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STATE V. SOCIETY : LEGISLATION, LEGAL CULTURE AND FAMILY LAW IN ITALY

Antonello Miranda[1]

Résumé

À mon avis, le droit de la famille représente le test décisif de la relation entre le droit et la « culture juridique » d'un peuple. En outre, c'est le domaine où le delta entre les combinaisons de la loi dans les livres *avec la loi* en action *est le plus grand. À travers cet article, j'ai pour ambition de démontrer comment l'évolution culturelle, sociale et politico-économique d'une société donnée (en particulier la société italienne contemporaine et plus généralement les sociétés européennes) accentue la déconnexion avec le « droit positif » et comment le « droit de la famille », malgré ses aspects « universels », est si intimement lié à la société qu'il représente le pivot de la culture juridique reflétant les idées, les traditions, les religions, l'approche culturelle et politique des peuples vivant dans le même pays. Il peut être intéressant, par exemple, de souligner la force et l'ampleur de l'évolution, au cours du dernier demi-siècle, de la « famille méditerranéenne » à la lumière de l'influence du modèle de la « famille nordique ou continentale » et de la croissance de l'économie et du bien-être ainsi que du développement de nouvelles pensées politiques et scientifiques. Un autre point difficile dans le droit de la famille contemporain est l'émergence d'une approche multicommunautaire même dans des pays, comme l'Italie, qui dans le passé n'étaient pas touchés par le problème de l'immigration et la croissance de fortes communautés étrangères. Cela signifie également qu'il est nécessaire de comprendre s'il existe une « contamination » entre les différentes règles et si l'État doit ou non s'immiscer afin de « défendre » les traditions « nationales » ou s'il peut admettre une sorte de corps de règles parallèles ou du moins admettre une « saignée » des règles du droit de la famille. Une fois encore, il y a un conflit entre les « idées » et l' « ordre juridique » du législateur (et des autorités) et la réalité, c'est-à-dire le droit en action. A mon avis, en analysant ces aspects, grâce à une approche et une méthodologie « interdisciplinaires », il devient plus facile de comprendre, à travers le droit de la famille, l'identité culturelle des différents groupes sociaux, en évaluant les possibilités de dialogue ou de « rejet » des différents modèles et le possible dépassement de la dimension positiviste. Le rôle du juriste, surtout dans le domaine du droit de la famille, devrait être d'observer la réalité et d'interpréter les règles, et non d'utiliser les règles pour forcer la réalité.*

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Mots clés *: Multi-communautarisme ; Multiculturalisme ; Droit de la famille ; Ordre juridique*

Abstract

In my opinion Family Law represents the litmus test of the setting of the relationship between the law and the "legal culture" of a People. Furthermore this is the field where the delta between the combinations of the law in the books with the law in action is wider.
With this paper I intend to demonstrate, how the cultural, social and political-economic evolution of a given society (in particular the contemporary Italian society and more generally the European societies) accentuates the disconnection with "positive law" and how "family law", despite having "universal" aspects, is so intimately linked to society so that it represents the fulcrum of legal culture reflecting the ideas, the traditions, the religions the cultural and political approach of the peoples living in the same Country. It may be interesting, for instance, outline how strong and wide had been the evolution, in the last half century, of the "Mediterranean Family" in the light of the influence of the "Nordic or Continental Family" model and the growing of economic and welfare as the development of new political and scientific thoughts.
One more difficult point in contemporary Family Law is the emerging of multi-communitarian approach even in Countries, like Italy, in the past not touched by the problem of immigration and the growth of strong foreign communities. This means also the needs to understand if there is a "contamination" between different rules and if the State should or not intrude in order to "defend" the "national" traditions or may admit a kind of parallel body of rules or at least admit a "bleeding" of the rules of Family Law. Again there is a clash between what is the "ideas" and "legal order" of the legislator (and the Authorities) and the reality, i.e. the law in action.
In my opinion analysing this aspects, thanks to an "interdisciplinary" approach and methodology, it becomes easier to understand, through family law, the cultural identity of different social groups, evaluating the possibilities of dialogue or "rejection" of different models and the possible overcoming of the positivist dimension. The role of the jurist, especially in the field of Family Law should be to observe the reality and to construe the rules, not to use the rules to force the reality.

Keywords*: Multicommunitarism; Multiculturalism; Family Law; Legal Order*

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Introduction

When the theme of the relation between State and law in "civil law" countries is addressed, it echoes the mantra of "positivity" and the dogma of the supremacy of the (statutory) law and therefore of the State over Law and Society.

Although the "detachment" between operational reality and the declamation of the laws is clear to comparatists (in particular the Italian School of Comparative Law), actually there is also a "centralisation" of studies, research and proposals that mainly concern the three "axes" of civil law: Contract, Property, Civil Liability. For example, on these three axes the idea of the "Common Core of European Law" has moved, assuming that on these same axes, being easier to find common rules, it was possible to draw a common frame of reference.

Rarely, on the contrary, an attempt has been made to study family law on the assumption that the basic structure, depending from the evolution of the society and from endogenous factors, was substantially unchangeable on the one hand and too "personal" on the other, to be worthy of consideration. The E.U. itself with the CEFL has so far produced a large number of studies, but they are circumscribed to looking at the different realities proceeding from afar with the eye of the national legislator.

In my opinion, instead, Family Law represents the litmus test of the setting of the relationship between the law and the "legal culture" of a People. Furthermore this is the field where the delta between the combinations of the law in the books with the law in action is wider.

My paper intends to demonstrate, how the cultural, social and political-economic evolution of a given society (in particular the contemporary Italian society and more generally the European societies) accentuates the disconnection with "positive law" and how "family law", despite having "universal" aspects, is so intimately linked to society so that it represents the fulcrum of legal culture reflecting the ideas, the traditions, the religions the cultural and political approach of the peoples living in the same Country. It may be interesting, for instance, outline how strong and wide had been the evolution, in the last half century, of the “Mediterranean Family” in the light of

the influence of the "Nordic or Continental Family" model and the growing of economic and welfare as the development of new political and scientific thoughts.

I refer to a research of around 35 years ago that outlined a distinction of family models in three groups: the "Nordic model" based on the strong separation between legal rules and religious aspects as for instance in the UK or in Norway, Sweden, Finland, Denmark and more in general, in the "Nordic Countries of Europe", with a great numbers of divorced couples, mono-personal families, de facto couples, LGTB couples etc.; the "Mediterranean Model" strongly influenced by "religious rules" and "old customary rules" with a strong pre-eminence of married couples (according to the religious rite), rare divorces, very few de facto couples, etc. as in Italy, Spain, Malta, Portugal and … Ireland and Poland (influenced by Catholic Church); the "Central Model" practically in the middle of the two extreme models considered, with a mix of "secularism" and customary-religious rules, with a mix of married couples and de-facto couples, etc., as in France, Belgium, Holland, Germany.

After 35 years I can say with no fear of contradiction that this distinction is no longer valid and has absolutely been superseded by factual reality: the "Italian model" in no longer far from the Central Model or the Nordic Model. Of course, there are still some differences: but these are no longer due to socio-cultural differences, which have all but disappeared or have been homologated with the fall of borders (whether physical, legal, electronic or cultural) as a result of 'globalisation', but rather to the different approach between 'Common Law' and 'Civil Law' countries. In the former, even in the field of family law, a sort of 'primacy' of self-determination and autonomy of private persons is favoured, with the most concrete residual intervention to protect collective and superior interests; in the latter, on the contrary, there is a general and abstract 'regulation' strongly influenced by politics, to impose choices and solutions even if unrelated to reality.

One more difficult point in contemporary Family Law is the emerging of multi-communitarian approach even in Countries, like Italy, in the past not touched by the problem of immigration and the growth of strong foreign communities. This means also the needs to understand if there is a "contamination" between different rules and if the State should or not intrude

in order to "defend" the "national" traditions or may admit a kind of parallel body of rules or at least admit a "bleeding" of the rules of Family Law. Again there is a clash between what is the "ideas" and "legal order" of the legislator (and the Authorities) and the reality, i.e. the law in action.

In my opinion analysing this aspects, thanks to an "interdisciplinary" approach and methodology (i.e. using statistics or/and socio-economic and political outfits[2]) it becomes easier to understand, through family law, the cultural identity of different social groups, evaluating the possibilities of dialogue or "rejection" of different models and the possible overcoming of the positivist dimension. The role of the jurist[3], especially in the field of Family Law should be to observe the reality and to construe the rules, not to use the rules to force the reality.

I. MULTICULTURALISM VERSUS MULTICOMMUNITARISM. THE GROWING "MICRO"-CLAIMS

When we speak about the relation between multiculturalism, way of life and family law we should take into account not only the different meanings of the concept of "multiculturalism" but also the fundamental difference between "common law system" and "civil law system" and the difference between "criminal law and private law". Furthermore we should have in mind the complexity of "family law" where the same term "Family" is difficult to define.Multiculturalism (as "family") is a "polysemous" or "multisemic" word.

The term multiculturalism came into common use around the end of the Eighties of the last Century and it is to identify a society where several cultures, even very different one from the other, coexist, respecting (maybe) each other. Despite interchanges, each culture retains the peculiarities of its own group. Minorities, in particular, maintain their right to exist, without homologation or merging with a predominant culture thereby losing their identity. The term

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[2] See: J. Ehmer, *A Historical Perspective on Family Change in Europe*, in N. F. Schneider and M. Kreyenfeld (Ed.), *Research Handbook on the Sociology of the Family*, ElgaronLine, 2021 p. 143 ss.; B. Nauck, *Cross-cultural perspectives in Family Research*, *ivi*, p. 42 ss.; T. Sobotka and C. Berghammer, *Demography of Family Change in Europe*, *ivi*, p. 162 ss.

[3] A. Watson, *Society and Legal Change*, Temple University Press, 2001; See also: A. Diduck, *Law's Families*, Butterworths, 2003. Of course the main reference speaking about the relations between culture, politics and family law is: D. Bradley, *Family Law and Political Culture*, Sweet and Maxwell, 1996.

multiculturalism, therefore, means the freedom of individuals to be able to choose their own lifestyle according to their own socio-cultural background as opposed to multicommunitarianism, that is the belonging and total fidelity of an individual to a certain community and culture[4].

Both definitions, however, refer to different ethnic groups living in the same territory, often creating a confusion of meaning between the two concepts.

Starting from the concept of "multicultural" society – and considering in particular the Italian contemporary society – in my opinion a distinction must be made between exogenous and endogenous multiculturalism.

Usually the exogenous multiculturalism has been defined (in a tautological way) as "the cohesion of different cultures placed together in a same society. It is not therefore a question of plurality of interests, of different peculiarities, but of cultures, or rather of symbolic universes that give meaning to the choices and plans of life of each one" [5]. In this sense it is similar to the concept of "multicommunitarianism" depending by the strength and the wideness of the influence of a certain "social community" or ethnic group on the others or on the pre-existent dominating group. In Italy this aspect is nowadays apparently more evident than in the past as consequence of the common "perception" of the immigration phenomenon (and in a sort of return to the past of the "atavistic fear" of the invasion and domination by foreigners or "aliens")[6].

From a "juridical" point of view, however, we must also admit that as much as we can "isolate" the legal system and everyone can boast a dose of "own" autochthonous legal tradition in reality we cannot say that today there really exists a "pure" system. In my opinion, but it is a matter of fact, all the legal

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[4] A interesting point of view on multiculturalism and multicommunitarianism, with a clear analysys of the descending problems in modern societies can be read in: W. KYMLICKA, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, 1996. But see also: Z. BAUMAN, *In Search of Politics, Cambridge*, 2006

[5] A. Bosi (edited by), *Città e Civiltà. Nuove frontiere di Cittadinanza*, Milano, 2009

[6] The "fear" of a invasion and the fear of "strangers" is worldwide common: the idea of "Gaijin" or "Barbarous" or "Alien" is a consequence of the fear to lose the identity of the group (and of course the privilege and the power of control of the society). Until few years ago (but in some part of the country until now) in Italy has been common to reproach children saying that they should be quiet otherwise the "black man" would have come to pick them up. I understand that is "politically incorrect" but it is the reality of the situation and this give us the measure of the phenomenon.

systems (and societies) are "hybrids" in the sense that they have however been contaminated by contact with others: a bit like the "Cyborgs" that are not (entirely) robots but are (also and still) human depending on the amount of grafts they have received.

If this is true, each "community" even if "dominant" lost its "purity" because with a rebound effect, has been influenced by what it has influenced in a sort of infinite loop.

This is a historical and concrete fact no society or legal system escapes from. However, it must also be admitted that the phenomenon has become very accentuated in modern times and, keeping pace with time, the disappearance of the "power" of states/nations or with the decay of some states/nations.

The phenomenon is, in fact, twofold: on the one hand, there is the hybridization and contamination of all systems due to technological, political, economic and social changes; on the other hand, there is a real loss of decision-making and representative power of the Nation that can no longer control its borders and that can no longer exert its "power", not even the legislative one in an absolute and sovereign way.

A few years ago, Stefano Rodotà told us about the existence of a "set of travel rights" i.e. the possibility for individuals to carry in their suitcases some "rights" wherever they went. This thesis seems to illustrate contemporary Western jurists' understanding of the notion of permeability or mobility of borders as well as of the idea of the relative impotence of State powers and of the "futility" of national laws[7].

Nowadays the phenomenon is even more accentuated than in the past, indeed it has grown exponentially: the internet has literally "skip" frontiers, technological development allows for a easy mobility that was previously unimaginable, the circulation of "communication" is also practically limitless, economic development and economic de-growth as local political choices create unexpected situations, above all uncontrolled and uncontrollable. There is enough to understand how "statutory law" but also entire legal systems no longer have "control" over the recipients in a sort of "orgy of globalization" that

[7] See: A. Miranda, Tra Moglie e Marito non mettere il dito. Ovvero della futilità delle leggi, in: R. Cavalieri, G. F. Colombo (Ed.) Il Massimario. Proverbi annotati di diritto comparato. pp. 165-171, Milano, 2013

rather than "sustainable diversity" based on free choices, it seems to me a forced hybridization due precisely to the crisis of the state/nation and the development of other (alternative and parallels) centers of power.

But this is not only confined to the "Ethnic" coexistence. From the Italian (legal system) point of view the "Ethnic multiculturalism" or better multicommunitarianism is in theory a false problem, notwithstanding the actual public opinion and perception. Indeed Italy is in itself a hybrid society even if with (some) common culture and values; the presence of "new" or relatively new Ethnic groups is, at the moment, substantially limited to a very small part of the population: according to the 2017 statistic the "foreigners" resident in Italy are not more than 5.000.000 but the majority of them are E.U. citizens (particularly Romanians or from the Eastern Countries of E.U.), while the most consistent groups of Islamic religion are Tunisians, Moroccans and Bangladesh citizens, i.e. a total of around 1.000.000 over a population of more than 60.000.000 (source: ISTAT). On the other hand, while public and political attention tends to focus and exacerbate crimes made by migrants, in reality the number of these crimes is comparable, if not less, to the crimes made by Italians.

Therefore, I think that for the Italian society it is more accurate to speak of "endogenous multiculturalism", even if a clarification needs to be done.

The endogenous multiculturalism has been defined as "the endogenous cultural assimilationism as policy, corresponded to the era of formation of national States, which afforded the central government the capability of meeting all the country's resources to act on behalf of the entire community, allowing a significant economic leap and a better position in international concert, increasing the outer defense. Patriotism accompanied the idea of "one state, one nation", where common values, shared among its citizens, imposed collective defense of the equals in the nation"[8].

But in reality, at least in Italy, we assist in a transformation of the former assimilations and common order in a complex and fragmented demand of "micro" claims and quests for rights and acknowledgment of different (and sometimes small) social groups. Again it is important to stress that it is not

8 S.J. Casali Bahia, *Values, Multiculturalism and Social Power*, in *Revista do Programa de Pós-Graduação em Direito da UFBA*, 2016, p. 391 ff.

(more or only) a question of different ethnicity or religion but a question of different "social group claims", "economic group claims", "group of interests claims", "pressure group claims", "corporation claims" and so on. In my opinion, it emerges on the one hand, the presence at various levels of "power groups" and decision-making groups that work side by side and sometimes replace the legislative and executive powers; on the other hand, there is a breakdown of the unity of the people, of autochthonous or "molecular" interests and values that appear only in the background and rather faded.

In addition, it should be taken into account the presence in Italy of different socio-economic, cultural and educational situations, among the various regions of the country and between the various areas of the same regions: accordingly, it becomes difficult to think of a general homologation or a common and harmonious development of Italian society. Between the "ordinary man" of the countryside of Ragusa (a very small town in Sicily) or Calabria or the deepest part of the tragically famous district of Scampìa (near Naples) and the "ordinary man" of the rich Milan or the Tuscan countryside there is an enormous socio-economic and cultural diversity while the groups in question have different needs, different communication and cultural codes and sometimes follow different legal rules.

If this analysis is correct, the question of multiculturalism is only slightly an "ethnic" or religious but in reality it depends on the emersion of different social groups. Let me say, to be clear, that for instance the request of acknowledgment of the rights of homosexual people is the same, from a legal point of view, being absolutely indifferent if the persons are Pakistan or Sicilian instead of Romanian or Tunisian or Milanese.

Italy is a Country where the rule of law and the rules of law are applied to all citizens and where all citizens are subject to the (same) law.

The focal point is the divergence between the society in its complexity and plurality of groups and the new demands occurring from it and the answers that the legislative power and the law are able to give. This is an extremely critical point because it also involves "political" rather than merely "legal" elements.

In conclusion in Italy, rather than a problem of multicommunitarianism, we may speak of a problem of endogenous multiculturalism, but not

determined by the co-existence of different "ethnic groups" as much as by the co-presence of a multitude of social groups (sometimes also slight) different as to culture, habits, mentality, knowledge, economic development, experiences and needs often influenced or determined by technological development, the economic situation and the circulation and reception of "globalized" life and socio-cultural models.

