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Cross Border Family Faces Financial Remedies**

by
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THE AGE OF INTEGRATION: CROSS BORDER FAMILY FACES FINANCIAL REMEDIES

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Abstract

The migratory phenomena of recent decades have favoured the creation of families of cross-border relevance. These are unions between a foreigner and a citizen of the State in which the family decides to live, as well as unions composed of members with different nationalities who settle in a third country. They can also be families who live in a country different from their nation of origin. An overview of the phenomenon and the identification of the problems linked to applicable law, plus the remedies offered by national regulations in the proceedings of divorce and the consequences on financial assets of couples is contemplated in the first part of this paper. A succinct analysis, in a comparative perspective, of the Italian, English and French legal systems permits drawing some conclusions about the legal evolution of important issues. These include those concerning the protection of the weaker component of the couple, and the remedies acknowledged by various legal systems in favour of this component. In the following two paragraphs, attention is focused on the existence of legal convergences on the European scenario and on the recent community regulation no. 1259/2010, about the applicable law in divorce proceedings and the consequences. Among common objectives of European systems is the will to give a prominent role to the parties' autonomy in the distribution of assets, apart from the judicial intervention (if needed) inspired by principles of equity, either explicitly or implicitly.

Keywords: Cross border families, financial remedies, integration, unification

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I. Cross-border families: the law of the “jungle”.

In recent decades, legal systems have had to acknowledge the existence of new family models¹. The attitudes of each system with respect to such new models have been different and varied: “the intentional and conscious position to ignore the phenomenon”² or the specific regulation of some aspects of it (maybe to limit the effect of the institution and its consequences) constitute the alternative “remedies” laid down by European countries.

Cross border-families³ play a major role within these new models. They have occurred both worldwide and particularly in Europe, as a result of the opening of borders (with the possibility of obtaining diplomas and qualifications at the European level, of finding jobs in countries other than those of origin, etc.) and of a cultural growth which recognizes in differences a source of enrichment of one's personal experience.

This intensification of the migratory flow⁴ from non-European countries to European states has increased the possibility of encounters between extremely diverse legal cultures, such as those belonging to the western legal tradition⁵ and those of an Islamic origin. Such circumstances have led to an increase in “mixed” marriages and consequently to a proliferation of divorces.

Although we can note a quite recent slowing in the number of cross border marriages⁶, 2008 was characterized by an important increase in these transnational unions: 37.000 “mixed” marriages were recorded in Italy, i.e. 15% of the total (in 1995, these accounted for only 4,8%).

We do not ignore that such unions are often not made official by marriage, thus their statistical relevance is probably more significant.

Equally interesting data concern the subject of divorce: in 2005, the Istat recorded 7.536 separations of mixed couples compared to 4.226 in 2000. This is equivalent to a 76,7% increase⁷.

1 It is difficult to give an exhaustive definition of the family and to find a definition in national legislation or international regulations. Although some countries, like Italy, do not legally recognize cohabitation, it is common to refer the definition of the family to the nucleus based both on marriage and cohabitation, including homosexual unions, too; unfortunately this definition is not always legally binding. On this theme see: R. Probert A. Barlow, *Displacing marriage – Diversification and harmonisation within Europe*, in *CFLQ*, 2000, 12, 153; R. Bailey-Harris, *Law and the Unmarried Couple – Oppression or Liberation?*, in *CFLQ*, 1996, 8, pp. 137–147; C. Ricci, *La “famiglia” nella giurisprudenza comunitaria*, in S. Bariatti, *La famiglia nel diritto internazionale privato comunitario*, Milan, Giuffrè, 2007, p. 91 ss.; J. Murphy, *International dimension in family law*, Manchester, Manchester university Press, 2005.

2 We allude here to homosexual couples whose relationship, in some legal systems, is not recognized for legal purposes and therefore not regulated – except for limited aspects.

3 I refer to unions between a foreigner and a citizen of the State in which the family decides to live, and unions composed of members with different nationalities who settle in a third country and also families who live in a country different from their nation of origin. An interesting overview on this phenomenon is N. Lowe, G. Douglas, *Families across frontiers*, Tubingen, Martinus, Nijhoff, 1996.

4 On the problems concerning the migratory flow J-Y. Carlier, S. Sarolea, *Migration and Family Law*, in J. Meeusen, M. Pertegas, G. Straetmans, F. Swennen, *International Family Law for the European Union*, Intersentia, Antwerpen, Oxford, 2007, p. 439.

5 On the theme of European tendencies see E. Orucu, J. Mair, *Juxtaposing Legal systems and the principles of European family law on divorce and maintenance*, Intersentia, Antwerpen, Oxford, 2007.

6 See the data recorded in the last annual report on marriage in Italy for 2010, in www.istat.it.

In relation to such families, many difficulties can arise regarding identification of the applicable law, above all when, in moments of crisis, each party seeks to apply the rules of his or her own state of origin, these are better known and, obviously, easier to understand in terms of language and of the practical consequences.

The choice of the applicable law is a difficult process, because of the presence of different levels of regulation. These could include international law, European acts and national legislation, as well as an increasing volume of (not always uniform) case law.

The exact selection of rules can have considerable consequences, since many diverse approaches exist in the discipline of marriage, divorce, cohabitation, dissolution of the cohabitation, property regimes of the couple, personal and financial effects of the breach, including in reference to the relationship between parents and children.

We must not forget that in some countries religious beliefs and/or the input of philosophical ideas can condition family law, and provide for particular solutions such as through the Islamic institution of Rejection.

Moreover, the difference between the legal traditions is not without any consequence: according to the legal classification done by Mattei and Monateri⁸, the law preponderance model (Rule of Professional Law) faces the social organization model given by tradition (Rule of Tradition), religious or philosophical trends (*e.g.* Islamic or far eastern Countries), or a political model (Rule of Political Law) which directs the nation's social life (see the developing countries in South-Africa or Latin America or the ex-socialist Countries).

In other words, the balance between interests among cross-border families is not focused solely on the legal rule, strictly considered, but is frequently subject to external influences. This is especially notable in consideration of the fact that sociological sciences have, in recent decades, started to interfere with these topics, and in particular with alternative dispute resolution (alternative to the judiciary resolution).

Consistent occurred changes had a significant impact on family law so that its own purpose has been slightly modified, since today the family itself is no more characterized by its social function, that is to say an economic instrument in favour of its members and a tool to assure progeny, that can be linked exclusively with the couple formed by a man and a woman married together. First of all there has been noted a prevalence, even if it is not a total exclusion, of the secular marriage in comparison to

7 For the statistics see the following website: www.istat.it . On this subject I also refer to my work: C. Valente, *I rapporti patrimoniali nelle famiglie inter-nazionali*, in *Il dialogo tra le culture. Diversità e conflitti come risorse di pace*, edited by C. Baraldi, G. Ferrari, Donzelli, Rome, 2008, pp. 253 – 271.

8 U. Mattei, P. Monateri, *Introduzione breve al diritto comparato*, Cedam, Padua, 1997; and also in V. Varano, V. Barsotti, *La tradizione giuridica occidentale, Testo e materiali per un confronto civil law common law*, Turin, Giappichelli, 2010, pp. 32 ss.

the religious one; and an increasing number of divorces, which doubled in the seventies. These, together with the number of children born out of wedlock, have encouraged the establishment of cohabitation as an alternative solution to marriage. The spreading concept of freedom, in all its forms of expression, the sexual one included, has encouraged the coming out of homosexual couples and the legal claim by homosexual couples to the enforcement of a constitutional right to equality.

The traditional nuclear family based on marriage has been replaced by partnerships without any children, single-parent families, reconstructed families, cohabitation, homosexual relationships. These all have to be framed in the context of the predominant Human Rights concepts of today.

This appearance of the new social phenomena has not obtained a unambiguous result in every legal national context. We can think, for example, that only few countries regulate cohabitation, or that only a small number of states give a legal status to the homosexual relationship, or that the divorce's requisites are different from state to state. Also, there are consistent differences in medically assisted reproduction rules and family mediation is not an efficient tool in every country; children are not protected in the same way everywhere even if a general attention for their welfare exists, and children are recognized everywhere as legal persons who are entitled to rights, and are no longer only the subjects of a guardianship.

