ATTEMPTS TO SIMPLIFY DIVORCE BY THE COURTS AND LEGISLATIVE CHOICES: A SLOW, PERSISTENT AND CONTINUOUS STEP TOWARDS THE REMOVAL OF THE STATE

AS TENTATIVAS DE SIMPLIFICAÇÃO DO DIVÓRCIO PELOS TRIBUNAIS E AS ESCOLHAS LEGISLATIVAS: UM LENTO, PERSISTENTE E CONTÍNUO CAMINHAR EM DIREÇÃO AO AFASTAMENTO DO ESTADO

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ABSTRACT

The Constitutional Amendment number 66 of 2010 and other subsequent normative changes had many impacts on the institute of divorce in Brazil. However, social dynamics imposes many changes to which the Legislature cannot respond, such as the resistance of more conservative social sectors. Some Courts of Justice considering the potestative right to divorce and the autonomy of will have edited provisions creating the imposition divorce or regulating the existing extrajudicial divorce against express legal text in the wake of the movement directed at the dejudicialization of the institute. In view of the grounds set forth by the Courts of Justice to justify the editions of these proclamations, it was intended to investigate two situations: the potestative right to divorce and the autonomy of the will. The theoretical and investigative development of the research was done by means of a deductive scientific method, presenting general concepts, on which, in a second moment, two hypotheses were tested, the first that the Constitutional Amendment number 66 of 2010 did not institute the potestative right to divorce in Brazil and the second that the "autonomy of will" would be inadequate to justify the imposition divorce. The research has an eminently theoretical and propositional character presenting parameters to guide the evolution of divorce in Brazil. Through the investigation, it is concluded that the postestative right to divorce stems from an infraconstitutional rule and that private autonomy would not admit surprise divorce.

Keywords: Imposing divorce; dejudicialization; postestative right; limits; regulation.

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RESUMO

A Emenda Constitucional nº 66 de 2010 e as normas infraconstitucionais posteriores trouxeram enormes impactos sobre o instituto do divórcio no Brasil, porém, ainda assim, a dinâmica social exige novas adequações as quais o Legislativo não consegue responder diante de inúmeras circunstâncias dentre as quais a resistência de setores sociais conservadores. Alguns Tribunais de Justiça considerando o direito potestativo ao divórcio e a "autonomia da vontade" editaram provimentos criando o divórcio impositivo ou regulando o divórcio extrajudicial já existente contra expresso texto legal na esteira do movimento direcionada à desjudicialização do instituto. Diante dos fundamentos expostos pelos Tribunais de Justiça a justificarem a edições de Provimentos foram investigadas duas hipóteses a justificar sua edição, o direito potestativo ao divórcio oriundo do texto constitucional e a "autonomia da vontade". O desenvolvimento teórico e investigativo impresso na pesquisa se deram por meio de método científico hipotético-dedutivo, sendo apresentados conceitos gerais, sobre os quais, em um segundo momento, foram testadas duas hipóteses, a primeira que a Emenda Constitucional nº 66/2010 não instituiu o direito potestativo ao divórcio no Brasil e a segunda que a "autonomia da vontade" não seria adequada a justificar o divórcio impositivo. A pesquisa possui caráter eminentemente teórico e propositivo apresentando parâmetros a nortear a evolução do divórcio no Brasil. As hipóteses apresentadas foram confirmadas, concluindo-se que o direito postestativo ao divórcio decorre de norma infraconstitucional e de que a autonomia privada não admitiria o divórcio surpresa.

Palavras-chave: *divórcio impositivo; desjudicialização; direito potestativo; limites; regulamentação.*

1. INTRODUCTION

In Brazil, the divorce institute was created more than one hundred and thirty years ago, and its legal nature and contours changed slowly during more than a century rapidly, especially after the promulgation of the Constitution of the Republic of 1988.

Even in the face of profound changes and the recent evolution, there is the imposition of resistance fostered by conservative sectors of society that are reflected in timid legislative production, which often fails to advance when it could.

Given the social dynamics ahead of the legislation, the Brazilian Courts, through the systematic interpretation of the constitutional text, have granted greater celerity, in general, to the evolution of rights related to the family, recognizing homoaffective unions, socioaffective adoptions, parity between spouses and partners, relativization of criteria for simple adoption, among other endless themes.

Using its typical function of interpreting the legal system and atypical function of standardizing acts practiced by extrajudicial services, the Court of Justice of Pernambuco, the Court of Justice of Maranhão and the Court of Justice of Goiás edited provisions regulating divorce, sometimes creating a modality not provided for by law, sometimes standardizing a species already provided for by law in a totally reverse way, considering in all cases the supposed potestative right to divorce and the "autonomy of the will".

