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THE MAINTENANCE OF THE FORMER SPOUSE IN A NEW
JUDICIAL RECONSTRUCTION: LET'S GO LIVING IN THE PAST

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THE MAINTENANCE OF THE FORMER SPOUSE IN A NEW JUDICIAL RECONSTRUCTION: LET'S GO LIVING IN THE PAST

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ABSTRACT

The new interpretation followed by the Italian Court of Cassation amended the consolidated evaluation criterion of the divorce subsidy over passing the fixed parameter of maintaining the standard of living enjoyed during marriage, in favour of the overall evaluation of ALL the parameters provided for by art. 5 of the Divorce Act 1970. Consequently, for the grant, reduction or even revocation of the divorce allowance, it is necessary to assess whether the former beneficiary spouse is, or not, economically self-sufficient, since it is not necessary for the former beneficiary spouse to be aseptically guaranteed the same standard of living as he or she was during marriage.

In application of the rule of Art. 9 of the Divorce Act 1970 and of the "rebus sic stantibus clause" immanent to questions concerning maintenance of the former spouse, any changed factual circumstances and the new interpretative method lead to believe that there are all the elements for the re-evaluation, case by case, of the divorce situation in the light of the application of the parameters suggested by the new interpretative trend of Court of Cassation.

In this way the "law in action" in Italy seems to be now perfectly in line with the rules followed in the European legal system and in the Common Law area too.

1. – Introduction

Since 1990, for more than 25 years, despite the fact that the wording of the 1970 Italian Divorce Act clearly indicated the numerous parameters to be used to assess, whether and how much, is due to ensure a fair livelihood for the former "economically weak" spouse, the judiciary has tended to interpret the rule, on the base of the parameter of "maintenance of the standard of living enjoyed while still married". As illustrated in this article, there are many explanations for this choice; the most trivial but also the truest reason is the political choice of protecting abstractly and regardless of the circumstances the economically weakest spouses that, in Italy, have usually been the wives, who until few years ago were in most cases dedicated to domestic and care work.

Only few months ago the Court of Cassation with a series of judgements, rightly considered "revolutionary", questioned the accuracy (always and in any case) of this dominant interpretation, judging on very particular cases different from all the others decided so far by the amount of money and goods at stake. In particular, we refer to the two most famous cases, namely the "Grilli's" case and the "Berlusconi's" case (see *infra* for references). While the latter case is well-known (it concerns the request by Mr. Berlusconi's ex-wife Mrs. Veronica Lario for a maintenance allowance for the "modest" sum of more than 3 million euros a month), the former is less noted, at least outside Italy, and it regards the divorce of Mr. Vittorio Umberto Grilli an economist, a public executive and above all a former Italian finance minister. In this case¹, specifically, the Court of Cassation

¹ Corte di Cassazione 10 maggio 2017, n. 11504, concerning the divorce between Vittorio Grilli,

has significantly innovated the interpretation of the divorce subsidy followed so far holding that this is no longer in line with the social situation and social perception of the institution of marriage on the one hand, and that it is not adaptable to the various concrete cases, in particular those involving large estates, on the other hand. In short, the Court argued that that maintenance should not be granted to those who are economically independent or have some income, or movable and immovable property, or capacity and actual possibilities of personal working and a stable availability of a house.

This article argues that in addition to be innovative these judgments in question - which have been criticised or overshadowed depending on the point of view of the observer – are also, and above all, acceptable and consistent from a legal point of view, because they highlight a wish, if not a need, to use all the parameters that the Divorce Act itself indicates as essential for a case-by-case assessment, i.e. tailored to the individual circumstances that lead to the divorce.

former Minister of Economy in the government of Prime Minister Mr. Mario Monti, and the entrepreneur Lisa Lowenstein. The Supreme Judges rejected the appeal by which the Minister's former wife claimed a maintenance subsidy already denied by a verdict by the Milan Court of Appeal in 2014. Maintaining the standard of living prior to divorce is no longer a right. Mr. Grilli, after the end of the marriage, suffered a contraction in incomes while Mrs Lowenstein can stay alone thanks to her income and property.

2. Italian matrimonial and divorce regime and recent reforms

In order to understand the real extent of the recent decisions of the Court of Cassation on the topic of maintenance and "post-conjugal solidarity", it is necessary to take into account the main features of Italian matrimonial and divorce regime.

First of all, it must be said that the rules of the Civil Code on marriage are still mostly those written by the Legislator in 1942 and within the 1975 reform. For instance, the two Articles that are usually considered as the basis of the legal regime of marriage in Italy literally are:

- *Art. 143. Mutual rights and obligations of the spouses.*

By marriage, the husband and wife acquire the same rights and assume the same duties. Marriage gives rise to a mutual obligation to fidelity, to moral and material assistance, to collaboration in the interests of the family and to cohabitation. Both spouses are required to contribute to the needs of the family, each in relation to their substances and their ability to work professionally or at home.

- *Art. 144. Address of family life and family residence*

The spouses agree among themselves on the direction of family life and determine the residence of the family according to the needs of both of them and the pre-eminent needs of the family itself. Each of the spouses has the power to implement the agreed policy.

Although the formulation has remained the same, both the doctrinal and judicial interpretation as well as the answer of the society have strongly influenced the reading of these norms that today are viewed as paramount the absolute equality between the spouses for all their existential, economic, educational choices and so on. On the other end there is an evident "privatization of relations" left in their fullness to the common negotiating intent of the spouses or to the free and complete self-determination of the

subjects.

The original meaning of marriage has been substantially "distorted", firstly with the entry into force of the divorce legislation, and after with the introduction of the civil partnership regime (heterosexual and homosexual), the abbreviated separation and the ensuing divorce regime². Marriage is no longer an "institute" or more technically a "legal transaction" (juristic act – *negozio giuridico*) through which two consenting persons of different sexes decide to declare to the State and to the people, their intention to live together forever and without the possibility of dissolving the tie and the agreed commitments. In reality, marriage is today a "quasi-contractual" (in the technical sense) bond for an indefinite period that can be dissolved at any time and with very short timescales -from six months to one year - *ad libitum*, moreover.

It should, in fact, be noted that with the distressed introduction of divorce, initially, the Italian legislator had somehow wanted to maintain a maximum of consistency with the general pattern of law. Although the law on "divorce" was approved a few years earlier the entry into force of the reform of family law, not only the Articles on marriage had not been innovated or modified but also there was no hint in the same reform law of the divorce in itself. If any, the coherence or systematization was in fact the result of the concerned political and parliamentary process of the divorce law.

Divorce, basically, seemed to be seen by many Parliaments with looks of disapproval and considered as an "extreme ratio" for cases in which it was

² Legge 20 maggio 2016, n. 76 Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze (GU Serie Generale n.118 del 21-05-2016).

not categorically plausible not to take into account the impossibility of maintaining the still standing relationship.

