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RECOMMENDATIONS REPORT

IMPROVING THE DIVORCE PROCEDURES IN TÜRKİYE

TO PREVENT SECONDARY TRAUMATISATION

JOINT PROJECT ON IMPROVING THE EFFECTIVENESS OF FAMILY COURTS: BETTER PROTECTION OF THE RIGHTS OF FAMILY MEMBERS

Bu proje Avrupa Konseyi tarafından, nihai faydalanıcı Türkiye Adalet Akademisi ile birlikte yürütülmektedir.

TÜRKİYE ADALET AKADEMİSİ

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JOINT PROJECT ON IMPROVING THE EFFECTIVENESS OF FAMILY COURTS: BETTER PROTECTION OF THE RIGHTS OF FAMILY MEMBERS

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Executive Summary

Rules on marriage and divorce depend on religious, social, historical, and political factors, varying significantly from one state to another. Domestic laws diverge on issues such as the admissibility of divorce, possible grounds for divorce, substantial and procedural requirements, and equal access to divorce for men and women. These different types of divorce laws are inspired by different visions on the balance between the role of the state in the divorce process and the autonomy of the spouses.

However, the implications of potential failure to ensure accessible and inclusive family justice system, and fast and effective divorce proceedings, are crucial. Over the past decade, Türkiye has indeed made significant progress in the fields of the judiciary and fundamental rights through an on-going reform process, which has been encouraged by the country's EU accession process. This process has also required improvement in certain areas of judiciary, for example in establishing an effective family justice system in which children and women are placed at the centre.

According to the current Turkish civil law, various aspects of divorce cases, such as custody arrangements, determination of spousal support and compensation claims, and establishment of personal relationship with children cannot be dealt with separately from the divorce dispute may result in long-lasting procedures and several intervals between hearings. This may eventually traumatize the parties and the children, particularly if there is violence involved. Therefore, the need to improve divorce procedures in Türkiye in view of better protecting women and children, including but not limited by introducing fast-track and simplified procedures, providing options for reconciliation, when appropriate, and allocating separate places for family courts, where children can be heard in child-friendly environment, remains on the agenda.

In preparation of this Report, the team of consultants conducted thorough analysis of the current normative framework, including existing legislation, regulations, legislative proposals, and case-flow practices to present key findings and the concrete action points in order to improve the effectiveness of divorce procedures.

The Report at the onset identifies best practices, based on the analysis of the relevant international and European standards and main principles drawn from the European Court of Human Rights ("ECtHR") jurisprudence, to support the effective implementation of the overall family court procedures, with a specific focus on the prevention of secondary traumatization. Examples as to the general functioning of the divorce systems from many European countries are provided,

as well as the recent reforms in the area of family justice are briefly presented from comparative perspective. The report further explores substantive and procedural best practices as legislation on divorce-specific procedural rules, no-fault divorce, reflection period, limited number of interim appeals in domestic divorce proceedings and tools to counteract the existing gender bias. This "best practices" review indicates that the introduction of no-fault divorce and the liberalization of the divorce laws both in substantive and procedural aspect as well as the adoption of simplified procedures as a general trend, is shown to facilitate decrease in the rates of domestic violence, leaving open the avenue to an amicable separation, and protecting in better way the interests of the children involved.

The pitfalls of the current divorce system in Türkiye are further elaborated upon in the Report after meetings with relevant stakeholders specified below to elaborate potential solutions in and to elaborate potential solutions in ensuring the effectiveness of the divorce proceedings and application of the procedures without causing secondary trauma on the spouses and their children. The main issues to be addressed in the family courts for strengthening its effectiveness and the protection of the rights of vulnerable groups are delays, sporadic specialization, and lack of fast-track procedures for certain types of cases. Practices relating to the protection of women's access to family court trials, child-friendly justice, and mediation, that need improvement on domestic level, are addressed in the Report. As a major issue, the length of the divorce process (trial procedures, joint review of the claims other than the divorce, prolongation caused by court's workload and case-flow management, fault-based divorce) and its reflections on the parties and children in the divorce proceedings calls for major reform.

The Report provides in its second part general and specific recommendations for legislative amendments and suggests the possible outcomes of such major reform. It offers comparative analysis of the best practices found and the problems and proposed solutions in ensuring the effectiveness of Turkish divorce proceedings, exploring the possible options and offering several recommendations for making the divorce system efficiently applicable in preventing (re)traumatization of the parties. Liberating the irretrievable breakdown of marriage ground regulated under Turkish law from any implications of fault is strongly recommended at legislative level and at the level of implementation. Furthermore, the recommendations suggest legislating provisions that link the grounds for divorce and financial consequences to eliminate opportunities for husbands to abuse these provisions to avoid any financial obligations towards their wives in the event where dependence between the divorce ground and financial matters applies. Specialized training of legal practitioners and members of the judiciary to achieve the right impact in practice, their awareness of gender equality and tools to this effect are as well strongly recommended.

List of Abbreviations

TCC:	Turkish Civil Code
MoJ:	Ministry of Justice (Türkiye)
RCA:	Regional Court of Appeals
ECtHR:	European Court of Human Rights
ECHR:	European Convention on Human Rights
CEDAW:	Committee on the Elimination of Discrimination against Women
CEPEJ:	European Commission for the Efficiency of Justice

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I. Aim of the Report

Family justice is constantly evolving and one of the most complex fields of the judicial system. It is also a key area for effectively protecting the rights of individuals, groups, and communities and it plays a critical role in ensuring that children and women can fully enjoy their rights and be put at the centre of the system.

This Report, prepared by the consultants of the Council of Europe, is intended to be used for the purposes of the project "Improving the Effectiveness of Family Courts: Better Protection of the Rights of Family Members" (Called as "Project" hereafter), co-funded by the European Union and the Council of Europe and implemented by the Council of Europe together with the beneficiary institution, the Justice Academy of Türkiye. The recommendations suggested by it are a response to the need for improvement of the effectiveness of divorce procedures in Türkiye and their application will be assessed from the viewpoint of reducing their traumatic effects on family members joining family courts procedures.

The purpose of the Report is to identify the pitfalls of the current divorce system in Türkiye after meetings with relevant stakeholders and to focus on potential solutions. Within this scope, with reference to several divorce system models it is aimed to address the problems and shortcomings and to improve effectiveness of divorce proceedings and application of the procedures without causing secondary trauma on the spouses and their children. Secondly, it is to make recommendations for legislative amendments and define best practises, based on the analysis of the relevant international and European standards and main principles drawn from the ECtHR jurisprudence, to support the effective implementation of the overall family court procedures, with a specific focus on the prevention of secondary traumatisation.

II. Scope of the Report

In the light of the above, the report will give answers at least to the following specific research questions:

1. What are the relevant European standards and best practises in divorce proceedings from the viewpoint of reducing their traumatic effects on family members?

2. What are the main principles that can be drawn from the ECtHR jurisprudence on the effectiveness of the divorce proceedings in family courts?

3. What is the current normative framework, including existing legislation, regulations, legislative proposals, case-laws of the Turkish Constitutional Court and Turkish Court of Cassation, and case-flow practises of Turkish family law against those standards and best practises?

4. What are the key findings and the concrete action points suggested by the participants of the 1st and 2nd Roundtable Meetings conducted in 2021 within the Project, in order to improve the effectiveness of divorce procedures and application of the procedures without causing secondary trauma?

5. What recommendations of action points and methods can be relevant in increasing the effectiveness of the divorce procedures without secondary victimisation, considering the European standards and best practises?

One additional question can be explored: ***taking into account the considerable progress Türkiye has made in the judiciary sector, how to link in a most effective way the number of reform and democratisation packages with the recommendations provided in the present report?***

There are four operative principles underpinning the recommendations:

1. The interest of the child is paramount.

2. Substantive gender equality in divorce proceedings should be regarded to prevent the perpetuation of discrimination patterns and negative stereotyping,

3. Equal opportunities for all parties involved irrespectively of gender, age, and representation must be provided.

4. Access to justice must be promoted.

III. Outline

This document is divided into five main chapters, which present the research outcomes and set of recommendations of distinct nature. Recommendations (must) and good practises (optional) are included. Potential faulty practises and how to avoid them are as well included.

The ***first*** chapter deals with the background of divorce and its various aspects, specifically the legal, social, and psychological aspects. This chapter also offers an extensive overview of different types of divorce. The ***second*** chapter explores conclusions that can be drawn from the ECtHR jurisprudence regarding the concept of divorce, its relation with the protected rights, and the effectiveness of divorce proceedings in the context of the prevention of secondary traumatisation. The ***third*** chapter highlights the best practises for effective divorce proceedings in the EU and around the world, providing specific examples. The ***fourth*** chapter, then, offers an insight into the Turkish divorce system, where analysis of the current normative framework, including existing legislation, regulations, legislative proposals and case-flow practises is provided based on the results of the roundtable meetings conducted within the Project

with stakeholders. Finally, the ***fifth*** chapter offers a comparison between the best practises found and the shortcomings that hinder the effectiveness of the Turkish divorce system, exploring the possible options and offering several recommendations for making the divorce system efficiently applicable in preventing (re) traumatization of the parties involved.

The last chapter of this report covers sixteen identified pitfalls of the Turkish Divorce System in comparison with European best practises covered in the report. After identifying each pitfall, two general recommendations are given: various options for improvement and specific recommendations with arguments for and against the given recommendations. In addition to this, the last chapter also sets out general recommendations regarding the improvement of the Turkish Divorce System.

IV. Methodology

In order to answer these questions, the team of consultants use a set of research methods. The desk research involves research and collecting relevant information from different resources:

- Desk review of the EU acquis on divorce proceedings, existing domestic legislation of the European countries and case law. (Brussels IIbis[1], Brussels IIter[2], and Rome III[3] principles should be taken into account when identifying the best practises in the EU family law context.)

- Desk review of ECtHR case law on divorce and related matters.

1 Council Regulation (EC) 2201/2003 on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels IIbis) [2003] OJ L338/1

2 Council Regulation (EC) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matter and the matters of parental responsibility, and on international child abduction (Brussels IIter) [2019] OJ L178/1

3 Council Regulation (EC) 1259/2010 on implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III) [2010] OJ L343/10

- Online desk research - review of the online materials available from courts' websites, Ministries of Justice, Supreme Councils of Judges, etc. and using the various search engines is one of the main methods for national and international consultants. Researches, studies, reports, and analyses available online should also be reviewed.

The national consultants have reviewed and discussed the outcomes of the three roundtable meetings held with the stakeholders. The identification of problems, shortcomings and the elaboration of potential solutions in ensuring the effectiveness of the divorce proceedings and application of the procedures without causing secondary trauma on the spouses and their children further facilitate the recommendations.

The main method of presenting good practices has been undertaken through a "Case Study", as it it has involved an in-depth study of a good practice giving knowledge of the applicable legislation and/or internal court decisions. Best practices that are implemented in courts from all levels (first and second instance courts) have been considered.

Chapter 1

DIVORCE AND ITS DIFFERENT ASPECTS

This chapter will be focusing on the context with a view to presenting different aspects of the divorce proceedings, comparative study of the existing types of divorce in various legal systems, and the general issues arising consequently from the shortcomings of the divorce procedures for the parties, with the emphasis on women and children.

The subject matter is not only central to family law but also highly sensitive. Rules on marriage and divorce depend on religious, social, historical, and political factors, varying significantly from one State to another. Domestic laws diverge on issues such as the admissibility of divorce, possible grounds for divorce, substantial and procedural requirements, equal access to divorce for men and women. Fundamental rights play an increasing role in the proceedings as they require non-discrimination between spouses, self-determination of the individual, the protection of the right to marry, and the right to respect for family life.

Marriage, although one of the most personal relationships in human nature, can be legally terminated only by means of divorce proceedings. Divorce, by its simple definition, is the legal dissolution of marriage through courts of law, administrative bodies, or even through private methods[4]. Not long ago, the stance on divorce and its legality had been rather diverse. Presently, however, divorce is legal in all 46 member states of the Council of Europe, with Malta legalising divorce in 2011. The Philippines and the Vatican remain as the only two states in the world today which have not yet legalised divorce[5].

4 'Divorce, n' (Merriam Webster Online Dictionary) <https://www.merriam-webster.com/dictionary/divorce> accessed 12 October 2021

5 Antokolskaia Masha, 'Divorce Law in a European Perspective', in Jens M. Scherpe (ed), European Family Law, Volume III: Family Law in a European Perspective (Edward Elgar: Cheltenham 2016), 41-81, 71-72.

