Essays

'Ties that Bind': Maintenance Order After Divorce in Italy

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Abstract

This article aims to describe the changes and uncertainties among judges and interpreters concerning the rules on after-divorce maintenance from when they were first introduced up to the most recent judgement by Italian Court of Cassation Joint Divisions.

Since the first statute on divorce, back in 1970, maintenance has been the object of heated debate due to the difficulty of balancing two opposing needs: recognising party autonomy in the post-marriage phase on one hand, and protecting the weaker spouse, on the other.

The courts' fluctuating approach towards the issue, as well as the debate about the nature and application of maintenance allowance, seems to have finally come to a happy ending with the intervention of the Joint Divisions. This decision has been welcomed by most legal scholars as a guiding light in a controversial issue – at least until now.

I. Divorce in Italy: A Brief *Excursus*

The traditional legal framework of family law has significantly changed since the enactment of legge 1 December 1970 no 898 (as amended by legge 6 March 1987 no 74), concerning marriage dissolution through divorce, and the broad reform enacted by legge 19 May 1975 no 151, which amended the family law provisions contained in the 1942 Italian Civil Code.[1] More recently, the enactment of legge 10 November 2014 no 162 (Arts 6 and 12) on consensual resolution of litigation related to separation and divorce, and enactment of the so called 'fast track divorce' statute (legge 6 May 2015 no 55) led to a considerable increase in the number of divorces.[2] Lastly, worth mentioning is the recognition of same

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[1] The ground to obtain divorce in Italy are listed in Art 3 of legge 1 December 1970 no 898. However, despite the exhaustive list of hypothesis contemplated by Art 3, the most frequent basis for divorce is the one specified in para 2, lett b), which refers to a situation of continuous personal separation lasting for one year, or six months in the case of consensual separation (terms innovated by legge 6 May 2015 no 55 on fast-track divorce). See among legal scholarship, C. Rimini, 'Il nuovo divorzio', in A. Cicu et al eds, *Trattato di diritto civile e commerciale, La crisi della famiglia* (Milano: Giuffrè, 2015), II, 1-46.

[2] The last Report on marriages, separations and divorces of the National Institute of Statistics shows an increase of divorces, which reflects the impact of recent changes in regulations. In particular, the introduction of the so-called 'fast track divorce' caused a considerable increase of the number of divorces (eighty-two thousand four hundred sixty-nine in 2015 compared to fifty-two thousand three hundred fifty-five of the previous year with an increase of fifty-seven

sex partnerships, by legge 20 May 2016 no 76.

Such statutes deeply reshaped the contours of Italian family law that were no longer capable of reflecting the contemporary pluralistic conception of families.

Although it is not possible to go into detail here about how divorce law has evolved and the stages it has gone through, it seems useful to briefly highlight the chronological *excursus* that led to the current discipline of divorce and its consequences.

Under the Civil Code of 1865, family law followed a 'patriarchal' structure, where the husband had authority over his wife and children on any aspects of family life. Italian law recognized the possibility of personal separation, but not divorce.[3]

The new Civil Code of 1942 did not change the discipline of family law; but the family's social function was emphasized. It was necessary to wait for the Republican Constitution of 1948 to see substantial changes in family law. The basis of family law was reshaped (at least in theory) following its enactment, with regard to different issues. The relationships between men and women changed thanks to the recognition of the principle of equality in multiple contexts.[4]

Despite the affirmation of such constitutional principles, it was necessary to wait until 1970 to achieve a comprehensive reform in matters of family law.

The introduction of legge 1 December 1970 no 898 provided the dissolution of marriage, or termination of the civil effects of marriage,[5] only for objective causes.[6] The legislator also provided for a maintenance order after divorce,

percent). See ISTAT, Report on *Marriages, Separations and Divorces* 14 November 2016, available at https://tinyurl.com/y76nu5lv (last visited 27 December 2018).

[3] See Arts 148-150 of Italian Civil Code of 1865, entitled 'The dissolution of marriage and spousal separation'.

[4] Art 3 of the Italian Constitution states that 'all citizens have equal social dignity and are equal in front of the law, regardless of differences of sex, race, language, religion, or political opinions'. The principle of equality appears also in Art 29 of the Constitution, which explicitly recognizes the value of family in society: marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family.

[5] It is worth noting that within the Italian legal system two types of marriage coexist: civil marriage and '*matrimonio concordatario*'. The latter, is a marriage celebrated by means of a religious rite according to the rules of Canon law (and is as such considered to be a *sacramentum*), but if it is recorded in the register of acts of Italian marital status, it acquires also civil effects. The concordatory marriage was recognized by the Laterans Agreement (*Patti Lateranensi*) signed in 1929 between the Kingdom of Italy and the Holy See. In 1947, the Laterans Pacts were recognized in the Italian Constitution as regulating the relations between the State and the Catholic Church.

[6] Art 3 of legge 1 December 1970 no 898: 'Application for dissolution of the marriage or termination of the civil effects of the marriage may be made by one of the spouses if, after celebration of the marriage, the other spouse has been sentenced by final judgment for offences, including offences committed previously:

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

when a party 'lacks financial means' or 'is unable to procure them for objective reasons'.

After a few years, in 1975, the legislator enacted a comprehensive reform of family law with legge 19 May 1975 no 151, finally giving effectiveness to the provisions of Art 29 of the Constitution. The reform promoted egalitarianism in matrimonial relations, abandoning the traditional position of supremacy occupied by the husband, placing greater emphasis on the principle of solidarity within the family and allowing both spouses to be involved in guiding the life of the marriage.

Some changes then innovated the divorce discipline in 1987. Legge 6 March

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

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

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

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

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

2) if:

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

b) the judicial separation of the couple has been pronounced by final judgment or the separation by mutual consent has been homologated or a *de facto* separation intervenes and itself begins at least two years before 18 December 1970. In order to present a petition for dissolution or the ending of the civil effects of marriage it is necessary in the aforementioned cases that the separation should have been continuous and lasted for at least three years from the time the couple appeared before the court for the judicial separation proceedings, even if the judgment concerned is effected by mutual consent. The eventual interruption of separation has to be pleaded by the respondent.

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

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

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

f) the marriage has not been consummated'.

See S. Patti et al, 'Grounds for divorce and maintenance between former spouses, Italian Report', in K. Boele-Woelki et al eds, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Antwerp-Oxford: Intersentia, 2004), VII, 13-14, 1-42.

1987 no 74 introduced detailed provisions of a short period to get a divorce, a shorter term for separation (three rather than five years), and a clearer definition of maintenance after divorce and its automatic indexing, in order to reduce judges' discretionary powers, as specifically illustrated in the Report of the Draft Law.[7]

II. The Introduction of Maintenance After Divorce in Italy: Nature of and Indexes for the Allowance

As already mentioned, the maintenance order after divorce appeared for the first time in 1970.[8] The original text of Art 5, para 6, of legge 1 December 1970 no 898 provided that when granting the divorce, the court awards one of the spouses, at the expense of the other, regular payment of maintenance, whenever the claimant lacks '*financial means*' or is unable to procure them for objective reasons. The obligation to pay maintenance ceases if the beneficiary remarries. When deciding on maintenance, the court has to take into account the '*financial position of the spouses*' and the '*reasons for the decision*'. When determining the amount, the provision established that the judge has to take into account the '*personal and financial contribution made by each of the spouses to the welfare of the family and the creation of their joint assets*'.[9]

In the past, according to the original text of Art 5, para 6, of legge 1 December 1970 no 898, the courts formulated the theory that maintenance had three functions, ie, welfare, compensation and 'refund'.[10] In particular, the welfare function was connected to the ex-spouse's deteriorated condition following the divorce, while the compensation function was linked to the personal and economic commitment of one of the ex-spouses to caring for the family. Lastly, the refund

[7] See N. Lipari, *Report of the Draft Law, Parliamentary Acts and stenographic report of the afternoon session of the Senate Assembly on 17.2.1987*, no 561, available at https://tinyurl.com/y9c4xjlx (last visited 27 December 2018). See also C. Rimini, 'Il nuovo divorzio', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale, La crisi della famiglia* (Milano: Giuffrè, 2015), II, 1-46; F. Cipriani and E. Quadri, *La nuova legge sul divorzio* (Napoli: Jovene, 1988), II.

[8] Compare C. Rimini, 'Il nuovo divorzio' n 7 above; L. Barbiera, 'Divorzio', *sub* Art 1, legge 1 December 1970 no 898, in G. Cian and G. Oppo eds, *Commentario al diritto italiano della famiglia* (Padova: CEDAM, 1993), VI, 101; E. Quadri, 'I presupposti del divorzio', in F. Cipriani and E. Quadri eds, *La nuova legge sul divorzio* n 7 above, 1.

[9] Italics used here to emphasise. Art 5, para 6, legge 1 December 1970 no 898, 'Disciplina dei casi di scioglimento del matrimonio' *Gazzetta Ufficiale Serie Generale* 3 December 1970 no 306 (with the judgment dissolving the marriage or terminating the civil effects of this latter, the tribunal, taking into account the financial position of the spouses and the the grounds for the decision, orders one of the spouses to pay periodical maintenance to the other proportionally to its assets and income. In the determination of the amount of maintenance, the judge takes into consideration each of the spouses' personal and financial contribution to the welfare of the family and the creation of their joint assets).

[10] See Corte di Cassazione-Sezioni unite 26 April 1974 no 1194, *Foro italiano*, I, 1335-1336, 1339-1340, and 1343-1344 (1974).

function was related to the reasons behind the decision to divorce.[11] The 'refund' component had to be intended in its broad meaning because of the implication of not merely economical profiles.[12] In this sense, this function has been defined as 'a form of reimbursement half-way between consideration and indemnification'.[13] Both judges and legal scholars recognized the multiple functions of maintenance, and gave equal weight to the three functions (welfare, compensation and 'refund').[14]

However, over time, both scholars and judges criticized the composite function of maintenance, particularly because of the risk of excessive discretionary power given to the judge.[15] As observed, a peculiarity of this system was in fact

[11] See reference to the '*funzione risarcitoria*' (refund) of maintenance, linked to the reasons for the decision, in the opinion of M. Marinucci (Senate), to the *Draft Law, stenographic report of the afternoon session of the Senate Assembly on 17.2.1987* no 561, available at https://tinyurl.com/y6uc3muk (last visited 27 December 2018). See also E. Quadri, *Rapporti patrimoniali nel divorzio* (Napoli: Jovene, 1986), 26. See, among, the consolidated trend in case law, Corte di Cassazione-Sezioni unite 26 April 1974 no 1194, *Foro italiano*, I, 1335-1336 and 1343-1344 (1974); Corte di Cassazione 9 July 1974 no 2008, *Foro italiano Repertorio*, 'Matrimonio', no 271 (1974); Corte di Cassazione 12 July 1984, no 4107, *Foro italiano Repertorio*, 'Matrimonio', no 131 (1984); Corte di Cassazione 2 June 1981 no 3549, *Foro italiano Repertorio* 'Matrimonio', no 165 (1981); Corte di Cassazione 10 January 1986, no 72, *Foro italiano Repertorio* 'Matrimonio', no 205 (1986).