It should also be noted that the same legislation on divorce has not changed in any way from its original expression, so that it has remained the same with the only exception of the part concerning the timing and the procedural aspects that have been recently modified, especially with the introduction of assisted mediation provisions. Nevertheless, the entire system of family law, and therefore also of divorce rules, has constantly been the object of interpretative upheavals searching for an adaptation of the letter of the law to reality and to the changed social needs.

Actually, if we were to settle exclusively on the wording expression of the law, there would be room only for its very limited application restricted to few rare cases of divorce, confirming the social disvalue with which the same divorce was seen.

The Italian law on divorce, indeed, allows such a possibility only in certain very precise cases, which are according to Art. 3 of Act n. 898 of 1st December 1970 "The dissolution or cessation of the civil effects of the marriage may be requested by one of the spouses": 1) when the other spouse has been the subject of a criminal sentence, which has the force of *res judicata*, for serious crimes of various kinds; 2) or when he or she has been acquitted for the same crimes for total defect of mind; 3) or when: "a final judgment has been given on the judicial separation between the spouses, or a consensual separation has been ratified or a *de facto* separation has taken place when the *de facto* separation itself began" before 1968; 4) or if the other spouse, a foreign national, has obtained the annulment or dissolution of the marriage abroad or has entered into a new marriage abroad; 6) and finally if "the marriage has not been consumed".

Letting aside the trivial consideration that after 48 years from the entry into force of this Statute in Italian society there has been an abundant transition from "approved but not consumed" marriages to those consumed but not approved (the number of cohabitations being almost equal if not higher than that of marriages). It seems to be quite clear that the chances of applying for divorce for these reasons are very limited so that, in fact, since the implementation of Act 898/1970, the vast majority of requests were based and are still based on the simplest and most frequent circumstance i.e. the judicial decision or the homologation of consensual separation.

In conjunction with the Art. 151 of the Civil Code³, it is clear that divorce can be pronounced only when "events occur, even regardless of the will of one or both spouses, such as to make intolerable the continuation of cohabitation or to cause serious harm to the education of the children".

Once again, the intention of the Legislator seemed to be achieving the maximum protection of marriage as "fundamental institution" and of its "unlimited duration", limiting the hypotheses of divorce to rare cases of absolute intolerability of the continuation of cohabitation. On the contrary, as clearly emerged from a review of relevant case law, the Italian courts have moved from an absolutely restrictive way towards an interpretation of the institute of divorce that is increasingly wide and favourable to the freedom of the parties (or of the party) until arriving at the current and consolidated hypothesis of the acknowledgment of a non-fault divorce ad

³ Art. 151. Legal separation.

Separation may be requested when, even independently of the will of one or both spouses, such events occur that the continuation of cohabitation becomes intolerable or seriously prejudices the education of the offspring.

The judge, in pronouncing the separation, declares, where the circumstances exist and it is requested, to which of the spouses the separation is imputable, in consideration of his behaviour contrary to the duties deriving from the marriage.

libitum of each spouse.

In other words, the evolution of judicial interpretation has kept pace with social and customary evolution. Therefore, a behaviour or a situation that in 1970 could NOT be considered a valid reason for the absolute intolerability of the continuation of cohabitation, today it is peacefully and constantly suitable. In particular, if one time ago it was necessary to somehow "justify" the intolerability of living together according to weighted subjective parameters, today the separation is granted on the basis of the simple desire of one of the spouses to terminate the relationship, even if the other spouse is not only completely innocent but even if he/she was a very good husband or a very good wife. This, of course, is a consequence of the full respect of the freedom of self-determination of individuals: just as people freely decide whether to get married and with whom, without giving any explanation about their choices, they can now separate and divorce freely and without any motivation when they no longer feel like continuing a relationship.

The legal framework concerning divorce has, of course, been subject to a number of legislative changes.

Firstly, with regard to divorce legislation, the separation period before acting for divorce moved from the 5/7 years (consensual/judicial) of the original separation to the 6/12 months of the current legislation.

If, in addition to this provision concerning this very short separation period required before divorcing, we also consider the (until now) consolidated judicial interpretation according to which the spouse claiming for separation and then subsequently for divorce, does not have to "prove" the impossibility of continuing the conjugal relationship" nor the "violation of the duties" provided by the matrimonial law, we can argue that today the

Italian divorce law is, at least from this point of view, exactly in line with other legal systems of both Civil Law and Common Law.

The introduction of the brand new legislation on "unmarried or de facto couples" also goes to this direction by extending and applying the same regime used for marriage to "registered" couples⁴.

As a consequence, marriage is no longer understood as an indissoluble link or protected institution even "against" the will or (better) the freedom of self-determination of the spouse or spouses, while the interest of the (minor) children shall always be protected.

As far as the economic interest is concerned, especially in the case of a "weak spouse", even here, in front of almost unchanged legislation, the judicial and common interpretation has been decisively affected by the evolution of the institution of marriage and divorce.

As will be shortly seen in detail, the patrimonial aspects and even the concept of the economically "weak spouse" have also changed according to time, both in the case law and in society.

Given the initial lack of value of separation and divorce, the hypotheses of "by-fault separation" almost automatically involved a strong economic commitment upon the "culpable" spouse. On the other hand, the high costs of divorce (for example, the maintenance allowance) were considered a sort of deterrent to break down the marriage, so much so an entire generation of Italians have been forced to live "separated in their own family home", i.e. for instance sharing the house but without cohabitation, due to a lack of sufficient funds to split up.

⁴ LEGGE 20 maggio 2016, n. 76, art. 25

In this scenario, the rules were interpreted in a "one-way" direction, in particular in favour of the economically "weak spouse", without carefully assessing - as foreseen by the same letter of the law - the economic situation of the other spouse that was required to provide maintenance allowance.

Obviously, the picture has largely changed today also because the economic crisis has exacerbated the economic difficulties making it necessary to take in consideration social changes: if the 50% of Italian couples prefer to live together rather than get married, it is a fact that needs to be taken into account, also reflecting about how it can be useless to impose steady rules and costs without considering the reality and the different situations at stake⁵.

⁵ For example, it is legally impeccable, but completely useless if not harmful, to assume that a maintenance allowance is fixed and based on completely automatic parameters, in the absence of a real possibility that this allowance will be paid for example in the context of the labour crisis and the reduction of incomes.

If in Italy couples are no longer married (or marry at a rather advanced age) it is because the transactional costs are higher precisely, but not only, in the event of separation and divorce. Moreover, as to avoid the obstacle of divorce costs, couples often preferred (and sometimes still prefer) to appeal to the Rotal Courts –i.e. the Ecclesiastical Tribunal following the Canon Law- to obtain, if in the presence of a "concordat" marriage (i.e. a marriage celebrated according to the Catholic Rite but with "legal" value as for the Italian legal system), the nullity of the marriage with a consequent reduction in financial commitment.

3.- Notion and requirements of maintenance in separation and divorce subsidy

Within the described evolution of the social and regulatory framework, it is also necessary to assess the function of the maintenance allowed throughout the separation and the so-called obligation of post-matrimonial solidarity.

To this end, it is necessary to clarify the distinction between separation maintenance and divorce maintenance (or subsidy).

