

Principles of European Family Law Regarding the Divorce by the Public Notary in Hungary

BÉLDI-TURÁNYI, NOÉMI*

ABSTRACT Thanks to the principles of the Commission on European Family Law on divorce law, extrajudicial divorce by mutual consent is becoming increasingly widespread in many European countries. The possibility of introducing this legal institution was also raised in Hungary in 2012 during the codification of the new Civil Code, but was ultimately rejected. The aim of this study is to examine the possibility of introducing divorce by the public notary as a possible alternative to divorce by mutual consent, in the light of the principles of European Union divorce law as well as the arguments and counter-arguments raised during the codification process.

KEYWORDS *extrajudicial, (administrative) divorce; divorce by the public notary, Hungarian codification*

Introduction

Over the past few decades, divorce has been on the rise across Europe, especially divorce by mutual consent.¹ This is due to the fact that, as a result of the codification wave of the 21st century, an increasing number of EU Member States have decided to introduce the possibility of extrajudicial divorce by mutual consent (administrative divorce) into their national legal systems. The advantage of divorce by mutual consent is that it simplifies the procedural rules, since if the parties agree on all the issues related to the divorce, the court eliminates the need to conduct the time-consuming, energy-intensive and very costly evidentiary proceedings related to the breakdown of the marriage.

Looking at the legislation of the Member States, the legislature has provided for the possibility of extrajudicial divorce through two additional forums: the administrative procedure of the civil registry office and the procedure of a notary. In the following, I intend to examine specifically the introduction of the possibility of divorce by the public notary in the Hungarian context.

* PhD student, University of Debrecen, Marton Géza Doctoral School of Legal Studies.

¹ Emilia Weiss, "A családjogi kodifikáció elvi kérdései," *Közjegyzők Közlönye*, no. 1 (2007): 7–8.

1. The spread of divorce by mutual consent in the European Union

Divorce at the request of one or both parties is now recognised in all Member States, but this was not always the case. Until the late 1940s in Central and Eastern European countries and until the late 1960s in Western European countries, the principle of the indissolubility of marriage was maintained, allowing divorce only in a limited number of severe cases. Today, the right to divorce applies in all EU countries. Malta was the last country to abolish the principle of indissolubility, in 2011.²

2. Principles of the Commission on European Family Law on the law of divorce

The Commission on European Family Law was set up to elaborate, on the basis of an in-depth analysis of the legal practices of the Member States, the “Principles of European Family Law” which, on the one hand, promote the harmonisation of European law and, on the other hand, assist the legislatures of the Member States in the process of codifying family law.³ In 2004, the Commission drafted the so-called principles on divorce,⁴ which are structured in three main chapters: the first chapter contains the general principles, followed by chapters two and three, which deal with the two types of divorce: divorce by mutual consent and divorce without the consent of one of the spouses.

2. 1 The basis for divorce and the competent body

The general principles include the following: “divorce should be granted by the competent authority which can either be a judicial or an administrative body.”⁵ The Commission on Family Law has left it to the legislatures of the Member States to lay down procedural rules on divorce and to decide whether a body other than the judicial body should have the power to deal with divorce. The Commission justified its position by pointing out that in some exceptional cases the judicial body acts as a quasi-administrative body in the proceedings, in

² Orsolya Szeibert, *A házasság Európában a jogegységesítő törekvések tükrében* (Budapest: ELTE Eötvös Kiadó, 2014), 96.

³ Szeibert, *A házasság Európában a jogegységesítő törekvések tükrében*, 15.

⁴ The principles are available in Hungarian: <https://ceflonline.net/wp-content/uploads/Hungarian-translation-of-CEFL-Principles-on-parental-responsibilities.pdf> and in English: <https://ceflonline.net/wp-content/uploads/Principles-English.pdf>

⁵ Principles of divorce law: Articles (2) and (3) of Principle 1:2.

particular when it approves the parties' consent to the divorce and the settlement of ancillary matters.⁶

2. 2 Divorce by mutual consent

The Commission on Family Law included divorce by mutual consent in the first place in order to emphasise the primacy of the parties' right of disposal and to facilitate an amicable settlement between the spouses.⁷ Divorce is based on mutual consent. The Commission has defined the concept of mutual consent and its framework, but has left it to the legislatures of the Member States to work out the details. Mutual consent refers to: when the spouses jointly apply to the competent authority for a divorce, but it is also mutual consent when one of the spouses applies for the dissolution of the marriage with the acceptance of the other spouse. The Commission has identified two "protective instruments" to protect marriage: a *reflection period* and a specific period of *separation*.

