

THE DIVORCE ALLOWANCE IN ITALY, BETWEEN RULES
AND PRINCIPLES

*LA PENSIÓN DE DIVORCIO EN ITALIA: ENTRE NORMAS Y
PRINCIPIOS*

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RESUMEN: La ley italiana reconoce el derecho a una pensión de divorcio en favor del cónyuge que carezca de “medios adecuados”. El significado de tal expresión, originariamente interpretada por las Secciones Unidas de la Corte de Casación en 1990 como una carencia de recursos necesarios para mantener el nivel de vida del que se disfrutaba durante el matrimonio, ha sido, sin embargo, reinterpretado por la Casación en 2017, en el sentido de entenderla referida a la ausencia de recursos indispensables para garantizar la independencia o autosuficiencia económica. En el trabajo el autor comparte esta última orientación y aclara que la nueva interpretación es coherente con los valores y los principios del ordenamiento italiano. Ofrece, además, argumentos en apoyo de tal orientación y espera que las Secciones Unidas puedan confirmarla.

PALABRAS CLAVE: cónyuges, divorcio, pensión de divorcio; principio de solidaridad, independencia económica, efectos y medidas en caso de divorcio.

ABSTRACT: *Italian law gives the right to a maintenance allowance to the spouse who does not have “mezzi adeguati”. The assumption consisting in the “mancanza di mezzi adeguati”, originally understood by the Joint Sections of the Italian Cassation of 1990 as a lack of resources to maintain the standard of living enjoyed during the marriage, was understood by the Court of Cassation in 2017 as a lack of resources of guaranteeing independence or economic self-sufficiency. In the essay, the author shares this new approach and clarifies that the new interpretation is consistent with the principles and values of the Italian legal system. The author therefore offers arguments to support this new interpretation and hopes that the Joint Sections of the Italian Cassation confirm this interpretation.*

KEY WORDS: *Spouses, divorce, maintenance allowance, family solidarity, standard of living, economic independence.*

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I. INTRODUCTION.

After a long season started, substantially in 1987, with the amendment of the Italian law on divorce, and continued until May 2017, during which it never seemed to question that the divorce allowance was due by the economically stronger spouse to support of the economically weaker spouse, to allow the last to benefit from the same standard of living enjoyed during the marriage, the question was placed at the centre of a lively debate.

The destabilization phase opened with the famous sentence of the Supreme Court n. 11504 of 10 May 2017¹, which has finally marked the abandonment of this interpretation, offering a new and acceptable reading of the provision pursuant to art. 5, paragraph 6, l. div.

According to this ruling the divorce allowance is not due if and when one of the spouses did not have adequate means to maintain the same standard of living enjoyed during the marriage, but if and only one of the spouses was economically self-sufficient.

The prerequisite for obtaining the divorce allowance indicated in art. 5, paragraph 6, l. div. and consisting in the ‘lack of adequate means’, it was originally

¹ Cass., 10 May 2017, n. 11504, in *Giustiziacivile.com*, 27.11.2017, with comment by BARBA, V.: “Assegno divorzile e indipendenza economica del coniuge. Dal diritto vivente al diritto vigente”; in *Fam. dir.*, 2017, p. 636 ss., with comment by AL MUREDEN, E.: “L’assegno divorzile tra auto responsabilità e solidarietà post-coniugale”, *ivi*, p. 642 ss.; in *Quotidiano giur.*, 2017, 7 ss., with comments by TOMMASEO, F.: “La Prima Sezione sui criteri per stabilire an e quantum dell’assegno divorzile: una svolta nella giurisprudenza della Cassazione?”, and by SCALERA, A.: “Assegno divorzile: l’indipendenza economica del coniuge è il nuovo parametro di riferimento”; in *Dir. succ. fam.*, 2017, 3, with comment by VITERBO, F.: “L’an e il quantum dell’assegno di divorzio: una valutazione da effettuare in concreto”; in *Foro it.*, 2017, I, c. 1859 ss., with comments by CASABURI, G.: “Tenore di vita ed assegno divorzile (e di separazione): c’è qualcosa di nuovo oggi in Cassazione, anzi di antico”, and by BONA, C.: “Il revirement sull’assegno divorzile e gli effetti sui rapporti pendenti”, as well as by MONDINI, A.: “Sulla determinazione dell’assegno divorzile la sezione semplice decide in autonomia. Le ricadute della pronuncia sui giudizi di attribuzione e sui ricorsi per revisione dell’assegno”. See also BIANCA, C.M.: “L’ultima sentenza della Cassazione in tema di assegno divorzile: ciao Europa?”, in *Giustiziacivile.com.*, 15 May 2017; SPADAFORA, A.: “Il nuovo assegno di divorzio e la misura della solidarietà post affettiva”, in *Giustiziacivile.com.*, 25 July 2017; LUCCIOLI, G.: “La sentenza sull’assegno di divorzio. Il nuovo che sa tanto di vecchio”, in *Giudicedonna.it*, 1/2017, p. 1 ss.

intended as a lack of sufficient resources to maintain the standard of living enjoyed during the marriage, whereas, now, it is understood as lacking sufficient resources to guarantee independence or economic self-sufficiency.