With the legal separation (consensual or judicial) the marriage is not yet ended and dissolved but rather "suspended" on a transitory basis pending the merely eventual judgment of divorce. In theory, a separation could never lead to a divorce request and, again hypothetically, it could even be run-down due to the possible reconciliation of the parties. In fact, the legal status of the spouse remains unchanged while certain obligations such as the duty of fidelity⁶ and cohabitation are lacking, or rather are undergoing changes, while the duty of reciprocal material assistance remains operative. According to this duty, the Courts should determine the maintenance allowance in favour of the "economically weak" spouse i.e. who needs

⁶ It should be noted that the interpretation of duty of fidelity has also changed, precisely as a result not of the evolution of customs but of the law and in particular of the new and consolidated interpretation of the "no fault" divorce and the shortening of the time limits for applying for divorce. In practice, it no longer makes sense to consider the duty of fidelity as "abstinence" from sexual relationships with other subjects outside of marriage, given that today, with just 6 months of separation, divorce can be obtained and the so-called "last attempt at re-conciliation" that should be done according to the law in front of the Judge is nowadays a simple and pure formality. In 1970, on the contrary, the duty of fidelity had a meaning, given the long term (5 years) foreseen for separation and the "secret hope" that in some way, even at the last useful moment, the fracture could be recomposed: evidently if this was the purpose or the "desire" of law it could not admit that the obligation of fidelity had a different meaning from sexual abstinence. To do so would have meant adding salt to the wound and making reconciliation highly improbable right from the start. With the new rules and with the new social reality, today the judiciary is interpreting the obligation of fidelity in the sense that the behaviour of the spouse must not "damage" the image of the other, i.e. must not give "scandal" as once was said. No more sexual abstinence but ... with the most classic understatements and a great deal of hypocrisy, it may be done but without saying.

support having no income of its own or if the income is insufficient for its needs.

The maintenance subsidy regarding the separation is recognized by the Civil Code as well as by Art. 156 providing that one of the effects of the separation on the assets between the spouses is that the judge, stating the separation, establishes for the benefit of the spouse to whom the separation cannot be alleged, the right to receive from the other spouse what is necessary for its maintenance, if he/she has not adequate revenue of his/her own. The amount of such allowance must be determined in relation to the circumstances and the revenues of the debtor. Anyway, the “alimony” stated in Articles 433 et seq. shall remain unaffected.

In my opinion, it is useful to stress that here we refer to the PHASE of SEPARATION and that Article 156 of the Civil Code was designed for a system that "ignored" the legal and normative reality of "divorce" and was preordained to the protection of marriage. In theory, as I said, this phase can last forever if the action for divorce is not proposed. Only with divorce the separation comes to the end while the marriage relationship is dissolved. This is a fundamental point that will, in fact, be the subject of recent case and of doctrinal elaborations.

The trend of judicial interpretation that has been modelled in the years⁷

⁷ In the event of separation, for the determination of the maintenance allowance, the potential earning capacity of the beneficiary spouse can be considered, but it is necessary to demonstrate an effective possibility of carrying out a working activity, in consideration of every concrete individual and environmental factor (Civil cassation, section I, sentence 6 June 2008, no. 15086).

The maintenance allowance cannot be paid to the husband who is liable for the separation, even if he has no means of subsistence.

In addition, the conjugal house in co-ownership can be assigned to the wife to avoid interrupting the relationship of trust with the places and people close to her, even in the absence of children (Civil cassation, section I, sentence February 15, 2008, no. 3797).

The assignment of the matrimonial home to the spouse, custodian of minor offspring or cohabiting with dependent offspring of any age, is not subject to extensive application, given the exceptional

following the introduction of the law on divorce has often been "wavering", saying and not saying and above all attesting on a more or less arithmetic calculation, likewise once occurred in the case of compensation for physical damage that was calculated according to fixed "forensic tables".

nature of the law; therefore, the spouse who does not meet the above requirements cannot be assigned the matrimonial home as maintenance (Civil cassation, section I, sentence no. 24407 of 23 November 2007).

In order to recognise the right to maintenance of a spouse who is not responsible for the separation, it is essential that the spouse should have no income enabling him or her to maintain a standard of living similar to that enjoyed during the cohabitation and that there should be an economic disparity between the two spouses, since it is irrelevant that, prior to the separation, the requesting spouse may have tolerated, immediately or in any event accepted a lower standard of living. And since separation establishes a regime that tends to preserve as far as possible the effects of marriage compatible with the termination of the cohabitation and, therefore, also the "type" of life of each of the spouses, if before the separation the spouses have agreed - or, at least, accepted - that one of them did not work, the effectiveness of this agreement remains even after the separation (Civil cassation, section I, sentence no. 25 August 2006, no. 18547, RV591588).

With regard to the personal separation of the spouses, their ability to work profitably, as a potential capacity to earn, constitutes an element that can be assessed for the purposes of determining the amount of the maintenance allowance by the judge, who must in this regard take into account not only the income in cash but also any usefulness or capacity of the spouses subject to economic evaluation. Moreover, the ability of the spouse to work in this case is important only if it is found in terms of the actual possibility of carrying out a paid work activity, in consideration of every concrete individual and environmental factor, and not just abstract and hypothetical assessments (Civil cassation, section I, sentence no. 25 August 2006, no. 18547, RV591587).

The spouse who is not liable for separation is entitled, according to Art. 156 of the Civil Code, a benefit which tends to be capable of ensuring him a standard of living similar to that which he had before his separation, provided that he does not receive adequate income of his own to enable him to maintain that status and that there is a difference in income between the spouses. As to the quantification of the allowance must take into account the circumstances (pursuant to the second paragraph of the cited article 156), consisting of those factual elements of an economic nature, or however appreciable in economic terms, other than the income of the hired person, which may affect the economic conditions of the parties (Civil cassation, section I, judgment of 27 June 2006, no. 14840, RV589897).

The principle of constitutional solidarity, also referred to in Article 143 of the Civil Code, requires separated spouses, even if no longer bound by the marriage bond, to have regard to the living conditions of their former partner, at least as a human person. Now, it is well known that the spouse who undertakes a new cohabitation derives economic benefits, if only because he can share the costs of ordinary administration (board, lodging and related expenses), unlike the spouse who is left alone, who has to face, in addition to the costs of ordinary administration, also those relating to the maintenance of the former spouse and any children. Therefore, in the event that the spouse entitled to the allowance establishes a new *de facto* relationship, which can be qualified as a cohabitation *more uxorio*, the honoured spouse has the right to the cancellation or reduction of the maintenance allowance (Court of Lamezia Terme, civil section, Decree No. 7654 of 01 December 2012).

Although winning a National Lottery "Superenalotto" is an occasional, exceptional and unpredictable event, it should be kept in mind in order to recalculate the economic position of the former husband, obliged to pay the monthly maintenance allowance (Civil Cassation, section I, sentence March 12, 2012 no. 3914).

However, despite the lack of clarity, or rather the deliberate abstractness, of the wording formulation of the law, some points have been consolidated. The action for maintenance may be proposed only if person concerned does not have adequate income of his or her own.