The differences are noticeable when the attention is moved from the western tradition to the eastern one, where the woman has not reached full emancipation yet. We must think about Islamic countries⁹, which allow polygamy and repudiation of women, with all its serious consequences, including on an economic basis, to them and their children, who are still strongly subdued to the *pater familias*, and also may be subject to child marriage.

That being stated, and setting aside the problems of provisions governing the appropriate jurisdiction, the most important complications in divorce proceedings arise when the judge must identify the relevant provisions in a specific case.

It can occur that the Judicial Authority has to apply national legislation, in addition to International or European law¹⁰. The first step is, therefore, the interpretation and correct enforcement

9 On the topic of the integration of Islamic families and the problem of the recognition of their laws see C. Gonzales Beilfuss, *Islamic family law in the European Union*, J. Meeusen, M. Pertegas, G. Straetmans, F. Swennen, *International family law for the European Union*, Antwerpen, Oxford, Intersentia, 2007, p. 425 ff. where the author investigates the legitimacy of the rejection and child marriage respect of the public order principle and C. Ruiz Sutil, *Le nouveau règlement "Rome III": la separation de corps et le divorce de la population marocaine en Europe et en Espagne*, in *Revue Internationale de Droit Comparè*, 2012, 2, p. 525 ff. where an analysis of the Spanish systems is combined with Islamic principles.

10 We can recall for example the following: The Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, 19th October 1996; The Hague Convention on the law applicable to matrimonial property regimes, 14th March 1978, The Hague Convention on the law applicable to maintenance obligations, 2nd October 1973; Regulation 2201/2003/EC. It can occur that two or more country have signed bi-lateral or multilateral Treaties that have to be taken into account in the identification of law. Recently a French-Allemande project about the

of the rules that govern the conflict under domestic law. This procedure is not simple because it requires the coordination of different sources of law, endowed with diverse ranking in terms of the hierarchy of the law, and which can lead to different solutions in each State.

The result is a general uncertainty about the rules applied to a specific case. This is caused by the diversity of national regulations and by the circumstance that the domestic law, at times, does not provide for regarding a specific situation. Reference can be made, for example, to the dissolution of the French Pacts or to the dissolution of registered homosexual unions as in the English model, which have no parallel in the Italian legal system or the case of polygamous marriage which is unknown to most of European countries.

The situation is quite complicated, since it is possible that the applicable law is not necessarily the law of the state in which the dispute arises, nor the national law of the applicant. So when the choice falls back on foreign law¹¹ the judge could be obliged to enforce a foreign law. Thus, he must also have an understanding of the exact meaning of the provision, its exact application, and the implementation of the foreign rules, with the risk of a dangerous combination of rules with indefinite effects¹².

In other words, the citizens are deprived of the chance to know and evaluate in advance (before the crisis) the consequences of the personal and financial choices made during the course of the normal development of the relationship. Each party is inclined to believe that his/her national law is destined to discipline a dispute originated at the moment of the divorce proceeding.

On the one hand, a potential conflict arises in the event of diverse nationalities of the parties, who may seek to apply their own law in their own jurisdiction. On the other hand, the absence of uniform law sometimes produces the aberrant result of “forum shopping”¹³ as the party will choose the judicial authority, either domestic or foreign, which is likely to provide the most favourable regulation of the specific case, in accordance with individual needs.

The result could be the removal of the proceedings from the “natural” judge, and the risk of protracting the duration of the process, thus increasing the legal costs, to the consequent detriment of all parties.

matrimonial regime have to be underline; on the theme see P. Simler, *Le nouveau régime matrimonial optionnel franco-allemand de participation aux acquêts*, in *Droit de la famille*, 2010, 5, pp. 8 ff.

11 According to international private law in force in Italy, Law 31st May 1995 no. 218, art. 30, the family assets are subject to the law of the state where the common life has taken place. In addition, the couple can decide to indicate the domestic rules appointed to solve any dispute. For example, an Italian citizen and a person of French nationality could choose the French or Italian law to govern all financial relations when this provision is contained in a written and valid agreement concerning their relationship.

12 See A. Harding, *Global doctrine and local knowledge: law in south East Asia*, in *International Common Law Quarterly*, 2002, 51, pp. 35 ff.

13 J. Meeusen, *System shopping in European Private International Law in Family matters*, in J. Meeusen, M. Pertegas, G. Straetmans, F. Swennen, *International Family Law for the European Union*, Intersentia, Antwerpen, Oxford, 2007, p. 239 ss.

The aim of this article is to analyse the different remedies offered by systems belonging to common law and civil law traditions, to protect the weaker party of the marriage, with the scope of discovering points of divergence or convergence.

Through the gathering of common law case history combined with existing legislative texts, this short paper will also trace the importance of extra-judicial elements (recourse to principles of equity, reasonableness, and fairness in the specific case) and their effects on operational rules. This procedure may reveal that beyond the divergence among national legal texts, the needs of the parties can find analogous encounters in the different legal realities, so as to indicate a line of common tendency. At first, the essay focuses on the distribution of family assets (§ II) and a right to maintenance which guarantees the weaker party (§ III); in the following paragraph I intend to make a brief reference to the recent European regulation on the theme of divorce, to verify its power to create uniform European legislation; a conclusive remark traces some considerations on family trends.

With regard to the methodology, these analyses apply a typical method of study in comparative law. The starting point is that some areas of the law, such as family law, (areas reflecting the strong influences of tradition and profoundly linked to ethical and moral themes) are more sensitive than other legal areas to moral and ethical issues and social customs. Thus, they remain subject to the evolution of concepts of equality, reasonableness and justice. So, from the comparison of different provisions contained both within the legislative texts, as well as from judicial decisions and identifiable practice, and finally through a procedure using the inductive method, the analysis has been based on specific real cases, in an attempt to verify the possibility of common tendencies in this subject. This last element has the capacity to adapt the law, in a general sense, to changing historical circumstances. Then, beginning with concrete examples, the article investigates, not so much the compulsory force of the provisions, but the possibility of identifying common operational rules¹⁴.

II. The division of property assets: is it possible to track trans-national tendencies?

When a cross border family comes to the end, the members have to find a reasonable settlement of all property and a resolution of personal affairs. The situation, which in general is not easy, is complicated by the transnational nature of the relationship that, as said, entails the application of domestic and/or foreign laws. In a practical dimension and in the absence of uniform regulation, the balance of the spouses interests are devolved upon the powers of the judge, who must choose the national regulation designed to solve personal and financial questions.

By restricting the scope of such short analysis to the economic consequences of the breach of the marriage, it must be considered that the financial choices made while living together and influenced

14 A. Gambaro, R. Sacco, *Sistemi giuridici comparati*, 3. ed., UTET, Turin, 2008, pp. 55 f.

by the emotional bond, could provide, at the point of divorce, an advantage to one party at a cost to the other.

In the natural course of their shared life, the couple does not consider the future consequences of their decisions because, regardless of the financial regime, any purchase is focused on the needs of the family. In such cases, some circumstances, like the fact that only one partner has a permanent job, or the choice of the wife to give up work or career prospects to dedicate herself to the care of the children, thus favouring the professional career of the partner, become unimportant. But, they constitute a risk for damaging the weaker party of the couple, because realistically, he or she has contributed, even indirectly, to producing for the family.

The remedies to such problems depend on the provisions applying to the family under the diverse regulations. For a long time, such differences were re-traced to the traditional opposition between systems belonging to the civil-law tradition and those belonging to common-law tradition.

A comparative analysis of national “policy”, in particular of the English, French and Italian systems, consents us to draft some observations. The objective of the following considerations is the evaluation of the peculiarity of the common law European system in comparison with the civil law traditions, for the purpose of discovering points of convergence or divergence.

Most continental systems provide the couple with different possibilities regarding the choice of property asset regimes (from the regime of communion *tout court*, to the communion of only the purchases made during the marriage, to deferred communion, i.e. a separation of the assets with calculation of the final incomes at the time of the divorce, to a total separation) while foreseeing at the same time a default option.