It appears important for the purposes of the report to explore the procedural variety of the different divorce proceedings, highlighting their positive and negative aspects in order to provide adequate recommendations. Across Europe, divorce laws have evolved from fault-based divorce (divorce as a sanction) to divorce based on the irretrievable breakdown of the marriage (divorce as remedy or failure) and divorce by mutual consent (divorce as an autonomous decision by the spouses themselves). In some jurisdictions divorce on demand (divorce as a right) as well exists. These different types of divorce laws are inspired by different visions on the balance between the role of the state in the divorce process and the autonomy of the spouses. As a rule, the liberalization of divorce laws and the adoption of simplified procedures have decreased rates of female suicide and domestic violence, leaving open the avenue to an amicable separation.

Children may come into contact with judicial or non-judicial proceedings in many ways, but when their parents get divorced or fight custody battles over them, they are on the front line and the potential traumatisation they might experience always should be considered by the professionals involved. The survey data tell us that a large fraction of children experience the divorce or separation of their parents before they reach adulthood[6]. As it has been underlined multiple times in the EU agenda[7] family law disputes may have adverse effects on the well-being of children. Civil proceedings, especially transnational litigation, deriving from dissolution of marriage or legal separation may result in a restriction of their rights and particularly during proceedings to determine parental responsibility, children can become hostage to long legal disputes between the former partners.

As a guiding principle, the best interest of the child must be paramount in divorce proceedings, which requires exploring it

6 M Kreyenfeld and H Trappe, 'Parental Life Courses after Separation and Divorce in Europe' (2019) <https://link.springer.com/book/10.1007%2F978-3-030-44575-1> accessed 8 November 2021 (Anderson et al. 2017)

7 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An EU Agenda for the Rights of the Child [2011] <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0060&from=EN>

from the perspective of the effectiveness of these proceedings. We should also have regard to the fact that the protection of the best interest of the child needs to arise, if possible, from amicable resolution of family matters and without unnecessary interference with the family life of parents and their child. In this light, legislators should opt for a divorce concept in which the exercise of children's (procedural) rights foreseen in international documents is facilitated and in which the child is protected from unnecessary exposure to (judicial) examination of its views relating to the parents' agreement where there is no doubt that such an agreement is justified and in compliance with the best interests of the child during and after the divorce.

The approach of empowerment of the family is the backbone of substantive gender equality in family law. Therefore, activities that have the function of disseminating information on equality between women and men, equality-based gender roles, and non-violent conflict resolution in interpersonal relationships should be promoted.

1.1 Types of Divorce

This section will explore the main types of divorce found in various legal systems.

1.1.1. "Fault divorce" essentially requires the court to examine the grounds based on the "fault" of a spouse. It is rooted in the idea of the state and/or the church as the guardians of universal morality, which must punish the spouse who has committed a matrimonial offence and release the innocent spouse from the bond with the offender[8]. The concept of "fault" will be discussed infra to provide a better overview on the discussed EU practises compared with the recent no-fault divorce law reforms in Europe.

1.1.2. "No fault divorce" is for the court not to make any findings that either party was at fault for the breakdown of the

8 Antokolskaia, M. V. (2006). Convergence of Divorce Law in Europe. Child and Family Law Quarterly, 18/3, 307- 330

marital relationship. Arguments for non-fault divorce[9] are:

i. The use of fault may trigger or exacerbate parental conflict, which has a negative impact on children, will ease stress and pain for the (ex)spouses

ii. Easier to settle the terms of the divorce without having to get caught up in long legal battles in court

iii. Removal of fault means removal of adversarial systems, lessening the chances of secondary traumatization

1.1.3. Unilateral divorce: The possibility of exiting a marriage without the consent of one's spouse shifts the power balance to the spouse more willing to exit, while the shortening of the legal process and the weakening need to show fault or irreconcilability have made divorce processes faster and possibly less conflict-ridden.

1.1.4. Divorce in absentia - Albeit its purely procedural implication, this type of divorce deserves attention as it is closely related to the right to a fair trial. In most legal systems, the dissolution of marriage or civil partnership still can occur if one of the spouses or civil partners is missing or they are presumed dead, however courts will generally require the requesting party to have made a diligent and reasonable effort to locate the other party before taking further action. Divorce in absentia may be the last resort in circumstances where, for example, the spouses do not reside together in one place or are in different countries for long periods of time and where one of the spouses cannot be found and served with the papers.

1.1.5. Private divorce - A private divorce is characterised by the marriage not being dissolved by a court's decision or that of a public authority but by a private legal act. The idea of releasing the courts from uncharacteristic functions was

9 Ministry of Justice (UK), 'Blame game to end as Divorce Bill receives Royal Assent' (26 June 2020) <https://www.gov.uk/government/news/blame-game-to-end-as-divorce-bill-receives-royal-assent> accessed 10 November 2021

prompted by the need to address the issue of balancing the workloads of district and regional courts.

1.2 Social and Psychological Aspects of Divorce

Divorce proceedings can be a tedious and painstaking process for those involved, especially for the children in the family. In addition to this, divorce proceedings in most countries, prove to be inaccessible due to the lack of access to legal aid, the complexity, and the lack of public awareness of the whole process.

Legal processes, in general, can be daunting for families, particularly those who are not legally represented. The resolution of disputes sometimes takes longer than necessary. In addition, the fault-based divorce system is "adversarial", which may not be the most suited to resolving family disputes. Finally, as disputing couples are the main participants in the divorce process, the child's voice who is not involved in these processes is sometimes not heard as clearly as it should be. Therefore, it is important for judicial systems to establish a problem-solving family justice system that will:

i. Protect and support the family as the basic unit of our society,
ii. Ensure that the interests of the child are protected,
iii. Effectively and fairly resolve family conflicts
iv. Reduce the emotional burden, time, and cost of resolving family disputes and,
v. Increase access to family justice for all.

Secondary traumatisation, in a general context, emerges as a result of knowing about or witnessing another traumatic event suffered by another significant person[10]. Because of the assumption that humans cannot exist alone, one's trauma can be transmitted to another[11].

10 Miro Klarić et al., 'Secondary Traumatisation and Systemic Traumatic Stress' (2013) 1(1) Medicina Academica Mostariensia <http://www.psychiatria-danubina.com/UserDocsImages/pdf/dnb_vol25%20Suppl%201_no/dnb_vol25%20Suppl%201_no_29.pdf> accessed 13 October 2021

11 Ibrahim Kira, 'Assessing and responding to secondary traumatization in the survivors' families' (2004) 14(1) Clinical Knowledge <https://irct.org/assets/uploads/Assessing%20and%20responding%20to%20secondary%20traumatisation.pdf> accessed 13 October 2021

For instance, divorce proceedings might cause direct trauma to the spouses but also may cause indirect trauma to the children. However, the concept of secondary traumatisation was used in the light of the definition of (re)traumatisation, which refers to additional traumatisation during processes such as divorce proceedings.

One particularly important aspect is that much of the trauma for children begins with constant arguments between the parents long before divorce proceedings. For a child, family conflicts and separation of parents have long-term effects. Some break down under the shock and stress of separation. For still other children, problems and tension appear only many years' later: during the adolescent crisis or during loving relationships or after the birth of their own children[12]. The experiences of divorce-separation are always dangerous and traumatic because they find themselves exposed to the affective needs and movements of adults; they are less protected and often they are personally involved in the conflict which will affect them for years to come, perhaps for their entire lives. When parents separate, the child easily breaks down in many ways: The child might be sad, aggressive and less proficient in school work.

Following an accumulation of events, impressions and reflections, originating from the trauma of the pre-divorce environment, the proceedings themselves put great, in some cases insurmountable burdens on children. Repeated interviews, intimidating settings, and procedures, discrimination: a plethora of such practices augment the pain and trauma of children who may already be in great distress and in need of protection. Specific secondary traumatic experiences for children are, for instance, parental alienation and psychological effects that hinder the child's growth and development. A child-friendly justice system brings relief and redress; it does not inflict additional pain and hardship and it does not violate children's rights.

Subsequently, inefficient divorce proceedings affect the unit of the family in different ways. For adults, as mentioned above, the mere lengthy duration of the divorce proceedings proves to be daunting.

12 Peter J Riga, 'Children as Victims of Divorce' (1994) The Linacre Quarterly <https://www.tandfonline.com/doi/pdf/10.1080/20508549.1999.11878239> accessed 9 November 2021

Moreover, divorce proceedings are often unaffordable, such as the access to legal aid. Gender bias is reflected in the whole justice system, which affects both men and women and their access to justice[13]. The length of proceedings is directly related to children's assessments of their child-friendliness: the longer proceedings last, the less child-friendly and more negative children find them. It is of great importance for this report to assess the effectiveness of the divorce system in Türkiye from the perspective of the child's best interest, and it is striking that the lengthy parental responsibility procedures, examined jointly with the divorce, do not regard the child's best interest in an appropriate way. The absence of clear schedules, recurrent adjournments of trials, the lack of information about courts' administrative organisation and the multiple hearings, which oblige children to repeat their testimony to a large number of professionals are without doubt bringing the conclusion that the interest of the children in such divorce proceedings is not a priority in a setting where the child should feel secure and comfortable.

13 Gender Equality Commission of the Council of Europe, 'Feasibility Study: Equal Access of Women to Justice' GEC 2013 1 Rev (Strasbourg 28 May 2013)

Chapter 2

ECtHR JURISPRUDENCE

This chapter will be focusing on the main principles that can be drawn from the ECtHR jurisprudence on the effectiveness of the divorce proceedings in family courts. It is advisable that the report does not focus only on the "effectiveness" per se but explores how the European Court of Human Rights (hereinafter in this Chapter: The Court) sees the divorce proceedings in the human rights context and their compliance with Articles 6 and 8 of the European Convention on Human Rights ("ECHR" or the Convention). The inclusion of social rights is related to the effectiveness principle, and the Convention should afford protection that is not theoretic or illusory but practical and effective. As an example, in the Airey case, the effective right of access to the courts required free legal aid and the Court pointed that hindrance of this right in fact can contravene the Convention just like a legal impediment[14].

Furthermore, although the Court has established no ranking order vis-à-vis the issues at stake in its cases, it adopts a particularly strict approach to states in two very specific situations: first, when the life or health of the applicant is at stake[15] and, second, when the delay could have irremediable consequences for the applicant[16]. Certain cases, which are of particular importance for applicants, are considered therefore a priority by the Court, and it includes these relating to the preservation of family life, disputes concerning maintenance obligations and cases relating more generally to the applicant's civil status, which undoubtedly will include divorce cases particularly with parental responsibility distribution[17].

14 Jukka Viljanen, 'The Role of the European Court of Human Rights as a Developer of International Human Rights Law' <https://www.corteidh.or.cr/tablas/r26759.pdf> accessed 9 November 2021

15 X v. France of 31 March 1992, Vallée v. France of 26 April 1994, Gheorghe v. Romania of 15 June 2007

16 H v. United Kingdom, of 8 July 1987, Nikolov and others v. Bulgaria of 21 February 2012, § 36

17 European Commission for the Efficiency of Justice, 'Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights (2018) <https://rm.coe.int/cepej-2018-26-en-rapport-calvez-regis-en-length-of-court-proceedings-e/16808ffc7b> accessed 9 November 2021

We can therefore distil several important principles, starting with the substantive ones, and then gradually moving to the procedural ones as both are closely related to the aim of the project.

2.1. Substantive Principles

In the area of framing their divorce laws and implementing them in concrete cases, the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention and to reconcile the competing personal interests at stake[18].

The Court's long-standing case law states that neither Article 8 nor Article 12 ECHR enshrines a right to divorce given that such a right was intentionally excluded from the text of the Convention. However, it also recalls that the Convention is a living instrument and that, where the domestic law allows for divorce, it must also allow divorced persons to remarry[19]. Thus the Court has adopted an evolutive interpretation of Article 8 with regard to "respect for family life"; however, it did not change its view significantly since ***Airey v. Ireland*[20],** where it found that in order to protect family life the State must sometimes allow a couple relief from the duty to live together.

The Court has resolutely held on to its 1986 finding[21] that the interference with Article 8 ECHR resulting from the absence of a right to divorce is justified by two legitimate aims, which are "the protection of the rights and freedoms of others, namely the interests and well-being of the applicant's wife, and the protection of morals"; together, these aims are considered to counteract "the menace of arbitrary and unilateral terminations of marriages in a society adhering to the principle of monogamy".

If the provisions of the Convention cannot be interpreted as guaranteeing a possibility, under domestic law, of obtaining divorce, they cannot, ***a fortiori*,** be interpreted as guaranteeing a favourable

18 Ibid. para 56

19 Babiarz v Poland App no 1955/10 (ECtHR, 10 January 2017), para 49

20 Airey v Ireland App no 6289/73 (ECtHR, 9 October 1979)

21 Johnston and Others v Ireland App no 9697/82 (ECtHR, 18 December 1986)

outcome in divorce proceedings instituted under the provision of that law allowing for a divorce[22].