In my opinion, it does not seem that the "statutory" law (which is paramount in civil law system) can quickly adapt to this transformation of society and its "fragmentary nature", nor being able to recognize those claims without sometimes entering into contradiction with its own principles[9].

II. MANAGEMENT OF DIVERSITY

A. The evolution of Family Law in Italy

As I wrote[10], actually observing family law, we note at least three peculiarities, which make any comparative analysis particularly problematic.

The first one is the resistance of the social reality of the family to be regulated, from above, by (statutory) law. Considering that, the traditional classifications, taxonomies and ideas regarding family law, seen as a branch of law totally separated from others, and comparative method seen as a mere confrontation of different legal solutions, are to be deeply reconsidered.

In fact, only a comparison of law opens to the other sciences like sociology of law and anthropology, ethnology of law, legal and social history and political science, can enlighten the real nature and extension of differences among various legal solutions in family law: a "multilevel" methodological

[9] I mean for instance of the French bill banning to wear conspicuous religious symbols in schools (*loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*") that even if based on the general principle of secularity of the State clashes with the general principle of the respect of religions or the freedom of expression.

[10] Miranda, A., *A Short Introduction to the Italian Legal System*, Vol. I, Turin, 2014, p. 106 ss.

approach in dealing with the field of family law appears consequently more than a hermeneutic choice but a real scientific and due necessity.

Secondly, if the evolution and differentiation of law and regulation in the countries do not only depend on their different social structure but overall on a never ending circle of legal transplant (by means of imitation or imposition of legal models), nevertheless one fundamental datum cannot be either denied or neglected: family law presents one of the most impressive percentage of differentiation; a real constellation of ideas of «family» and consequently a great diversification of legal solutions descending from various types of "groups" living in a certain historical moment.

Finally, as I said before, there is a strong contiguity among different plans: legal, moral and social. Indeed while the development of family law – in the form of codified rules, case law, other national and transnational statutory tools – means a more advanced commitment of legal systems to family issues, the different legal answers and instruments have to settle with the ontological closeness of family and its relational dynamic respect to an imposed external rules. Actually, it is a strong and widespread idea that the family members can or should self regulate their ménage and self restrain their behaviours according the common and best interest of "family life" (this is a general principle of the Italian Law establishing the right to self-determination of the Individuals).

The problem of the existence, enforceability, efficiency and efficacy of family rules depends on the fact that people "feel" those rules as something which expresses what everyone "ought" to do; without this osmotic process between the legal norms and the correspondent social and "moral" commands, every attempt to impose from above external rules will clash, causing a high level of no compliance. It might further materialise a risk of outmoded legal principles and statements, while having the «legal irritant» effect of a top down decision.

Thus, any study on family law has to confront with deeply different ideas and definitions of "family" as socio-legal entity: in Italy, nowadays, while the "statutory law" till seems anchored to old principles and a monolithic traditional concept, the family could be defined:

i) as a group of people related by blood or

ii) as members of the same household or
iii) as a group of parents and children, or
iv) as nuclear family (father, mother and children) or
v) as extended family (grandparents, aunts, uncles and cousins), founded or not on marriage, or
vi) composed by heterosexual couple or also by homosexual one.

Moreover, family law has an increasing international dimension: not only because Italian judges have to deal every days with matters such as recognition of foreign marriages and divorces, but also because some family matters are not longer regulated exclusively by our national law, but also by international conventions and principles: first of all those of European Convention of Human Rights and the relative case law of the Strasbourg Court; with reference to European Union law, an important body of European Court of Justice case law and of EU legislation have defined – not always coherently – what is to be a family member and delineating the level of social entitlement available to them.

This multitude of points of view and definitions (national, European, international) not only hide different policy choices on what a family should be and do (in other words the «target» which family law has to pursue) but also strongly affected the number, the typology, the extent of the family relations multiplying options and denominations and consequently making the work of researchers really difficult.

Indeed, beside a mere normative element of family rules, it is possible to detach a *contextual* element made by social and cultural norms, by historical conditionings and policy trends, by cryptotypes and not verbalized or implicit rules.

At this point the question is whether it will be possible to draw some fundamental and common guidelines and principles generally valid notwithstanding the "gap" between the legal conceptions and the reality of the "idea" of Family or if it is possible to outline a integrated (statutory law, case law, customary law, etc.) body of "common" principles

The answer depends on the point of view of the observer. We should not take into consideration a «packaged» idea of family, but we have to consider that every time the legal system recognises a certain unit as a family worthy of

protection, there will be as a consequence the growth of family obligations and rules.

It is sad to admit that inside Italy the influence of "jurists" on Politics and on the legislation is really weak as weak is the influence of the legal thought in general. The reasons of this weakness are complex and not easy to deduce: one of the reason may reside in the too "static" and rhetorical analysis of the jurists, sometimes unable to go further than a mere "positivistic" reconstruction of "abstract even if impeccable logic" model; or, maybe, in the prominence of the economic approach to the problems; or in the indifference of politics towards problems of complex solution (and not appealing in terms of image and ... votes); and so on.

Italian "family law" seems to me as the symbol of this gap between society, "intellectuals" and politics. Indeed, notwithstanding the consequence of the strong influence of social habits and a sort of "path dependency", notwithstanding the ability of our academics and the interpretative and reconstructive effort of the judiciary, family law seems almost very old and out of date facing to the reality. Family lawyers are talking of «anarchy», «chaos» and «incoherence» of rules, with the new ideas and techniques proving fragmented and uncoordinated, and in any case not entirely displacing the original model, facing "an uneasy transition from a known past to an uncertain future", being it almost impossible to talk of a global transformation where one body of rules, thought, structures and institutions will be replaced by another.

Even the expression "family law", in consideration of the developments of the contemporary society, sounds today misleading seeming better to speak at least of a "law of families". But this, as we can see in a few moments, in a country as Italy were usually the "traditional" family (the one with "mama and papa" as English said) had a strong constitutional, legal and even social protection is, even today, a very difficult question.

The real problem of "family law" is the fact that the "law", intended in a positive way as Statutory Law, has not changed at all being "*immobilis in mobile*". It has rather been crystallised, acquiring a short-sighted confined vision, thus accentuating day after day its disconnection from real life.

In Italy, indeed, family law appears to be the field in which the fire of doctrinal debate is still brightest and in which, more and more often and in a

painful way, judges have been called upon to make decisions in the absence of precise, exhaustive and up-to-date rules of law or, and this is even worse, in presence of new statutory rules and amendments or improvements absolutely not comprehensible and sometime plenty of technical mistakes (like the infamous statute on artificial insemination enacted on 2004 and after 10 years completely transformed by judiciary).

Moreover, this is a field in which the legislator's work appears more and more lacking in influence, if not harmful, also in consideration of the inability, for obvious internal reasons of ideological contrast and cultural decadence, of the national legislator himself to intervene.

This first characteristic aspect of family law makes the subject unique within Italian's (perhaps within the whole of civil law's) juridical panorama, because, as I said before, we observe a substantial take-over of the "positive" superiority of the legislative formant in favour of the doctrinal and juridical ones: in other words, in contemporary Italian family law, what takes on particular importance are not so much the rules of law (which are too complex and out of step with modern times and needs of the society), as second readings, reconstructions and, most of all, the interpretation and the concrete implementation of the law by jurists and judges.

In short, we find ourselves facing a field in which, today, cases end up being the main source for rules; but if, on the one hand, this is natural, functional and reassuring in Common Law Systems, on the other hand it becomes incongruous and therefore disruptive in a Civil Law System, in which, like it or not, the judge and the jurist are, no matter what, always subject to the Statute Law and may only "move" within its narrow confines. So much so as to even force them to distort and overthrow the *ratio legis* in order to reach a decision of some sort.

The second characteristic element of family law, tightly bound to the first, is the intimate connection between legal aspects and society's developments and needs: in other words, family law or, better, family matters, differ from the other areas of Private Law (i.e. property law, contract law, succession law and even torts and civil liability), because it suffers more the consequences of society continuously changing and it depends more on the conditions and circumstances in which it has to operate.

If we examine the history of the concept of property for example, we will note how, in spite of social and technological evolution, in this field the terms of the problems remain the same and how the solutions adopted and the legislative choices made are firmly bound to millenary conceptions and institutions; all of this without causing (too many) traumas and without society or, better, "common people", dissenting or refusing the traditional model. The idea of property may be different in the way it actually articulates itself from one country to another and from one time to another, but it remains an idea based on universal concepts.

We could risk a similar statement for contracts, even though in this field differences are more relevant and depend on the differences among the societies in which the contract is required to work.

This, on the contrary, cannot be said of family law. As I said before, it would, be enough to think of the different conceptions of "family" which today exist in different cultures and even within the same country, to understand how, in this field, legislative choices are tightly bound and functional to their different contexts.

We are in an area of Private Law where "legal rules" remain mere "proposal of rules", if they cannot precisely reflect the "everyday rules" i.e. the rules spontaneously created and followed by society. In Family Law the divergence between the "declamation" of the rule and its ability to operate runs the risk of being extreme, given the speed and the depth of social mutations and also given the presence of hidden or complex extra-juridical elements which greatly influence each model's evolution.

The point is that Family Law represents a kind of "traditional law", therefore spontaneous and far from the idea (typical of jurists belonging to technologically advanced societies) of a "law created through some artful procedure", be it a bill, or a sentence which sets a precedent, or an essay by a prestigious scholar; family law is, for the most part, a "spontaneous law of advanced societies" which excludes "any decisional intervention by any authority, and any requisite which would limit society's power to choose". The point is, in my opinion that the "search for joy" is independent from any even strong rule of "positivistic" law; so that the society or each group move on

looking for the joy and no one will follow a law that is not able to give answers to their needs[11] .

Nevertheless "Family questions" are often common, as common are the solutions, as universal is (even if within its different meanings and institutions) the theme of the family.

Therefore, at least in contemporary Italy, what changes is not family law (I mean the legal rules) but family itself, of course in Italy, as well as in many other Western countries), more or less in the middle of the 70s, the Legislator tried to reform the old law (that in Italy was the same since 1920). The presence of a civil code (of 1942) and the arrangement of legal rules concerning the family in a specific book of the code itself, as well as in a myriad of provisions scattered in its various sections dedicated to single specific institutions, made it possible for the Italian "Family Law Reform Act 1975" to be a proper "global" reform of the subject.

The reform appeared necessary because, according to the doctrine, "on the plot of the civil code the provisions of the Constitution were to insert themselves, causing profound changes"; our Constitution was, in fact, subsequent to the civil code and founded on particularly intense principles of equality, personal freedom and respect for social groups. Accordingly, trying to give effectiveness to the provision of art. 29 of the Constitution, which acknowledges "the rights of the family as a natural society founded on marriage", which, in turn, "is based on the moral and juridical equality of husband and wife", it was necessary to update the old code model of patriarchal family dominated by the husband-father, by emphasising equality between husband and wife and among the single components of the family

[11] I had asked to some friends of mine why, according to them, American music is so successful in Italy and why, so far, no one is subject to the religious prohibition of listening to Rock and Roll.
The answer was almost identical: we follow an alien "thing" if it is compatible with our habits but above all if we "like" it (as my wife says) or improves our quality of life (as my colleague professor of management says) present or future (the Catholic promise of paradise for the poor, the Islamic promise of virgins).
We reject what "we don't like" or what we believe can worsen our quality of life. In this sense, "the individual satisfaction" plays an important role in the dynamics of systems and can help explain why we continue to use the "discoloured" canvas of rules instead of throwing it away or trying to clean it. This is particularly true for Family Law and the real risk is the one of a gap between rules of law (proclaimed) and the effective rules followed by the society or by the social groups; along with the risk of a substantial loss of systematic consistency and steadiness.

and, moreover, by protecting the custody and care of the children, in accordance with their "best interest".

With the "Family Law Reform Act 1975" great part of the civil code was rewritten, taking care of respecting Constitutional principles and consequently:

i) introducing the new regime of statutory joint ownership of goods (comunione legale);
ii) abolishing the prohibition to make donations between husband and wife;
iii) establishing the new regime of patrimonial conventions, with the consequent abolition of the "dowry" and the contemporary introduction of the "patrimonial fund" (a kind of "trust for families");
iv) and modifying successions, first of all in favour of the surviving consort and secondly in favour of the children, without discriminating between legitimate and natural ones.

Furthermore, this new Act provides for the involvement of a Court in the case of controversies between husband and wife on "essential affairs" and of problems concerning the children.

Nevertheless, even in those periods of major movements and reforms there was a strong influence of the Church and (in a some way) of Canon Law. Even if alongside the existing traditional marriage system, strongly linked to a State run set of legal rules, we can observe the development, in a small way, of a liberal conception of the family as a private sphere beyond the reach of the State interference, the family law reform act assumed that the marriage would be an indissoluble relationship – not only or simply "private" as a contract but to a certain extent "public" – and interfering in family life by laying down expectation of behaviour, i.e. the so called "obligations of marriage" not only from an economic point of view but also imposing the duty to cohabit, the duty of be faithful and loyal, the duty to give moral and material assistance, and the duty to sort out and deal with the rules regulating the ordinary daily common life of the family.

Two relevant innovations come to the support of our law reform: the introduction, in 1971, of divorce and the adoption laws (1967, 1974, 1983, 2001

and at least 2013 – Act 28th Dec 2013, n. 154 in G.U. 08/01/2014, n. 5); the last innovations were seen with a certain degree of superficiality not only as a «remedy» for situations of deserting of minors but even as possible alternative way to satisfy wish for having children. But our legislator (and often the jurists) following only the footpath of traditional family, was not able to foreseen what will be happened thanks to the new possibilities arising out the artificial insemination that make the effective application of those Statutes absolutely marginal and residual.

The first innovation, i.e. the divorce, indelibly and irreversibly marked Italian society which, since then, has had to change its attitude and way of thinking, as far as the concept of "legitimate family" is concerned, since it was traditionally founded on marriage or, in other words, on a stable, indissoluble and indefinite affective union and on a mutual sharing of duties, projects and moral values between two individuals of different sex. Unfortunately –maybe because of the closeness in time of the two laws–, of this desirable change the legislator of the 1975 reform was not able to almost seize anything. For example, was not expected that permitting a "no fault" divorce would have implied the possibility for divorcees who married again of forming new legitimate families –known as "step-families" – which would have joined the original legitimate ones (with all the easily imaginable consequences: births of "legitimate" children from different parents, cohabitation and relations among children – all of them legitimate – from different biological parents, etc.). Without mentioning patrimonial problems caused by spouses' joint ownership of "matrimonial" assets and successions which, in Italy, provide for a substantial protection of the "closest relations", especially descendants, ascendants and consorts.

In conclusion, it has to be taken into consideration that the family law reform act operated a real and proper split between wedding – seen essentially as a (juridical) relationship between two individuals – and filiation, which is protected in itself, both in and out of the legitimate family.

Even if the reform act recognized harmony and equality between husband and wife as the foundation of matrimonial union (possibly with the other components of the nuclear family taking part in it), it has expressly provided for and essentially regulated those aspects of marriage which have a

patrimonial nature, such as conventions, especially those stipulated when getting separated or divorced. In these cases, except for the impossibility to derogate from the rules protecting children, it is at least acknowledged that the couple may, by resorting to their autonomy, avoid reaching an hopeless contrast, which would force the courts to intervene and not just to supervise. In this perspective we should also frame all matters relating to parents' authority, which the reform establishes should be exercised by mutual consent of the father and mother (previously it was only exercised by the father) and which, rather than consist of a controlling and managing power over the minor during his development and education, in effect, is explicitly considered a controlling and managing power over minor's patrimony. With regard to this, it is enough to note how art. 330 of the civil code[12] provides for the forfeiture of parents' authority for "abuse of power" or, in other words, of the powers of usufruct, representation and administration of the child's goods, capitals and patrimonial interests.

There was a sort of justified fear or diffidence in accepting the idea that also "life and personal" choices and not only patrimonial issues may be subject to express agreements on behalf of the couple, even if, on the other hand, the law itself takes for granted that family life should be founded on the couple's agreement (and, therefore, on their personal wills and mutual benefit). As it has been noticed, if, on the one hand, it appears possible, according to art. 144's reformed text[13], to extend "negotiability" to matters which "used to be characterised by authoritative power and submission" (in other words to the decisions which give a marriage its direction), on the other hand that does not necessarily imply that "only the *negozio* (juristic act or legal relationship), as a complete act, with its own lasting juridical effects, is an instrument to determine an «agreed» direction".

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[12] Art. 330 Italian Civ. Code: *The court may rule that a child is deprived of parental responsibility if the parent fails to comply with or neglects the duties involved or abuses the powers conferred on him or her, to the serious detriment of the child.*
In such cases, the court may, on serious grounds, order the removal of the child from the family residence or the removal of the parent or cohabitee who is abusing or abusing the child.

[13] Art. 144 Italian Civil Code: *The spouses agree on the direction of family life and establish the residence of the family according to the needs of both and the primary needs of the family.*
Each spouse shall have the power to implement the agreed policy.

B. Relevant fields of contemporary family law

Since 1975 forty-six years have gone by, a period of time almost double to that which went by between the issuing of the Italian civil code and the Family Law Reform Act. But social traditions, the material conception of family and of "legitimate" family, relationships within it, even the idea of filiation, are much more distant today from those of 1975's society, than the latter were from those of 1942's society, thus making legislation today still in force totally obsolete. Accordingly, it is not only a question of minor amendments or small improvements, but rather of a general rethinking of the role of family law in a modern and complex society such as that which prevails in present day in Italy. In the last 30 years, in fact, in Italy, both the statutory framework of family law, and, to a greater extent, the traditional conception of mono-nuclear and legitimate family (based on indissoluble or stable and permanent marriage), have been put under pressure from:

a) strong social forces that want to obtain major equality of roles and a real parity between the sexes;
b) recognition of the paramount importance of children's rights and interests;
c) development of new technologies, particularly in the field of artificial fertilisation;
d) the increasing number of de facto and same-sex relationships;
e) the increasing number of divorces (reinforcing the need to protect the rights and interests of the weaker partner);
f) the increasing number of births "outside marriage" and the growing number of families incorporating children with different blood parents and/or one-parent families.