On the contrary, the common law model is characterized by the separation of property assets as an automatic application of existing laws, to which the parties can of course make an exception¹⁵.

At the time of the breakdown of the couple, the existence of family regimes in continental systems produces “hard and fast rules”¹⁶ in which the power of the judge to give a property transfer¹⁷ order is restricted. Instead, in English law, greater flexibility exists, despite the regime of separation.

Under the Italian model, the standard regime provides for the sharing of assets, assigning as joint property to the spouses property acquired after the celebration of the marriage, with the sole

15 Complete overview in A. Fusaro, *I rapporti patrimoniali tra coniugi*, in G. Alpa, G. Capilli (edited by), *Lezioni di diritto privato europeo*, Cedam, Milan, 2007, pp. 68 ff.

16 A.-F. Bock, *Dividing the Assets at the Dissolution of Marriage. A Comparative Assessment of Legal Systems Following a "Hard and Fast Rule" and Systems with a Discretionary Approach to the Division of the Assets*, in K. Boele-Woelki, T. Sverdrup (edited by), *European Challenges in Contemporary Family Law*, Portland, Intersentia, 2008, pp. 290 ff.

17 For example, in the French system, in the case of community of assets, the judge is the only one authorised, pursuant to art. 1476 of the civil code, to proceed to rule in favour of just one of the members of the couple, generally the parent with child custody. In this case, the person in question is entitled to the payment of a sum to offset the value of the property or to the attribution of assets of equivalent value.

exclusion of assets inherited by one party only or those used for professional and/or personal reasons¹⁸. A person who has contributed to family life, even only in terms of domestic work, is, in theory, “automatically”¹⁹ protected in the separation and divorce proceedings, which allow an equal distribution of joint property.

When the parties opt for a separation regime²⁰, the protection of the weaker party must pass through the court system because he/she has to prove his/her contribution²¹ and its exact value in economic terms. The path to the demonstration is very arduous when the parties disagree on the division of the property in a separation or divorce proceedings, so there is a concrete risk of losing what one party has contributed to acquiring²². In this context, the civil procedure regulations and the rules of the civil code (concerning property, contracts and donations) concur. To discipline the dispute, a complex *iter* is necessary to establish a property right and a series of rebuttable presumptions help the weaker party to claim, above all, chattels. Meta-judicial principles like *aequitas* and fairness help the judge to make a reasonable decision and to mitigate the rigid application of statutory laws. In this sense the evaluation of a series of elements like the care of the children and the house can contribute to give relevance to the wife position; an express recognition of the economical value of the housewife status is traceable in the topical decisions²³. At the same time having this element repercussion on the ability to find a new work after the separation, the judge must take into account in the family asset²⁴.

In the same direction, the French system provides for a rigid regulation in the division of the asset tied to the elected family regime. In the communion category such as *communauté réduite aux acquêts*, *communauté de meubles et acquêts* and *communauté universelle* most of properties belong to the spouses in common and at the time of divorce they are divided into equal portion; on the contrary, in the separation regimes (*séparation de biens*, *participation aux acquêts*) each party is the owner of the assets

18 Art. 177 c.c. ff. In the sharing regime the Italian system allows a personal acquisition when the other spouse expressly consents to his exclusion from ownership: Cass. 19th February 2000 no. 1917, in *Giust. civ.* 2000, I, 1365, note of Finocchiaro, *Acquisto dei beni in proprietà esclusiva del coniuge in regime di comunione legale*; Cass. 7th July 1998, no. 6589 in *Giust. civ. Mass.* 1998, 1478.

19 Cass. 24th July 2003, no. 11467 in *Famiglia* 2005, 155.

20 The party retains ownership of assets purchased solely (art. 215 c.c.); there is, therefore, a legal presumption of joint property for the purchase of goods and chattel. See: A. Zaccaria, *La separazione dei beni*, in G. Bonilini, G. Cattaneo, *Il diritto di famiglia. Il regime patrimoniale della famiglia*, II, 2 ed., Turin, Utet, 2007, p. 357 ff.

21 In this context, “contribution” includes all aspects which are susceptible to economic evaluation but not quantifiable in terms of producing concrete income for the family; I refer to the “invisible” contributions such as the care of the family, a partner giving up or slowing their own professional path as defined by E. Al Mureden, *Nuove prospettive di tutela del coniuge debole. Funzione perequativa dell’assegno divorziale e famiglia destrutturata*, Milan, Ipsoa, 2007, p. 11 ff. On the presumption of personal property see Cass. 6 march 2008 n. 6120 in *iurisdata* 2012.

22 The civil code, art. 219 c.c., provides for a presumption of community with the exception of the case in which the party can demonstrate the sole property. Therefore, the application of this rule to real estate is discussed; see Cass. 10th february 1995 n. 1482 in *iurisdata* 2012.

23 Cass. 29th march 2012, n. 5107 in *iurisdata* 2012; Cass. 15 may 2009, n. 11291 in *Diritto & Giustizia* 2009.

24 Trib. Bari 3rd november 2010, n. 3276 in *iurisdata* 2012.

acquired solely, so the weaker party has to prove the entitlement to justify a property right: the recognition of a donation between the spouses or the demonstration of a contribution to the increasing value of the family property could be a valid remedy to give protection to the partner²⁵, as the recent jurisprudence has declared.

As regards to other European systems which recognize a regime of separation of assets, the task of protecting the weaker party is undertaken by specific legislative provisions or common law remedies.

In the English system, the category of beneficial rights balances the effects of the rigid application of the law²⁶ on property and contracts, as specific provisions concerning family regime are not present. In this way, the judge has the power to provide for the transfer of assets from one partner to the other. In particular, with reference to the family home the judge can declare a trust²⁷ and consequently rule for the assignment of the house based on the needs of the children of the couple or, having checked certain conditions (including when any children reach the age of majority and financial independence), the judge can order the sale of the family home (and impose the distribution of the income).

The trust for sale of the family home in the form of a *Mesher* or *Martin order* and, in general, the recognition of an implied trust can preserve the party without income; beside these provision the court

25 The distribution of the family assets is a complex procedure as it needs the evaluation of the income and debt and consequently the assignation of the properties or the economic adjustments. For an exhaustive analysis see: P. Raynaud, *Les régimes matrimoniaux*, III ed., Sirey, Paris, 1986; A. Albarain, *Les régimes matrimoniaux en droit français. Aspects the droit civile et droit fiscal*, in A. Bonomi – M. Steiner, *Les régimes matrimoniaux en droit comparé et en droit International privé*, Librairie Droz, Geneve, 2006, pp.117 ff.; Y.H. Leleu, *Les régimes matrimoniaux*, Vol. 3, Larcier, Paris, 2002; K. Boele-Woelki (edited by), *Principles of european family law regarding divorce and maintenance between former spouse*; Antwerp – Oxford, Intersentia, 2004; on the theme see: Cour de Cassation., 12th December, 2007 n° 2007-041899, in *LexisNexis*, 2012; Cour de Cassation, 14th October 2009, n° 08-16.876, in *LexisNexis*, 2012; Cour d'appel Lyon, 12th February, 2009, Numéro JurisData 2009-376923, in *LexisNexis*, 2012.

26 It is interesting to briefly acknowledge the developments which have taken place at regulatory level in such context. Before the Seventies, the separation of property assets along with the rules on property and contract often led to unfair results considering that husband and wife maintained the ownership of the assets acquired both before and after the marriage; after such period and with the introduction of the Matrimonial Causes Act 1973, the situation changed considerably. The doors have been opened to the age of the discretionary system (or as the US system calls it - equitable distribution) characterized by the absence of pre-established rules with the sole exception of the provisions of Sec. 23 of the Matrimonial Causes Act 1973, which indicates a series of elements to be taken into account in the distribution of assets (child welfare, needs of the parties, contribution of each, standard of living, duration of marriage, age of the parties, etc.). The application of similar criteria has often resulted in the splitting of the assets into equal parts for the purpose of also making the parties independent in the shortest possible time; this means that in most cases, preference is given to the needs of the parties (and above all the children) in particular habitation needs, with the setting up of a trust or guaranteeing a periodical payment or a capital. Such principle has been departed from in favour of a proportionate distribution (*Charman v. Charman*, in *EWCA Civ*, 2007, 503, following *White v. White*, in *FLR*, 2000, 2 981) in the so-called big money cases in which the mathematical division of the assets could produce unfair results if the marriage has been a short one or the weaker party has never made any effort to contribute to increasing the family assets or to reaching economically advantageous positions. On the financial remedies in general see: S. Cretney, *Family*, in A. Burrows, *English Private Law*, II ed., Oxford, Oxford University Press, 2007, p. 93 ff.