Even though after the first two provisions, the National Council of Justice has issued a recommendation stating the incompetence of the Courts to create types of divorce, it remains to be examined whether this would be, at this juncture, a potestative right emanating directly from the constitutional text and whether the "autonomy of will" would be sufficient to lift the

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current rules that require, in watering, the participation of both spouses in both consensual and litigious form.

In face of this problem, it has been assumed the hypothesis that divorce would be potestative right by virtue of an infra-constitutional rule, not deriving, therefore, directly from the constitutional text.

Another hypothesis investigated concerns the legal limits of private autonomy, seeking to examine whether this principle would be subordinated to the legal standard according to which, as a rule, the surprise dissolution of marriage is not allowed.

The theoretical and investigative development printed in the research comprises the deductive scientific method, starting from general conceptions in order to test the hypotheses raised to solve the problem presented and also propose speculative options to assist in the appropriate development to the continuation of the evolution of the divorce institute in Brazil.

The research was built in four parts, in the first section the scope of the difficult evolution of divorce in Brazil was presented; afterward, the attempts and grounds used by the Courts of Justice in the administrative regulation of the new type of divorce and the divergence from the legislative choices were examined; then the possibility of decreeing divorce *inaudita altera parte* under the current legislation was examined; finally, the Ordinary Bill number 3.457 of 2019, which intends to regulate the imposing divorce, was examined.

In order to develop this work, a bibliographical survey was conducted by consulting books and scientific articles, as well as the relevant national and international legislation, with the purpose of contributing to the development of legal reasoning on the subject, presenting parameters to guide the evolution of the institute.

2. THE DIFFICULT EVOLUTION OF DIVORCE IN BRAZIL

The current regulation of the dissolution of marital partnership bond in Brazil is the result of long cultural, legal, and legislative evolution, associated with debates and social efforts still in development that encounters constant religious and conservative resistance (Senado Notícias, 2017).

During the Brazil Empire period, marriage was regulated by the Catholic Church, which only admitted the dissolution by the death of one of the spouses, and it was still possible to declare the nullity of marriage when present impediments, defect of consent or in the form of celebration, with no provision regarding the dissolution of the marital bond or society by act of will (CARVALHO, 2018, p. 309).

On January 24th, 1890, through the decree number 181, the term divorce was inserted into the legal system, and the regulation of civil marriage was also closed by the Catholic Church. The aforementioned decree established the possibility of consensual or litigious divorce only through the judicial means, however, even if it was possible to separate bodies and end the conjugal society, the marital relationship was not dissolved, keeping people united even if against their own will (BRASIL, 1890).

The articles 85 and 86 of the decree required the participation of both spouses to decree the divorce both in the consensual modality, in which it was necessary the unequivocal manifestation of the parties, and in the unilateral application for divorce that required the contradictory before the evidence of guilt.

The Constitution of the Republic of July 16th, 1934 ended the term divorce that did not dissolve the marriage and inserted the institute of conjugal separation, named *desquite* by the brazilian law attributing the regulation to the ordinary legislature, which, in turn, maintained the same restrictions already in force, thus clearly distinguishing the separation of bodies from the separation of fact (CARVALHO, 2018, p. 311).

The timidity in the amendments in substantiated law has also had an impact on procedural law, because the Code of Civil Procedure in force at the time, Law number 5,869 of January 11th, 1973 regulated the process of conjugal separation, named *desquite* by the brazilian law in its articles 1.120 to 1.124, presenting specific procedure for the consensual modality and the ordinary procedure for the litigious modality, requiring, in any case, the indispensable participation of the parties in the proceedings.

The absence of a significant substantial or adjective change aimed at the dissolution of marriage and the growth of divorce[2] regulation in other countries caused intense debate between those who demanded the recognition and regulation of the institute and those who were against regulation by religious or political-conservative convictions (DIAS, 2016, p. 153).

It was only after almost a century of the change made by decree number 181 of 1890, was promoted an important and transformative normative change directed to marriage. This time, through constitutional amendment number 9th of June 28th, 1977, which allowed, for the first time, the dissolution of marriage by will, subject to prior legal separation for more than three years, when proven the separation of fact for the same period or direct divorce when the separation had happened at least five years before that amendment under the terms of the law (BRASIL, 1977).

The Constitutional Amendment maintained the express attribution to the ordinary legislature to regulate divorce in Brazil, establishing, from the outset, minimum conditions for the dissolution of marriage as declined above.

At this time, Brazil was one of the few countries in South America, among those members of the United Nations (UN), that still did not allow divorce, and both internal and external [3]influence, intensified the debate on the regulation of the dissolution of marriage (Senado Notícias, 2017), the Catholic Church and conservative sectors of society once again vehemently opposed it (DIAS, 2016, p. 302).

