ROUTLEDGE HANDBOOKS

Routledge Handbook of Family Law and Policy

Edited by John Eekelaar and Rob George

2.5

Relaxation and dissolution of marriage in Latin America

Nicolás Espejo-Yaksic and Fabiola Lathrop-Gómez

Introduction

In the light of statistics, and as in other regions of the world, the traditional model of the family in Latin America is experiencing a crisis.[1] While some authors see a steady increase in divorce rates as the main factor of this crisis,[2] available socio-legal studies have pointed out that the transformation of the traditional family model in the region has multiple causes, and that the spread of divorce is far from being the main one.[3]

The wider variety of family forms in Latin America is expressed in a variety of constitutional conceptions of this social institution. Among these conceptions we find those that are *restrictive*[4] (where only 'natural' men and women are recognised as having the right to marry or enter into *de facto* civil partnerships); *intermediate*[5] (where the Constitution provides protection for all forms of family, but only recognises marriage between a man and a woman) and; *wide*[6] (where the Constitution establishes a wide mandate for the 'integral protection of the family', leaving space for all forms of family, marriage or civil partnerships).[7] Accordingly,

1 D. Davison, *Separación y Divorcio*, Buenos Aires: Editorial Universidad, 2006, pp. 21–3; C. Caldani and M. Ángel, 'Bases para la armonización del Derecho de Familia en el Mercosur', in C. Crosman and M. Herrera (eds), *Hacia una armonización del Derecho de Familia en el Mercosur y países asociados*, Buenos Aires: LexisNexis, 2007, p. 19.

2 H. Corral, *Ley de divorcio: las razones de un no*, Colección de Estudios de Derecho Actual, Editorial Santiago de Chile: Universidad de Los Andes, 2001, pp. 15 and 168; R. Navarro, 'Matrimonio y Derecho', in G. García Cantero *et al* (eds), *El matrimonio: ¿contrato basura o bien social?*, Pamplona: Thomson Aranzadi, 2008, pp. 55–71.

3 C. Grosman and I. Martínez, *Familias ensambladas*, Buenos Aires: Editorial Universidad, 2000, p. 29; M. Cerrutti and G. Binstock, 'Cambios en las familias latinoamericanas y demandas para la acción pública', in CEPAL (ed.), *Las familias interrogadas. Hacia la articulación del diagnóstico, la legislación y las políticas*, Santiago de Chile: Serie Seminarios y conferencias, No. 61, 2011, pp. 44–52.

4 Constitution of Honduras, Art. 112°.

5 Constitution of Brazil, Art. 226°; Constitution of Ecuador, Art. 67°.

6 Constitution of Argentina, Art. 14° *bis*.

7 M. Herrera, 'La Familia en la Constitución 2020, ¿Qué Familia?', in R. Gargarella (ed.), *La Constitución en 2020: 48 propuestas para una sociedad igualitaria*, Buenos Aires: Siglo Veintiuno Editores, 2011, pp. 85–94.

Latin American family law seems to be situated in a hybrid space. On the one hand, secular law remains affected by the influence exerted by the Catholic Church on the codification process and the prevailing recognition of Canon Law, which did not allow divorce.[8] On the other hand, family law in Latin America is progressively recognising the autonomy of partners and regulating new forms of family, a process that leads to the existence of a trilogy of institutions that end, dissolve, or relax the marriage. (See further Chapters 1.2 and 2.1 of this book.)

Typology of divorce and separation

In Latin America it is possible to recognise a double (or parallel) system of marriage breakdown. On the one hand, there is *judicial separation*, which does not dissolve the marriage, but suspends certain rights and obligations emanating from the marriage (hence it is called a 'relaxation' of the marital link). On the other hand, there is *divorce* itself ('dissolution of marriage').

Judicial separation exists in most Latin American legislation.[9] This institution may be invoked in two cases: (a) where one of the spouses has violated his/her marital obligations (fault separation) or; (b) when one or both spouses want to legally recognise the separation of bodies, yet are not fully convinced that the marital link should be broken (agreed separation).[10] While this institution played a particular role mainly for the Catholic population – allowing only a physical separation and the suspension of specific marital rights and obligations – judicial separation is in retreat, as divorce has gained ground.[11] (See further Chapter 2.2 of this book.)

As for the institution of divorce, the generality of Latin American laws recognise the so-called 'subjective divorce' or 'fault divorce' (*divorcio por falta*) and 'objective divorce' or 'remedy divorce' (*divorcio remedio*). In the case of fault divorce, one of the spouses has to prove culpable conduct by the other party (e.g. infidelity, violence, drug abuse, etc.). In remedy divorce, one or both spouses must prove the effective non-existence of the common marital life: that is, the cessation of *affectio maritalis*.[12]

Grounds and conditions for judicial separation and divorce

As we can see, certain types of conduct by the spouses are considered as grounds for both judicial separation and divorce. Among these actions, we can identify conduct that is contrary to the duties of cohabitation, fidelity and assistance, all of which may lead to a declaration of

8 The Dominican Republic and Cuba are early exceptions to this trend, recognising legal divorce in 1897 and 1918, respectively. Bolivia established divorce in 1932, while Colombia, Peru and Chile did not have full divorce until 1976, 1977 and 2004, correspondingly. In countries where full legal divorce was not recognised, spouses used to utilize frauds like annulments based on the incompetence of public officers (Chile) or fictitious allegations of guilt between couples (Argentina).

