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THEORETICAL AND PRACTICAL ANALYSIS OF ROMANIAN DOMESTIC REGULATIONS REGARDING THE DIVORCE

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INTRODUCTION

The decision to divorce is rarely an easy one and the reasons leading to such an option for the irreparable rupture of relations between spouses reach, most often, the most intimate resorts of the human psyche. At the same time, even in the most "liberal" geographic and temporal spaces, the divorce of a couple produces concentric waves of consequences that are not limited to family, circle of friends and acquaintances, but are felt, in a greater or lesser extent, in the community and, on the edge, in the entire society.

Not to mention the changes in the name, marital status, mandatory alimony relationships, legal regime of any property acquired jointly by former spouses and other changes that divorce produces in socio-legal reality, dissolution of a marriage is not just a "private affair" of parties, which does not interest the Law. Especially if children have resulted from the marriage, its dissolution cannot possibly remain indifferent in the eyes of the Law, which, above the interests of a person or another, must protect the interests of all those that are under its regulation.

The legislator optical on the divorce varies depending on the historical depending on the historical, cultural and religious context, from its strict ban until maximum permissiveness. Also the society does not remain insensitive to the legislator's attitude and, many times, the latter one assumes an "educational" role, suggesting to the members of the society that divorce is a family failure, a penalty for wrongdoing or just a simple remedy, available to every couple with problems.

Our option for this theme was determined by the complexity of the social phenomenon of marriage dissolution, whose causes and effects are beyond the norm and the judiciary, but the Law cannot ignore them. In this thesis, we aim to address the dissolution or marriage by divorce, from one of the perspectives from which it can be analyzed, namely from the lawyer's

perspective.

Remaining aware that a subject so delicate cannot be exhausted in a doctoral thesis and only by a legislative, doctrinal and jurisprudential analysis, we propose, as main scientific objective of this work, to undertake a theoretical and practical analysis, of the legal dispositions relating to divorce, reported mainly to the Romanian law system. As a reflection of social changes to which we assist in Europe and worldwide and also of the Romanian legislator's option for modernization and regulatory renewal, in recent years, in our country occurred considerable legislative changes regarding the divorce. The process of change of regulations in the field is closely related to post-revolutionary legislative attempts and crystallized with the adoption of Law no. 202/2010 on measures to accelerate the settlement processes, with the entry into force of Law no. 287/2009, on the Civil code and Law no. 134/2010, on the Code of civil procedure.

By adopting these laws, the legislator has made radical improvements in divorce matter, in general, and the ways of dissolution of marriage, in particular. The new regulations have achieved a significant liberalization of divorce, socially perceived as welcome, perhaps also as a consequence of decades of legislative excessively interventionist policy, in the field of marriage dissolution.

Today, we can say that the main legislative provisions in the matter (art. 373-404 Civil code and art. 914-934 Code of civ. procedure) gives priority to divorce by agreement of spouses (considered "remedy-divorce"), to the detriment of divorce for the fault of one of them (so-called „penalty-divorce")

To achieve the goal that we propose in this thesis, we believe that we cannot omit the detailed study of the historical evolution of regulations regulating the divorce, starting from the ancient Roman law, continuing with the "old Romanian laws", the Civil code from 1864, the Code of civil procedure from 1865 and the Family code, until present.

Another means by which we hope to achieve our scientific goal is to achieve a thorough logical-legal analysis of the current internal regulations in divorce matters, both materially and procedurally. This approach involves the application of methods that are interpretative on the regulations in the field, identification of any gaps or legislative inconsistencies, the critical analysis of opinions expressed in specialty literature and foundation of some proposals of *lege ferenda*, where we consider appropriate the intervention of a legislator to clarify, adopt, modify or remove some legal rules.

Last but not least, we believe are useful to our approach of research some forays in other legal systems, of the same Romano-Germanic origin as the Romanian law, but also in law systems assimilated to different cultures, such as the Anglo-Saxon or Muslim. Such elements of comparative law can contribute, in our opinion, to both theoretical understanding of the institution of divorce, and to draw practical conclusions, on how Romanian legislator could harness the experience of other countries in regulating marriage dissolution.

From a structural point of view, the thesis is divided into 8 chapters.

Thus, in Chapter I, the work started with a detailed presentation of regulations relating to divorce, starting from the ancient Roman law. In this regard, we have analyzed aspects of Roman family, the forms of Roman marriage in order to identify the ways of dissolution of the marriage characteristic to Roman society.

