SEPARATION IN ITALY AND RELATED ISSUES

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1. Premise

The many legislative changes affecting the family which were brought in from the end of the 1960s to the mid 1980s all had the same aim: to abolish the previous practice - regarded as excessively rigid and to replace it with new more malleable rules that respect the autonomy of the couple. In concrete terms, even though this area is subject to various inalienable principles and rights, it would seem to be opportune to grant the couple the autonomy to determine their own common life.

From this emerges the private law nature of marriage, underlined even further by the right to apply for separation to which the spouses have the exclusive right, provided the necessary controls are in place.

The law on separation (and divorce) between spouses plays a central role in family law, because of its social relevance and the number of proceedings taking place, as well as because of the nature of the issues connected with it, which have been investigated on many occasions by doctrine, at times successfully and at others not.

Before 1970, separation was the only alternative to a good working marriage and the only way out of a total family crisis. However, as marriage was regarded as indissoluble, the institution of separation was frowned upon, unless it was seen as the starting point for the reconstruction of the family unit.

2. Judicial provisions regarding separation in Italian law

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1 Family law has for some time tended to recognise agreements and willingness on the part of the interested parties as the source of the rules for governing marital life and crises, either replacing the law or as an alternative to it. Thus, the fields in which an agreement (reached more or less freely) is allowed between the parties has been extended to matters of separation and divorce, this being an area in which a private agreement is encouraged in order to, amongst other things, reduce court time, which itself can be a source of conflict between members of the family. See RESCIGNO P., Interessi e conflitti nella famiglia: l’istituto della “mediazione familiare”, in Giurisprudenza italiana, 1995, IV, p. 73 ff.

2 With the introduction of divorce, the scene changed completely, as Art. 3 of Law 898 of 1970 (divorce law) indicated one of the possible reasons for divorce to be the protraction of a previous separation. Separation thus changed from being a period of inactivity before attempting reconciliation and became the prelude to ending the marriage.
The current provisions governing personal separation between husband and wife were introduced under the Family Reform Act no. 151 of the 19th May 1975. At the end of a protracted and complex parliamentary procedure, the above law was introduced, allowing on the one hand for separation by mutual consent to be maintained, and abolishing the so-called separation “due to fault”, based on specific actions on the part of one or other spouse which could be invoked by the other as a legitimate reason for interrupting the consortium vitae, which was replaced by judicial separation.

Judicial separation simply presupposes the existence of facts which render the continuation of cohabitation intolerable to the spouses, or which cause grave prejudice to the children and can be requested by either of the spouses if within the family it is necessary to “end a cohabitation which, lacking the affection and solidarity which justify its very existence, has become intolerable”.

As a result of this clear break with the previous system, separation can now be applied for even in cases where the crisis did not occur due to the “misconduct” of one or other of the spouses; indeed Art. 151, subsection I of the Italian Civil Code, sets out the following: “Separation can be submitted to a tribunal even where application is made independently of the will of one or both spouses, if, on the basis of events, continuation of conjugal life has become intolerable or would seriously jeopardise the upbringing of the children”, and thus provides for cases in which the reasons for separation cannot be ascribed to one or both of the spouses.

Despite this, misconduct on the part of a spouse acquires relevance in terms of the declaration of charge. The Italian Civil Code establishes that when pronouncing separation, the judge declares, where the circumstances allow and it is requested, which of the spouses is charged with the separation on the basis of his/her conduct contrary to the duties arising from marriage (sanction).

The same article very generically identifies the causes of the intolerability of conjugal life in facts which “occur independently of the will of the spouses”, i.e. any events and conduct which destabilise conjugal life.

The nature of these facts mentioned in the provisions need therefore not be defined, but rather the effects of those facts on the marital relationship, or rather, on its continuation.  

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4 See CORONA, Convivenza intollerabile e separazione dei coniugi, Jovene, 1984.
So circumstances and situations of relevance have a much broader meaning, and this is due not only to the elimination of “fault”. Indeed, it should be pointed out that despite the fact that it is commonly believed that intolerability in continuing conjugal life should be based on objective and certifiable factors, it is very rare for a separation application to be rejected due to insufficient grounds, so even minor disagreements of a decidedly surmountable nature end up constituting sufficient grounds for requesting and being granted separation. This could be avoided only by creating a checklist outlining all of the grounds for separation, but such a remedy would seem to be rather distant from the logic of the new law, in which importance is attached to verifying a situation of intolerability of conjugal life, which cannot be identified as having specific causes, but only as a set of episodes and conducts.