Furthermore family law, in Italy, has an increasingly international dimension, largely because of greater worldwide mobility. The courts have to deal with matters (a novelty recognised in a 1995 Statute) such as marriages

and divorces of mixed couples or of foreigners (with different religions, traditions and customs) living in Italy.
Until now these problems have been only partially confronted, with some piecemeal intervention, by means of specific statutes or through judicial interpretation and application of old law rules and the Civil Code.

For example we:

a) have sought to simplify the procedures to grant divorce (in consequence of the changing demands to protect the legitimate family and its unity and indissolubility);
b) have issued new rules to safeguard the rights of separated partners (use of the matrimonial home, right to alimony and maintenance) and the interests of children (right to education, care and maintenance);
c) have simplified the rules on adoptions (including international ones) to try to favour adoption and simultaneously reduce resort to artificial fertilisation;
d) have, furthermore, enacted rules which apply the European convention for protection of human rights and fundamental freedoms;
e) have to take in count the decisions of the European Courts and the new European rules.

Nevertheless these legal developments have not been sufficient, because in many cases they have called into question fundamental aspects of our legal system like, for instance, the idea of the "legitimate family" established on marriage as the fundamental nucleus of society; or the concept of marriage as a "juridical act" (rather than a contract); or the similar notion of "legitimate filiation" – that is to say, the legitimate child is one who is generated by a mother and procreated by a father who are united (to each other, of course!) in marriage – which, whilst no longer corresponding to the ancient Roman Law model, is still followed by the Civil Code today.

As I have already said, the gap between legislation and society resulted in a massive decision making on behalf of judges. The courts (and often also the doctrine) faced with the absence of explicit statutory rules, gaps in the law, have tried to answer the newest and most different of demands. This has

obviously happened with no coherent strategy, sometimes even ending up distorting the *ratio* and the common sense of the rules dictated by the legislator.

If, on the one hand, the work of the courts has contributed to discipline, albeit in a limited way, phenomena such as *de facto* families, by extensively interpreting the Constitution (particularly its art. 2) and the code and by taking advantage of the gaps left by the legislator, on the other hand it has contributed to feed uncertainty, since the courts must anyhow formally comply with statutory rules dictated in the presence of circumstances and concepts which today have not only disappeared, but sometimes even overturned.

Last but not least there is the phenomenon of the increasing of expectance of life and the contextual the simultaneous reduction in births that have transformed our country into one of those where the population is rich in people of the third age, some even over 80 and in good health, with all the consequences and refluences that may arise: I mean the growth of single living alone, the needs for assistance, the increasing numbers of divorce between people over 65/70 or more, the increasing numbers of marriages between old men and younger – and usually foreigner– women with the practical disruption of the old succession rules.

As I said, the demands and needs of the population have been met either with more or less limited interventions by the courts or with sectorial laws often passed more under the pressure of public opinion than with the necessary assessment.

That the proverbs and the "Latin" aphorisms have an anthropological and cultural foundation is self-evident. What is sometimes less apparent is their transnational scope to demonstrate, if they still need it, that "People are the same the whole world over" and that "there is nothing new under the sun": I mean that despite the diversity of evolution, cultural diversity, social diversity, economic diversity, many human behaviours and attitudes tend to repeat equally regardless of the latitude and longitude. So that at the end of the day or au bout du compte, it is not so different the sky over Berlin from the one over Tonkin and, especially when we come to family relationships, there are behavioural and conflicting dynamics that are not only identical but also often resistant to "impositions" and "Commandments" of the (statutory) laws.

I just do not want to refer to the well-known saying of an Italian Authority (A. C. Jemolo) "the family is an island that the sea of law can only limp but not penetrate" but to the finding that it is a mere illusion of a "positivist and municipal" jurist to think of dictate and impose rules on such human phenomena as those of family interrelationships. Indeed, on the contrary, it is only by observing and studying social and family behaviour, by analysing the evolution and the impact of science and technology (and of the economy), that it is possible, in some measure, to identify common elements that allow us to provide for general rules. It is a serious parallaxes mistake to think that statutory laws are good and work by themselves only because they are logical or rational or politically supported, without being really felt and shared by the society.

Now if this is true for many situations, it is truer still when it comes to wives and husbands, parents and children, or companions of life, i.e. when there is such a relationship between such intimate, private and so naturally primitive that is the family.

The point is that in the context of the relationships that we consider to be the "family", countless variables have been produced not only from technological progress, but also by social, economic and political modifications and evolutions that have led to unforeseen and sometimes unforeseeable consequences scaring and shocking the fundamental concepts and even the "theoretical" idea of "family" that (French, German, Spanish, Italian ...) "civil codes" and legislators had in mind.

I do not mean to say that laws have not changed over time and space: it is all too obvious that this is the case (I think, for example, about the Prussian Code that provided for "marital duties" in a totally unthinkable approach nowadays, or the Italian rule on "contract to buy the nurse's milk" today totally useless).

I want to say is that legislators and laws not always have to, and often cannot, try to chase and pursue society and technology because this will end in a kind of infinite loop. In my opinion, as in the view of the popular wisdom of proverbs (Don't go between the tree and the bark; Don't get in between the nail and the flesh), it is better perhaps that the legislator's finger stay out, for how much it is possible, from the family relationships.

As I have already wrote, and being aware of repeating myself, I believe that in "family law", it is desirable to have a general intervention rather than a limited number of sectorial interventions.

Sectorial interventions are truly very dangerous because they alter the precarious balance reached by the system (with the interpretation, the decisions of judges, customs and so on) with unexpected consequences on the entire "network" of the legal system. I think, for example, of laws that have reduced the age of majority. Or, in our system, the new rules on "supporting administration"; or the surrogate motherhood laws; or the rules on capacity, inability and representation.

However, it must be admitted that even the global and general review may create more problems than the ones it intended to solve. The allusion is to the Italian "mythical" family law reform act of 1975 that, as we have seen before, was the outcome of a solid technicality but, being deaf to, and misunderstanding the social mutations was not able to rethink the great notions that are the foundation of family relationships.

The ideal in my opinion would be the detection of simple and limited rules and of principles that should be very general and of context allowing a large space for manoeuvre to the interpreter who, should take into account a clear framework of directives and a kind of residual soft law only operating on socially and politically protected situations.

For the rest each Statute or Act may be a "legal irritant" and it risks to be rejected in its practical application.

The Law, indeed, (I mean in the sense of "*Diritto*", "*Recht*", "*Droit*", "*Derecho*") is or should be the product of the evolution of rules that have been consolidated in a Community or in a Society while "Statutes" or laws are only a kind of "proposal of norms" that may or not effectively become "The Law" followed by that Society or Community[14].

[14] See: Miranda, A., *The Bleeding of Legal Rules between Rights and Limits, in the Age of Migration Flows and the Crisis of the Nations*, InTrasformazione, 2017,

III. Marriage and personal relationships

A. Marriage and personal relationships: from here to the eternity?

Starting from interpersonal relationships, the first basis of the system is certainly the relationship that arises from marriage.

The rules have not changed once again and even today the family is based on marriage (as the Constitution says) and marriage concerns couples of different sex who want to live together. The law provides for certain consequences, namely mutual respect, loyalty, the duty to contribute to the family burden and the needs of each spouse by the other, and finally, in the case of children, to their maintenance and education. In addition, there are consequences under inheritance law for the case of predecease of one of the spouses and a whole series of tax and pension benefits and family home benefits for the surviving spouse or children.

It is a "secular" approach of the state and even if at the time of the emanation of the code the vast majority of the population was of the Catholic Christian religion, the norm is absolutely anodyne with respect to religious or political or ideological beliefs. Indeed, it still applies to anyone regardless of ethnicity, creed or social group.

It should be noted that following the agreements with Vatican State (Lateran Pacts and subsequent amendments) religious marriage (celebrated according to the Catholic rite) is at the same time a "legal civil" marriage. Even today, although much less than in the past, most marriages are celebrated with the religious rite.

The data collected by the ISTAT (Italian Institute of Statistics) are clearly illuminating of the actual situation and of the "mutation" respect to the past.

In 2015, 194,377 marriages were celebrated in Italy, approximately 4,600 more than in the previous year. This is the largest annual increase since 2008. In the period 2008-2014, marriages decreased on average at the rate of almost 10,000 per year.

The slight recovery of marriages partly concerns the first marriage between spouses of Italian citizenship: 144,819 celebrations in 2015 (about

2,000 more than 2014), while from 2008 to 2014 they had decreased by more than 40,000 (76% of the overall decline in the wedding). The propensity to the first wedding also increases: 429 for 1,000 men and 474 for 1,000 women. The values are still 20% lower than in 2008. Single spouses are on average 35 years old and single brides 32 years old (both almost two years older than in 2008).

The second wedding, or subsequent, were 33,579 in 2015 almost 3,000 more than in 2014 (+9%). The incidence on the total of marriages reaches 17%.

The increase in marriages celebrated with civil rite continues in 2015. There were 88,000 - 8% more than in 2014 - and now represent 45.3% of total marriages. Much of this increase is due to the second wedding, but the civil rite is increasingly chosen even in the first marriages of Italian couples.

There are about 24,000 marriages in which at least one of the spouses is a foreign national (12.4% of the wedding celebrated in 2015), a decrease of about 200 units compared to 2014.

As to the conjugal instability, the 2015 data are affected by recent legislative and statutory amendments. In particular, the introduction of so-called short divorce (*divorzio breve)* disclosed a significant increase in the number of divorces, which amounted to 82,469 (+57% on 2014). The increase in separations was more limited, at 91,706 (+2.7% compared to 2014).

Following the introduction of a new law on "out-of-court" and "private" settlements on the subject of separation and divorce, 27,040 divorces (32.8% of divorces in 2015) and 17,668 separations (19.3% of separations) were defined at the civil status offices.

The average duration of marriage at the time of separation is about 17 years. The share of separations of long-term marriages has doubled over the last twenty years, from 11.3% in 1995 to 23.5%.

At the time of separation, husbands are on average 48 years old and wives are 45 years old. The most copious clutch is between 40 and 44 years for wives (18,631 separations, 20.3% of the total), between 45 and 49 years for husbands (18,055, 19.7%).

The tendency to separate is lower and more stable over time in marriages celebrated with the religious rite. Ten years after the wedding, the surviving marriages are practically the same for the marriage cohorts of 1995 and 2005

(911 and 914 out of 1,000 respectively). Surviving civil marriages fell to 861 for the 1995 cohort and 841 for the 2005 cohort.

In 2015, the number of separations with children in shared guardianship is about 89% of all separations. Their mothers exclusively care for only 8.9% of children. This is the only obvious result of the application of Law 54/2006 on shared guardianship; in fact it seems only a "façade" because in the most part of the cases even today it is really difficult to provide for a "peaceful" and really joint custody of the children.

There was also an increase in the first marriage between spouses of Italian citizenship: 144,819 celebrations in 2015 (about 2,000 more than 2014), while from 2008 to 2014 they had decreased by more than 40,000 (76% of the overall decline in the wedding observed during the same period).

The first marriage is an important indicator for the study of the training behaviours of families. The decrease in first marriages has been going on for over forty years and its acceleration in recent years is due, in part, to a so-called "structural effect", associated to the change in the composition of the population by age. The prolonged decrease in births, which from the mid-1970s and for over 30 years has affected our Country, has in fact led to a sharp reduction in the population in the age group in which the first marriages are by far most frequent, that between 16 and 34 years. In 2015, young people aged between 16 and 34 years of Italian citizenship are about 10 million and 500,000, more than 1 million and 500,000 less than in 2008.

These "structural effects" will continue to act in the future in the direction of a decline in the level of marriages. The tendency to first marriage, net of the "structural effect" of the population by age, is measured by calculating the rates of first-notification, obtained by comparing the spouses of each age - single or single at the time of marriage - to the corresponding male and female population. In 2014, these indicators recorded an all-time low: 421 first marriages were celebrated for 1,000 men and 463 for 1,000 women. The decrease is as high as 25% if we look only at the first marriage rates of young people under 35, i.e. the age at which the phenomenon is concentrated.

In 2015 the tendency to the first wedding increases slightly (on average 2% more than in 2014): 429 first marriages were celebrated for 1,000 men and 474 for 1,000 women, these values are still 20% lower than in 2008. At the same

time, the age of the grooms at the first wedding is increasing: single spouses are 35 years old on average and single spouses 32 years old (both almost two years older than 2008). These data suggest that the slight increase in the first marriage 2015 is partly attributable to the "recovery" of part of the substantial postponement of the wedding put in place in recent years, perhaps also conditioned by the prolonged economic crisis.

The increase in the average age at the first marriage has been in progress since the mid-1970s and is the consequence of the postponement to increasingly mature ages of the main stages of the transition process to adulthood. In particular, the increasingly prolonged stay of young people in their families of origin is moving forward the calendar of their first union. In 2015, 80.9% of 18-30 year olds (over 3 million and 200,000) and 69.7% of their peers (over 2 million and 700,000) live in their families of origin. Unfortunately this ratio is growing even more.

The prolonged stay of young people in their families of origin is due to many factors, including: the widespread increase in schooling and longer training times, the difficulties that young people face in starting to work and the precariousness of the job itself, difficulties in accessing the housing market and obtain a mortgage or a financial support. The effect of these factors has been amplified in recent years by the unfavourable economic situation that has pushed more and more young people to further delay, compared to previous generations, the stages of the path to adult life, including that of the formation of a family. After such a marked phase of postponement of the first wedding as that observed from 2009 to 2014, it is possible that there will be a partial recovery linked to some extent to the improvement of general economic conditions, with particular reference to the labour market.

Those data are a impressive photograph of the Italian actual situation as to the "civil" marriage.

In my opinion, as we have seen, one crucial point is the introduction of "short divorce" (divorzio breve) while a second crucial point is the slow pace with which Italy has introduced a law on civil unions[15].

But let's go on step by step.

[15] Law 20.05.2016, n. 76 Regulation of civil unions between persons of the same sex and regulation of cohabitations. G.U. n.118 21-05-2016.

As to the "short divorce" (legge 6 maggio 2015, n. 55), the legislator, taking a precise and strong claim for "updating" of the "old" law (inspired, for political reasons, to an evident disfavour towards the same institution that was in fact hindered), revised the terms and procedures for obtaining divorce.

The aim of the reform is to speed up the process so that the two spouses can separate and then divorce in a shorter period of time, partly because of the different ways in which the marriage can now be dissolved.

Italian law (Law No. 898 of 1 December 1970) is well worth remembering, it never speaks of divorce, but of dissolution of the marriage or, if it is a concordat marriage, that is, marriage contracted in church according to the Catholic rite, it speaks of cessation of the civil effects of marriage.

In order to understand the impact of the amendments to divorce law it is necessary to take into account the main feature of the Italian matrimonial regime.

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

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

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

Art. 144. Address of family life and family residence

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

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

The original meaning of marriage has been substantially "distorted", firstly with the entry into force of the divorce legislation, and after with the introduction of the civil partnership regime (heterosexual and homosexual), the abbreviated separation and the ensuing divorce regime[16]. Marriage is no longer an "institute" or more technically a "legal transaction" (juristic act – *negozio giuridico*) through which two consenting persons of different sexes decide to declare to the State and to the people, their intention to live together forever and without the possibility of dissolving the tie and the agreed commitments. In reality, marriage is today a "quasi-contractual" (in the technical sense) bond for an indefinite period that can be dissolved at any time and with very short timescales -from six months to one year - ad libitum, moreover.

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

Divorce, basically, seemed to be seen by many Parliaments with looks of disapproval and considered as an "extreme ratio" for cases in which it was not categorically plausible not to take into account the impossibility of maintaining the still standing relationship.

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

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

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

Under this legislation, the court may pronounce a divorce when the spiritual and material communion between the spouses cannot be maintained or reconstituted in the presence of one of the grounds provided for by the same law and therefore only in the presence of particular circumstances:

(a) where, after the marriage has been celebrated, the spouse has been finally sentenced, even for acts committed previously, to life imprisonment or a sentence of more than 15 years, or for serious crimes against the family, or for inducing, coercing, exploiting or aiding prostitution;
(b) where a spouse has been acquitted of one of the offences referred to in (a) by reason of a mental defect, if the court having jurisdiction to order the dissolution or cessation of the civil effects of the marriage determines that the defendant is unfit to maintain or re-establish the family relationship;
(c) where a spouse who is a foreign national has obtained abroad the annulment or dissolution of the marriage or has contracted another marriage abroad;
(d) if the marriage has not been "consumed" (i.e. if there was not a sexual intercourse between the spouses);
(e) has become final as a result of a judgment correcting the gender allocation;

(f) whether a final judgment has been given in respect of the separation of spouses, or whether separation by mutual consent has been approved (or whether separation by agreement has taken place when it began at least two years before the 1970 Act entered into force).

Judicial separation presupposes a situation of conflict between spouses who, having failed to reach an agreement, apply to the court. One or both spouses may request the judicial separation when events occur which make the continuation of cohabitation intolerable or which seriously harm the bringing up of the children.

Consensual separation requires an agreement between the spouses on the regulation of their property relations and on decisions on custody and maintenance of the children. In order to be effective, the spouses' agreement must be submitted to the court for its evaluation and granted by the court.

Before the 2015 reform, the application for divorce had to be submitted after a continuous separation period of at least three/five years (or five/seven years), depending if it is consensual or not.

