



Principles of European Family Law Regarding Divorce – Special View over The Romanian Civil Code

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Abstract: This paper aims to discuss the harmonization of family regulations at European level and also to analyze to what extent the Principles of European Family Law regarding Divorce have been included in the family regulations at national level. In order to reach the objectives, there were two research methods that have been used: document analysis and comparative research. At European level there is no definition of “family” and this fact makes the concept of family very difficult to define. Considering the various sociological, anthropological, historical and religious factors, the definition and the meaning attributed to this institution differs from state to state. The analysis has revealed that in the last decade there is a growing interest for harmonization in the field of family law. It has also revealed that, at national level, steps have been made in order to integrate the European principles in the national regulations. The importance of this study is that has provided detailed information of the European norms and also a thorough analysis about the national regulation and the improvements that can be made.

Keywords: family law principles family law harmonization; divorce; Romanian Civil Code

1. Introduction

The family law has been traditionally been considered as the discipline that deals with the legal rights and duties of the family members, but considering the constant growth of the number of the marital breakdowns and also considering the development of new institutions (e.g. same-sex unions or partnerships) the concept of family law has evolved in a more remedial set of regulations that aim to protect the weaker family member. Also, due to some so-called cultural constraints and the lack of clarity regarding competences for European institutions to develop one substantial family law, it was until recently remained almost completely outside harmonization activities. In addition, also the European Council considered family

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law as “very heavily influenced by the culture and the tradition of national legal systems, which could create a number of difficulties in the context of harmonization”¹.

This paper has several aims. The first aim is to obtain a clear picture of what is the present situation of European family law. In this context, it is important to see if further harmonization or even unification is feasible, useful and desirable although the Europeanization within this field of law still is strongly debated. The second aim is to examine what harmonization means for national States.

This paper comprises of descriptive, comparative and analytical parts and in order to achieve the objectives pointed out above, there has been examined the legal literature as well as European and Romanian legislation in the field.

2. The European Family Law

It has been commonly agreed that the family law is unlike any other branch of law. The family law does not concern only individuals and their private interests; it also constitutes a liaison and an interface between the social and private spheres of the society. No society would have managed to keep order without imposing rules to regulate human relationships, by creating prohibitions and limits. That is the reason why some legislation considers that family law belongs, at least in some parts, to the area of public law.

Also, the family law is characterized by the diversity that has its roots in the culture, history and mentalities of people (Meulders-Klein, 2003, p. 109). The background for the family law was the uniform medieval cannon family law. Many legal concepts like the marriage akin to a sacrament, the indissolubility of marriage or the exclusion of illegitimate children from the family were vested or developed during that time (Antokolskaia, 2003). Later on, ideological pluralism increased, and it became more and more difficult for the States to justify the canon law concepts that was inherited. Nevertheless, they were maintained for a considerable period, and much longer than other political and religious dogmas.

In the 20th century a wave of revolutionary changes appeared in the field of family law. In Scandinavia and the Soviet Union, family law was rapidly and radically reformed during the first decades. The so-called Nordic cooperation was progressed and resulted in a coordinated drafting and enacting of legislation allowing divorce on the irretrievable breakdown of marriage (Jänterä-Jareborg, 2003). The southern European Countries needed almost the entire century in order to achieve the same level of modernity. Italy, for instance, permitted divorce in

¹Council Report on the need to approximate member states` legislation in civil matters of 16th November 2001; 13017/01 justciv 129, p. 114.

1970, and Malta remains the last European country, which allowed divorce only in 2011.

The development of the European Family Law appeared in the context of Europeanization. Every time, when family ties cross national borders it is necessary to determine which national family law will be applicable. This means a substantial challenge to lawyers who give advice concerning the stipulations of contracts or the likely outcome of legal disputes involving cross-border family situations. The same is relevant for the Courts if they have to decide such lawsuits and for the administrative bodies whose task it is to apply the law. In fact, as mentioned in the literature, in this area, it manifests *iurisdictio* the competence judge <to speak law>. The judge will be the one who chooses and indicates the rule of law which will be verified whether or not be applicable to the case (Cimpoeru, 2007).