Unlike the civil system, which bases a separation application on generic and indefinite factors, canon law establishes precise and specific factors; indeed, canon law allows for spouses to separate on the grounds of adultery (CIC can. 1152) or if one of the spouses occasions grave danger of soul or body to the other or to the children or otherwise makes the common life unduly difficult (CIC can. 1153).

Again in Art. 151, the Italian Civil Code speaks of “conjugal life”: on this term, doctrine and case law agree in sustaining that it is more than just mere cohabitation, as it would be reductive to think that a partner could ask for a judicial separation (feeling that conjugal life had become intolerable) with the sole aim of ending a cohabitation. In fact, this is one of the grounds for applying for a separation, but it is based on there being a situation of relative difficulty within the marital relationship, taken as a whole.

So we reach the conclusion that conjugal life (in which intolerability constitutes grounds for separation) is understood as the marital relationship as a whole, i.e. the material and spiritual sharing of life which began with the marriage rites.

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6 Court of Cassation, 17/11/1983, no. 6860 and Court of Cassation, 17/06/1998, no. 6031, respectively in *Massimario di Giustizia civile*, 1983 and 1998. Reconciliation between spouses is understood as “reconstruction of the family unit via the restoration of the spiritual and material union between the spouses, which ceased with the judgement of separation” or as “reconstruction of the family unit as a whole in its material and spiritual relationships”.
7 Moreover, even though the terms “conjugal life” and “cohabitation” are often used synonymously, they not only represent two distinct things (conjugal life stands for common life, while cohabitation for shared living quarters), but nowadays the former may not even include the latter. Indeed there are a number of marriages in which for various reasons, despite the existence of a solid union, the spouses do not live together stably.
But it should be underlined that whereas the marriage laws of 1942 (the year in which the civil code was instituted) were imposed on husband and wife by the legislator (given the role of head of the family attributed to the husband), the 1975 model was inspired by the moral and civil equality of husband and wife and based on implicit and explicit agreements which the spouses gradually achieve over the course of their married life.

As well as for the above-mentioned grounds, a spouse can also apply for separation on the grounds of “events which seriously jeopardise the upbringing of the children” and these can also occur independently of the wishes of the spouses. In this regard, doctrine maintains that if prejudice to the offspring does not also constitute grounds for intolerability in continuing to live together, and the partners regard conjugal life as preferable, prejudice remains irrelevant as no independent form of protection can be found through the separation procedure, to which only the spouses have access.

The 1975 legislator refers not only to judicial separation but also to separation by mutual consent, underlining in Art. 150 of the Civil Code that “the spouses have the exclusive right to apply for judicial separation or for the official confirmation of separation by mutual consent”. This is in substance a very personal and inalienable right, so that any settlements are to be regarded as null and void which imply its renunciation on the part of either party and/or any agreements for separation by mutual consent which preliminarily renounce recourse to the declaration of charge.

Under Italian law, it is not compulsory to specify in the application the arrangements for a separation regime, nor does this need to be written down, so spouses can express orally and indisputably the conditions agreed upon, and these will be recorded by the clerk of the court. The agreement presented or simply confirmed before the presiding judge, recorded in the report by the clerk, is what must be confirmed by the court, i.e. the main document setting out the future separation regime.

The only limits to the autonomy of spouses are the inalienability of the rights arising from marriage and the non-confirmability of any clauses that do not respect imperatives or the public order.

9 Court of Cassation, 21/02/1983, no. 1394, in Diritto di famiglia e delle persone, 1983.
10 These agreements are subject to change, as is true in any marital relationship which grows and changes over time, agreements adapt at the same time to the numerous events which characterise conjugal life. See CORONA, op. cit.
reach a clearly-defined agreement on the separation conditions with a series of heterogeneous factors governed by the uniqueness of the marriage context.