Even in the face of great resistance, on December 26th, 1977, Law number 6.515 was published, establishing for the first time in the country the possibility of the end of the marital bond by the will and the dual system of dissolution of marriage to be instituted in court according to constitutionally established guidelines, requiring, in all cases, the participation of both spouses.

2 *Vide* Decree Portuguese of November 3rd of 1910 and Decree-Law number 261, of May 27th, 1975; and Uruguay Law number 3.245 of October 29th, 1907 and Law number 4.845, of April 28th,1914.

3 Argentina and Chile were the last South American countries to institute and regulate divorce, recognizing, respectively, on June 3rd, 1987, according to the Law number 23.515, and on April 22nd, 2004, through the Law number 19.947.

The Constitution of the Republic of 1988 maintained the possibility of dissolution of marriage by will through the dual system to be legally regulated, reduced the deadline for the application for conversion of separation into divorce from three to one year, and also reduced the term of direct divorce in case of de facto separation, from five to two years not limited to facts past the apex norm.

The change produced by the constitutional text required infraconstitutional adaptation. In this sense, the provisions of Law number 6.515 of 1977 were modified, through Law number 7.841 of October 17th, 1989 and Law number 8.408, requiring in all cases judicial action and participation of the spouses. The Civil Code, Law 10.406, of January 10th, 2002, despite regulating divorce materially, partially reproducing what was regulated by the previous Law, did not promote deep alterations in the institute.

On January 4th, 2007, Law number 11.441 was published, which for the first time removed from the Judiciary the exclusivity of the separation or divorce decree, allowing the spouses to apply for a consensual divorce through a lawyer at the notary public, when absent dependents unable.

The partial dejudicialization of separation and divorce introduced in the legal system, in addition to the objective of reducing the demands of the Judiciary also recognized the capacity and freedom of the spouses to decide (CARVALHO, 2018, p. 345), through the exercise of their private autonomy. According to Rolf Madaleno (2018, p. 391), the possibility of choice made available to the couple was the main change promoted by the mentioned law[4].

Even before the publication of the law that made extrajudicial separation and divorce possible, the Proposals for Amendment to the Constitution number 33 and 413, both from 2007, had already been presented, which intended to unify in divorce all the hypotheses of dissolution of society and marital bond. The mentioned constitutional amendment projects gave new wording to the paragraph 6th of article 226 of the Constitution of the Republic of 1988 (CARVALHO, 2018, p. 315).

With the approval of the Constitutional Amendment, the dual system of dissolution of marriage, present in the original wording was suppressed from the constitutional text, defining divorce as sufficient act for such, not requiring, also for the first time, apparently, infraconstitutional regulation and other criteria (GAGLIANO; PAMPLONA FILHO, 2019, p. 596).

The absence of constitutional provision of criteria or requirements for the dissolution of marriage through divorce enabled the infraconstitutional legislator to maintain the emancipating trajectory initiated by Law number 11.441 of 2007, reducing the invasive action on the couple's privacy and expanding the respect for private autonomy (LÔBO, 2018, p. 33).

After the constitutional amendment, the debates about the reception or not of legal separation foreseen in the Civil Code of 2002 were intensified. Given the absence of constitutional provision for such, and according to Dimas Messias de Carvalho, "the vast majority of family law jurists concluded that legal separation was not received by the amendment" (CARVALHO, 2018, p. 332).

4 Currently the congestion rate of the State Judiciary is 74% (CNJ, 2019, p. 36).

However, Law number 13.105, dated March 16th, 2015, which replaced the previous Code of Civil Procedure, published at a time after the constitutional amendment, maintained the procedural possibility of legal separation autonomous to divorce proceedings.

On March 14th, 2017, the Superior Court of Justice issued a decision in the security warrant number 1.247.098, recognizing the diversity of the legal nature of legal separation and divorce. On that occasion, it settled understanding in the sense that Constitutional Amendment number 66 of 2010 received the articles of the Civil Code, and even the procedural devices not addressed in that decision were considered constitutional.

On October 29th, 2019, Law number 13.984 was published, which inserted article 14-A in Law number 11.340, of August 7th, 2006, expanding the jurisdiction of the Courts of Domestic and Family Violence against Women to process divorce petitions, establishing preference to the petition, in the court they were in, if the violence began after the petition was filed.

Although the evolution of the institute of divorce in Brazil is undeniable, even in the face of sectorial resistance, especially after the current constitutional framework, it is evident that the advance has been more acute in the face of the original constituent power and the reforming derivative than in relation to the ordinary legislator, a fact that has repercussions on the problem proposed[5] in this research about the possibility of regulating divorce by state courts.