[12] See Corte di Cassazione-Sezioni unite 26 April 1974 no 1194, *Foro italiano*, I, 1340, 1335-1336 and 1343-1344 (1974), which implies a balanced evaluation of the reciprocal culpability linked to the decision of divorce.

[13] S. Patti et al, 'Grounds for divorce' n 6 above, 18. This function was defined by M. Bin as a criterion 'intended to stabilize the economic positions of the spouses at the moment of divorce', see M. Bin, 'Italy: Reform of Maintenance after Divorce' 28 *Journal of Family Law*, 542-550, 543 (1989). See also, A. Lamorgese, 'L'assegno divorzile e il dogma della conservazione del tenore di vita matrimoniale' *questionegiustizia.it*, 11 March 2016.

[14] See Corte di Cassazione-Sezioni unite 26 April 1974 no 1194, *Foro italiano*, I, 1335-1336 and 1343-1344 (1974); Corte di Cassazione 9 July 1974 no 2008, *Foro italiano Repertorio* 'Matrimonio', no 271 (1974); Corte di Cassazione 12 July 1984, no 4107, *Foro italiano Repertorio* 'Matrimonio', no 131 (1984); Corte di Cassazione 2 June 1981 no 3549, *Foro italiano Repertorio* 'Matrimonio', no 165 (1981); Corte di Cassazione 10 January 1986, no 72, *Foro italiano Repertorio* 'Matrimonio', no 205 (1986). Among scholarship, see R. Tommasini, 'Il diritto all'assegno di divorzio: criteri di determinazione', in E. Quadri ed, *La riforma del divorzio: atti del Convegno di Napoli*, 22 maggio 1987 (Napoli: Jovene, 1989), 283; S. Sangiorgi, 'Il passato e il futuro nella determinazione dell'assegno di divorzio' *Rivista di diritto civile*, II, 563-575 (1988); E. Quadri, *La nuova legge sul divorzio* n 7 above, 31.

[15] See Corte di Cassazione 2 June 1981 no 3549, *Foro italiano Repertorio* 'Matrimonio', no 165 (1981); E. Quadri, 'La riforma del divorzio' *Foro italiano* 148, 141-142 and 155-156 (1985); Corte di Cassazione-Sezioni Unite 29 November 1990 no 11489; Corte di Cassazione-Sezioni Unite 29 November 1990 no 11490 with comments of E. Quadri, 'Assegno di divorzio: la mediazione delle Sezioni unite' and Vincenzo Carbone, '*Urteildämmerung*: una decisione crepuscolare sull'assegno di divorzio' *Foro italiano,* I, 67-68, 91-92 (1991); Corte di Cassazione-Sezioni unite 29 November 1990 no 11491; Corte di Cassazione-Sezioni unite 29 November 1990 no 11492, *Vita Notarile*, 161 (1991); E. Quadri ed, 'Divorzio: verso quale riforma?' *Foro italiano*, 68, 63-64 and 73-74 (1987). For an overview of legal literature and legal practice before 1987 Reform, see E. Quadri, *Rapporti patrimoniali nel divorzio. Esperienze giurisprudenziali e prospettive di riforma* (Napoli: Jovene, 1986), 28.

the extreme discretion given to the judge, not only in determining the amount of maintenance, but also in its assignment, which did not require a specific assessment of the 'state of need' or 'inadequate means'.[16] Maintenance was 'automatically' assured, as a rule, to the woman, since it was believed that she had invested all her energy into a marriage structured as a perpetual relationship and, therefore, considered as a 'set-up for life'.[17]

With the enactment of legge no 74 of 1987, the new text of Art 5, para 6, presented some innovation. In particular, maintenance would be paid to the spouse 'when the latter does not have *adequate means* or is *unable to provide for himself/herself for objective reasons*'.[18] Compared to the original text of the provision, the 1987 reform dropped the adjective 'financial'. This wording, as observed 'clearly emphasises that maintenance is provided first and foremost as support'.[19]

It is worth noticing that the replacement of the composite nature of maintenance with an exclusively assistance function is confirmed by the Report of the draft statute modifying the law on divorce (legge 1 December 1970 no 898). In the words of the Rapporteur Lipari,

> 'particular attention shall be made with regard to the function of maintenance after divorce, which is to provide assistance to the spouse in state of need, compared to the refund and compensatory functions'.[20]

This was explicitly reaffirmed in the first judgement of legitimacy after the amendment of the legge 6 March 1987 no 74. In that decision, the court firmly established that by enacting the law, the legislator had abandoned the theory of the composite nature of maintenance, favouring only the welfare criterion.[21]

According to the prevailing opinion among legal scholars, the new legal rule

[16] See E. Quadri, 'La riforma del divorzio' n 15 above; A. Lamorgese, 'L'assegno divorzile e il dogma della conservazione del tenore di vita matrimoniale' n 13 above.

[17] See A. Lamorgese, n 13 above.

[18] Art 5, para 6, legge 1 December 1970 no 898 as amended by legge 6 March 1987 no 74: 'In the judgment dissolving the marriage or ending the civil effects of the marriage, the tribunal, after taking account of the position of the spouses, the reasons for the decision and the personal and financial contribution made by each of the spouses to the welfare of the family and the creation of their joint assets, orders a spouse to pay periodical maintenance to the other spouse if the latter has no appropriate means or is unable to provide for himself/herself for objective reasons'.

[19] S. Patti et al, 'Grounds for divorce' n 6 above, 18.

[20] Professor N. Lipari was the rapporteur of legge 6 March 1987 no 74 at the Senate of the Republic, which introduced the sixth paragraph of Art 5 of the legge 1 December 1970 no 898, which still regulates the divorce allowance for the former spouse. He declared: 'This provision, was one of the articles that most committed and tormented the Commission. The same formulation, is probably a little cumbersome and redundant, but the text currently submitted to the Parliament reflects the difficult work of mediation that we had to carry out' *Atti Parlamentari*, Senato 7 February 1987, see n 7 above.

[21] Corte di Cassazione 17 March 1989 no 1322, *Foro italiano*, I, 2522-2523, 2511-2512 and 2525-2526 (1989).

maintained only one of the aforementioned criteria, ie welfare, as a parameter to allow or deny the right to a financial provision order. Other parameters only play a role at a subsequent stage, the determination (the *quantum*) of the maintenance order.[22]

In this perspective, it is worth noting that the argument used by the court in proclaiming the mere assistance function of the rule is connected to the principle of post-conjugal solidarity.[23] As observed, maintenance is tailored to the previous relationship, and specifically refers to rebalancing the ex-spouses' positions. In this sense, the duty of solidarity is an obligation between persons that were bound so deeply as in a marriage. The welfare function of maintenance after divorce represents the projection of marriage obligations, as a result of solidarity bonds, which can even survive after marriage.[24] By consequence, an economic bond, originally connected to the personal one, survives to its dissolution. Even after a marriage dissolving, this economic obligation still remains and implies a duty of assistance, free of any moral implications, simply based on the previous marriage.[25]

When referring to the indexes to allow maintenance, the new text establishes that the judge may consider the 'circumstances of the spouses', the 'reasons for the decision', the 'personal and financial contribution made by each spouse to the welfare of the family and the creation of personal and joint assets', as well as 'the income of both spouses'. Lastly, the judge might also assess all the above-mentioned elements 'in the light of the duration of the marriage' in order to establish the amount of the maintenance.

III. Standard of Living *Versus* Economic Independence. The Debate in the Case Law

Maintenance allowance (Art 5, para 6 of legge 1 December 1970 no 898) has been the object of divergent interpretations in case law[26] since its enactment.

[22] See M. Bin, 'Italy: Reform of Maintenance after Divorce' n 13 above, 542. In the same direction, see L. Barbiera, *Il divorzio dopo la seconda riforma* (Bologna: Zanichelli, 1988), 96; M. Dogliotti, *Separazione e divorzio* (Torino: UTET, 1988), 173; A. Trabucchi, 'Un nuovo divorzio. Il contenuto e il senso della riforma' *Rivista diritto civile*, II, 125-142, 131 (1987).

[23] C.M. Bianca, 'Conseguenze personali e patrimoniali', in E. Quadri ed, *La riforma del divorzio* (Napoli: Jovene, 1989), 58, 49-69.

[24] ibid.

[25] See in case law, Corte di Cassazione 2 March 1990 no 1652, *Foro italiano*, I, 1165-1166 and 1173-1174 (1990). See also, M. De Robertis, 'Assegno di divorzio ed adeguatezza dei mezzi economici tra tenore di vita in costanza di matrimonio e modello di vita autonoma e dignitosa' *Diritto di famiglia e delle persone*, 891-899, (1998).

[26] See E. Quadri, 'Divorzio: Verso quale riforma?' n 15 above, 68. See also the first series of judgements regarding maintenance after divorce, Corte di Cassazione 1 February 1974 no 263, *Foro italiano*, I, 1246 (1974); Corte di Cassazione-Sezioni unite 26 April 1974 no 1194, *Foro italiano*, I, 1335 (1974).

In fact, two alternative approaches emerged in early case law. According to the first one, maintenance after divorce should guarantee to the ex-spouse the couple's *standard of living* during the marriage.[27]

It is interesting to note that this approach arose from the connection that interpreters made between the discipline of maintenance after separation and the rules governing maintenance after divorce.