In case under domestic law the refusal to divorce does not create ***res iudicata,*** the parties are not prevented from submitting a fresh petition for divorce to the courts at a later stage if and when circumstances change. To contemplate otherwise would mean that a request for a divorce would have to be allowed regardless of the procedural and substantive rules of domestic divorce law, by a person simply deciding to leave his or her spouse and have a child with a new partner[23].

Particularly related to the divorce ***in absentia,*** the Court has found that Article 6(1) (right to a trial and access to court) require the authorities to inform sufficiently the parties in divorce proceedings and being unaware of it leads to deprivation of the right to participate in breach of Article 6 of the Convention[24].

Protection measures in domestic violence cases provided in the law must be applicable not only to married, but also to unmarried or divorced couples. The legislative framework in place must guarantee that a divorcée could benefit from the protection measures laid down in the law and as its application should not be left to the interpretation and discretion of the family-affairs judge examining the case. Otherwise, the party in need of protection - in the case at hand the wife - will be required to live in a situation likely to cause her fear, vulnerability and anxiety, and that, for many years after having applied to the domestic courts, she will be forced to live in fear of her former husband's conduct[25]. The psychological impact is a major aspect in domestic violence and an important circumstance that the domestic courts must take into account in its assessment in divorce proceedings[26].

22 Babiarz v Poland App no 1955/10 (ECtHR, 10 January 2017), para 56

23 Ibid. para 54

24 Schmidt v Latvia App no 22493/05 (ECtHR, 27 April 2017)

25 M.G. v. Türkiye App no 646/10 (ECtHR, 22 March 2016)

26 M.G. v. Türkiye App no 646/10 (ECtHR, 22 March 2016)

2.2 Procedural Principles

The simplification of the divorce proceedings is considered by the Court a general guarantee to litigants for the effective right of access to the courts for the determination of their "civil rights and obligations"[27].

The litigants in person should have access to legal aid in complex divorce proceedings. The legal aid in divorce proceedings is ***per se*** not guaranteed, but the Court recognizes that litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practises or, as cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined. What is more, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court[28]. It is not realistic, in the Court's opinion, to suppose that, in litigation of this nature, the applicant could effectively conduct her own case, despite the assistance which, as was stressed by the Government, the judge affords to parties acting in person. Effective respect for private or family life obliges the States to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse there to.

On the length of the divorce proceedings, the Court refused to give states any legal rulings on what might be considered a standard length of proceedings. It has remained faithful to its practical approach and its commitment to weighing up all its established criteria according to the circumstances of each case, and has never laid down precise rules on, for example, how much time a court should give to a divorce case to avoid the threat of sanction from Strasbourg. The position has not changed since the 1998 reform[29]. The Court has however established the following criteria for assessing whether the length of proceedings is reasonable: "the complexity of

27 Airey v Ireland App no 6289/73 (ECtHR, 9 October 1979), para 26

28 Airey v Ireland App no 6289/73 (ECtHR, 9 October 1979), para 24

29 European Commission for the Efficiency of Justice, 'Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights (2018) <https://rm.coe.int/cepej-2018-26-en-rapport-calvez-regis-en-length-of-court-proceedings-e/16808ffc7b> accessed 9 November 2021

the case, the conduct of the applicant, the conduct of the national authorities and what is at stake for the applicant."

In Recommendation CM/Rec (2010)3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings[30] it is reiterated that excessive delays in the administration of justice constitute a grave danger, in particular for respect for the rule of law and access to justice. That excessive length of proceedings, often caused by systemic problems, is by far the most common issue raised in applications to the ECtHR and that it thereby represents an immediate threat to the effectiveness of the Court and hence the human rights protection system based upon the ECHR. Therefore, it is recommended that the states should take all necessary steps to ensure that all stages of domestic proceedings, irrespective of their domestic characterisation, in which there may be determination of civil rights and obligations or of any criminal charge, are determined within a reasonable time, that mechanisms exist to identify proceedings that risk becoming excessively lengthy as well as the underlying causes, with a view also to preventing future violations of Article 6, and when an underlying systemic problem is causing excessive length of proceedings, measures are required to address this problem, as well as its effects in individual cases.

As a general requirement, states must put in place an effective domestic remedy for cases involving lengthy proceedings particularly in civil cases, given notably the recurrent and persistent nature of the underlying problems, the number of people affected by them and the need to grant them speedy and appropriate redress at domestic level[31]. It is crucial that while the Court welcomes legislative initiatives, it also requires the states actually to put into effect any measures aimed at improving the situation, complying with the Court's substantial and consistent case-law on the matter. The states must further ensure that the remedy or remedies comply, both in theory and in practice, with the key criteria set by the Court. In so doing, the authorities should also have due regard to the

30 Recommendation CM/Rec (2010)3, adopted by the Committee of Ministers on 24 February 2010 at the 1077th meeting of the Ministers' Deputies

31 Rumph v Germany App No 46344/06 (ECtHR, 2 September 2010)

Committee of Ministers' recommendations to the member States on the improvement of domestic remedies of 12 May 2004[32].

In a decision on admissibility in a civil case, the Commission held that "in civil proceedings, the parties must show 'due diligence' and that only delays attributable to the state may justify a finding of a failure to comply with the 'reasonable time requirement'. In the case in question, it concluded that there had been no violation of Article 6(1), considering that the less than diligent conduct of the applicant was largely responsible for the length of divorce proceedings, which on the face of it appeared unreasonable, lasting more than 10 years[33].

The divorce proceeding calls for "swift determination" (§47), regarding the particular diligence required in cases concerning civil status and capacity. There had been a violation in respect of divorce proceedings lasting nine years and having examined all the material submitted to it, the Court considers that the Government has not put forward any fact or argument capable of justifying the delay in the present case[34].

The Court acknowledges that proceedings with petitions for separation and divorce, where the domestic court has to rule on custody of the parties' child, who is a minor, and contact arrangements with a non-custodial parent, can be considered to be of a "certain complexity".

The divorce proceedings, if ***excessively long***, unquestionably affect enjoyment of the right to respect for family life, as illustrated by the (for reference, in the present case the divorce proceedings lasted seventeen years). In cases concerning the status of persons, as are divorces, the issue at stake in the dispute for the person concerned is also a relevant criterion and particular diligence is required in view of the possible consequences that excessive delay may have, inter alia, on the enjoyment of the right to respect for family life[35].

32 Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session)

33 Hervouet v France App No 30074/96 (ECtHR, 2 July 1997)

34 Bock v Germany App No 22051/07 (ECtHR, 23 March 1989)

35 Berlin v Luxembourg App no 44978/98 (ECtHR, 15 July 2003)

The divorce should be treated as an urgent request when the wife is subjected to domestic violence by her husband. The failure to do so is not a simple failure or delay in dealing with violence against the wife but amounts to repeatedly condoning such violence and reflects a discriminatory attitude towards the wife as a woman[36]. The Court underlined the particular diligence needed in dealing with complaints concerning domestic violence and emphasised that the "Istanbul Convention" required the States Parties to take the necessary measures to ensure that investigations and judicial proceedings were carried out without undue delay. Furthermore, the Court considered that the national authorities have a duty to take into account the victim's particular state of psychological, physical and/or financial insecurity and vulnerability, and to evaluate the situation as rapidly as possible[37].

The Court attaches importance to the failure of the domestic authorities to conduct the divorce proceedings efficiently and to take into account specific circumstances of those proceedings, such as the agreement of the parties to divorce, a possibility of rendering a partial decision and the urgent nature of these proceedings under domestic law[38].

In case of a failure of the lower instance to comply with a time-limit to complete the civil proceedings at issue, ordered by appeal court, it cannot be accepted that the remedies provided by the national law in respect of the length of proceedings are effective in a divorce case[39].

Even in legal systems which enshrine the principle of the conduct of the proceedings by the parties, the attitude of the persons concerned does not exempt the judges from ensuring the speed required by Article 6 (1) of the Convention. In cases of enforcement of decisions on family law issues, such as contact and custody rights, the Court held on several occasions that what is decisive is the question of whether national authorities have taken all necessary

36 Eremia v The Republic of Moldova App no 3564/11 (ECtHR, 28 May 2013)

37 M.G. v. Türkiye App no 646/10 (ECtHR, 22 March 2016)

38 V.K. v Croatia App No 38380/08 (ECtHR, 27 November 2012)

39 ibid (n 35)

steps to facilitate the execution as can reasonably be demanded in the special circumstances of each case[40]. Moreover, the State is responsible for delays in the presentation of the opinions of court-appointed experts and the domestic court needs to take any measures to discipline parties or the experts[41].

The unreasonable length of judicial divorce proceedings could not raise an issue under Article 12[42]. The Court did not rule out that a similar conclusion could be reached in cases where, despite an irretrievable breakdown of marital life, domestic law regarded the lack of consent of an innocent party as an insurmountable obstacle to granting a divorce to a guilty party[43].

The Court has however found that the right to private and family life of a divorced couple's daughter had been violated as regards the length of the custody proceedings, which might imply that this principle is applicable to divorce proceedings where the ancillary matters are compulsory examined jointly[44].

40 Committee of Ministers of the Council of Europe, 'Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice (17 November 2010), para 136

41 Stasik v Poland App no 21823/12 (ECtHR, 6 October 2015) para 107

42 Aresti Charalambous v Cyprus App no 43151/04 (ECtHR, 19 July 2007)

43 Ivanov and Petrova v Bulgaria App no 15001/04 (ECtHR, 28 June 2011), para 61

44 M and M v Croatia App no 10161/13 (ECtHR, 3 December 2015), para 171-172

Chapter 3

EUROPEAN BEST PRACTICES IN EFFECTIVE DIVORCE PROCEDURES

This chapter will be focusing on European best practices in effective divorce procedures and related trauma prevention. It is essential to the rule of law that the substantive and procedural law is clear, coherent, and enforceable so as to enable families to resolve the issues arising after separation without causing secondary trauma. Key elements must be identified in order to identify situations at risk and elaborate a strategy to prevent high-conflict dissolution of families.

It is of particular importance to note that many of the decisions made in family cases involve judges and magistrates exercising a degree of discretion and, in doing so, they are representing the social and other value judgments of society as to what is a fair or proper outcome in a dispute. In this regard it appears fundamental that transparency and openness in the divorce system must be ensured at any given moment. Therefore, it is legitimate for the public to know of these judgments, to provide a basis for trust in the soundness of the court's approach and its decisions, or to establish a ground for concern in that regard. As stated in the recently published report by Sir Andrew McFarlane, ***"it is by openness that judges are held to account for the decisions they make so that the public can have confidence that they are discharging their important role properly."***[45]

At the onset it should be noted that the effectiveness of the judicial systems in civil litigious proceedings is on the forefront of the EU agenda. The European Commission underlines in its Communication on 2020 EU Justice Scoreboard[46] that ***"Efficiency, quality and***

45 Report with conclusions on the issue of transparency in the family courts, Sir A. McFarlane, 29.10.2021

46 Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: EU Justice Scoreboard [2020]

independence are essential parameters of an effective justice system, whatever the model of the national justice system or the legal tradition in which it is anchored. Figures on these three parameters should be read together, as all three elements are often interlinked (initiatives aimed at improving one of them may have an influence on the other)". By comparing information on the justice systems, the EU Justice Scoreboard makes it easier to identify shortcomings and best practices and to keep track of challenges and the progress. For the first time, the 2020 EU Justice Scoreboard presents a consolidated overview of the measures taken by Member States for a child-friendly justice system. Almost all Member States make at least some accommodations for children, with measures for child-friendly hearings (including in the settings) and to prevent several hearings of a child particularly prevalent. However, less than half of Member States have dedicated child-friendly websites providing information about the justice system[47].

As a principle that we derive from the EU acquis on divorce, the EU legislators seek to promote a certain concept of divorce: an egalitarian, as well as a simplified and easily accessible divorce. The underlying policy of the Rome III regulation is a policy in favour of divorce, conceived as an individual right. This follows clearly from Article 10, which grants a genuine right to divorce by discarding the applicable law if it makes no provision for divorce.

In 2004 CEFL published the Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses. Although these principles are not law, but a legally non-binding model, they represent a significant step in the development of common divorce law in Europe. The aim of these principles is to represent the best of the divorce law provisions of the European countries; therefore, they may serve as a source of inspiration for the national legislatures of those European countries which consider reforming their national divorce laws. However, the substantive family law of every country has always been and still is a very sensitive area which, a lot more than any other legal area, reflects the social, cultural and religious views of the particular society and where changes happen very slowly. It would not be an exaggeration

47 ibid (n 42)

to say that family law is one of the core law areas of any country[48].