The revolution is Copernican and allows, from my point of view, not only to implement the principles and fundamental values of our system of regulations, but above all to overcome aberrant situations that practice has put under the eyes of all. Spouses obliged to pay disproportionate divorce allowances in respect of other ex-spouses who, for the sole emulative purpose, deliberately chose not to work, lived in the shadows new sentimental stories, fictitiously renounced their maternal or paternal inheritance and adopted vulgar stratagems for the sole purpose of preserving the maintenance allowance, which they allowed, without any work commitment, to maintain, parasitically, the standard of living enjoyed in marriage.

To understand the reasons for this profound change and understand the reason for this ferment around the problem that involved the legislator, the judges of the Supreme Court and many of the Italian jurists, it is necessary briefly to retrace the history of this discipline.

II. THE INTERPRETATION OF THE EXPRESSION “MANCANZA DI MEZZI ADEGUATI”, CONTAINED IN THE ART. 5, PARAGRAPH 6, L. DIV., IN ITALIAN JURISPRUDENCE.

The history of this theme begins in 1987, when the law n. 74 modifies the art. 5, l. divorce². It is precisely because of this important change that the discipline of the c.d. Divorce check changes the physiognomy, since it is established, differently to the past, that the divorce allowance is due only when one of the spouses “does not have adequate means or in any case cannot obtain them for objective reasons”.

From here a serious and wide debate opens up, since it was necessary to establish what the legislator intended with this expression.

2 The text of the art. 5, paragraph 4, l. div., before the modification made by the art. 10 of the l. March 6, 1987, n. 74, was formulated as follows: con la sentenza che pronuncia lo scioglimento o la cessazione degli effetti civili del matrimonio, il tribunale dispone, tenuto conto delle condizioni economiche dei coniugi e delle ragioni della decisione, l'obbligo per uno dei coniugi di somministrare a favore dell'altro periodicamente un assegno in proporzione alle proprie sostanze e ai propri redditi. Nella determinazione di tale assegno il giudice tiene conto del contributo personale ed economico dato da ciascuno dei coniugi alla conduzione familiare ed alla formazione del patrimonio di entrambi. Su accordo delle parti la corresponsione può avvenire in un'unica soluzione”. After the modification made by the l. 74/1987, this discipline, now contained in paragraph 6 of the art. 5 l. div., has the following content: “Con la sentenza che pronuncia lo scioglimento o la cessazione degli effetti civili del matrimonio, il tribunale, tenuto conto delle condizioni dei coniugi, delle ragioni della decisione, del contributo personale ed economico dato da ciascuno alla conduzione familiare ed alla formazione del patrimonio di ciascuno o di quello comune, del reddito di entrambi, e valutati tutti i suddetti elementi anche in rapporto alla durata del matrimonio, dispone l'obbligo per un coniuge di somministrare periodicamente a favore dell'altro un assegno quando quest'ultimo non ha mezzi adeguati o comunque non può procurarseli per ragioni oggettive”.

At first glance, the change seemed to have a limiting function: whereas before the divorce allowance, taking into account the parameters indicated, seemed always and in any case due to the economically stronger spouse in favour of the economically weaker spouse, after the change made in 1987 it seems that the divorce is due only when a spouse does not have adequate means.

This more restrictive interpretation is substantially followed by one of the first decisions of the Court of legitimacy that expresses itself on the point. In 1990 the Court of Cassation³ affirms that the divorce allowance has a mere welfare function and therefore “la valutazione relativa all’adeguatezza dei mezzi economici del richiedente va [...] compiuta conformandola non al tenore di vita da questi goduto durante il matrimonio, ma ad un modello di vita ritenuto economicamente autonomo e dignitoso, quale, nei casi singoli, configurato dalla coscienza sociale”. Furthermore, the Cassation states that this interpretation should have served, on the one hand, to avoid dragging the consequences of assets connected or dependent on a definitively extinguished legal relationship and, on the other hand, to free the conjugal condition from exclusively patrimonial connotations, which could de-empowering the beneficiary, not encouraging him to realize his personality with his work⁴.

Although this interpretation was widely shared and in clear line with the changed discipline on the divorce, the cultural resistance to such a change of perspective was still strong. Although in 1990 the juridical and moral equality between spouses could be fully achieved, and although the path that allowed and facilitated women’s access to all public and private functions, historically reserved for men, was almost completely completed, the prejudice that the family model founded on marriage was to imply a labour sacrifice of the woman, historically considered the subject appointed to take care of the family, even if there were children, was still strong. Even though in 1990 it was already clear that this way of reasoning expressed a

3 See Cass., 2 March 1990, n. 1652, in *Dir. fam.*, 1990, I, p. 437 ss., with comment by NAPPI, G.: “Assegno divorzile e principio di solidarietà postconiugale”, and by DALL’ONGARO, F.: “L’art. 10 della legge 74/87 ed il dissidio sul concetto di mezzi adeguati”; in *Foro it.*, 1990, I, c. 1165 ss., with “Osservazioni” di MACARIO, F., and with comment by QUADRI, E.: “La Cassazione “rimedita” il problema dell’assegno di divorzio”; in *Giur. it.*, 1990, I, I, p. 925 ss., with comment by SOTGIU, S.: “Il concetto di “adeguatezza dei mezzi” nell’attribuzione dell’assegno di divorzio”; in *Corr. giur.*, 1990, p. 459 ss., with comment by CARBONE, V.: “Il “tenore di vita” del coniuge divorziato”; in *Giust. civ.*, 1990, I, p. 2390 ss., with comment by SPADAFORA, A.: “Il presupposto fondamentale per l’attribuzione dell’assegno di divorzile nell’ottica assistenzialistica della riforma del 1987”. See also BIANCA, C. M.: “L’assegno di divorzio in una recente sentenza della Cassazione”, in *Riv. dir. civ.*, 1990, II, p. 537 ss.