It is quite clear that if 40 years ago there was still a strong resistance of public opinion to the idea of "no fault" divorce (in 1974 there was a popular referendum on divorce that saw a majority in favour of 59% while 41% was against) over the years the "limits" wanted by the legislator of the time to restrict the use of divorce only to apparently "specific" cases, have come up against changes in public opinion and acceptance of the institute by very large sections of the population. In fact, it became almost immediately clear that of all the "cases" in which divorce could be requested, the only truly real one was the request for divorce following a separation (consensual or not) for incompatibility[17]; in this case the work of the courts that interpreted the rule

[17] Art. 151. Legal separation.
Separation may be requested when, even independently of the will of one or both spouses, such events occur that the continuation of cohabitation becomes intolerable or seriously prejudices the education of the offspring.
The judge, in pronouncing the separation, declares, where the circumstances exist and it is requested, to which of the spouses the separation is imputable, in consideration of his behaviour contrary to the duties deriving from the marriage.

was also important, going as far as recognizing the “no fault” separation, recognizing the “incompatibility” ad libitum of the requesting spouse. It is sufficient that one of the two does not wish, for any reason, to continue living together in order to obtain separation and divorce.

Despite the long deadlines and the existence of unbelievable and pleonastic procedural rites (such as the need to appear years after the separation, perhaps with new companions and other children, before the President of the Court to “try” a “reconciliation” clearly impossible), this has ended up creating a huge gap between the demands of society and the law.

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

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

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

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

If, in addition to this provision concerning this very short separation period required before divorcing, we also consider the (until now) consolidated judicial interpretation according to which the spouse claiming for separation and then subsequently for divorce, does not have to "prove" the impossibility of continuing the conjugal relationship" nor the "violation of the duties" provided by the matrimonial law, we can argue that today the Italian divorce law is, at least from this point of view, exactly in line with other legal systems of both Civil Law and Common Law.

In addition, following the reform, it is possible to separate without recourse to the courts, with the assistance of a lawyer or before the civil registrar.

Through assisted mediation, the law allows spouses to go to their lawyer to obtain separation or divorce.

The spouses are obliged to be assisted by at least one lawyer per party and to conclude the proceedings within a period of time determined by the same parties, which may not be less than one month or more than three, which may be extended by 30 days by agreement between the parties.

The agreement must be drawn up in writing, on penalty of nullity, and signed by the parties and their lawyers.

The convention must contain the amendment of the status of the spouses, the economic aspects of the termination of the conjugal union, the provisions on children and their custody and maintenance.

If there are no children (minors or adults who are unable or dependent), the agreement concluded must be sent to the public prosecutor's office in the public prosecutor's office responsible for the territory, which must grant the authorisation. If the Public Prosecutor finds irregularities, the agreement either returns to the renegotiating parties or, in the absence of a common understanding, may be brought to court.

Of course it is a different problem when there are minors or children of legal age but unable or economically not self-sufficient.

In this case, the agreement, within ten days since its conclusion, must be sent to the public prosecutor, who may authorise it if he considers it to be in the best interests of the children or, within five days, transmit it to the President of the court.

The lawyer is required to transmit to the civil registrar of the municipality where the marriage was registered or transcribed, the agreement authenticated by the same, with the certificates.

The procedure for separation and divorce before the civil registrar is much faster and cheaper.

Unlike assisted mediation, spouses are not obliged to have a lawyer present.

This type of separation may only be concluded by spouses without children who are minors or adults and incapacitated or disabled or economically dependent, and may not contain any agreement on transfer of assets.

The rule specifies that spouses who have made a declaration of divorce are to be recognised by the civil registrar to confirm the agreement after 30 days.

The agreement concluded before the civil registrar, as is the case for assisted mediation, has the effect of a judicial measure from the date of the act containing the separation or divorce agreement.

As it is easy to understand, in fact, from an indissoluble marriage with a monogamous family we are today in the presence of a marriage “for an indefinite period” with the presence of families with “variable composition” certainly more in line with the different and new needs of Italian society or better of the different socio-cultural components present in it. However, as is often the case in family law, the introduction of a “sectorial” rule has nevertheless had a number of unforeseen consequences on the social perception of other aspects of family law. Such as the constant loss of the “centrality” of marriage and the failure of “cohabitation pacts” for heterosexual couples.

As a consequence, marriage is no longer understood as an indissoluble link or protected institution even "against" the will or (better) the freedom of

self-determination of the spouse or spouses, while the interest of the (minor) children shall always be protected.

The introduction of the brand new legislation on "unmarried or de facto couples" also goes to this direction by extending and applying the same regime used for marriage to "registered" couples[18].

Coming therefore to this new regulation the focal point is that this is a subject not particularly “perceived” by the population as a whole; the law has been perceived more as recognition of the rights of “gay couples” than as a tool for “protection” of the rights of de facto couples. Here too, we are helped by statistics that show that just less than two years after the law was passed, over 98% of cases involve same-sex couples. How easy it was to foresee, people who does not want his relationship to be recognized and regulated according to the norms of the civil code (it is not therefore a religious question) obviously does not register his union: in fact, after all, with civil marriage one acquires obligations and rights that are practically the same as those acquired with the registration of the union (with the same “facility” as the separation procedure). Virtually, the norm masks its true essence of recognition of “gay marriages” from whose “lobbies” it was strongly desired, above all for symbolic rather than real reasons (objectives that could easily have been achieved with a series of amendments and extensions of what was already provided for by the norms).

Describing in brief this legislative “novelty” very much felt as a “success” by some strong movements of “gender”, with it the civil union between two people of legal age takes place in front of a state official and in the presence of two witnesses and will be recorded in the civil status archive. The documents of the union, indicating the personal data, the matrimonial property regime and the residence, are recorded in the civil status archive.

The parties may establish, for the duration of the union, a common surname by choosing it from among their surnames, even if they prefer or post their surname if different.

The law extends the rights provided for by civil marriage in its entirety to same-sex couples: it is explicitly stated that in order to protect rights and duties, “provisions referring to marriage” in all other laws, and those containing the

[18] Legge 20 maggio 2016, n. 76, art. 25 (Act 20.05.2016, n. 76 Regulation of civil unions between persons of the same sex and regulation of cohabitations).

words “spouse” and “spouses”, are also meant to apply to persons who join civilly. This also includes “inheritance” rights and rules on intestate succession.

In fact, as it is easy to see, this is the same procedure as for civil marriage, with the only difference that in the case of “divorce” the 6-month period provided for in the new divorce law for civil marriages is reduced to 3 months.

Heterosexual couples will be able to enter into a “cohabitation contract” that in fact regulates the aspects already provided for by the rules of the Civil Code on marriage. This passage is truly singular because it allows the stipulation of a contract that regulates for example the direction of family life (i.e. the “ménage”); a similar agreement is provided for civil marriage but is left to the free determination of the parties and, I must say rather hypocritically, is not considered (due to a supposed lack of the “economic” element) as a contract.

Having assumed that, it is, as has been said, very clear why heterosexual couples do not have recourse to civil unions, since in fact they have exactly the same advantages and disadvantages, including obligations, rights and duties, as civil marriage. In substance it is a useless and pleonastic parallel institute. The choice of the legislator is essentially political in the sense that in this case it was decided to provide that this law also applies to heterosexual couples in order not to choose to recognize only “gay marriage”.

Even in this case, I personally think that there was room for a wide reformation of the rules on “legal marriage” and the linked rules (on succession and inheritance, on “care and assistance”, on economic support etc.) that may better answer to the different multicultural claims but in a more systematic way without the doubt and overlapping devised by the new “normative patchwork”.

B. Dissolution of marriage and relationships

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

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

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

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

Obviously, the picture has largely changed today also because the economic crisis has exacerbated the economic difficulties making it necessary to take in consideration social changes: if the 50% of Italian couples prefer to live together rather than get married, it is a fact that needs to be taken into account, also reflecting about how it can be useless to impose steady rules and costs without considering the reality and the different situations at stake[19].

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

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[19] For example, it is legally impeccable, but completely useless if not harmful, to assume that a maintenance allowance is fixed and based on completely automatic parameters, in the absence of a real possibility that this allowance will be paid for example in the context of the labour crisis and the reduction of incomes.
If in Italy couples are no longer married (or marry at a rather advanced age) it is because the transactional costs are higher precisely, but not only, in the event of separation and divorce. Moreover, as to avoid the obstacle of divorce costs, couples often preferred (and sometimes still prefer) to appeal to the Rotal Courts –i.e. the Ecclesiastical Tribunal following the Canon Law- to obtain, if in the presence of a "concordat" marriage (i.e. a marriage celebrated according to the Catholic Rite but with “legal” value as for the Italian legal system), the nullity of the marriage with a consequent reduction in financial commitment.

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

With the legal separation (consensual or judicial) the marriage is not yet ended and dissolved but rather "suspended" on a transitory basis pending the merely eventual judgment of divorce. In theory, a separation could never lead to a divorce request and, again hypothetically, it could even be run-down due to the possible reconciliation of the parties. In fact, the legal status of the spouse remains unchanged while certain obligations such as the duty of fidelity[20] and cohabitation are lacking, or rather are undergoing changes, while the duty of reciprocal material assistance remains operative. According to this duty, the Courts should determine the maintenance allowance in favour of the "economically weak" spouse i.e. who needs support having no income of its own or if the income is insufficient for its needs.

The maintenance subsidy regarding the separation is recognized by the Civil Code as well as by Article 156, providing that one of the effects of the separation on the assets between the spouses is that the judge, stating the separation, establishes for the benefit of the spouse to whom the separation cannot be alleged, the right to receive from the other spouse what is necessary for its maintenance, if he/she has not adequate revenue of his/her own. The amount of such allowance must be determined in relation to the circumstances

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

and the revenues of the debtor. Anyway, the “alimony” stated in Articles 433 et seq. shall remain unaffected.

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

The trend of judicial interpretation that has been modelled in the years[21] following the introduction of the law on divorce has often been "wavering",

[21] In the event of separation, for the determination of the maintenance allowance, the potential earning capacity of the beneficiary spouse can be considered, but it is necessary to demonstrate an effective possibility of carrying out a working activity, in consideration of every concrete individual and environmental factor (Civil cassation, section I, sentence 6 June 2008, no. 15086).
The maintenance allowance cannot be paid to the husband who is liable for the separation, even if he has no means of subsistence.
In addition, the conjugal house in co-ownership can be assigned to the wife to avoid interrupting the relationship of trust with the places and people close to her, even in the absence of children (Civil cassation, section I, sentence February 15, 2008, no. 3797).
The assignment of the matrimonial home to the spouse, custodian of minor offspring or cohabiting with dependent offspring of any age, is not subject to extensive application, given the exceptional nature of the law; therefore, the spouse who does not meet the above requirements cannot be assigned the matrimonial home as maintenance (Civil cassation, section I, sentence no. 24407 of 23 November 2007).
In order to recognise the right to maintenance of a spouse who is not responsible for the separation, it is essential that the spouse should have no income enabling him or her to maintain a standard of living similar to that enjoyed during the cohabitation and that there should be an economic disparity between the two spouses, since it is irrelevant that, prior to the separation, the requesting spouse may have tolerated, immediately or in any event accepted a lower standard of living. And since separation establishes a regime that tends to preserve as far as possible the effects of marriage compatible with the termination of the cohabitation and, therefore, also the "type" of life of each of the spouses, if before the separation the spouses have agreed - or, at least, accepted - that one of them did not work, the effectiveness of this agreement remains even after the separation (Civil cassation, section I, sentence no. 25 August 2006, no. 18547, RV591588).
With regard to the personal separation of the spouses, their ability to work profitably, as a potential capacity to earn, constitutes an element that can be assessed for the purposes of determining the amount of the maintenance allowance by the judge, who must in this regard take into account not only the income in cash but also any usefulness or capacity of the spouses subject to economic evaluation. Moreover, the ability of the spouse to work in this case is important only if it is found in terms of the actual possibility of carrying out a paid work activity, in consideration of every concrete individual and environmental factor, and not just abstract and hypothetical assessments (Civil cassation, section I, sentence no. 25 August 2006, no. 18547, RV591587).

saying and not saying and above all attesting on a more or less arithmetic calculation, likewise once occurred in the case of compensation for physical damage that was calculated according to fixed “forensic tables".

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

Furthermore, it is clear that the separation "maintenance" differs from the "alimony" obligations: Art. 156 of Civil Code, in fact, affirms that in any case at least the “maintenance” mentioned in the article 433-438 of the Civil Code[22], i.e. the “alimony” strictly necessary for living must be paid to the spouse who has no income of his or her own. This undeniably means that the obligation of separation “maintenance” may be quantitatively - and qualitatively - different from that of alimony.

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

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

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

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

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

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

The abstractness of the statutory rule has, as was said, forced the doctrine and above all the Courts to concretise the interpretation of the same rule. I must say that on this point I am rather critical, in the sense that the legislator had rightly formulated the rule in a very general way to allow its real and actual application on the basis of the "discretion of the civil law judge" (which is not pure discretion but the right to choose between several objectively and subjectively ponderable solutions and therefore by the end of common sense and reasonableness) in a way that was not "automatic" or "standardized" for all the hypotheses but rather so in a way that let it possible to distinguish case by case and situation by situation.

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

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

Obviously, there are a lot of social explanations about this interpretation as well: It should be considered that, as we said before, until few years ago Italian model of family was mainly characterized, according to a male breadwinner system, by a one (male) income, the relegation of most women to

care and domestic work, an average of two children and a rather high average duration of the marriage.

This led the judges, for a simple cost/benefit analysis, to decide in favour of the "economically weak" spouse (to whom the children were usually entrusted) without taking into account the needs of the other spouse but rather evaluating -and sometimes supervising- for example the duration of the marriage and therefore the long contribution, even if difficult to quantify, to common life by the "weak spouse".

This interpretation has been decisively affected by the social evolution and the various changes in the national and international economic situations, often becoming difficult and practically impossible to meet the payment of a "maintenance" no longer sustainable by the obliged or, as it has happened, a maintenance established for a separation between spouses following a very short marriage and with a large difference of age in the couple[23].

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

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

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

C. The Claim for Post Marriage Solidarity

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

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

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

The welfare or solidarity function of the allowance is quite evident: it acts to prevent, as a result of divorce, a worsening of the assets and living conditions of the economically weaker former spouse who could have contributed to the enrichment of the other former spouse with his or her personal contribution to their relationship or by taking on commitments (such as caring for their children or "managing" the family home and the social and relational life of the couple) that have nevertheless allowed an increase in the economic and social "position" of the other partner. In different and simpler words, the law would like to avoid that, once the marriage is over, those who in some way "enjoyed" the contribution and support of the other do not keep it all. On the other hand, it is also clear that the legislator's concern is to avoid that who have actually done little or nothing for the couple gains of the situation (especially in the case of a non-fault divorce) becoming unjustly "richer". In this, is also evident a

certain "ethical-moral" heritage, whereby situations of "commodification" of the matrimonial relationship would be avoided[24].

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

Unlike the maintenance payments for separation, to obtain the divorce allowance, it is not necessary for the beneficiary spouse to be without adequate proper revenues, but it is necessary for him or her not to have adequate means of subsistence and to be objectively in a position not to be able to obtain them. It should be noted that the adequacy in this case is not a function of an alleged "standard of living" (as in the case of the allowance following the separation) but rather in directly proportional function to the personal and economic contribution given during the marriage (and therefore in relation to the duration of the same) to the family management and the formation of personal or common assets; at the same time the adequacy is inversely proportional to the personal and economic contribution given by the other ex-spouse during the marriage and during the separation phase. In simple terms, we can say that the greater the contribution of the former spouse during the marriage, the greater will be the "adjustment" and therefore the amount of the divorce allowance; the greater will be the contribution of the other spouse (the one with resources, in other words) the smaller will be the adjustment and the divorce allowance. Finally, in this evaluation, we must add the rather broad parameter of the "reasons for the decision" -including, but not limited to, the reasons for the divorce- and of the conditions of the former spouses, always with a view to a more general duty of general and post-marital solidarity.

As newly affirmed by the Corte di Cassazione, (and in the well known decision of court of Appeal of Milan n. 479 of 16th Nov 2017), i-e. in the Berlusconi's case[25], it is also necessary that: "national legislation should be

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

[25] In this case the Court has refused to grant the divorce allowance to Mr. Berlusconi's wife, already recognised by the first trial, for the sum of one million euros and four hundred thousand euros per month, since she has a large amount of real estate and movable assets - valued at several tens of millions of euros - with the consequent possibility and capacity for investment, but also savings, since she opted for a secluded life and in the normal way, assets which, moreover, are entirely made up of her husband, who has an incomparably higher

interpreted in accordance with EU guidelines and in such a way as to ensure the effectiveness of EU rules; in the area of divorce and maintenance between former spouses, the European Commission has issued regulatory guidelines in order to contribute to the harmonization of family law in Europe and to facilitate the free movement of persons in Europe; in particular, it is required that the issue of maintenance between former spouses be moulded around the principles of self-sufficiency, need and temporariness". Consequently, an interpretation of the Divorce Act of 1970 should to be adopted in compliance with those principles, and in particular with Principle 2.2 "Self-sufficiency - after the divorce each spouse provides for his or her own needs"; Principle 2.3: "Conditions for maintenance: the grant of maintenance after divorce presupposes that the demanding spouse does not have adequate means to meet his or her own needs and that the obliged spouse has the capacity to meet those needs"; Principle 2.8: "Time limits: the competent authority may grant maintenance for a limited period of time, but exceptionally may grant it without time limits".

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

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economic position. The divorce allowance may be granted exclusively to a former spouse who, for objective reasons, does not have adequate means to achieve economic self-sufficiency, a parameter which is not based on rigid and predefined criteria but, beyond any automatic application, on variable and relative indicators linked to specific situations, the position of the requesting spouse having to be assessed, in particular as regards his or her living conditions, age, plans and state of health. See: Caraburi, G. , Gli effetti economici della crisi coniugale, http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione_Casaburi_28_2_18_assegno_div.pdf, p.16.