Separation by the mere consent of the spouses\textsuperscript{13} has no effect without confirmation by the judge, so he has the power to investigate and evaluate the agreements reached by the spouses over the children, and may indicate modifications in the interests of the children, and may refuse to confirm the separation if the outcome is negative. So separation by mutual consent reconciles the independence of the spouses with the public concern for the interests of the children, or where necessary, the spouse in the weaker financial position.

Even though years have passed since the reform law came into force and spouses have shown a clear preference for proceeding by mutual consent, this procedure is still an issue of great debate, with some praising its advantages, while others condemn it for its superfluity; there are even some authoritative sources who have called for it to be suppressed.\textsuperscript{14}

When examining the relationship between the consent of the spouses and confirmation by the court, there are various different approaches which, attributing different importance to the consent compared with the later judicial approval, resolve the problem of the revocability of the consent itself\textsuperscript{15}.

The most authoritative stance would seem to be that taken by doctrine which regards consent between the spouses expressed before the presiding judge as the source of separation, whereas judicial approval is a mere confirmation of its efficacy, and on that basis revocability of consent should be excluded.

3. The function of this institution

The most relevant feature of marital separation under Italian law is that it conserves the autonomy of the couple or the need for freedom on the part of one spouse from an intolerable conjugal life.

\textsuperscript{13} In this sense, the legislator specifies the source of the separation clauses, clearly distinguishing between a provision which arises from a judicial decision and one arising out of an independent agreement between the spouses, in which the judge merely carries out the necessary controls. See FERRANDO G.-FORTINO M.-RUSCELLO F. (Eds.), \textit{Op. cit.}
\textsuperscript{14} CIPRIANI, \textit{Abrogazione della separazione coniugale?}, in \textit{Diritto di famiglia}, 1997, II.
But when considered within a wider European context, it is conditioned by two factors: the principle of the dissolubility of marriage\textsuperscript{16}, recently introduced in some countries and the influence of religious factors in others. These factors, which are in some way interconnected, lead to a constant comparison with divorce, in terms of autonomy and mutual dependence.

Indeed, while in the first group of countries separation is either not contemplated or is an alternative to divorce, so that spouses can choose one or other of the two institutions, in the second group of highly Catholic countries (which includes Italy), in which until a few decades ago separation was the only way of resolving a marriage breakdown, separation has not yet been attributed a very clear role following the introduction of the divorce laws.

In the Italian system, legal separation (the separation sentence passed by final judgment), after a period of three years as set out by law, constitutes one of the premises for applying for divorce\textsuperscript{17}, as is made clear by the majority of case law\textsuperscript{18}. Its function thus becomes twofold, in the sense that on one hand it is a procedure in its own right, with its own autonomous relevance, while on the other it is a necessary premise for applying for a divorce in the future, as separation is tangible evidence that the material and spiritual union between the spouses cannot be maintained or rebuilt.

Under Italian law, there is no reference at all to \textit{de facto} separation for the purposes of divorce. So, even though it is a sign of a marriage breakdown, it has no effect in terms of requesting a divorce, for which the intervention of a judge is required who will confirm the existence of a breakdown with a judgement or decree.

Thus, compared with other European systems, the Italian system differs both in its need to formalise the separation judicially and in the irrelevance of a breakdown in conjugal life.

\textsuperscript{16} Despite the divorce law, the Italian legislator has sought to maintain the principle of consensual indissolubility of marriage, refusing to allow spouses to predetermine the length of their marriage or to split up the union by mutual consent, or to subordinate or resolve its efficacy on the basis of some future or uncertain event. Constitution of the union is left to the free will of the parties, but the discipline and ending of that union is not part of their bargaining autonomy, so from this point of view there is no contrast between canon and state law; both forbid couples from placing conditions or time limits on their marriage or any form of freely arranging its end. See Civil Cassation court, Sect. I, 4/12/1985, no. 6064, in \textit{Diritto ecclesiastico}, 1985, II and CARDIA, \textit{Manuale di diritto ecclesiastico}, il Mulino, 2000.

\textsuperscript{17} On this topic, a parliamentary bill has been drawn up, which we will deal with below. This bill, which was immediately rejected by the Chamber of Deputies, aimed to reduce the number of years that the personal separation must have lasted (from the spouses’ appearance before the presiding judge) from three to one, before a divorce can be granted.
4. Problems connected with separation

a) Spousal maintenance

Under Art. 143 of the Civil Code, both spouses are obliged to contribute towards the maintenance of the family. The nature of the problem changes when separation intervenes, as the needs of the family as a whole are no longer to be taken into consideration, but rather the individuals (spouse or children) “in relation to their actual circumstances and their ability to provide for themselves in the workplace or in the home”.