Notoriously, substantive EU family and divorce law does not currently exist with the exception that certain definitions are provided in the EU acquis, for instance in Article 2 of Brussels II*bis*, reproduced in Brussels II*ter*. National laws in EU countries will determine the reasons spouses can file for divorce or legal separation, and the procedures involved. The rules vary greatly from one EU country to another. Specific best practices from various jurisdictions in the European countries and globally will be discussed in this section. The best practices identified are presented in a table and will be further described below. The conditional categorisation to substantial and procedural aims to showcase the different ways to improve the efficiency of divorce proceedings.

Substantial	Procedural	
■ Legislation on specific procedural rules for divorce proceedings	**Legal Assistance/Support**	**Court proceedings**
■ Introduction of no-fault divorce	■ Appropriate organisation of the judicial system	■ Possibility for examination of the divorce claim and ancillary matters
■ Fast track divorce proceedings	■ Training of judges	■ Appointment of guardian ad litem for the child
■ Unilateral (non-consensual) type of divorce	■ Institutional support	■ Differentiated case management
■ Non-consensual divorce on the basis of separation	■ Special scheme to assist unrepresented litigants	■ Simplification of required court documents
■ Shortening/Removing the period of separation in non-consensual divorce	■ State-subsidised legal aid in divorce proceedings	■ Introducing a pre-filing consultation session
■ Reflection period	■ Strengthening community touchpoints through public education	■ Court-mandated family mediation
■ Limited number of interim appeals	■ Introducing effective techniques to ensure the proper hearing of the child	■ Considering alternative dispute resolution
■ Counteracting gender bias in divorce proceedings	■ Expert assistance	

48 Liga Stikane, 'What Effect Does European Private International Law on Cross-border Divorce Have on National Family Laws and International Obligations of the Member States?' <https://www.athensjournals.gr/law/2019-5-4-5-Stikane.pdf> accessed 10 November 2021

3.1 Substantial Best Practices

3.1.1. Legislation on Specific Procedural Rules for Divorce Proceedings

First and foremost, it is clear that adopting special procedural rules for family cases ensure, on the one hand, the legal certainty of participants in family relationships, primarily of course children, and, on the other hand, facilitate procedures and enable participants to arrange family relationships in accordance with their wishes and needs.

As noted in the Opinion No. 15 (2012)[49] of the Consultative Council of European Judges (CCJE) on the Specialisation of Judges, general procedural rules must also apply in specialist courts. However, in addition introducing specific procedures for each specialist court is liable to lead to a proliferation of such procedures, creating risks vis-à-vis access to justice and certainty of the law. Specific procedural rules are permissible if they respond to one of the needs which led to the setting up of the specialist court, and as an example, proceedings relating to family law, where examination of children is subject to specific rules geared to safeguarding their interests, is pointed out.

3.1.2. Introduction of No-Fault Divorce

In recent decades, many countries have adopted reforms aiming at simplifying the dissolution of marriage when one of the spouses wants to end the relationship. Since the early 1970s, many states in the U.S. as well removed fault as a ground for divorce, and almost all of them allowed one of the spouses to file a petition for divorce without the consent of the other. Many European countries have followed similar paths during the past 50 years[50], and now there are no longer any countries in Europe which maintain exclusively fault-based divorce as the sole ground for divorce. The rationale behind

49 Opinion no. 15 (2012) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Specialisation of Judges, para 35

50 Pablo Brassiolo, 'Domestic Violence and Divorce Law When Divorce Threats Become Credible' (2014) <https://scioteca.caf.com/bitstream/handle/123456789/710/domestic-violence-divorce-threats-credible.pdf;jsessionid=B0B6BD104FF33D1657A594C3DC8A51E6?sequence=1> accessed 10 November 2021

these reforms is that fault divorce is fundamentally adversarial in nature - parties present their own cases and produce their own evidence before a judge who will decide the case. The adversarial approach is however not always appropriate for family disputes and may, in some cases, exacerbate conflict and prolong the time to adjudicate them. Nowadays the trends in divorce laws in Europe are to abolish or diminish the impact of fault in divorce proceedings. Often the fault-based divorce is severely criticised as outdated[51].

It is of great importance to mention that the fault in divorce proceedings is directly linked with the formal and substantive gender equality. As stated in the Committee on the Elimination of Discrimination against Women ("CEDAW") General Recommendation No29[52], some legal systems make a direct link between grounds for divorce and financial consequences of divorce. Fault-based divorce regimes may condition financial rights on lack of fault. They may be abused by husbands to eliminate any financial obligation towards their wives. In many legal systems, no financial support is awarded to wives against whom a fault-based divorce has been pronounced. Fault-based divorce regimes may include different standards of fault for wives and husbands, such as requiring proof of greater infidelity by a husband than by a wife as a basis for divorce. Fault-based economic frameworks frequently work to the detriment of the wife, who is usually the financially dependent spouse. Practitioners and researchers have similarly found that courts have exhibited "a double standard for women and men in fault behaviours" and are still "more willing to find fault with women than men for the same conduct." Many judges still adhere to dated notions of appropriate gender stereotypes particularly when adjudicating the financial and custodial consequences of fault-based dissolution[53].

51 "The fault grounds still on the books in the twenty-first century are, to a considerable extent, relics of the nineteenth-century legislation we have discussed—laws enacted by all-male legislatures chosen by all-male electorates that restricted women's choices without earning their votes. From: Karin Carmit Yefet, 'Divorce as a Formal Gender-Equality Right' <https://law.haifa.ac.il/images/Docs/Divorce.pdf> (2020) accessed 10 November 2021

52 Committee on the Elimination of Discrimination against Women, 'General Recommendation on Article 16 of the CEDAW' [2013] C/GC/29

53 Karin Carmit Yefet, 'Divorce as a Formal Gender-Equality Right' <https://law.haifa.ac.il/images/Docs/Divorce.pdf> (2020) accessed 10 November 2021

Despite the divergence in the divorce laws in Europe, there are certain similarities as to which actions could constitute infringement of marital duties and therefore can be considered as "faulty". The usual considerations of fault include unjustified abandonment of the family house, marital infidelity, abusive conduct, being sentenced, alcoholism, drugs addiction, or the effective cessation of marital life for a certain period of time.

It must be noted that in some legal systems the "forgiveness" has as well significant implications. Austrian law draws a distinction between divorce arising from fault, divorce for other reasons and divorce by mutual consent, and in a fault-based divorce, one spouse must have committed serious wrongdoing such as adultery, physical violence or mental cruelty or dishonest or immoral conduct causing the marriage to break down irretrievably. A petition for divorce is not admissible on these grounds if the wrongdoing was forgiven or not perceived as destructive to the marriage. Divorce must be petitioned for within six months from the time when the reason for divorce came to the notice of the other spouse and is no longer admissible if ten years have passed since the reason for divorce became known[54].

When both spouses allege legal fault-based grounds in a divorce action, under the American doctrine "comparative rectitude", some courts examine which one of the spouses is at "lesser fault" and which in a "greater fault" and may grant the divorce with favourable outcome to the spouse whose fault is less serious. As these are very subjective categories, 'lesser-fault', and 'graver fault' are left to the judiciary's discretion and it will very often be impossible to allocate the fault accurately in this context.

Another important aspect in the context of this report is discussed by the Nuffield Foundation report (October 2017)[55]. The theory underpinning the use of fault as a basis for divorce is that petitions are an ***accurate account*** of who or what was responsible for the breakdown of the marriage. What the law in fact requires, as well

54 Family law in Austria: overview | Practical Law (thomsonreuters.com)

55 Liz Trinder et al., 'Finding Fault? Divorce Law and Practice in England and Wales' (2017) <https://www.nuffieldfoundation.org/sites/default/files/files/Finding_Fault_full_report_v_FINAL(1).pdf#page=41> accessed 10 November 2021

as the practice, are different - rather than accurate accounts of the primary reason for the breakdown of the marriage, petitions are probably best read as narratives produced to achieve a divorce. In this sense, fault, especially behaviour, continues to be relied on to secure a faster divorce and does not necessarily reflect the real reasons behind the divorce application. Academic research and United Kingdom Law Commission[56] reviews from the 1970s onwards reported serious problems with the divorce law, including the lack of honesty of the system with the parties exaggerating behaviour allegations to get a quick divorce, while the court could do little more than 'pretend' to inquire into allegations. This study found that those problems continue and have worsened in some respects.

Conversely, the non-fault divorce system offers a number of advantages. Excluding fault from divorce proceedings can be seen as a means to protect the privacy and integrity of the individuals concerned, and makes the divorce generally more accessible, minimising the potential conflict between the spouses. Undoubtedly, the most significant ones are the decrease of domestic violence related to the fault allegations, the shorter duration of the proceedings, and the subsequent lowered potential victimisation primarily of women and children as a cumulative result. The combination of unilateral and no-fault divorce with the possibility of filing for divorce directly, without legal separation as a necessary step, would imply a substantial reduction in the length of time needed to obtain a divorce. Moreover, uncontested fault-based divorce in countries like England and Wales or France sometimes provide a 'shorter road' to divorce than non-fault ones and are therefore chosen by the spouses by mutual agreement.

By virtue of examples, we will explore here three divorce law reforms – in Spain (2005), Bulgaria (2009), the UK (2020), Switzerland (2000), and France (1976).

56 The United Kingdom Law Commission has been given the Royal Assent to report on issues important within the UK Legal System, and is the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed.

▶ Spain (2005)

In July 2005, the Spanish parliament approved a comprehensive reform of the rules governing marital dissolution in Spain. This reform included two key modifications that substantially lowered the barriers to divorce. First, it eliminated the mandatory 1-year legal separation period before divorce. Second, it allowed for unilateral and no-fault divorce. As a consequence of these legal changes, the divorce regime suddenly went from one with fault and mandatory separation period to another with easy, unilateral, and no-fault divorce, dramatically reducing both the economic and emotional costs of marital dissolution. The response of the divorce rate was immediate: In the first year after the reform, the number of divorces grew by 170 percent, and although this increase was partially compensated by the reduction in the number of judicial separations, the evidence points to an important rise in marital dissolution rates, at least in the short run[57]. The results also show a decline in extreme spousal violence, which can be attributed to the legal change. Intimate partner homicides of married women have fallen by around 30 percent after the reduction in the cost of divorce. Moreover, a relevant fraction of this decline is explained by a reduction in violence between spouses who are amid a process of marital dissolution. This reform in Spain has important implications for the role of the duration of the divorce process. In particular, these findings provide evidence in favour of a negative association between the length of the divorce process and the incidence of ex-spouse victimisation.

▶ Bulgaria (2009)

The Bulgarian divorce system underwent major reform with the new Family code adopted in 2009. Both forms of divorce were preserved - by mutual consent and divorce by claim on the basis of a deep and irreparable disorder of marriage. However, there are important new situations in both types and the new regime took into account

57 Pablo Brassiolo, 'Domestic Violence and Divorce Law When Divorce Threats Become Credible' (2014) <https://scioteca.caf.com/bitstream/handle/123456789/710/domestic-violence-divorce-threats-credible.pdf;jsessionid=B0B6BD104FF33D1657A594C3DC8A51E6?sequence=1> accessed 10 November 2021

the simultaneous amendments made by the Code of Civil Procedure to the proceedings in matrimonial matters. Among the major novelties are the abolition of the three-year term for admissibility of divorce by mutual consent and the abolition of reconciliation period. Greater importance is attached to the consent of the spouses to the dissolution of their marriage and to the settlement of the consequences of the divorce, and agreement between the spouses is not only allowed, but also encouraged at every stage of the proceedings.

Remarkably, the new Bulgarian Family code offered simplified and more dynamic divorce proceedings, as fault lost its significance as an element of the factual composition of the divorce. Under the repealed Family code (1985), the spouses could apply for divorce when the marriage is broken down, and with the decision to allow the divorce, the court of its own motion had always to rule on the fault. The new Family Code of 2009 adopted another principle - in the case of spouses, they may seek divorce when the marriage is deeply and irreparably broken down, and with the decision to grant the divorce, the court rules on the fault only in case one of the spouses has requested it. However, the court will indeed rule on the matter of fault only if expressly requested to do so by a party or the parties to the case, but it is nevertheless required to establish that there are grounds for terminating the marriage, namely a serious and irretrievable breakdown[58]. Therefore, no objective criteria are examined - divorce upon an irretrievable breakdown in the narrow sense is granted upon the subjective criterion alone: when the court is convinced that that marriage cannot be saved.