In fact, Art 156 of the Civil Code provides the recognition of maintenance in favour of the separated spouse

> 'if he has no autonomous income on his own'. The amount of financial support has to be measured 'to the circumstances and income of the spouse obliged to give it'.[28]

Following case law interpretation, maintenance order on separation was introduced to guarantee the economically weaker spouse a continuation of the lifestyle enjoyed during marriage.[29] According to this interpretation, the right to financial support for ex-spouses clearly shows a *continuum* with the provision of order of maintenance on separation both in its nature as well as in content and terminology.[30] There was no difference between the concept of

> 'inadequacy of means' used by the amended Art 5, para 6 of legge 1 December 1970 no 898 (on divorce), and the parameter provided by Art 156 of the Civil Code regarding the recognition of maintenance in favour of the separated spouse 'if he has no autonomous income'.[31]

As observed, this meant a sort of protraction of marriage bonds after its dissolution, in order to affirm, also in this case, the principle of indissolubility of the marriage bond.[32]

[27] Corte di Cassazione 17 March 1989 no 1322, *Foro italiano*, I, 2512, 2511-2512 and 2525-2526 (1989).

[28] See Art 156 of the Italian Civil Code.

[29] See Corte di Cassazione 17 March 1989 no 1322, with comments of E. Quadri, 'La natura dell'assegno dopo la riforma' *Foro italiano,* 2511-2512 and 2525-2526 (1989); Corte di Cassazione 18 August 1994 no 7437; Corte di Cassazione 4 February 2009 no 2707, Corte di Cassazione 9 October 2007 no 21097 and most recently Corte di Cassazione 13 June 2014 no 13423; Corte di Cassazione 18 January 2017 no 1162 and 16 May 2017 no 12196, available at www.dejure.it. Among scholars see G. Gabrielli, 'L'assegno di divorzio in una recente sentenza della Cassazione' *Rivista di diritto civile*, II, 537-545 (1990); C. Rimini, 'Assegno di mantenimento e assegno divorzile: l'agonia del fondamento assistenziale' *Giurisprudenza italiana*, 1799, 1799-1806 (2017); C. Rimini, 'Verso una nuova stagione per l'assegno divorzile dopo il crepuscolo del fondamento assistenziale' *Nuova giurisprudenza civile commentata*, 1275, 1274-1282 (2017); B.M. Colangelo, 'Assegno divorzile: la *vexata quaestio* del rilievo da attribuire al tenore di vita matrimoniale' *Famiglia e diritto*, 274-275, 272-278 (2018).

[30] See Corte di Cassazione 17 March 1989 no 1322, ibid, 2525; G. Ceccherini, 'Natura e funzione dell'assegno al coniuge divorziato' *Foro italiano*, 235-236 and 245-246 (1977).

[31] Corte di Cassazione, ibid.

[32] See G. Ceccherini, 'Natura e funzione dell'assegno al coniuge divorziato' n 30 above; C.

The only difference, as noted by an authoritative scholar, is that in the separation discipline the reference to the tenor of life enjoyed during marriage is mandatory in favour of the spouse not responsible for separation. While in the divorce discipline, the judge's discretionary power may operate in granting the maintenance between a maximum measure – represented by the tenor of life criterion – and a minimum – represented by the state of need (alimony), taking a multitude of elements into account.[33] This was the interpretation followed by the Supreme Court until recent time. In fact, the consolidated trend of the Supreme Court acknowledged the parameter of standard of living in order to determine the maximum measure of the amount of maintenance, using it as a virtual evaluation. While, in the practical determination of the amount of maintenance the standard of living parameter should be evaluated and balanced with all other criteria indicated in Art 5 (conditions and income of spouses, personal and economic contribution to the formation of family assets, duration of marriage and grounds for the decision). This means that the evaluation of these criteria might also lead the judges to moderate, decrease and even completely annul the amount of maintenance recognized.[34]

According to scholarship and case law, the trend that referred to the concept of adequateness of means to living standards during the marriage was based on the argument that the role of marriage can continue after its termination.[35] In practice, it was a sort of extension of the principle of 'conjugal solidarity'. Therefore, the principle of solidarity survived between ex-spouses, too.[36]

By contrast, according to the second approach of case law, encouraged by

Rimini, 'Verso una nuova stagione per l'assegno divorzile dopo il crepuscolo del fondamento assistenziale' n 29 above, 1277. The exasperated distinction affirmed by judges between separated spouses 'ties (where the relationship still exists) compared to divorce (where the relationship is definitely terminated) was criticized by G. Casaburi, 'Tenore di vita e assegno divorzile (e di separazione): c'è qualcosa di nuovo oggi in Cassazione, anzi d'antico' *Foro italiano*, I, 1897, 1895-1890 (2017). This is especially true after the enactment of the Law on fast-track divorce that approached separation and divorce.

[33] See G. Gabrielli, 'L'assegno di divorzio in una recente sentenza della Cassazione' n 29 above: 'The only difference is that in the separation discipline the reference to the tenor of life enjoyed during marriage is mandatory in favour of the spouse not responsible for separation. While in the divorce discipline, the judge's discretionary power may operate in granting the maintenance between a maximum measure - represented by the tenor of life criterion - and a minimum - represented by the state of need (alimony), taking a multitude of elements into account'. See in case law, Corte di Cassazione 15 May 2013 no 11686 and Corte di Cassazione 9 June 2015 no 11870, available at www.dejure.it.

[34] Corte di Cassazione 29 November 1990 no 1490, with comments of E. Quadri and V. Carbone, *Foro italiano*, I, 67-68 and 91-92 (1991); Corte di Cassazione 19 March 2003 no 4040, Corte di Cassazione 22 August 2006 no 18241, Corte di Cassazione 12 July 2007 no 15611, Corte di Cassazione 28 October 2013 no 24252, Corte di Cassazione 21 October 2013 no 23797 and Corte di Cassazione 5 February 2014 no 2546, available at www.dejure.it.

[35] See, in the recent legal theory, C. Rimini, 'Verso una nuova stagione per l'assegno divorzile dopo il crepuscolo del fondamento assistenziale' n 29 above.

[36] Critical opinion in C. Rimini, ibid.

some legal scholars,[37] the term '*adequate means*' should be interpreted in the sense of protecting a *free and dignified life*, with the exclusion of the right of the beneficiary spouse to maintain the previous standard of living.[38] Emphasis is placed on the end of the relationship in this latter perspective. Except for conjugal solidarity, no other links must be considered or fostered.[39] Following this orientation, the spousal maintenance, therefore, should be 'neither blocked at the threshold of pure survival, nor exceeding the level of normality'.[40]

Following this orientation, the Supreme Court clearly affirmed that 'maintenance after divorce has an eminently welfare nature', and then declared that its attribution depended on 'the economic autonomy of the applicant', in the sense that the other spouse is required to 'help the other' only if he (or she) is not economically independent and within the limits in which the aid is necessary because of the lack of resources resulting from the dissolution of marriage.[41] Judges therefore have to evaluate this requirement through the lens of 'the principle of 'post-conjugal' solidarity, which represents the ethical and juridical foundation of assigning the divorce allowance'.[42] Therefore,

> 'the assessment of the appropriateness of the applicant's economic means must be made with reference not to the standard of living enjoyed during marriage, but to an economically autonomous and dignified life model, as configured by the conscience of society'.[43]

However, the following judgements of the Supreme Court did not adhere to the economic independence criterion. In the same year, judgements nos 11489 and 11492 held by the joint divisions of the Court of Cassation, preached the exclusively welfare function of maintenance and applied it as a means of assuring the spouses the preservation of the *standard of living* during marriage. Following these decisions, the 'tenor of life' criterion represented the guiding principle for the next twenty-seven years. Accordingly, the criterion on which to grant the right of spousal maintenance on divorce is

[37] See, A. Spadafora, 'Il presupposto fondamentale per l'attribuzione dell'assegno divorzile nell'ottica assistenzialistica della riforma del 1987' *Giustizia Civile*, I, 2390 (1990); M. Bin, 'Italy: Reform of Maintenance after Divorce' n 13 above, 546 and 548; M. Bin, 'I rapporti di famiglia. Sentenze d'un anno' *Rivista Trimestrale Diritto e Procedura Civile*, 323-333 (1989); L. Barbiera, *Il divorzio dopo la seconda riforma* n 22 above, 97.

[38] In the case law, see Corte di Cassazione 2 March 1990 no 1652, with comments of E. Quadri and F. Macario, *Foro Italiano*, I, 1165-1166 and 1173-1174 (1990).

[39] See, F. Lobasso, 'Il mantenimento del tenore di vita matrimoniale: un controsenso rispetto alla cessazione degli effetti civili del matrimonio' *Giurisprudenza italiana*, 3 (2000).

[40] See Corte di Cassazione n 38 above.

[41] See Corte di Cassazione n 38 above; Corte di Cassazione 17 April 1991 no 4098, *Foro italiano,* 1411-1412 and 1413-1414 (1991).

[42] See Corte di Cassazione n 38 above.

[43] See ibid.

> 'the inadequacy of the means of the applicant spouse to maintain a *tenor of life* similar to that enjoyed during marriage, without any need to prove the claimant's state of need and who could also be economically self-sufficient'.[44]

Following this argument, if the ex-spouses do not have adequate income to maintain the same lifestyle they enjoyed during the marriage and there is an imbalance between the income and overall wealth of the economically weaker and wealthier spouse, judges allow the former the right to receive financial support.

Both legal scholars and judges justified this duty considering it an inherent and long-lasting feature of the marital relationship, called 'post-conjugal solidarity'.[45]

Case law has generally interpreted this requirement since 1990s as the claimant's inability to maintain the standard of living to which he or she was accustomed during the marriage. Along these lines, for over twenty-five years, the spouse who lacked adequate assets and income (and has little or no earning capacity) was granted by the court the same economic standard of living enjoyed during marriage.

IV. The Parameters for Calculating the Amount of Maintenance: 'Circumstances', 'Reasons' and 'Personal Contribution' in Case Law Interpretation

The parameters for assessing the lack of 'adequate means' caused significant problems among interpreters. In fact, as observed, the choice of this ambiguous concept demonstrates a lack of political agreement on how to strike a balance between two opposing demands: on one hand, the need to protect the spouse in the weaker financial position, and on the other the need to minimise the adverse effect of divorce on the parties' assets.[46]

Under Art 5, para 6 of legge 1 December 1970 no 898, the judge is required to take into consideration the grounds for the divorce, the personal and economic contribution given by each of the spouses to the marriage, the income of both spouses, also evaluating all these elements in relation to the length of marriage. With regard to the indexes provided for Art 5, para 6, of the law, indeed, it was not clear whether these indexes should be used by the judges both in the phase of the recognition (the *an* in Latin), and in the phase of real determination (the *quantum* in Latin) of the maintenance amount. Or, on the contrary, if they should just be used in the second phase of determining the amount.