There are presently no Community provisions on applicable law in divorce, because the Treaty does not provide any legal basis for the development of a substantive family law. This means, the EU is neither competent to unify substantive family law, nor currently empowered to legislate by regulation or directive in this field, since the family branch of civil law does not fall under the exclusive or even peripheral jurisdiction of the Community institutions in accordance to Article 3 and 5 of the Treaty.

Furthermore, even if the EU had the competence, the principles of subsidiarity and proportionality should have been respected. This means that where problems can be solved more appropriately through other methods, the EU is not allowed to act (Wozny, 2005).

To date, harmonization is achieved by spontaneous development whereby case law and legal doctrine played an important part. Evidently, the Council of Europe has also met an important goal with its ECHR, but other similar initiatives are not expected. In fact, the Council of Europe attempts to encourage the Member States to cooperate without compelling them to adopt the uniform laws, which might give rise to internal political and social resistance (Meulders-Klein, 2003, p. 111). In this connection, it commissions comparative studies, sets up standing committees of experts, convened international conferences on Family law and publishes recommendations¹.

Articles 65 and 67 EC, as revised by the Amsterdam Treaty, provide the legal base for regulating in matters regarding judicial cooperation in commercial and civil law, where they are necessary for the proper functioning of the internal market. The ongoing legislative activities within the EU suggest that this interpretation is a

¹See Council of Europe, Directorate General of legal affairs; http://www.coe.int/T/E/Legal_Affairs/ (online 05/30/05).

flexible one, since the European Council¹ has laid down an explicit connection between Family law and the functioning of the internal market. It came to the conclusion that removing of obstacles and safeguarding the free movement of persons within the European internal market creates interaction between family law and other community rules².

In this context, Council Regulation 1347/2000 (Brussels II)³ on jurisdiction and the recognition and enforcement of judgments in matrimonial matters of parental responsibility for children of both spouses involved in matrimonial proceedings can be recognized as first attempt. It includes rules on jurisdiction and recognition in matrimonial matters, but does not contain rules on applicable law.

Since the 1st of March 2005, Council Regulation 1347/2000 is replaced by Council Regulation 2201/2003 (New Brussels II)⁴. In all likelihood, it will affect any changes, because it takes over the rules on matrimonial matters almost unchanged. Nevertheless, the expectation⁵ for more regulations, particularly, on rules-of-conflict (Jayme & Kohler, 1999; Heß, 2000) still exists. In the area of family relationships, there is a general interest in the continuity of legal ties. If the rights of the family members vary due to the diverging regimes by simply changing the residence, this does not meet the legitimate expectation of citizens. Moreover, unified family rules would ensure internationally uniform decision-making, so that a status, which exists in one State, remains in effect and it is recognized in another State.

3. European Principles regarding the Divorce

Since the late 1990s the attitude towards the harmonization of family law has become increasingly more positive (Boele-Woelki, 2002; Pintens, 2003). The most tangible result of this development was the establishment of the Commission on European Family Law (CEFL) in 2001, aimed at elaborating non-binding Principles for family law in Europe. However, in spite of the growing amount of literature (Martiny, 2004) and the thriving drafting activities of the CEFL, harmonization of family law remains a highly controversial issue and the

¹The Presidency Conclusions of the Laeken European Council of December 2001.

²Council Report on the need to approximate member states' legislation in civil matters of 16th November 2001; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003DC0068:EN:HTML> (online 01. 08. 2013)

³<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0019:0036:EN:PDF> (online 01. 08. 2013).

⁴<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML> (online 01. 08. 2013)

⁵In particular according to the Vienna Action Plan of 1999 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1999:019:0001:0015:EN:PDF> – online 01. 08. 2013) and the Draft programme of measures of the Council (2001)

discussion whether it is at all possible is far from being closed case. The reason for this is that the cultural constraints argument has not been overcome, but rather circumvented.