In Chapter II we have continued with the analysis of the provisions comprised in the “old Romanian laws”, like religious rites, straightening the law, Calimach Code, Caragea Code, Austrian Civil code, Romanian civil code from 1864 and the Family code. Also in this chapter we have dedicated some sections to the analysis of aspects of comparative law regarding the separation from the body, as a means of de facto separation of spouses in French law and other European states.

Chapter III contains analysis of the evolution of Romania's internal regulations of a procedural nature in divorce matters. Thus, we have analyzed the procedure of divorce especially in regulating the "old civil code" and the Code of civil procedure from 1865, given that these were the first that included procedural provisions of dissolution of marriage.

In Chapter IV, in addition to scientific incursions in comparative law, in legal systems of Roman-Germanic origin, Anglo-Saxon and Muslim and analyzing the thorough logical and legal current regulations in divorce matters, under a material aspect I realized also the analysis of internal regulations of Romania, under the same aspect. Thus, from this latter perspective, there have been analyzed the provisions of the current Civil code regarding the extra-judicial procedures of dissolution of marriage, namely divorce by administrative means and notary procedures.

Chapter V was devoted to an alternative method of conflict resolution, mediation. We have examined within it the dispositions of the special law in the matter of family conflict resolution, Law no. 192/2006, but also the European dispositions enshrined to alternative settlement of conflicts.

Chapter VI is one of the most important parts of the thesis, whereas it gets under review the procedural dispositions relating to divorce. Thus, we have investigated in this chapter the legal texts provided by the new Code of civil procedure, but also the solutions given by the courts of Romania in divorce proceedings.

Chapter VII is devoted to the effects that the dissolution of marriage produces both between spouses, as well as between parents and children. Therefore, the chapter contains two sections, one dedicated to the effects of divorce on property and non-property relations between spouses and the other to the reports of the same nature between parents and children.

Finally, through Chapter VIII we concluded our research by analyzing the provisions of private international law governing the divorce with

extraneity element, contained in the current Civil code and the new Code of civil procedure.

Operational definition of concepts

Divorce is the concept that totally dominated this work and whose understanding is necessary to raise awareness of spouses about the legal effects, sometimes irreversible that this procedure, once made, will produce.

The forms of marriage dissolution represent the various ways through which the spouses can end their marriage. Thus, they can address the court, notary public or civil status officer to request dissolution of their marriage. Besides these, there is of course the de facto separation of spouses, but this modality will not produce legal effects and legally their marriage validly concluded will continue to exist.

Knowing these modalities is essential for the spouses to understand both the procedure of marriage dissolution as well as the possibilities they have at hand to get a divorce in a short time, less expensive and less traumatic.

The consent of spouses is a concept whose importance depends on the modality of dissolution of marriage chosen by the spouses, representing their will, freely expressed and uncorrupted to end their marriage.

The importance of having the consent of both spouses at their marriage dissolution may be essential if they request marriage dissolution by administrative means, notarial or jointly by judicial means or rather insignificant if the divorce is requested by the fault of one spouse.

Research methodology:

To substantiate the proposed research, we mainly used the following research methods:

- the historical method to determine the historical evolution of concepts and regulations relating to divorce, and also to identify, within each stage, the

elements of continuity and discontinuity in divorce matters in the Romanian legal system, starting with the oldest legislation provisions known in the matter and continuing to the present;

- quantitative method, with which we have gathered and stored information from legislation, jurisprudence and domestic doctrine but also those belonging to the international doctrine and jurisprudence in divorce matters, information that was subsequently used in developing the doctoral thesis;

- scientific method, to logically and legally process data obtained by the method previously described, identifying problems currently existing in legislation, jurisprudence and Romanian doctrine in divorce matters, which led to the foundation of a series of solutions for solving them;

- logical method, for natural structuring of the work in relation to targets proposed, for the fair and efficient processing of data collected during the research, avoiding the contradictions, ambiguities and achieving the coherence of the doctoral thesis;

- comparative method, to identify common elements between the Romanian regulations and others systems of law on divorce. We considered the analysis of the laws of countries like England, France and Egypt, whose legal systems are either different than the Romanian law system (England and Egypt) or similar to it (France).

Using the methods listed for achieving the objectives proposed facilitated, in the end, the correct interpretation of the results obtained from the research and contributed to the formulation of some pertinent conclusions.

CONCLUSIONS AND PROPOSALS *DE LEGE FERENDA*

The main research objective that we have assumed through this thesis was to undertake an analysis, theoretical and practical, of legal provisions

relating to divorce, reported mainly to the Romanian legal system.