Furthermore, it is clear that the separation "maintenance" differs from the "alimony" obligations: Art. 156 of Civil Code, in fact, affirms that in any case at least the "maintenance" mentioned in the article 433-438 of the Civil Code⁸, i.e. the "alimony" strictly necessary for living must be paid to the spouse who has no income of his or her own. This undeniably means that the obligation of separation "maintenance" may be quantitatively - and qualitatively - different from that of alimony.

The assessment must also take into account the income of the debtor (which may change over the time and which, in theory, may also have been the result of the other spouse's contribution to the marriage).

Finally, the assessment must be made "in relation to the circumstances" of the matrimonial relationship and therefore also of the conduct of the spouses or of any other element that can be evaluated by the judge as matter of fact.

The abstractness of the statutory rule has, as was said, forced the doctrine and above all the Courts to concretise the interpretation of the same rule. I must say that on this point I am rather critical, in the sense that the

⁸ Art. 438 of the Italian Civil Code: "Alimony may be requested only by those who are in need and are unable to provide for their own maintenance. They must be allocated in proportion to the needs of those who apply for them and to the economic conditions of those who have to administer them. They must not, however, exceed what is necessary for the life of the nourishing, however, having regard to its social position". This measure tends to be geared to the minimum necessary, practically a lump sum.

legislator had rightly formulated the rule in a very general way to allow its real and actual application on the basis of the "discretion of the civil law judge" (which is not pure discretion but the right to choose between several objectively and subjectively ponderable solutions and therefore by the end of common sense and reasonableness) in a way that was not "automatic" or "standardized" for all the hypotheses but rather so in a way that let it possible to distinguish case by case and situation by situation.

Unfortunately, perhaps for the immense number of separation cases and for the massive slowness of the Italian judicial system, as well as for the average and common value of many claims for separation (the widespread model of single-income family with the man as breadwinner and the home-wife unable to support herself after the separation) the evaluation of the judge has been in a very short time, "standardized".

Thus, for example, the Courts, with various theoretical justifications, (all of them being, however, widely questionable), have tended to assume as "adequate" the income produced autonomously by the individual, which is capable of allowing him/her to maintain the standard of living adopted during the period of marriage. Hence the ideas of maintenance in relation to the standard of living hold by the couple before separation.

Obviously, there are a lot of social explanations about this interpretation as well: It should be considered that, as we said before, until few years ago Italian model of family was mainly characterized, according to a male breadwinner system, by a one (male) income, the relegation of most women to care and domestic work, an average of two children and a rather high average duration of the marriage.

This led the judges, for a simple cost/benefit analysis, to decide in favour of the "economically weak" spouse (to whom the children were usually

entrusted) without taking into account the needs of the other spouse but rather evaluating -and sometimes supervising- for example the duration of the marriage and therefore the long contribution, even if difficult to quantify, to common life by the "weak spouse".

This interpretation has been decisively affected by the social evolution and the various changes in the national and international economic situations, often becoming difficult and practically impossible to meet the payment of a "maintenance" no longer sustainable by the obliged or, as it has happened, a maintenance established for a separation between spouses following a very short marriage and with a large difference of age in the couple⁹.

In conclusion, the new legal, economical and social situations have forced the Courts to rethink the strengthened interpretation, pointing, finally, at a case by case analysis and taking into account, as expressly prescribed by the rule, all the circumstances which are, obviously, different according to each case. We will see that this is also at the basis of the recent judgments on both separation and divorce maintenance.

In this regard, it should be pointed out that the maintenance allowance concerning the separation is quite different from the maintenance concerning the divorce in terms of conditions and factual and legal

⁹ With the evolution of customs, with the increase in the average age, with the discovery of drugs that allow a satisfactory sexual life even in old age, with the circulation of migrants of need from European and non-European countries, with the development of the phenomenon of so-called "personal carers" (usually more or less young ladies willing to care for the elderly left alone) have increased the cases of marriages with great difference in age and economic condition resulting in separation in the short to medium term. As the British say, It is may also be unethical or morally unjust but it's...real life. Obviously, in these cases the common interpretation of the "standard of matrimonial living" has led to serious distortions and forced a rethink. The same legislator has taken steps to remedy the situation, for example by introducing (but this touched the State's pocket) limits on the basis of the duration of the marriage, for example in the case of the award of a post-mortem survivor's pension.

situation.

The maintenance allowance essentially has a welfare function in the sense that it should allow the spouse, who has no means of subsistence, to "bear" the separation and therefore the new condition of life, created with the same separation at least until the marriage has been definitively dissolved with divorce.

The divorce allowance, instead, must be paid to the former spouse precisely after the divorce decree, i.e. when the marriage bond has been definitively dissolved and both former spouses now free and free from the obligations provided for the marriage (with the exception, of course, of what is established in terms of filiation and parental duties).

The divorce cheque is explicitly provided for "joint and several" purposes by art. 5 par. 6 of the Divorce Act (898/1970) which states: 'In its judgment on the dissolution or cessation of the civil effects of the marriage, having regard to the circumstances of the spouses, the reasons for its decision, the personal and financial contribution made by each to the family management and formation of the assets of each or of the couple, and the income of both of them, and having regard to all the foregoing factors, including the duration of the marriage, the Court shall lay down an obligation for one spouse to pay to the other periodically a sum of money when the latter has no adequate means or is otherwise for objective reasons unable to obtain them'.

The welfare or solidarity function of the allowance is quite evident: it acts to prevent, as a result of divorce, a worsening of the assets and living conditions of the economically weaker former spouse who could have contributed to the enrichment of the other former spouse with his or her personal contribution to their relationship or by taking on commitments

(such as caring for their children or "managing" the family home and the social and relational life of the couple) that have nevertheless allowed an increase in the economic and social "position" of the other partner. In different and simpler words, the law would like to avoid that, once the marriage is over, those who in some way "enjoyed" the contribution and support of the other do not keep it all. On the other hand, it is also clear that the legislator's concern is to avoid that who have actually done little or nothing for the couple gains of the situation (especially in the case of a non-fault divorce) becoming unjustly "richer". In this, is also evident a certain "ethical-moral" heritage, whereby situations of "commodification" of the matrimonial relationship would be avoided¹⁰.

It should also be pointed out that, in the case of the divorce allowance, since the personal relationship of the spouses has definitively ceased, the law lays down stricter requirements for its recognition.

Unlike the maintenance payments for separation, to obtain the divorce allowance, it is not necessary for the beneficiary spouse to be without adequate proper revenues, but it is necessary for him or her not to have adequate means of subsistence and to be objectively in a position not to be able to obtain them. It should be noted that the adequacy in this case is not a function of an alleged "standard of living" (as in the case of the allowance following the separation) but rather in directly proportional function to the personal and economic contribution given during the marriage (and therefore in relation to the duration of the same) to the family management and the formation of personal or common assets; at the same time the

¹⁰ For example, in the English Common Law Marriage (or any matrimonial agreements) cannot be based on a consideration that may in any way have sexual implications.

adequacy is inversely proportional to the personal and economic contribution given by the other ex-spouse during the marriage and during the separation phase. In simple terms, we can say that the greater the contribution of the former spouse during the marriage, the greater will be the "adjustment" and therefore the amount of the divorce allowance; the greater will be the contribution of the other spouse (the one with resources, in other words) the smaller will be the adjustment and the divorce allowance. Finally, in this evaluation, we must add the rather broad parameter of the "reasons for the decision" -including, but not limited to, the reasons for the divorce- and of the conditions of the former spouses, always with a view to a more general duty of general and post-marital solidarity.