4 So, we read in the motivation of the sentence: questa conclusione aderisce, da un lato, ad una ricostruzione del sistema che non lascia spazio alla improbabile sopravvivenza di uno status economico connesso ad un rapporto personale definitivamente estinto (ma, se fosse vero il contrario, patrimonialmente indissolubile) e soddisfa, dall’altro, quelle esigenze solidaristiche che trovano non nel suo fittizio prolungamento, ma nella sua cessazione la propria ragione giustificatrice, liberando, ad un tempo, la condizione coniugale da connotazioni marcatamente patrimonialistiche, che, dando per acquisite e fornite di ultrattività posizioni, molte volte, di “pura rendita” (come si esprime la citata relazione parlamentare), oltre a stravolgere l’essenza del matrimonio, ne possono favorire la disgregazione, deresponsabilizzando il beneficiario, e, una volta che questa si sia verificata, assolverlo dall’obbligo di attivarsi per realizzare con le proprie risorse la sua personalità e acquisire, così, una dignità sociale effettiva e condivisa”.

social model completely outdated and inadequate compared to the contemporary system of order, which had already moved in order to determine a definitive overcoming, cannot hide that at that time there was a real phase of transition, which would certainly have informed all the experiences to come, but which, again, could not be extended to all past experiences. The Joint Sections of the Supreme Court, moving from this assumption, with the famous sentences n. 1490⁵ and 1492⁶ of 29 November 1990, change the orientation expressed by the Court of Cassation a few months ago⁷ and affirm the principle of law that guided our jurisprudence until May 2017. The divorce allowance is paid by the economically stronger spouse and to the advantage of the economically weaker spouse and must be such as to allow the last to maintain the same standard of living enjoyed during the marriage. In 2015 the Constitutional Court⁸ intervened on the subject, on the solicitation of the Court of Florence⁹. Although this decision has been considered and continues to be considered a sure confirmation of the orientation stated by the Joint Sections of the Cassation of 1990, I believe that we can offer a different reading.

On the merits, the Constitutional Court, far from affirming the correctness of an orientation wishing to attribute to the spouse a grant of such amount as to allow it to maintain the same standard of living enjoyed in marriage (in these terms the question of constitutional legitimacy was raised) , takes care to specify that

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- 5 Cass., SS.UU., 29 November 1990, n. 11490, in *Foro it.*, 1991, I, I, p. 67 ss., with comments by QUADRI, E.: "Assegno di divorzio: la mediazione delle sezioni unite", and by CARBONE, V.: "Urteildämmerung: una decisione crepuscolare (sull'assegno di divorzio)". In the sentence we read these words: l'accertamento del diritto di un coniuge alla somministrazione di un assegno periodico a carico dell'altro va compiuto mediante una duplice indagine, attinente all'*an* ed al *quantum*; il presupposto per concedere l'assegno è costituito dall'inadeguatezza dei mezzi del coniuge richiedente (tenendo conto non solo dei suoi redditi, ma anche dei cespiti patrimoniali e delle altre utilità di cui può disporre) a conservare un tenore di vita analogo a quello avuto in costanza di matrimonio, senza che sia necessario uno stato di bisogno dell'avente diritto, il quale può essere anche economicamente autosufficiente, rilevando l'apprezzabile deterioramento, in dipendenza del divorzio, delle condizioni economiche del medesimo che, in via di massima, devono essere ripristinate, in modo da ristabilire un certo equilibrio; la misura concreta dell'assegno - che ha carattere esclusivamente assistenziale - deve essere fissata in base alla valutazione ponderata e bilaterale dei criteri enunciati dalla legge (condizioni dei coniugi, ragioni della decisione, contributo personale ed economico dato da ciascuno alla conduzione familiare ed alla formazione del patrimonio di ciascuno o di quello comune, reddito di entrambi, durata del matrimonio) con riguardo al momento della pronuncia di divorzio; il giudice, purché ne dia sufficiente giustificazione, non è tenuto ad utilizzare tutti i suddetti criteri, anche in relazione alle deduzioni e richieste delle parti e dovrà valutarne in ogni caso l'influenza sulla misura dell'assegno stesso, che potrà anche essere escluso sulla base dell'incidenza negativa di uno o più di essi; se l'assegno di divorzio è richiesto soltanto sulla base del riconoscimento del contributo personale ed economico dato dal coniuge richiedente al patrimonio dell'altro, senza alcun riferimento all'inadeguatezza dei mezzi dello stesso richiedente (nel senso suddetto), l'assegno, avendo natura esclusivamente assistenziale, non potrà essere riconosciuto".
- 6 Cass., SS. UU., 29 November 1990, n. 11492, in *Giur. it.*, 1991, I, I, p. 1410 ss., with comment by COLELLA, P.: "La Cassazione riflette in tema di assegno divorzile".
- 7 Se note n. 3.
- 8 Corte cost., 11 February 2015, n. 11, in *Fam. dir.*, 2015, p. 537 ss., with comment by AL MUREDEN, E.: "Assegno divorzile, parametro del tenore di vita coniugale e principio di autoresponsabilità".
- 9 Trib. Firenze 22 May 2013, in *Fam. dir.*, 2014, p. 687, with comment by AL MUREDEN, E.: "Il parametro del tenore di vita coniugale nel "diritto vivente" in materia di assegno divorzile tra persistente validità, dubbi di legittimità costituzionale ed esigenze di revisione" and by MORRONE, A.: "Una questione di ragionevolezza: l'assegno divorzile e il criterio del medesimo tenore di vita".