3. THE ATTEMPT OF THE STATE COURTS TO REGULATE ADMINISTRATIVELY NEW TYPE OF DIVORCE AND THE LEGISLATIVE CHOICE

The Constitutional Amendment number 66 of 2010 changed the constitutional text by removing from §6 of article 226 the dual system and the deadlines for dissolution of marriage, as well as the express determination directed to the ordinary legislature for its regulation. It became established that civil marriage could be dissolved by divorce (BRASIL, 1988).

Given the absence of extensive treatment granted by the amendment to divorce (FIUZA, 2019), several discussions have been held among Brazilian jurists, on various related topics. However, despite varied disagreements on numerous points, most authors of family law understand that the constitutional amendment assigned to divorce the status of potestative right.

It is worth noting that the potestative right is related to the exclusive will to exercise a subjective right in order to change the legal situation (SILVA, 2014, p. 740). This means that the right is considered potestative when the holder has the possibility of submitting his will to others without the possibility of valid resistance.

5 The fact that the representatives of the constituent power derived reformatory are, in Brazil, also responsible for the production of ordinary legislation could make sound as incongruous the assertion that the constitutional amendments on the subject investigated advanced more than ordinary regulations, however, as will be observed later, constitutional advances were made through rules of limited effectiveness that require infraconstitutional complement to achieve finalistic effects (SILVA, 1998, p. 89), thus overcoming the merely political-ideological function to finally achieve the legal-instrumental function, under penalty of not doing, establishing a purely symbolic norm (NEVES, 1994, p. 76).
*Vg*P: Carlos Alberto Dabus Maluf and Adriana Caldas do Rego Freitas Dabus Maluf (2018, p. 469); Dimas Messias de Carvalho (2018, p. 388); Fernanda Tartuce (2018, p. 243); Flavius Tartuce (2019b, p. 319); Maria Berenice Dias (2016, p. 122); Pablo Stolze Gagliano and Rodolfo Pamplona Filho (2019, p. 586); Paulo Lady (2018, p. 104); and Rolf Madaleno (2018, p. 464).

As for paragraph 6th of article 226 of the Constitution of the Republic of 1988, although the reforming constituent legislator has suppressed issues previously imposed on the ordinary legislator that conditioned the decree of divorce (CARVALHO, 2018, p. 340) it has not been forbidden that the institute was regulated by imposing criteria, conditions or procedures for its intent.

José Afonso da Silva (2019, p. 141) warns that every constitutional norm both positive and negative effects, that is, the constitutional norm can revoke all previous legal order contrary to its determinations, imposing non-reception, and at the same time prevent the ordinary legislator from producing laws contrary to its dictates.

Thus, it is possible to state that the Constitutional Amendment number 66 of 2010 fixed only one form of dissolution of marriage, not eventually excluding others. Therefore, if there was a previous law that prevented the dissolution of marriage, it would not be received[6], and it is incumbent upon the ordinary legislator to prevent the creation of a law that removes divorce from its constitutionally defined purpose: the dissolution of marriage.

However, the wording given to the provision under examination by the Constitutional Amendment referred to did not attribute connoted properties to divorce referring to a previously existing institute of material and procedural civil law. This, added to the absence of complete regulation by the Reform Power attributes to the constitutional rule mediated applicability requiring tacitly infraconstitutional regulation, observing, in any case, its positive and negative effects already examined.

Thus, the infraconstitutional legislator, by failing to impose material conditions to direct divorce, which it could have done due to the mediated applicability of the constitutional rule, attributed to divorce the status of a potestative[7] right, but procedurally[8] regulated its decree.

In a different way, understanding that the potestative status of divorce derives directly from the constitutional text and not from ordinary legislative choice, as well as based on the principle of autonomy of will, the Court of Justice of Pernambuco published Provision number 6 of May 14th, 2019, creating and regulating the imposing divorce with or without name change to be performed in the extrajudicial service.

The mentioned provision demanded as requirements marriage, the absence of a requirement for maintenance or division of property, as well as the inexistence of an unborn child or incapable children and the assistance of a lawyer.

The procedure created would be performed exclusively by the registry office where the marriage was registered, would require the request of only one of the spouses and the notification of the absent spouse, which could even occur by public notice before the registration.

In the same wake of the Court of Justice of Pernambuco, only six days after the publication of the Provision, the Court of Justice of Maranhão published Provision number 25 of May 20th, 2019, basing the administrative act on article 16, item one, of the Universal Declaration of Human Rights, aimed at the freedom of marriage and its dissolution, on the post-divorce right

6 It is important to note that valid marriage dissolves through divorce and also death, as recommended in Paragraph 1 of the article 1,517 of the Civil Code.