The *reflection period* is intended to make the divorce more considered, but Principle 1:5 states that there is no need to use this protective function if the spouses have no minor children and have agreed on the ancillary matters. Principle 1:4 emphasises that *factual separation* is not a condition for divorce by mutual consent, but if the spouses have been separated for at least six months, no reflection period is required. A longer period of separation is important because it proves the actual and irretrievable breakdown of the marriage.

As a general rule, the judicial or other authority is not obliged to examine the agreement between the spouses, thus ensuring the spouses' right to self-determination. The main reason for including a procedural guarantee was that neither the legislature nor the judicial or other authority administering the law intended to interfere unnecessarily in the everyday life of the spouses. In addition, an official review of the agreement on property matters would also seriously infringe the spouses' right to self-determination. In contrast, if the divorce involves a minor child, the competent body (judicial or other authority) is obliged to review the agreement in the best interests of the child.

3. The emergence of extrajudicial divorce in Europe

As a result of the codification wave of the 21st century, an increasing number of EU Member States have decided to introduce the possibility of extrajudicial divorce by mutual consent into their national legal systems. Looking at the legislation of the Member States, the legislature has provided for the possibility of extrajudicial divorce through two additional forums: the administrative

⁶ Katharina Boele-Woelki, Frédérique Ferrand, Cristina González Beilfuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny, and Walter Pintens, "*Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*," (Cambridge – Antwerpen - Portland, 2013), 23.

⁷ Szeibert, *A házasság Európában a jogegységesítő törekvések tükrében*, 120.

procedure of the civil registry office and the procedure of a notary. In the following, I present the main provisions of the Romanian, Spanish and French models.

3. 1 The Romanian model

In Romania, the legal institution of extrajudicial dissolution of marriage was introduced by the Civil Code No. 287/2009 (hereinafter: “Codul Civil”), adopted in 2009, and by No. 202/2010 on certain measures to accelerate disputes resolution.⁸ The Romanian legislature has provided for the possibility of divorce by mutual consent in three ways: in addition to the judicial procedure, before a notary and in the administrative procedure before the representative of the competent civil registry office.⁹ Part of the Romanian legislature’s aim was to achieve a faster and more efficient procedure for divorce by mutual consent and to reduce the burden on the courts.¹⁰

Under Romanian law, spouses may apply for an extrajudicial divorce at the civil registry office or notary public at the place of marriage or the last common place of residence. In the case of a dissolution of marriage before a notary, the spouses may submit the application for divorce jointly and in person, but they must appear again before the notary at a later date set by the notary to confirm the application and declare their intention to dissolve the marriage. The notary is obliged to grant the parties a reflection period of 30 days from the date of receipt of the application, which may not be waived or shortened.¹¹

Additional conditions for the procedure before the notary are determined by the involvement of a minor child: if the spouses do not have a minor child, the notary examines the parties’ capacity, their free and independent will and their agreement on ancillary matters.¹² In the case of a minor child, another special condition is that there must be a joint agreement on ancillary matters relating to the minor.¹³ Provided that the necessary conditions are met, the notary will grant the request for divorce, record the agreement of the parties in a deed¹⁴ in accordance with the legal requirements and issue a certificate of dissolution of the marriage, which has constitutive effect and, once issued, the marriage is

⁸ Published in “*Monitorul Oficial*” No. 714, October 26, 2010. https://www.cdep.ro/pls/legis/legis_pck.lista_mof?idp=20356.

⁹ 375 § – 376 § of the Codul Civil.

¹⁰ Nicosur Crăciun, “The Divorce by the Public Notary,” *Proceedings. Bulletin of the Transilvania University of Braşov, Series VII: Social Sciences and Law*, no. 2 (2014): 189.

¹¹ Section 376 paragraph (1) of the Codul Civil.

¹² Boglárka Kárányi, “Házasság felbontása közjegyző előtt a román jogban,” *Közjegyzők Közlönye*, no. 1 (2020): 79.