this parameter only detects the maximum limit of the size of the grant, specifying that the competition of the other parameters indicated in the provision could imply that the spouse is not in any way¹⁰. In the method, I believe that this ruling cannot be shared, since the Court should not have declared the groundlessness of the question, but should have declared it inadmissible by order. Moreover, if we consider the quirkiness of the question of constitutional legitimacy, with which the Court has asked to assess compliance with the Constitution, not a provision of law, but a precise interpretation (which is not the only possible one) provision of the law had been made.

The real breakthrough is registered with the aforementioned sentence of the Cassation of 2017.

The principle of law that is affirmed is truly disruptive. This innovation could not be welcomed by everyone and, to the exact opposite, demonstrating a tendential conservative spirit of the jurists, there are many contrary reactions that attempt to undermine the foundation of the new line of interpretation.

The dispute comes from many parts: not only from some jurists of the chair, but also from some judges and many parliamentarians.

On the reactions provoked by the jurists of the chair I will try to say something further, trying to show that the objections raised are not all convincing and that this new position of interpretation is the only one consistent with the principles and fundamental values of our system of regulations. With the hope that these considerations can contribute to our current debate.

I would just like to mention the reactions to both some judges and some Members of Parliament, precisely to demonstrate the centrality of the issue.

10 In the sentence we read these words: "l'esistenza, presupposta dal rimettente, di un 'diritto vivente' secondo cui l'assegno divorzile ex art. 5, sesto comma, della L. n. 898 del 1970 "deve necessariamente garantire al coniuge economicamente più debole il medesimo tenore di vita goduto in costanza di matrimonio" non trova, infatti, riscontro nella giurisprudenza del giudice della nomofilachia (che costituisce il principale formante del diritto vivente), secondo la quale, viceversa, il tenore di vita goduto in costanza di matrimonio non costituisce l'unico parametro di riferimento ai fini della statuizione sull'assegno divorzile. La Corte di cassazione, in sede di esegesi della normativa impugnata, ha anche di recente, in tal senso, appunto, ribadito il proprio 'consolidato orientamento', secondo il quale il parametro del 'tenore di vita goduto in costanza di matrimonio' rileva, bensì, per determinare 'in astratto ... il tetto massimo della misura dell'assegno' (in termini di tendenziale adeguatezza al fine del mantenimento del tenore di vita pregresso), ma, 'in concreto', quel parametro concorre, e va poi bilanciato, caso per caso, con tutti gli altri criteri indicati nello stesso denunciato art. 5. Tali criteri (condizione e reddito dei coniugi, contributo personale ed economico dato da ciascuno alla formazione del patrimonio comune, durata del matrimonio, ragioni della decisione) 'agiscono come fattori di moderazione e diminuzione della somma considerata in astratto' e possono 'valere anche ad azzerarla' (così testualmente, da ultimo, Corte di cassazione, prima sezione civile, sentenza 5 febbraio 2014, n. 2546; in senso conforme, sentenze 28 ottobre 2013, n. 24252; 21 ottobre 2013, n. 23797; 12 luglio 2007, n. 15611; 22 agosto 2006, n. 18241; 19 marzo 2003, n. 4040, ex plurimis)".

The 2017 decision is taken by the second civil section of the Supreme Court. Needless to say that after this decision many other issues have been brought to the attention of our Courts and, in particular, the Courts, to which spouses obliged to pay particularly expensive divorce allowances have immediately requested the revision of the provision, precisely in view of the orientation expressed by the Court of Cassation in May 2017. From that moment not only do the requests for revision of the previously established economic conditions flourish with regard to already closed divorce procedures, but other and numerous disputes concerning issues related to the divorce allowance continue to populate the roles of judges of the Cassation. The first civil section, invested with certain issues, is not convinced of the new orientation expressed by the second section, to the point that in a controversy brought to its attention decides to put the matter back to the Joint Sections of the Supreme Court, so that the topic, considered of utmost importance, be decided by a ruling that should be the fixed point. The Joint Sections of the Court of Cassation discussed the matter at the public hearing of April 11, 2018. At the time when this work is dismissed, it expects to know what the decision will be. Of course, I hope that it can confirm the most recent speech and I hope that these reflections can contribute to the debate¹¹.

