

## THE MODALITIES AND EFFECTS OF THE DIVORCE REGIME IN TIMOR-LESTE: IS A REFORM NEEDED?

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**Keywords:** (1) Divorce; (2) Family Law; (3) Alimony Right; (4) Civil Code; (5) Legislative Reform.

**Abstract:** The present text aims at setting a brief overview of the divorce regime of the Democratic Republic of Timor-Leste. We will illustrate the modalities that are provided in the Civil Code and well as the corresponding effects. Throughout, we will try to set a critical view and question a need for reform.

### 1. Introduction:

The Civil Code of the Democratic Republic of Timor-Leste adopted by the Law 10/2011, of 14 September, contains the legal norms that regulate the familiar relations.

As we know, the history of this young country is not an easy one, the efforts made to strengthen democracy and build a proper justice system have been tremendous due to the challenges the country currently faces. The lack of human resources obliges the country to transpose most of its laws from other

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legal systems, which caused a lack of knowledge and failure of application of legal norms.

The Civil Code of the Democratic Republic of Timor-Leste is an example of this scenario, as it is a copy of the Portuguese correspondent.

In Portugal, the diploma was approved on 25 November 1966 and it is inspired in the BGB (Bürgerliches Gesetzbuch), the Civil Code of the Germany dated of 1900. It follows the same structure being divided into 5 books: Book I on *General Provisions*, Book II on *Obligations* (agreements, contracts, liabilities, guarantees, etc), Book III on *Real Property Rights* (property and land issues, etc), Book IV on *Family Law* (including marriage, divorce, adoption, etc) and Book V on *Successions/Inheritance*.

Our focus will be on the specific regime of the divorce that is established in Book IV, concerning Family Law. This is an area of primordial importance especially for nations that are rebuilding themselves and Timor-Leste is no exception. When study the development of a country in terms of fundamental rights, we must necessarily look at their legislative framework regarding family, this is even more evident when we want to assess the equality between women and men.

Throughout the text, there will be comparisons with other legal systems, in particular with the legal system of Portugal, insofar as it is useful to see how legal systems that share the same matrix as Timor-Leste have evolved.

## **2. The concept of family in Timor-Leste:**

Before analyzing the concept of divorce enshrined in the Civil Code, we must first look at the concept of family. Uses and customs are deeply rooted in Timorese society, in particular, as far as the family is concerned, we find that there is a customary frame in the society and therefore, it is important to make a short analysis of these uses and customs.

Timor-Leste adopts an extended concept of family. We often see the term *uma lulik* associated with the family. *Uma lulik* means sacred house, so in the

concept of family fit parents, grandparents, uncles, blood cousins or by marriage, and other relatives. Among them, there is a strong interdependence, which leads to a shared responsibility within the family. An example of this is that all female and male members may be called "mother" or "father" of the child.

*Uma lisan* is the term used to express this extended concept of family. It is through it that relationships within the family are established without neglecting ancestral connections.

In a society that values the family this much, it is normal for marriage and divorce to be paramount in its legal order and partly shaped by the country's own culture. This is foreseen in the Civil Code, which provides for its own modality of marriage: the monogamous *barlaqueado*. This traditional marriage is a common practice in the society and it consists of an exchange of goods between the families of the spouses. Apart from it, two other modalities are provided: civil marriage and the Catholic marriage.

Marriage is a contract endowed with particular characteristics, which, in addition to its contractual nature, has an institutional nature, performing very important social functions. The Civil Code of the Democratic Republic of Timor-Leste defines marriage as "the contract between two persons of different sex who wish to form a family through full communion of life" (Article 1467).

The Timorese society still faces with some prejudice the divorce. Although this is an accepted reality, religious and cultural reasons are the basis of this prejudice, to which is added a certain ignorance of the regime that regulates the divorce situations, a point that we will now address.