7 Dimas Messias de Carvalho (2018, p. 388) argues that it could be opposed to divorce exception, that is, the absence of marriage, thus removing the absolute character of the subjective right to divorce something that could drive away the *status* of the law of the state.

8 See article CPC 733.

arising from the constitutional text, on the constitutional principle of fraternity, on the movement of the dejudicialization of law, and also on the principle of private autonomy.

Despite creating a procedure similar to that of the Court of Justice of Pernambuco, the Court of Justice of Maranhão innovated by denominating the divorce created as unilateral, as well as providing the assistance of a lawyer. In view of the regulations promoted by Courts of Justice, only ten days after the last provision, the National Council of Justice issued recommendation number 36 of May 30th, 2019 due to the request for a writ distributed by the National Inspector General's Office filed under number 0003491-78.2019.2.00.0000 (CNJ, 2019b).

In the decision rendered in the writ that originated the mentioned Recommendation, the National Council of Justice considered the exclusive competence of the Union to legislate on procedural and registry law, as well as the infraconstitutional regulation of divorce and the absence of authorization for the unilateral or imposing divorce modality recommending that the Courts refrain from editing acts regulating the registration of extrajudicial divorce by unilateral declaration, as well as providing their immediate revocation to the contrary (CNJ, 2019b).

The National Court of Justice, when editing the above-mentioned recommendation, noted the formal obstacle in the face of the union's private legislative competence laid down in items one and twenty-five of article 22 of the Constitution of the Republic of 1988, which cannot be taken by the Judiciary. The judiciary possesses only the administrative competence to regulate the divorce by extrajudicial means and in accordance with the restricted commands set forth in article 733 of the Civil Procedure Code, being legally invalid the rules of courts that would see to expand or contradict the decision of the legislature.

The National Council of Justice also warned that there would be impediment of a material order to the provisions published in the face of the isonomy violation determined by the Constitution in the application of national laws, because the States that published the provisions cited above, would have procedures different from those that understood they did not have sufficient competence to do so.

Although it has not been the object of examination of the National Court of Justice, it is also worth noting as previously stated, that the potestative right to divorce has no origin in the constitutional text, but in the choice of the ordinary legislature that in turn issued procedural and registral rules to regulate the institute, not being feasible the direct application of the constitutional rule when it has mediata and indirect effectiveness, therefore limited.

Bernardo Gonçalves Fernandes (2020, p. 108) argues that the standard of limited effectiveness requires the action of the legislator to regulate it, only then, increased its capacity, would acquire full effectiveness, that is, by itself, it would not have immediate and direct applicability.[9]

Thus, since the legislator, whose jurisdiction is private, chose the form and requirements for the development of divorce, it is not an attribution of the Judiciary, through an administrative and restricted act, to create new species and registration procedures for the institute of divorce.

Another point presented in both Provisions published by the Court of Justice of Pernambuco and the Court of Justice of Maranhão are the fundamentals of the creation and regulation of

9 In the opposite direction check: CARVALHO, Dimas Messias de. *Direct from Families*. 6th ed. São Paulo: Saraiva Educação. 336-337, 2018.

a new type of divorce in the principle of the autonomy of will of the spouse who is dissatisfied with the marital bond.

However, it is observed that the elevation of unilateral will to a level higher than that of the Law, article 733 of the Code of Civil Procedure, as a cause and legal effects, is not adequate to the contemporaneity and evolution of the legal system that currently only admits objective freedom within the legal limits, which was convinced to be called private autonomy [10] (RIBEIRO; AYLON, 2019, p. 367).

Although it may be considered that the term "autonomy of will" has been used as a label, it is not possible to ignore that its meaning has been used as a species when it is accepted that the unilateral will can overlap the express legal text.

Another important fact about the choice of the legislator holding private jurisdiction relates to the publication of Law 13.984 of October 29th, 2019, therefore, at a time after these provisions and recommendations, which, among other provisions, amended provisions of Law Number 11.340 of August 7th, 2006, Maria da Penha Law, expanding the competence for processing and decreeing divorce and dissolution of a stable union also to the Justices of Domestic and Family Violence against Women.

It is observed that even in cases involving violence, the ordinary legislator did not opt for the possibility of an imposing or unilateral divorce, failing to create a special procedure for this, despite conferring preference in the court in which the divorce is being processed when the situation of domestic and family violence is being processed after the court.

Even after Recommendation number 36 of the National Court of Justice and the guidelines married in its grounds, the Court of Justice of Goiás issued provision number 42 of December 17th, 2019, which also regulated, against *legis,* the possibility of consensual divorce even when the couple has incapacitated or unborn children.

In the aforementioned Provision, The Court of Justice of Goiás considered relevant the regulation different from that already existing in the Civil Procedure Code on the grounds that it would be giving a " better interpretation of the rules inserted in article 733, of the Code of Civil Procedure, with regard to the proposal of dejudicialization" (TJGO, 2019).