27 See C. Valente, *Coniugi e coabitanti nella giurisprudenza di equity*, in *Le situazioni affidanti*, edited by M. Lupoi, Turin, Giappichelli, 2006, p. 129-145; M.D. Panforti, *Intervento legislativo e reazione giurisprudenziale nella vicenda inglese del trust for sale* in *Riv. Dir. civ.*, 1996, I, 485.

has statutory power to make an order against either spouse (lump sum payment, unsecured periodical payment, secured periodical payment)²⁸.

As seen, the typical property regime of the common law tradition is separation, meanwhile, the civil law models vary from separation, to community, to other forms of community of acquests. Each option entails diverse forms and different levels of protection for the weaker party.

In the first cases, the lack of specific regulation to preserve the weaker party is balanced by the procedural law that gives the judge the power to transfer the assets of the family.

The continental choice is tied to the selected regime or the default regime; in any case the court's possibility to intervene in the transfer is not formally enunciated, but a system of presumption helps to make a reasonable arrangement.

A point of convergence comes out in the participation regime where the intervention of the court can produce results similar to the English solution²⁹, as the deferred community recognizes to the judges a wide discretion on the distribution of assets. Such a regime consents a great autonomy to the spouses in the administration and enjoyment of the assets acquired during the marriage. Only at the breach of the common life is the reconstruction of the entire familiar property necessary in order to proceed to an equal division. In this context, the transfer of assets and related adjustments are permitted, thus causing the same results typical of the English systems, where the discretion of the judges constitutes a fundamental element.

Another point of convergence is traceable in all European countries, where the indirect protection of the weaker party passes through the recognition of an occupation right on the family home (generally the most important asset of the family) to the parent with child custody (generally the weaker party) until the children reach the age of majority.

For example, in the French system³⁰, as a consequence of the divorce the judge can order the “enforced” rental of the *logement* in favour of the spouse who is not the owner but has care of the offspring³¹.

28 *Mesher v Mesher and Hall*, in *All ER*, 1980, 1 126; *Martin v. Martin*, in *Fam*, 1976, 335 CA; *Elliot v Elliot* in *FCR*, 2011, 477 the judge ordered the sold of the family home with the aim to acquire another houses to guarantee the habitation need of both member. In *Vicary v Vicary*, in *FLR*, 1992, 2, 271, CA the wife did not contribute directly to husband's business, but her contribution in the care of the home and the children enabled the husband to accumulate his wealth, so she was entitled to share in the result.

29 See S. Cretny, *Community of property imposed by judicial decision*, in *Law Quarterly Review*, 2003, p. 349 ff.

30 The legislator provides, also, a specific guarantee to the family home, and indirectly, to its occupant during the marriage: the civil code (art. 215-3 civil code) prevents the partner disposing of the home without the consent of the spouse. On the family financial remedies: P. Malaurie, L. Aynès, *Les régimes matrimoniaux*, Defrenois, Paris, 2004; F. Boulanger, *Droit civil de la famille*, IV ed., Paris, Economica, 2000; A. Benabent, *Droit civil: la famille*, 11 ed., Paris, Litec, 2003; F. Debove, R. Salomon, T. Janville, *Droit de la famille*, II ed., Paris, Vuibert, 2006; A. Colomer, *Droit civil: régimes matrimoniaux*, 10ème éd, Paris, Litec, 2000; N. Peterka, *Régimes matrimoniaux*, Paris, Dalloz, 2008; F. Terré, *Le couple & son patrimoine: biens communs et biens propres*,

In the same direction, the Italian system provides for the assignment of the home to the parent, without property rights, to guarantee the welfare of the children. Analogous results are realised in the English system through the imposition of an implied trust in the interest of the offspring, when the judge does not enforce the transfer of the asset.

Although the aforementioned results do not assure a property right in itself, they do allow the possession and detention of the house, often for a long time. That is to say that, in practice, the occupant has almost the same power as the owner, above all towards third parties. This, even if for a limited time, is useful for achieving a new economic balance.

The study of cited European systems reveals that the national regulations have a different legislative approach for the treatment of the family home in general, and the protection of the weaker party in particular (which appears strongest in the English context). But case law demonstrates that the relevance recognized to concrete circumstances (such as the couple having children) acts as an element for catalyzing the existing differences and operates as an indirect protection of the weaker member, despite the separation or community regime of the family.

III. The maintenance of the weaker party in the national regulations.

In addition to the effect on real property, another relevant aspect of divorce proceedings merits to be investigated. This relates to the interest of the weaker party to have an economic contribution after divorce, in order to maintain the living standard existing during the marriage.

A general debate about the protection of the weaker party through the payment of an indemnity³² after the separation or the divorce has to be mentioned.

In the Italian system a member of the couple has the right to a contribution when he/she does not have adequate means³³ and he/she cannot provide for the family for objective reasons³⁴. The

concubinage, divorce, donation entre époux, régime matrimonial (choix, changement), logement de la famille, société entre époux, transmission aux enfants, Paris, Éditions du Jurisclasseur, 1999.

31 The protection of the family home is enacted also in a case involving rental: the spouse who is not a party to the rental contract can obtain the assignment of the house in consideration of social and familial interests.

32 We note in the Italian system that the assignment of the family home cannot constitute a form of maintenance because it represents exclusively a remedy to guarantee the children's interests; this point has been clarified, after a contrasting interpretation of art. 155 quarter c.c., by the introduction of the reform on separation of parents and shared custody of children (by law no 54 of 8th February 2006 applicable in all cases where parents do not longer live together like legal separation, divorce or simply interruption of cohabitation in the case of unmarried parents), Cass. 17th December 2007, no. 26574 in *Foro It.*, 2008, 5, 1487. On the contrary, the assignment of the family home constitutes a part of the general settlement in the considerations of the English judge involved in the division of the family asset: K. Standley, *Family Law*, III ed., Palgrave, 2001, 165 ff.; F. Burton, *Family Law*, London, Cavendish Publishing, 2003, 159 ff.

33 According to a recent judicial tendency, the condition of inadequate means has to be interpreted in its wider sense; it is not referring to a necessary status, but it has to indicate a significant deterioration of the previous economic situation. See Cass. 12th September 2008, no. 23549 in *Guida al diritto* 2008, 43, 52.

34 Art. 9, Law on divorce 1st December 1970 no. 898. It must be highlighted that in the Italian system separation precedes the decision of divorce. In that first phase the party can make an agreement concerning the patrimonial assets, in general, and maintenance in particular, or the judge can impose the payment in case of judicial

payment is due in consideration that the applicant cannot maintain a standard of living similar to that which she/he enjoyed while the couple was living together³⁵. In other words, the right to maintain the pre-existing economic standard is a general rule, with the aim to avoid negative repercussions after the divorce. However, following the divorce, this is evidently difficult to achieve in most cases; in this sense, some Italian judges take into account the incidence of the costs for both parties in defining the new style of living³⁶, as well as the general assets of each party and their potential in terms of professional careers and property³⁷, plus, finally, the personal and economic contributions of each partner to family life, the income of both parties, and the duration of the marriage³⁸.

A noteworthy element is the fact that the amount of the maintenance is always subject to modification when the situation of a party improves or worsens. Jurisprudence has to consider any new cohabitation of the beneficiary, and any child/children born in the second family of the party³⁹, as elements to justify a variation.

The couple can arrange the payment of a lump sum⁴⁰ as maintenance and recently judges have tried to operate⁴¹ in this direction.