### **3. The divorce regime in the Civil Code of Timor-Leste**

For a long time, the possibility of a divorce was denied, but legislations eventually evolved to allow such act, first only for non-Catholic marriages, then for all marriages, since the indissolubility of marriage assumes a religious value

only, and it is not for the State to impose this duty of conscience (Coelho & Oliveira, 2016, pp. 681,682).

When we talk about divorce, it is important to keep in mind the three theories or concepts that allow us to explain this reality, so that we can better understand the legislator's options. They are: (1) divorce-sanction - which is based on the idea of guilt and therefore on subjective causes, the so-called "guilty violation of conjugal duties", such as adultery and attempted murder; (2) divorce-remedy – where, although there is no fault on the part of the spouses, it is no longer required of one or both of them to remain married, is based in an objective cause, and is the pragmatic case of the alteration of the mental faculties of one of the spouses; and (3) divorce-rupture - which has become more recently autonomous and translates into the realization of the rupture of life in common and therefore, is based only on objective causes.

There is a tendency to remove the negative charge that is almost always associated with divorce, to make it less dramatic. If guilt becomes irrelevant, the grounds are created to prevent spouses from exchanging unfounded accusations and directing exclusive guilt to the other, further damaging the family situation (Coelho & Oliveira, 2016, p. 689).

It remains to be considered whether in the future the right to sue for divorce will exist without constraints and limitations by virtue of the right to free development of personality.

### **3.1. Modalities of divorce**

#### **3.1.1. Divorce by mutual consent**

Divorce determines the end of marriage, extinguishing the contractual bond that existed between the parties.

According to article 1650, in Timor-Leste, there are two types of divorce: divorce by mutual consent and litigious divorce.

Article 1652 establishes the requirements for divorce by mutual consent: “1. A divorce by mutual consent may be petitioned by the spouses at all times.

2. The spouses do not need to reveal the cause of the divorce but shall agree as to alimony awards to the spouse that needs them, the custody of minor children and the disposition of the family home. 3. The spouses shall also agree as to the regime to be observed during the period the proceedings are in progress, with respect to alimony awards, the exercise of parental authority and the utilization of the family home”.

As n. 2 explains, divorce by mutual consent does not mean that there is no cause of divorce, but only that this cause does not have to be revealed.

Article 1651 mentions that “during the divorce process, spousal reconciliation shall always be attempted (n. 1)”. And, “if, in a litigious divorce, the reconciliation attempt produces no result, the judge shall attempt to reach an agreement from the spouses as to a divorce by mutual consent; if an agreement is reached, or if the spouses at any time during the process have opted for this type of divorce, the terms of divorce proceedings by mutual consent shall be followed, with the necessary adaptations (n. 2)”.

As we see, Timor-Leste adopts an optimistic approach believing in the reconciliation, and for that reason, imposes a mandatory spousal reconciliation. When this is not achieved, the legislator gives preference to divorce by mutual consent.

In Portugal, the obligation of reconciliation for any form of divorce was eliminated and is only required when divorce is without the consent of one of the spouses, which demonstrates a position that shows that it is not for the court to make this conciliation and that it would not be realistic to think that the courts used all their efforts in this direction (Coelho & Oliveira, 2016, p. 705). It also does not impose the achievement of complementary agreements so that a divorce can be requested, but when one or more of these agreements are missing the request for divorce will be sought in court for the judge to deal with these issues, as in the divorce without the consent of one of the spouses (article 1778A, (3)).

The idea of dedramatizing divorce, a key aspect of the 2008 Portuguese reform, meant that when it is based on mutual consent, its procedures may run in the Civil Registry.

In Timor-Leste, we see that the country is taking steps in this direction, and although the precepts in the Civil Code do not provide this possibility, the Ministerial Diploma n.º 4/2014 of 12 March, which approved the organic structure of the National Directorate of Registries and Notaries, provides for the existence of decentralized services, such as civil registry offices. These, in turn, are competent to record all the facts regarding the status and civil capacity of the individual (article 20). This includes, of course, the acts relating to marriage and divorce.