In fact, case law only used the indexes contained in the article, in this second

[44] Corte di Cassazione-Sezioni unite 29 November 1990 nos 11489 and 11490, available at www.cortedicassazione.it; Corte di Cassazione-Sezioni unite n 15 above.

[45] See, C. M. Bianca, 'Conseguenze personali e patrimoniali' n 23 above, 56, 58.

[46] See S. Patti et al, n 6 above, 19.

phase,[47] until the 2018 judgement of the Court of Cassation.

As affirmed,[48] the welfare purpose of maintenance allowance emerged from the clear-cut distinction of the two phases of *an* (recognising the right) and *quantum* (determining the allowance). The first phase requires the judge to compare the claimant's economic conditions before the termination of the marriage with the one after divorce and establish the amount needed to protect the claimant from suffering a deterioration of his/her standard of living. The second phase requires the judge to calculate the amount in abstract as the maximum limit of the maintenance amount, then measure it against the indexes provided in the Art 5, para 6 of the legge 1 December 1970 no 898 (the 'circumstances of the spouses'; the 'reasons for the decision'; the 'personal and financial contribution made by each spouse to the welfare of the family and the creation of personal and joint assets'; the 'income of both spouses' and 'the duration of marriage'), with the purpose of its concrete determination.[49] It should be noticed that this criterion usually operates to moderate or decrease (and not increase) the amount due by the obliged spouse.[50]

It is easy to guess that this criterion also caused significant interpretation problems for judges.

In general, the reference to the 'circumstances of the spouses' has been read as a judge's discretionary power, who may take personal and specific circumstances of the spouses into account such as age, illness, social conditions, professional qualifications and length of the marriage, because all these factors can in practice

[47] This trend started with the paramount judgments of the joint divisions of the Corte di Cassazione in 1990s, see n 15 above. As a result, the next decisions followed constantly this interpretation: Corte di Cassazione 13 October 2014 no 21597, available at www.dejure.it; Corte di Cassazione 5 February 2014 no 2546, with comments of A. Paganini, 'L'ex coniuge ha deciso di non lavorare più? Il giudice deve tenerne conto nel determinare l'assegno divorzile' *Diritto e Giustizia*, 67 (2014); Corte di Cassazione 3 July 2013 no 5177, *Guida al diritto*, 25, 65 (2012); Corte di Cassazione 27 December 2011 no 28892, *Famiglia e diritto*, 304 (2012); Corte di Cassazione 24 March 2010 no 7145, *Famiglia e diritto*, 606 (2010); Corte di Cassazione 12 July 2007 no 15611, *Famiglia e diritto*, 1092 (2007); Corte di Cassazione 2 July 2007 no 14965, *Guida al diritto*, 38, 54 (2007); Corte di Cassazione 12 February 2003 no 2076, *Famiglia e diritto*, 344 (2003); Corte di Cassazione 1 December 1993 no 11860, with comments of V. Carbone, 'L'evoluzione giurisprudenziale in tema di assegno di divorzio' *Famiglia e diritto*, 15 (1994).

[48] See Corte di Cassazione 17 April 1991 no 4098, *Foro italiano*, 1411-1412 and 1413-1414 (1991).

[49] See, in the legal scholarship, M. Bin, 'I rapporti di famiglia' n 37 above, 323 (1989). In contrast with this approach see the comment of E. Quadri, 'Assegno di divorzio: la mediazione delle Sezioni unite' n 15 above, 70-72; S. Sangiorgi, 'Il passato e il futuro nella determinazione dell'assegno di divorzio' n 14 above, 569. See more recently, E. Al Mureden, 'Assegno divorzile, parametro del tenore di vita coniugale e principio di autoresponsabilità' *Famiglia e diritto*, 537-552 (2015). In case law, see Corte di Cassazione n 48 above; Corte di Cassazione 2 March 1990 no 1652, *Foro italiano*, I, 1165-1166, 1173-1174 (1990); Corte di Cassazione Cassazione, 17 March 1989 no 1322, *Foro italiano*, I, 2512, 2511-2512, 2525-2526 (1989).

[50] See Corte di Cassazione-Sezioni unite 29 November 1990 no 11490 n 15 above. The Constitutional Court also affirmed the mentioned interpretation in 2015, see Corte costituzionale 11 February 2015 no 11, with comments of E. Al Mureden n 49 above.

affect the claimant's ability to obtain appropriate means. As observed, this leads to the conclusion that the determination of maintenance, being made strictly on the facts of the specific case, is a matter of discretion for the judge, who applies the rules in Art 5, para 6 of legge 1 December 1970 no 898.[51]

It is worth noting that Courts were uncertain in the past about 'income of both spouses' and whether judges should only consider the effective income or all assessable assets, like real estate and capital assets. This latter view was the one taken by the Supreme Court,[52] which provided that not only the current income has to be taken into account but also all assets capable of evaluation and any assets by which income can be earned, including real estate and even assets that are temporarily unproductive.[53]

The criterion of the 'reasons for the decision' may be taken into account, but only in the phase of determination of the maintenance amount. The reasons that led to the decision shall be relevant for judges together with all the other elements indicated in the provision, only in the phase of the concrete determination, as a criterion to moderate the amount and not in the phase of recognising the right. In this sense, the acknowledgement of their relevance could even be superfluous when the ex-spouse has adequate means.[54] Following this argument, judges never considered the claimant's new stable relationship a reason to exclude the right to maintenance.[55]

As regards the personal and financial contribution made by each spouse to the family and the creation of personal and joint assets, case law established that every kind of contribution must be taken into account, including domestic work, care taken of the other spouse, children and the home,[56] including any contribution made during the period of personal separation.[57] Recent cases have considered the disorderly behaviour of one of the spouses during the marriage as grounds to reduce maintenance (in the light of the parameter of contribution given to family life).[58]

Another parameter indicated in the first part of the provision is of utmost importance: the duration of marriage. In fact, a Supreme Court judgement in 2013 pointed out that the 'duration of marriage' should only be taken into consideration

[51] See S. Patti et al, n 6 above, 23.

[52] See Corte di Cassazione 20 March 1998 no 2955, available at www.dejure.it

[53] See Corte di Cassazione, n 52 above. More recently, see Corte di Cassazione 4 April 2011 no 7618; Corte di Cassazione 4 February 2011 no 2741, available at www.dejure.it.

[54] See Corte di Cassazione 24 March 1994 no 2872, available at www.dejure.it.

[55] See Corte di Cassazione 10 November 2006 no 24056 and more recently see Corte di Cassazione 12 February 2013 no 3398, available at www.dejure.it.

[56] Corte di Cassazione-Sezioni unite 29 November 1990 no 11490 n 15 above.

[57] Corte di Cassazione 2 April 1985 no 2261, *Giurisprudenza italiana*, I, 1320 (1985); Corte di Cassazione 27 December 2011 no 28892, with comments of M. Rinaldo, 'L'assegno divorzile: natura, criteri di determinazione e profili problematici' *Il Diritto di Famiglia e delle Persone*, 666-681 (2012).

[58] See Corte di Cassazione 27 December 2011 no 28892, ibid, 672.

for the second phase, ie, the determination of the amount of the maintenance;[59] however, in another case, the Supreme Court rejected the claim for the right of maintenance because the cohabitation only lasted ten days.[60]

In any case, the criterion to concede or deny maintenance payments until 2017 was assessed on the basis that ex-spouses have a right to retain the same 'tenor of life' after divorce.[61]

It is worth noting that, in the case law approach, the standard of living does not coincide with 'lifestyle'. This means that the assessment of '*appropriate means*' must be made following the 'tenor of life' criterion, even though the ex-spouses conducted a sober life style during their marriage.[62]

The second requirement for recognising the right for maintenance on divorce is the impossibility to provide appropriate means for *objective reasons*. Old age and the need to take care of children fall into this category.

However, as observed by the case law, the tenor of life standard should not be interpreted in a rigid, but an elastic way. In fact, it is a determinant factor only in the phase of attributing maintenance, which is the phase aimed at determining if there is a right for maintenance (the *an* in Latin). This is, therefore, a 'virtual'

[59] Corte di Cassazione 22 March 2013 no 7295, available at www.dejure.it.

[60] Corte di Cassazione 26 March 2015 no 6164, available at www.dejure.it. See, in the opposite sense, the debated decision of Corte di Cassazione 4 February 2009 no 2721, *Famiglia e diritto*, 682-683 (2009), which allowed the right of maintenance to a marriage lasted only one week. See the comment of E. Al Mureden, 'L'assegno divorzile viene attribuito dopo un matrimonio durato una settimana. Configurabilità e limiti della funzione assistenziale riabilitativa' *Famiglia e diritto*, 683-693 (2009).

[61] See Corte di Cassazione 23 May 2014 no 11517, Corte di Cassazione 28 October 2013 no 24252 and Corte di Cassazione 14 November 2011 no 23776, available at www.dejure.it.

It is interesting that except for sporadic judgements occurred immediately after the decision of the joint divisions of the Supreme Court (Corte di Cassazione 2 March 1990 no 1652), the trend expressed by the following judgements (Corte di Cassazione- Sezioni unite 29 November 1990 nos 11490, 11489, and others), has been followed by numerous judgements. See among many Corte di Cassazione 16 June 2000 no 8225, *Giurisprudenza italiana*, I, 462 (2001), with comments of O.B. Castagnaro, 'La Cassazione si ostina a far sopravvivere uno status economico connesso ad un rapporto definitivamente estinto e a non riconoscere il carattere alimentare dell'assegno'; Corte di Cassazione 17 January 2002 no 432, *Nuova giurisprudenza civile commentata*, I, 38 (2003), with comments of E. Al Mureden, 'In tema di adeguatezza dei redditi del coniuge divorziato'; Corte di Cassazione 27 September 2002 no 14004, *Famiglia e diritto*, 14 (2003) with comments of G. De Marzo, 'Revisione dell'assegno divorzile e conservazione del tenore di vita matrimoniale'.