It is precisely in relation to the individual needs of each spouse that, following separation, there arises the right of one to receive from the other whatever is needed to maintain himself/herself. This is not an unconditional right, but rather a request that can take effect only in the absence of a judgement which makes a charge of separation; the spouse who is charged with that fault will only be able to claim alimony from the other if indigent and unable to provide for himself/herself.

The text of the Civil Code explicitly sets out that any charge of fault attributed to the spouse from whom maintenance is requested is not relevant, but does not presuppose that the spouse obliged to pay maintenance has been charged with such fault. If that were the case, then the rights of the indigent spouse would depend upon pinning blame on the other, but this has nothing to do with the financial circumstances of either spouse.

The expression “does not have appropriate means of his/her own” (Art. 156 Civil Code) has been interpreted in the sense of measuring the appropriateness of one’s own income in order to maintain the same standard of living enjoyed during the marriage. This interpretation clearly regards separation as a period of stasis and not as a prelude to divorce, with the family still being regarded as a unit. Therefore the standard of living, within reasonable limits, must remain intact for all of the members despite the impending divorce.

The income of the spouse who requests maintenance must first be calculated by considering effective income (derived from employment and properties in one’s possession) and then any other income deriving, for example, from the use of the family house.

\[\text{Tribunal of Reggio Emilia, 10/07/1995, in Foro italiano, 1995, I.}\]
A further evaluation is the general aptitude for work of a spouse who has never worked, in order to obtain a contribution to his/her own maintenance from the other; work appropriate to one’s aptitude and ability, in order not to have to take on “just any trade”.

As well as the financial circumstances of the spouse who claims maintenance, the debtor’s circumstances must also be calculated, and on that basis the financial disparity between the two can be calculated and this will be used to calculate the amount payable in favour of the financially weaker spouse.

A relevant condition for the purposes of maintenance rights is that of cohabitation *more uxorio* following separation, which can reduce or even exclude the requirement to maintain a spouse because it is felt that the claimant no longer lacks appropriate means, and gains sufficient income from his/her new family.

There are various ways in which the debtor can be obliged to pay maintenance, and these depend on agreements made between the parties or established by the judge, and so may be a periodical payment or else a lump sum (handing over a capital payment) to the beneficiary, which may be in the form of cash or transfer of a property.

b) Provisions for children

In a separation case, the treatment of minor children is one of the most delicate issues. For this reason, the law considers their interests above all and creates provisions that are both fairly clear and (despite some problems of interpretation) relatively simple to apply.

All provisions pertaining to children must be taken in the children’s exclusive material and moral interests (Art. 155 Civil Code). The aim of this provision is to eradicate the most common claims which parents make, which affect the children and damage their interests, and which are caused by a mutual aggressivity stemming from the breakdown in the conjugal relationship, to which only the lawyer can find a remedy. The lawyer has the duty to help the parent to understand that he/she does not have rights over the children, but rather is invested with a responsibility.

The judge, too, in the interests of the children, must be as objective as possible and thus avoid adopting provisions that are punitive towards one or other of the parents or use discriminatory criteria when awarding
custody, such as the gender of the spouse or his/her moral, political or religious convictions\textsuperscript{19}, even when these may have played a role in the separation.

Again in the interests of the minor, the judge must award custody, and where neither of the parents can provide their children with adequate moral and material care, must place the child in the care of third parties or institutions.

Parental responsibility is generally due to the parent who has been awarded custody, but the judge has the power to confer joint responsibility, so that both parents can decide on questions of greatest importance together. Thus the parent who has not been awarded custody maintains the right to watch over the education and upbringing of his/her children and can apply to the judge if there are issues which he/she feels go against the children’s interests.

The parent not awarded custody also has visiting rights\textsuperscript{20}, which is essential for the continuation of the parent-child relationship, and the details are established by the judge on the basis of Art. 155 of the Civil Code.