As we can see, the most recent case law has perfectly grasped the meaning of Art. 5 par. 6 of the Divorce Act, taking into account the various social and economic needs and reiterating what has gradually emerged over the years, namely that only by considering all these parameters, it will be possible to reach at an assessment that is as consistent as possible with the different situations of each individual divorce.

The social impulses and also the new economic situation consequent to the serious economic crisis of 2011, have forced the interpreters, opposed with the inertia of the legislator, to rethink the assumed parameters, and in particular, to review the automatism followed in securing always and however, often uncritically, to the economically weak former spouse the maintenance of the standard of living enjoyed during the marriage. The rigid application of this parameter, which was not even explicitly provided for by the Divorce Act, had often led to paradoxical results, especially in the cases (which were, however, the majority) of divorces with medium-low economic situations. In practice, if during the marriage the couple had maintained a standard of living thanks to the work of one spouse and the active contribution of the other, as a result of the divorce often the former spouse who was obliged to maintain the other have been, in fact, deprived of the resources and means to support himself.

The described interpretation was founded on a "good" intention. It was intended, actually, to achieve a fair division of resources at the time of the breaking of the marriage, relying also on the provisions of Art. 29 of the Constitution[26], in order to avoid that, at a stage of family life marked by a strong breakdown of patrimonial and human resources, the negative consequences deriving from a division of the agreed contribution to the assets and ménage may fall on the weaker spouse who, in the overwhelming majority of cases, was the one who took on domestic and household work.

On the basis of these "policies", the judicial interpretative trend begun with the decision[27] of the United Sections of the Supreme Court of 29

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

[27] Cass, SS.UU., 29 November 1990, no. 11490, in Foro it., 1991, I, 1, 67

November 1990, no. 11490, then pompously but improperly qualified as a "living law" in consideration of the constant confirmation received for more than twenty-five years from the subsequent decisions of the Courts (both of merit and legitimacy), had been consolidated.

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

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

Also the reference to the "clause" of Art. 29 of the Constitution, if at the beginning of the Nineties of the last Century it could still appear as a justification for the protection of the "marriage", as fundamental institution for the "family", in the space of a few years it lost its allure in the face of the new social needs and the new real situation, that were gradually consolidating in the Italian society: the massive presence of de facto couples and cohabitations (even with children), the influx of immigrants from different realities, the freedom of movement and establishment within the EU, with the extension of the rights connected to European citizenship, challenged the same notions of family and "marriage". Among other things, the "overprotective" and uncritical attitude of the courts has strongly contributed to make the new generations preferring a de facto relationship to a "legal" one. In other words, the remedy has gradually become worse than the evil it was intended to cure.

It goes without saying that this interpretative line, despite its consolidation, was not free of technical errors. For example, in my opinion, although the reference to the "standard of living" previously enjoyed is conceptually valid, this "parameter" cannot be used as an exclusive one and, on the contrary, it should be calculated precisely taking into account those elements and circumstances concerning the entire matrimonial relationship and both spouses. Moreover, this line of interpretation seems to reflect the tendency not to distinguish, as the legislator instead clearly does, the two very

different situations of separation and divorce. After all, the interpretative line here criticized used to indifferently suggest evaluations and considerations perhaps valid for the separation, also for the different context of the divorce; so that ignoring not only the different letter of the law and the different presuppositions but also the fundamental circumstance that with the divorce the marriage dissolves and the couple is no longer such, returning both to be completely free and independent and, if you want, "strangers". Furthermore, I do not believe that we can compare, for example, the situation of a couple whose marriage lasted two years with that of a couple whose marriage lasted forty years; or the situation of a couple with both active spouses, and with their own incomes and properties with that of a single-income couple, without external financial aid, without estate and with a constant risk of impoverishment.

Even from a comparative point of view, this interpretation does not hold up. In fact, considering that modern Italian society is today fully homogenous or homologous to the societies of the European Countries, considering that the institution of the family and the institution of marriage (and divorce) appear substantially the same and with the same juridical and economic problems, it seems to be odd that the dominant interpretation followed until recently by the Italian Courts has been in dissonance with what happens in the courts of the other European Countries and (even) in the Common Law area[28].

In the light of these considerations, the new interpretation trend on divorce maintenance followed by the Court of Cassation since the 2017, which has actually "overturned" the previous and consolidated interpretation based

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

on "maintaining the standard of living held during marriage", can be viewed as a new RELEASE of the rules in line with other European legal frameworks.

This was the case with the judgment of the Court of Cassation. n. 11504 of 2017, which was confirmed (albeit with some variations) by other successive rulings of the Supreme Court: Cass. 22 June 2017, no. 15481; 8 August 2017, no. 19721; 29 August 2017, no. 20525; 9 October 2017, no. 23602; 27 October 2017, no. 25697; 26 January 2018, no. 2042; 26 January 2018, no. 2043; 7 February 2018, no. 3015; 7 February 2018, no. 3016; 20 February 2018, no. 4091.

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

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

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

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

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

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

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

The person -the Supreme Court tells us- with divorce must be considered *uti singulus* and no longer as part of a married relationship now vanished, so that firmly holding to the preservation of the standard of living (still valid for the

purposes of separation) would result in a kind of illogical ultra-activity of the already extinct relationship.

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

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

When assessing economic independence, the Court obviously rules out any reference to the pre-existing matrimonial relationship and community of life. In this sense, if anything, it is necessary to consider the former spouses as individuals both in the phase of the evaluation of *an debeatur* (focusing on the self-determination of the subjects and on the self-sufficiency of the individual) and in that of the quantum debeatur. In this last phase, by rejecting the traditional function of restoring the economic conditions enjoyed by the spouses during their marriage, the aim is to quantify the allowance on the basis of the principle of solidarity (not according to Art. 29 of the Constitution, but according to the more general and less stringent parameter of Art. 2 of the Constitution[29]), taking into account the assessment of ALL the traditional parameters provided for by law, furthermore making a comparison between the economic positions of the former spouses. Consequently, in the evaluation of the quantum, an objective and weighted criterion must be used, in order to ensure the economically weak former spouse the achievement of economic independence, i.e. of his or her self-sufficiency, obviously taking into account his or her contribution (and the contribution of the other ex-wife) to the

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

economy of the family assets. As we said before, this is a function in the sense that the contribution of the "weak" spouse is directly proportional to the amount of the allowance while the contribution of the "strong" spouse is inversely proportional to the amount of the allowance.

The Supreme Court, representing the criterion of self-responsibility, independence or economic self-sufficiency, has in fact provided some indications to delimit this parameter. The Court indeed upholds that "the main indices - except of course other elements that may be relevant cases by cases - to ascertain, at the stage of the judgment on *an debeatur*, the existence, or not, of the economic independence of the former spouse demanding the divorce allowance - and therefore the adequacy or not of the means and the possibility or not for objective reasons to obtain them - can thus be identified: 1) possession of income of any kind; 2) possession of movable and immovable properties, taking into account in the broad sense all charges imposed and the cost of living in the place of residence (habitual residence: Article 43(2) of the Civil Code) of the person applying for the allowance; 3) the abilities and effective possibilities of personal work in relation to health, age, sex and the labour market, whether employed or self-employed; 4) the stable availability of a dwelling house...". There is therefore a strong reference to each specific case and all its variables, with decline to carry out any standardisation.

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

spouse a life that is more than decorous and certainly much more "rich and substantial" than that of the overwhelming majority of the population.

According to the Court, in fact, in the presence of a "Big Money Case", the overall patrimony constituted during marriage and during the phase of separation by the former spouse in favour of the other is to be considered indicative of the intention of preserving and guaranteeing, also for the future, the expectations matured by the other, placing him/her in a condition "not only of self-sufficiency, but of economic well-being" such as to allow him an objectively high standard of living. This means that the right to receive a divorce allowance no longer exists, "whether we refer to the parameter of self-sufficiency or whether we want to consider the parameter of a standard of living on which the claiming former spouse could in any case rely, even if during the marriage the standard of living was absolutely beyond any comparison, for the wealth of the other former spouse".

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

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

It goes without saying that, if there were any significant changes in the situation of fact after the divorce, these changes could very well be taken into account, for the purposes of a review of the "*quantum*" and also of the "*an debeatur*". This point is particularly clear, in the judgement of Court of Cassation

no. 15481 of 2017, according to which "the judge, in the context of the proceedings pursuant to article 9 of the Divorce Act[30] when the plaintiff asks for the reconsideration of the divorce conditions - in particular the revocation of the allowance - ensuing the occurrence of new contingencies, must refer to the criteria set out". It follows, in substance, that the judge must assess whether the new contingencies are suitable reasons for revision (or revocation) of the allowance with reference no longer to the preservation, by the entitled person, of the same previous standard of living but to the achievement, on his part, of economic self-sufficiency (just like occurs in the new interpretive trend).

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

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

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

Secondly, even if this is a more general matter, at least in Civil Law systems such as the Italian one, there is always a certain distance between what is the abstract prediction of the rule of law and its concrete interpretation and

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

application. In the field of Italian family law, this aspect is even more evident in the "reluctance" of the legislator to intervene in "personal" matters rather than in economic matters. In fact, if we observe the Code structure of Italian family law, we realize that with the 1975 reform Act, the Legislator tended to focus on the "privatization" of personal relations, essentially dealing with economic aspects (I am thinking, for example, of the duties of assistance towards children and of the "legal representation" of minor progenies), preferring to leave, in my opinion rightly, a wide margin of manoeuvre for the discretion of the judge.

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

As we said, it is up to the Courts to intervene to fill with their discretion[31] the "gap" that, especially in the field of family law, has gradually been created between the social reality and its needs and the "immobile" letter of the (statutory) law. I shall limit myself for reasons of space simply pointing out that with a trivial calculation, between the 1975 reform and the previous regulation of 1942 there is a lapse of 33 years while since 1975 to present 46 years have passed ... and certainly the "family" that was in mind of the legislator of 1942 was much closer to that of 1975 than can be said today between the family of 1975 and that of 2018.

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

Fourthly, from the excursus that has been done up to now, in the specific case of the "crisis" of the married couple, a clear evolution of the interpretation

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

of the Courts emerges, being strongly tied and consequent to the Italian social and economic development. It should be considered that after the introduction of the law on divorce, even today, the large majority, if not almost all, of the cases concerned situations of small or medium economic and patrimonial entity essentially corresponding to the national "stereotype" of the single-income family, often with no properties, with children and a wife/mother housewife. If we add to this the social and normative "disfavour" (obviously at least in the initial phase of application of the law and at least until the terms for obtaining a divorce have not been drastically reduced, also due to the changed attitude of society, which has become increasingly favourable to divorce and the de facto couples), we can understand how the jurisprudence has tried, for example through the use of the parameter "of the standard of living held during marriage", to protect the economically "weaker" spouse who risked suddenly, perhaps after years of "assistance" to the family, to be without any support. This action of the Courts is also well understandable in the light of the general circumstance of a scarce backing of the State welfare system (care for elders, care for not working people, care for disabilities, care for children etc.) in Italy, where care assistance has been prevalently and traditionally completely delegated to the family and to the "relatives"[32]. Similarly, but specularly, there were cases where, as a result of changes in the economic circumstances of the spouses, the recipient of the divorce settlement was in a better economic

[32] This argument is particularly complex and discussed until now. For an interesting point of view see: Marella M.R., La svolta neoliberale che penalizza le donne, in "Il Manifesto", 11/04/2018.
On the other end, there are the claims of so many ex husbands that are in a growing situation of "poverty" just as consequence of the "standardized" imposition of the divorce maintenance; on this particular and heavy aspect see: Senesi A., Padri separati. L'assist del Pierllone, in Corriere della Sera, 27/05/2018 https://milano.corriere.it/notizie/cronaca/18_maggio_23/padri-separati-l-assist-pirellone-39bfa6a2-5dee-11e8-b13c-dd6bf73f9db5.shtml
"*It is estimated that in Lombardy there are almost one million families living in separation or divorce and that sixty per cent of them have at least one child. According to the most recent Istat data, in the region, in 2015, there were 14,979 separations and 15,717 divorces, national records in both cases. Finally, in Milan, it is estimated that almost 50,000 separated fathers are living in economic difficulty... In recent years a worrying gap has been created between the parent to whom the child is entrusted, who in most cases is the mother and the spouse who must leave the house and is unprepared to deal with this situation. A measure which is direct and which has an immediate effect on the support of these people in difficulty must be structured.*
Separate and divorced parents risk entering the category of new poor... they are the new poor of the rich city as the emergency, tell operators and sociologists, has been stabilized in permanent drama".

situation than the former spouse who was obliged to support him. Or situations in which a divorce allowance was granted well in excess of the needs of the other former spouse.

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

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

Sixthly, it should be noted that it is precisely as a result of new and changed social needs and following the action in the courts of cases that vary greatly from the point of view of the circumstances, the economic entity and the actual situation of the applicants that the Court of Cassation has, in a sort of "back to the future" or “return to the forbidden planet”, revived the broad formula of the Divorce Act for maintenance. Therefore, as in the quoted Italian "Big Money Cases", the judiciary is applying not so far the "safeguard clause" of maintaining the standard of living during marriage but is adding to it a whole series of parameters, already explicitly provided for by the law and also by European legislation, which allows a better differentiation of the assessment of both the *an debeatur* and the *quantum debeatur* to each individual case. The

rediscovery of the parameter of economic self-sufficiency and the clear distinction between the "institution" of separation and that of divorce fit perfectly into this interpretative framework.

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

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

Despite of protests and cultural "micro-actions" by groups more or less organized (i.e. Italian Women's Union, feminist groups, "antagonist" groups, etc..), which fear the danger of "jumping" the protection for the woman/wife/mother now exposed to the risk of losing the welfare achieved during marriage and with marriage, in my opinion this new line of interpretation does not exclude the protection of women but, if anything, strengthens it rightly providing for in relation to the exact assessment of the contribution to the family ménage but also the entire "history" of marriage and common life.

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

IV. PARENTS AND CHILDREN RELATIONSHIPS

The relationship between parents and children is really complex and, again, it is a field where there is a contraposition between who thinks there is a need for the control and intervention of the "State" (both legislator or/and judges) and who thinks, instead, that the "autonomy" and "freedom" of choice of the individuals should prevail. Even if this phenomenon is common in "civil law Countries", it is also diffuse in Common law Countries: we can say that it is a kind of "alternance" of Jungian psychological or, as I prefer to say, juridical types[33].

In Italy traditionally the "family" was a substitute of the State and was the "first centre" of formation and evolution of individuals: in fact since long time the "care and assistance" to minors or the care and assistance of elders is de facto exercised by the family group and not by the State. The idea of a omni-comprehensive "welfare State" like the Scandinavian ones was (and probably is) very popular in Italy even if it is more a myth than a reality: indeed we are very very far from that model and as consequence of the (economic, social and cultural) crisis not only the State are not able to intervene deeply to "protect" the social welfare but also the family is not more able to mediate acting as social shock absorber.

I believe that to understand this assumption we can refer, for example, to the very serious situation of youth unemployment which in 2016 for the age group between 15 and 24 years sees Calabria at 58.7%, Sicily at 57.2%, and

[33] «The type is an example or model of the peculiar character of a species or community. In the narrowest sense of this work, the type is a characteristic model of a general attitude, which manifests itself in different individual forms. Of the many types possible here I have defined four; they are those that follow the four typical fundamental functions: thought, feeling, intuition, sensation. When such an attitude is usual and characterizes the individual, I speak of a psychological type. Types based on fundamental functions can be called: logical type, sentimental type, intuitive type, sensory type; all these types are divided into rational and irrational. The former include the logical and sentimental types; the latter include the sensory and intuitive types. Finally, libido preferences allow us to distinguish between introverted and extroverted. All basic types can belong to both classes, depending on whether they dominate introversion or extroversion» in Carl Gustav Jung, *Tipi psicologici*, Newton Compton, Roma, 1973, p. 442. Civil law systems are logical and sentimental while common law systems are sensory and intuitive; civil law is introverted while the common law is extroverted.

Sardinia at 56.3%; in 2016 there are five Italian regions that have recorded an unemployment rate of at least twice the EU average (8.6%), or more than 17.2%: This is Calabria, 23.2%; Sicily, 22.1%; Campania, 20.4%; Apulia, 19.4%; Sardinia, 17.3%. The most serious thing is that these data are not understood in their seriousness except considering that at least a good half of these young people do not study, do not look for work, live "in the family"; it is the so-called "NEET generation" "Not in Education, Employment or Training" that has reached and exceeded in Italy the 2,000,000 cases. This is a very serious social phenomenon that adds to the high age of our elderly and the growing number of young people (as in Japan a country with which we share, albeit with due differences, this particular coexistence of longevity, the social and economic-cultural crisis of young people) as the Hikikomori[34] who tends to isolate itself more and more from social relationships, often socialising only through the web (i.e. those who isolate themselves from society for long periods living alone or confined in a room without having relationships if not very limited with their family members).

In this situation it is easy to understand how, in the absence of legislative interventions or precise welfare (and economic) policies, today they are the "grandparents" who, with their pensions and their help, maintain and support their sons and, above all, their grandchildren.

Moreover, the presence of "serious elderly" (over 85) often without a family group able to support and care for them, is the other side of the medal of contemporary Italian society.

We will return to these aspects shortly with reference to the first of two recent regulatory interventions, namely the law called "after us" and the law on "support administration". Unfortunately, due to lack of space and time I can only mention the phenomenon of the acquisition of apartments owned by elderly people, usually single, by large real estate groups that offer in exchange for the bare property the right to live in the same house and a small life annuity or insurance cover (or donations to third parties who commit themselves in a similar way).