The abolition of compulsory determination of fault brought positive changes in several directions, including speedier procedure (both in terms of courts' workload and spouses) and possibility for amicable separation, which reduced the risk for secondary traumatisation for the parties and children. In result, the fault-based divorces lost their place, and the majority of the spouses prefer not to enter into such costly, long and emotionally burdening experience, in which as an

58 European Judicial Network, 'Divorce and Legal Separation in the Netherlands' (16 December 2020) <https://e-justice.europa.eu/content_divorce-45-bg-en.do?member=1> accessed 10 November 2021

important addition, witnesses must be interrogated. The reform also removed the significance of the fault per se, and it is mandatory for the court, when determining for instance which of the two ex-spouses after the termination of the marriage should use the family home, to take into account not solely the fault, but to link it to the housing needs, to assess the health situation of the spouses, and if there are minor children - their specific needs.

In regard to the consequences related to the spousal maintenance and the costs for the procedure, which were (and theoretically still are) linked to the fault, it should be noted that the courts have adopted a very successful approach which has made the fault allegations relatively unattractive. On first place, as the Supreme Court of Cassation of Bulgaria ("SCC") clarified, the request of one party to rule on marital fault gives rise to the power of the court to assess the fault of both parties, and such request for determination of fault is not a subjective right of one of the parties to the dispute to obtain a court ruling only on the fault of the other party. Raising this issue, the party only initiates a court ruling on fault based on the evidence gathered in the case, but cannot limit this ruling only to the fault of the opposing party[59]. Furthermore, in most cases where fault is claimed the court strives to find arguments which lead to the conclusion that both spouses did not put enough efforts to preserve the marriage and determines "joint fault" - fault of both spouses, since both have contributed to the profound and irreparable breakdown of the marital relations. Usually the arguments would be that it is clear from the evidence that the cause of the spouses' marriage disorder is complex and is due to their extremely aggravated family relationships, caused by different factors: estrangement and misunderstanding on important family matters, rude and conflicting treatment of one of the spouses towards the other, imposition of unilateral decisions (for instance to withdraw a loan with a mortgage on the family home), and established extramarital affair. Such cumulative circumstances give rise to the courts to consider that both spouses have "anti-marital behaviour" which has collectively caused an irreversible breakdown in their marital relationship.

59 Supreme Court of Cassation, Decision on Civil Case № 7400 on the inventory for 2015, http://www.vks.bg/pregled-akt?type=ot-spisak&id=E6CF8D7100D85D08C2257ED7002395A4

Subsequently, the joint fault is not influencing the calculation of the maintenance, if any, and the costs for the proceedings are ultimately borne by both spouses.

Furthermore, the Bulgarian law does not define the term "fault for the deep and irreparable breakdown of marriage". The courts perceive that concept as a set of the objective and subjective attitude of both spouses towards the matrimonial relationship and the fulfilment of the marital obligations entered into, some of which are the care of the spouses to each other, the maintenance of the family and their joint residence, etc. In order to avoid subjectivity, only actual conduct objectified to specific actions of each spouse should be assessed. The case law shows that all manifestations of the individual character and personality of the spouses are case-specific and cannot be brought under a common denominator. What is discussed and evaluated is therefore whether and to what extent each one of them violate the harmony in the family and negatively affect the relationship within it. That is, the same behaviour in some cases can lead to marital disorder, and in others not –according to the character, upbringing, global views of the spouses, their tolerance and their attitude and views on the essence of marriage.

The case law of the SCC is often referred to by the lower instances in this regard. As an example, in one recent judgment[60] the SCC of Bulgaria is called to examine the fault for a marital breakdown between elder spouses as various fault allegations are brought up. The SCC explores many aspects of their marital life and finds important that each spouse led a completely independent life in which the other spouse was not present. Both spouses were elderly, in poor health and needed each other's care and attention, which they failed to provide to each other, neglecting their marital obligations. At the same time, both have not made the necessary efforts to overcome the contradictions and problems in the family. Their passive behaviour and violations of the requirements for cohabitation, common household, respect, understanding and trust in the partner, have led to a situation where their marital relationship lack content that is due according to the law and morality. The

60 http://www.vks.bg/pregled-akt?type=ot-spisak&id=A8C744C557746099C2257921002E831B

marriage is therefore considered by the SCC formal and unnecessary and is terminated on a joint matrimonial fault. The SCC concluded that it is the prolonged ***de facto*** separation preceded by a broken personal relationship between them that has permanently destroyed the family community permanently and irreversibly.

As pointed above, under the Bulgarian family code, two issues are related to the "joint fault" outcome – the use of the family home, and the state fees for the court proceedings. As a consequence, in this case, the family home division is equal - each of the two spouses has the right to use one of the rooms independently, with shared use of the living room, kitchen and other service spaces. This outcome predefines the court fees as well, and each one of the parties should pay to the SCC the amount of BGN 25 for the termination of the marriage, and the other relevant costs as attorney's fees are borne by the parties as initially incurred.

District court Kyustendil also discusses in detail the notion of marital fault in one of its recent judgments[61]. The court holds that the legislature indeed does not define the concept of fault for the 'deep and irreparable disorder of marriage', but the jurisprudence has required it to be regarded by the court as a set of the objective and subjective attitude of both spouses towards the matrimonial relationship and the fulfilment of the marriage obligations entered into. In this case the wife was creating conditions for continuous conflicts in the marital relations between the spouses, and the husband subsequently cohabited with another woman from which he currently has a child. The court accepted that both parties, through their conduct, were aware that they were ruining the marital relationship and were reluctant to compromise and seek solutions, taking into account the needs and desires of each other. They have not made sufficient efforts to overcome the conflicts and to restore harmonious relations with each other. The behaviour of both spouses affected the normal course of the marriage and led to the impossibility of continuing the joint matrimonial life. The law obliges equally both spouses, by mutual understanding, common efforts and according to their capabilities, property and income, to ensure

61 http://kos-bg.eu/post/0063d813/31053013.htm

the well-being of the family, which in this case has not been done to the full extent of both, and therefore they both are responsible for the marital breakdown. The particular approach and argumentation in this court act is very typical and replicated in many other ones.

Regional court of Shumen in one of its judgments as first instance[62] also rules on the fault for the marital breakdown, providing detailed arguments in the same direction. In this case, fault allegations were brought up by the applicant and it was therefore necessary for the court to examine that question. On the basis of the factual situation established in the case and the conduct of the parties, the court found that "the specific causes and personal faults" for the irreparable disorder of matrimonial relations between the spouses were not established in a conflicting and unequivocal manner. The fact that the applicant left the family home, and his wife was evaluated as a behaviour that created prerequisites for estrangement of the wife, and she was found not to have put enough efforts to repair the relationship. The court held in this situation that both spouses contributed to the breakdown of the marital relationship – they (as in the previous judgment) have not made sufficient efforts to overcome the conflicts and restore harmonious relations with each other. The court found that both parties, through their conduct, were aware that they were ruining the marital relationship and therefore the fault for the marital breakdown is joint.

- United Kingdom (Ongoing)

The ongoing divorce law reform in the UK was introduced as a bill proposal in 2019 and the Divorce, Dissolution and Separation Act 2020 received Royal Assent on 25 June 2020. Under the current UK law, parties are unable to apply for a divorce or agree to divorce without making allegations about one party's conduct unless 2 years have elapsed since their separation, and as a consequence 3 out of 5 divorces are applied for on a fault basis. The intention of the reform, according to its explanatory notes, is the removal of legal requirements which do not serve both the State's and the divorcing couples' interests. Moreover, the reform aims to avoid further conflict

62 http://kos-bg.eu/post/0063d813/31053013.htm

and poorer outcomes for both the spouses and their children alike. The reform also introduces the option of joint application of divorce for when the cases are of mutual decision[63]. In addition to the introduction of joint application, the reform removes the possibility of contesting the decision to divorce. This is due to the fact that the application of divorce by irretrievable breakdown is to be taken as conclusive evidence for the termination of the marriage[64].

In October 2017, the report of a Nuffield Foundation funded research project recommended removing fault entirely from divorce law and replacing it with a notification system. The report concluded that it was time for the law to be reformed to address the mismatch between law and practice[65]. Advocates of this form of divorce speak of reducing the conflict which can be caused by allegations of fault. In some cases, the assertion of fault is considered to be a 'charade'[66]. The new reform essentially replaces the requirement to provide the evidence of a spouse's misconduct or separation facts with the requirement of irretrievable breakdown. This requirement of irretrievable breakdown may be for one or both spouses[67]. As it currently stands, in the UK, divorce can only be initiated by one party, and they must then present one ground of divorce, including adultery, behaviour and desertion, and time of separation[68]. The reform then removes this requirement altogether, and also provides for a minimum time of six months for divorce proceedings.

63 UK Ministry of Justice, 'Divorce, Dissolution and Separation Act 2020: Explanatory Notes' (2020) <https://www.legislation.gov.uk/ukpga/2020/11/pdfs/ukpgaen_20200011_en.pdf> accessed 9 November 2021

64 ibid.

65 Liz Trinder et al., 'Finding Fault? Divorce Law and Practice in England and Wales' (2017) <https://www.nuffieldfoundation.org/sites/default/files/files/Finding_Fault_full_report_v_FINAL(1).pdf#page=41> accessed 10 November 2021

66 Catherine Fairbarn, 'No-Fault Divorce' (2019) <https://researchbriefings.files.parliament.uk/documents/SN01409/SN01409.pdf> accessed 10 November 2021

67 Divorce, Dissolution and Separation Act 2020

68 UK Ministry of Justice, 'Divorce, Dissolution and Separation Act 2020: Explanatory Notes' (2020) <https://www.legislation.gov.uk/ukpga/2020/11/pdfs/ukpgaen_20200011_en.pdf> accessed 9 November 2021 para 5

▶ Switzerland (2000)

The concept of no-fault divorce was introduced in Switzerland in its reform adopted on 1 January 2000[69]. Within the Swiss family law, there are no specific grounds for divorce. Instead, a petition must be filed requesting for divorce, which does not need any reason. There are three types of petitions, namely: joint petitions, petitions after one spouse after living apart, and petition from one spouse because the mere continuation of the marriage is an unreasonable expectation. For the last sort of petition, the spouse must detail why it is not reasonable for them to remain in the marriage, which the court only allows due to serious reasons such as spousal abuse, disreputable or dishonourable moral conduct, or criminal activity.

The concept of equal fault in the Turkish Divorce System is inspired by the concept of equal fault from Swiss law. It must be noted that in general, Turkish Family Law was reshaped in 1972, adapted from the Swiss Civil Code[70]. The Swiss Civil Code kept up with regard to post-marital maintenance obligations, which led to the removal of fault in cases of divorce. The reforms of Swiss law in 1998, thus, abolished the subjective principle of fault regarding compensation for damages incurred due to the divorce (Article 151 aZGB). There was a switch from the 'fault' criterion to a 'need' criterion when it came to the compensation part of the divorce. A study claims that in comparison to Swiss judiciaries, Turkish judiciaries, even with the concept of 'equal fault' still eliminate the women's right to compensation[71].

▶ France (2017)

In 2017, an amendment in the French divorce system came into force to facilitate divorce by mutual consent. There are two specific terms, namely ***divorce par consentement mutuel*** and ***divorce par consentement mutuel par acte d'avocats.*** The first term designates

69 Thomson Reuters Practical Law, 'Family law in Switzerland: overview' (Thomson Reuters Practical Law, 1 November 2020) <https://uk.practicallaw.thomsonreuters.com/7-612-5665?transitionType=Default&contextData=(sc.Default)> accessed 16 December 2021

70 Esin Örüçu, 'Recent Developments in Turkish Family Law' [2004] Recht van de Islam 21, pp. 1-20

71 B Özlük and M Saral, "Concept of Fault, Post-Marital Maintenance Obligation and Discrimination against Women in the Turkish Judicial System" [2018] International Journal of Law, Policy and the Family 32, pp. 281-301

one of the possibilities of dissolution of marriage by mutual consent of the spouses. In addition, its concept comprises a new semantic feature, divorce requested by means of judicial process, since, in this case, the spouses must submit to the judge an agreement that regulates the consequences of their divorce (Article 230 - French Civil Code, 2016). Except for these modifications, the concept of the term ***divorce par consentement mutuel judiciaire*** continues to have the semantic features regarding the request and judgement conditions of that divorce provided for in articles 2, 7, 8, 9 and a of the law of 26 May 2004[72].

3.1.3. Fast-Track Divorce Proceedings

The rationale behind the adoption of fast-track divorces lies in the concept that the emphasis should be shifted from blame to resolution, and a simple and straightforward path should be offered to spouses which aim at amicable separation. For instance, the "Express Divorce" process was introduced in Spain in 2005[73]. It is a typical no-fault divorce, formally called ***'divorcio por mutuo acuerdo',*** and requires that both spouses agree to the divorce and, importantly, to all of the terms of the divorce. There must be agreement regarding such matters as custody of the children and visitation rights, use and enjoyment of the family home, and the distribution of matrimonial assets. If an agreement has been reached with no areas of dispute remaining, then the couple may apply to the court for a divorce via the fast-track process.