In the last decade, the brazilian judiciary's leading role in the evolution of Family Law is undeniable, which, using a systematic and harmonic interpretation of the national legal system, recognized existing family relationships in our society, such as the decision given in the direct action of unconstitutionality (ADI) number 4.277 of 2011, "which qualified the homoaffective union as a family entity, deserving of the same protection of the State conferred on the stable union" (LÔBO, 2018, p. 33); as well as in the Extraordinary Resource number 898.060/SC in which there remained a legal thesis that there is no hierarchy between biological and socioaffective affiliation.

The aforementioned decisions do not exhaust the current work of the Judiciary in boosting the evolution of family law through interpretation according to the[11] Constitution, characterized

10 "In this new social, political and economic context, the autonomy of the will was relativized and the pure private agency was transferred to a greater state protagonism. Even this sum of factors provides the outbreak of a new vision of autonomy, which debinds from the term will and clings to private expression" (RIBEIRO; AYLON, 2019, p. 367).

11 *Vg*: ; Equality between hetero and homoaffective unions, 131 ADPF; Abbreviation of domeclaraof unconstitutionality of the article 1,790 CC, RE number 646,721 and Resp 1,635,649 (themes 498 and 809); Exceptional authorization for the adoption of a grandchild by grandparents, Resp 1.635.649; *et al*.

by the absence of revocation of legal provision, but altering the meaning of words so that they better fall within the constitutional command (STRECK, 2018, p. 217).

However, in the case of the provision issued by the Court of Justice of Goiás, as stated elsewhere, the constitutional text used a term already provided for in material and procedural law, allocating its regulation to the infraconstitutional norm, and the Constitution is limited to describing the legal nature of divorce as an appropriate institute for the dissolution of marriage, but not being the only one. In turn, article 733 of the Code of Civil Procedure, maintained the possibility of extrajudicial divorce expressly still limited the faculty to legal requirements, such as consensuality; absence of unborn or incapable children; and counselassist.

Although one can criticize the legal criteria listed above, especially the requirement of absence of an unborn child or incapable children, since the end of the conjugal relationship does not alter the bond between the ascendants and their descendants, maintaining the family power and the right to coexistence or visitation, thus ensuring the special protection conferred on the incapable, legislative choice is not contrary to the constitutional text.

However, the provision of the Court of Justice mentioned above, seems to contradict frontally the legal text, seeking to regulate matters of private legislative competence of the Union, as previously dealt with, challenging the constitutional order and the balance between the Powers of the Republic, ignoring the fact that the constitutional interpretation is not only attached to the Judiciary and that only the judiciary would have the capacity to present the best and most appropriate interpretation to the Constitution (REZENDE, 2017, p. 132).

Understanding that the Constitutional Amendment number 66 of 2010 inserted a norm of a mediative and indirect nature, being indispensable infraconstitutional regulation according to the powers established by the Constitution, and even though divorce is a law of law by virtue of material and procedural legislative choices, it is necessary to conclude, in tow, the invalidity of the regulations of Courts of Justice intended to innovate when they create a kind of divorce, as well as the illegality of acts that frontally contrary legal provision of private jurisdiction of the Union. Thus, although it is necessary to understand the adequacy of the right to social realities, it must be understood that the appropriate route for this is the legislative one in continuous respect to the constitutional precepts already addressed above.

4. DECREE OF DIVORCE INAUDITA ALTERA PART AND THE LEGISLATIVE CHOICE

The current Code of Civil Procedure, seeking to change the bellicose legal culture, inserted in the procedural legal system paradigm against phatic directed to dialogue and cooperation, aiming to mitigate uncooperative behaviors with the purpose of having the parties involved have the opportunity to resolve their own conflicts or influence any decision awarded (THEDORO JÚNIOR, *et al*,2015, p. 69).

The *caput* of article 9th of that legislation states that "no decision shall be made against one of the parties without it being heard in advance"(BRASIL, 2015) in respect of the principle of non-surprise of decisions. The provision of *inaudita altera parte* is legally feasible, in exceptional

cases, in accordance with the items contained in the sole paragraph of the same article[12] that made possible the exercise of deferred adversarial proceedings.

On January 31st, 2020, several legal sites reported the decision[13] handed down by the judge, Karen Francis Schubert, holder of the 3rd Family Court of the district of Joinville, Santa Catarina who granted, *inanely, inaudita altera parte*, the application for divorce formulated by the author party in provisional custody of evidence.