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[34] http://espresso.repubblica.it/attualita/2017/12/21/news/hikikomori-in-italia-viaggio-tra-i-giovani-che-non-escono-1.315896

The immobility of the legislator is evident not only in the field of marriage regulation (if we exclude the novelties we have already mentioned) but also in the relationship with offspring where the endogenous social and multicultural pushes and claims are however very strong and differentiated.

Of course, it cannot be said that there has been no innovative intervention. The point is, however, that these are once again sectorial measures, a kind of "coloured piece of cloth" that ends up highlighting the defect and not eliminating it.

The problem here is that the impulses of individuals, micro-actions are originated by irrational impulses but always directed to "enjoyment" or "pleasure" and therefore difficult to regulate or eventually to stop or fight in a univocal way.

A. The gap between the "legal notion" of filiation and the reality as consequence of social and technological development.

A good example of the "pressure" on the law by cultural changes may be the fresh issue in Italy of the legislative decree[35] that equating natural children to the legitimate ones, finally but with a great delay, has taken into consideration social changes. The previous legislation (protecting the legitimate filiation), with all the concern and probably with a not bad intention by the legislator, had ended up producing a huge gap between what was the "indisputable" statutory rule and what was the concrete reality of the law in action that had been changing, step by step and day after day, using legal artifices, alternative interpretation of different rules, inventions more or less imaginative in order to obtain what the law itself denied.

Fortunately (although we must wait for the effective impact of this new act on society) this time the legislator does not seem to have committed the serious mistakes that he made in the "infamous" Act n. 40/2004 on assisted fecundation i.e. the less applied law of Italy after the one imposing the use of safety belts in the cars.

[35] Decreto legislativo 28 dicembre 2013 n. 154, G.U. 8 gennaio 2014 n. 5 Revisione delle disposizioni vigenti in materia di filiazione, a norma dell'articolo 2 della legge 10 dicembre 2012, n. 219.

In this case the Italian Constitutional Court and the Corte di Cassazione, were called to correct the self-evident "mistakes" and to repeal large part of the Act that was in contrast with human rights and dignity.

In this on-going trend a very fresh decision of the Corte di Cassazione (Sep. 2016), stating the possibility to be "legitimate child of two mothers" (and excluding any "right" for the biological father), devastated what is the remaining ruin of the Italian statutory rules on filiation (and on family).

In the Italian legal system the rules on "filiation" are prima facie the same *ab immemorabili* (formally without any change from 1920). Our classic legal definition of "child" requires that he must be born by the mother and procreated by the father. This involves that, as Roman lawyers said, while the father is uncertain (only presuming that he should be the man who was legally married with the mother) the mother is always known being "by nature" who has been pregnant of and gave birth to the baby.

This rule is obviously connected with the ones on "legal marriage" that, until now, is the "agreement to live together" between "husband" and "wife" and, of course according to the tradition they should be "man" and "woman".

In brief according to the Italian Civil Code, filiation is based on four elements:

1) a valid marriage between parents;
2) a child that must be born to the (married) mother,
3) and procreated by her husband;
4) conception must occur during the marriage (in constancy of marriage).

The first two element apparently do not lead to testing difficulties, but to ascertain that the son was conceived by the husband of the mother and in a constancy of marriage it is more difficult so that the legislator intervened (Articles 231, 232, paragraphs 1 and 233) with a legal presumption of paternity," prescribing that "the husband of the mother is the father of the child conceived during the marriage" and with a second presumption providing that: "the child born after one hundred and eighty days after the marriage and before three hundred days since the date of the annulment, the dissolution or the

ending of the civil effects of marriage, is conceived during the marriage by the spouses.

It is interesting to note that no rules in our Code define who is the mother. All the rules are "father oriented" looking for his identification. The point is that for some millennia the mother was the woman who gives birth to HER son. There was no alternative option.

On the contrary, due to the impossibility to trace, with "scientific tools" (no blood test, no DNA test), who is the father there was a need to use some "magical formula", the presumptions indeed, to identify with a reasonable grade of certainty the father looking at the "nature" and the common rules followed by that society. As you can imagine, it is practically impossible for a "civilian" to welcome different interpretation without destroying the whole systematic construction of the family law and in particular of filiation (with all the consequences in terms of parent's power, property, succession law, etc.).

Of course if the science was able to modify what was certain for century, dividing the moment of fecundation from the moment of pregnancy (implant in uterus of the embryo), distinguishing the genetic mother from the biological one and in the meanwhile the science thanks is able to ascertain without any doubt who is the father (because there is only one fathered i.e. the genetic one), it is clear that the gap between the reality and the "word" of the law is extremely huge and cannot be filled by a single piece of legislation but there is a need for complete reform of the entire family law system.

In the meanwhile we can only turn to the reconstructive work of Authors and judiciary like in the leading case here reported.

In brief I refer to the "simple" question of divorce that is a concept "outside" the idea of family that we have in theory in our rules. It is clear that, the Divorce Act 1970, presents a dramatic alteration into the system because the general implant of the family law was not modified at all. So, after the introduction of divorce, in the Italian legal system we can have a multitude of legitimate "families" with a multitude of children all legitimate even if … the original mother and father married and remarried again and again … like Zsa Zsa Gabor or Elisabeth Taylor.

Times are changing and today in Italy the number of "legally married" couples is just a little over the de facto one and we passed by the canonical law

marriage "ratified but not consumed" to the marriage consumed but not ratified… and now the "patchwork" of new rules and new social needs and multi-cultural (micro) claims are so heavy to hide the foundations of our family law.

Let me say that I am not sure that this phenomenon is under control by the law or politics. Our legislator and the public opinion are confused and it seems that "every" claims of every (even small) group of individuals has been founded on "rights". As I will say in the conclusion of this work the risk of a lost of cultural and legal identity is extremely high like it is the risk of a clash between the rights of single and the rights of the more.

B. The extension of parental responsibility and the best interest of the minor as in new cases of terrorist or mafia's education.

The State intervention in that intimate and generative core, which is the relationship between parents and children, does represent a very sensitive matter.

The question is profoundly disruptive between those who, fearing the (surreptitious) imposition of familial and cultural models, resolutely fight for protecting the full discretionary power of the parents in exercising their prerogative, first of all, that one regarding the education of their own children; and those who, considering family as a fundamental cell of the entire society, are open to figure out some forms of restrain in family autonomy in the perspective of a peaceful and ordered societal framework.

Provided the broader options of educative models that our democratic and pluralistic societies are open to implement and respect, there are increasing concern that parents or older siblings, holding extremist ideologies, may indoctrinate children into those beliefs, placing them at risk of emotional and psychological harms, putting them at risk of being radicalised and even at risk of being involved by their family in terrorist activities.

Similarly in Italy, courts have been beginning to consider the mafia phenomenon *from a child welfare point of view*: mafia organizations are always built around blood ties and the children of bosses - particularly the first-born - are predestined to follow in their father's footsteps.

Is it acceptable that a father, a mafia boss, uses to share with his underage children plans to kill the rivals of another gang, instilling into them feelings of hate and contempt against the democratic institutions and the public security forces? Is it admissible "educating" children to the activities of racket and of drug dealing? Is it tolerable that mother who instructs her child to the "code of silence" and to the duty of violent revenge against the "enemies" of the family? But also, and not so dissimilarly, is it freedom of religion and of education that one consisting in instilling into the minors the contempt against nonbelievers, pushing children towards the jihadist violence and raising the offspring to the propaganda of the terror?

All these questions are dramatically pushing, and represent tremendous challenges in many, if not all, western societies: the scholars' theories about the child best interest and minors' welfare, as well as the conception of caring and loving parents, have to face with dateless and, at same time, ever-new realities[36].

The everyday life of those children belonging to "mafia families", as well as of those minors at risk of radicalization into the jihadist thought.

A fairly recent reform of filiation in Italy[37] has profoundly changed the legal paradigm in the relationship between parents and their children: moving from the parents' duties to the children's rights.

Thus, art. 315 bis of the Italian Civil Code clearly enlist the child's right to be maintained, educated, instructed at school, and to be morally supported, alongside his right to grow up in the family of origin and to maintain relevant relationship with relatives, as well as his or her right to be heard in all concerning matters.

Having said that, the new legal framework puts in a strict inter-linkage the parental responsibility and the minor's rights in the sense that, on one hand, the first one is placed with the specific purpose to realize and guarantee all those rights entitled to the children; and, on the other hand, the above

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[36] See S. Casabona, *Pedagogia dell'odio e funzione educativa dei genitori: uno studio di diritto comparato su mafia e radicalizzazione jihadista*, Milano, 2016; S. Casabona, *Limiti alla funzione educativa dei genitori tra strumenti di controllo giudiziari e automatismi legislativi*, in Minorigiustizia, n. 3/2016, p. 56-62; S. Casabona, *Decadenza dalla responsabilità genitoriale del latitante di mafia*, in Questione Giusitizia, online, 2016.

[37] Act 10 December 2012, n. 219.

mentioned children' rights do constitute not- overriding limits to that discretionary power stemmed from the parental responsibility.

So that, according to Italian family law, the child best interest does represent not only the final task of the parental responsibility but also its limit.

Moreover, always according to article 315bis c.c., the concrete and daily identification of the child best interest has to be done in the *respect of his/her capacities, natural inclinations and aspirations*: this does mean that the fundamental guiding principle of the child education provided by his parents has to be found out in the same personality and identity of the minor, and not in any objective and external parameters.

However, what just said must not be interpreted in the sense of an absolute detachment of the family education from the *common principles and values of civil and peaceful coexistence in the society*. In fact, if it is fully true that the Italian legal system strongly refuse any kind of State ideology that pretends to homologate and unify the moral and intellectual education of minors to principles and values imposed by the law, nevertheless the Italian Constitution (article 2)[38] pretends that the children' education has to be necessarily inscribed into the framework of those supreme guiding principles that represent the legal foundation of the system: first of all, the respect of the inviolable rights of the person.

Having précised this, the parental responsibility can not be intended in the sense of the segregation of family education from the common and general values of the entire societal community: the parental right/duty to educate their son has to be necessarily be in compliance with those common values and principles, placed and recognized at constitutional and international level, that guarantee a peaceful coexistence in the society.

In other words, if it is true that the system affords an extreme huge margin of discretion in educating children, inspired to great variety of cultural models; it is also true that the parental discretionary power encounters its insurmountable borders in the fundamental constitutional principles and in the legal rules.

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[38] Constitution of Italian Republic, art. 2: "The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled".

Assuming that there is a critical matter of compatibility between the educational models transmitted by families belonging to the mafia, as well as families sharing extremism jihadist ideologies, and the fundamental principles and values recognized and enshrined by the Italian legal system, the question is if, and in which terms, it is possible a state intervention for protecting minors.

From a child' harm point of view, to be educated in the violence, revenge, contempt of democratic institutions, in the intimidation and oppression, as well as in the hate of other religions, it does constitute *per se* violation of his right *to be educate in accordance of the constitutional principles*, and it does constitute *abuse* of parental responsibility.

In fact, exposing children to violence, educating them in killing and revenge is not dissimilar from the classic assumption of child abuse, in terms of psychological, physical and sexual abuse.

Moreover, children, who grow up in such contexts and are educated according to deviant educational models, not only are exposed to negative cultural models, but also concretely run the risk to suffer psychological and psychiatric harms: for example, in several cases addressed by Italian Juvenile Courts, it was emerged that the "mafia sons", minors who lives in family belonging to mafia criminal association, suffer of post-traumatic war symptoms, forasmuch as they fear to be killed, or they are scared that someone of relatives can be killed or injured by enemies, and their dreams are often populated by blood nightmares[39].

Finally, from the perspective of future potential child' harms, children exposed to this kind of deviant education models are naturally more inclined in following their parents' footstep, replicating the same behaviours into the organized crime or into the jihadist violence activities. This, not only does represent a tremendous peril for the public order, but also exposes the minors to physical harms, even not their death.

[39] See Trib. min. Bari, decreto 17 gennaio 2007, p. 2, in Fam. e minori, 2007, n. 8, p 16; Trib. min. Reggio Calabria, decreto del 7 febbraio 2012; Trib. min. Reggio Calabria, decreto del 19 luglio 2012; Trib. min. Reggio Calabria, decreto 07 settembre 2012; Trib. min. Reggio Calabria, decreto del 22 gennaio 2013; Trib. min. Reggio Calabria, decreto del 19 giugno 2013; Trib. min. Reggio Calabria, decreto 23 settembre 2014; Trib. min. Reggio Calabria, decreto del 3 marzo 2015; Trib. min. Reggio Calabria, decreto del 31 marzo 2015; Trib. min. Reggio Calabria, decreto del 14 luglio 2015; Trib. min. Reggio Calabria, decreto del 29 settembre 2015; Trib. min. Reggio Calabria, decreto 8 marzo 2016.

The matter of the dysfunctional educational models, one can say a sort of "pedagogy of hate"[40], have been addressed since ten year on by the Italian Juvenile Courts from the perspective of child welfare.

The judiciary intervention is assessed legitimate *only if* it has proved that parents have instilled in their child principles and values in radical contrast with those of our Constitution: elements of proof could be represented by the family inaction (or even worst the parental instigation) in respect of those children accused of committing crimes against patrimony and persons.

What is under the judgment of juvenile courts is not the behaviour of the parents in itself, but the actual child harm or the very likely risk to suffer an harm caused by (or to some extent descending from) the parental behaviour.

According to article 330 and 333 civil code, the judiciary can terminate (or making such provisions that are suitable in the interest of the child) parental authority when the parent violates or neglects the duties inherent in it with serious prejudice to the child.

That said, the intervention of the judges has the purpose to stop, even temporarily, the damaging effects of the parent's deviant education, taking the children away from their relatives and placing them in social services or in hosting families.

It is interesting as the pedagogical conceptual grids and theories are implemented by the judges in the legal reasoning of the decisions aimed not only at showing children a world totally different from the one in which they grow up, but also at offering minors safe and healthy chances for developing their identities and personalities

Still remain the tragic doubt about what is really in the best interest of the child: eradicating him from his family of origin and from his affections for *trying* to provide an education respectful of principles and values of the civil coexistence; or let the minors leaving with their parents, without any interference in the familial relationship[41], but exposing them to the fearsome *pedagogy of hate.*

[40] See Salvatore Casabona, *Pedagogia dell'odio e funzione educativa dei genitori*, quoted.
[41] Convention on the Rights of the Child, New York, 1989, art. 8.1

C. The trans-mortem protection of minors or dependants with disabilities or pathologies.

In Italy, as I already said, the welfare system relies on a 'familistic' model, which lacks efficient public services and delegates to families, especially to women, the main role of providing care to family members who need assistance. The State, traditionally, does not provide efficient childcare and long-term care services /whit great differences between the rich Northern part of Italy and the poor Southern part of Italy).

In recent years the shortcomings of the Italian welfare system have emerged in their seriousness because of different reasons. First, the increase in the ageing of the population combined with the shortening of hospitalization periods in medical institutions has led to an increase in the number of people needy of home assistance and care. At the same time, the growth in the participation of women in the labour market together with changes in family structure (mainly due to the growth of one parent families, the decreasing number of their members and the increase in their geographical mobility) have undermined the Italian informal care system that is mainly sustained by women.

As recently observed by L. Palumbo, "Care work is a family affair: families – and, within these, especially women – are the main actors responsible for providing care to members who need assistance, receiving from the state only (…) the so-called *indennità di accompagnamento* (attendance allowances), which are cash benefits for dependent people, comprising a standard exiguous sum – currently around € 512 per month[42] – which is distributed without control upon its use).

The shortcomings of the Italian welfare system have recently emerged in their seriousness due to (…) the weakening of informal family support, mainly produced by a growth in female participation in the labour market and changes to family structure – i.e. a greater number of one parent families, a decrease in the size of families and an increase in their geographical mobility. The combined

[42] This amount does not cover the cost of regularly employing a care assistant (around €1,000 – 1,200 per month). *But following the economic crisis it is a great cost that probably it is practically impossible to maintain by the State without depressing the economic system and the welfare system* (italics is mine).

effect of all these factors has led to the outsourcing of domestic/care work, mostly through the employment of migrant workers who are often willing, for lack of alternatives, to "accept" substandard and exploitative working conditions in relation to salaries, working hours and protection". This headed to a transition from a family to a "migrant in the family" model of care, in which (female) migrant workers have "met unsatisfied needs for care while ensuring the continuity of a family-based long-term care model"[43].

Of course this multi-cultural merging with different habits and traditions is particularly complex and hard to manage from a legal/political point of view. There is, among other difficulties, a black-market in both illegal entering in Italy as "migrant" and as to the payment system; of course from the point of view of the Government there is also a problem of public order and legality but in the same time this situation is "tolerated" for its effect on the economy and care assistance.

Of course it is simple to understand what is the impact on the family of the presence of a person that become in some cases absolutely fundamental for the same existence of the family itself (I mean for instance as in the case of mononuclear family composed by a very old person with no sons or with sons that are in their turn old or not able to provide a personal assistance) but may have a different culture, a different age and sometimes a different religion and different approach to life.

Moreover, a strong stressing point is the difficulties to protect disabled persons, usually living with parents, when the "family's" assistance is not more possible, for instance for the dead of both parents. This is a great problem in a older society like the Italian one especially in case of weaker economic conditions.

Around three years ago, Italy adopted an important Act for people with disabilities, entitled 'After us' ('*Dopo di noi*'). This Act foresees measures of assistance, care and protection in favour of people with serious disabilities, who have no family support because they miss of both parents or because parents are not able to assist them. More specifically, the Act establishes a fund for the

[43] Bettio, F., Simonazzi, A., & Villa, P. (2006), Change in care regimes and female migration: The "care drain" in the *Mediterranean, Journal of European Social Policy*, I (3), 271–285, p. 278.

assistance and support of disabled family members, which can be also used for the implementation of innovative residence programmes such as cohousing. As for fiscal incentives, the Act introduces deductions on the costs of insurance policies, and exemptions and tax benefits on transfers of assets after the death of family members, establishment of trusts and other legal protection instruments.