The tenor of life argument has represented the decision-making criterion even in recent case law. See, Corte di Cassazione 9 April 2017 no 9945, Corte di Cassazione 28 February 2017 no 5062, Corte di Cassazione 23 February 2017 no 4703, Corte di Cassazione 8 February 2017 no 3316 and Corte di Cassazione 7 January 2017 no 975, available at www.dejure.it; Corte di Cassazione 29 September 2016 no 19339, *Foro italiano*, *Massimario*, 721 (2016); Corte di Cassazione 11 January 2016 no 223, *Foro italiano*, *Massimario*, 12 (2016); Corte di Cassazione 9 June 2015 no 11870, *Foro italiano Repertorio*, no 173 (2015); Corte di Cassazione 3 April 2015 no 6864, *Foro italiano Repertorio*, no 175 (2015); Corte di Cassazione 10 February 2015 no 2574, *Foro italiano Repertorio*, no 220 (2016), *Famiglia e diritto*, 259 (2016).

[62] See Corte di Cassazione 16 October 2013 no 23442, *Corriere Giuridico*, 1349 (2014), with comments of V. Amendolagine; see Corte di Cassazione 4 November 2010 no 22501 and Corte di Cassazione 24 March 2010 no 7145, available at www.dejure.it

determination, which only becomes concrete in the second phase, where the judge proceeds to the effective determination of the amount of maintenance. Therefore, the tenor of life concurs (and must be balanced) with the other criteria mentioned in the provision of Art 5, on the basis of a thoughtful case-by-case evaluation. The interdependence of the two phases of recognition and determination was thus confirmed and followed until the recent decision of the joint divisions of the Corte di Cassazione 11 July 2018 no 18287.

V. The Tenor of Life's Debate Between Autonomy and Reasonableness

The 'standard of living' criterion has been the object of important debate among scholarship.[63] Some legal scholars raised criticisms of the tenor of life criterion, sometimes considered 'anachronistic'.[64] However, other scholars recognize a basis of the tenor of life criterion in its practical dimension. In a specific kind of marriage, where one of the spouses represents the main source of family income, and the other contributes to the family needs mainly with housework, the tenor if life parameter should be applied on the basis of a planned contributions asset.[65] Obviously, this situation lasts for a significant period, and may induce the spouse dedicated to housekeeping to forsake working outside the home, or to choose a less demanding or profitable job. In such situations, the parameter of 'tenor of life' in case of divorce is the expression of the principle of 'conjugal solidarity' and must be taken into account, considering the importance of the distributive (and not purely compensatory) component.[66] As has been noted, it is extremely important to ensure protection, which has a constitutional basis in Arts 2, 3 and 29 of the Constitution, 'to the ex-spouse who has invested his energy and sacrificed his own professional aspiration to care for the family'.[67] For marriages that reflect this situation, the tenor of life will be applied as an

[63] For a general overview about the tenor of life approach on maintenance after divorce and separation, see A. Finessi, 'Commento all'art. 5, 6° comma l. div.', in A. Zaccaria ed, *Commentario breve al diritto della famiglia* (Padova: CEDAM, 2016), 1387; with specific reference to the *criteria* in cases of separation, see G. Ballarani, 'Commento all'art. 156 c.c.', in A. Zaccaria ed, *Commentario breve al diritto della famiglia* (Padova: CEDAM, 2016), 371; G. Bonilini and C. Coppola, 'Commento all'art. 5 l. div.', in G. F. Basini et al eds, *Codice di famiglia, minori, soggetti deboli* (Assago: UTET, 2014), II, 4241; For a useful and updated analisys of the different trend in the case law, see E. Bargelli, 'Assegno di divorzio e tenore di vita matrimoniale' *Giurisprudenza italiana*, I, 219-228 (2017).

[64] In this sense, see E. Bargelli, ibid.

[65] Of this opinion, E. Quadri, 'I coniugi e l'assegno di divorzio tra conservazione del 'tenore di vita' e 'autoresponsabilità': 'persone singole' senza passato?' *Corriere Giuridico*, 885-901 (2017); E. Al Mureden, 'Assegno divorzile, parametro del tenore di vita coniugale e principio di autoresponsabilità' n 49 above, especially at 543; E. Al Mureden, 'La solidarietà post-coniugale a quaranta anni dalla riforma del 75' *Famiglia e diritto,* 991-1007 (2015).

[66] Of this opinion, E. Al Mureden, 'La solidarietà post-coniugale' n 65 above.

[67] ibid.

expression of the preeminent principle of *reasonableness*, once an income balance has been established. As mentioned before, this criterion is obviously valid in cases of long-lasting marriages or marriages with dependent children, whose custody is entrusted to the spouse dedicated to the family. Whereas, in cases of economically weaker but younger spouses, or without any dependent family members, the principle of self-responsibility will prevail, especially in cases of short marriages.

However, other legal scholars consider the requisite of adequacy of means - even if generic and susceptible to excessive judicial discretion - should be related to the possibility of leading *a free and dignified life*, whereby recalling judgement no 1652 of 1990.[68] Thus, the spouse who is unable to obtain adequate resources for objective reasons has the right to a contribution sufficient for the realization of his or her personality. This minority view openly criticises the prevailing opinion, considering the 'tenor of life' criterion an obstacle to promoting equality of social dignity, and reaching economic independence. Marriage should not be considered a source of a right to a post-conjugal income, measured by the economic level enjoyed during marriage. As observed, the tenor of life criterion, if used as a lifelong insurance to enjoy a standard of living which is extended to a period of time that is subsequent to the marriage relationship, is in open contrast with the aim of the divorce, as definitive termination of marriage relationship.[69] In fact, criticism of this trend has a rational basis as it inevitably leads to indefinitely postponing the moment for interrupting economic relations between the spouses (following the twin-judgements of the Supreme Court in 1990). As observed,[70] applying this criterion represents an obstacle for the obliged spouse to create a new family and in fact violates his/her fundamental rights. This is recognized by Art 12 of European Convention of Human Rights (ECHR)[71] and Art 9 of the European Union's Charter of Fundamental Rights.[72]

VI. The Adoption of the 'Clean Break' Solution (Court of Cassation 10 May 2017 No 11504)

With judgement no 11504 of 10 May 2017, the Supreme Court of Cassation reversed the stable trend of the courts based on the 'tenor of life' parameter.

The case concerned an ex-spouse of a former Italian politician, who initiated Milan's court of first instance to obtain very high monthly spousal maintenance

[68] Corte di Cassazione 2 March 1990 no 1652, *Foro italiano*, I, 1165-1166 and 1173-1174 (1990)

[69] See M. Palazzo, 'Il diritto della crisi coniugale. Antichi dogmi e prospettive evolutive' *Rivista diritto civile*, II, 575-642 (2015).

[70] Corte di Cassazione 10 May 2017 no 11504, *Famiglia e diritto*, 636 (2017). See also A. Lamorgese, 'L'assegno divorzile e il dogma della conservazione del tenore di vita matrimoniale' n 13 above.

[71] Art 12 European Convention of Human Rights, available at www.echr.coe.int.

[72] Charter of Fundamental Rights of the European Union, *OJ* C 202, 7 June 2016, 389-405.

for the remainder of her life. In the first instance and at appeal, the judges denied the right of maintenance because of an unjustified allegation of the inadequacy of the claimant's means. The claimant filed an appeal to the Supreme Court that in turn rejected the claim, stating that the courts in Italy should be guided by whether ex-spouses can achieve *economic independence* following a divorce. In other words, if the spouse has sufficient economic independence, including sufficient income and housing, the court should not interfere by addressing or providing for any further financial support.

The Supreme Court's decision came like an earthquake, suddenly and unexpectedly. Its effects were more deflagrating than expected,[73] establishing a judicial departure from the traditional interpretation of the court of maintenance upon divorce based on the preservation of the ex-spouse's standard of living. The court found that if a former spouse is capable of work and deemed self-autonomous or capable of being so, he or she will no longer be awarded an automatic right to claim spousal maintenance.

The court was aware of the stable trend that has been adhered to for several decades. In its own words, 'it is known that both before and after the fundamental judgments of the Supreme Court (joint divisions) in 1990, the reference point for evaluating a claimant's 'adequate means' has been permanently recognised by this court as the 'tenor of life' enjoyed during the marriage'.[74] However, 'after almost twenty-seven years, this court considers such orientation, (…), no longer current'.

With judgement no 11504 of 2017, the Supreme Court identified a new parameter to relate the notion of adequacy/inadequacy of the means of the former spouse for maintenance allowance: the achievement of economic independence, understood as equivalent to economic self-sufficiency.

In other words, spousal maintenance shall be considered as an instrument aimed at granting economic independence.

It is worth pointing out that in this particular decision, involving very rich ex-spouses used to a luxurious 'standard of living', the overruling of the 'tenor of life' parameter can certainly represent an attempt to stop the allowance of disproportionate financial support. In this scenario, it is not difficult to imagine the negative effects that could be provoked by applying the 'standard of living' to the letter. It has been broadly recognized that the 'tenor of life' argument can

[73] See, F. Danovi, 'La Cassazione e l'assegno di divorzio: *en attendant Godot* (ovvero le Sezioni Unite)' *Famiglia e diritto*, 51-64 (2018); E. Quadri, 'L'assegno di divorzio tra conservazione del 'tenore di vita' e 'autoresponsabilità': gli ex coniugi 'persone singole' di fronte al loro passato comune' *Nuova giurisprudenza civile commentata*, 1261 (2017); Id, 'I coniugi e l'assegno di divorzio tra conservazione del 'tenore di vita' e 'autoresponsabilità': 'persone singole' senza passato?' n 65 above; E. Al Mureden, 'L'assegno divorzile tra autoresponsabilità e solidarietà post-coniugale' *Famiglia e diritto*, 636-654, (2017).

