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**About the Dissolution of Marriage Settlement in
 the Context of Romania's Integration in the European Union**

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Abstract: According to the stipulations of the New Civil Code, the dissolution of marriage has undergone some changes concerning both material and procedural law. We aim at achieving a critical analysis of the new rules of divorce, making proposals *de lege ferenda*, based on the interpretation of the texts of these normative acts, the Romanian jurisprudence experience, comparative law (especially French law), of European law (Brussels II bis Regulation) in relation to the old regulation of the Family Code and the Code of Civil Procedure (current and future one).

Keywords: divorce; competence; the interest of the child; divorce certificate; European Law

1. About the Institution of Divorce in General and its Regulation in the New Civil Code

The Romanian legislator wanted that the New Civil Code, adopted by Law. 287 of July 17, 2009², to represent a unitary regulation of civil law relations, as it was originally and how to meet all modern codes of European states. This explains why the family relations, including those involving the dissolution of marriage, as well as those private international law, are found in Book II "On family" (Bodoașcă, 2009, pp. 11- 34) and seventh book "Provisions of private international law" of this legislative act.

Regarding the New Code of Civil Procedure³, retained traditional regulation of divorce proceedings in the present Code of Civil Procedure (article 607-619), as a special procedure, in Book VI, article 903-1049, most texts being taken over.

We must mention that some remarks on the structure chosen by the legislator, when it passed to the legislative construction of reserved for the dissolution of marriage in the new Civil Code. It is clear from Chapter VII "The dissolution of marriage" (article 373-404), found in Title II, entitled "Marriage", it results that was abandoned the traditional structure enshrined in the Family Code (article 37 - 44), that is it has not been adopted the same logical and natural sequence of presentation of the legal norms dedicated exclusively to rules of material law relating to cases where the court may the dissolution of marriage, to the legal effects that the divorce produces on the personal relations and patrimony between spouses, and among them, as their parents and their minor children, leaving procedural aspects of law to the Code of Civil Procedure.

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² Republished under article 218 of Law no. 71/2011 for the implementation of Law no. 287/2009 of the Civil Code, published in "Official Monitor", Part I, no. 409 of June 10, 2011. The new Civil Code was originally published in "Official Monitor", Part I, no. 511 of July 24, 2009, amended by Law no. 71/2011 and corrected in the Official Monitor, Part I, no. 427 of June 17, 2011 and "Official Monitor", Part I, no. 489 of July 8, 2011. The new Civil Code entered into force on October 1, 2011.

³ Adopted by Law no. 134/2010 on Civil Procedure, published in "Official Monitor", Part I, no. 485 of July 15, 2010. See (Crăciunescu & Lupășcu, 2011, pp. 19- 34)

Thus, in reading the chapter reserved to the dissolution of marriage from the New Civil Code, it appears that the material rules are combined with those of procedural law. There are two explanation of this situation, namely: first, the fact that the two new codes - Civil Code and the Code of Civil Procedure, have not entered into force simultaneously, which means that as of October 1, 2011 a request for dissolution of marriage is to be settled, by reference to the new Civil Code in terms of material law and in terms of procedure, by applying the old Code of Civil Procedure. According to this situation, it was adopted the technique of regulation development in its dissolution of marriage within the New Civil Code and in matters of procedure, changing the text to the extent considered necessary the Code of Civil Procedure, which it will be replaced by the New Code of Civil Procedure (Deleanu, 2010, pp. 22-43) (Recently it was announced June 1, 2012 by Minister of Justice as the date of its entering into force).

Another reason for the current regulation it results from the inspiration of the legislator. Thus, unlike the institution of parenthood, among whom the authors the Romanian Civil Code chose the Quebec Civil Code¹, it appears that the regulation provided by the French Civil Code (article 227-310) for the institution of divorce was closer to their "soul", some articles being found as its translation (such as, for article 388 it is correspondent article 266 of the French Civil Code regarding the right of innocent spouse to be compensated by the judgment of divorce, as article 390 and 391 correspond to article no 270 and article 271 of the French Civil Code, except that the Romanian legislator imposed the condition of the duration of a marriage at least 20 years). Also, some texts were taken from the French Civil Code which are no longer in force, being amended or repealed by Law no 2004-438 of 26 May 2004 concerning the divorce, which has produced a fundamental reform in the dissolution of marriage matters in France.