While being presented as in important instrument improving the current Italian welfare system, the Act '*Dopo di noi',* however, has been criticised for strengthening a welfare model that opts for privatised solutions rather than providing efficient public services, to the detriment of people with disadvantaged economic conditions.

Anyway it is a first answer to a social and cultural problem that is a consequence of the vanishing of the traditional context of Italian family. In this case it will be more important than a "small" statutory answer a complete political intervention more able to manage the cultural and collective transformation of the Italian contemporary society.

V. THE IMPACT OF "NEW" RELIGIOUS (MICRO) CLAIMS IN CONTEMPORARY ITALIAN FAMILY LAW

As I told before, in the Italian family law multicultural claims are essentially of endogenous origin. Our contemporary society is plenty of social groups different by ideologies, principles, religion and origins. In fact our population is a melting pot and a sum of different dominations even if each Region and even each town has a kind of "identity". Thus while it is (maybe) a folkloristic legend the "division" of the "community" in "northern people" ("polentoni" i.e. polenta's eaters) –usually very sharp and well-organized, hardworking, positive but distressed by the bad weather and someway sad- and "southern people" ("Terroni" i.e. hicks) –confusing, superficial, lazybones, but happy and rich by sun and sea- it is not far from the reality the existence of prejudices and a sort of "proudness" and sense of appurtenance of people of different regions and sometimes of different towns in the same regions: even nowadays the "ordinary man" of the traditional society of Naples is different from the "ordinary man" of Venice or Palermo[44].

Notwithstanding today we have a strong and widespread "standardisation" of customs, habits, models etc., I shall admit that the new forms of family brought in Europe by migrant communities demand for recognition in the legal systems of the European host countries. This forces the States to pay attention to the new forms of family induced by social and migration reasons. Even as I have said before, in Italy the "phenomenon" is very restricted and it is not only a "simple" ethnical question as a religious problem

Indeed a significant number of conflicts usually involve the Muslim ones, both because they constitute a huge rate of migrants, and because the institutions of the Islamic family law are the most discordant ones with the culture of the European rights and of course the Italian Family Law.

Let's think about:

[44] I know personally what this difference means: indeed as I was fortuitously born in Palermo while I am pure Neapolitan blood, and having married a pure Sicilian woman, I have a great personal and multi- annual experience ... as intercultural mediator between my parents and their daughter-in-law: two very far habits, way of saying, way of life and … cooking too.

- moral and legal equality between men and women[45];
-equal freedom and dignity of the spouses[46] within the marriage
- best interest of the child in existential choice, education etc.;
- parental responsibility;
- the right to marry art. 12, ECHR[47], which guarantees the freedom to marry, to both man and woman.
- Bigamy and polygamy, that in Italy as in many European countries, are crimes.[48]

Then - especially as regards the personal status of Muslims - Islamic law does not accept the separation between law and religion and furthermore is "transnational" and "universal" by definition, which on the contrary are characteristics of Western legal systems, it is easy to guess that family relationships are the most affected by the influence of the religious requirements. In particular, as the Qur'an itself rules explicitly and in detail that relationships, Islamic family law has most resisted the secularization and the modernist trends.[49]

Although law concerning the Islamic immigrants falls within international law and should be applied by the Courts of the European Union Countries, the cases that occur are numerous and complex so that it is almost difficult allow the automatic application of foreign law. A further and different situation is that of Italian citizens or residents who are Muslim and pretend the respect of their religious precepts even in contrast with the Italian rules.
Even if, we should say it, this happens for all kind of religion and customs.

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[45] EHRC. art. 23.
[46] EHRC. Additional Protocol, VII art. 5.
[47] ECHR, Art. 12 – *"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right"*.
[48] As an example, in Italian law bigamy is forbidden by art. 556 c.p., in French law by art. 433-20 of the *Code Penal*, and it is the same in Germany and in Spain.
[49] For an analysis of Islamic family law see Pearl, D. and Menski, W. *Muslim Family Law*. London: Sweet & Maxwell, 1998; Anies, M.A. "Study of Muslim Woman and Family: A bibliography." *Journal of Comparative Family Studies* 20, 2 (1989): 263-274; Pahman, F. "The Controversy over the Muslim Family Law." *South Asian Politics and Religion.* Ed. Smith., D. E. Princeton: Princeton University Press, 1966, 414-427. In the Italian literature, Aluffi Beck Peccoz, R. *La modernizzazione del diritto di famiglia nei paesi arabi*. Milano: Giuffrè, 1990; Abagnara, V. *Il matrimonio nell'Islam*. Napoli: ESI, 1996; Abu-Sahlieh, A.A. "*Il diritto di famiglia nel mondo arabo: tradizioni e sfide*". I musulmani nella società europea. Turin: Edizioni della Fondazione Agnelli, 1994.

In fact the crucial point is the difficulty to maintain the coherence of the legal system without falling in contradictions. From one side, indeed, the Civil Law Countries respect all religions providing as the Italian Constitution (art. 19) that "Everyone has the right to freely profess his own religious faith in any form, individual or associated, to make propaganda of it and to exercise its worship in private or in public, provided that it is not a question of rites contrary to morality". But from the other side the same legal system cannot admit conducts that are in contrast with its principles and laws.

The role and influence of the Sharia Courts or of the Muslim Arbitration Tribunals are particularly relevant in the process of circulation of the legal-religious models in the system of reference. It must be kept in mind that these Courts, in exercising the powers somehow recognized by the legal system[50] (as in United Kingdom), respond to general questions and decide concrete cases in different fields. They deal with divorce, parent-child relationships, inheritance, duties of wife and husband; but also with torts, loans and contract law. Judges, who can only be male (with some are exceptions), interpret the sacred sources and the doctrine according to various schools of thought in which the Muslim legal science[51] is divided. By applying the Shari'a, they perpetuate the revelation, combining it according to the needs of the time.

Through the activity of the Sharia Courts and Muslim Arbitration Tribunals (MATs), the legal solutions adopted may be fully recognised within the national legal system, albeit with certain limits and subject to certain formal and/or substantive conditions.

These "parallel institutions", in fact, in my opinion may only be recognized by the Italian legal system as alternative dispute resolution "private" bodies and within the limit fixed by the Law as to their "jurisdiction" and as to the "matters".

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[50] See Glenn, H.P. *Legal Traditions of the World*, Oxford univ. Press, 2010, p. 376 ss.

[51] The literature on the importance of schools and the various breakdowns is boundless, for an essential idea see Melchert, C. *The Formation of the Sunni Schools of Law.* Leiden: Brill, 1997; Kahn, M.H. *The Schools of Islamic Jurisprudence.* New Delhi: Kitab Bhavan, 1991; Ziadeh, F.J. "Law: Sunni Schools of Law" *The Oxford Encyclopedia of the Modern Islamic Law.* Ed. Esposito, J. New York: Oxford University Press, II, 1995. 456 ss.; Bearman, P. et al. *The Islamic School of Law.* Cambridge MA: Harvard University Press, 2005; Arabi, O. *Studies in Modern Islamic Law and Jurisprudence.* The Hague: Kluwer, 2001. 18-25; Nurlaelawati, E. *Modernization, Tradition and Identity.* Amsterdam: Amsterdam University Press, 2010. 221-222.

So religious law, through the Sharia Courts, competes with the State and secular law. It is a model of parallel and concurrent jurisdiction, based on the fusion between religious and legal rule, in which the panel of judges, the judge, the arbitrator or mediator all use concepts, categories and precepts derived from the law of God, which is at the same time a guide for religious and social behaviours, for both the spiritual and temporal life. By following adjudicative or conciliatory models, such institutions implement a form of social control based on the rule of religion, which has therefore a place in the Western context that, for centuries, has known the separation between Church and State, between legal rule and religious rule, since it is based on the principle of laity.

In particular, the Islamic Sharia Courts began to operate in the UK in the second half of the XX century, as advisory bodies, to which the Muslims could turn "in a foreign land" to obtain advices, opinions, to straighten out interpretative doubts on Sharia, on the correct way to behave for a good Muslim. This becomes very important for a Muslim living in an "alien" context, such as that of the Western communities of those States based on the rule of law, to preserve identity and tradition as well as not to leave their home communities because of the fading of the rules and dogmatic categories due to the coexistence with and within the "alien" system.

Today the Islamic Courts surveyed in the UK are about one hundred[52] and the majority of them were established – *unofficially* like in Italy– inside mosques or private dwelling-houses[53], set up by small, medium or large communities of migrants, who shared ethnicity, geographical origin or membership of one of the Islamic schools.

Italy is in a similar situation even if it is almost impossible to be sure of the number and the "powers" of this kind of "courts". Just ten years ago, an investigation by Carlo Bonini, published in the newspaper "Repubblica", showed how Sharia law has already been applied in Italy. No legal recognition by the Italian State, of course, but only a sort of arbitration function assigned, with the consent of both parties, to the leaders of the various Islamic

[52] See some of the statistical data incorporated in a legal research in Zee, M., "Five options for the relationship between the State and Sharia Councils." *Journal of religion and society*. 16 (2014) 2-14; in the Italian literature, see Marotta, A. "Il diritto musulmano in Occidente: Corti islamiche nel confronto tra democrazia e shari'a." *Heliopolis, Culture, Civiltà Politica* 2 (2013): 193.

[53] A phenomenon that occurs at present in many European and Italian cities.

communities present in our country. As Bonini wrote, an imam "unites in marriage. It settles disputes specific to family law. He shall decide on the custody of children. It calls for the intervention of husband and wife guardians in cases of bad treatment. He verifies the presuppositions of the "*talaq*", the formal declaration with which the man repudiates the woman who is his wife. It shall see that the marriage tie is dissolved when it is not recoverable" [54]. Of course not all these decisions od obligations or rules may have a formal legal significance in Italy but, as an Imam from Milan explains, "*a community is such even if it can administer and voluntarily submit to the law of its God. That's what we do*".

Learning from the experience of United Kingdom, in the opinion of some Italian Author the Shariah rules on family law could find space within the Italian legal system through the use of ADR systems for the settlement of disputes as it is in compliance with the principles of the rule of law and of laity, and may be the best way of respect for cultural and religious diversity.

According to this setting, the eminently negotiating nature of the mediating agreement or the adjudicative function of the arbitration award maintain the dispute, its solution and the content of the agreement or of the award within the private sphere, with the possibility to ask for its *law enforcement*, through the involvement of States Courts[55] and in compliance with, however, some fundamental limitations [56].

Following the United Kingdom experience, we too, as the Archbishop of Canterbury and Lord Chief Justice, Rowan Williams, can speak about "*joint governance*" and "*transformative accommodation*"[57].

In particular, according to this theory[58], each single individual would be free to choose the jurisdiction to which submit disputes and to adjudge its own

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[54] *http://ricerca.repubblica.it/repubblica/archivio/repubblica/2008/12/08/milano-la-legge-degli-imam.html?refresh_ce*

[55] See Anello, G. "'Fratture culturali' e 'terapie giuridiche'. Giurisdizioni religiose e diritti umani in una prospettiva interculturale." *Diritti umani e diritto internazionale* 5 (2001): 149.

[56] See Pera, A., *Dialogo e Modelli di Mediazione*, Cedam, 2016, p. 145 ss.

[57] Schachar, V.A. "Privatizing diversity: a cautionary tale from religious arbitration in family law.", *Theoretical Inquiries in Law* 9 (2008): 572-607.

[58] See Williams, R. *Archbishop's Lecture, Civil and Religious Law in England: a religious perspective*. February 7, 2008, available at *www.rowanwilliams.archbishopofcanterbury.org/articles.php/1137*.

rights. The solution offered is freedom, left to individuals in terms of *choice of forum* and *choice of law*.[59]

To have an idea of the role that the common law Courts have in determining the crucial points of this balance, it seems appropriate to refer to a leading.
The case *Uddin v. Choudry* 2009 concerns two spouses who originally came from Bangladesh and moved to Britain. They had celebrated their marriage according to Islamic rites, but not proceeded to registration under the Marriage Act.
The dispute between the spouses concerned the effects of the dissolution of religious marriage and the failure of the marriage contract.
In particular, the marriage contract stipulated that the bride received a sum of £ 15,000 from her husband or his family (*mahr*). This sum, however, had not been paid at the time of the marriage. The spouses did not consummate the marriage and, a few months after the celebration, the bride asked the competent Sharia Council the dissolution of the marriage. The Islamic Court ruled positively on the dissolution of marriage without deciding anything about the other claims of the woman, concerning the payment of the *mahr.*
In this case, in search of the applicable foreign law rule, the Court of Appeal has resorted to the appointment of an Islamic law expert, *mufti,* making recourse to the MAT. In the technical report, the expert clarified that:
– if not stated otherwise in the marriage contract, the gifts are considered pure and simple and should not be returned in case of divorce;
– if the marriage is not consummated for reasons not attributable to the bride, she is entitled to the payment of the entire previously agreed *mahr*. So the Court of Appeal held that the gifts received during the period of engagement were not to be returned and that the marriage contract was valid. Therefore, the bride was entitled to payment of mahr provided by the contract. The expert opinion allowed, on the one hand, the application of Islamic law in the exercise of jurisdiction of common law and, secondly, to proceed on the merits of the master agreement in the part relating to asset issues in the strict sense, without questioning the effectiveness and validity of the divorce decision issued by the Islamic Sharia Council. In our case, the dialogue between the parallel legal systems is carried out through a technical and procedural law instrument that is the appointment of an expert in the subject matter of the dispute. But there are hard cases, where this dialogue is more complex and not always possible. Always with reference to marriage, let's think about *limping marriage*. This term refers to those marriages that are valid for the religious order and incapable of producing civil law effects in the State legal system. In this context it is particularly difficult to integrate the belonging religious culture and the protection of fundamental rights. In this situation the Muslim believer is the holder of a "split" legal status , whereby, on the one hand, she/he is obliged to respect the religious prescriptions and on the other, is subject to state law applicable in relation to her/his status. Cases also occur where one or both spouses (most often one) get a divorce before a state Court, but not the dissolution of the religious bond. Therefore, the couple will be divorced for the State legal system, but not for the religious community and the Islamic legal system to which they belong. In many cases, moreover, the refusal to pronounce the *talaq* by the husband becomes a coercive instrument to ensure that the woman accepts, also in the civil trial, detrimental conditions arising out of divorce as far as income and property are concerned, or in matter of custody of children. In such cases, the fact that the State does not recognize the validity of Islamic law clearly does not prevent, however, harmful consequences for the woman, who is the weak part of the marital relationship and, indeed, it weighs heavily on her subjective legal situation.

[59] Marotta, A. "Il diritto musulmano in occidente: Corti islamiche nel confronto tra democrazia e shari'a." Quoted: 194-195.

The theme, as prof. Alessandra Pera observed[60], is therefore the clash between the *law of the land (one for all)* and the rules of the Muslim personal status, applied through the channels of private autonomy, through contracts and obligations or through solutions offered by the Sharia Courts which act as mediators or arbitrators in relations between private individuals.

Yet, it should be noted that there have been criticism to an approach deemed too "accommodative", because *Sharia* cannot become a form of jurisdiction in England nor in Wales nor in Italy and any matter or dispute, especially in the field of family law, must be treated and ruled by a judge who applies the *common law of England and Wales*[61] and in our legal system, of course the Italian Civil Law.

These most intransigent positions are partly justified by the need to safeguard human rights and weak individuals, especially when the choice of resorting to religious justice or, in upstream, the choice to profess a certain religion is not an expression of free consent.

Moreover according to the interpretation of some of the Sharia schools, recourse to secular justice is not recommended if not even prohibited. The rejection of the Sharia jurisdiction by a Muslim is an act of dissent from his community, a criticism to a shared system, which would lead to the marginalization and to be labelled as *"western"* or "*kafir*"[62] .

The hypothesis of an appeal against the arbitration award before the competent court would be even more unlikely and, in any case, rare because not all immigrants belonging to the Muslim community are (as Menski described them) *skilled navigators of pluralism rather than assimilated monoculturalists*, indeed sometimes they have language difficulties and do not

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[60] Pera, A., *Dialogo e Modelli di Mediazione*, Cedam, 2016, p. 150.

[61] See Griffith-Jones, R. "The unavoidable adoption of Shari'a law – the generation of a media storm." Quoted. 35, which reports the position expressed by Bridget Prentice, Undersecretary of the Ministry of Justice in 2008: *«Shari'a law has no jurisdiction in England and Wales and there's no intention to change this position. Similarly, we do not accommodate any other religious legal system in this country's laws»*.

[62] Kafir is an Arabic word that indicates, through a wide variety of shades, the person who does not believe in the God of Islam, usually translated as "unbeliever", "non-religious" or "infidel." The word comes from the root <K-F-R> which has 482 branches in the Qur'an, starting with the term *kufr* that indicates anything that is unacceptable or offensive to Allāh. From *Kafir* stem also the term *Kaffir*, used by European settlers in South Africa to address generically black people, and the ancient name (Kafiristan) of the Afghanistan region of Nurestan. See *http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100044658*; and *http://www.treccani.it/enciclopedia/cafri_(Enciclopedia-Italiana)/*

know the national law and the forms of protection it provides in relation to certain rights. [63]

Therefore, the voluntary nature of the use of these alternative forms of jurisdiction would be mere a declamation, which leads to violations of the rights of access to justice, to *due process of law* and to the *right to day in court* and other fundamental rights in the legal tradition of both common and civil law systems[64].