In the French system⁴² the *prestation compensatoire*, generally payment of a sum, has the function to compensate⁴³ the economic disparity after the rupture of the marriage in the life of the spouse⁴⁴. If

separation. These statements are not mandatory in the phase of divorce in which the condition to determine a decision on the spousal support are subject to autonomous judgement: Cass. 21st February 2008, no. 4424 in *Foro It.*, 2008, 7-8, 2124; Cass. 28th January 2008, no. 1758, in *Giust. civ. Mass.* 2008, 1, 97. The decision concerning the family assets in separation proceedings can, at most, represent an index of reference, Cass., 30th November 2007, no. 25010, in *Giust. Civ. Mass.*, 2007, 11.

35 The living standard must be evaluated in the light of the future economic improvement of the spouse due to circumstances present during the life together, see Cass. 8th October 2008, no. 24858 in *Guida al diritto*, 2008, 46, 81. Also the continued donations of the father-in-law can contribute to determine living standards and to calculate the amount of the maintenance, Cass. 23rd July 2008, no. 20352, in *Diritto & Giustizia*, 2008. Even the amount of money recognized to a party as compensation are considered in the calculation of the maintenance, see Cass. 10th July 2008, no. 19064 in *Giustizia & Diritto* 2008. Obviously, the contribution of the wife in the care of the house and the offspring constitutes an element of evaluation: Cass. 14th January 2008, no. 593, in *Giust. Civ.* 2008, 3, 608.

36 I refer to the decision of Trib. Bari, 23rd September 2008, no. 2120, in *giurisprudenzabarese.it*, 2008. The Court did not consider it fair to give pre-eminence to doubling the costs of the wife; it pondered the expenses met by the husband to find, for example, a new house. The party burdened with the maintenance has the right to enjoy a similar standard of living, although not the same.

37 Cass. 12th July 2007, no. 15610 in *Giust. Civ. Mass.*, 2007, 7-8.

38 They are the same criteria introduced in the Principles of European Family Law taken from the analysis of the reply of a questionnaire sent to national European reporters. Obviously they are not binding principles as they represent the result of academic work; see E. Orucu, J. Mair, *Juxtaposing Legal systems and the principles of European family law on divorce and maintenance*, *op. cit.* pp. 265.

39 Cass. 22nd November 2000, no. 1505, in *Nuovo dir.* 2001, 563; Cass. 9th April 2003, no. 5560, in *Famiglia e diritto* 2003, 487; Cass. 28th June 2007, no. 14921, in *Diritto & Giustizia* 2007.

40 Art. 9 Law no. 898 of 1st December 1970; Cass. 18th July 2002 no. 10458 in *Giust. civ. Mass.* 2002, 1272.

41 Cass. 24th May 2007, no. 12157, in *jurisdata* 2012.

42 French family law has been subject to an important movement of reforms with the Law n°2000-596 of 30th June 2000 and Law n°2004-439 of 26th May 2004. See also before the reform: J. Carbonnier, *Les regimes matrimoniaux*, in *Essais sur les lois*, 2 ed., Paris, Defrenois, 1999, p. 41 ff.

there is no common consent, the amount is determined by a judge on the basis of different criteria⁴⁵ among which, art. 271 code civil, are the professional choices during common life “*pour l'éducation des enfants et du temps qu'il faudra encore y consacrer ou pour favoriser la carrière de son conjoint au détriment de la sienne*”⁴⁶.

The payment has to take place in the form of a lump sum⁴⁷ or the transfer of an asset or of a concrete interest in an estate⁴⁸. The monthly payment should be an exceptional event, related to specific circumstances of the creditor or the debtor and limited to 8 years. A life-long annuity is recognized in special cases⁴⁹.

The tendency to reduce the term of the periodical payment, and the favouring of the immediate definition of any economic claim, is also typical of the English system⁵⁰. This result comes to fruition

43 For instance in a recent case the maintenance has been denied in a short marriage where the wife has able to work: Cour d'appel Bordeaux, 28th february 2012, n. 10/04177, in *LexisNexis France*, 2012. In the evaluation of the consequences of the family breakdown the contribution due for the children's maintenance must not interfere: Cour de Cassation 25th May 2004 no. 02-12.922 in *Bulletin*, 2004, I, 148 p. 121.

44 Art. 270 et ss. code civil. On the general regulation of the family and its assets P. Malaurie, H. Fulchiron, *La famille*, 2 ed., Paris, Defrenois, 2006. It must be underlined that the payment of such indemnity is not automatically recognized by the judge who must consider whether a disparity exists consequent to the divorce; in such context, this has been denied due to the shortness of the marriage; see Cour de Cassation, 15 février 2012, n° 206 in *Bulletin on line*, 2012, Cour de Cassation, 15 février 2012, n° 208 in *Bulletin on line*, 2012.

45 A recent decision of the Cour de Cassation clarified that the common life prior to the marriage does not represent an element able to consider the needs and the resources of the wife: Cour Cassation 16th April 2008, no. 07.12814 in *Dalloz*, 2008, 1271, obs. V. Avena-Robardet.

46 The total commitment to the care of the children, and the consequent sacrifice of professional work, is a reasonable element to confirm a life annuity in favour of the wife: Cour de Cassation, 11th July 2006 no. 05-19.862 in *Bulletin*, 2006, I, 381 p. 328; recently Cour d'appel Lyon, 16th January 2012, n° 10/07500, in *LexisNexis France*, 2012; Cour d'appel Chambéry, 18th October 2011, n° 10/01758 in *LexisNexis France*, 2012.

47 It is singular that “payment” in the form of capital can be made in instalments even for small amounts; with sentence of the Cour d'Appel de Paris, 24ème Chambre A, 13 June 2007, the judge ruled payment of a sum of €4,800 split up into €200 instalments; Cour d'appel Bordeaux, 6th September 2011, n. 10/05639, in *LexisNexis France*, 2012.

48 The *prestation compensatoire* can be in the form of the allowance of occupation of the family home: Cour de Cassation 19th April 2005 n° 03-16.140 in *Bulletin*, 2005, I, n° 190, p. 160; Cour de Cassation, 31 mars 2010, n° 377, in *Bulletin on line*, 2012.

49 Cour d'appel Dijon, 1st March 2012, n° 11/01269; in this case the obliged party was authorized to periodical payment because he didn't have liquid asset. Due to the possibility of forfeiture, the *prestation compensatoire* is subject to particular regulation as regards its revision. The periodic payments can be modified only in their duration; the life annuity can be suspended or ended when important changes intervene in the condition of the parties. Obviously it is impossible to make a revision of the lump sum or other statement regarding the estates; this explains why the second marriage or cohabitation do not have negative repercussions on the *prestation compensatoire*. All the changes known at the moment of the divorce and considered in fixing the *prestation compensatoire* do not justify a claim for revision Cour de Cassation 3rd November 2004 no. 02- 18.509 in *Recueil Dalloz* 2004 p. 3037. Also in the regime prior to the reform of the 2004, in the case of a life annuity the second family cannot be an unforeseeable element able to weight the amount of the contribution without a concrete evaluation of the costs of the new familial situation: Cour de Cassation 25th April 2006 no. 05 – 16.345 in *Bulletin* 2006, I, 198 p. 174. The Court can suspend, cease and modify the periodical payment when a change in the conditions of the party is registered: Cour d'appel Douai, 18th November 2010, n° 09-06518, in *LexisNexis France*, 2012.

50 In *AMS v. Child Support Office*, in *FLR*, 1998, 1, 955 the capitalised maintenance was considered a valid alternative to secured periodical payment. On the English system see: C. Valente, *Regno Unito*, in *Il diritto di famiglia nell'Unione europea. Formazione, vita e crisi della coppia*, edited by F. Brunetta D'Usseaux, Milan, Cedam, 2005, p. 323 ss.

through the “clean break”, a practise that utilizes the payment of a sum of money or the transfer of an asset whose value represents the financial settlement. All elements are considered in quantifying the clean break compensation, thus going beyond the duration of the marriage and each party’s resources, to include the consequences of the professional choices of each party⁵¹.