As a consequence of the structure of the New Civil Code, we consider that the depositions for divorce from the current Civil Code regulations are somewhat difficult to follow, as long as these items are combined with the Code of Civil Procedure. In addition, because the New Code of Civil Procedure shall enter into force after the Civil Code, although both codes were written at the same time, we notice some legislative inconsistencies (such as article 923 which provides the dissolution of marriage based on the separation in fact of at least 5 years).

Referring to the **legal language**, without identifying all the inaccuracies, the inconsistencies or gaps in the texts, we found that the legislator uses an ordinary, everyday language, since the term "divorce" is preferred legal expression "the dissolution of marriage".

Several observations can be made about the content of the dissolution of marriage settlement. Thus, it appears that the legislator intended to capitalize the valuable doctrine and the case law matters, putting the forefront the interests of minor children and spouses wish to divorce, assigning elements of continuity and tradition (such as, the dissolution of marriage due to health status of a spouse), of modernity (the legislator's concept being of divorce -cure and not divorce-sanction, also the joint exercise of parental authority) and comparative law (such as, the dissolution of marriage based on the actual separation of the spouses for at least two years, found in article 238 of the French Civil Code).

Also, the New Code of Civil Procedure, the last common residence of the spouses is what determines the territorial jurisdiction of the court in divorce matters (article 903), as a continuation of the provisions of article 375 of Civil Code and a the takeover of the rule of habitual residence of the spouses of article 3 of Regulation (EC) of 27 November 2003 no. 2201/2003 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and parental responsibility, repealing Regulation (EC) no. 1347/2000.

Furthermore, due to limited space, we intend to present some aspects of the design of legislator's concept adopted in the dissolution of marriage regulation, the legal effects of fault in the dissolution of

¹ *Code civil du Quebec/ Quebec Civil Code*. Edition 2002-2003, J.L.Boudouin, Y. Renaud, Wilson & Lafleur, Montreal. See (Lupșan, 2011, p. 67; Crăciunescu & Lupășcu, 2011, pp. 54- 72).

marriage, highlighting the new and comparative law elements, making some proposals *de lege ferenda*.

2. On the Concept of the Romanian Legislator in the Dissolution of Marriage Settlement

Regulating four ways of dissolution of marriage in article 373 (divorce based on the agreement of the spouses, divorce caused by serious harm to family relationships that led to the impossibility of continuing the marriage, divorce based on the actual separation of spouses of at least two years and the divorce because of health status of one of the spouses which makes impossible to continue the marriage), makes widely accepted the idea that the New Civil Code continued the same mixed design of remedy-sanction divorce as established in article 38 of the Family Code and the fact that we find in most European laws.

In addition, there were diversified the ways of obtaining divorce. Thus, with the judicial process, unique in the regulation of family law, to which it was added briefly also the divorce by administrative and notary means, introduced by Law no. 202/2010 on measures to accelerate judgments¹ - now, there have been stated three ways to obtain a dissolution of marriage, leaving it to of a spouse to chose one or another, depending on their interests, and especially the speed with which they wish to end the marriage.

It is noted that the legislator was gentle and severe at the same time, when creating a new dissolution of marriage settlement.

Why gentle? Because whether after the marriage resulted or not children, regardless of duration of marriage, on the one hand the New Civil Code provides the spouses more opportunities for the dissolution of marriage, and on the other, in the dissolution of marriage matters it was given more liability to more authorities (civil status officer, public notary, judge). Also the agreement of the spouses produces legal effect in all that relates to marriage (divorce, name, liquidation of matrimonial regime, parental authority, home of the children, alimony, etc.), accelerating a lot the dissolution of marriage proceedings (e.g. within 30 days after filing for divorce request to the public notary or civil service status, if the spouses keep their agreement, the certificate of divorce is released, which proves the dissolution of marriage the very day of its release; by the judicial proceedings, the divorce decision is final in the day of its passing).

