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The Divorce. Comparative View between Old and Current Regulations – Social Significance

Loredana TEREC-VLAD[1]

[1] Ștefan cel Mare University in Suceava, Romania; Titu Maiorescu University in Bucharest, Romania; Romanian Academy - Institute of Sociology, Bucharest, Romania;
loredana.vlad@fdsa.usv.ro

Abstract: In the past, Romanian legislation did not distinguish between the termination of marriage and its dissolution through divorce. Divorce represented, as stipulated in art. 38 of the Family Code, the means of dissolving the marriage, for good reasons, which made it no longer possible to continue the marriage. It follows from the definition of divorce that it could only be obtained by judicial means, even in the situation when it was based on the consent of the spouses, the court being the one that pronounced it, after verifying the fulfillment of the legal conditions. Nowadays and with the entry into force of the New Civil Code, things have changed considerably. At the same time, when it comes to divorce and marriage, in European law only the right to conclude a marriage is protected, but the right to divorce is non-existent.

Keywords: *divorce; the application of the civil law in time; social meanings of the dissolution of marriage.*

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1. Introduction

Until Law no. 59/1993, the regulation of divorce was in the sense that the dissolution of the marriage has an exceptional character; thus, it was stipulated that the marriage could be dissolved only "in exceptional cases", when the relations between the spouses were seriously and irreparably damaged. A legislative leap took place when, through Law no. 202/2010, the acceleration of the settlement of lawsuits was pursued; at the same time, it was regulated that spouses could divorce by administrative or notarial consent, only in the situation when there were no minor children resulting from the marriage (Huidu, 2019) or adopted.

Major changes regarding divorce also appeared after the entry into force of the New Civil Code, as the possibility of obtaining a notarized divorce was established, even when there are minor children. At the same time, a new case of judicial divorce was settled, i.e. at the request of one of the spouses, after a de facto separation of at least two years, due to the exclusive fault of the plaintiff (Avram, 2022).

The Romanian Civil Code regulates divorce in art. 373-404. According to art 373 of the Civil Code, divorce can take place: "a) by the agreement of the spouses, at the request of both spouses or of one of the spouses accepted by the other spouse; b) when, due to valid reasons, the relations between the spouses are seriously damaged and the continuation of the marriage is no longer possible; c) at the request of one of the spouses, after a de facto separation that lasted at least 2 years; d) at the request of one of the spouses whose state of health makes it impossible to continue the marriage". As can be seen from the current regulation compared to the previous regulations, namely the Family Code, in article 373 divorce was introduced at the request of one of the spouses, if there was a de facto separation of at least two years.

2. Divorce systems or concepts about divorce

The system that regards divorce as a remedy considers that divorce intervenes in case of the impossibility of continuing the marriage, regardless of whether or not this situation is attributable to one of the spouses. Divorce appears as a remedy for a situation that cannot continue. The conception of divorce as a sanction means that divorce is considered a sanction for the fault of one of the spouses. It is ruled against the spouse who is considered guilty of harming the relations between the spouses, at the request of the innocent one. If both spouses are guilty of breaking up the

marital relationship, the divorce will be pronounced due to the fault of both. It will not be granted if it is requested by the exclusively guilty spouse.

The mixed system or the conception of a remedy-penalty divorce combines elements from the first concepts presented; divorce is considered to always be a remedy, but in many cases, based on the fault of one or both spouses, divorce is seen as a sanction. It is observed that, in both hypotheses, the fault is taken into account, which presupposes a sanction, without ignoring the fact that, at the same time, ipso facto, divorce is also a remedy, being the means to put an end to a situation that can no longer last.

3. Conception of Romanian law regarding divorce

It is well known that the institution of marriage is protected by law; thus, if the free consent of the spouses is necessary for the conclusion of the marriage, in the same way their will must be taken into account when it manifests itself in the meaning of the dissolution of the marriage. Either of the spouses must have the right to request the dissolution of the marriage. Not admitting this right to spouses would mean returning to the system of the indissolubility of marriage, to the principle of the "for life" marriage (Deaconu, 1990), which from a moral point of view, is an ideal principle, but which, transposed into a factual plane, could give birth to special conflict situations.

When the issue of the dissolution of marriage is raised, the social nature of marriage must also be taken into account. Marriage, the basis of the family or the basic cell of society as it is also called from a legal point of view, is not only a personal problem, it does not only interest the two spouses, but also society as a whole (Apostu, 2013, 2018). A social interest is shown for all family relationships. In the guidance decision of the Supreme Court no. 10 of November 13, 1969, point 6, it is shown that divorce processes are of close interest to the entire society, and point 8 emphasizes their importance for educating citizens in healthy morals and for raising future generations. The social nature of marriage means that the will of the spouses cannot by itself constitute a sufficient basis for its dissolution. That is why the manifestation of the will of the spouses is ascertained by the competent state authority.

But defending marriage does not mean maintaining it at any cost. Even if this is the normal situation, in the sense of concluding a marriage for life, its maintenance should not be done under any circumstances, as it has been demonstrated that rigid solutions and the adoption of a cumbersome procedure at the end of which very few divorce actions were allowed have generated and maintained many conflicts, with some of the most negative

consequences (Vlad, 2017). So, our law recognizes both the admissibility, in justified cases, of divorce, as well as the principle of marriage and family stability.