### **3.1.2. Litigious divorce**

The second type of divorce provides for situations in which the spouses do not reach consent, and then one of them seeks legal action against the other. Article 1656 states that either spouse may sue for divorce if the other culpably violates conjugal obligations, when the violation, due to the gravity or reiteration thereof, compromises the possibility of communal life (n. 1), which implies that Timor-Leste enshrines the litigious divorce as a fault divorce. It continues, by stating that, when appraising the gravity of the invoked facts, the court shall take into account, namely, the culpability that may be imputed to the petitioner and the level of education and moral sensitivity of the spouses (n. 2). This prediction is legally dubious, and offensive of other norms and principles constitutionally protected. In Portugal, the corresponding norm was repealed.

Article 1657 establishes the exclusion from the right to sue for divorce, mentioning that the spouse cannot obtain the divorce, under the terms of article 1656 if: a) if he has instigated the other to practice the fact invoked on the basis of the request or has intentionally created conditions for its verification; or b) if revealed by its subsequent conduct, namely, explicit or tacit forgiveness that he or she does not regard the act in question as an

impediment to communal life. Here we see the doctrine of divorce-sanction, as the legislator prevents one of the spouses from obtaining a divorce.

Marriage should be seen as an instrument to achieve individual happiness, to achieve something so personal, that when this happiness is not reached, there is a possibility to get divorced. If we exclude this possibility to one of the spouses, in the cases mentioned in article 1657 we are violated the general right of personality, as the family is a condition for the harmonious development of the person, by virtue of article 39 (1) of the Timorese Constitution (Vasconcelos, 2011, p. 157).

Law n. 61 / 2008, of October 31, revoked article 1780 of the Portuguese Civil Code, which refers precisely to the exclusion of the right to sue for divorce. This solution was timely needed, as the nations were quickly changing their vision and ending with the conception of divorce as a sanction, in which one of the spouses sue for divorce against the other on the basis of the culpable violation of the marital duties. As Rute Teixeira Pedro explains in Portugal, the court is not required to investigate guilt, but the court has to investigate the marriage breakdown and the elements provided for in article 1780 may still be relevant (Pedro, 2017, p. 681).

Along with divorce on the basis of the guilty breach of marital duties, we see that divorce is still possible on the basis of the objective breakdown of marriage, provided for in article 1658. Thus, it constitutes grounds for divorce: a) *de facto* separation for three consecutive years; b) *de facto* separation for one year if divorce is required by one of the unopposed spouses of the other; c) the alteration of the mental faculties of the other spouse, when it lasts more than three years and, by its gravity, compromise the possibility of living together and d) desertion with no news from the absentee for a period no less than two years.

In Portugal, the Divorce Law of 2008 changed the corresponding article, shortening the deadlines established. We agree that the three years provided for in the Timorese system, for this matter, would be inappropriate with the matrimonial reality. If for more than a year, the spouses live apart, it is not

justified that they have to wait three years before they can obtain a divorce, the same goes for desertion and alteration of the mental faculties that compromise the possibility of living together.

The main innovation in the Portuguese legislation was the inclusion of a general clause that gives legal relevance to other cases that can demonstrate the definitive rupture of the marriage. It was clearly thought that in situations of domestic violence, regardless of the criminal consequences that will arise in these cases, this is a clear example of a fact that shows the definitive breakdown of the marriage. A similar legislative solution for the Timorese Civil Code' reform should be considered.

The general clause provided for in article 1781 d) of the Portuguese Civil Code, as Rute Teixeira Pedro explains, cannot establish a unilateral divorce, the request cannot suffice with "the serious formulation of will to not continue to be married" (Pedro, 2017, p. 683), as this would reduce the scope of the constitutional guarantee, provided for in article 36 (1). Therefore, a harmonious reading of this article implies that the request made under paragraph d) must be accompanied by facts that demonstrate the breakdown of marriage and with an equivalent degree of severity highlighted in the previous paragraphs. Still, the facts mentioned here must constitute objective causes and do not give legal relevance to concepts of guilt, since the court will not issue a statement of guilt (Pedro, 2017, p. 682). We are here faced with the expression of a divorce-rupture system.