Getting the divorce outside the courtroom, without court intervention, as was it was our tradition seems to turn marriage into a simple contract that can come out at the appreciation and will of the spouses.

Why severely? Because when there is no understanding between spouses about the dissolution of marriage settlement, the court intervenes and it will decide according to the law. However, the novelty is the fault of the spouse whose marriage breaks will be accountable for his conduct in marriage relationships and not only morally, but especially at patrimonial level, as we show below, the guilt remains an important factor in the effects of divorce. The divorce settlement out of the guilt of one spouse reflects the idea of individual responsibility of the spouses in family life. What brings new the current Civil Code in addition to the previous regulation is binding the fault to real financial consequences that guilty spouse for divorce will incur.

3. On Some Legal Effects of Fault in the Divorce Decision

The provisions of article 384, paragraph 2 of the New Civil Code, the wording “*the spouse against whom the divorce was pronounced loses the rights that the law or the conventions concluded previously with third parties which were assign to*”² we must particularly mention. Seeking the

¹ Published in Official Monitor, Part I, no. 714 of October 26, 2010.

² Text renders article 265 of the French Civil Code.

inspiration source of this text, we found in the old forms of article 265 of the French Civil Code, to which it given up by Law no. 2004-439 of 26 May 2004. Currently, article 265-1 of the French Civil Code provides: “*Le divorce est sans incidence sur le droits que l’ un ou l’autre des époux tient de la loi ou des conventions passées avec des tiers / Divorce does not affect the rights one or the other spouse according to the law or past agreements with the third parties*”.

Returning to the Romanian legislator, without indicating in the text which are those rights that a husband loses due to the fault established by the court's decision of divorce, it remains to identify them in the contents of the New Civil Code, on the one hand, or to imagine them, in the absence of case law, when we consider the agreements with third parties.

For the first category of rights, from reading the divorce settlement, it is noted that with alimony between the former spouses (article 389 paragraph 2-5, which is a revival of article 41 of the Family Code), the New Civil Code has granted to the fault in the breakup of marriage relationship new and important legal effects for the legislative landscape in Romania, namely: the innocent spouse is entitled to a compensation for the damage caused by the divorce (article 288¹), entitled to compensatory benefit (article 390-395) as a criterion in attributing home, whether the home is under renting contract (article 324 paragraph 1) or the common property of spouses (article 324 paragraph 4), the loss of the right to receive the compensation to cover the installation in a new home expenses, paid by the husband who was granted residence (article 324 paragraph 2), may also have certain material benefits arising from matrimonial convention concluded according to article 332 paragraph 2 of the New Civil Code.

As regards the rights that the husband guilty of marriage dissolution it will lose them in the third parties relations, one can imagine the following situations: the revocation of donation signed by the family of the innocent spouses and the guilty spouse (e.g. in-laws donate a property to the groom, taking into consideration its quality, if the donation was completed under this condition, of not retaining the fault in case of the grantee's divorce), revocation of the legate.

Another unique situation is found in article 380 of the New Civil Code (correspondent of article 616 index 2 of the Code of Civil Procedure, taken entirely by article 914 paragraph 2 of the New Code of Civil Procedure), which enable further action by the heirs of the husband's divorce applicant, referral to the court under an action for divorce based on the fault of the defendant husband. There is a series of questions: the respondent spouse retains or loses the quality of surviving spouse under the conditions where the judgment shall retain the exclusive fault to divorce? What are the interests of heirs to continue the divorce proceedings on behalf of the deceased applicant?