Under a different profile, the subject has also interested some Italian politicians, who, worried about the new jurisprudential orientation, and animated by the intention to preserve that old interpretation have proposed an amendment to the law. In the XVII legislature, on July 27, 2017, some parliamentarians presented the proposed law n. 4605, which rewrites the art. 5 l. div., to exclude the new

11 At the time of proofreading of this paper the sentence of the joint sections of the Court of Cassation (11 July 2018, No. 18287) intervened. This ruling, to overcome the interpretative contrast that had arisen in our jurisprudence, indicated the interpretation to be followed. The Supreme Court does not choose either the interpretation originally adopted in 1990, nor the new interpretation of 2017. It proposes, in fact, a different and new interpretation that, fortunately, seems much closer to the last interpretation of 2017, although it reduces the rigor. According to the Court of Cassation, the expression "lack of adequate means" should be understood not as a mere economic self-sufficiency of one of the spouses, but as a more complex judgment, taking into account a multiplicity of parameters. In particular, starting from the comparison of the economic-patrimonial conditions of the two spouses, it is necessary to consider not only the achievement of a degree of economic autonomy (such as to guarantee self-sufficiency, according to an abstract parameter) but, in practice, a level of income adequate to the contribution provided in the realization of family life (taking into account the professional and economic expectations eventually sacrificed, the duration of the marriage and the age of the applicant). Therefore, the criterion of adequacy also has a prognostic content with respect to the concrete possibility of recovering the professional and economic prejudice deriving from the assumption of a different commitment. From this specific point of view, the age factor of the applicant has undoubted importance to verify the concrete possibility of an adequate relocation to the labor market. In this perspective, the Supreme Court exceeds the original interpretation of art. 5, paragraph 6, l. div., which indicates that there is no distinction between the criteria for determining whether the divorce allowance is due and the criteria for determining the extent of the allowance. The lack of adequate resources is not a fact that has to be assessed by taking into consideration only the economic condition of the spouse requesting the allowance, but the economic conditions of both spouses, the personal and economic contribution of each person to family management and training of the common heritage and of each, the income of both and the duration of the marriage. This interpretative solution, even if it seems different from the one proposed in 2017, is in line with that. Compared to the 2017 decision, try to reduce rigidity and introduce corrective mechanisms, which take into account the duration of the marriage and the contribution of each spouse to the formation of the common heritage and each one.

interpretation of the law and to restore the old interpretation of the rule proposed by the Supreme Court of Cassation in 1990¹². The theme is, therefore, so worrying that some MPs have even thought of overcoming any interpretative problem with a new amendment of the law.

III. THE REASONS SUPPORTING THE NEW INTERPRETATION.

The major risk to which this new interpretive approach is exposed is twofold, since its detractors try to undermine the foundation, on one side, making a tendentious reading that engenders the suspicion that one wants to deprive the weak divorced spouse of any protection, for another verse, hypothesizing that this new interpretation is strongly contrary to the principles and values of our order system and, above all, in disregard of the principle of solidarity.

Both attempts do not appear to me to be on the mark and, to the exact opposite, constitute an important opportunity to confirm the reasonableness¹³ of this decision and the need for this line of exegesis to be confirmed and pursued in a firm and convinced manner.

Both the two profiles must be analysed.

Generating the suspicion that this interpretation deprives or seriously weakens the protection of the weaker spouse is, indeed, an out of work. The new line of interpretation has, rather, the purpose of protecting the really needy spouse, avoiding transforming, as had happened, the discipline on the divorce allowance into a sort of exaggerated and disproportionate matrimonial penal clause.

12 Article 1 of this bill contains this text: 1. Il sesto comma dell'art. 5 della legge 1° December 1970, n. 898, è sostituito dal seguente: "Con la sentenza che pronuncia lo scioglimento o la cessazione degli effetti civili del matrimonio, il tribunale dispone l'attribuzione di un assegno a favore di un coniuge, destinato a compensare, per quanto possibile, la disparità che lo scioglimento o la cessazione degli effetti del matrimonio crea nelle condizioni di vita dei coniugi". 2. Dopo il sesto comma dell'art. 5 della legge 1 December 1970, n. 898, sono inseriti i seguenti: "Nella determinazione dell'assegno il tribunale valuta le condizioni economiche in cui i coniugi vengono a trovarsi a seguito della fine del matrimonio; le ragioni dello scioglimento o della cessazione degli effetti civili del matrimonio: la durata del matrimonio; il contributo personale ed economico dato da ciascuno alla conduzione familiare e alla formazione del patrimonio di ciascuno e di quello comune; il reddito di entrambi; l'impegno di cura personale di figli comuni minori o disabili, assunto dall'uno o dall'altro coniuge; la ridotta capacità reddituale dovuta a ragioni oggettive; la mancanza di un'adeguata formazione professionale quale conseguenza dell'adempimento di doveri coniugali. Tenuto conto di tutte le circostanze il tribunale può predeterminare la durata dell'assegno nei casi in cui la ridotta capacità reddituale del richiedente sia dovuta a ragioni contingenti o comunque superabili. L'assegno non è dovuto nel caso in cui il matrimonio sia cessato o sciolto per violazione, da parte del richiedente l'assegno, degli obblighi coniugali".