All of the spouses’ duties towards the children continue after separation, but they need to be carried out in a different way, due to the breakdown in the family. These duties are not only moral, which are managed as we have seen above, but also material, and both parents must contribute towards those.

Indeed, the judge presiding over the separation will take a decision in which he establishes how much the parent not awarded custody of the children must contribute to their maintenance, education and upbringing, and how this should be done. This decision refers without doubt to minors, but under case law children continue to be entitled to receive maintenance from their parents until they are financially self-sufficient.

The criteria for establishing the amount of the contribution can be assumed from Art 148 of the Civil Code, which continues to be used even after separation, so the debtor’s “circumstances and capacity for work” will be taken into account.

\textsuperscript{19} Court of Cassation, 27/02/85, no. 1714, in \textit{Giustizia civile}, 1986, I.

\textsuperscript{20} Visiting rights are more than just a right, they are regarded as a duty, and failure to carry them out can be deemed a reason for removing or limiting parental rights, according to Art. 300 & 333 of the Civil Code. This right becomes a duty because in order to protect the interests of the children, in most cases, visits are in the children’s interest, as they help to maintain a meaningful relationship with both parents. See DE FILIPPIS, \textit{Trattato breve di diritto di famiglia}, Cedam, 2002.
Case law in the 1980s recognised the relevance of the financially weaker parent’s aptitude for work not “in merely abstract and hypothetical terms”, but also taking into account “all concrete subjective and objective factors”\(^{21}\). Case law does however seem to have changed direction over the years, giving greater value to the agreements reached between spouses during marriage, reaching the conclusion that "if before separation the spouses had agreed or at least accepted (even *per facta concludentia*), that one of them would not work, that agreement should remain in place after separation"\(^{22}\).

The contribution will be paid in monthly amounts, through a lump sum or by transferring a property to the children\(^{23}\).

Finally the parent awarded custody has the right to receive family allowances for the children, even if the person employed is the other spouse.

### 5. Religious freedom of the minor under separation

The right to religious freedom, upheld by Art. 19 of the Italian Constitution, in relation to the upbringing on the part of the parents, ends up being closely connected with the choices made by the parents, whether during the marriage or following separation. But we should underline that, as case law shows, if one parent changes religious affiliation this cannot be used as grounds for separation and is not relevant in terms of custody, unless this has also led to the parent not fulfilling his/her rights and duties related to the marriage.

Consequently, the parent has the right to propose his/her own faith to the children. In fact, Art. 155 of the Civil Code gives the parent with custody the task of maintaining, educating and raising the children, therefore introducing the child to a specific religious faith is part of the upbringing which the parent offers the child\(^{24}\), even if he/she is separated, taking into account the abilities and character of the child.

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\(^{21}\) See Court of Cassation, 5/07/86, no. 4418, in *Massimario di Giustizia civile*, 1986

\(^{22}\) See Court of Cassation, 18/07/1994, no. 7437, in *Giustizia civile*, 1995, I.

\(^{23}\) The issue of whether to pay off maintenance with a lump sum is the subject of much debate. Opinions converge, however, on the fact that the payment of a lump sum would not exclude “the possibility for the spouse at a later date, if circumstances have changed, which may simply be that the lump sum has been spent, to request at least a maintenance payment, where the conditions apply”. DOGLIOTTI, *Separazione e divorzio, Il dato normativo, I problemi interpretativi*, II ed., Utet, 1998.

\(^{24}\) “There is a limit to the exercise of any right, beyond which the exercise becomes damaging to the corresponding rights of others: religious freedom is due to each member of the family, without any discrimination. All this leads to the consideration that faith in a
Religious freedom and a pluralist society, on which the constitution was based (Art. 30 of the Constitution and Art. 147 of the Civil Code), combine to state that in the parent-child relationship, the autonomy of the minor and concern (as previously mentioned) over his/her ability and character constitute the essential factors in the relationship, and therefore the parents act as guardians for the children.

But this raises a fundamental issue: disagreement between parents and children on key issues, such as the definition of a threshold age beyond which children acquire the ability to make their own choices in matters of faith for their own spiritual fulfilment, below the age at which parental responsibility comes to an end.