As newly affirmed by the Corte di Cassazione, (and in the well known decision of court of Appeal of Milan n. 479 of 16th Nov 2017), i.e. in the Berlusconi's case¹¹, it is also necessary that: "national legislation should be interpreted in accordance with EU guidelines and in such a way as to ensure the effectiveness of EU rules; in the area of divorce and maintenance between former spouses, the European Commission has issued regulatory guidelines in order to contribute to the harmonization of family law in Europe and to facilitate the free movement of persons in Europe; in

¹¹ In this case the Court has refused to grant the divorce allowance to Mr. Berlusconi's wife, already recognised by the first trial, for the sum of one million euros and four hundred thousand euros per month, since she has a large amount of real estate and movable assets - valued at several tens of millions of euros - with the consequent possibility and capacity for investment, but also savings, since she opted for a secluded life and in the normal way, assets which, moreover, are entirely made up of her husband, who has an incomparably higher economic position. The divorce allowance may be granted exclusively to a former spouse who, for objective reasons, does not have adequate means to achieve economic self-sufficiency, a parameter which is not based on rigid and predefined criteria but, beyond any automatic application, on variable and relative indicators linked to specific situations, the position of the requesting spouse having to be assessed, in particular as regards his or her living conditions, age, plans and state of health. See: Caraburi, G. , Gli effetti economici della crisi coniugale, http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione_Casaburi_28_2_18_assegno_div.pdf, p.16.

particular, it is required that the issue of maintenance between former spouses be moulded around the principles of self-sufficiency, need and temporariness". Consequently, an interpretation of the Divorce Act of 1970 should to be adopted in compliance with those principles, and in particular with Principle 2.2 "Self-sufficiency - after the divorce each spouse provides for his or her own needs"; Principle 2.3: "Conditions for maintenance: the grant of maintenance after divorce presupposes that the demanding spouse does not have adequate means to meet his or her own needs and that the obliged spouse has the capacity to meet those needs"; Principle 2.8: "Time limits: the competent authority may grant maintenance for a limited period of time, but exceptionally may grant it without time limits".

It follows, one more time agreeing with the Court of Cassation, that the right of the spouse to the divorce allowance must be excluded if the "means" of the same spouse are considered sufficient and adequate if compared to the parameter of self-sufficiency, "or to the constitutional parameter of sufficiency for a free and dignified existence or to the different parameter considered as corresponding to the interpretation of current legislation pursuant to art. 12 of the preliminary provisions to the Civil Code differently, since it is necessary to promote a question of the constitutional legitimacy of the provision in the part in which, by effect of the living law, it provides that the adequacy of the means of the applicant for the divorce allowance is linked to the standard of living enjoyed during the period of marriage".

As we can see, the most recent case law has perfectly grasped the meaning of Art. 5 par. 6 of the Divorce Act, taking into account the various social and economic needs and reiterating what has gradually emerged over the years, namely that only by considering all these parameters, it will be

possible to reach at an assessment that is as consistent as possible with the different situations of each individual divorce.

4.- The revirement of the Italian Supreme Court's approach to maintenance and divorce rules. The Italian "big money cases"

The social impulses and also the new economic situation consequent to the serious economic crisis have forced the interpreters, opposed with the inertia of the legislator, to rethink the assumed parameters, and in particular, to review the automatism followed in securing always and however, often uncritically, to the economically weak former spouse the maintenance of the standard of living enjoyed during the marriage. The rigid application of this parameter, which was not even explicitly provided for by the Divorce Act, had often led to paradoxical results, especially in the cases (which were, however, the majority) of divorces with medium-low economic situations. In practice, if during the marriage the couple had maintained a standard of living thanks to the work of one spouse and the active contribution of the other, as a result of the divorce often the former spouse who was obliged to maintain the other have been, in fact, deprived of the resources and means to support himself.

The described interpretation was founded on a "good" intention. It was intended, actually, to achieve a fair division of resources at the time of the breaking of the marriage, relying also on the provisions of Art. 29 of the Constitution¹², in order to avoid that, at a stage of family life marked by a strong breakdown of patrimonial and human resources, the negative consequences deriving from a division of the agreed contribution to the assets and ménage may fall on the weaker spouse who, in the overwhelming majority of cases, was the one who took on domestic and

¹² Art. 29 It. Cost.: "The Republic recognizes the rights of the family as a natural society based on marriage. Marriage is ordered on the basis of the moral and legal equality of the spouses, with the limits established by law to guarantee family unity".

household work.

On the basis of these "policies", the judicial interpretative trend begun with the decision¹³ of the United Sections of the Supreme Court of 29 November 1990, no. 11490, then pompously but improperly qualified as a "living law" in consideration of the constant confirmation received for more than twenty-five years from the subsequent decisions of the Courts (both of merit and legitimacy), had been consolidated.

However, despite the long series of confirmations for this orientation of the courts, evidently stated more by political considerations than by real purely legal considerations, the criticism of the doctrine and the perplexity of public opinion had not been slow to manifest.

In fact, the automatism, uncritically applied and regardless of the different circumstances of each case, almost always granted a divorce allowance directed at maintaining the former "weak" spouse's standard of living held during marriage, often appearing to be wrong in substance and contrary to the need for fairness that it wanted to ensure.

Also the reference to the "clause" of Art. 29 of the Constitution, if at the beginning of the Nineties of the last Century it could still appear as a justification for the protection of the "marriage", as fundamental institution for the "family", in the space of a few years it lost its allure in the face of the new social needs and the new real situation, that were gradually consolidating in the Italian society: the massive presence of de facto couples and cohabitations (even with children), the influx of immigrants from different realities, the freedom of movement and establishment within the

¹³ Cass, SS.UU., 29 November 1990, no. 11490, in *Foro it.*, 1991, I, 1, 67

EU, with the extension of the rights connected to European citizenship, challenged the same notions of family and "marriage". Among other things, the "overprotective" and uncritical attitude of the courts has strongly contributed to make the new generations preferring a de facto relationship to a "legal" one. In other words, the remedy has gradually become worse than the evil it was intended to cure.