The CEFL's first Principles of European Family Law regarding Divorce and Maintenance between Former Spouses were published in December 2004 (Boele-Woelki, 2004). On the basis of a detailed questionnaire containing 105 questions the expert members prepared twenty-two comprehensive national reports based on the law as it stood in 2002. These national reports, together with the relevant legal provisions, are available on the CEFL's website (Boele-Woelki, 2005). In order to provide an overview and a straightforward simultaneous comparison of the different solutions which have been chosen within the national systems, all the given answers were integrated into two publications (Boele-Woelki, 2003).

The Principles regarding divorce aim at a dedramatisation of divorce without neglecting the interests of the children and the weaker spouse. The Principles clearly favor consensual divorce above unilateral divorce. In the case of a divorce without the consent of the other spouse they provide a simple objective test – the expiry of a one-year period of factual separation – and thereby avoid an undesirable investigation into the state of the marriage. The irretrievable breakdown principle has been rejected. As to the consequences of divorce, the Principles also encourage the spouses to come to an agreement. Such an agreement, however, is not a prerequisite for the divorce.

4. Similarities and Dissimilarities of General European Principles regarding Divorce within the Romanian Civil Code

The European Principles regarding divorce are contained in three chapters. The first Chapter sets out the General Principles: Permission of Divorce (Principle 1:1), Procedure by Law and Competent Authority (Principle 1:2), and Types of Divorce (Principle 1:3). The second Chapter contains the Principles regarding Divorce by Mutual Consent: Mutual Consent (Principle 1:4), Reflection Period (Principle 1:5), Content and Form of the Agreement (Principle 1:6) and Determination of the Consequences (Principle 1:7). The third Chapter deals with Divorce without the Consent of one of the Spouses and contains three Principles: Factual Separation (Principle 1:8), Exceptional Hardship to the Petitioner (Principle 1:9) and Determination of the Consequences (Principle 1:10).

4.1. Permissibility of Divorce

Principle 1:1 paragraph 1 contains the permission of divorce. Paragraph 2 in this context specifies that divorce does not require any minimum period of marriage. The permission of divorce as such reflects the common core within Europe. Divorce is permitted in all Member States. In Romanian Civil Code the permission for divorce is regulated in article §373. The abandonment of specific time requirements is mainly based on two grounds. First, it is not in accordance with the common core in Europe, and second, it would not protect the weaker party who wishes to break with his or her spouse as soon as possible (Boele-Woelki, 2004, p. 19). Furthermore, this Principle is also intended to favour an undemanding procedure for consensual divorce (Boele-Woelki, 2004, p. 19).

This means, that no impediments regarding both the duration of marriage and any separation periods should be established. The CEFL takes the view, that dédramatisation of divorce proceedings can only be achieved if the parties are not hindered by detailed periods, without specific reasons they must be adhered to.

Adversely, concerning the divorce without consent, there seems to be no justification for imposing a minimum duration of marriage as independent requirement. The legal position in Romania is the same. In the Civil Code no specifically minimum of time to obtain a divorce is mentioned.

4.2. Divorce Procedure

According to Principle 1:2 paragraph 1, law should determine the divorce procedure. This formulation is general and states only that divorce, as a secular issue, should be governed by a legal process. Procedural rules fall within the competence of the national legislator. Paragraph 2 states that divorce should be granted by a competent authority which can either be a judicial or an administrative body.

Under Romanian law, a valid marriage can be dissolved by judicial decision upon the petition of one or both of the spouses according to articles 374, 379 and 380 Romanian Civil Code. The procedural rules differ dependent on whether divorce is by consent or not. A valid marriage can also be dissolved by following an administrative procedure in front of an administrative body or a public notary, as stipulated in articles 375-378 Romanian Civil Code. However, one valid marriage can be dissolved by an administrative body only if there are no children born during the marriage period.

4.3. Types of Divorce

According to Principle 1:3 the law should permit both divorce by mutual consent and divorce without consent of one of the spouses.