#### **4. Judicial separation of persons and assets**

There is another possibility for those cases where the spouses no longer conceive the relationship as ideal, but yet are not prepared or do not want to walk the path of divorce: the judicial separation of persons and assets.

The judicial separation of persons and assets does not determine the end of the marital bond and because of that, it maintains the duties of fidelity, cooperation and respect, even though the duty of cohabitation is extinguished.



Regarding the separation of assets, this modality assumes the same effects as the dissolution of marriage (article 1672). The judicial separation of persons and assets will end with the reconciliation of the couple or with the dissolution of marriage (article 1673).

The legislator prefers divorce to the judicial separation of persons and assets, and for that reason, it provides that the latter may be converted into divorce.

Subsequently, article 1675 mentions that at the end of two years from the date on which the sentence ordering the judicial separation of persons and assets becomes final, either spouse may request that the separation be converted to divorce (n. 1). In case, that request is made by both spouses the period of two years is not necessary (n. 2).

In addition, irrespectively of that period, either spouse may request for the conversion if the other commits adultery after the separation, and in this case, article 1657 shall be applied (n. 3). Article 1657 states the exclusion from the right to sue for divorce, that we have mentioned before.

Article 1675 continues by mentioning that the sentence converting the separation into divorce may not alter what has been decided in the separation proceeding, under the terms of Article 1663, with regard to the culpability of the spouses (n. 4).

In Portugal, the 2008 reform revoked the correspondent n. 3 and 4 in its legislation.

Although we share the opinion that it is unconstitutional to limit a person's right to seek a divorce, and for that reason we reject the exclusion from the right to sue for divorce, that applies in n. 3, we also do not agree that the spouse who fulfilled the marriage duties, has to wait for the deadline predicted in n. 1 to sue for a divorce from the one who committed adultery and who thus violated the duties that existed, only because the latter does not agree to the divorce.

## **5. The effects of divorce**

### **5.1. General considerations**

The conception of fault divorce carries consequences. First, in the sharing of common property, the legislator established that "the spouse declared sole or principal culprit cannot receive more than he would have received if the marriage had been entered into under the communion of acquired (article 1666)".

This was also the solution of the Portuguese legislation, but after the 2008 reform, article 1790 of the Civil Code of Portugal contains the following provision: "In the event of divorce, neither spouse may in the sharing receive more than he would have received had the marriage been entered into under the communion of acquired status", eliminating here also the concept of guilt. It was intended to prevent divorce from being a means of acquiring property.

Divorce, viewed as a sanction, implies a loss of benefits to the wrongful spouse. Article 1667 (1) states that the spouse declared sole or principal guilty shall forfeit all benefits received or to be received from the other spouse or third party, in view of the marriage or in consideration of the married state, whether the stipulation is prior or subsequent to the celebration of marriage. Whereas, n. 2 of the cited article states that the innocent spouse or the spouse who is not the principal culpable retains all the benefits received or to be received from the other spouse or third party, even if they have been stipulated with a reciprocity clause; may renounce these benefits by unilateral declaration of will, but if there are children of the marriage, renunciation is only allowed in favour of them. The conception of divorce as a sanction is here demonstrated<sup>2</sup>.

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<sup>2</sup> In Macau, for instance, this article is maintained, without neglecting that the corresponding legal diploma dates from 1999, while the Portugal changed its divorce regime in 2008, ending the relevance of guilt for property purposes.

Another of the consequences of this determination of guilt is the obligation of compensation. It is stated that the spouse declared sole or principal culprit and the spouse who requested the divorce on the basis of the alteration of the mental faculties of the other spouse must compensate for the damages caused to the other spouse ( article 1668).