4. Grounds for divorce

4.1. Comparative view on the known systems regarding the reasons for divorce

Three systems are known regarding the grounds for divorce, differentiated according to whether or not the law enumerates those circumstances that are considered grounds for divorce or, on the contrary, determines only certain criteria according to which the courts are to assess whether the circumstances invoked by the parties fall under the grounds of divorce or not.

In a first system, the reasons for divorce are highlighted either exhaustively or only by way of example. Some reasons are determined only generically, so the court will proceed to an individualization of those reasons. Sometimes the legislator makes a distinction between the reasons that, once established, necessarily lead to divorce (peremptory reasons) and those that are left to the discretion of the court (optional, non-peremptory reasons).

In a second system, the law does not specify the grounds for divorce, but only certain criteria, according to which the courts will assess whether the circumstances invoked by the parties can be considered grounds for divorce. Finally, in a third, mixed system, the criteria for assessing the reasons for divorce are specified, but at the same time, some of them are also listed, by way of example.

4.2. Grounds for divorce and their assessment criteria

The grounds for divorce are assessed on a case-by-case basis by the court. The agreement of the parties for the dissolution of the marriage and the divorce request of a husband on health grounds are considered by the law as valid reasons. In the previous wording of art. 613 and 613^1 bis of the Civil Procedure Code, three situations were foreseen, with consequences also from a procedural point of view, regarding the grounds for divorce. In the first case, neither a conciliation term nor a thinking term is granted. Receiving the request for divorce, the judge directly sets the trial term, in cases where the divorce was requested for the reason that the defendant spouse: suffers from alienation or chronic mental debility, is declared missing by court decision, has left their spouse and lives abroad.

In the second case, a term of reconciliation is granted by the judge in chambers, but the thinking term is not granted. The judge gave the plaintiff reconciliation advice, set a time for conciliation between the spouses, and if they did not achieve this, he directly set the term for trial, without granting the time for thinking, if the divorce was requested because: the defendant was convicted for the attempt or complicity in the attempted murder against the applicant, instigated pther to murder against the applicant spouse, did serious bodily harm to them, failed to report these facts or favored those who committed them or was convicted for committing a sex crime; the defendant's husband was convicted for one or more crimes committed with intent, other than those shown above, to serve a prison sentence of at least three years, if the divorce petition was filed during the execution of the sentence (Barbu, 2019; Barbu & Nicholas, 2019), but only if no children resulted from the marriage. Until Decree no. 475/1977, no period of reflection was granted even if the spouses had lived apart in fact for at least 5 years and the proof of this fact was made through official documents (Bacaci et al., 1999).

In the third case, both the term of reconciliation and the term of thinking from 3 to 6 months are granted. Upon receiving the divorce request, the judge gave the plaintiff reconciliation advice, set a time for reconciliation in chambers, and if this was not achieved, set a thinking term of 3 to 6 months. After the end of this term, the procedure established by law for the actual divorce followed. It was done in this way when there were minor children resulting from the marriage.

According to the new regulation by the Civil Code, these three situations have been eliminated, and a single procedure was regulated. Therefore, these deadlines are no longer granted, and the term for trial is set directly. The special provisions regarding the presentation of evidence, their admission and administration at different times, which were intended to extend the divorce trial procedure, were also repealed. Upon receiving the request for divorce, the judge will give the plaintiff reconciliation advice and, if they persist in their request, will set a term for trying the case (art. 613 C. proc.civ.).

A special situation is when the divorce is requested based on the consent of the spouses, when the judge verifies, that the request for divorce is based on the consent of both spouses, after which he will set a deadline of two months in public court. At this term, it will be checked whether the spouses insist on their agreement, and if so, the case will be judged without administering any more evidence related to the grounds for divorce, but if

necessary, evidence will be administered in relation to the requests ancillary to the request of divorce.

It follows that, at present, the request for divorce for alienation or chronic mental debility is subject to the common law procedure. Even the sick husband can apply for divorce. Divorce can also be requested for any other illness that makes it impossible to continue the marriage. The text has a broader wording, "state of health", which makes it that the reason for divorce is left to the discretion of the court (Filipescu, 2000).

The declaration of disappearance by court decision is also a reason for divorce left to the judgment of the court, whether or not it determines the impossibility of continuing the marriage. The other reasons that previously justified a special procedure are now left to the discretion of the court. The phrase "substantial reasons" means that the divorce will be pronounced only in justified cases, and not when there is only a temporary misunderstanding between the spouses or when the common life of the spouses is still possible. The validity of the reasons implies a certain gravity and duration of the misunderstandings between spouses (Filipescu, 2000).