13 The expression "reasonableness" is used in a technical sense, that is, to indicate an interpretation made in compliance with the principles and normative values in force, in the awareness that the balancing of principles cannot be performed outside the hierarchy of values expressed by the system. For all, see PERLINGIERI, G.: *Profili applicativi della ragionevolezza nel diritto civile*, Napoli, 2015, p. I ss., to which reference should be made for further references to literature and jurisprudence.

According to the new address, it is necessary to ascertain, in order to establish whether the divorce allowance is due or not, if the spouse is economically self-sufficient, disregarding the standard of living that the spouses may have enjoyed during the marriage, by carrying out only a check on the actual, overall and overall economic condition of the applicant spouse. The spouse who is not economically self-sufficient continues to keep the right to the divorce agreement in full respect of the principle of solidarity. However, this right is lost by the economically self-sufficient spouse, even if it has not been written to allow it to maintain the same standard of living enjoyed during the marriage, and above all what seems to me very reasonable, the spouse who, in practice, it is economically not self-sufficient, but whose condition of economic self-sufficiency depends on a deliberate choice of the same subject, that is the fruit of his own free determination.

Moreover, it is worth considering that the concept of independence and economic self-sufficiency does not lend itself to being considered a rigid mechanism with respect to which an abstract and purely syllogistic evaluation is possible, but, to the contrary, an assessment that, as the Cassation itself has been able to clarify, is able to reconcile the particularities of the individual concrete case and to offer adequate, coherent and congruent responses to the interests involved.

Economic self-sufficiency becomes itself a real general clause, offering itself as a criterion of elastic evaluation, which refers to a plurality of other evaluations¹⁴.

In this perspective, economic self-sufficiency is not only a fundamental and indispensable tool, since it allows the “defettibilità”¹⁵ of the rules and the balancing of the principles¹⁶, but also a tool for checking the judicial decision, because it allows to verify the correctness of the decision and the choice made in order to concretize, from time to time, the content of this formula. People who hold the same and identical income and have the same composition of their assets, could, from time to time, be considered economically self-sufficient, now economically not self-sufficient depending on other important variables that the Cassation must

14 In the Italian legal system, characterized by a hierarchy and complexity of sources of production, it must be excluded that the interpreter can postpone and draw on social evaluations and norms or moral norms, or on individual consciences and convictions, and affirm that he should draw exclusively on the legal system. That is to say, the complex of principles that base our legal system and which not only constitute the sole guarantee of pluralism and democracy, but also give the general clauses a normative meaning. The principles and normative values of an order, which express the project aimed at society, if, on the one hand, guarantee the ability of the legal system to adapt to the socio-economic changes of reality and to offer a solution to the concrete case, which is adequate and reasonable, on the other hand, allow the controllability of the judicial decision, since they allow verification, on the basis of the regulatory system, when the judge has correctly carried out the activity of concretizing the general clause and when not.

15 CHIASSONI, P.: “La defettibilità nel diritto”, in *Materiali per una storia della cultura giuridica*, 2008, pp. 491-494, 498.

16 ALEXY, R.: “Diritti fondamentali, bilanciamento e razionalità”, in *Ars interpretandi*, 2002, p. 131 ss., to which we owe the overcoming of the objections to the balancing theory raised by HABERMAS, J.: *Fatti e norme. Contributi a una teoria discorsiva del diritto e della democrazia* (1992), trad. it. di L. Ceppa Milano, 1996.

have had regard: age, the labour market, sex, the cost of living and, I would add, the possible placement of minor children¹⁷.

This new direction, therefore, far from wanting to deprive the divorced spouse of any kind of protection intends to entrust the divorce to the real function of welfare and, above all, aims to overcome any application distortion to which the previous reading had led, preventing the marriage from being transformed, as the experience of our last years tells, in an instrument of unjustified parasitic enrichment.

From a different point of view, it seems to me, contrary to the contrary view¹⁸, that this ruling does not create any short circuit between the determinations relative to the an and those relating to the quantum of the allowance, since the two profiles continue to remain distinct, without that linking the lack of adequate means to a situation of economic self-sufficiency, undermining the determinative criteria of the quantum, or weakening its hermeneutical value, or even leading to the outcome to which it would have accompanied the out-dated jurisprudential interpretation¹⁹.

We come to the second question.

The idea that a spouse is entitled to the divorce allowance when he has no income that allows him to maintain the same standard of living enjoyed in marriage is strongly dissonant with the informative principles of our system of ordinances and, above all, offers a picture of the marriage relationship which is no longer

17 This interpretation allows us to overcome the concerns expressed by LUCCIOLI, G.: "La sentenza sull'assegno di divorzio", cit., p. 7, il principio di auto responsabilità economica invocato esige che il soggetto debole si dia da fare, recuperi il tempo perduto, si cerchi una qualsiasi occupazione, anche se avanti negli anni, anche se privo di qualsiasi professionalità da spendere in un mercato del lavoro così avaro di opportunità per tutti, e soprattutto per chi ha poco da offrire. Il distacco dalla realtà del nostro Paese e l'adesione ideologica ad un principio astratto di autosufficienza ha indotto la Corte di Cassazione ad una opzione interpretativa che certamente peggiora la condizione sociale delle donne che (forse) intendeva promuovere, aprendo nuovi fronti di contrasto all' interno della famiglia".