In this regard, the Portuguese legislature has chosen the following wording, in accordance with article 1792, under the heading "Reparation of damages", "1. The injured spouse has the right to request compensation for damages caused by the other spouse, in the terms of civil liability and common courts. 2. The spouse who requested the divorce on the basis of article 1781 (b) must repair the non-patrimonial damages caused to the other spouse by the dissolution of the marriage; this claim must be deducted in the divorce proceedings itself."

In this context, the *Ita Nia Rai* project deserves mention, a project developed by the State Secretariat for the Promotion of Equality in 2008. A Working Group on Gender and Property Law was created and recommended the consideration of non-financial contributions in the division of property. These contributions should be taken into account, including domestic work. At this point it should be mentioned that women in Timorese society assume a traditional role, often working at home. This work is associated with agriculture (90% of the work of Timorese women, of which 70% do not receive remuneration, according to OPE 2007 data) (Grupo de Trabalho sobre Género e Lei da Propriedade, 2009, p. 5).

## **5.2. Alimony rights**

Article 1884 of the Civil Code of Timor-Leste provides who is entitled to alimony in the event of divorce. They are, accordingly to n. 1, paragraph a) the spouse not deemed guilty or, when both are guilty, not deemed culpable in the divorce sentence, if the divorce has been decreed with grounds on article 1656 (culpable violation of conjugal obligations) or paragraphs a) or b) of article 1658 (*de facto* separation for three consecutive years or *de facto* separation for one

year, if the divorce was petitioned by one of the spouses without opposition from the other. Paragraph b) and c) provide that the defendant spouse, if the divorce has been decreed with grounds on paragraph c) of article 1658 or any of the spouses, if the divorce has been decreed by mutual consent or, in the case of litigious divorce, if both are deemed equally guilty, are also entitled to alimony in the event of divorce.

N. 2 of the same article continues by stating that states that exceptionally, the court may, for the sake of equity, grant alimony to the spouse who would not be entitled under the terms of the previous paragraph, taking into consideration, in particular, the duration of the marriage and the collaboration rendered by this spouse to the economy of the couple.

In Portugal, this obligation to provide for alimony rights was eliminated, meaning that, in principle, each ex-spouse should provide for their subsistence after the divorce was established. With the end of assessing guilt as a relevant factor for the provision of alimony rights, this obligation became temporary. Necessity reasons may entitle either spouse to alimony rights, but this right is not guaranteed, and based on equity may be denied, as derived from article 2016 (3) of the Civil Code. The lender has no right to maintain the standard of living that he enjoyed while married.

Angola, even though maintaining a system very similar to that of Timor-Leste as regards the grounds for suing for divorce, also provides that the former spouse has the right to alimony in case of divorce (article 262 (1)), and their allocation to the divorced spouse will consider their socio-economic condition and the causes of divorce (article 111 (1)), by virtue of its Family Code, approved by Law no. 1/88 of February 20<sup>3</sup>.

We share the opinion that what we are not dealing with an obligation of "maintenance" (Coelho & Oliveira, 2016, p. 774), but with the right to receive everything that is indispensable for sustenance, such as food, habitation and

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<sup>3</sup> In Angola, article 103 of the Family Code prohibits a man, without the wife's consent, from suing for divorce, when the latter is pregnant or before one year after giving birth, unless he challenges the paternity of the child.

clothing. This was, moreover, the understanding that the legislator enshrined in article 1871. The measure of food is proportional to the means of the one who provides them and the necessity of that one who receives them (1872/1).

Prior to the entry into force of the Civil Code of Timor-Leste, Law n. 7/2010, of July 7, the Law against Domestic Violence, stated in article 29 that the victim is entitled alimony from the aggressor, as long as it proves its necessity. The amount will depend on the possibilities of the aggressor and the needs of the victim (Article 30)<sup>4</sup>.

The same law attributes legal relevance to what might be considered a de facto union, when it states that "persons who live or have lived in conditions similar to those of the spouses, even without cohabitation" (article 3, b) are covered by the concepts of family members.