¹³ Daniela Negrila, *Divortul prin procedura notariala Studii teoretice si practice* (Bucuresti: Universul Juridic, 2014), 60–61.

¹⁴ Section 376 paragraph (4) of the Codul Civil, and 36/1995. s. Act Section 137 paragraph (3).

considered dissolved.¹⁵ If these conditions are not met, the notary will reject the application, against which the parties have no remedy, and they can then apply to the courts for a divorce.¹⁶

3. 2 The Spanish model

The Spanish legislature, through Law 15/2015 on “non-contentious proceedings”, introduced the possibility of dissolution of marriage by mutual consent before a notary, alongside judicial proceedings, in order to reduce the burden on the courts and accelerate proceedings. The parallel jurisdiction of the court and the notary was intended to give the parties a choice of forum. However, the legislature considered it advisable to keep the procedure within certain limits.¹⁷

Under the Spanish legislation, in order to qualify for the notarial procedure, the spouses must both have legal capacity; they must request the dissolution of the marriage by mutual consent; they have to have agreed on the ancillary matters relating to the dissolution; and they must not have a minor child or an adult child with limited legal capacity.¹⁸ Therefore, if one of these conditions was not fulfilled, the spouses could only resort to the possibility of judicial dissolution.

Under the Spanish Civil Code (hereinafter: “Código Civil”) and the Spanish Public Notaries Act, either spouse may apply for a divorce within three months of the marriage¹⁹ to the notary of the last common place of residence or the place of residence or habitual abode of one of the spouses.²⁰

The application for dissolution of marriage must be accompanied by an agreement or a draft agreement on the settlement of ancillary matters relating to the marriage, as well as the marriage certificate.²¹ The notary must summon the parties within three days of receiving the application submitted in accordance with the law. The parties must appear in person and together before the notary and declare their intention to dissolve their marriage.

In the dissolution procedure, the Spanish legislature imposes serious obligations on the participants in the procedure: it requires the mandatory and active participation of legal representatives, including the facilitation of the conciliation between the parties and the drafting of the agreement²² while the role of the notary is to control the legality of the parties’ agreement, verifying the parties’ capacity and their consensual declarations of intent, which is fully

¹⁵ Negrila, *Divortul*, 312.

¹⁶ Section 378 paragraph (2) of the Civil Code.

¹⁷ Tamás Molnár, “Az egyezségi eljárások szerepe a közjegyzői nemperes eljárásokban,” *Magyar Jog*, no. 9 (2018): 508.

¹⁸ Article 81 and 86 of the Código Civil.

¹⁹ Article 82 of the Código Civil.

²⁰ Article 54 of the Spanish Notary Law.

²¹ Article 82 of Código Civil.

²² Diána Klisics, “A házasság felbontása közös megegyezés alapján. A közjegyző lehetséges szerepe,” *Családi Jog*, no. 3 (2020): 53.

compatible with the activity required in the context of the drafting of the deed.²³ If the conditions laid down by law are fulfilled, the notary shall record the fact of the dissolution of the marriage in a deed which shall have constitutive effect. Spanish statistics show that out of a total of 101,294 divorces in 2016, 93.7% were handled by a court, while only 6,381 cases, that is 6.3% of the annual total, were carried out by a notary.²⁴ Other significant differences can be found in the length of the procedure: while the court procedure took an average of four months, the notarial procedure was completed in an average of one week.²⁵

3.3 The French model

In France, a reform law on the dissolution of marriage came into force in 2017,²⁶ transferring the procedure for divorce by mutual consent from the jurisdiction of the courts to the exclusive jurisdiction of the notary.²⁷

Under the new provisions, the spouses must jointly request the dissolution of the marriage, be of full legal capacity and agree on the ancillary matters, in particular those relating to minor children, in order to initiate proceedings before a notary. The procedure is guaranteed by the obligation for spouses to have their own legal representative, thus ensuring the legality of the procedure and the effective representation of the interests of both parties.²⁸ If the necessary conditions are fulfilled, the spouses, with the help of their legal representatives, draw up a draft agreement on the dissolution of the marriage.²⁹

Under the French legislation, the parties are given a reflection period of 15 days after being served with the draft agreement, so that the spouses may sign it only after this period has elapsed. The agreement, signed by the parties and countersigned by the lawyers, is sent to the competent notary, who may not examine the content of the agreement but must check that the procedural conditions have been met, in particular the reflection period and the parties' capacity to act.³⁰ If the agreement meets the conditions set out in the law, the

²³ Gábor Juhász, "A házasság felbontása közjegyző előtt Spanyolországban és egyes latin-amerikai országokban," *Közjegyzők Közlönye*, no. 6 (2018): 27.