This principle is reflected in article 373 Romanian Civil Code that states which are the reasons for a marriage to be dissolved: (a) by mutual consent of the spouses, or by request of a single spouse accepted by the other; (b) when because of solid reasons, relations between spouses are seriously damaged and continuation of marriage is no longer possible; (c) at the request of either spouse after a separation which lasted at least 2 years; (d) at the request of either spouse whose health condition makes it impossible to continue the marriage.

4.4. Divorce by Mutual Consent

Principle 1:4 clarifies Principle 1:3 and determines mutual consent as one autonomous ground for divorce. The growing recognition of the freedom of the spouses to terminate their marriage and being encouraged to find a solution themselves as to the consequence of divorce are arguments for the establishments of a separate type of divorce.

Mutual consent is therefore not treated as irretrievable breakdown. Divorce should be permitted only for the reason of a mutual consent; no other reasons are necessary. Furthermore, this principle abstains from a separation period. Indeed, there are some reasons, which speak for a separation period. First, it can be seen as a way to realize that the mutual consent is for real and avoids any hasty decisions. Second, it could provide as a measure for protecting the family and the institution of the marriage in general and the weaker party respective children in particular.

But, this principle favors predominately the mutual consent. This means, the consensus is to of overriding importance. A separation period does not fit with the free and clear will of the corresponding spouses for any time at all.

4.5. Reflection Period

Principle 1:5 is particularly established to take into account the various arguments that are put forward for a cooling-off period. Firstly, if, at the commencement of the divorce proceedings, the spouses have children under the age of sixteen years and they have agreed upon all the consequences of the divorce, a three-month period of reflection shall be required. If they have not agreed upon all the consequences, then a six-month period shall be required. Secondly, if, at the commencement of the divorce proceedings, the spouses have no children under the age of sixteen years and they have agreed upon all the consequences of the divorce, no period of reflection shall be required. If they have not agreed upon all the consequences, a three-month period of reflection shall be required. Finally, it is regulated that no period of reflection shall be required, if, at the commencement of the divorce proceedings, the spouses have been factually separated for six months.

Thus, it provides an exemption of the general provision 1:4 and shows that a quick divorce by mutual consent should not be permitted if the spouses have not agreed upon circumstances according to Principle 1:6 or if they have children less than 16

years. It is obvious that the CEFL wants to facilitate the spouses agreement on the consequences of the divorce by setting up the reflection period of different lengths. A period of three respective sixth months does not constitute a major obstacle, but makes the divorce by mutual consent even more attractive by forcing the spouses to agree upon all consequences.

In Romanian legislation there is only one provision related to a reflection period, contained in the first paragraph of article 376 Romanian Civil Code which regulates the divorce procedure in front of an administrative body or a public notary. Registering the request of divorce by mutual consent, the specialized public servant or the public notary grants the spouses a reflection period of 30 days. After expiry of this period the authority has to verify if the spouses insist on their divorce request and if their consent is free and uncorrupted.

4.6. Content and Form of the Agreement

According to Principle 1:6, the consequences upon which the spouses should have reached an agreement are: (a) their parental responsibility, where necessary, including the residence of and the contact arrangements for the children, (b) child maintenance, where necessary, (c) the division or reallocation of property, and (d) spousal maintenance. It is also stated in the second paragraph that such an agreement should be in writing.

In Romanian legislation there are regulations for the aspects on which the spouses have to reach an agreement, but there is no obligation for the spouses to make the agreement in writing. The administrative authority takes note about their agreement and issues the divorce certificate.

According to article 375 second paragraph Romanian Civil Code, the marriage can be dissolved by the public notary even if there are minor children involved, if the spouses have reached an agreement on all the aspects regarding: (a) the name that the spouses will have after the divorce; (b) the joint parental responsibility; (c) the residence of children after divorce; (d) the arrangements for maintaining contact between the children and the parent they don't live with and (e) children maintenance. As it can be seen, there is no obligation for the spouses to reach an agreement on the division or reallocation of their property or on the spousal maintenance. If they want to settle things on these issues they are free to do it, but there is no legal obligation on this respect.