[74] See Corte di Cassazione-Sezioni unite 29 November 1990 no 11489, no 11490, no 11491, no 11492, n 15 above.

be used as a weapon designed to enrich the 'weaker' ex-spouse (normally the woman) and to literally take revenge against the wealthier spouse (normally the man), obliging him to pay disproportionate maintenance support. This way, the allowance of financial support is closer to – as stated by the court in this case – a 'set-up for life' solution, and not to real 'support'. Far from these unusual situations, most cases do not involve ex-partners of politicians or billionaires, but ex-spouses with normal standards of living. On one hand, it is true that in extraordinary situations the allowance of spousal maintenance based on the 'tenor of life' criterion often led to the allowance of parasitic income and to an unjustified extension of an already finished relationship. On the other hand, most ex-spouses conduct a 'normal life' with 'normal' standards. In this sense, the risk of such exorbitant financial support is inexistent.[75]

It is still undeniable that this judgement is part of a noticeable worldwide trend to shorten, reduce or extinguish spousal support to the economically weaker spouse following divorce. This is aimed at stopping the tendency of an 'automatic right to hefty maintenance payments', as well as recognising the parties' autonomy once a relationship has ended.

According to the Supreme Court's judges,[76] once the civil marriage has been dissolved or the civil effects resulting from the transcription of the religious marriage ceased, the marriage relationship is definitively terminated on both personal and economic levels. Spouses must, therefore, be considered thereafter 'individual persons', with regard to both their economic and personal relations (Art 191 of the Civil Code, para 1) and, in particular, with regard to the reciprocal duty of moral and material assistance (Art 143 of the Civil Code, para 2).

Because of the extinction of the marital relationship, the right to maintenance – provided for by Legge no 898 of 1970, Art 5, para 6, amended by legge no 74 of 1987, Art 10 – is conditioned to the prior judicial assessment of the lack of 'adequate means' of the former spouse requesting the allowance and, in any case, the impossibility of 'obtaining them for objective reasons'. The motivation alleged by the court derived from the assumption that the right to maintenance based on the economic interdependence of marriage living clashes with the real nature of divorce, which involves the definitive breakdown of the marriage bond.

Divorce (unlike separation) operates as a permanent break: like marriage, it is based on a free choice, and therefore it no longer corresponds to a 'definitive arrangement'. Consequently, the marriage relationship must be considered definitively extinct, and this is true not only for the spouses' personal status, but also for their economic-patrimonial relationships, in particular referring to their mutual duty of moral and material assistance. Therefore, the person is intended

[75] See data in C. Rimini, 'Assegno di mantenimento e assegno divorzile' n 29 above. A standard maintenance amount in Italy does not normally exceed five hundred and thirty point forty euro gross monthly.

[76] Corte di Cassazione 10 May 2017 no 11504, *Famiglia e diritto*, 636 (2017).

as being single, no longer as part of a marriage relationship that is now extinct.[77] It follows that preserving the standard of living creates undue extra pressure on an already extinct relationship,[78] and an obstacle to the right – already widely accepted – to give life to a new family, after the breakup of the previous marriage.[79]

This change of view is clearly connected to the progressive disappearance of 'traditional' models of marriage and the profound change in its function and social perception as an institution.

The court emphasized more radically the 'two phase-evaluation' of maintenance allowance: the attribution of maintenance (*an*) and the determination of the amount (*quantum*). The first phase will be dedicated to acknowledging the claimant's self-sufficiency, and based on the principle of self-responsibility. If a former spouse is capable of working and deemed self-autonomous, or capable of being so, she (or he) will no longer be awarded an automatic right to claim spousal maintenance. The second phase is directed at quantification (*quantum debeatur*), and governed by the principle of solidarity, according to the traditional parameters in the first part of Art 5, para 6. It is only at this stage that comparisons can be made between the economic positions of former spouses. Such an interpretation leads to the conclusion that if the claimant has 'adequate means', his or her income (regardless of their source) may influence the amount of maintenance even to the point of excluding entitlement.

As observed, ex-spouses have to be considered as single persons,[80] but their life spent together must also be taken into consideration.[81]

Most legal scholars strongly criticized the overruling made by a single division of the Supreme Court of a stable trend (since 1990!) in the case law.[82] Indeed, it is undeniable that objections raised by scholars regarding the method have reasonable grounds. It is worth recalling that even though precedents are not binding in Italy, Art 374, para 3 of Code of Civil Procedure establishes that if the simple division does not agree with the joint divisions' opinions, it shall refer to them, by reasoned order. In other words, the risk is that such a delicate matter could give rise to an imposing dispute, leaving no fixed or univocal principle for judges to apply, and so materialise as a threat to legal certainty and predictability

[77] See M. Fortino, 'Il divorzio, l' "autoresponsabilità" degli ex coniugi e il nuovo volto della donna e della famiglia' *Nuova giurisprudenza civile commentata*, 1254-1260 (2017).

[78] Corte di Cassazione 10 May 2017 no 11504, *Famiglia e diritto*, 636 (2017). See among scholars, E. Al Mureden, 'L'assegno divorzile' n 73 above, 642.

[79] See the comment to the judgement of E. Al Mureden, 'L'assegno divorzile' n 73 above.

[80] See M. Fortino, n 77 above.

[81] See others who share the same opinion, E. Quadri, 'I coniugi e l'assegno di divorzio tra conservazione del 'tenore di vita' e 'autoresponsabilità': 'persone singole' senza passato?' n 65 above.

[82] See among others, D. Piantanida, 'L'assegno di divorzio dopo la svolta della Cassazione: orientamenti (e disorientamenti) nella giurisprudenza di merito' *Famiglia e diritto*, 65-77 (2018); F. Danovi, 'La Cassazione e l'assegno di divorzio: *en attendant Godot* (ovvero le Sezioni Unite)' n 73 above. *Contra*, see M. Fortino, n 77 above, 1254.

of decisions.[83] Nevertheless, most of the following judgements openly welcomed the 'new' parameter of self-sufficiency affirmed by the Supreme Court in the decision no 11504 of 10 of May 2017.[84]

Subsequent case law, though, did not offer a univocal interpretation of the 'self-sufficiency' principle.[85] In fact, the notion risks being the object of conflicting interpretations. In particular, it is not clear whether the notion should have an objective and abstract valence, which is the same for everyone, or whether it should have a relative and personalized valence, with reference to the concrete needs of the ex-spouses and their particular life background.[86] It is also not clear if the indexes contained in para 6 of Art 5 of legge 898 of 1970 in order to evaluate the economic independence of the claimant have to be interpreted as alternatives, or analyzed overall.[87]

On one hand, the so-called 'clean break' solution adopted by the courts clearly represents a pragmatic way to solve 'pathological' consequences of maintenance orders; but it is also true that it starts a long debate on how this trend fits in to developing legal and social trends, which cannot be ignored.[88] In particular, the debate concerns the role that one of the spouse invested in the family, and focuses on the gender equality issue, in a social scenario characterized by increasingly fast divorce processes,[89] and the permanence of different roles between men and women in the family. By adopting a 'clean break' solution, the ex-spouse who has a monthly income of (more or less) one thousand euro, will not be entitled to maintenance allowance, regardless of the family's financial conditions, and,

[83] The opportunity to refer the question to the joint divisions of the Court of Cassation has been opportunely mentioned in the critical comment of the judgement (no 11504 of 2017) by F. Danovi, 'La Cassazione e l'assegno di divorzio: *en attendant Godot* (ovvero le Sezioni Unite)' n 73 above; E. Al Mureden, 'L'assegno divorzile' n 73 above; F. Danovi, 'Assegno di divorzio e irrilevanza del tenore di vita matrimoniale: il valore del precedente per i giudizi futuri e l'impatto sui divorzi già definiti' *Famiglia e diritto*, 655-668 (2017); B.M. Colangelo, 'Assegno divorzile: la *vexata quaestio* del rilievo da attribuire al tenore di vita matrimoniale' n 29 above, 278.

[84] See Corte di Cassazione 11 May 2017 no 11538; Corte di Cassazione 22 June 2017 no 15481; Corte di Cassazione 29 August 2017 no 20525; Corte di Cassazione 9 October 2017 no 23602; Corte di Cassazione 25 October 2017 no 25327, available at www.dejure.it.

[85] See Tribunale di Udine 1 June 2017, *Famiglia e diritto*, 272 (2018). Among scholars, see F. Danovi, 'Assegno di divorzio e irrilevanza del tenore di vita matrimoniale' n 83 above; Id, 'Verso una nuova stagione per l'assegno divorzile' n 29 above.

[86] See, in favour of a practical interpretation of the principle, Corte di Cassazione 26 January 2018 no 2042, available at https://tinyurl.com/y7owmfqt (last visited 27 December 2018).

[87] See, among others, F. Danovi, 'La Cassazione e l'assegno di divorzio: *en attendant Godot* (ovvero le Sezioni Unite)' n 73 above; U. Roma, 'Assegno di divorzio: dal tenore di vita all'indipendenza economica' *Nuova giurisprudenza civile commentata*, I, 1001-1016 (2017); E. Al Mureden, 'Il parametro del tenore di vita coniugale nel diritto vivente' *Famiglia e diritto*, 690-703 (2014).

[88] See F. Danovi, 'La Cassazione e l'assegno di divorzio' n 73 above.

[89] The enactment of legge 10 November 2014 no 162 (Arts 6 and 12) on consensual resolution of litigation related to separation and divorce, and enactment of the so called 'fast track divorce' (legge no 55 of 2015) led to a considerable increase in the number of divorces.

above all, the commitments made in favour of the other spouse or child care.[90]

Moving on from a crystallized family model, based on a paternalistic perspective and mostly disfavouring the spousal parties' autonomy after the marriage break down, the court opted for a 'clean break' model that recognizes spouses' contractual autonomy. Family law provisions are generally moving towards this new perspective. The self-sufficiency principle is at the core of the EU harmonization process in family law. This is particularly evident in the works of the Commission of European Family Law (CEFL), which elaborated the Principles of European Family Law. According to these Principles, 'each spouse should provide for his or her own support after divorce'.[91]

The principle of self-sufficiency revitalises the dilemma between the need to better define what might be object of private agreement between spouses, and what, on the other hand, must remain outside the private autonomy of the spouses.[92] With this in mind, it is essential to balance the two opposing needs, ie, the protection of the weaker party,[93] and the need to limit a permanent bond between ex-spouses, in favour of recognising the principle of self-responsibility. Faced with this challenge, the affirmation of only the welfare function of maintenance does not seem a balanced and satisfying solution to define the post conjugal conflict.[94]

VII. Maintenance Order and Gender Asymmetry in a Comparative Overview

The connection between maintenance discipline after divorce and gender asymmetry is self-evident. In particular, a much-debated question is whether the commitments and sacrifices made during a marriage have to be reflected in the financial support or not.