It goes without saying that this interpretative line, despite its consolidation, was not free of technical errors. For example, in my opinion, although the reference to the "standard of living" previously enjoyed is conceptually valid, this "parameter" cannot be used as an exclusive one and, on the contrary, it should be calculated precisely taking into account those elements and circumstances concerning the entire matrimonial relationship and both spouses. Moreover, this line of interpretation seems to reflect the tendency not to distinguish, as the legislator instead clearly does, the two very different situations of separation and divorce. After all, the interpretative line here criticized used to indifferently suggest evaluations and considerations perhaps valid for the separation, also for the different context of the divorce; so that ignoring not only the different letter of the law and the different presuppositions but also the fundamental circumstance that with the divorce the marriage dissolves and the couple is no longer such, returning both to be completely free and independent and, if you want, "strangers". Furthermore, I do not believe that we can compare, for example, the situation of a couple whose marriage lasted two years with that of a couple whose marriage lasted forty years; or the situation of a couple with both active spouses, and with their own incomes and properties with that of a single-income couple, without external financial aid, without estate and with a constant risk of impoverishment.

Even from a comparative point of view, this interpretation does not hold up. In fact, considering that modern Italian society is today fully homogenous or homologous to the societies of the European Countries, considering that the institution of the family and the institution of marriage (and divorce) appear substantially the same and with the same juridical and economic problems, it seems to be odd that the dominant interpretation followed until recently by the Italian Courts has been in dissonance with what happens in the courts of the other European Countries and (even) in the Common Law area¹⁴.

In the light of these considerations, the new interpretation trend on divorce maintenance followed by the Court of Cassation since the 2017, which has actually "overturned" the previous and consolidated interpretation based on "maintaining the standard of living held during marriage", can be viewed as a new RELEASE of the rules in line with other European legal frameworks.

This was the case with the judgment of the Court of Cassation. n. 11504 of 2017, which was confirmed (albeit with some variations) by other successive rulings of the Supreme Court: Cass. 22 June 2017, no. 15481; 8 August 2017, no. 19721; 29 August 2017, no. 20525; 9 October 2017, no. 23602;

¹⁴ On this point, see the work of E. Al Mureden, comment at Cass. Civ. 16 maggio 2017, n. 12196, in *Famiglia e Diritto*, 2018, 4, 330 to note 18: "Almost fifty years ago - coinciding with the transition from fault-divorce to break marriage based on the irretrievable breakdown - the need to ensure adequate protection for the spouse who is mainly dedicated to family care led to the abandonment of the traditional common-law title theory of property to leave room for a different rule summarised in the formula of the equitable distribution system. Thus, both the 1970 Matrimonial Proceedings and Property Act and the 1973 Matrimonial Causes Act - in line with the idea that the State's abdication of the role of gatekeeper of access to divorce must be balanced by the assumption of the role of guardian of the economic interest of divorcing spouses and their children - provide instruments to compensate for the negative effects of the growing instability of marriage (Smart, *Divorce in England 1950-2000: A moral tale?*, in AA. VV., *Cross currents, Family Law and Policy in the United States and England*, edited by Katz, Eekelaar and Maclean, Oxford, 2000, 363 ff.).

27 October 2017, no. 25697; 26 January 2018, no. 2042; 26 January 2018, no. 2043; 7 February 2018, no. 3015; 7 February 2018, no. 3016; 20 February 2018, no. 4091.

It has to be said that the Courts position has, obviously, given rise to criticism and to favourable opinions, both in doctrine and in the case law.

However, on careful reading, it does not seem that this revirement is without substance. On the contrary, in my opinion, the reasoning followed by the judges of the Supreme Court is based on the letter, standards and material provisions of law and, above all, on the fundamental consideration that only through the examination of all the parameters mentioned by the law it is possible to assess case by case adapting to the singular real situation the amount of the divorce allowance and even the obligation or not to pay it.

The rationale of the decisions of the Judges of the first section of the Court of Cassation is based on a series of reasoning (I agree with) which essentially entail of:

- 1) A clear distinction between **separation** (when we are still in the presence of a marriage the effects of which are only partially suspended or limited) and **divorce** (with the end of the marriage and the consequent restoration of the previously existing legal status).
- 2) Distinction between the two phases of the ascertainment delegated to the Judge i.e.: a) the an debeat stage of the assessment, at which stage the court first ascertains if the legal conditions for recognition of the right (i.e. the applicant's lack of adequate means, and the impossibility of obtaining them for objective reasons) are met, with reference to the applicant's self-sufficiency, as well as indices or parameters such as the possession of income of any kind, of estates or/and assets, taking into account any

relative charges, the cost of living in the place of residence, the capacity and actual possibilities of personal work, in relation to age, health, sex, the labour market, the stable availability of a house of residence, and so on. b) Determination of the quantum debeatur that is a second step to which access is to be gained only if the first step was successful, and in which the court proceeds to the concrete quantification of the divorce grant, taking into account the additional elements specified in art. 5. of Divorce Act, i.e. the conditions of the spouses, the reasons for the separation judgment, the personal and economic contribution made by each spouse to family ménage and to development of the property of each of them and of the common assets, the income of both spouses and the marriage duration.

In this perspective, it should be reaffirmed that the "standard of living" held during marriage is no longer the "standard par excellence" but may serve as a top limit for the amount to be paid, provided, of course, that the other parameters have been fully evaluated too.

The first point -i.e. the difference between separation and divorce- is based on a historical-sociological argument (which has already been mentioned several times), namely the progressive disappearance of the "traditional" models of marriage as well as the change in the function and social perception of the institution based on the premise, clearly stated, that divorce determines, unlike separation, a clear and definitive cut: like marriage, it is the result of a free choice, and therefore no longer matches with a "final arrangement but nearby "indefinite". The freedom to marry, in other words, contains the *alea* of divorce which acts, by extinguishing the matrimonial relationship, not only on the level of the spouses' personal status, but also on the level of their economic and patrimonial relations and in particular on their reciprocal duty of moral and material assistance.

The person -the Supreme Court tells us- with divorce must be considered *uti singulus* and no longer as part of a married relationship now vanished, so that firmly holding to the preservation of the standard of living (still valid for the purposes of separation) would result in a kind of illogical ultra-activity of the already extinct relationship.

Accordingly, there is NOT a legally relevant interest of the former spouse to maintain the standard of married life precisely because with divorce the parties are again free while the principle of post-marital solidarity is part of the normal course of human relations.

As far as the second point is concerned – i-e- the distinction between the two steps of the ascertainment delegated to the judge-, in the phase of *an debeat* determination, the Supreme Court, confirmed the importance of welfare function of the divorce maintenance, and recognized the achievement of economic independence as a new parameter to which the notion of adequacy of means should be related, equating at the end of the day this notion of adequacy with the economic self-sufficiency.

When assessing economic independence, the Court obviously rules out any reference to the pre-existing matrimonial relationship and community of life. In this sense, if anything, it is necessary to consider the former spouses as individuals both in the phase of the evaluation of *an debeat* (focusing on the self-determination of the subjects and on the self-sufficiency of the individual) and in that of the quantum *debeat*. In this last phase, by rejecting the traditional function of restoring the economic conditions enjoyed by the spouses during their marriage, the aim is to quantify the allowance on the basis of the principle of solidarity (not according to Art. 29

of the Constitution, but according to the more general and less stringent parameter of Art. 2 of the Constitution¹⁵), taking into account the assessment of ALL the traditional parameters provided for by law, furthermore making a comparison between the economic positions of the former spouses. Consequently, in the evaluation of the quantum, an objective and weighted criterion must be used, in order to ensure the economically weak former spouse the achievement of economic independence, i.e. of his or her self-sufficiency, obviously taking into account his or her contribution (and the contribution of the other ex-wife) to the economy of the family assets. As we said before, this is a function in the sense that the contribution of the "weak" spouse is directly proportional to the amount of the allowance while the contribution of the "strong" spouse is inversely proportional to the amount of the allowance.