18 For all, SPADAFORA, A.: "Il nuovo assegno di divorzio e la misura della solidarietà post affettiva", cit., p. 11 ss.; CASABURI, G.: "Tenore di vita ed assegno divorzile (e di separazione): c'è qualcosa di nuovo oggi in Cassazione, anzi di antico", cit., c. 1898. A milder position is proposed by AL MUREDEN, E.: "L'assegno divorzile tra autoresponsabilità e solidarietà post-coniugale", cit., p. 645, who speaks of a weakening of the criteria indicated in the first part of art. 5, paragraph 6, l. div.

19 The new interpretation seems to me to be perfectly consistent also with the criteria that must be used to determine the size of the allowance, if it is due. If we only have regard to these criteria it is easy to see that they lend themselves, even better than before, to an assessment capable of taking into account the particularities of the individual case. It must, in fact, have regard to the conditions of the spouses, the reasons for the decision, the personal and economic contribution given by each to the family management and the formation of the patrimony of each or the common one, to the income of both, comparing all these parameters to the duration of marriage. The idea that the divorce allowance should be used to compensate the economically weaker spouse has fallen, it seems to me that all these parameters not only do not conflict with the new jurisprudential orientation, but are even in line with effective coherence. Such criteria will allow, in fact, to establish what should be the measure of the divorce allowance that a spouse must correspond to the other that is not economically self-sufficient, globally evaluating every single concrete situation and avoiding any kind of abstraction of reasoning.

responsive to the current culture of our country, that is, to the system of law, since law is culture²⁰.

An interpretation that would assign to the divorced economically self-sufficient spouse a divorce allowance, when it has no income to maintain the same standard of living enjoyed during marriage, connects to a non-shared idea of marital social education and to a non-shared idea of the concept of solidarity, which ends up offering a reading of the last totally dissociated and disconnected from personalism.

The relationship between social and personal formation is completely redesigned by our Constitution. One can no longer think of a social formation that is above the individual (as has historically happened), but of social formations, which are at the exclusive service of the person. Social formation receives protection not as such, but as it becomes a place for the free realization and full development of the human personality. There can never be group supremacy over the individual. According to this perspective, family law deserves to be fully re-read, in the awareness that it must be functionalized to the realization of the human person and his dignity. On the other hand, we often offer reductive readings, tiredly anchored to the idea of marriage as the only possible paradigm of the family and as a social formation waiting to be kept at any cost. The idea that the divorce allowance had a compensatory and compensatory function (an idea that came to an end only in 1987, following the reform of the provision in article 5, l. Div.) Is exactly in line with that idea of marriage and it is the reason why the new normative line (clearly emerged in the amended text of article 5, paragraph 6, l. div.) struggles to make its way, leading to the interpretation offered in 1990 by the Joint Sections of the Supreme Court.

From a different point of view, the principle of solidarity cannot be exclusively reduced within the limits of economic support, because it has, of necessity, a much wider and much more ideal vocation. The principle of solidarity, which, of course, informs our system of regulations, is cooperation and equality in the affirmation of the fundamental rights of all. Solidarity is a function of the person and the opposite can never be the case. Solidarity and personalism cannot be separated, so that it is necessary to make it an integrated reading, in order to grasp the sense of these two identifying values of our legal system.

20 See FALZEA, A.: *Introduzione alle scienze giuridiche. Il concetto di diritto*, 5^a ed., Milano, 1996, p. 396 ss.; GROSSI, P.: "La formazione del giurista e l'esigenza di un odierno ripensamento metodologico", in *Quad. fiorentini*, 2003, p. 36; PERLINGIERI, P.: "Dittatura del relativismo e tirannia dei valori", in *Fatto e diritto. L'ordinamento tra realtà e norma*, a cura di TASSO, T.G., Napoli, 2011, p. 136 ss.; *Id.*, "Primato della politica e diritto dei giuristi", in *Riv. giur. Mol. Sannio*, 2014, p. 120; RODOTÀ, S.: "Ideologie e tecniche della riforma del diritto civile", in *Riv. dir. comm.*, 1967, I, p. 83 ss. e ora in *Le prolusioni dei civilisti*, vol. I (1940-1979), Napoli, 2012, p. 3091 ss.; DE STEFANO, R.: *Per un'etica sociale della cultura*, I, *Le basi filosofiche dell'umanismo moderno*, Milano 1954; *Id.*, *Per un'etica sociale della cultura*, II, *La cultura e l'uomo*, Milano, 1963.

At the top of our legal system is the dignity of the human person, whose fulfilment is complete when everyone is able to contribute to the material and spiritual progress of society. Constitutional solidarity, therefore, is certainly compatible with a perspective aimed at attributing a divorce to the divorce agreement purely assistance, but absolutely contrary to assigning a compensatory function or, even worse, compensation.

The interpretation of the Court of Cassation of 2017, which has the merit of having handed over to the divorce agreement an exclusively welfare dimension, seems to me to be in perfect harmony with the principles and normative values in force.