In Scotland, due to Brexit and as a result of legislation repealing Brussels II***bis***, the grounds for divorces and dissolutions changed in relation to the applications received by courts after the end of the transitional period. The Act of Sederunt 2021[74] which comes into force on 1 March 2021 makes changes to the court rules and prescribed application forms as a consequence of the UK leaving the EU, in particular ensuring the grounds of jurisdiction comply with the

72 Beatriz Curti-Contessoto and Isabelle Oliveira and Ieda Maria Alves, 'The Semantic and Lexical Evolution of "Divorce" throughout the History of French Legislation' (2020) 9 JLL 48

73 Domenech Abogados, 'Fast-track Divorce under Spanish Law' <https://www.legaladviceinspain.com/divorce_in_spain/fast-track-divorce-under-spanish-law.html> accessed 14 October 2021

74 Divorce, Dissolution and Separation Act 2020

current legislation[75]. Simplified divorce proceedings are introduced, provided that either party of the marriage or either civil partner is domiciled in Scotland on the date when the action is begun or was habitually resident in Scotland throughout the period of one year ending with that date.

The interplay between the domestic violence and divorce proceedings is as well on the EU agenda, introducing the principle that in cases of domestic abuse any potential delays in divorce proceedings must be avoided. Under German law, in principle, a "quick" divorce is not possible without a separation year in the case of the uncontested divorce or without a three-year separation period in the case of the disputed divorce. Only in exceptional cases an immediate divorce can take place without a separation phase, and the prerequisite for this is that the continuation of the marriage represents an unreasonable hardship for the applicant[76]. The family courts consider the domestic violence one of these exceptions and divorce without the required separation can be granted in cases of abuse between spouses[77].

Some US states allow as well for emergency expedited divorces in cases of domestic violence. An individual seeking an emergency expedited divorce should investigate the procedural requirements in their state, such as whether they may ask for the expedition in the initial divorce petition or must file a separate motion. Jurisdictions may also require certain evidence to justify the emergency. An expedited divorce may allow individuals experiencing domestic violence to completely remove themselves from their abuser much more quickly than most other divorce options[78].

75 Scottish Courts and Tribunals, 'Simplified Divorce and Simplified Dissolution of Civil Partnership Forms' <https://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms/simplified-divorce-and-simplified-dissolution-of-civil-partnership-forms> accessed 13 October 2021

76 Bürgerliches Gesetzbuch (BGB), § 1565 Scheitern der Ehe

77 https://www.scheidung.org/haertefallscheidung/

78 https://www.justia.com/family/divorce/special-circumstances-in-divorce/domestic-violence-victims-rights-and-information/domestic-violence-and-divorce/

3.1.4. Unilateral Type of Divorce

The non-consensual divorce is an implication of the liberation of the divorce laws worldwide, as liberal (unilateral/no-fault) divorce law seems to be more likely to induce divorce than a legislation requiring mutual consent.

Under unilateral divorce, a spouse seeking divorce is no longer reliant on the other's agreement. It exists as a general model in Europe and although not purely "by demand", in most of the countries if one of the spouses argues that the marriage has irretrievably broken down, the court will generally assume that that is the case, even if the other spouse disputes it[79]. Two major practices, directly linked to the effectiveness of the divorce procedure, should be explored here.

- Non-consensual divorce on the basis of separation. This type of divorce is envisaged in CEFL Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses. Principle 1:8 stipulates that divorce should be permitted without consent of one of the spouses if they have been factually separated for one year[80]. The rationale behind this principle is that the marital life should not be continued against the will of one of the spouses, and the separation serves as a guarantee that the marriage is without any possibility to be repaired.

In fifteen out of the twenty-two jurisdictions surveyed specific provision is made for non-consensual divorce to be obtained in whole or in part on the basis of separation. These are Austria, Belgium, the Czech Republic, Denmark, England and Wales, France, Germany, Greece, Ireland, Italy, Norway, Portugal, Scotland, Spain, and Switzerland (the majority of them require de facto separation, just like Türkiye)[81]. 5 years separation is one of five available grounds for divorce that spouses can show that marriage has irretrievably

79 European Judicial Network, 'Divorce and Legal Separation in the Netherlands' (11 December 2020) <https://e-justice.europa.eu/content_divorce-45-nl-en.do?member=1> accessed 14 October 2021

80 Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses (ceflonline.net)

81 Marianne Roth, 'Future Divorce Law-Two Types of Divorce' in Esrin Orucu and Jain Mari (eds) *Juxtaposing Legal Systems and the Principles of the European Family Law on Divorce and Maintenance* (Intersentia 2007) 53.

broken down in England or Wales. The consent of the other spouse is in this case not required (in case there is mutual consent the requirement for separation is 2 years). The legal requirements a petitioner for divorce or dissolution must meet is the fact of five years' separation to prove irretrievable breakdown of the marriage or civil partnership. Despite some additional procedural requirements, the separation remains crucial and in principle is enough in order divorce to be granted.

It should be noted that in some circumstances factual separation may not have been possible, such as it not being affordable to run two separate households. It is therefore not an absolute condition for the spouses to have lived separately in different dwellings, and conversely, living in separate dwellings does not mean that the marital life has ended[82].

- Shortening/Removing the period of separation in non-consensual divorce. To go one step further, particularly in those relationships in which there is no mutual consent for termination and consequently consensual divorce is not possible, a required period of separation might pose specific difficulties. Such an "on-hold" period becomes particularly damaging and creates danger in situations where there is risk of violence against the spouse or the children. In this case, the possibility to directly file for divorce appears to be crucial from the perspective that adequate protection should be guaranteed especially to women and children living in violence-fuelled environments. If this option is not available, the spouse would face two alternatives, both unfavourable and contributing to this high-conflict situation: to go to court and claim divorce on the basis of fault, in case it exists, which may involve a lengthy and expensive legal battle with the other partner, or to stop the marital life for the required separation period, and then to apply for divorce on the base of de facto separation.

82 Katharina Boele-Woelki, 'Common Core and Better Law in European Family Law' (2005) <https://assets.budh.nl/open_access/fenr/boeken/common_core_better_law.pdf> accessed 10 November 2021

However, in several European countries the spouses have to live apart for a certain period before they are allowed to divorce formally under the notion of non-consensual divorce. The period of separation can vary from one to five years. In Switzerland, spouses must have been living under different roofs for a period of two years before they are eligible to divorce. In Norway, the period of separation is one year, while in Ireland it's five years. Italy also imposes a compulsory trial period.

In the Netherlands, if the spouses are still living in the same house, they can submit a petition for divorce. Dutch divorce law is, therefore, more flexible than in many other (European) countries.

The reform in Spain introduced several important changes, and one of them is eliminating the mandatory 1-year legal separation period before divorce. Under the old regime, which was in place since 1981, a two-step process to deal with marital breakdown existed. The couple who wanted to dissolve the marriage generally had to resort to a period of separation before being able to file for divorce and once the petition for legal separation had been filed, at least 1 year had to pass before filing for divorce[83]. As a consequence of the relaxation of the requirements to obtain a divorce, there was a huge increase in the number of divorce proceedings petitioned. In the first year after the reform, the number of divorce petitions that entered into local courts increased by 170 percent.

3.1.5. Reflection Period

CEFL principles also recommend certain reflection period in case of consensual divorce, when the spouses have children under the age of 16[84]. It is clear that the rationale behind this reflection period is to prevent immature divorces and to regard the best interest of the minor children. The importance of the reflection period is

83 Pablo Brassiolo, 'Domestic Violence and Divorce Law When Divorce Threats Become Credible' (2014) <https://scioteca.caf.com/bitstream/handle/123456789/710/domestic-violence-divorce-threats-credible.pdf;jsessionid=B0B6BD104FF33D1657A594C3DC8A51E6?sequence=1> accessed 10 November 2021

84 Commission on European Family Law, 'Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses' <http://ceflonline.net/wp-content/uploads/Principles-English.pdf> accessed 9 November 2021

emphasised also by the approach taken from the French divorce reform by including a reconciliation period of 15 days even in cases of private divorce. The spouses are each assisted by a lawyer and take note of their agreement on the marriage breakdown, through an agreement. Each spouse has a period of reflection amounting to fifteen days before signing this agreement and cannot waive this period.

In the context of this recommendation report, which aims to offer solutions in order to improve the effectiveness of divorce system in Türkiye, we must note that despite the reflection period puts emphasis on the best interest of the children, born from the marriage, it is applicable with positive impact in systems where the consensual divorce is relatively simplified and does not pose significant burdens on the spouses.

3.1.6. One Maintenance Claim in All Types of Divorce

In fault-based divorces a question that often arises is whether that spouse's marital fault or misconduct is a factor in determining the maintenance. Despite this correlation still exists in many legal systems, already in 1989, the CoE Committee of Ministers underlined that in the assessment of contributions to be made by one party to the other party, account should not be taken of any fault of either party[85]. Since the maintenance is primarily an economic consideration based on the financial position of the parties during the marriage, marital fault or misconduct by either spouse should be considered irrelevant to it, even when the grounds for divorce may allege fault. The disconnection of the fault from the maintenance claim would emphasise that marriage is an economic partnership in which each spouse has an equal right to the benefits of the family income, regardless of who earns it. As alternatively suggested by the abovementioned Recommendation, however, legislation may provide the possibility that a contribution may be refused or reduced where the party seeking the contribution has been seriously at fault.

85 RECOMMENDATION No. R (89) 1 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON CONTRIBUTIONS FOLLOWING DIVORCE, Principle 5

Similarly, principle 2:1 CEFL establishes that maintenance between former spouses should be subject to the same rules regardless of the type of divorce, and it reflects the common core of European law[86]. The national reports drawn by CEFL experts showed that while in the past maintenance was only granted to the innocent spouse, the withdrawal of fault as a ground for divorce has meant that the majority of jurisdictions do not build upon a link between fault and maintenance anymore[87]. Portuguese law, for example, only establishes one maintenance claim regardless of the type of divorce. The same is true of Norway and Denmark, although these jurisdictions are also so-called pluralistic jurisdictions where several forms of divorce exist. In those jurisdictions where there is only one type of divorce there is as well only one post-divorce spousal maintenance regime.

Under Austrian law the fundamental idea behind the distribution of matrimonial property is the equitable division of the assets acquired during the marriage between the spouses. Fault is not a decisive criterion for the distribution of assets. Regarding the spousal maintenance, in case of a divorce where both spouses are equally at fault, spouses are not entitled to mutual maintenance, and in the event of a fault divorce, the spouse who the court found to be solely or primarily at fault in the breakdown of the marriage must pay maintenance to the other spouse under specific restrictive conditions[88].

3.1.7. Private (Non-Judicial) Divorce

There is an increasing trend in European countries to allow so-called "private" divorces - consensual divorce proceeding which is performed out of the judicial system and which usually has as a formal requirement to be carried out with the interference with a public authority, as a notary. Such dissolution of marriage out of the

86 Commission on European Family Law, 'Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses' <http://ceflonline.net/wp-content/uploads/Principles-English.pdf> accessed 9 November 2021

87 Katharina Boele-Woelki, 'Common Core and Better Law in European Family Law' (2005) <https://assets.budh.nl/open_access/fenr/boeken/common_core_better_law.pdf> accessed 10 November 2021

88 Family law in Austria: overview | Practical Law (thomsonreuters.com)

court, provided there is mutual consent between spouses, is being introduced in different European countries as a faster alternative to a judicial divorce. Several European countries have introduced it in their legal systems, including Estonia, Latvia, Slovenia, Spain, Portugal, and Romania[89]. This trend is mainly explained by the sometimes-long duration of court proceedings and the lack of need for a judicial decision in simple cases. According to the calculations of the Lithuanian Ministry of Justice, the exemption of district courts from some currently-heard cases, as proposed by amendments to the law, would reduce the workload of district courts in civil cases by almost 10%, as well as simplify the resolution of many family issues[90].

The new Family code of Slovenia, adopted in 2019, allows for non-judicial divorce and delegates the jurisdiction to the notaries. As a consequence, a change in existing divorce procedures is observed, and it is made possible to take the recent tendency to shift the handling of certain matters from the judicial systems into account, thereby relieving burdens of the judicial authorities[91].

In 2014 private divorce was introduced in Italy alongside judicial divorce. In Spain, divorce is possible through concordant declarations to the ***Secretario Judicial*** or through corresponding declarations in a public document drawn up by a notary.