The Supreme Court, representing the criterion of self-responsibility, independence or economic self-sufficiency, has in fact provided some indications to delimit this parameter. The Court indeed upholds that "the main indices - except of course other elements that may be relevant cases by cases - to ascertain, at the stage of the judgment on *an debeatur*, the existence, or not, of the economic independence of the former spouse demanding the divorce allowance - and therefore the adequacy or not of the means and the possibility or not for objective reasons to obtain them - can thus be identified: 1) possession of income of any kind; 2) possession of movable and immovable properties, taking into account in the broad sense

¹⁵ *The Republic recognizes and guarantees the inviolable rights of human being, both as an individual and in the social formations in which its personality takes place, and requires the fulfilment of the binding duties of political, economic and social solidarity.* As usually happened to the "general clause" of the Constitution, this provision say too much and as consequence say nothing. It is too generic to be realistically applied. But it is useful to justify practically whatever decision.

all charges imposed and the cost of living in the place of residence (habitual residence: Article 43(2) of the Civil Code) of the person applying for the allowance; 3) the abilities and effective possibilities of personal work in relation to health, age, sex and the labour market, whether employed or self-employed; 4) the stable availability of a dwelling house...". There is therefore a strong reference to each specific case and all its variables, with decline to carry out any standardisation.

The latest decision of the Supreme Court in one of the so-called Italian Big Money Cases is, in my opinion, very interesting. In its Judgment No 12196 of 2017 (i.e., again the Berlusconi's case), the Court upholds that the divorce allowance must be reduced or even may not be due, in relation to the allowance provided for separation, when the former spouse has obtained, either in wedlock or after separation, assets, properties and resources such as to render him or her self-sufficient. The doctrine seems unanimous in considering in these cases completely obsolete and also illogical the ancient parameter of the "standard of living in constancy of marriage" because we are in the presence of high or very high assets where the "adequacy of means" for the "weak" spouse is easily found and is in *re ipsa*. In these cases -the judges tell us- it is satisfactory the occurrence of the economic self-sufficiency, even if it is "interconnected" to the particular circumstances of the case, to guarantee the suing former spouse a life that is more than decorous and certainly much more "rich and substantial" than that of the overwhelming majority of the population.

According to the Court, in fact, in the presence of a "Big Money Case", the overall patrimony constituted during marriage and during the phase of separation by the former spouse in favour of the other is to be considered indicative of the intention of preserving and guaranteeing, also for the

future, the expectations matured by the other, placing him/her in a condition "not only of self-sufficiency, but of economic well-being" such as to allow him an objectively high standard of living. This means that the right to receive a divorce allowance no longer exists, "whether we refer to the parameter of self-sufficiency or whether we want to consider the parameter of a standard of living on which the claiming former spouse could in any case rely, even if during the marriage the standard of living was absolutely beyond any comparison, for the wealth of the other former spouse".

Significant, it seems to me, in this regard, the fact that the Attorney General of the Court of Cassation, discussing the issue now mentioned (i.e. the "Berlusconi's case) in front of the United Sections of the Supreme Court, said "that every judgment requires the assessment of the peculiarities of the specific case because the adoption of a single principle runs the risk of promoting a kind of class justice ... It can also be agreed to take as a benchmark the criterion of self-sufficiency, but it cannot be excluded to relate also to other criteria established by law such as the duration of marriage, the contribution of the spouse to the family, the standard of living". At the end of the day and while we are waiting for the pronouncement of the united sections, it seems to be consolidated the new "overall" reading of ALL the parameters envisaged, the function of the "standard of living" as one of the different parameters and as a possible maximum limit.

In this way, and only in this way, the assessments of the judges can be adapted to the actual and substantial differences of the distinct situations submitted to their judgment.

It goes without saying that, if there were any significant changes in the

situation of fact after the divorce, these changes could very well be taken into account, for the purposes of a review of the "*quantum*" and also of the "*an debeatur*". This point is particularly clear, in the judgement of Court of Cassation no. 15481 of 2017, according to which "the judge, in the context of the proceedings pursuant to article 9 of the Divorce Act¹⁶ when the plaintiff asks for the reconsideration of the divorce conditions - in particular the revocation of the allowance - ensuing the occurrence of new contingencies, must refer to the criteria set out". It follows, in substance, that the judge must assess whether the new contingencies are suitable reasons for revision (or revocation) of the allowance with reference no longer to the preservation, by the entitled person, of the same previous standard of living but to the achievement, on his part, of economic self-sufficiency (just like occurs in the new interpretive trend).

It is a decision of particular importance, first of all operative, that opens the way to appeals, according to the aforesaid Art. 9, in order to obtain the revocation (or at least the reduction) of divorce allowances acknowledged according to the former interpretation, at least today revised.

¹⁶ Art. 9 of Divorce Act 1970: "*If there are justified reasons after the judgment pronouncing the dissolution or cessation of the civil effects of the marriage, the court, ipso iure and, in the case of measures concerning children, with the participation of the Public Prosecutor, may, at the request of one of the parties, review the provisions concerning custody of the children and those concerning the extent and modalities of the contributions to be paid pursuant to articles 5 and 6*".

5.- Concluding remarks

On the basis of the preceding considerations, we can draw some conclusions.

First of all, it should be noted that, as I have often had occasion to write, it is always very difficult for both the Legislator and the judge to address and deal with family law issues, given the complexity of the interests at stake, not just and only economic interests. These are affections, personal relationships, situations that often do not have easily understandable motivations. For this reason, family mediation with the help of expert mediators (solution adopted in the English Common Law) can often be a helpful strategy.

Secondly, even if this is a more general matter, at least in Civil Law systems such as the Italian one, there is always a certain distance between what is the abstract prediction of the rule of law and its concrete interpretation and application. In the field of Italian family law, this aspect is even more evident in the "reluctance" of the legislator to intervene in "personal" matters rather than in economic matters. In fact, if we observe the Code structure of Italian family law, we realize that with the 1975 reform Act, the Legislator tended to focus on the "privatization" of personal relations, essentially dealing with economic aspects (I am thinking, for example, of the duties of assistance towards children and of the "legal representation" of minor progenies), preferring to leave, in my opinion rightly, a wide margin of manoeuvre for the discretion of the judge.

Therefore, when dealing with "family matters", one must bear in mind the difference between "Law in the books" and "Law in action" or, to put it another way (even if they are "fashioned" statements and used in a rather imprecise way) as to the judgments here discussed, between the law

formally in force and the “living law”, between the letter of the law and its effective interpretation.