According to the Brazilian Institute of Family Law (IBDFAM), the magistrate based the preliminary decision on the law of divorce as well as on the autonomy of the will, as infering:

> Therefore, the expression of will of the author is sufficient maturation to depart from the anticipation of the effects of the request for dissolution of the conjugal bond.Thus, it is not reasonable to impose on the author the burden of bearing all the processing of the done and evidential dilation so that it has analyzed its claim, when it has already expressed its unequivocal interest in the dissolution of the conjugal society *(apud* IBDFAM, 2019).

Once again, it is verified that the potestative right to divorce is observed as something that arises from the Constitutional Amendment number 66 of 2010, being granted to paragraph 6th of article 226 of the Constitution of the Republic of 1988, full applicability, even if the definition of divorce is attached to the material law and its applicability to the infraconstitutional procedural law, as already dealt with in previous lines.

Again, it is important to emphasize that the principle of autonomy of the will no longer has room before overcoming the liberal individualism that sacralized the unilateral will (TARTUCE, 2019a, p.48), and it is imperative to observe the private autonomy that allows the individual to regulate his desires within legal limits, not being sufficient his mere will.

Chapter X, of Title III of the CPC, includes family actions, establishing guidelines aimed at consensualism and specific norms to citation, preliminary hearing, hearing of incapacitated and participation of the Public Prosecutor's Office, referring the process, as to the rest, to the rules of the ordinary common procedure.

It is observed that both in the special procedure (article 695) and in the ordinary common procedure (article 294), although it is possible to anticipate the effects of the intended protection, as a rule, conditions the examination of the applications to comply with the stages of the process that must excel by consensus. Thus, understanding that the mere requirement, based on the autonomy of the will, would be sufficient to remove the legislative choice by rituality, disallows legislative choice and may attack the separation of powers or even usurp private jurisdiction fixed in item one of article 22 of the Constitution of the Republic of 1988, besides being contrary to the consensual guideline of the procedure.

It is also stated that the ordinary legislature, although expressly providing for the possibility of granting provisional protection (article 695) also established the general rule about the rite (article 697) to be observed for the decree of the demands of families (article 693), including judicial divorce, thus, even if it is possible to grant the granting of evidence protection in the Law

12 In addition to the cases provided for in the single paragraph of the article 9th, also authorize the granting of a prelimary *inaudita altera parte* of those issued on the basis of article 562 of the Civil Procedural Code.

13 Cf: Ibdfam: http://www.ibdfam.org.br/noticias/7152/Div%C3%B3rcio+%C3%A9+decreed+before+even+quote%C3%A7%C3%A3o+do+husband; Conjur: https://www.conjur.com.br/2020-fev-01/juiza-decreta-divorcio-antes-mesmo-citacao-marido; Crumbs: https://www.migalhas.com.br/quentes/319569/juiza-de-sc-decreta-divorcio-de-casal-antes-mesmo-da-citacao--do-marido.

of Families this must always be observed in its exceptional character under penalty of converting exceptionality into a rule and fulminating with legal provisions formally in force, instituting the legal, the imposed or unilateral divorce.

Thus, it seems that the current legal text would not, as a rule, authorize the unprecedented injunction to amend part of the divorce, but nothing will prevent its decree, after the adversarial proceedings have been established, including by means of a partial decision of merit under article 356, item one, of the Civil Procedural Code.

5. THE LEGISLATIVE BILL NUMBER 3.457 OF 2019

Inspired by the provision number 06 of 2019 of the Court of Justice of Pernambuco, as well as the positioning of [14] Professors José Fernando Simão and Mário Luiz Delgado, Senator Rodrigo Pacheco (MDP/MG) presented Ordinary Law Bill number 3.457 of 2019 for the addition to the article 733-A of the Civil Procedural Code intending to regulate the unilateral extrajudicial divorce direct by endorsement (SENADO, 2019).

The legislative bill aforementioned intends the creation of a new type of extrajudicial divorce embodied in the unilateral declaration of one of the spouses, assisted by a lawyer, to be presented to the registry of births, marriages and deaths that must notify personally and in its impossibility by means of notice, the other spouse to become aware of the request, proceeding to the immediate registration (SENADO, 2019).

This project imposes as the only obstacle to the proposal for a new form of divorce the existence of unborn child and incapacitated children, in the same wake of the regulations already provided for in article 733 of the Civil Procedural Code.

The rapporteur of the Committee on the Constitution of Justice, Senator Marcos Rogério da Silva Brito (PDT) presented two amendments proposing the correction of terms used, uttering at the end a vote in favor of the matter that is ready to be based on the initiator house.

In an opinion poll on the matter of that legislative bill opened on the Senate website, it presented until April 6th, 2020, approval exceeding 91% (ninety-one percent) before voters (SENADO, 2019), in addition to also having the support of IBDFAM[15].