3.1.8. Legislative Basis for Counteracting Gender Bias

An issue that is crucial in improving the effectiveness of fault-based divorce proceedings to prevent secondary trauma, and that deserves special attention, is counteracting gender bias. The specificity of the gender bias explains the reason why such bias may be detrimental to both genders. Therefore, instead of engaging in ideological "gender wars", gender discrimination affecting mothers and fathers needs to be simultaneously studied in order to understand and properly

89 Katazyna Bogdzevic et al., 'Non-Judicial Divorces and the Brussels IIbis Regulation: To Apply or Not Apply?' <https://repository.mruni.eu/handle/007/17527> accessed 10 November 2021

90 Malte Kramme, 'Private Divorce in Light of the Recast of the Brussels II*bis* Regulation' [2021] Zeitschrift für das Privatrecht der Europäischen Union 3/2021

91 New Family Code And The (De) Judicialization Of Divorce In Slovenia, Suzana Kraljic, University of Maribor, June 2020

counteract the underlying discrimination dynamics that create favourable conditions for high-conflict divorces.

In this regard, the international standards set by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter: Istanbul Convention) and the general recommendations to it should be discussed[92]. The UN Committee on the Elimination of Discrimination against Women has consistently concluded that the elimination of discrimination against women requires States parties to provide for substantive as well as formal equality. Formal equality may be achieved by adopting gender-neutral laws and policies, which on their face treat women and men equally. Substantive equality can be achieved only when the States parties examine the application and effects of laws and policies and ensure that they provide for equality in fact, accounting for women's disadvantage or exclusion.

As noted in the General recommendation on Article 16 of the Istanbul Convention[93] on Economic consequences of marriage, family relations and their dissolution, the economic consequences for women of marriage, divorce, separation and death have been of growing concern to the UN Committee on the Elimination of Discrimination against Women. Divorce effects, and gender differences therein, extend into various spheres, including changes in economic status, health and well-being, domestic arrangements, and social relationships. Research conducted in some countries has found that while men usually experience smaller, if not minimal, income losses after divorce and/or separation, many women experience a substantial decline in household income and increased dependence on social welfare where it is available.

In the recently adopted European Parliament resolution on the impact of intimate partner violence and custody rights on women

92 Türkiye notified the European Council its withdrawal from the convention in March this year (2021), but nonetheless the Istanbul Convention provides standards on the equality between women and men and promotes prevention of violence against women by encouraging mutual respect or non-violent conflict resolution and questioning gender stereotypes.

93 Committee on the Elimination of Discrimination against Women, 'General Recommendation on Article 16 of the CEDAW' [2013] C/GC/29

and children[94], emphasis is put on the key role of economic support for victims in helping them to achieve financial independence from their violent partner. The European Parliament stresses that the majority of women become poorer during separation and divorce procedures, and that some women give up asking for their fair share and what they are entitled to for fear of losing custody and calls therefore on the Member States to pay particular attention to the risk of the situation of victims of domestic violence becoming more precarious during the separation and divorce process.

It is however true that the family courts cannot alone ensure a fair divorce process for women and provide them services which will enable them efficient integration back into society and help them gain independence. Multidisciplinary approach is required on many different levels, with prevention programs, awareness raising campaigns, programs available to women who are now facing challenges during their divorce process and in their life after the divorce. At the beginning of the divorce process, they should be offered professional psychological support and counselling during and after the divorce process in order to avoid or decrease the secondary traumatization, to empower themselves, find motivation and resources to continue their life and create their own personal plan towards financial independence. Example for possible solutions could be as well prolongation of the domestic violence injunctions until the end of the divorce proceedings.

3.1.9. Limited Number of Appeals in Order to Avoid Delays

One particularly critical issue, despite being deeply dependent on the domestic procedural rules, is the number of appeals within the divorce proceedings, where every court act partially precludes different interim procedures or refuses claims of the parties is subject of interim appeal. Such an approach leads to an unlimited number of interim appeals, each one of which has procedural requirements and deadlines and should be abolished. It is believed that such abolition does not affect the right of either spouse to a fair trial under Article 6

94 European Parliament resolution of 6 October 2021 on the impact of intimate partner violence and custody rights on women and children, https://www.europarl.europa.eu/doceo/document/TA-9-2021-0406_EN.html

ECHR. The same is applicable to the lack of possibility for the Supreme court to get involved in the cases as a third instance. Both parties are provided two opportunities to have the cases heard in full (usually District Court and Court of Appeal). A system where the courts are centralised is believed to offset the reduction in instances, due to the increased specialisation of the judges dealing with divorce cases. In the same way, Brussels II*ter* in Recital 42 also requires Member States to consider limiting the number of appeals possible to one.

3.2. Procedural Best Practices: Legal Assistance and Support

Improving the legal assistance and support provided to the parties involved goes a long way in preventing secondary traumatization. For instance, families facing divorce or family violence-related issues face multiple issues and are best supported by specialist agencies that are staffed with social workers equipped with specialist knowledge and skills in handling divorce and family violence issues through institutional support.

3.2.1. Appropriate Organisation of the Judicial System

First and foremost, the obligation on member States of the Council of Europe to organise their judicial systems in such a way that they can respect the right to a hearing within a reasonable time has encouraged some States to undertake large-scale reform[95].

In the Czech Republic, similarly, a number of procedural changes were brought to the Code of Civil Procedure in 2000, 2005, 2008 and 2009, intended to diminish the workload of judges, to simplify procedures and to prevent delays. Some notable examples include replacement procedure for partial judges opposed to the rigid procedure for appointment of permanent judicial officials; reducing the possibility to appeal in all cases and allowing appeals only in relatively significant ones; the duty of judges to instruct the parties

95 European Commission for the Efficiency of Justice, 'Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights (2018) <https://rm.coe.int/cepej-2018-26-en-rapport-calvez-regis-en-length-of-court-proceedings-e/16808ffc7b> accessed 9 November 2021

on their procedural rights and obligations, and to encourage friendly settlements; the new rules established to ensure special diligence in family cases, the speedy decision-making in proceedings concerning children and the possibility of mediation and peaceful settlement of disputes between parents; a new system for serving court documents, relying on the "presumption of service" and the "preparatory hearing" intended to make the proceedings more concentrated, so that the court can decide the case in a single hearing[96].

As general trend in Europe regarding the effective organization of the courts, the digitalisation of the family justice systems should be mentioned as well. As noted by the Council of Europe's European Commission for the Efficiency of Justice ("CEPEJ") recent action plan on digitalisation for a better justice for 2022-2025[97], the transition from paper to digital court files is ongoing and necessary. Particularly with regard to the efficiency of the court systems, creating electronic tools would facilitate the work in the courts and make it possible to identify and limit potential backlogs, to respect reasonable timeframes and to better manage the workload of justice professionals.

On 8.12.2021 negotiators from the European Parliament reached a provisional agreement with the EU Council on the regulation to reform the management and financing of the e-CODEX system, marking a turning point in the process of digitalization of EU justice systems. The system will make cross-border judicial communication more efficient and courts more accessible, while increasing mutual trust between EU judicial authorities and citizen's trust in the Union. The e-CODEX system supports a number of cross-border electronic exchanges in the context of family law as iSupport[98] – tool, co-ordinated by the Permanent Bureau of the HCCH, which was born out of the ambition to develop an electronic case management and secure communication system for the cross-border recovery of maintenance obligations under the EU. Enhances fundamental rights like the right to effective access to justice, the right to a fair

96 Ibid.

97 https://rm.coe.int/cepej-2021-12-en-cepej-action-plan-2022-2025-digitalisation-justice/1680a4cf2c

98 https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support/isupport1

trial, the principle of non-discrimination and protection of personal data and privacy.

3.2.2. Training of Judges

Requiring training and specialisation of professionals involved and preparing guidelines and tools is generally important for developing judicial competence and improving the quality of justice and the performance of courts. In the recently published Collection of Opinions of the Consultative Council of European Judges (CCJE)[99], the "specialist judge" is defined as a judge who deals with limited areas of the law (e.g., criminal law, tax law, family law, economic and financial law, intellectual property law, competition law) or who deals with cases concerning particular factual situations in specific areas (e.g., those relating to social, economic or family law). Moreover, in the CCJE's questionnaire conducted prior to the abovementioned Opinion the family courts were identified as examples for judicial specialisation common in many European countries.

The training of judges, which deal with divorce proceedings regardless if specialised family law departments exist in the particular institution, should emphasise on several major points based on the specifics of these cases.

- *Acquisition of set of specific skills for child-friendly hearings* - in a recent study[100] children described judges' attitudes as rather formal and unfriendly. They complained about the lack of interaction with, and feedback from, judges; their poor interpersonal skills; and the impression that judges lacked interest in the hearings and were not listening to them. Some children even complained that professionals shouted at them, tried to influence them and threatened them during the hearings. As FRA noted in the abovementioned study, EU Member States should ensure that all professionals in contact with children receive training in child

99 https://rm.coe.int/ccje-opinions-compilation-1-23-en-final/1680a40c2e%0A%0A

100 European Union Agency for Fundamental Rights, 'Child-friendly justice: Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States' (2017) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-child-friendly-justice-children-s-perspective_en.pdf> accessed 10 November 2021

rights, child-friendly verbal and non-verbal communication and language, child development and child-related criminal and civil legislation. The same is underlined by the Practice guide for application of BrusselsIIbis Regulation, noting that whether the hearing of the child is carried out by a judge, an expert, social worker or other official, it is of the essence that that person receives adequate training, for instance how best to communicate with children. Whoever takes the views needs to be aware of the risk that parents seek to influence and put pressure on the child. When carried out properly, and with appropriate discretion, the hearing may enable the child to express his or her own wishes and to release him or her from a feeling of responsibility or guilt[101]. In this sense, it is even of greater importance that judges are trained to identify the varying needs of children in different age groups so that they can address these and communicate with children appropriately.

- *Gender awareness* - raising gender awareness of judges appears to be a central issue, as the perception of a particular person can have decisive influence on the outcome of the case. Judicial gender stereotyping occurs when judges reach a view on cases based on preconceived beliefs, specific attributes, characteristics or roles by reason only of a person's sex or gender. As pointed by the Office of the United Nations High Commissioner on Human Rights in its recent Workshop guide on gender stereotyping for the judiciary[102], among the concepts that should be discussed are gender stereotypes, gender stereotyping and judicial stereotyping, and their linkage to international human rights norms and standards, as well as the specific legal obligations of the judiciary, as a branch of the State, under international human rights law regarding the elimination of gender stereotypes. Examples of judicial stereotyping from decisions by international, regional and national courts or human rights mechanisms can be also provided.

101 Practice Guide for the application of the Brussels IIa Regulation, para 6.5

102 UN Office of the High Commissioner on Human Rights, 'Gender Stereotyping and the Judiciary' (2020) <https://www.ohchr.org/Documents/Publications/GenderStereotyping_EN.pdf> accessed 10 November 2021

In recent years in Germany[103], courses on the following subjects with gender implications have been offered: new developments in divorce law for family lawyers (numerous courses), violence in families, how to deal with victims of sexual violence at courts, international trafficking. However, the emphasis tends to be on legal rather than on gender questions.

- ***Understanding of the interplay between domestic violence and divorce*** - as a derivative of the previous point, a significant number of contentious divorce cases actually have a history of domestic violence, although this fact may not necessarily be shown or even known by the parties' attorneys. When they are not aware of a history of violence, or of the dynamics of domestic violence, it is also not uncommon for legal professionals (especially judges) to encourage the divorcing couple to reconcile or 'work out their differences' – often in order to 'keep the family together.' This practice can inadvertently increase the danger to the victim and/or her children of repeated or escalated violence[104].

3.2.3. Institutional Support

Considering the complexity of the process, a multi-disciplinary approach to handling divorce cases forms part of the work towards building a better and more consistent divorce process. Professional associations and other relevant actors should be encouraged to promote institutional cooperation and a multidisciplinary approach. Standard operating procedures among professionals should also be promoted to foster cooperation between the professionals involved, and the court must be empowered to order, where appropriate, expert assistance from social and psychological service professionals to be provided during the decision-making process to ensure that the best interests of the parties and the children involved are promoted.

103 Ulrike Schultz, 'Raising gender awareness of judges – elements for judicial education in Germany' <https://docs.google.com/document/d/1NJvO86KTfMZXEYmfgurFISPvGrwEJJXIkcszYstWRaY/edit#> accessed 10 November 2021

104 UN Office of the High Commissioner on Human Rights, 'Gender Stereotyping and the Judiciary' (2020) <https://www.ohchr.org/Documents/Publications/GenderStereotyping_EN.pdf> accessed 10 November 2021

Under the CoE's Guidelines on child-friendly justice, close cooperation between the professionals working with divorce cases is highly recommended[105]. Such close cooperation enables the sharing of best practices between the professionals such as the police, social workers, (child) psychologists, lawyers and judges. Creating a common assessment framework between the professionals working closely with children in divorce proceedings will help serve the best interests of the child as it could assist with further decision making regarding the handling of a certain case.