As we said, it is up to the Courts to intervene to fill with their discretion¹⁷ the "gap" that, especially in the field of family law, has gradually been created between the social reality and its needs and the "immobile" letter of the (statutory) law. I shall limit myself for reasons of space simply pointing out that with a trivial calculation, between the 1975 reform and the previous regulation of 1942 there is a lapse of 33 years while since 1975 to present 43 years have passed ... and certainly the "family" that was in mind of the legislator of 1942 was much closer to that of 1975 than can be said today between the family of 1975 and that of 2018.

Thirdly, it follows that if it is necessary to intervene by applying Italian law, one cannot limit oneself to reading the "statutory law" and the codes, but must necessarily take into account the long evolution of case law and also of doctrine, which has gradually been consolidating, in my opinion above all, evaluating the approach of "Law in Action" itself in the mirror of, and coherently with, European models and the Western legal tradition.

Fourthly, from the excursus that has been done up to now, in the specific case of the "crisis" of the married couple, a clear evolution of the interpretation of the Courts emerges, being strongly tied and consequent to the Italian social and economic development. It should be considered that after the introduction of the law on divorce, even today, the large majority, if not almost all, of the cases concerned situations of small or medium economic and patrimonial entity essentially corresponding to the national

¹⁷ This discretion is not absolute and pure but must take into account the various circumstances and therefore based not on the rigid and mechanical application of the letter of the law but on the reasonableness of the same interpretation, also in relation to the observed current social situation

"stereotype" of the single-income family, often with no properties, with children and a wife/mother housewife. If we add to this the social and normative "disfavour" (obviously at least in the initial phase of application of the law and at least until the terms for obtaining a divorce have not been drastically reduced, also due to the changed attitude of society, which has become increasingly favourable to divorce and the de facto couples), we can understand how the jurisprudence has tried, for example through the use of the parameter "of the standard of living held during marriage", to protect the economically "weaker" spouse who risked suddenly, perhaps after years of "assistance" to the family, to be without any support. This action of the Courts is also well understandable in the light of the general circumstance of a scarce backing of the State welfare system (care for elders, care for not working people, care for disabilities, care for children etc.) in Italy, where care assistance has been prevalently and traditionally completely delegated to the family and to the "relatives"¹⁸. Similarly, but specularly, there were cases where, as a result of changes in the economic circumstances of the spouses, the recipient of the divorce settlement was in a better economic situation than the former spouse who was obliged to support him. Or

¹⁸ This argument is particularly complex and discussed until now. For an interesting point of view see: Marella M.R., La svolta neoliberale che penalizza le donne, in "Il Manifesto", 11/04/2018.

On the other end, there are the claims of so many ex husbands that are in a growing situation of "poverty" just as consequence of the "standardized" imposition of the divorce maintenance; on this particular and heavy aspect see: Senesi A., Padri separati. L'assist del Pierllone, in Corriere della Sera, 27/05/2018 https://milano.corriere.it/notizie/cronaca/18_maggio_23/padri-separati-l-assist-pirellone-39bfa6a2-5dee-11e8-b13c-dd6bf73f9db5.shtml

"It is estimated that in Lombardy there are almost one million families living in separation or divorce and that sixty per cent of them have at least one child. According to the most recent Istat data, in the region, in 2015, there were 14,979 separations and 15,717 divorces, national records in both cases. Finally, in Milan, it is estimated that almost 50,000 separated fathers are living in economic difficulty... In recent years a worrying gap has been created between the parent to whom the child is entrusted, who in most cases is the mother and the spouse who must leave the house and is unprepared to deal with this situation. A measure which is direct and which has an immediate effect on the support of these people in difficulty must be structured.

Separate and divorced parents risk entering the category of new poor... they are the new poor of the rich city as the emergency, tell operators and sociologists, has been stabilized in permanent drama".

situations in which a divorce allowance was granted well in excess of the needs of the other former spouse.

Fifth, it must be said that the sclerotization of the described judicial interpretation and the standardization in the evaluation of the maintenance allowance, first, and divorce after, showed the same limits of the immobility of the legislator. More specifically, this did not allow the courts to differentiate case by case the situations, applying the same measure even in the presence of different circumstances such as the income of the couple, the duration of the marriage and the transformation of the same institution of divorce from a "faulty" one to a "no-fault" and *ad libitum* (of just one of the spouses) divorce. With the passing of time, all that led to the creation of sometimes dramatic situations "transferring" aseptically from the completely innocent and unaware spouse part of his (little) income to the other spouse, and thus turning the former "strong" spouse into a divorced indigent. Similarly, this "standard" application, which has not considered all the parameters provided for by the Legislator, seems to be particularly problematic today as it may not take into account the impact of the serious economic crisis of the country and of the new social conception of marriage.

Finally, as far as we are concerned, this interpretation was out of line with European models and, in particular, with Common Law models, where, moreover, the cases concerned economically more consistent and variegated hypotheses than the Italian average are frequent.

Sixthly, it should be noted that it is precisely as a result of new and changed social needs and following the action in the courts of cases that vary greatly from the point of view of the circumstances, the economic entity and the actual situation of the applicants that the Court of Cassation has, in a sort

of "back to the future" or "return to the forbidden planet", revived the broad formula of the Divorce Act for maintenance. Therefore, as in the quoted Italian "Big Money Cases", the judiciary is applying not so far the "safeguard clause" of maintaining the standard of living during marriage but is adding to it a whole series of parameters, already explicitly provided for by the law and also by European legislation, which allows a better differentiation of the assessment of both the *an debeatur* and the *quantum debeatur* to each individual case. The rediscovery of the parameter of economic self-sufficiency and the clear distinction between the "institution" of separation and that of divorce fit perfectly into this interpretative framework.

After all, the Court of Cassation has finally observed that each case of divorce is different and particular so that a linear parameter cannot be applied to complex situations that differ from one another.

This new line of assessment of the positions of former spouses allows, thanks also to the letter of Article. 9 of the Divorce Act the request of "reevaluation" of the divorce allowance previously established on the basis of the "static parameter" of maintaining the same standard of matrimonial life and, if the circumstances concerning the two former spouses (and the possible offspring) have changed not only economically but also in fact (for example, if the children have become independent, if the former spouse has "sufficient" means for his economic autonomy, and so on) also its complete revocation. In other words, it is entirely undisputed in doctrine and by Courts that the decisions on divorce grant are essentially subject to the "*rebus sic stantibus*" clause.

Despite of protests and cultural "micro-actions" by groups more or less organized (i.e. Italian Women's Union, feminist groups, "antagonist"

groups, etc..), which fear the danger of "jumping" the protection for the woman/wife/mother now exposed to the risk of losing the welfare achieved during marriage and with marriage, in my opinion this new line of interpretation does not exclude the protection of women but, if anything, strengthens it rightly providing for in relation to the exact assessment of the contribution to the family ménage but also the entire "history" of marriage and common life.

At the end of the day we can say that for marriage or divorce... it takes two to tango.