²⁴ Szabolcs Szente, "Szekcióülés I. összefoglaló: Közös megegyezésen alapuló bontás közjegyző előtt," *Notarius Hungaricus*, no. 2 (2018): 41.

²⁵ Molnár, "Az egyezségi eljárások szerepe a közjegyzői nemperes eljárásokban," 508.

²⁶ Law No. 2016-1547 (November 18, 2016) on the Modernization of the Justice in the 21st Century [Original reference: LOI n° 2016-1547 (du 18 novembre 2016) de modernisation de la justice du XXIe siècle].

²⁷ Frédérique Ferrand, Laurence Francoz Terminal, "Beträchtliche Neuigkeiten im französischen Familienrecht 2016–2017," *Zeitschrift für das Gesamte Familien Recht*, no. 18 (2017): 1456–1459.

²⁸ Margaret Ryznar, and Angélique Devaux: "Voilà! Taking the Judge Out of Divorce," *42 Seattle University Law Review* 161, (2018): 164.

²⁹ Article 229 of the French Civil Code (Article 229 du Code Civil).

³⁰ French Civil Procedure Act. 1144-1148, articles contain the procedural rules for demolition by mutual agreement before the notary [Original reference: Article 1144-1148. du Code de procedure Civile].

notary will issue an enforceable deed or certificate.³¹ The agreement has the same legal effect as a court judgement.

The advantages of a French-type dissolution of marriage before a notary include a quick and simple divorce without the need for litigation, the parties only need to sign an agreement prepared by their legal representatives, there is no need to appear in person before a notary and there are no declarations to be made concerning the marriage. However, despite the many advantages of this procedure, some criticisms have been made on the part of the notaries: the absence of a personal hearing of the spouses reduces the notary's role to that of approving or rejecting the agreement, and the notary does not have a broad discretionary power, since the notary dissolves the marriage solely on the basis of the documents presented.³²

On the basis of the foreign examples cited, it can be concluded that the arguments in favour of the introduction of a dissolution of marriage before a notary have been all in favour of reducing the workload of the courts and ensuring a quick and efficient divorce from the spouses' point of view. As a result of the gradual simplification of procedural rules, national legislatures have given priority to the right of the parties to dissolve the marriage by making it possible to avoid the evidentiary procedures that are typical of the judicial route if they apply for divorce by mutual consent and reach agreement on the ancillary matters. The rules on the dissolution of marriage before a notary provide the parties with a wide scope of discretion, which undoubtedly reinforces the contractual nature of divorce.

4. The law on divorce in Hungary

Upon the enactment of Act V of 2013 on the Civil Code (hereinafter: the Civil Code), which entered into force on 15 March 2014, the Hungarian legislature confirmed the principle that *only a judicial body may dissolve a marriage*, and at the same time, declared two types of divorce: *divorce by mutual consent* and *divorce by non-consensual*, so-called "*factual dissolution*". Practical experience shows that the vast majority of divorce cases are resolved by mutual consent.

4.1 Divorce by mutual consent in Hungarian law

According to the Civil Code, the court may dissolve the marriage without examining the grounds and circumstances leading to the breakdown of the marriage, if the parties request it on the basis of their final, voluntary and uncontested mutual agreement.³³ In this way, the regulation expresses the

³¹ Orsolya Szeibert, "A gyermek helyzete és jogai a házasság felbontása iránti új típusú eljárásokban," *Családi Jog*, no. 4 (2019): 38.

³² Kinga Kultsár, "A házasság felbontása közjegyző előtt Franciaországban," *Közjegyzők Közlönye*, no. 3 (2021): 69.