Although this is the better solution⁵² in the division of the assets, the English judge has a wide discretion in the application of ancillary relief exercised in accordance with a just and reasonable criteria⁵³; so, according to the statutory provisions⁵⁴ the Court may provide for periodical payments of variable duration linked to the life of the parties and subject to modification in the event of a change in the condition⁵⁵ of the partners. These situations are advisable in the presence of children or when a party does not have realistic expectations of economic independence⁵⁶.

Therefore, despite the existing differences⁵⁷ in the national provisions, the practical results can be often analogous; that is to say the consequences of the family breakdown can produce similar effects when the focus is the operative procedure of the rules (law in action).

51 In this sense the express right to compensation for the wife’s dedication to family care is in *SRJ v. DWJ (Financial Provision)*, in *FLR*, 1999, 2, 176.

52 As Baroness Hale noted in *Miller v. Miller* and *McFarlane v. McFarlane* “the periodical payments are a continuing source of stress for both parties”; the aim of the divorce should be the reaching of independency. *Miller v Miller; McFarlane v McFarlane*, in *UKHL*, 2006, 24.

53 The concepts of fairness and reasonableness are obviously in evolving criteria influenced by social and moral values. As specified above, after the case *White v. White*, in *UKHL*, 2000, 54 it has been clear that the yardstick of equality cannot guarantee always a fair result above all in the treatment of both short and long marriages. It appears impossible to apply the same rules to all cases: for example the assignment of the home, the sole relevant element of the family assets, represents a problem linked to general marriages which, on the contrary, do not characterize the so called “big money case”. A new trend has been introduced in *Miller v. Miller* and *McFarlane v. McFarlane* op. cit. in which the distinction between non-matrimonial and matrimonial property became the discussion point on the way to share the family asset: M. Welstead, *Judicial reform or an increase in discretion – The decision in Miller v. Miller; Mcfarlane v. Mcfarlane*, in *The International Survey of Family Law 2008 Edition*, Jordan Publishing, 2008, p. 61 ss.; J. Miles, *Charman v. Charman (No. 4) – making sense of need, compensation and equal sharing after Miller/Mcfarlane*, in *CFLQ*, 2008, 20, 3, p. 378.

54 Sec. 23 Matrimonial Causes Act 1973: the court can make an order for periodical payment, secured or unsecured, an order for a lump sum and also an order to transfer the property of the family home or other real estate or even to sell the house. According to section 25 there are numerous elements to take into account amongst which are the welfare of the children, current and potential income, earning capacity, property and other financial resources, financial needs, family standards of living, the age of the parties, the duration of the marriage.

55 The re-marriage and the start of a new cohabitation are changes which can lead to a revision of the financial orders, Matrimonial Causes Act 1973 sec. 28. The relevance of the cohabitation, in this context, has been contested: the English system in fact does not recognize cohabitation as having the same effect as marriage, and in particular that relationship does not give the partner legal rights against the other’s assets. See the opinion of Thorpe L.J. in *Flavell v. Falvell*, in *FLR*, 1997, 1, 353.

56 C v C (Financial provision), in *FLR*, 1989, 1, 11: the divorce proceeding begun after twenty years’ marriage, the judge limited her periodical payments to 12 years by which time the younger child would be 18. He said the idea of periodical payments for life for a young or youngish wife (W was then 44 and had significant earning potential) with substantial capital is largely obsolescent. On the contrary in *M v. M (Financial Provision)*, in *FLR*, 1987, 2, the termination after five years would be inappropriate and unjust because of the age and the limited work experience of the wife, in the same direction *Barrett v Barrett*, in *FLR*, 1988, 2, 516, CA.

57 In the same way, European legal systems have also indicated the payment of a sum for alimony to offset the position of the weaker party; this is the case, *inter alia*, of the Czech and German systems. The detailed report on national regulation is available in K. Boele-Woelki, B. Braat, I. Sumner, *European Family Law in action, II, Maintenance between former spouses*, Intersentia, Antwerpen, Oxford, New York, 2003; M. D. Panforti, C. Valente

For example, in this context a common aspect concerning maintenance is represented by the function of indemnity, recognized in the payment, and by the tendency of countries to reduce the duration to a definitive term. Both these elements represent the instrument to establish a fair situation, and guarantee a standard of living similar to the previous one, when the parties cannot immediately resolve financial matters⁵⁸.

IV. The “solution” provided by the recent European regulation.

The evolution of the national regulations towards standardized solutions is a slow and gradual process, which does not prevent the risk of a general uncertainty. Even though the above mentioned factors of convergence constitute an excellent basis for the research of uniform solutions, the legal evolution of family law is characterized by fragmentation and uncertainty in cross border conditions.

An important step towards the simplification of such relations was recently made by the European Community which, already in 2005⁵⁹ had begun work to assess a “revision” of European legislation on family law⁶⁰.

The general aim of such initiative was to provide a clear and complete juridical representation on the subject of divorce and provide members of the couple with adequate solutions as regards legal certainty, predictability, flexibility. The detriment to the economically weaker member of the couple, and instead, the position of the party best able to sustain the legal costs necessary for the proceeding (in the hope of obtaining a favourable ruling) represented the factors for evaluating the new legislative asset⁶¹.

Such a procedure has led to the adoption of Regulation no. 1259/2010 dated 20 December 2010, into effect on 21 June 2012⁶².

The reform does not harmonize national laws (expressly recognised as the result of different historical and cultural processes) but it makes the task of the judge called upon to settle the dispute

(edited by), *Rapporti familiari ed esigenze abitative. Le risposte in uno studio comparato*, Mucchi, Modena, 2012; Z. Kralickova, *Legal protection of unmarried and divorced mothers in Czech Republic*, in B. Verschraegen (edited by), *Family Finances*, Vienna, Jan Sramek Verlag, 2009, pp. 281-291.

58 See also: T. Auletta, *Il diritto di famiglia*, 9 ed., Turin, Giappichelli, 2008.

59 I refer to the green book on applicable law and jurisdiction on divorce matter. A specific analysis is laid down in regulation of European Council on 17 July 2006 COM 399 (available on website <http://eur-lex.europa.eu/it/index.htm>) and S. Tonolo, *Il libro verde della Commissione europea sulla giurisdizione e la legge applicabile in materia di divorzio*, in *Riv. Dir. Int.*, 2005, pp. 776 ff.

60 A critical paper is M. Buschbaum, U. Simon, *Les proposition de la Commission européenne relatives a l'harmonisation des règles de conflit de lois sur les biens patrimoniaux des couples maries et des partenariats enregistrés*, in *Rev. Crit. DIP*, 2011, 100 (4), pp. 801 ff.

61 See on the matters of “rushing to court”: M.C. Baruffi, *Due gli obiettivi del “sistema” UE: evitare il forum shopping e definire un quadro normativo certo*, in *Famiglia e minori*, 3, 2011, pp. II ff.; R. Clerici, *Il nuovo Regolamento dell’Unione Europea sulla legge applicabile al divorzio e alla separazione personale*, in *Fam. Dir.*, 2011, pp. 1053 ff.; I. Ottaviano, *La prima cooperazione rafforzata dell’Unione Europea: una disciplina comune in materia di legge applicabile a separazioni e divorzio transnazionali*, in *Dir. Un. Eur.*, 2011, pp.113 ff.

62 The sole art. 17, relating to the notification obligations of member States to the Commission, applies starting on 21 June 2011.

easier, with prior indication of the applicable law; and it also allow the couple to have sufficient elements for appreciating the consequences of the breach⁶³ of the marriage in advance.

Such a result was achieved by means of a procedure widely used in many international treaties, specifically by granting the parties the chance to reach an agreement on applicable law⁶⁴. This principle follows in the wake of a movement, which tends to “privatize”⁶⁵ relations within family law. The trend already present in common-law countries, has also made an appearance in continental law, in order to promote negotiation and mediation between individuals, and to reduce the interventions of a public nature. The traditional view of the family, linked to the status concept, to whom the State grants rights and/or powers, has been replaced; nowadays, all the family members are entitled to autonomy in the conduction of family life and above all to manage family assets.