4.7. Determination of the Consequences

Principle 1:7 states that in all divorce cases, the competent authority should determine the consequences for the children regarding the parental responsibility and children maintenance, but any admissible agreement of the spouses should be taken into account insofar as it is consistent with the best interests of the child.

This principle exists also in the Romanian legislation. According to the Romanian Civil Code, the competent authority always has to take into account that the agreement between spouses is consistent with the best interest of the child. If the public notary observes that this agreement is not consistent with the best interest of the child, he will reject the divorce request and the spouses will have to address to a court of justice, which will decide accordingly.

The second paragraph of the Principle 1:7 states also that the competent authority should at least scrutinize the validity of the agreement on the matters regarding the division or reallocation of property and spousal maintenance. The question to what extend scrutiny is to be restricted is a matter of balancing values and interests. Hereby, easy and public access to divorce, the autonomy of the spouse and the protection of the weakest spouse should be considered.

According to the third paragraph, if the spouses have not made an agreement or reached only a partial agreement on the matters regarding the division or reallocation of property and spousal maintenance, the competent authority is not automatically empowered, but *may* determine these consequences if the spouses make such a request.

4.8. Factual Separation

According to Principle 1:8, the divorce should be permitted without consent of one of the spouses if they have been factually separated for one year.

In Romanian Civil Code – article 373 letter c) - the divorce should be permitted without consent of one of the spouses if they have been factually separated for two years. The separation period of two-years is established because it would provide a sufficiently length from which it can be reasonably deduced that the marriage has no future. The legal term of factual separation contains the idea that marital life between the spouses must have ended, or one spouse believes that the marriage has broken down. So, in general, if the criterion of separation period is satisfied, divorce should be granted regardless of its circumstances.

4.9. Exceptional Hardship of the Petitioner

If the spouses have not been factually separated for one year, the competent authority may grant the divorce in cases of exceptional hardship. But, in any case, the hardship should be exceptional. This means only cases, which render the continuation of the marriage unbearable, should be taken into account.

We would consider that also this principle is reflected in the Romanian legislation, for the article 373 Romanian Civil Code regulates that the divorce may be requested by one spouse if, for good reasons, relations between spouses are seriously damaged and the continuation of marriage is no longer possible and also, for health condition of one spouse that makes it impossible to continue the marriage.

4.10. Determination of the Consequences

In addition, the provisions about non-consensual divorce deal with the determination of the consequences. Principle 1:10 provides for the competent authority to determine both consequences for the children and the spouses, and economic consequences. Paragraph 1 follows the same wording as Principle 1:7. The term “economic consequences” mentioned in paragraph 2 is broad and includes the division or reallocation of property and spousal maintenance (Wozny, 2005, p. 32).

Furthermore, both paragraphs relate to any admissible agreement made between the spouses, which is to be taken into account from the competent authority. Any agreements can be helpful with respect of the consequences at stake, the content of the agreement and with respect of the date when the agreement is made. Consequently, even in cases of non-consensual divorce, any autonomous act should be considered to determine as often as possible in the interest of the spouses.

5. Conclusion

Studying all the regulations in the field of family law at European level, it is certain that all the legislations are based on a number of common principles. On the other hand, the cultural heritage, the religion and different values may be representing high obstacles, but all these obstacles are not insurmountable in order to develop one European Family Law. The harmonization of family law regulations might only be feasible, if a study is conducted on what is common to the European legal systems and an important contribution to this process can be made by academics.

The aims of this paper established in the beginning of the research were completely reached. It has been analyzed the current status of the European family law and its development through the last decades. Secondly, it has been made a comparison between the Principles of the Commission on European Family Law (CEFL) and the Romanian family law system regarding divorce. The similarities and the discrepancies have been underlined and we consider that the Romanian Family Law is sufficiently modern and compatible with the published European Principles. Considering that the Principles are of a non-binding character, the comparison made can obviously be only of theoretical interest. Gathering all the findings and the results of this study in a final conclusion allowed us to provide a well-founded and realistic perspective about European and Romanian Family Law in the future.

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