As mentioned above, the phenomenon in Italy is still "underground" in the sense that it is difficult to obtain official data also due to the "resistance" of the inter-state communities. However, this was also a decisive factor in the recent Italian general elections. The "fear" of forced islamisation and the loss of the centrality and supremacy of the laws of the state has played a strong role in the choices of citizens often misled by the press which, as is normal, tends to report with great emphasis cases of violation of criminal laws (more or less identical among the "native" population) and with little competence some decisions of civil courts in fact not always "crystalline". This is the case, for example, of a recent decision of Padua Tribunal[65] where a couple of Italian residents he Moroccan, she Italian of Moroccan origin - asked the judge to apply the family code of Morocco that provides for divorce according to Islamic rules. But more than the immediate divorce, the novelty of that judgment was the application of Moroccan law also to property relationships. The ex wife was recognized for Mout'a i.e. a gift for consolation established according to the duration of the marriage and the financial situation of the spouse, and Sadaq, i.e. the wedding dowry that the man had undertaken to pay to be able to marry the spouse. In the Moroccan Family Law Code, according to the word of the lawyers of the parties, the Moroccan legislator has tried to reconcile positive law with Muslim law that provides as still possible, under certain conditions,

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[63] In particular, this applies more to women than to men according to Ali, S.S. "Authority and Authenticity: Sharia Councils, Muslim woman's rights, and the English Courts." *Child and Family Law Quarterly* 25 (2013): 113. The Author identifies a number of elements that "*pressurizes women to use such forums to obtain 'acceptance' from their families and communities".*

[64] Mensky, W., *Comparative Law in a Global Context*, Cambridge University Press, 2006, p. 302

[65] Tribunale di Padova - Sentenza 8 settembre 2017 n. 2102.

repudiation and polygamy. Two concepts that do not exist and cannot enter the Italian judicial system even if sometimes there is a claim for.

In other different cases sometimes the Italian courts recognised the application of the "Islamic rules" but, again, only if there is a compatibility with the fundamental rights of the persons.

Notwithstanding those cases become real *legal irritants*, in front of public opinion, even if it should be clarified that they are sometimes accidental and unintended, and sometimes strategic and intentional, in order to protect the belonging legal tradition. In other words, some incidents of lack of communication may produce in the public opinion the sensation of "ensuring supremacy and spaces to a certain religious or legal culture", while in reality the intention is to establish the limits and the respect of coherence with internal values and legal interests that are essential to each national legal tradition.

In the Western legal tradition and in Italy these values are protected through the concept of unavailability of rights or statuses and the concept of public order, as well as though the limits of mandatory rules and morality, the principles of secularism, equality and rule of law.

Minority legal orders are the expression of a cultural and religious minority, who poses and manifests itself as a true *legal order*, albeit being a minority, with its strong component of identity, of normativity, and its need for conservation of the legal tradition, of the dogmatic categories and its own rules.

The rule of law is the State system, organized according to the principle of territoriality of the law, which hosts the minority.

Certainly, forms of legal pluralism in the strong sense, which contemplate the recognition of jurisdiction for religious Courts, would result in the delegation of a significant portion of powers to a specific community of believers, giving the latter the collective right to live according to its own rules.

This, on the one hand, would open the way for the transformation of a social minority into a political minority and, on the other hand, would result in serious discriminations against some members of the community, especially the most vulnerable ones, since it would produce a jurisdictional segmentation of the people on an ethnic and cultural base[66].

[66] Colom Gonzales, F. "Entre el credo y la ley. Procesos de integralidad en el pluralismo jurìdico de base religiosa." *Revista de Estudios Politicos (nueva época)* 157 (2012): 83-103.

It should be noted that this issue affects not only Italy or United Kingdom but also many European legal systems[67].

As in the Western Countries as in Italy and in the global world, the religious law challenges the State and secular monopoly of law and the justice systems of religious communities compete with the justice of the State.

[67] In France, where maybe the sentiment of national identity is stronger than in Italy, spaces for the application of Islamic law are drawn from international private law or specific bilateral agreements (As shown by the study carried out by Fournier, P. *Dossier 27: Reception of Muslim family law in western liberal states*, December 2005, available on line at *www.wluml.org/node/504*.) and however within the limits of public order and of the *lois de police* (See Hocart, C. *La reconnaissance du statut personnel des musulmans en France. Question sensible, question de sensibilité*. CURAPP Question sensibles. Paris: PUF, 1998. 279.)
In addition, the mandatory provisions prevent, at least in theory, the entrance of those provisions and institutions of Islamic law in contrast with the internal principles (Campiglio, C. "Il diritto di famiglia islamico nella prassi italiana." *Rivista di diritto internazionale privato e processuale* 1 (2008): 43-46).
The phenomenon of Islamic Courts and parallel jurisdictions however remains hidden and undercurrent, since such form of jurisdiction is exercised inside mosques and private homes, but has not yet "formally" met or clashed with the state authority. The theme is not at the attention of the public and political debate. It remains underground.
In Germany, the mediation carried out within Muslim communities involved also criminal law, according to the tendency of Middle East family clans to decide the conflicts in accordance with their cultural traditions, but in an *unofficial* way (Rohe, M. "Reasons for the application of Shari'a in the west." *Applying Shari'a in the west: facts. Fears and the future of Islamic rules on family relations in the west*, ED. Berger, M.S. Leiden: Leiden University Press, 2013. 38.) At an official level instead, Germany recognizes spaces of enforcement of Islamic law through two lines, both oriented and limited by the concept of public order: 1) private international law, by virtue of which the applicable law (in matter of personal rights and family law) is that of the parties (Rohe, M. "Islamic law in Germany." *Hawwa* 1 (2003): 46-59.); 2) the so-called "*optional civil law*", by means of which margins of private autonomy are recognized in particular, as far as we are concerned here, in the area of marriage contracts.
In Holland, Sharia is applied officially by the authorities and within the national legal system by means of: a. international private law; b. the foreign diplomatic authorities, who can be consulted by Muslims on various issues; c. substantial law, that offers different options on this point. Islamic law is enforced also unofficially, whenever it is possible to consult the religious authorities, provided that Dutch law is not infringed. These forms of openness are conveyed through: - the "principle of favour", - religious freedom, - the autonomy of the parties in the field of private law, - *ad hoc* provisions and open standards (Rutten, S. "Applying Shari'a to family law issues in the Netherlands." *Applying Shari'a in the west.* Ed. Berger, M.S. Leiden: Leiden University Press, 2013, 97).
The Dutch model is of particular interest because it has brought a solution to the afore mentioned problem of *limping marriages*, so in case of refusal of the husband to cooperate for the divorce, the power of the civil court is provided to order the husband to cooperate. Such power has also been applied to cases in which the parties were Muslim citizens, so the husband was ordered to cooperate for the religious or consular divorce (For the first applications of such institute by the Court of First instance in Rotterdam, see Rutten, S., *Applying Shari'a in the west,* Ed. Berger, M.S. Leiden: Leiden University Press, 2013, 102).

Several approaches can be found to decline the relationship between the two systems, by differently grading or excluding the idea of *accommodation*[68] seen above: i) full recognition, where the State delegates part of its sovereignty and of the related powers to the religious tribunals, both at a legislative and at a jurisdictional level; ii) partial recognition, according to which religious tribunals can diverge from state law, applying rules that are proper to the religion-based system and to the personal status, but the effectiveness of the judgements is subject to the scrutiny of legality (conformity to general and fundamental values, public order, mandatory rules, morals, the *lois de police*, etc., depending on the state legal system of reference); iii) no recognition, so the political choice is that of no intervention, no mediation and allow the decisions of religious Tribunals to have relevance only for those belonging to the community of reference, denying them any juridical effect and, therefore, their ability to regulate, create, modify or extinguish legal relationships of various nature; iv) more or less absolute ban, characterized by limitations to the jurisdiction of religious courts, in order to prohibit or minimize the competition of the parallel legal system in the exercise of the legislative or judicial power.

The options are clearly different from each other and can be combined and rated, but whatever the political choice, it seems more than ever appropriate to avoid the risk of a fracture between the minority community (religious law) and the majority one. Even because the choice of one of the last two models does not rule out that minorities may apply at an informal, more or less cryptic-typical level, those rules to which the national legal system intends to give little or no space. This does not imply the claim that any behaviour, use or widespread rule in a minority should be necessarily encouraged or simply considered neutral by the state legal system, which should obviously not abdicate from its function. The respect of "minority" groups is obvious but within the limit of the respect of the rights of individuals and until that respect does not mean the violation and the infringement of the prerogative, rights and general principles of the majority. From this point of view I think that the role of "public order" is absolutely substantial.

[68] for a partly different and more articulate classification, see Zee, M. "Five options for the relationship between the State and Sharia Councils." *Journal of Religion and Society* 9-10

Conclusion

More than a conclusion we can say that this may be a starting point for a deeper and wider research on the multicultural and (micro) claims in the contemporary Italian family law.

As I told, the Italian society is not yet at a stadium of "ethnic multiculturalism" so complex as in the USA or in Uk or in France and other Western Countries. Italy is surprising more similar to Japan with same problems of strong economic competition and crisis, growing up of the number of very old peoples needing for assistance, the crisis of the traditional family, the difficulty to manage a "lost generation" of young without work and perspectives, a certain "resistance" to the "foreign influences" but also with a growing "individualizations" of the society with the strong request for new rights even more "small" and singular, often in contrast with the rights of the community.

It is emblematic of this situation the ridiculous approach to the "rights of the others" like the choice to forbid the public exposition of the Crucifix as the suppression of "Merry Christmas" wishes in favor of a more politically correct "Good Festive Season". It is clear that there is here a systematic contradiction whereby, on the one hand, the legal system recognizes and protects the right to profess one's religion and, on the other hand, prohibits the expression of one's beliefs through the use of religious symbols or, which I think is even worse, when requires not to wear a burquini on the beach. In fact the point is that this "research" of, or submission to, the respect at any price of the other's rights is (sometimes) becoming a "contempt" to the rights and cultural consolidated traditions of community. In my opinion we may be open to the different culture but not so that to erase our culture (if any): the "bleeding" is always a reality but each system or society will react to the alien rules that are not "useful" or "liked" to follow. In few words the rights of the few should be protected and recognized but not up to the sacrifice of the rights of the more.

As it is said in the case of mediation for social inclusion[69] it is not important to reach a perfect integration but it is important the "relations" i.e. it is a question of reciprocal understanding and respect, not necessarily of integration at all costs Or at the cost of loosing the identity of the hosting society).

As it was observed by prof. E. Galli della Loggia[70], the Italian approach is nowadays grounded on "*legal prescriptivism*, so frequently used - in this case as in many other cases - by supporters of the (statutory) law. Get married? It is a right. Have a child? A right. Adopt it? That is also a right. All rights, and of course all rigorously established, foreseen, deduced, from the always invoked *liberal democracy* alias *the freedom*". Those who recognize themselves in both can only necessarily recognize themselves in any request of new individual rights like the homosexual rights, the women rights, etc. No one –said Galli della Loggia- has asked, however, why, despite the existence of such "democracy" for over a century, but it is only ten years that, for instance, gay marriage with its various appendices "has entered (not without some difficulty) in the list of rights that always the same "liberal democracy" could not deny except by denying itself. But why is it that - it is inevitable to ask oneself - the claim to such a right had never previously come to anyone's mind, not even to the most libertarian among libertarians? Did homosexuals not feel the need to marry and have children yesterday? Was democracy not liberal enough? We were not democratic enough, or what?

The obvious answer is that the rise of gay marriage into the sky of rights does not in fact derive from any principle inherent in liberal democracy, from any prescription of its own. It is only the result of the specific historical evolution of our society, of its progressive individual secularization, and of the consequent will of the parliamentary majorities that are formed in it".

According to the Author principles have nothing to do with them, except as a rhetorical weapon. They are invoked not only because they think in this way of conferring a chrism of inappellability to their claims, attaching to the

[69] A. Miranda, M. Russo, *Social mediation: a (proposed) educational pathway, in Diritti Comparati, 2, 2017,* p. 90-140.

[70] E. Galli Della Loggia, *La vera radice dei diritti*, in Corriere della sera, 1 febbraio 2016.

opponents the convenient label of reactionaries, of enemies of "freedom". But also to circumvent or to put aside, the questions that in our cultural horizon seem most unseemly: is it good for children to have a father and a mother, or is it indifferent? Is it preferable to have a society in which sexual identities are biological or one in which they are the most varied, defined from time to time by individuals?

There is yet another reason behind the invocation of principles, i.e. is the will of a parliamentary majority, of any parliamentary majority, sufficient to authorize a social practice, to establish any rights, even in the most crucial areas with regard to the historical-anthropological profile of a community? The answer, according to Della Loggia, is yes: "the will of a majority is enough. If tomorrow, for example, someone with a broad consensus, sufficient media support and a certain cultural prestige were to propose the introduction of human cloning, one can almost be sure that it would ultimately succeed. It would also establish everyone as right to cloning: of course in the name of what is prescribed by liberal democracy".

It is usually argued that the Constitution is a limit to the arbitrariness of majorities. As Della Loggia, I personally would have also doubts about the effectiveness of this limit, first of all because the Constitution should be interpreted as every statute or act, and the interpretation depends upon the times and the evolution of the society.

In short, "the Constitutions serve only, in the best case, to prevent parliamentary majorities from violating the rights explicitly mentioned in their text. But only this. It is very difficult to prevent them from establishing new ones as they wish: each time, of course, with the appropriate invocation of democracy, of the Constitution, and of its necessarily vague formulas, such as, precisely, that of equal social dignity written in our Charter. On the basis of which, as we can see, everything can be sanctioned in practice: from the right to parenthood to, let us say, an equal pension for everyone. When they establish new rights, these majorities do so, therefore, not to fulfill the commandments of "liberal democracy", but because every time this seems politically convenient: that is, able to win the favor of the voters, to win the elections".

But it is not to forget that by their nature majorities are condemned to always be, in one way or another, the representatives of common thought and social conformism.

The supporters of *legal prescriptivism* can in this way justify everything and its opposite. In reality, as we have seen before, not all the different cultural claims are tolerable or acceptable, and not all the legislative or judiciary solutions are always acceptable or tolerable.

As we have seen, in the Italian contemporary family law there is a concurrence of different and sometimes "micro" or "individualized" claims. These claims are sometimes in contrast each other or juxtaposed with general principles and habits followed by the general community, so that it is almost impossible, if not useless, the intervention of "prescriptive legislator".

As I said, in family matters the best way is to ensue accordingly to the general principle, leaving the Judiciary and the "Authority" to reconstruct the law, assessing with discretion (not arbitrariness but "reasonableness") each singular case, each micro or macro claims, judging if such a request is or not compatible with the principles followed by the community of reference.

The topic is complex and would require further in-depth and critical analysis.

In my opinion, however, a comparative conclusion can be made. As I said, the main problem with the rules is the assessment of compatibility or incompatibility with the legal system and the maintenance of the systematic coherence of the legal system itself.

If we look at the decisions or reactions of the French and Italian system (but I do not doubt that it is the same for all systems of the civil law area) it seems clear to me that the compatibility or incompatibility is assessed in terms of "policy" rather than in terms of strict law, usually by using the "negative" limit of public order.

If we look at the decisions and reactions of the English system, it seems to me that the assessment of compatibility or incompatibility is taken case by case and as matter of fact through the comparison made by judges (never monocratic and always of great experience) with the "values" (of which the public order is only one of many elements) i.e. those principles of collective and social interest recognized by the communities: the sanctity of the person; the

sanctity of property; national and social safety; social welfare; morality of the day; respect of tradition; the peaceful national and international coexistence; etc. Those values are not "codified" or absolute but depend on social and historical changes.

I wonder if the English lesson it is exportable at least in civil law systems. In my opinion, also in the civil law systems (and in the Italian one in particular), there are rooms for evaluating the tolerability of bleeding in order to ensure systematic consistency and, at the same time, adaptation to the new historical and social realities in accordance with the best quality of life for all associates. Indeed we too can refer to the "general principles" in our legal system - as expressly stated by the Civil Code in art. 12 of the preliminary provisions - and we can in addition, refer not only to the public order but also to the concept of “good custom or morality”.

Very briefly I remember here that public order has been defined as "the set of fundamental juridical assets and of primary public interests on which is based the orderly and civil cohabitation in the national community" (art. 159 d. lgs. 112/1998) and is seen in a negative sense, i. e. as a limit to any behavior in contrast with the rules of the State. While "good custom and morality", i.e. the set of principles and ethical-social values of a community, "even more than public order and other elastic clauses of the legal system, requires a continuous contact between norms and the multiform variety of social life. So, far from having a unique, eternal and immutable content, the' good custom and morality' can be filled with correct contents only with reference to the historical-social-moral contingency of a community ".

In my opinion, it is precisely from the mixture of these three elements that it is possible for the interpreter to deduct in a more objective way what are the "values" at the basis of society and of the legal system. Through them it is possible to assess whether and to what extent the alien "rule" bleeding the native normative pattern is or not compatible and therefore acceptable.

Like all closing clauses, the triad public order + morality + general principles of the system has a rubber nature that is sufficiently elastic to adapt to novelties but rigid enough to avoid alterations and contradictions.

I very well understand that even in these cases the assessment will always be an evaluation entrusted to an interpreter, a judge, a lawyer, a

politician... with all the risks involved. However, I am confident that any system contains in itself the antidote to arbitrariness.

Ultimately, the most difficult but essential thing in law is to decide and to decide weather or not and within what extension that claim may be allowed without challenging or prevaricating the rights and the principles followed by the community.

This was the case of the Indian traditional practice (Sati) of burning widows on the death of their deceased husband that British wondered how it was possible to ban or stop or limit without, however, violating the principle of the British pax of full recognition of the traditions and local rules followed by the "citizens" of the Empire. The solution, even this typically "British", was found by Governor Charles James Napier, who argued against the complaints of the locals who just demanded respect for their religious rules in the country: "Be it so. This burning of widows is your custom; prepare the funeral pile. But my nation has also a custom. When men burn women alive we hang them, and confiscate all their property. My carpenters should all therefore erect gibbets on which to hang all concerned when the widow is consumed. Let us all act according to national customs".