In fact, it is common in contemporary marriages or partnerships that one of the spouses/partner dedicates energy and time to increase his or her earning capacity (usually the man), while the other invests time and effort in rearing

[90] See C. Rimini, 'Verso una nuova stagione per l'assegno divorzile' n 29 above, 1279.

[91] K. Boele-Woelki et al, 'Principles of European Family Law, Chapter I, General Principles', Principle 2:2 'Self-sufficiency', in K. Boele-Woelki et al eds, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Antwerp-Oxford: Intersentia, 2004), VII, 137.

[92] See M.R. Marella, 'The privatization of Family Law: limits, gaps, backlashes' *Familia*, 615, 611-633 (2017). See also in this *Journal*, R. Montinaro, 'Marital Contracts and Private Ordering of Marriage from the Italian Family Law Perspective' 1 *The Italian Law Journal*, 75-90, 80 (2017).

[93] See among legal scholarship, C. Rimini, 'Verso una nuova stagione per l'assegno divorzile' n 29 above; R. Tommasini, 'Il diritto all'assegno di divorzio' n 14 above, 276; E. Quadri, 'Divorzio verso quale riforma' n 15 above, 68.

[94] See the critics and proposals offered by C. Rimini, 'Assegno di mantenimento e assegno divorzile' n 29 above, 1806.

children and doing domestic work, (usually the woman).[95]

The 'clean break' view is based on the idea that individuals will be better off in the long run if they establish their independence immediately after divorce. From the feminist point of view, enforcing the self-sufficiency principle could inspire a new family model, in which spouses are equally engaged in managing the family, and ex-spouses should work towards the goal of being independent from each other after divorce. Some scholars maintain this model may finally lead to the abandonment of a model of family where one of the spouses (the woman) is still seen as the 'angel of the hearth'. According to this view, it could represent a small but significant step towards a new family model based on effective gender equality.[96] However, the self-sufficiency principle represents a double-edged sword because, in a realistic analysis, some spouses' (typically women) provide long lasting devotion to work within the home, abandoning their job's perspectives, making self-sufficiency an unachievable goal. So, the disproportion that existed during marriage will continue after divorce, placing many women at a substantial disadvantage in the labour force. This model then shows a persistent gender asymmetry, notably because women invest more in domestic work and childcare during the marriage and because, in most cases, the children live with their mother after the divorce. The new criterion risks, therefore, creating a huge prejudice in favour of the weaker party. For example, if the objective and standardized interpretation of this notion prevails, most ex-wives with a modest income and integrating economic self-sufficiency will not be entitled to divorce maintenance. Or, at most, they will only receive an extremely modest one, taking into account the other partner's position. This is in spite of a life dedicated to the family, and in spite of her ex-husband's richer conditions – which are in part due to those same wives' domestic commitment.[97]

Therefore, the risk of an unequal distribution between the spouses is clear.[98] So, how can we restore gender equality at a time when women still perform most of the domestic and parenting tasks?

In search of a solution, the comparative analysis offers some models that are able to compensate for the inequalities resulting from women's investment in family life.[99] It is worth noting that in many legal systems, the principle of

[95] See C. Rimini, 'Verso una nuova stagione per l'assegno divorzile' n 29 above.

[96] See, more on this opinion, M. Fortino, n 77 above.

[97] See C. Rimini, 'Assegno di mantenimento e assegno divorzile' n 29 above, 1803.

[98] See ibid 1804.

[99] For a comparative analysis see the contributions of C. Rimini, 'Verso una nuova stagione per l'assegno divorzile' n 29 above; E. Quadri, 'I coniugi e l'assegno di divorzio tra conservazione del 'tenore di vita' e 'autoresponsabilità' ' n 65 above, 13; S. Patti, 'I rapporti patrimoniali tra coniugi. Modelli europei a confronto', in G. Ferrando ed, *Il nuovo trattato di diritto di famiglia* (Bologna: Zanichelli, 2008), II, 229; see also, E. Al Mureden, 'Assegno divorzile, parametro del tenore di vita coniugale e principio di autoresponsabilità' n 49 above, 543; K. Boele-Woelki et al, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Antwerp-Oxford: Intersentia, 2004).

self-responsibility – widely recognized and applied – leading to 'clean break' solutions, is equally combined with a balanced policy of distribution of family resources, in order to guard the value of dignity within domestic and non-domestic employment and protect gender justice.[100]

French law has opted for a system of redistributive justice designed to compensate for the economic inequalities created by a gendered division of labour in the family.[101]

French divorce law provides that 'a spouse may be required to pay the other spouse an allowance to *compensate*, as far as possible, the disparity that the breakdown of the marriage creates in their respective living conditions'.[102] In fact, in fixing the amount of the compensatory allowance, the judge takes into account

> 'the consequences of the professional choices made by a spouse during the couple's union either for the sake of their children's education (and the time that this responsibility would continue to require), or to promote the career of the other spouse at the expense of his or her own career'.

The other parameters taken into consideration are the length of marriage, age, health status, qualification and employment status, assets and pension rights.[103]

[100] See E. Al Mureden, 'L'assegno divorzile tra autoresponsabilità e solidarietà post-coniugale' n 73 above.

[101] See Arts 270 and 271 of the French Civil Code, available at www.legifrance.gouv.fr. The solution adopted by French legislator has been recognised as a good example for the Italian Legal system by C. Rimini, 'Verso una nuova stagione per l'assegno divorzile' n 29 above, 1279 and by E. Quadri, 'L'assegno di divorzio tra conservazione del 'tenore di vita' e 'autoresponsabilità'' n 73 above, 1261.

[102] Art 270 of the French Civil Code: '*Le divorce met fin au devoir de secours entre époux.*

L'un des époux peut être tenu de verser à l'autre une prestation destinée à compenser, autant qu'il est possible, la disparité que la rupture du mariage crée dans les conditions de vie respectives. Cette prestation a un caractère forfaitaire. Elle prend la forme d'un capital dont le montant est fixé par le juge.

Toutefois, le juge peut refuser d'accorder une telle prestation si l'équité le commande, soit en considération des critères prévus à l'article 271, soit lorsque le divorce est prononcé aux torts exclusifs de l'époux qui demande le bénéfice de cette prestation, au regard des circonstances particulières de la rupture' (Divorce puts an end to the duty of support between spouses. One of the spouses may be compelled to pay the other an allowance intended to compensate, as far as possible, for the disparity that the breakdown of the marriage creates in the respective ways of living. This allowance shall be in the nature of a lump sum. It shall take the form of a capital the amount of which must be fixed by the judge. However, the judge may refuse to grant such an allowance where equity so demands, either taking into account the criteria set out in Art 271, or when the divorce is declared on account of the blame lying wholly upon the spouse who requests the advantage of this allowance, considering the particular circumstances of the breakdown).

[103] Art 271 of the French Civil Code : '*La prestation compensatoire est fixée selon les besoins de l'époux à qui elle est versée et les ressources de l'autre en tenant compte de la situation au moment du divorce et de l'évolution de celle-ci dans un avenir prévisible.*

A cet effet, le juge prend en considération notamment:

It has been remarked that

> 'this redistributive justice underlies the French community property regime, under which both partners' earnings, wages and goods bought during the marriage go into a common pot'.[104]

Some commentators, however, criticize the ambivalence of these measures. In fact, they may seem to favour women by giving them a degree of financial independence that enables them to divorce. But, at the same time, from a feminist perspective it has been underlined that

> 'they penalize women because, being merely compensatory, such measures perpetuate or mask women's over-investment in the family compared to men'.[105]

In other words, the adoption of a purely compensatory principle, 'taking domestic labour and childcare into account is a factor both for equity and for maintaining inequalities' because of men and women's persistently different roles.[106] Consequently, some scholars have suggested applying compensatory

- la durée du mariage;
- l'âge et l'état de santé des époux;
- leur qualification et leur situation professionnelles;
- les conséquences des choix professionnels faits par l'un des époux pendant la vie commune pour l'éducation des enfants et du temps qu'il faudra encore y consacrer ou pour favoriser la carrière de son conjoint au détriment de la sienne;
- le patrimoine estimé ou prévisible des époux, tant en capital qu'en revenu, après la liquidation du régime matrimonial;
- leurs droits existants et prévisibles;
- leur situation respective en matière de pensions de retraite en ayant estimé, autant qu'il est possible, la diminution des droits à retraite qui aura pu être causée, pour l'époux créancier de la prestation compensatoire, par les circonstances visées au sixième alinéa' (A compensatory allowance must be fixed according to the needs of the spouse to whom it is paid and to the means of the other, account being taken of the situation at the time of divorce and of its evolution in a foreseeable future. For this purpose, the judge shall have regard in particular to: - the duration of the marriage; - the ages and states of health of the spouses; - their professional qualifications and occupations; - the consequences of the professional choices made by one spouse during their living together for educating the children and the time which must still be devoted to this education, or for favoring his or her spouse's career to the detriment of his or her own; - the estimated or foreseeable assets of the spouses, both in capital and income, after liquidation of the matrimonial regime; - their existing and foreseeable rights; - their respective situations as to retirement pensions, having estimated, as much as possible, the reduction of the retirement rights that circumstances mentioned in the sixth paragraph above might cause for the spouse creditor of the compensatory allowance).

[104] A.M. Leroyer, 'Reducing Gender Asymmetries Due to Divorce' 3 *Population*, 498-499 (2016).

[105] See M. Pichard, 'Genre et rapport patrimoniaux entre époux', in S. Hennette-Vauchez, M. Pichard and D. Roman eds, *La loi et le genre* (Paris: CNRS, 2014), 799; A. Revillard, 'Protection humiliante ou source de droit ? Prestation compensatoire, pensions alimentaires et luttes feministes' *Jurisprudence*, *Revue critique*, 217-230 (2011).