The motivation for choosing this theme was the complexity of the social phenomenon of marriage dissolution and its legal consequences, but also the notable legislative changes that occurred in Romania in recent years in relation to this institution. We believe we can speak about a true legislative reform, given that new regulations have achieved a significant liberalization of divorce, giving preference to „remedy-divorce", by agreement of spouses, to the detriment of „penalty-divorce" pronounced from the fault of one spouse.

To achieve the objective we have set in this thesis, we started to study the historical evolution of the regulations from the field of divorce, starting from the ancient Roman law, continuing with the "old Romanian statutes", the Romanian Civil code from 1864 and the Family code. We assumed this initial step in order to reach a real understanding of the context and content of current regulations in Romania, contained in art. 373-404 Civil code and art. 914-934 Code of civil procedure.

This historical analysis has allowed us to make a series of observations on the perception of the legislator upon the social phenomenon of divorce, its normative attitude and even on the meaning that it has awarded the spouses' decision to cut-off the family relationships.

Even in terms of semantics and terminology, the conception of the legislator has evolved; if the term in question was designated by the word *divortium* – during the period of Roman domination, "despartenie" or "separation" – during the old Romanian laws, currently the Romanian legislator uses the notion of "divorce" in a sense that can be interpreted as a synonym of the phrase "dissolution of marriage". Such an interpretation would result from the fact that, although chapter VII of the current Romanian Civil code is entitled "dissolution of marriage", the only provisions that we find subsumed under this chapter are related to divorce.

Or, as shown in the thesis, in reality these two terms are not

synonymous, because marriage can be dissolved not only by divorce, but also by concluding another marriage, when the other spouse was declared dead by the court (in this case, if the spouse declared dead reappears, but the other spouse has remarried, the first marriage is considered dissolved on the date of the subsequent marriage).

The historical analysis that we have undertaken was expanded on what the legislator accepted, over time, as grounds for divorce. Their wider or more restricted settlement had direct social consequences on the number of marriages dissolved by divorce. For example, until the XIXth century, the marriages could be dissolved for ridiculous reasons, like woman visiting a neighbour, without her husband's consent, or her participation to parties. It was only with the entry in force of the Civil code of 1864 when the grounds for divorce were limited in number and much more clean-cut in the Romanian legislation.

Also to persons who could seek divorce have been changes over time.

If today seems inadmissible and absurd that parents of spouses to intervene in family relations of the latter, these ancestors have been long recognized the right to approve the divorce of their children (provision laid down in art. 259 of the "old Civil code")

A constant of the legislation of our country was the possibility to request the dissolution of marriage, even if at first it was only the prerogative of man.

Historical evolution of legislator's mentalities is reflected in the regulation of relations between spouses, centuries of subordination of woman to man being replaced today with the affirmation and assurance of the principle of equality between spouses. The old statutes, considered today as primitive and discriminatory, were focused on the regulation of patrimonial effects of divorce, omitting almost entirely the non-patrimonial, as well as those regarding the relations of divorced parents with the children from the

marriage. Current regulations in Romania (and not only), even objectionable or defective in some respects, still succeed to shape a modern legal system and adapted to social realities of today. Legal rules governing the divorce settle today the non-patrimonial and also the patrimonial relations between the former spouses, aspects such as the name worn after divorce, the obligation of alimony or compensatory benefit, the relations between parents and children, respecting their best interests.

Last but not least, we have given an analysis space to reports between legal and religious rules on divorce. If, initially, the task of solving the family conflicts belonged to the Church, today, family relations are governed by the state, unitary throughout the country, without distinction between the religions of citizens. Even the optic of the Church on divorce progressed, more and more religions admitting today what once seemed unthinkable: dissolution of marriage and the conclusion of a new marriage.

One of the few sources of knowledge on old Romanian law is the accounts of foreign travellers, but whose opinions were strongly influenced by their own religious and cultural conditionings.

Indeed, these have written their work based on the local reports and direct pursuit of their daily lives, but their observations are based only on visiting some historical regions of the country, usually small communities.

That being so, the reports of these travellers may not be, in our opinion, extrapolated and considered as representative for the whole territory of present day Romania, all the more so as here lived, over time, different ethnic groups: Romanians, Saxons and Hungarians, each with its own customs.

Apart from the historical analysis that we performed in this thesis, we tried a thorough logical-legal analysis of the current internal regulations in divorce matters, both in terms of material and procedural aspect. We have researched comparative and interpretative investigations on regulations in the matter, indicating, where appropriate, the legislative gaps and inconsistencies.