9 Argentina, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, Venezuela, among others.

10 Some laws have a 'time for reflexion' between spouses, after which the may decide to fill in a divorce petition; see Civil Code of Uruguay, Art. 127; Civil Marriage Statute of Chile, Art. 27.

11 As an example, in Chile there are around 100 legal separations per year, while in the same period there are more than 47,000 divorces.

12 The Civil Code of Argentina is an exception to this rule, considering separate grounds for the determination of *maritalis affectio* for these purposes.

fault separation or fault divorce. As an example, Chilean law states that a spouse may seek legal separation should a serious violation of the duties and obligations towards the other spouse or their children make the familial coexistence intolerable. In turn, Chilean law considers as legal grounds for divorce an attempt on the life of or serious ill-treatment against the physical or psychological integrity of a spouse or any children, serious and repeated transgressions of the duties of cohabitation, support and fidelity, homosexual behaviour, alcoholism or drug addiction.[13]

In the case of remedy divorce, legislation presumes that continuous physical separation (separation of bodies) implies the absence of *affectio maritalis*.[14] Consequently, once the absence of common marital life has been verified by a court of law, it is possible to declare the divorce[15] As for the period of cessation of cohabitation required for declaring judicial separation or remedy divorce, Latin American law varies from country to country. In the case of unilateral petitions for separation or divorce, legislation requires no less than two years of continuous physical separation.[16] When the petition for separation or divorce has been presented by both spouses, legislation requires no less than one year of physical separation.[17]

The periods of cessation of cohabitation required have been the focus of some constitutional debates. For example, in 2006, the Constitutional Court of Argentina declared, as 'excessive and even nonsensical', the three-year requirement in the case of divorce.[18] In contrast, the Constitutional Court of Chile decided in 2013 that the time-requirement established by law (even in the case of remedy divorce) did not constitute a restriction on the right to seek a divorce.[19]

Lastly, some recent legislation in Latin America does not require the cessation of the *affectio maritalis* as a condition to seek separation or divorce, but only that one or two years should have passed since the celebration of marriage.[20] Alternatively, some legislation has removed

13 Civil Marriage Statute of Chile, Arts 26 and 54. In a similar vein, Civil Code of Argentina, Arts 202 and 214 n. 1; Civil Code of Peru, Art. 333 n. 1–10; Federal Civil Code of Mexico, Arts 267 n. I-III-IV-V-VI-XIII-XV and 270; Family Code of Bolivia, Art. 130.

14 Chilean legislation is particularly strict in terms of the document-based evidence required for establishing the exact dates of the cessation of cohabitation; see Civil Marriage Statute, Arts 22, 23 and 25. In contrast, Brazilian law allows parties to provide different forms of evidence (Civil Code of Brazil, Art. 1580.2); see T. Vainsencher, 'El divorcio en el Derecho brasileño', in A. Acedo Penco and L. Pérez Gallardo (eds), *El divorcio en el Derecho Iberoamericano*, Zaragoza: Temis-Ubijus-Reus-Zavalia, 2009, p. 128.

15 Argentinean Law also recognises the right of spouses to fill in a claim of divorce, merely based on serious causes, which, in turn, make life in common morally impossible and after three years since the marriage was celebrated. Civil Code of Argentina, Art. 21.

16 Two years: Federal Civil Code of Mexico, Art. 267 n. XVIII; Civil Code of Peru, Arts 339 and 333 n. 2; Civil Code of Brazil, Art. 1580.2; Family Code of Bolivia, Art. 131; Civil Code of Colombia, Art. 154 n. 8. Three years: Civil Code of Ecuador, Art. 110.2; Civil Marriage Statute of Chile, Art. 55.3; Civil Code of Uruguay, Arts 148.9 and 187.1. As an exception, Law No. 45/91 of Paraguay, Art. 4° (which requires one year of separation without the intention of resuming cohabitation).

17 Civil Marriage Statute of Chile, Art. 55.1; Civil Code of Brazil, Art. 1580.2; Civil Code of Peru, Art. 333.12.

18 Family Court Referee, No. 5, Rosario, M., D. G. C. G., F.A., 14 November 2006.

19 Rol N° 2207–12–INA, p. 27.

20 Civil Code of Guatemala, Art. 154; Federal Civil Code of Mexico, Art. 274; Family Code of Panama, Art. 212 n. 10.

all time-frame prerequisites, requiring only the consent of the spouses to the divorce (determined in a court of law).[21]