In this context, the regulation⁶⁶ has enabled married couples to formalize a choice tied to the law with which the parties have or have had some links. The aim is to discourage, as much as possible, the recourse to foreign jurisdictions and, indirectly, to protect the economically weaker member. The option must therefore fall between the laws of the country of habitual residence of the couple, or that of the country of last habitual residence, if either of them currently lives there, or that of the country where one of them has nationality or, finally, the *lex fori*; all this with reference to the time the contract is made.

Whenever the parties have not stipulated such an agreement, the regulation itself indicates the applicable law, listing, in order, that of habitual residence of the couple, or lacking this, that of the last habitual residence (as long as no more than one year has passed before appealing to the judicial authority), if one of them still lives there. Or in the absence of such, that of the country of which the married couple are nationals; the *lex fori* still remains to be considered at the time the case is established.

63 The regulation don't furnish the definition of divorce but a common opinion refers to all proceedings before the court, except the religious institution; in this sense the rejection of Islamic nature declared by a rabbinic tribunal or religious authority has been excluded by the application of the European act. On the extension of the reform see K. Boele – Woelki, *For better or for worse: the Europeanization of international divorce law*, in *Yearbook of Private International Law*, 2010, p. 13 ff.

64 On this subject: M. Condinanzi, C. Amalfitano, *La libera circolazione della “coppia” nel diritto comunitario*, in *Dir. Un. Eur.*, 2008, pp. 399 ff..

65 On this subject: A. Zoppini, *L'autonomia privata nel diritto di famiglia, sessant'anni dopo*, in *Riv. Dir. Civ.*, 2002, I, pp. 213 ff.; B. Braat, *Indépendance et interdépendance patrimoniales des époux dans le régime matrimonial legal des droits français, néerlandais et suisse*, Intersentia, Berne, 2004, A. Miranda, *Le modèle italien: la privatisation des modèles familiaux face aux développements sociaux*, in O. Roy, *Réflexions sur le pluralisme familial*, Parigi, Press Universitaire de Paris Ouest, 2011, pp. 93 ff. and also S. Sica, M. Messina, *Famiglia non fondata sul matrimonio ed autonomia negoziale*, in G. Autorino Stanzone (edited by), *Il diritto di famiglia nella dottrina e nella giurisprudenza*, Vol. I, Giappichelli, Turin, 2011, pp. 409- 433.

66 See M. Velletti, E. Calò, *La disciplina europea del divorzio*, in *Corr. Giur.*, 2011, pp. 719 ff.

However, such an innovative approach to the problem of identifying the applicable law does leave various problems unsolved⁶⁷ for reasons including the lack of case law, due to the very recent nature of the reforms.

One of the purposes of such regulation⁶⁸ is to limit the application of the foreign law and to convince the married couple to prefer the law of the place in which the case will probably be established. This does not, however, guarantee the exclusion of the foreign law, with the well-known difficulties this entails: problems in the understanding the foreign legal language and the institutions as a whole, difficulties discovering the sources of the foreign law, lack of acquaintance with foreign procedures and jurisprudences.

The target of the European legislation is to prevent delays and additional costs affecting divorce/separation cases, and therefore to protect the weaker member of the couple. This must also be reconsidered because the possibility of coming to an agreement⁶⁹ on applicable law does not necessarily put the members of the couple on an equal position, and above all the choice is not always made in an aware manner⁷⁰.

In addition, there is a risk that the indication of the criteria would not meet the expectations of the parties. We can refer the case in which a couple transfers their residence after the agreement relating to the applicable law. This would obviously give rise to a series of problems concerning predictability and would place major obstacles in the way of reconstructing the will of the parties, as well as the governance of the disputed relations.

Last but not least in terms of importance, to this must be added the fact that, among others, there are matters relating to the validity of the marriage, the property effects of the marriage, parental responsibility and alimony obligations that all remain outside the application of the mentioned regulation; without ignoring the circumstance whereby such regulation only applies to marriage unions. This leaves numerous problems relating to partnerships and recorded unions unresolved, for both homosexual and heterosexual unions.

67 A critical aspect concerns the universal character of the regulation that has to deal with the nature of enhanced cooperation of the text to which only a certain number of nation have accepted; see M.C. Baruffi, *Il regolamento sulla legge applicabile ai "divorzi europei"*, in *Il diritto dell'Unione Europea*, 2011, 4, pp. 869 ff.; S. Peers, *Divorce, European style: the first authorization of enhanced cooperation in European Constitutional Law Review*, 2010, 339 ff.; P. Hammje, *Le nouveau règlement (UE) n. 1259/2010 du Conseil du 20 décembre 2010 mettant en œuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps*, in *Revue critique de droit internationale privé*, p. 295 ff.

68 G. De Marzo, *Il regolamento (Ue) 1259/2010 in materia di legge applicabile al divorzio e alla separazione personale: primi passi verso un diritto europeo uniforme della famiglia*, in *Foro it.*, 2011, I, 918 ff.

69 Problems must also be included relating to the form of agreement (art. 7) as the law require the written form but makes a reference to national law as to the validity of the agreement as the formal criterion.

70 Even thus the regulation encourages the couple to consult an expert to appreciate the consequences of any decision, this might not be enough, including in the light of any changes in the life of the couple.

It is important to underline that, in accordance with the definition given by European Court⁷¹, the family regime includes the discipline of the property during the marriage as far as the financial relationship which originated in the marriage, and having effect in the divorce proceedings.

With the above mentioned restrictions, the effectiveness of the regulation is limited to the grounds for divorce and the personal consequences of the divorce (and separation)⁷². Paradoxically the risk is that, in the presence of a valid agreement about the applicable law, the disadvantaged party could sustain a case for a limited effect of the contract and the regulation, in order to promote the enforcement of his/her national law. In effect, the lack of a consensus about laws governing the specific case can produce aberrant results. The impossibility of adopting regulation criteria imposes the need to refer to the principles of international private law, which differs in every country. Generally, the reference is to the national law of the common residence, or to the last residence of the couple, or to the citizenship. This causes the well known problems and consequences of uncertainty.

V. Financial autonomy: the aim of divorce proceedings in European systems.

It is clear that on the European level the uniform discipline of family law is still far from being reached. Even though there is severe opposition to the uniformity of law, coming from supporters of nationalism, the harmonization process has already started. In the nineties the idea of harmonization was discussed for the first time, as a consequence of the internalization of private law in general terms.

The work of The Hague Convention cannot be ignored, as it is an inter-governative organization that represents approximately one hundred and thirty states, and has been established in order to develop trans-boundary legal tools, which are to be applied in several fields of law, to answer to the real needs of the coming uniformity of such law. Starting from the leading need to give effect to foreign judicial sentences, this organization has worked in order to adopt conventions able to remove uncertainties. Among those conventions are the agreement on the international abduction of minors, the convention on international adoption, the one on alimony, on recognition of divorce, and on wills.

On a comparative basis, in the year 2001 the International Commission on European Family Law (CEFL⁷³) and its Expert Group, composed of academics and national experts on family law issues, focused on the processing of the Principles of European Family Law. Even though the results of this focused work were important (several papers on the requisites for divorce and for alimony, parental responsibility, homosexual cohabitation), there are still many questions to be resolved. These include

71 European Court 17th march 1979, De Cavel I, n. 143/78, in *Raccolta*, 1979, 1055 and European Court 31st march 1982, C.H.W., n. 25/81, in *Raccolta*, 1982, 1189.

72 G. Rossolillo, *Ambito di applicazione, relazione con il regolamento CE n. 2201/2003, definizione e carattere universale*, in *Nuove leggi civili commentate*, 2011, 6, pp. 1462.

73 On this theme, amongst the other, see: K. Boele- Woelki, *Perspectives for the unification ah harmonisation of family law in Europe*, Antwerp, Oxford, New York, Intersentia, 2003; K. Boele- Woelki, J. Miles, J. M. Scherpe, *The future of family property in Europe*, Cambridge, Antwerp, Portland, 2011.

the choice of the law able to be more broadly applied in some areas tied to local tradition. Topics, for example, include the many clashes on issues concerning fundamental rights such as dispute resolution regarding health. In many cases these involve not only legal matters, but ethical and religious ones as well. That is to say the law regarding euthanasia, end of life therapeutic treatment, or feminine genital mutilation, typical of some African areas.