We critically analyzed the opinions formulated in the specialty literature, following with priority the aspects related to continuity and discontinuity of legal dispositions, in order to make an objective evaluation of the current state of regulations and scientific research on the subject of this thesis.

As a conclusion of these analyses, we can say that the institution of dissolution of marriage has evolved from the exceptional character, that it has acquired through the provisions of the Family code, to a procedure often used in practice, which may take many forms: dissolution of marriage by agreement of spouses, by administrative means, by notary procedures, by the court, or dissolution of marriage from the fault of one spouse, through the court, for a variety of reasons.

Also, the legislative dispositions in divorce matters have evolved from a negative to a positive formulation, closely related to the intention of Romanian legislator to achieve a liberalization of the institution of divorce.

Divorce by administrative means and the one at the notary are two distinct ways, but similar, of dissolution of marriage by agreement of spouses. They were covered, on the one hand, to help relieve the courts, and, on the other hand, to allow the spouses who are unable to continue the marriage, for reasons which have seriously and irreparably damaged the relations between them, a relatively fast, simple and less expensive possibility of dissolution of marriage.

With all the positive aspects presented, we must take into account that Romania is among the few states that have adopted, simultaneously, all three ways of dissolution of marriage. Although the practice will be the one to show, in the end, their usefulness, in doctrine were presented some negative aspects of the procedures of dissolution of marriage by agreement of spouses, but also some controversial ones, such as establishing the true will of spouses.

If, initially, the fault of one of the spouses has been a cornerstone of dissolution of marriage proceedings, with the entry into force of the Law no. 202/2010, the Romanian legislator grated a greater weight to the consent of spouses in marriage dissolution.

Thus, the free expressly and uncorrupted consent of the spouses to the dissolution of marriage has acquired a particular importance. The legislator has applied the principle of symmetry in this case, supporting the idea according to which, if for the conclusion of marriage the freely expressed consent of the spouses is enough, also at its dissolution their consent is sufficient. Only where one spouse does not consent to dissolution of marriage, the judicial procedure becomes mandatory, in all other cases, where the spouses agree with the marriage dissolution, they are free to opt for any of the procedures regulated by law.

It is essential, however, to comply with the conditions imposed by the law on consent. It must necessarily be freely expressed and uncorrupted. Therefore, the spouses must appear in person in front of the civil status officer or in front of the notary public, both when filing the divorce and throughout the divorce proceedings. Only exceptionally divorce petition may be filed by a trustee.

Spouses consent covers different aspects of divorce, and not only the consent given for dissolution of marriage. Thus, to be able to opt for either of two ways of dissolution of marriage (by administrative means or by notary procedures), the spouses must agree on the name they will wear after divorce.

Another aspect on which the spouses must express their consent is their minor children, born in wedlock, outside it or adopted by the spouses, if they opt for dissolution of marriage by notary procedures. And that is because, through notary procedures, parental authority should be divided between the parents; the possibility of its exclusive exercise exists only for court proceedings.

Also, the legislator passed from the deadlines for conciliation and long thought, which the spouses were bound to respect in order to obtain a divorce, to a reasonable period of 30 days, applied in case of extrajudicially dissolution of marriage.

Regarding the divorce by administrative means, we consider that, *de lege ferenda* would require the amendment of art. 378 Civil code, towards the establishment – along with the right to apply to court for judgement of divorce and to ask the cover of damage caused by unjustified refusal of the civil status officer to settle the divorce petition – of the right to require the dismantling of the provision to reject the divorce petition, or even the establishment of an appeal against it.

As shown in the contents of the work, there are now debates about the continuation of divorce proceedings by heirs, related to the conditions in which the appeals can be exercise against the divorce decisions, but also some aspects about measures that the court may take on the path of injunctive relief, in the process of divorce.

I suggested to the legislator to modify the content of art. 919 Code of civil procedure, so as to clarify its content and eliminate any ambiguity. We consider it necessary to establish legally if interim measures which the court can take now, on the path of injunctive relief, are limited to "only" those listed in this article, or to specify that, if case of request of other measures than those exhaustively listed in this article, all the conditions of admissibility of injunctive relief must be met.

And on the appeals against the decision of divorce, the new regulations are also likely to leave room for interpretation. We propose, *de lege ferenda*, the amendment of provisions of art. 927 Code of civil procedure, in expressly nominating the appeals that can be exercised by spouses, against the judgments given in divorce proceedings; and this is because, at present, the provisions in question show only some peculiarities of appeal and

extraordinary appeals.