This regulation is designed to protect the marriage, but within reasonable limits, without any exaggerations of any kind. Judicial practice considered as valid reasons: the unjustified refusal of one of the spouses to live together with the other or the unjustified leaving of the conjugal domicile, which means the de facto separation attributable to the defendant spouse; the infidelity of one of the spouses in the form of adultery; the inappropriate attitude of one of the spouses, which is expressed in acts of violence and other such manifestations, or which have as a consequence serious misunderstandings between the spouses, which make it impossible to continue the marriage; the existence of physiological incompatibilities, which affect marital relations; bad moral behavior, materialized in obvious acts of breaking up family life; the existence of a serious incurable disease from which one of the spouses suffers and unknown to the other spouse until after the conclusion of the marriage, if it is established that the subsequent manifestations of the disease are more and more frequent and of such a nature as to justify the refusal of the applicant spouse to cohabit with the defendant spouse, the continuation of the marriage becoming impossible.

On the contrary, a curable illness that was not hidden from the other spouse cannot constitute grounds for divorce. Also, the fact that one of the spouses suffers from a serious illness (for example, epilepsy) is not of a nature to lead, by itself, to the dissolution of the marriage if it is not proven that, due to the manifestations determined by the illness, cohabitation becomes impossible, because the illness requires compliance with the

obligation of moral and mutual support, but in conjunction with the sick husband's concealment of the illness they suffer from, it is a solid reason for divorce. The de facto separation of the spouses cannot legitimize the admission of the divorce action, unless it is due to the defendant spouse's fault.

It was decided that if there were no misunderstandings between the spouses, the court has the obligation to establish the real reason why one of the spouses left for work in a different locality than the one where their marital residence is located and qhy because of this the marriage became impossible for the applicant spouse. The circumstance that the defendant's spouse did not contribute to the maintenance of the household cannot, by itself, constitute a valid reason for divorce, because this can be resolved by other legal means than that of dissolving the marriage.

5. Divorce in the current regulation

Nowadays, the legislator determines the cases of dissolution of marriage; in this case, we are talking about divorce by mutual consent. As we previously stated, with the agreement of the spouses, the divorce can be achieved administratively, notarially and judicially. The untainted agreement presupposes free consent: "as regards vices of consent, the agreement of the spouses upon divorce has a personal non-patrimonial character, but only those compatible with the legal nature of this act (error, malice, violence) are applicable, and injury is excluded" (Avram, 2022).

1. The divorce of the spouses by administrative means: the legislator considered that, as the marriage is concluded in front of the registrar, the divorce can also be obtained, based on the agreement of the spouses, also in front of the registrar; a condition, however, is that there are no minors from marriage, out of wedlock (the filiation relationship must be with both spouses) or adopted. The Civil Code mentiones that the divorce application must be submitted by both spouses. The civil office must register the application and the spuoses are given a period of 30 days for reconsidering; if the spouses insist on divorcing, the registrar issues the divorce certificate without mentioning any fault of either spouse (art. 375-376 of the Civil Code).

2. Divorce of spouses through the notarial procedure: it is allowed even if there are minors; the agreement must take into account all aspects, starting from the exercise of parental authority and up to the determination of the parents' contribution to raising expenses etc. In this case, a period of 30 days is granted. If from the social report it appears that the decisions taken by the spouses are in contradiction with the child's best interests, then

the notary will issue a ruling rejecting the divorce petition and instruct them to address the court (art. 375 para. 2 of the Civil Code).

3. Judicial divorce - in this case we are talking about several situations:

- divorce based on the joint request of the spouses;
- divorce based on the request of one of the spouses, accepted by the other spouse (Avram, 2022).

When there is no agreement of the spouses, the separation will be carried out by judicial means: in this case we are talking about the judicial divorce based on fault; a relevant aspect is that of the underlying reasons. It can be observed that there is a continuity with regard to the old regulations, because the new Civil Code introduced the obligation of fidelity and the obligation of mutual respect. As far as fault is concerned, in art. 379 para. 2 of the Civil Code is mentioned that the divorce is pronounced due to the exclusive fault of the plaintiff spouse, except for the situation when the defendant declares their agreement with the divorce, when it is pronounced without mentioning the fault of the spouses. Another situation foreseen by the legislator is: the divorce of the spouses due to the health condition of one of the spouses. In this case, the divorce is a remedial divorce; in order to protect the citizens, the legislator considered that only the sick spouse can ask for the dissolution of the marriage (art. 373 lit b), CC).

6. Conclusions

In the sense of family stability, an important role belongs to the legal regulation regarding divorce. This regulation is a powerful way of fighting against the lenient attitude towards family and society and, at the same time, it contributes to the formation of habits and customs within family relations, in accordance with the moral requirements expressed by family law.

If the divorce were to be obtained easily, without seriousness and the necessary sense of responsibility, this fact could have a negative influence on family relationships right from the moment they start through marriage, in the sense that the conclusion of the marriage could be done with much thought and full of responsibility. The future spouses could do this because they would know that they could dissolve the marriage they would have concluded without any difficulty. The conclusion of such marriages would be neither in the interest of the respective spouses, nor in the interest of society.

If divorce is only allowed for well-founded reasons, verified by the competent state body, this will have a positive influence on those who want

to get married, drawing their attention to the importance of marriage and to the responsibility that they assume by concluding it.

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