Rules of procedure

As a general rule, Latin American laws require judicial (non-administrative) proceedings for spouses who want to separate or divorce from their partners.[22] Nevertheless, and despite the predominance of generally expeditious judicial procedures, especially if both spouses request the court's intervention, there is a growing tendency towards non-judicial proceedings, such as public certifications.[23] This tendency towards non-judicial proceedings in divorce matters is generally restricted when there are children involved. In these cases, legislation tends to require judicial proceedings, even when there is a mutual agreement between spouses, for example, as in Brazil,[24] Mexico[25] and Peru.[26] Lastly, in some states, regardless of the common intention of both spouses to divorce, legislation requires the judge to initiate a compulsory process of judicial conciliation.[27]

Emerging debates

Divorce, morality and intimacy

The use of fault grounds for separation or divorce seems open to criticism. Among other reasons, there seems to be a lack of justification for interfering in the intimate sphere of spouses on grounds of their conjugal performances and without the existence of concrete damage to the other party's basic rights.[28] At the same time there is a straightforward difficulty in condemning the (single) fault of one of the spouses for the violation of certain conjugal (relational) duties, particularly in the case fidelity. Additionally, fault divorce may intensify the conflicts within the family unit in these kinds of divorce.[29]

In any case, it should be noted that Latin American laws are gradually moving towards the elimination of fault divorce.[30] This is the case regarding Brazilian legislation, which only recognises remedy divorce, without requiring an express reason to be given by spouses, but only the effluxion of a certain period of time before seeking divorce. In Brazil, direct divorce – not dependent on a previous legal separation – may be obtained by one or both spouses if *de facto*

21 Civil Code of Ecuador, Arts 107–8; Civil Code of Nicaragua, Arts 175–9; Civil Code of Colombia, Art. 154.9; Civil Procedural Code of Colombia, Art. 651.
22 See Argentina, Bolivia, Costa Rica, Chile, Panamá and Puerto Rico, among others.
23 E.g. in Cuba since Decreto-Ley n.154/1994, Colombia since 2005 Ley 962 de 2005, Art. 34; in Ecuador since Ley n.2006–62 de 2006.
24 Civil Procedural Code of Brazil, Art. 1124-A.
25 Federal Civil Code of Mexico, Art. 272.
26 Law No. 29.227 of 2008, Art. 4 (a).
27 See Civil Code (Argentina), Art. 236°; Civil Marriage Statute of Chile (Chile), Art. 67°; Law No. 45/91 (Ley de Divorcio vincular, Paraguay), Art. 5°.
28 J. Eekelaar, *Family Law and Personal Life*, Oxford: Oxford University Press, 2007.
29 M. Herrera, 'Una mirada crítica y actual sobre el divorcio vincular en el Mercosur y países asociados a la luz de los Derechos Humanos', in *Revista de Derecho Privado*, Instituto de Investigaciones Jurídicas UNAM, edición especial 2012, pp. F215–20.
30 Cuba being the first in only considering remedy divorce in 1975.

separation exceeds two years. In the case of indirect divorce, one year of prior judicial separation is required.[31]

The growing priority of the best interests of the child

Family law in the region is in the process of distinguishing between the effects of divorce and separation on the spouses and those affecting their children. Accordingly, the legislation seems to regulate/limit more intensively the autonomy of parents on matters that may have an impact on their children after the separation. This tendency may be observed in the wider margin of judicial discretion and competence granted to judges in order to review the terms of divorce agreements in relation to children. By contrast, spouses have more freedom to arrange issues that affect themselves only, such as the distribution of the marital property or the awarding of the family home.[32]

We believe that the growing concern for the best interests of the child in both separation and divorce proceedings is a positive one, fully in line with Articles 3.1. and 18.1. of the UN Convention on the Rights of the Child 1989.[33] (See further Chapter 4.6 of this book.) Such concern manifests itself in two exemplary regulations. On the one hand, the legal obligation imposed on divorcing spouses to submit before the court a full regulatory agreement on the future economic and personal life of their children, reviewed by the tribunal.[34] On the other hand, this increasing concern for the best interests of the child is seen in the growing recognition and regulation of parental co-responsibility, allowing shared custody of the child and more flexible regimes for parental visiting (e.g. shared or alternate residence).[35] (See further Chapters 3.3–3.5 of this book.)

31 Civil Code of Brazil, Art. 1580°.

32 This liberty in the regulation of the consequences of divorce between spouses is also limited in some countries by the principle of protecting the economically weaker spouse (usually, the wife). E.g. Civil Marriage Statute of Chile, Art. 3, Para. 1, where both the interest of the child and of the weaker spouse are considered as leading principles for the interpretation of the Law.

33 Article 3.1: in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Article 18.1: states parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

34 See Civil Marriage Statute of Chile, Arts 21°, 27° and 55°; Civil Code of Argentina, Art. 236°. In other countries, the law determines the legal impacts of divorce on children, while regulating remedy divorce; see Civil Code of Peru, Arts 340°–342°.

35 See Civil Code of Brazil, Arts 1583° and 1584° as reformed in 2008; see also the current debate in the Chilean Congress for recognising shared custody of the child on the Civil Code; see A. Kemelmajer de Carlucci, 'La guarda compartida. Una visión comparativa', in *Revista de Derecho Privado*, Instituto de Investigaciones Jurídicas UNAM, edición especial 2012, pp. 281–6.