According to article 382 paragraph (1) of the Civil Code “the marriage is dissolved on the days that the judgment according to which the divorce was pronounced remain final.” By the exception to this rule paragraph (2) of the same article it shows that in the case of further action by the heirs of the husband's divorce applicant, if the action is allowed, “the broken marriage is counted from at the date of death”. At the same time article 954, paragraph (1) of the Civil Code states that “a person's legacy is open at the moment of the death.” In these conditions it might ask whether or not the respondent husband has the calling to her husband's legacy applicant, if one of the two effects of death occurs on the same day - opening inheritance and the divorce judgment – it takes precedence over the other. According to article 970 Civil Code “the surviving spouse inherits the deceased spouse if at the date of opening of inheritance, there is a final divorce judgment.” So the death date is the date the inheritance is opened, but also the date of the dissolution of marriage. Basically, the two moments overlap, without having the law to predict which of them prevails. But if we analyze further the reasons for introducing the possibility continuing the divorce proceedings by the applicant husband's heirs, namely to protect their economic interests, it might conclude implicitly, the legislator has given priority to the divorce becoming final to the legacy to opening. However, an express statement of the legislator to this effect would be appropriate.

¹ It corresponds to previous formulation or article 266 of the French Civil Code, to which it was given up by Law of May 26, 2004 in order to separate the monetary consequences of divorce in granting the divorce guilt.

Returning to the legal inheritance, the defendant husband of sole fault for the divorce decision will lose the quality of surviving spouse, it will not inherit the deceased, from which will benefit the heirs who continued the divorce.

As regards testamentary inheritance, in case the applicant's spouse has made a legacy in favor of defendant spouse and not revoked before his death, the accused husband is destined for inheritance. It could still be removed from the testamentary inheritance by the co-heirs, if they would seek dismissal of the court related to article 1069, paragraph 2 b, being retained the sole fault in the breakup of his marriage, as shown in the judgment of divorce obtained in article 380 of the New Civil Code (and maintained the possibility and condition of the New Code of Civil Procedure, article 914)

4. Conclusion

Responding to statistics that show a large number of divorces, over the last 12-15 years, the New Civil Code reform is characterized by three elements: the diversity of access ways to divorce, each couple will choose how to dissolve of marriage, according to their desire; simplifying the divorce procedure, regardless of its path; establishing significant patrimony consequences for the guilty spouse for the dissolution of marriage.

When the New Civil Code provisions will be better known by spouses, especially through the effects that they produce in the dissolution of marriage, they will give up to an amicable divorce in order to obtain a court divorce decision by fault of the spouse, that represent then grounds to obtain compensation benefits and amends and other matrimonial benefits. The result of this awareness will translate through sharpening the conflicts between spouses, seeking the construction and justification for the fault on the spouse to convince the judge in giving a favorable solution.

Lawyer's role is to give legal advice to show the spouse, if applicable, the appropriate legal remedy for its interests. The path chosen will depend on the legal effects it produces, the rights that a spouse counts to win after a divorce.

5. Bibliography

Bodoaşcă, T. (2009). Examen de ansamblu și observații critice privind familia și căsătoria în reglementarea noului Cod civil. *Dreptul/Law*, no. 12, 11- 34.

Crăciunescu, C.-M., & Lupașcu, D. (2011). Mica reformă justiției și marea reformă a divorțului/The little justice reform and the great reform of divorce. *Pandectele Române/Romanian Pandects*, no. 1, 19- 34.

Deleanu, I. (2010). Divorțul - în ambinața prevederilor Proiectului Codului de procedură civilă/The Divorce, according to the draft Code of Civil Procedure. *Pandectele Române/Romanian Pandects no 4*, 22-43.

Lupșan, G. (2011). *Instituția filiației în dinamica dreptului românesc. In Dinamica dreptului românesc după aderarea la Uniunea Europeană, Academia Română/The institution of filiation in the dynamics of Romanian law. In the Dynamics of Romanian law after EU accession, Roman*. Bucharest: Institutul de Cercetări Juridice "Andrei Rădulescu", Universul Juridic.