³³ Paragraph (2) of Section 4:21 of the Civil Code.

autonomy of the will of the parties, since the basis for the dissolution of the marriage by mutual consent is the consensual will of the parties. Nevertheless, the legislature has sought to ensure that divorces are more considered by providing various procedural guarantees to ensure the constitutional protection of marriage. The procedural guarantees of divorce law include: *personal hearing* of the parties, the *attempt at reconciliation*, the *judicial discretion*, and providing a *reflection period*.

4. 2 Procedural guarantees in divorce proceedings

As a general rule, in divorce proceedings, the appearance of the parties and their *personal hearing* by the court is mandatory, even if the party is acting through a legal representative or if the court has extensive knowledge of the facts based on the preparatory documents. The personal hearing of the parties is one of the most important parts of the divorce proceedings, as it allows the court to ascertain the actual will of the parties, their true intentions and any other needs they may have in relation to the marriage. The court also attempts to *reconcile the parties* at the hearing.³⁴

In the case of divorce by mutual consent, the *judicial discretion* is limited to examining the final and uncontested expression of the parties' will. In order for the court to dissolve the marriage bond, it is essential that the parties reach a consensus on any ancillary matters that may arise.³⁵ An agreement on ancillary matters confirms that the parties' intention to divorce is serious and deliberate, that a final decision has been reached on the significant issues affecting them,³⁶ and that there is no suspicion of coercion or threats by either party.

As can be seen, the Hungarian procedural rules give priority to respecting the spouses' autonomy of decision and the court is no longer required to examine whether the spouses' agreement is in the reasonable interest of the parties.³⁷ In this way, the legislature gives the parties considerable freedom to exercise their right to self-determination and the opportunity to make their own responsible decisions.³⁸ At the same time, the legislature has made it a requirement for the court "not to support" the conclusion of ill-considered settlements.³⁹

A further "brake" on the divorce process was the granting of a *reflection period*, a basic requirement repealed by the legislature as of 1 September 2022.⁴⁰ Under

³⁴ Paragraph (2) of Section 456 of Act CXXX of 2016 on the Code of Civil Procedure (hereinafter: CCP).

³⁵ BH 1976.6.260.

³⁶ Orsolya Szeibert, *Családi jog* (Budapest: ELTE Eötvös Kiadó, 2015), 79.

³⁷ Márta Nagy, "A házasság megszűnése," in *Internetes Jogtudományi Enciklopédia*, eds. András Jakab, and Balázs Fekete. <http://ijoten.hu/szocikk/a-hazassag-megszunes> (2018) Paragraph [29].

³⁸ Márta Nagy, "A házasság megszűnése," Paragraph [23].

³⁹ Ottó Csiky, "A házasság felbontása," in *A családjog kézikönyve*, ed. András Körös, (Budapest: HVG-ORAC Kiadó, 2007), 83.

⁴⁰ Act XXIV of 2022.

the previous legislation, the legislature made at least two hearings compulsory, with the exception of the following cases: when the personal hearing of one of the parties is not compulsory or when the parties do not have minor children.⁴¹ However, the new legislation introduced a general rule of divorce in one hearing, thus eliminating the reflection period in general.

4. 3 Hungarian efforts to introduce divorce by the public notary

According to Hungarian legislation, the dissolution of marriage is exclusively a judicial matter, but both legal literature and the legislature have already raised the idea of introducing divorce by the public notary, and the possibility of doing so was elaborated in the Civil Code No. T/5949 draft proposal, which was adopted during the codification of the Civil Code but did not enter into force. Under the proposal, marriage could be dissolved by the public notary if three conjunctive conditions were met:

- If the spouses apply for divorce jointly and without any external influence;
- They have no common minor or dependent children, and;
- They have agreed in a notarial deed or in a private deed countersigned by a lawyer on the ancillary matters required by law.⁴²

The legislature justified the introduction of this legal institution by stating that the procedure is suitable for facilitating the rapid and conflict-free dissolution of marriages and that the will of the parties is to be guaranteed by the lawyer or notary acting as an intermediary.⁴³ A number of criticisms have been made of the proposal - which are discussed in more detail in the final chapter of the paper - and the legislature has eventually rejected the introduction of the possibility of divorce by the public notary.