Obviously, we do not want to exclude the importance of the commitment that one of the spouses may have lavished on family life, especially if it has been a long marriage from which were born children, middle term, who have become adults and economically self-sufficient, but we must avoid any transformation of marriage into a sort of economic bet for the future, transforming the divorce allowance, as had happened in recent times, into a veritable and exuding marriage penalty clause.

Furthermore, it should be noted that the consolidation of this interpretation could, undoubtedly, lead to a contraction of the use of premarital agreements²¹ or para-marital agreements, considering that most of them are designed to escape the serious economic consequences due to the interpretation of the divorce law, that is to mitigate the rigor of decisions that could have assigned to the spouse a weak a divorce check natural life during excessive amount²².

21 It is sufficient to think about the famous decision of Cass., 21 December 2012, n. 23713, in *Leggi d'Italia*, which admitted the validity of a contract stipulated between two nubendi, on the assumption that the failure of the marriage was not considered as genetic cause of the agreement, but was degraded to a mere conditional event. The Court affirms, confirming its restrictive stance, that the one in question was an agreement between the parties, free expression of their negotiating autonomy, unrelated to the category of premarital agreements in view of divorce (which intend to regulate the entire economic set-up between spouses or a relevant profile) and characterized by proportional benefits and counter-claims. In a restrictive sense, see, lastly, Cass., 30 January 2017, n. 2224, in *Notariato*, 2017, p. 143, which states that gli accordi con i quali i coniugi fissano, in sede di separazione, il regime giuridico-patrimoniale in vista di un futuro ed eventuale divorzio sono invalidi per illiceità della causa, perché stipulati in violazione del principio fondamentale di radicale indisponibilità dei diritti in materia matrimoniale, espresso dall'art. 160 c.c. Pertanto, di tali accordi non può tenersi conto non solo quando limitino o addirittura escludano il diritto del coniuge economicamente più debole al conseguimento di quanto è necessario per soddisfare le esigenze della vita, ma anche quando soddisfino pienamente dette esigenze, per il rilievo che una preventiva pattuizione -specie se allettante e condizionata alla non opposizione al divorzio- potrebbe determinare il consenso alla dichiarazione della cessazione degli effetti civili del matrimonio. La disposizione dell'art. 5, comma 8, l. div., -a norma del quale, su accordo delle parti, la corresponsione dell'assegno divorzile può avvenire in un'unica soluzione, ove ritenuta equa dal tribunale, senza che si possa, in tal caso, proporre alcuna successiva domanda a contenuto economico-, non è applicabile al di fuori del giudizio di divorzio, e gli accordi di separazione, dovendo essere interpretati secundum ius, non possono implicare rinuncia all'assegno di divorzio».

22 Considers the decision of Cassation of 2017 an important stage for a recognition of the autonomy of the regulatory capital of the family crisis SPADAFORA, A.: "Il nuovo assegno di divorzio e la misura della solidarietà post affettiva", cit., p. 16 ss., spec. p. 19, si delineano, allo stato, le premesse di un profondo ripensamento della materia, nel senso della possibile apertura -non più aprioristicamente rinnegabile- verso una

In conclusion, it is precisely the principle of equality of treatment between spouses that requires us to consider the interpretation offered by the Court of Cassation of 2017 as the only truly capable of being in line with the principles and normative values in force, because it is the one that allows to restore marriage as a constitutive act of social formation, characterized by a free and responsible choice of its members. Therefore, it is not a matter of overcoming post-conjugal solidarity, but of attributing to it a meaning that is truly consistent with the principles of solidarity and personalism, and that precisely in the light of the last one, it gives just importance to the self-responsibility of the person, whose dignity is the primary and apical value of Italian-European law²³.

prefigurazione degli equilibri economici attinenti alla crisi familiare anticipata già alla fase fisiologica del rapporto, o, ancor prima, a quella della contrazione del vincolo, secondo una tendenza ben salda presso altri ordinamenti, che riconoscono piena legittimità agli accordi prematrimoniali».

- 23 As I said in note n. 11, 11 July 2018 the sentence n. 18287 of the Court of Cassation, established the new line of interpretation. Although the Court of Cassation has not exactly confirmed the interpretation made in 2017, I do not think we should be very critical of this new interpretation. The possibility of overcoming the literal data of the normative provision, in the part in which it seemed to distinguish between the criteria for determining whether the divorce allowance was due and the criteria for determining the size of divorce allowance, must be appreciated. The decision to make this assessment as consistent as possible with respect to the specific case must be appreciated. On the other hand, one can criticize the idea that the free choice of one of the spouses to devote themselves primarily to caring for the family is considered a decisive factor in determining whether or not the divorce allowance is due. It is worth considering that the egalitarian regime of relations between spouses and the structure of the modern family should lead to the exclusion that there is only one spouse involved in the care of the family. On the other hand, if a spouse, despite having dedicated significant assistance to the family, has managed to maintain his economic independence, it is not clear why he should receive a divorce allowance. To give an affirmative answer, must pass the idea (on which I'm skeptical and critical) that the other spouse must compensate the care that the first has offered free to the family. It must, therefore, pass the idea that family care is an activity that must be remunerated in the event of a family crisis and that the divorce allowance has a compensatory function.

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