There is no law in Italy on this point, so when there is disagreement only the judge can decide on a case by case basis, evaluating the subjective conditions of the child’s development and enabling him/her, if circumstances so require, a certain degree of independence.\(^ {25}\)

6. A parliamentary bill on separation

On 23\(^{rd}\) October 2003, nearly 30 years after the referendum on divorce, Parliamentary Bill 2444 dated 1\(^{st}\) March 2002 was rejected. This bill aimed to reduce the amount of time required for divorce from three years to one. This was unexpected, as the Justice Commission had reached an agreement between currents in the majority and opposition on a compromise solution, which would allow this reduction only for couples without children of minor age.

This proposal sharply divided public opinion into two camps, one in favour and the other against the reduction. A recent survey carried out by the National Magistrates’ Association has shown that 74% of Italians are in favour of making divorce proceedings simpler in order to bring them into line with other European countries, and mainly to reduce the burden of trials, given that the time-frames and costs associated with Italian courts’ handling of separation cases (especially judicial ones) are excessive.

The current provisions show in order to present a petition for the dissolution or ending of the civil effects of marriage, the final separation judgement or confirmation of separation by mutual consent must have been obtained, and the separation must have been continuous for at least three years.

The *ratio* for this rule can be traced back to the fact that in 1970 (the year in which divorced was introduced in Italy) divorce was not considered as a cause of the breakdown of conjugal life, but as a remedy to a breakdown which had already occurred and whose efficacy, therefore, was subordinate to separation as a transitory and reversible instrument\(^{26}\). This *ratio* can also be explained by the fact that at the time the institution of concordatory marriage already existed, and the political weight of the Church and the Catholic component of society.

The experience of recent years has shown that far more often the legal imposition of a three-year period is losing its original function, and acts merely as a bureaucratic impediment, which does not help to rebuild a broken relationship, but greatly delays the chance to formalise, at a juridical and moral level, other “circumstances” which have intervened in the meantime.

The Bill presented before Parliament also aimed to reduce the time taken to dissolve the communal estate between the spouses, no longer making it dependent on the final separation judgement, but rather on the consent to live separately which the presiding judge gives to the spouses when they appear before him. This would have allowed the communal estate to disappear, without waiting for the final separation judgement, for those couples who no longer have a conjugal life and whose lives are clearly separate; this would also have the advantage of protecting the financially weaker partner, who would thus have had much quicker access to the property belonging to the common heritage.

Thus, the final aim of Bill no. 2444 was to render current provisions more flexible and better suited to issues of a social nature.

\(^{26}\) The 1970 law set out that the interval between the separation sentence and the petition for divorce should last 5 years and if the spouse not at fault had opposed the sentence, this rose to seven. Only in 1987, once the climate which had marked its introduction had become calmer, and it had become socially more acceptable, this was reduced to three years. Later adjustments to this provision have helped to create a fairly consistent institution. BARBIERA, *Separazione e divorzio: fattispecie, disciplina processuale, effettiapatrimoniali*, Zanichelli, 1997.
In contrast to these lay arguments are the Catholic ones, which maintain that simplifying and reducing the time taken for a procedure regarding the dissolution of a marriage serves only to discredit the institution itself, as well as trampling on the sacramental nature of marriage\textsuperscript{27}.

Even though few reconciliations occur in the three years which follow separation, it is equally true that this is merely the result of a previous breakdown. It therefore becomes vital to establish how best to avoid the formation of mismatched couples; there is no one way, but one thing is certain - that people tend to reflect less over choices that are seen as easily modifiable.

Contrary to what some maintain, conflict does not increase due to the passage of time, but as a consequence of all of the negative events which characterise a separation, so reducing times will not serve to bring serenity back to a relationship, but only to damage the spouse who has suffered the separation and to formalise the definitive ending of the marriage union more quickly, thus reducing the chances of reconciliation.

\textsuperscript{27} “As the judge cannot replace the will of the two parties, which can give rise only to the validity or invalidity of a marriage contract, so no sentence can give rise to a sacrament where there is none or remove one which exists… just as one can never be (100%) sure of the judgement, except where matters are crystal clear, so it is hard to be sure of the fact that a sacrament cannot arise between baptised people, except perhaps in the case of a total lack of faith”. MUSSELLI, \textit{Manuale di diritto canonico e matrimoniale}, Monduzzi editore, 1997.