The idea of introducing the procedure was raised again in 2018 in the context of a referendum initiative, although the proposal was rejected by the National Election Commission (NEC).⁴⁴ However, in the context of a review procedure, the Curia found that the referendum question complied with the clarity requirement of the law and thus validated the question, which was worded as follows “*Do you agree with the possibility of a public notary to dissolve the marriage?*”⁴⁵

The reason given by the NEC for its negative decision was that the wording of the question was not clear to voters and the legislature and in fact could be misleading to citizens. According to the NEC, it is not clear from the question what kind of regulation the legislature will introduce if the referendum is successful: would only notaries be entitled to carry out the procedure or would

⁴¹ Section 196 of the CCP, Paragraph (5) and (6) of Section 456 of the CCP.

⁴² Uniform proposal No. T/5949/414 on the Civil Code: Paragraph (1) of Section 3:25.

⁴³ Diána Klisics, “A házasság felbontása közös megegyezés alapján. A közjegyző lehetséges szerepe,” *Családi Jog*, no. 3 (2020): 52.

⁴⁴ Decision No. 1026/2018 of the National Election Commission.

⁴⁵ Decision No. Kvk.VII. 39.031/2018/2 of the Curia.

there be a parallel competence? Furthermore, the question suggests that it is up to the parties to decide whether to apply to the court or the public notary for the dissolution of their marriage, regardless of whether there is a dispute between them.

In the context of the review, the Curia also examined the fulfilment of the two-way requirement of clarity in referendums, both for the voters and the legislature. In the end, the legislature concluded that the question was clear to the voters as it concerned the introduction of divorce by the public notary, indicating that the initiative did not seek to make this type of divorce exclusive in the future.

From the point of view of legislative clarity, the Curia concluded that a successful referendum presents the legislature with an obvious task: to define the rules for the dissolution of marriage by the public notary, which can be done in several ways, but did not wish to elaborate on these possibilities.

Based on all these reasons, the Curia approved (validated) the referendum initiative. In the end, the initiative had failed because the initiator could not meet the requirements of the legislation in force: to launch the referendum, the initiator was required to collect at least 200,000 signatures within 120 days.

5. Examining the introduction of divorce by the public notary

It is the task of the legislature to decide which body has exclusive or concurrent competence to dissolve a marriage. The Commission on European Family Law has explicitly stated among its principles that a marriage may be dissolved by a judicial or other administrative body.⁴⁶ There are two models for dissolving a marriage: the *judicial route*, in which the state courts are empowered to dissolve the marriage bond, and the *extrajudicial route*, in which the dissolution is carried out by a state authority or an administrative body.⁴⁷

5. 1 Reasons for introducing divorce by the public notary

Based on the experience of international legal practice, it can be stated that extrajudicial divorce (by the public notary or registrar) is predominantly used as a subsidiary to the judicial route. However, the question arises as to what criteria were taken into account by the legislatures of the Member States when deciding to introduce extrajudicial divorce? In the following, I intend to examine the arguments in favour of introducing divorce by the public notary into the legal system.

⁴⁶ Orsolya Szeibert, "A házasság felbontása: az Európai Családjogi Bizottság bontójogi elvei és a magyar bontójog," in *Európai jogi kultúra: megújulás és hagyomány a Magyar civilizációjában*, eds. Adám Fuglinszky, and Annamária Klára (Budapest: ELTE Eötvös, 2012), 47–48.

⁴⁷ Szeibert, *A házasság Európában a jogegységesítő törekvések tükrében*, 97.

In Europe, the dissolution of the marriage bond has been a major problem in recent decades, and even where national laws have allowed parties to divorce, the process has proved to be lengthy and complicated. The legislature has also recognised the systemic problem, thus by creating mutual consent as an independent *sui generis* ground for divorce and by gradually simplifying the procedural rules, it has sought to ease the situation of the parties involved in divorce, but there is still an expectation on the part of society to further develop the rules of divorce law and to simplify and speed up divorce by mutual consent.⁴⁸

In addition to the introduction of procedural rules to facilitate divorce, the diversion of divorce proceedings from the judicial route in order to *reduce the burden on courts* has been a relevant aspect of international legal practice. The possibility of regulating divorce by mutual consent through a notarial procedure - by analogy with the dissolution of a registered partnership - has already been raised at a theoretical level in the legal literature.⁴⁹ Since the parties are seeking the dissolution of their marriage by mutual consent, the proceedings clearly avoid any adversarial character. In the proceedings, the court only examines the agreement reached by the parties and, if it is in accordance with the law, dissolves the marriage by approving the agreement without an evidentiary hearing.⁵⁰