[106] A. M. Leroyer, 'Reducing Gender Asymmetries Due to Divorce' n 104 above.

measures to eliminate the cost of the difference between men and women. As observed, 'the aim is to place a value upon the caregiver's work by equitably rewarding their investment in the family'.[107] This model is based on a 'genuinely egalitarian policy (which,) would give an incentive to share childcare equally'. Beyond compensatory measures, such a model includes 'men have incentives to take an equal share in domestic and parental work'.[108] According to this feminist view, such a model 'would involve a set of measures to change the perception of men's and women's roles both at work and in the family'.[109] This means that, for example, parental leave and benefits are paid equally to both parents on condition that they both spend the same amount of time with the children.

In recent years, German case law has also significantly revalued the compensatory needs when determining maintenance after divorce.[110] After a first reform in 2008 that was criticized because of its massively disadvantageous treatment of the weaker spouse, on the basis of the 'self-responsibility' principle,[111] a following amendment introduced forms of compensation for disadvantages arising from the marriage in the discipline of maintenance. The relevant provisions in the Civil Code are § 1570 - § 1573, § 1575 and § 1576.[112]

Another interesting example is offered by the US. Some US jurisdictions introduced an 'equitable distribution system', providing an equal distribution of family incomes at the moment of marriage breakdown. For example, the New York's statute requires the judges to distribute assets 'equitably between the parties, considering the circumstances of the case and of the respective parties'.[113] To achieve equity, the legislator has provided a list of thirteen different elements that together take account of spousal need, resources, contribution to the marriage, and economic misconduct.[114] Because of the existence of a 'catch-all clause', this provision considers 'any other factor which the court shall expressly find to be just and proper',[115] and leads to an increase of the judges' discretionary

[107] ibid 498.

[108] ibid.

[109] ibid.

[110] See, among legal scholarship, G.M. Cubeddu, 'Lo scioglimento del matrimonio e la riforma del mantenimento tra ex coniugi in Germania', in S. Patti and G.M. Cubeddu eds, *Introduzione al diritto della famiglia in Europa* (Milano: Giuffrè, 2008), 300.

[111] Under the Reform of 2008 the alimony payments were 'automatically' limited by the courts in the case of the absence of disadvantages as a result of the marriage without due consideration of other aspects in individual cases, especially marriage duration.

[112] References to the German model of maintenance in E. Quadri, 'L'assegno di divorzio tra conservazione del "tenore di vita" e "autoresponsabilità" ' n 73 above; S. Patti, 'I rapporti patrimoniali tra coniugi' n 99 above, 229; G.M. Cubeddu, 'Lo scioglimento del matrimonio e la riforma del mantenimento tra ex coniugi in Germania' n 110 above.

[113] N.Y. DOM. REL. L. § 236B(5)(c), MAINTENANCE Domestic Relations Law § 236-B(5-a) & (6); see in the legal scholarship, M. Garrison, 'What's Fair in Divorce Property Distribution: Cross-national Perspectives from Survey Evidence' 72 *Louisiana Law Review*, 69 (2011).

[114] See N.Y. DOM. REL. L. § 236B(5)(c) n 113 above.

[115] ibid (14).

power. As observed,

> 'basically, the statute directs the judge to base the distributional decision on an appraisal of the parties' past conduct, present needs, and future life circumstances, but leaves the scope, methodology, and application of that appraisal to judicial discretion'.[116]

VIII. The Re-Affirmation of the Composite Nature of Maintenance After Divorce. The End of the Story?

In the above-illustrated highly controversial scenario, the recent decision no 18287 of 11 July 2018 held by the joint divisions of the Supreme Court was expected and warmly welcomed by most legal scholars.[117]

Firstly, the court points out that the parameter to ascertain the right of maintenance allowance has a composite nature, since 'the adequateness of means or the impossibility to obtain them for objective reasons' must be evaluated through the indexes contained in the provision of Art 5, para 6,[118] which all have equal weight, representing the expression of the solidarity principle. Therefore, the criterion of 'adequateness of means' has a compensatory content, and cannot be limited either to the welfare level or to the comparison between the economic conditions of the parties.[119]

The maintenance order, both as to its nature and its amount, originates from the choices and decisions adopted by the spouses in the planning of their family life. These choices also imply the division of the tasks and duties derived from marriage (Art 143 Civil Code). It follows that, when deciding for maintenance, judges must give importance to the choices and roles on which the conjugal relation and family life was based. Consequently, maintenance after divorce does

[116] See, M. Garrison, 'What's Fair in Divorce Property Distribution' n 113 above.

[117] See Corte di Cassazione-Sezioni unite 11 July 2018 no 18287. See among scholars, F. Danovi, 'La Cassazione e l'assegno di divorzio: *en attendant Godot* (ovvero le Sezioni Unite)' n 73 above; B.M. Colangelo, 'Assegno divorzile: la *vexata quaestio* del rilievo da attribuire al tenore di vita matrimoniale' n 29 above; D. Piantanida, 'L'assegno di divorzio dopo la svolta della Cassazione: orientamenti (e disorientamenti) nella giurisprudenza di merito' n 82 above, 65; C. Rimini, 'Assegno di mantenimento e Assegno divorzile' n 29 above; E. Quadri, 'L'assegno di divorzio tra conservazione del "tenore di vita" e "autoresponsabilità" ' n 73 above; E. Al Mureden, 'L'assegno divorzile tra autoresponsabilità e solidarietà post-coniugale' n 73 above.

[118] Conditions and income of spouses, personal and economic contribution to the formation of family asset, duration of marriage and grounds for the decision. See Art 5, para 6, legge 898 of 1970.

[119] See scholars' contributions that suggested the adoption of compensatory solutions prior to the Court of Cassation judgement no 18287 of 2018, C. Rimini, 'Assegno di mantenimento e Assegno divorzile' n 29 above, 1806; E. Al Mureden, 'Il parametro del tenore di vita coniugale nel diritto vivente' n 87 above; E. Al Mureden, 'L'assegno divorzile tra autoresponsabilità e solidarietà post-coniugale' n 73 above, 653.

not have an assistance function because it is no longer based on the spouses' economic disproportion (following the standard of living approach) or on the claimant's subjective condition (self-sufficiency approach). It is in fact based on the equalising and compensatory functions, which are directly based on the Constitution. According to the court, only the adoption of all the criteria listed in Art 5, para 6 of the legge 898 of 1970 at issue will give effectiveness to the parameter of 'adequateness of means', in compliance with the constitutional principles involved: equality between spouses (Art 29 Constitution), dignity (Art 3 Constitution) and self-determination.

In other words, assessing whether one's means are adequate must also satisfy a prognostic function regarding the effective and practical determination of the prejudice suffered by the claimant both economically and professionally, as a result of their efforts and commitments for the benefit of the family. Consequently, the claimant's age is undoubtedly of utmost importance for the assessment of the real possibility of finding a job with regard to the 'impossibility to obtain adequate means for objective reasons'. It is therefore possible for the court to determine maintenance without being bound by a 'maximum limit' (which corresponds to the economic self-sufficiency), taking into account, of course, the other spouse's contribution to the family. In this perspective, the amount may be higher for the applicant who, for example, has spent a lot of time on family needs, domestic work, or childcare and education. The decision held by the joint divisions reaffirms that maintenance after divorce has a composite nature: welfare-oriented and compensatory. In this regard, the Court underlines that the compensatory nature of maintenance is not supposed to re-create the previous standard of living, but rather to recognize the weaker spouse's role and contribution to the family income. In order to achieve this result, the court strongly rejects the adoption of a biphasic process (although emphasized by the precedents) in order to assess the right of maintenance. The criteria listed in the provision constitute the parameters both for the attribution and determination of maintenance, in light of the comparative analysis of the 'economic and personal conditions' of the parties. The contribution offered by the claimant to family life must be taken into account, with particular focus on the length of the marriage and age of the ex-spouse entitled to maintenance.[120] The court underlines that the compensatory nature of maintenance is not supposed to re-create the previous standard of living, but rather to recognize the role and the contribution of the weaker spouse to the family income.

With this judgement, the joint divisions of the Court of cassation have finally innovated and modernized the criteria listed in Art 5, para 6 of Legge 898 of 1970, in order to align our system with other European Countries and protect both the breadwinner and home carer.

[120] See E. Al Mureden, 'L'assegno divorzile tra autoresponsabilità e solidarietà post-coniugale' n 73 above.

As already mentioned,[121] the clean break solution coexists in many legal systems with other instruments aimed at guaranteeing adequate protection to the ex-spouse who dedicated time and effort in favour of the family during the marriage. All those instruments have a compensatory rather than welfare basis.[122] This way any risk of 'long-life arrangement' or, on the contrary, undue responsibility on the shoulders of the economically weaker party, is eliminated, reaching a real 'clean break'.[123]

Only by applying the parameters indicated in Art 5, para 6, in its compensatory function, does the tenor of life concept gain real meaning and a right place. The court upholds neither self-sufficiency nor the standard of living parameter, but an integrated evaluation of the criteria contained in the provision, in order to award the weaker spouse compensation for the effort and sacrifices made during the marriage, in the exercise of a free and shared choice of life, on the basis of the primary principle of equality.[124] The relevance of the involvement of the weaker spouse into the family is strictly connected to the fact that people can neither change nor modify the past, regardless of any possible risk of ultra-activism.[125]

The compensatory function of maintenance is, therefore, affirmed to value the practical commitment of both ex-spouses in the family and the woman's role in the family, which otherwise would remain hidden and submerged.

The Court of cassation's decision has gone back to the past (saving the composite nature of maintenance) to look toward the future - departing from a maintenance order exclusively measured on the tenor of life of the ex-spouses during the marriage, and from the growing idea of the indissolubility of the relationship).[126] Apparently, the court put an end to the story, re-balancing the stages of a hard debate. In this new perspective, marriage ties still bind.

[121] See section VII above.

[122] A characteristic of this model is that maintenance allowance is made in a unique solution. Consequently, any undue extension of the marriage bond is excluded, reaching a real 'clean break'.

[123] See C. Rimini, 'Verso una nuova stagione per l'assegno divorzile' n 29 above, 1277.

[124] See E. Al Mureden, 'L'assegno divorzile tra autoresponsabilità e solidarietà post-coniugale' n 73 above.

[125] See, E. Quadri, 'L'assegno di divorzio tra conservazione del "tenore di vita" e 'autoresponsabilità" ' n 73 above; see also G. Casaburi, n 32 above.

[126] A. Simeone, 'Il nuovo assegno di divorzio dopo le sezioni unite: ritorno al futuro?' *il familiarista.it*, 17 July 2018.