## **6. Conclusion: is a reform needed?**

The changes in family law have been constant in several legal systems. Because it is a part of the law that binds intrinsically with the person and their intimate relationships, it is normal for the legal systems to accompany and follow the conceptual evolutions in this area. It is possible to list some matters that have been the object of this evolution, such as divorce, parental responsibilities, women's rights and gender equality, children's rights and de facto union.

This had as a corollary the fact that the family lost economic, educational, care and security functions in most countries (Coelho & Oliveira, 2016, pp. 119, 120).

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<sup>4</sup> It is interesting to note that the Law against Domestic Violence refers to the possibility of a provision of provisional alimony, in accordance with art. 32. Thus, "at any time, the Court may, at the request of the victim or the public prosecutor, grant a provisional alimony allowance. (n. 1) There will never be "restitution of a provisional alimony supply already received" (n.2), and "in case of economic insufficiency of the accused, the alimony duty is borne by the Services of the Ministry of Social Solidarity" (n.3).

On the contrary, we see that these functions continue to be very present in Timorese society, since it is the family, the family in the extended concept that we have seen, which guarantees financial support, especially in rural areas, which still provides for education, care and security, although, little by little, Timor-Leste is taking steps for those roles to be assumed by the State.

The cultural relativism that characterizes the country cannot serve to justify attacks on the rights of the person, as it seems to happen when limiting access to divorce in the terms we have seen, and, even though Timor-Leste's legal system did not follow this movement, nor could it, due to the circumstances of its society, has, nevertheless, always been at the forefront of human rights advocacy.

With regard to the matter of divorce, at an early stage, the question was whether or not to accept divorce, since marriage was conceived as a perpetually unchanging relationship in which an idea of solidarity, sometimes to the detriment of one's own happiness, should prevail. Over the years, this vision has changed, and marriage became seen as an instrument of personal fulfilment and therefore divorce must be admitted.

In the 1960s and 1970s, a reform took place and we see a predominance of no-fault divorce model in Western countries (Parkinson, 2015, p. 2), as western legislations have evolved into ideas of consensual and unilateral divorce, or purely a breakdown of the marital relationship, without any guilt considerations.

Thus, we note an evolution in the sense of giving consideration to the contribution of spouses in the home and the support they give the other in the pursuit of a career, often to the detriment of their own (Costa, 2005, p. 133).

Timor-Leste approved its Civil Code in 2011, long after this liberalization of divorce movement took place, however, it opted to maintain a conception of a divorce system that is no longer suitable.

We note the importance that family plays in the country. Its prominent role in society is reflected precisely in the laws in force, and is guided by strong

religious and cultural beliefs, making marriage and divorce having specific characteristics. Despite a prejudice that still exists in society, linked to divorce, this is allowed by the Civil Code.

This takes two forms: divorce by mutual consent and litigious divorce. The first is the preferred modality of the legislator, and as the name explains, it translates into the agreement of the spouses for divorce. Nevertheless, even for this modality, the legislator imposes an attempt of reconciliation.

The second can be sued on two grounds: the guilty violation of conjugal duties and in the rupture the life in common. The guilty breach of conjugal duties shows that a conception of divorce-sanction is still very present in Timorese society, while the rupture of life in common is the expression of the conception of divorce-rupture. We have seen that the western legislations have evolved to eliminate the relevance of guilt and to establish a single model of divorce-rupture since it is understood that marriage aims at individual happiness and when it is no longer achieved, no indication of a cause should be required for it to be dissolved.

Because of this understanding of a divorce as a sanction, at the patrimonial level, the spouse who is declared guilty or main culprit only exceptionally benefit from alimony rights.

We must conclude that these solutions are not suitable for a law that was adopted in 2011. Although we cannot ignore that other countries still maintain the guilt divorce regime, nor that there are countries that do not even allow for divorce, like the Philippines, legislation in these countries was adopted long before the liberalization movements and before the profound reforms in the family matters, and that by remaining unchanged, they jeopardize the right to the free development of the personality, which is why a deep reform in this sector is necessary.

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