From the spouses' point of view, an additional requirement is that an approved agreement should have the same legal effects as a court judgment. Among the notarial non-litigious proceedings, one of the main advantages of a mutual agreement approved by the public notary in probate proceedings and in the dissolution of a registered partnership is that it can have the *effect of a judgment* (i.e., substantive *res judicata*) under the law.⁵¹

On the basis of the substantive legal force, on the one hand, both the judicial or other authority and the spouses are bound by the decree approving the agreement and, on the other hand, a judgement, "*res iudicata*", is made, which prevents the same parties from bringing an action against each other on the same right arising from the same facts or from contesting a right already decided in the judgement.⁵²

Another argument in favour of the introduction of divorce by the public notary is the *right of the parties to choose the competent forum*. According to the

⁴⁸ Diána Klisics, "A házasság felbontása közös megegyezés alapján. A közjegyző lehetséges szerepe," 56.

⁴⁹ Mihály Pulinka, "A közjegyzőség új hatáskörei vagy az új közjegyzőség hatáskörei? – Jubileumi visszatekintés a közjegyzői hatáskörök változásaira," *Közjegyzők Közlönye*, no. 4 (2017): 48.

⁵⁰ Judit Molnár, "Gondolatok a házasság egyező akaratnyilvánításon alapuló felbontásáról," in *Ami a múltból elkísér. A családjogi törvény ötven éve*, ed. Tamás Gyekiczky (Budapest: Gondolat – Debreceni Egyetem, 2005), 129–132.

⁵¹ Szilvia Csuporné Kukucska, "A közjegyző előtti egyezségi eljárás 1. rész," *Közjegyzők Közlönye*, no. 4 (2018): 63.

⁵² Attila Gábor Lerner, "Az új közjegyzői nemperes eljárás: a közjegyző előtti egyezségi eljárás," *Közjegyzők Közlönye*, no. 6 (2018): 55–56.

proposal that emerged during the codification of the Civil Code, the legislature would have left the choice of forum to the discretion of the spouses by creating a parallel jurisdiction, provided that the conditions for divorce by the public notary were fully met. Consequently, the judiciary would continue to have exclusive jurisdiction in cases where the parties do not intend to divorce by mutual consent, namely where there is a dispute between the parties or where the marriage involves a minor child. The parties' choice would therefore be limited to a narrow range of cases where the conditions are met.

5. 2 Arguments in favour of maintaining the exclusivity of the judicial route

In the course of the codification of the Civil Code, the concept of divorce by the public notary gave rise to a great deal of debate among the legislators and legal practitioners, and at the same time several objections were raised against the introduction of this legal institution, which led to the rejection of this possibility in Act CXX of 2009.

The arguments in favour of rejecting this legal institution included the fact that the *judicial route was based on solid legal traditions* which did not justify the elaboration of further alternative options, and that the principle of constitutional protection of marriage and the family implied the *preservation of the exclusive jurisdiction of the judiciary in divorce matters*.⁵³

Another objection was that, although the legal institution had proved to be functional and effective in international legal practice,⁵⁴ its incorporation into the Hungarian legal system as a non-litigious proceeding was not justified because it was not suitable for reducing the burden on the courts and for further speeding up and simplifying the current procedure.⁵⁵

In criticising the concept of divorce by the public notary, the Expert Proposal specifically highlighted the *lack of a guarantee of broad judicial discretion*. Since only a judicial body is empowered to verify the spouses' declaration of will to dissolve their marriage, to agree on ancillary matters and to determine whether the marriage is in fact irretrievably broken,⁵⁶ this judicial discretion is currently not available in the context of notarial non-litigious proceedings.⁵⁷

⁵³ Diána Klisics, "A házasság felbontása közös megegyezés alapján. A közjegyző lehetséges szerepe," 52.

⁵⁴ Taking into account the Spanish, Romanian and French regulations.

⁵⁵ Lajos Vékás, "Bírálat és jobbító észrevételek az új Ptk. kormányjavaslatához," *Magyar Jog* (2008), 580–581.; *Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez*, ed. Lajos Vékás (Budapest: Complex Kiadó, 2008), 414.