The published studies demonstrate that even though the differences between the provisions are still significant, points of convergence can be understood among the various European models, probably because the execution of the rules produces increasingly similar results.

The sensation is that these common tendencies are the effect of both a natural evolution in the area of family law and of social changes occurring in this area⁷⁴.

One element worthy of mention is the tendency to favour the reaching of economic independence by both parties once the marriage has been dissolved. In this sense, the recent European regulation will play an important role in facilitating the prompt solution of controversies, thanks to the identification of applicable law.

The clean break model originating in Anglo-Saxon countries seems to have been imported into the continent where, ever more often, solutions are adopted which are suitable for defining consequences of the breakup of the marriage in a definitive way. A typical example is the payment of a lump sum instead of periodical payments or the transfer of real estate⁷⁵.

This phenomenon is so widespread that today some authors⁷⁶ can speak of a sort of “erosion” of the principle of marriage solidarity.

Political and social evolution, i.e. the fact that women have a certain amount of economic independence (which they also maintain during the marriage), the change in costumes and mentality (increasingly more marriages break up and after only a short time), the change in the very concept of marriage (by now no longer considered an indissoluble instrument of financial security) are all aspects which undermine such solidarity.

In effect, despite the property asset system of the family, the decisions of different legal systems are now turned towards restricting the economic consequences of the breach of the marriage in a

⁷⁴ We must underline that the phenomenon of modernisation has affected each European system but has not eliminated completely the existing differences. On the evolution of family law and its consequences see: M. Antokolskaia, *Harmonisation of Family Law in Europe: a historical perspective. A tale of two millennia.*, Intersentia, Antwerpen, Oxford, 2006; M.A. Glendon, *The transformation of family law: State, Law, and Family in the United States and Western Europe*, Chicago & London, University of Chicago Press, 1989; C. McGlynn, *Families and the European Union. Law, Politics and Pluralism*, Cambridge, Cambridge University press, 2006, pp. 176 ff.

⁷⁵ We can mention *Gojkovich v. Gojkovich* in *Fam.*, 1992, 40 where the judge order a lump sum of 1 million to wife to buy hotel (and to start a business plan).

⁷⁶ On this subject see H. Fulchiron, *Des solidarités dans les couples séparés*, in B. Verschraegen (edited by), *Family Finances*, *op. cit.*, pp. 517- 531.

relatively short time. Discussions no longer centre on extending a legal and moral obligation but only on the need to achieve a fair distribution, in order to ensure that both parties have an economic base suitable for making them independent. Thus, this could be considered as reducing the meaning of marriage solidarity to the utmost.

A right to life-long maintenance is no longer guaranteed, but the switch from the breakage of the bond to the new status⁷⁷ must be made easier, at economic level, by means of the fair sharing of all assets, a process to be completed as quickly as possible.

In this context, the distinction between common-law countries and civil law countries lessens and seems capable of being overlooked, as does the traditional dichotomy between the separation of assets (most typically found in common law systems) and the sharing of assets (most frequently adopted by civil law systems)⁷⁸.

Another point is the situation often introduced into continental systems, in which measures permit the judge to reach a decision based on *equitas*⁷⁹, in order to balance the effects of a rigid application of rules for the family in question.

In general, the recourse to meta-judicial criteria has been introduced in the resolution of proceedings where the discretionary use of the law is recommended for the best balance of the interests. The rigidity of national regulations can be mixed with fairness and equal principles with the aim of adapting interpretation of the law to the specific need of the case.

This is another typical *modus operandi* imported from the English system to the continental ones. It can be said that the process of “familiarisation” of property⁸⁰ began in the second part of the last century in the English system has started to produce the same effects in the continental nations. The guiding principle is the need to make the property rules affecting ownership of family home flexible, and to recalibrate the assets in relation to the specific necessities of the family members.

The autonomy reserved to the parties by national legislation is not to be ignored. The possibility of regulating property relations, in view of a possible breakdown of the partnership (maintenance or

77 For example, in French law, the percentage of married couples which obtain alimony is very low - just 16.14% of cases; see Foulchiron, *Des solidarités dans les couples séparés*, *op.cit.*, p. 520.

78 See on the subject T. Sverdrup, *Maintenance as a separate issue - The relationship between maintenance and matrimonial property*, in K. Boele- Woelki, *Common Core and better law in European Family Law*, Intersentia, Antwerp, Oxford, 2005, p.119 ss.; L. Fox, *Reforming Family Property – Comparisons, Compromises and Common Dimensions*, in CFLQ, 2003, 15, pp.1–19, V. Roppo, G. Savorani, *Crisi della famiglia e obblighi nell’Unione Europea*, Turin, Giappichelli, 2008; C. McGlynn, *Families and European Union Law*, in R. Probert, *Family life and the Law. Under one roof*, Aldershot, Ashgate, 2007, p. 247.

79 See also J. Copson, *Financial provision in England after an overseas divorce*, in FLQ, 45, 3, 2011, pp. 361 ss.; A. Laquer Estin, *International divorce: litigating marital property and support rights*, in FLQ, 45, 3, 2011, pp. 293 ff.

80 The reference is to the Jhon Dewar theory (J. Dewar, *Land, law and the family home*, in S. Bright, J. Dewar, *Land law: themes and perspectives*, Oxford, Oxford University Press, 1998, pp. 327 ff.) as explained in the recent article of A. Hayward, *Family property and the process of familiarisation of property law*, in *Child and Family Law Quarterly*, 2012, 24, 3, 284 ff. Even if the theory is elaborated to mitigate the effect of rigid rules concerning property in the dissolution of cohabitation couple, the effect could be *a fortiori* extended to marriage.

separation agreements) typical of the common law traditions has started to enter in some civil law countries, where the validity and effectiveness of such agreements is currently under evaluation. In this direction, a specific regulation currently appears in the Principles elaborated by CEFL⁸¹.

That aspect is a concrete representation of the major phenomenon regarding the privatization of family law. It is well demonstrated by the habit of resolving, on a judicial level, the still existing relationship (clean break) question: for example, the transfer of property, or the payment of a lump sum, or the more frequent use of alternative dispute resolution instruments.

In addition, the common social evolution⁸² had a deep impact on the family law of European countries. These include the secularisation of marriage, the new concept of couple should be not necessarily bound by marriage, liberalisation and the introduction of no-fault divorce, the phenomenon of the re-composed family, and the necessity to guarantee all the needs of family components, independently of the genetic ties.

The affirmation of the above-mentioned principles permits us to discuss a natural convergence of systems. The diffusion of models and forms of indirect communication such as the circulation of national decisions, bring about an evolution, albeit slow, of the law, and have often led to a “legal transplant” of national rules⁸³.

To this scope we must add the willingness of national legislators to cooperate, encouraged by an interest in the study of foreign law, to offer further valid solutions.

Natural convergence is undoubtedly the best instrument for achieving a commonly accepted uniform discipline. However, it is a slow process and probably difficult to carry out regarding the aspects which remain largely linked to local tradition⁸⁴.

In conclusion, it can be said that all direct efforts aimed at standardizing family law seem to be based on a common point of departure: minimizing state intervention, apart from issues concerning the care of the child, and preferring the autonomy of the parties and the intervention of the judge, based on equitable principles.

81 See K. Boele-Woelky, F. Ferrand, C. Gonzales Beilfuss, M. Jantera-Jareborg, N. Lowe, D. Martiny, W. Pintens, *Principles of European Family Law regarding divorce and maintenance between former spouses*, Antwerp, Oxford, Intersentia, 2003.

82 M. Antokolskaia, *Comparative family law: moving with the times?*, in E. Orucu, D. Nelken, *Comparative Law. a handbook*, Oxford, Portland, Oregon, Intersentia, 2007, p. 241 ff.

83 A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, Scottish Academic Press, 1974.

84 See on the subject A. Fiorini, *Rome III – Choice of law in divorce: is the Europeanisation of Family Law going too far?*, in *International Journal of Law, Policy and the Family*, 22, 2, 2008, pp. 178 – 205.