Debates and various interpretations are surrounding also on the date of marriage dissolution, when the divorce proceedings are continued by heirs, upon the death of a spouse. Thus, if the action of heirs is allowed, the marriage of the deceased is considered to be dissolved on the date of filling the divorce, according to art. 925 Code of civil procedure. In this case, it was questioned the legal nature of the relationships between the defendant and the plaintiff, in the period between the filing of divorce and the death of a spouse, taking into account that, for example, during this period a child's birth could intervene who, because of these regulations, would acquire the status of a child born out of wedlock. Consequently, in order to prevent such situations, we consider that the text of the law must be changed meaning to establish the date of marriage dissolution at the time of death, and not the date of filing for divorce.

With all the gaps and ambiguities reported, the new legislation also brings several clarifications, on issues which gave birth to doctrinal jurisprudential controversies, under the empire of the code of civil procedure from 1865. Thus, for example, the new provisions have replaced the term of "domicile" with "residence", in the content of the rules for determining the competent court, from the territorial point of view, to settle the divorce petition. This clarification of terminology is intended to indicate unequivocally the factual residence of the spouses, respectively the location where the procedural documents will be communicated to them throughout the divorce process.

Moreover, at present, we appreciate that all provisions governing the Romanian courts to settle the petition of marriage dissolution addressed to the court are characterized to some degree of clarity and precision. The legislator has succeeded to cover, with few exceptions, the situations which may arise in practice on establishing the competent court, materially and territorially, in

settling the divorce petitions, with or without extraneity elements.

In conclusion, we can say that the legislator has made significant improvements, appreciated as welcome by the majority of specialty literature, of divorce, in general, and to its procedural aspects, in particular, and this not only by amending the Code of civil procedure, but also by adopting the Law no. 202/2010 and the Civil code of 2009.

In the formulation of proposal of *lege ferenda*, where we considered it necessary for the legislative intervention to clarify, adopt, amend or eliminate of certain legal norms, we have inspired also from the positive aspects that we have identified in the legislation of other countries. We have studied for this purpose, both legal systems of the same origin as Romano-Germanic and Romanian law, and legal systems assimilate to different cultures, such as the Anglo-Saxon or Muslim.

Internationally, it appears that most countries of the world, with only a few exceptions, consider the divorce tolerable. Even is some Islamic states, can be seen a notable development in this regard: traditionally, divorce was considered unacceptable – then was admitted the unilateral divorce – only at the request of the man and only for reasons specifically listed in the law, leading to admitting the divorce today, requested on the initiative of either spouse.

Marriage dissolution by administrative means and notary procedures is rarely found worldwide. Only some of the world's countries, such as Portugal, Russian Federation or Denmark, have adopted these procedures, which are found in Romanian legislation. In most states, however, the only way for dissolution of marriage was and remains the judicially. The reasons for this regulation were debated in the foreign doctrine, which concluded quasi-unanimous that such a rule would be in the detriment of spouses who do not have legal knowledge and are unable to defend their own rights.

On the other hand, both in internal doctrine and in the international one,

it was increasingly placed the issue of regulation of the right to divorce, by international treaties and conventions, as a fundamental human right. This proposal is based on the principle of symmetry: if the person, under the European Convention of Human Rights, has the right to marry, so should benefit from the right to seek divorce, if he cannot or no longer wants its continuation.

Also, the regulation of the right to divorce, as a fundamental human right, would oblige the states to regulate it under the national laws, given that today there are still states that prohibit marriage dissolution or impose, for its realization, cumbersome, expensive and lengthy procedures, likely to discourage spouses to resort to divorce.

At the end of the theoretical and practical research that we have undertaken on the divorce, we can say that, although perfectible, the Romanian legislation in this matter is one of the most progressive in the world. We believe that the state can no longer assume today a paternalistic role, by excessively censuring the family decisions and imposing formal obstacles to spouses determined to put an end to family relationships. From this point of view, we consider it is beneficial the legislative permissiveness awarded to spouses, to choose the most convenient method, the less traumatic to do this, both in terms of a couple, and in terms of other related persons, who are mentally and emotionally affected by this situation.

The attitude of Romanian legislator is, in our opinion, mature, balanced and realistic, which is translated through a fair regulation that manages to ensure the protection of the general interests of society, while respecting gender equality, personal freedoms and right to private life.

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