⁵⁶ Andrea Nagy, "A házassági jog kodifikációi" (PhD diss., University of Miskolc, 2012), 184.

⁵⁷ Gábor Jobbágyi, "A Kormány Ptk. tervezetéről," *Magyar Jog*, no. 2 (2009): 100–101.

6. Conclusions

The possibility of bringing divorce by mutual consent under the jurisdiction of the public notary was first raised by the Commission on European Family Law. It justified the alternative of extending jurisdiction by arguing that in simple cases, where the spouses have no minor children and have agreed on both the divorce and the ancillary matters, *the court fulfils an essentially administrative role* in approving the mutual agreement and dissolving the marriage, a role that other administrative or public bodies may be able to perform. It is important to stress that the position on the principles of divorce law, including the extension of jurisdiction, is only a recommendation, since the Commission has left it to the legislatures of the Member States to decide whether they intend to introduce the possibility of extrajudicial divorce and, if so, in what framework and under what procedural rules they would allow it. Similarly, the principles of divorce law do not establish mandatory guarantees to be applied in divorce proceedings in order to protect the institution of marriage and the parties.

The foreign models presented in the study clearly reflect an openness to extrajudicial dissolution of marriage. In order to protect the legal institution of marriage, a number of positive guarantees have been included in the legislation of the Member States. A common feature of the foreign examples were the requirements as preconditions for the procedure, such as the joint agreement on the dissolution of the marriage and ancillary matters, and that the parties should not have any minor children in common. The fact of a mutual agreement between the spouses, which means that there is essentially no dispute between the parties, can undoubtedly be effectively included in the scope of the notarial procedures and the notary's control of the legality is fully equivalent to the activity carried out in the context of the drafting of the deed. In order to ensure a quick and efficient procedure before the notary, foreign legislatures have set very short deadlines, which the notary must strictly control: the notary must give the parties a reflection period of 3 days in Spain, 15 days in France and 30 days in Romania. Similarly, the requirement for a lawyer in the Spanish and French models, which effectively facilitates the awareness of the parties (obligation to provide information by a lawyer) and guarantees the effective exercise of their rights (prior consultation between the parties and preparation of the agreement), also serves to accelerate the procedure. However, the introduction of mandatory legal representation does not mean that the role of the notary is diminished, since the notary still has the obligation to inform the parties and, if necessary, to propose amendments more favourable to the parties.⁵⁸ Based on the examination of foreign models, it can be concluded that the introduction of the dissolution of marriage by mutual consent before a notary would offer a simple and quick procedure for the parties and, through the implementation of these procedural guarantees, would adequately protect the legality of divorce cases.

⁵⁸ Juan Perez Hereza, "La separación y divorcio notarial," *El notario del signo XXI, revista del Colegio Notarial de Madrid*, no. 63 (Septiembre – Octubre 2015): 36.

The fact that there is a mutual agreement between the spouses, namely that there is no (legal) dispute between the parties, can undoubtedly be effectively incorporated into the scope of the notarial procedure and the control of legality by the public notary is fully equivalent to the activity carried out in the context of the deed drafting procedure. An additional protective instrument is the condition guaranteeing the protection of minor children (which requires exclusively a judicial route), as in this case a wide margin of judicial discretion or, if necessary, the involvement of experts may be justified.

During the codification of the Civil Code, the Hungarian legislature also considered the possibility of introducing divorce by the public notary, but ultimately came to the conclusion that further simplification of the rules of divorce law was not justified and that the joint request and agreement of the parties required judicial control in order to protect marriage.

It is important to emphasise that it is up to the legislature to decide whether it intends to give priority to the protection of the marriage bond or to the autonomy of the spouses in decision-making. Undoubtedly, the legislature's aim was to make things easier for the parties involved in a divorce by gradually simplifying⁵⁹ the national procedural rules. However, citizens may continue to demand that the divorce rules should be further developed, simplified and accelerated. In order to prove or disprove this, the most suitable way would be a new referendum initiative.

⁵⁹ The repeal of paragraphs (5) and (6) of Section 456 of the CCP ensures the possibility of divorce by negotiated agreement.