The aforementioned project with the support of popular and important familiarist Institute manages to supply the evident unconstitutionality present in the provisions issued by the Court of Justice of Pernambuco and the Court of Justice of Maranhão, but it ceases to advance when it continues to require the absence of an unborn child or incapable children, because the end of the marital bond between the parents does not affect their relationship or legal bond with the offspring, even if, obviously, it may reflect on the coexistence, something that could remain reserved for autonomous judicial process to deal with issues that actually directly affect minors, such as custody, coexistence and alimony, in the wake of the provision edited by the Court of Justice of Góias and commented above.

14 Cf: https://www.conjur.com.br/2019-mai-19/processo-familiar-barrar-declaracao-unilateral-divorcio-negar-natureza-coisas

15 Cf: http://www.ibdfam.org.br/noticias/6965/Div%C3%B3rcio+Impositivo+%C3%A9+presented+as+ project+de+lei+no+Senado%3B+texto+foi+elaborado+por+membros+do+IBDFAM

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It is noteworthy that the children are not and could not be object ed in any defendant related to the divorce of their parents this because they are subjects of the relationship derived from family power, not being objects or taxpayers of this action that seeks the dissolution of marriage, but rather the recipients of the exercise of the burden of creation, guidance and protection entrusted to parents who may be the object of their own action (RAMOS. 2016, p. 39).

Thus, it would be better if the aforementioned legislative bill would unbind the two institutes, divorce and affiliation, because, in addition to becoming coherent in the face of the plurality of family models in summed up by the Constitution of the Republic of 1988, in which the affiliation is independent of marriage between the parents, it could also reduce the litigiousness since the institutes were fragmented, thus being possible the realization of unilateral extrajudicial divorce directly by endorsement, and, in parallel, action aimed at the custody, conviviality and food of minors or unborn child.

Thus, the regulation given by the legislative bill, once again, is not adequate enough in view of the current social needs, however, given the history of resistance and difficulties imposed by conservative sectors, the proposed amendment may be another step in the slow evolution of family law towards the direct and incised removal of the State in matters of an exclusively private nature that requires only regulation.

6. CONCLUSIONS

The current legislation concerning divorce in Brazil is the result of more than a century of evolution of the institute and social, cultural and legal confrontations that opened possibilities for the dissolution of marriage. The resistance that has always existed on this institute still has reflexes and even today seems to impose unjustified obstacles to its greater agility. Faced with these difficulties, Courts of Justice of Pernambuco and Maranhão edited provisions creating and regulating the taxed or unilateral divorce to the chill of the law.

The creation and normative regulation considered that Constitutional Amendment number 66 of 2010 would have granted the divorce the status of potestative law, as well as the autonomy of the will, addressed to only one of the spouses, would be sufficient to remove the legal regulations that regulate the subject.

Even if the National Court of Justice has determined the suspension of such provisions issued by the Court of Justice of Pernambuco and the Court of Justice of Maranhão, as well as recommended to the other state and district courts to refrain from editing similar infralegal rules due to the evident formal unconstitutionality, since it is a private jurisdiction of the Federal Government to legislate on Civil Law, Procedural Law and Public Registration, it remains to be seen that the legal right to divorce originates in an infraconstitutional rule, not directly due to §6 of article 226 of the Constitution of the Republic of 1988 in view of its mediata applicability which prevents the courts from editing rules to be used to regulate the imposing divorce.

Shortly after the recommendation issued by the National Court of Justice, the Court of Justice of Góias issued a proposal seeking to expand the dejudicialization of divorce, enabling, optionally, extrajudicial divorce even for those who have underaged or unborn children, which,

although consistent with social developments, also seems to suffer from the same incurable evil as the provisions that preceded it, that is, the invalidity of the regulation in the face of formal incompetence and the mediata and indirect applicability of paragraph 6 of article 226 of the Constitution of the Republic of 1988, and is still blatantly illegal since it establishes a rule diametrically contrary to those established by Article 733 of the Civil Procedural Code.

Even judicial decisions that decree divorce, when issued in evidence guardianship in an unprecedented way, do not seem to be aligned with the principles imposed by the special rite of family actions or the common subsidiary rite of the Civil Procedural Code, because they would remove the consensus that should lead the judicial work of this kind.

However, the legislative bill number 3.457 of 2019, inspired by the above-mentioned provision issued by the Court of Justice of Pernambuco, seems to overcome questions regarding formal unconstitutionality, being still consistent with the constitutional norm of mediata and indirect efficacy and with the Democratic State of Direct, although it remained critical in the face of its shyness and the possibility of advancing in a more incisive way in order to expand the possibilities of tax divorce even to those who have underaged or unborn children, considering that the end of marital bond does not change the legal relationship between ascendants and descendants.

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