. 215).

Our law (s. 1288(1)) allows variations to be made even after marriage provided that the spouses have the authority of the Court and without any prejudice to the rights of the children or of third parties, and provided also that such variations are made in a public deed (s. 1289) and registered in the Public Registry (s. 1290), the notary having also to draw up a note of reference (s. 1291).

When amendments to marriage contracts are made *before* marriage, the Italian position is that they have no effect unless they are stipulated by a public deed in the presence and with the simultaneous consent of all persons who were parties to the marriage contract (art. 163); so too under our law (s. 1287). However, any amendment is without effect with respect to third persons unless a notation referring to the deed containing the amendment is made on the margin of the original marriage contract. The notation is to be made on the copy of the marriage contract filed in the public archives by the notary who received it and also on the copy submitted for transcription, if the marriage contract has been transcribed (art. 163), which it must be if dealing with immovables.

No proof of simulation in marriage agreements is admissible, even if such proof is shown by written counterdeclarations. These counterdeclarations can have effect *only* as to those between whom they take place and only if made in the presence and with the simultaneous consent of all persons who were parties to the marriage con-

tract (art. 164). No such limited effect is apparent under our law.

As regards *capacity*, the traditional rule 'habilis ad nuptias, habilis ad pacta nuptialia' is not always followed today and the minor must generally be assisted by the same persons who consent to his marriage, i.e. by the parent exercising paternal authority, the guardian, the curator in the case of an emancipated minor, or the special curator appointed purposely to assist the minor in drawing up the marriage agreements (art. 165). With regard to disabled persons, the assistance of the curator previously appointed is necessary for the validity of stipulations and donations made in the marriage contract by such a disabled person or by a person against whom an action for a declaration of disability has been instituted (art. 166). Under our law, marriage agreements entered into by minors (where the father is absent, dead, interdicted, or of unsound mind) or by disabled persons are to be authorised by the Court.

Italian law provides for three regimes that can be set up by marriage agreements. These three regimes have already been referred to but it is fitting to discuss them briefly. They are: a family patrimony, a dowry and a community of acquests.

The constitution of a family patrimony aims at securing to the family certain specified immovable property or negotiable instruments ('titoli di credito') which are thereby rendered inalienable and rendering any fruits the immediate property and enjoyment of the family. This patrimony can be constituted even during marriage by one or both spouses or by a third party who, however, is entitled to retain ownership of the goods. The administration of this property lies with the spouse to whom it belongs. If the property belongs to both spouses or to a third person the administration will lie with the designated spouse and in lack of such designation, with the husband. The family patrimony is dissolved on the dissolution of marriage though if, on the death of one spouse, there are children, the bond remains till the last child at-

tains majority.

The constitution of a dowry has today lost much of its importance, mainly because of the negative consequences deriving from the inalienability of the goods forming the object of the dowry, i.e. such property as the wife or others on her behalf brings expressly as dowry to the husband to sustain the burdens of marriage. One must here point out that constituting a dowry by will is considered as null under Italian law. From this I submit that one can imply that even a renunciation of succession in return for a dowry or donation in contemplation of marriage (an agreement permitted under our law by s. 1284(2)) would be invalid. In fact, article 458 of the Italian Civil Code expressly lays down that 'Any agreement by which one disposes of his own succession is void' and further that 'Any act by which one disposes of the rights that can belong to him by a succession not yet opened, or renounces such right, is equally void'. That this applies even to marriage contracts is clear from what the Corte di Cassazione said on the 22nd May 1959 that: 'Patti successori vietati dalla legge' comprendono 'anche ogni convenzione che abbia per oggetto di costituire, modificare, trasmettere o estinguere diritti relativi a una successione non ancora aperta.'

And while on succession, as regards the varying of the legal order of succession which is dealt with by section 1283 of our Civil Code and which provides for its invalidity, the fact that no mention of it is made in Italian law under the Chapter dealing with 'Marriage Contracts' would also render it invalid, and this in accordance with general principles. Besides, with regard to such promises made in marriage contracts as are mentioned by our law in section 1284(1)(a), (b) and (c)* and which are thereby declared valid, the fact that are not expressly or otherwise listed under the aforesaid Chapter would also render them invalid.

Finally, the last regime that can be established by the spouses is *the community of acquests* which is an institution seldom put into practice in Italy, unlike our law where it automatically takes effect when the marriage is celebrated. The community consists of the enjoyment of present and future goods of the spouses and such property as is acquired during marriage under any title, except through donation, heredity or legacy. Administration vests with the husband who can even alienate goods in the community so long as he does so by onerous title. Once the community is dissolved, the goods contained in it are divided equally between the spouses, saving the relevant 'prelevamenti' or any different proportions that may have been established in the matrimonial agreements.

To conclude I must point out that in Italy, legislation is being prepared to bring about far-reaching changes in connection with the patrimonial regime of the family. Thus, the concept of the husband as the sole bread-winner of the family – already somewhat varied by the wife's Constitutional right to work – may, in the near future, be further relegated by certain provisions whereby the wife may in certain cases be obliged to work. Moreover, various innovations as regards the economic government of the family are also foreseeable.

* 1284(1) A promise made in a marriage contract by the parent of one of the future spouses to such future spouse –

(a) not to leave to such future spouse out of his or her estate a portion smaller than that which such future spouse would take on an intestacy, or

(b) not to diminish such portion by any donation in favour of his or her other children or of any other person, or

(c) not to give or leave, by donation or will, to any of his or her other children more than that which he or she would give or leave to such future spouse, shall be valid.