3.2.4. Special Scheme to Assist Unrepresented Litigants

If a person is unable to access or use their legal rights, then it is not possible for the courts to perform their role of administering justice effectively. It is clear that the legal aid systems prioritise the criminal cases and often litigants in divorce proceedings do not qualify for legal aid and yet cannot afford to engage lawyers, which leads to experiencing continuous difficulties in navigating the court system. They are usually unfamiliar with court procedures and processes and might be unaware of their right to access to legal aid both for the cases they are summoned or for the cases they initiate. It might be crucial for such unrepresented litigants to receive assistance or information regarding future procedures and potential outcomes prior to initiating court proceedings in order to assess the benefits and the costs of it. Often, these litigants experience frustration and difficulties as well navigating the court system, and especially in divorce proceedings the nature of the dispute adds to the difficulty of managing it without the assistance of lawyers or other third parties.

It is without doubt that self-represented litigants are held to the same standards as attorneys and representing themselves does not exempt these litigants from understanding and following the procedural rules. However, it remains crucial to ensure that the unrepresented litigant is aware of their principal right to legal representation and additionally to receive guidance to ensure that

105 Council of Europe, 'Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice' (2010) <https://rm.coe.int/16804b2cf3> accessed 10 November 2021

they understand the court process, its requirements, and what they must do for themselves to enable the court to perform its adjudication role fairly. In adversarial divorce proceedings, as the fault-based divorce, without this guidance from the court, there is a risk that the unrepresented litigant will be disadvantaged by a more experienced opponent. Therefore, such support tools serve threefold aim: to enable citizens to access and exercise their unmet legal rights in court, to support unrepresented or self-represented litigants in conducting fair hearings, and to explain the fundamentals about the particular procedure.

UK introduced in the previous decade "Procedural Advice Scheme for unrepresented litigants"[106]. It provides free legal advice on civil procedural matters for unrepresented litigants who commence or are parties to legal proceedings in a limited number of courts. There are certain cumulative requirements, namely this service is available for unrepresented litigants who have not been granted legal aid and have not engaged lawyers; and satisfy the Procedural Advice Scheme's income eligibility limit of not exceeding a specified monthly income. Some examples of the advice given are: explaining court rules and procedures, court documents, orders, trial procedures; how to commence a court action; how to make the various interlocutory applications; how to prepare court documents; how to prepare for a hearing; explaining the costs involved in proceedings and the taxation of costs; how to enforce a judgment or an order; and explaining the procedures for launching an appeal. It is worth noting that the brief pamphlet presenting this scheme is available as well in several ethnic minorities' languages, like Bengali, Hindi, Indonesian, Nepali, and Tagalog.

3.2.5. State-Subsidised Legal Aid in Divorce Proceedings

The right to legal aid is an integral part of human rights. However, in the area of family law funded programs to help people from disadvantaged backgrounds get access to legal representation

106 The Government of the Hong Kong Special Administrative Region, 'Legal Advice Scheme for Unrepresented Litigants on Civil Procedures' <https://www.admwing.gov.hk/eng/public_service/paso.html> accessed 10 November 2021

are usually not prioritised and normally will be subject to certain conditions[107].

The government of the Netherlands as well applies a special scheme for legal assistance in divorce cases by offering compensation for legal-aid counsellors who provide assistance to the parties[108]. One of the reasons for that is the requirement for the spouses to draw up a parenting plan, which became mandatory on 1 March 2009 for all divorce cases involving minors. A total of €11 million will therefore be made available in the period up to 2024 for an initiative for the benefit of legal assistance providers who are required to draw up a parenting plan as part of their work. Furthermore, €8 million will be made available for a similar initiative for four-party meetings between divorcing partners and their legal assistance providers.

In addition, the Legal Aid Board has prioritised the development of legal aid packages for divorce cases. In February 2022 the Board will launch experimental subsidy scheme for divorcing couples, with a view to offering tailor-made solutions for the litigants[109]. The aim is investigating what they need in terms of legal assistance for their (most often complex) divorce proceedings and what appropriate compensation can be granted to them in this regard.

In Croatia for parties in divorces, in which children are involved, regardless of if it is fault or non-fault divorce, legal aid is available on request, except in proceedings of consensual divorce in which the spouses do not have minor joint or adopted children or children over whom they exercise parental care after the age of majority[110].

107 Legal aid in the UK is available in funding cases in divorce, but only if the party is financially eligible and at risk of domestic abuse.

108 Government of the Netherlands, 'Additional Resources committed to legal aid in divorce cases' <https://www.government.nl/latest/news/2021/01/11/additional-resources-committed-to-legal-aid-in-divorce-cases> accessed 10 November 2021

109 Start subsidieregeling experiment echtscheiding Raad voor Rechtsbijstand (uitelkaar.nl)

110 Courts of the Republic of Croatia, 'Free Legal Aid' <https://sudovi.hr/en/citizens/free-legal-aid> accessed 14 October 2021

3.2.6. Strengthening Community Touchpoints Through Public Education

Public and accessible legal education is the true starting point for access to justice, helping the public and thereby those who could become self-represented litigants. The regulatory objective of increasing public understanding of the citizen's legal rights and duties is therefore important. This can be done by equipping the community with information touchpoints, such as websites containing relevant information for divorce proceedings in their respective jurisdiction.

In addition, accessibility of the information and procedures should be promoted. Persons and children with disabilities, physical and/or mental health issues, intellect, language, location, and other hindrances (the list aims to be non-exhaustive) should be able to access public legal education. In Canada, family justice services systems provide information, which is highly visible, easy to access and user-friendly on the divorce proceedings and possibility of mediation[111].

3.2.7. Introducing Effective Techniques to Ensure the Proper Hearing of the Child

As stated in General Comment No 12 to UNCRC[112]: ***"In cases of separation and divorce, the children of the relationship are unequivocally affected by decisions of the courts. Issues of maintenance for the child as well as custody and access are determined by the judge either at trial or through court-directed mediation. (...) For this reason, all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes. Some jurisdictions, either as a matter of policy or legislation, prefer to state an age at which the child is regarded as capable of expressing her or his own views."***

111 OECD, 'Equal Access to Justice' (2015) <https://www.oecd.org/gov/Equal-Access-Justice-Roundtable-background-note.pdf> accessed 10 November 2021

112 United Nations Committee on the Rights of the Child, 'General Comment No 12: The Right of the Child to be Heard (1 July 2009) UN Doc CRC/G/GC/12 (CRC GC 12)

This topic is continuously addressed in the EU, and the diverging rules regarding the hearing of the child was one of the six main shortcomings that led to recasting Brussels II*bis*. The results of the conducted research among the several EU Member States show that the judges hear children less often in civil (and family) court proceedings, compared to the criminal court proceedings. Brussels II*ter,* therefore, consecrates these rights, broadens and clarifies the obligation of Member States to give children the opportunity to be heard during proceedings that concern them.

Article 21 of Brussels II*ter* introduces an obligation for Member States to provide a subject child, who is capable of forming their own views, with a genuine and effective opportunity to express their views, either directly or through a representative or an appropriate body and this obligation extends to all proceedings concerned with matters of parental responsibility. Further, the courts in Member States are required to give due weight to the views of the child in accordance with their age and maturity.

It is clear that the EU acquis do not aim at harmonising the way in which children's views are ascertained across the EU. The new regulation leaves Member States able to implement the obligation according to domestic practices. Accordingly, the new regulation does not stipulate the way in which the child's view will be ascertained and instead recital 39 specifies that to whom and how the child's voice will be heard will be left to Member States to determine in accordance with national law and procedure. Therefore, it is open to individual Member States to determine whether a child's views are obtained by a judge or by a specially trained expert (such as a Children and Family Court Advisory and Support Services officer or a child psychologist). In this sense, several good practices can be identified. Express concern should be that children between 15 and 18 years tend to be provided much lower levels of protection and are sometimes considered as adults or left with an ambiguous status until they reach 18 years of age and urge States to ensure that equal standards of protection are provided to every child, regardless of their age[113].

113 CMW and CRC, Joint General Comment No. 4 and No. 23. Para. 3.

As an example, "blue rooms" are specially designed premises, usually within the building of the court, for questioning and hearing of children. The dedicated room has sound and video recorders to be used for children involved in legal proceedings, including child victims or witnesses of violence, and emphasises the best interests and rights of the children. The Blue Room provides a relaxed and predisposed environment for the child to conduct quality questioning by a specialist. In Poland, children's opinions vary depending on the location of the hearing. The Nobody's Children Foundation (Fundacja Dzieci Niczyje) in Poland has developed special 'blue rooms' to host hearings for victims and witnesses under 15 years of age. The use of these rooms is based on clear guidelines. The rooms have colourful walls, child-friendly furniture, toys, drawing materials and children's books. They are also furnished with one-way mirrors and recording equipment. The hearing is conducted by a judge, who conveys questions through a microphone to a psychologist or social worker, who then relays the questions to the child in an appropriate manner. The legal representatives of the accused, the prosecutor, a recording clerk and the parents of the child are among those who observe the hearing from behind the mirror. Children positively assess hearings in dedicated, child-friendly 'blue rooms'; they say that the judges are nice, friendly and understanding. They appreciate the informal atmosphere and opening warm-up conversation, being offered a break or a glass of water during the hearing and being given time to think about their answers and allowed to express their emotions, including by crying. In contrast, they assess hearings in court negatively; children find judges unfriendly, impolite, and sometimes even outright rude. In Bulgaria, hearings are usually conducted by judges in court. However, where 'blue rooms' are used, social workers question the children. Children who were heard in 'blue rooms' in Bulgaria evaluate social workers more positively than judges for their questioning[114].

In Bulgaria and Romania courts make use of so-called 'blue rooms' which are specially designed rooms for the questioning and hearing

114 European Union Agency for Fundamental Rights, 'Child-friendly justice: Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States' (2017) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-child-friendly-justice-children-s-perspective_en.pdf> accessed 10 November 2021

of children. There could be a team that prepares them for upcoming procedures, by informing the children about their rights and the process as a whole. Also, the specifically trained professionals will help reduce the psychological stress of the child before an interview with a judge. The preparation will also include an individual assessment of the child about his/her readiness to participate in legal proceedings.

Additionally, the Guidelines on child-friendly justice from the Council of Europe recommends that during court proceedings, that in all proceedings involving children, undue delay must be avoided. The urgency principles should be applied in proceedings involving children, and that speedy response must be provided in order to protect the best interests of the child, while respecting the rule of law. In family law cases, more specifically, courts are recommended to exercise exceptional diligence in order to avoid any risk of adverse consequences on the family relations[115]. Moreover, information should be adapted to the child's level of understanding and ability to communicate. Children should also be given all the necessary information on the proceedings, and that they must be duly reasoned within a language they can understand[116].

3.2.8. Expert Assistance

Professional accompaniment during hearings would give the confidence in vulnerable persons (especially children) that their interests are better protected, being accompanied and supported by a wide variety of social professionals, including social workers. Psychologists are reportedly present during hearings in several countries, including Bulgaria, Germany, Poland, Romania and Spain. Some children noted that they appreciate the support from other professionals, such as witness support staff in the United Kingdom (and in one case in Croatia). Forensic doctors and prosecutors as well can accompany the minors in cases where domestic violence is present. In France specifically in family hearings the judges may interview the children and hear the children alone, but also children can be accompanied by a lawyer or a person of their choice.

115 Ibid 30-31

116 Council of Europe, 'Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice' (2010) <https://rm.coe.int/16804b2cf3> accessed 10 November 2021 28-29

3.3 Procedural Best Practices: Making the Court System More Efficient

3.3.1. Possibility for Examination of the Divorce Claim and Ancillary Matters (Including Parental Responsibility and Financial Relief) Separately

The Court of Justice of the European Union notes that the above distinction between divorce and ancillary matters echoes the distinction made by the Brussels II*bis* Regulation between disputes concerning divorce, legal separation, and marriage annulment, on the one hand, and disputes regarding the attribution, exercise, delegation, and restriction or termination of parental responsibility, on the other[117]. Currently, this approach is applicable mainly to cross-border disputes, where the private international law on jurisdiction rules do not allow the same court to examine the divorce and the ancillary matters (as parental responsibility, alimony, etc.)

However, following the need to protect the interests of the child and to achieve procedural effectiveness, usually the divorce laws envisage combining all aspects of a divorce into one procedure, so custody of and visitation rights for any children, maintenance/ alimony and division of any marital property are all combined in one application. When the divorce cannot proceed without joint examination of ancillary matters due to the domestic law legislation, interim measures can temporarily distribute the parental responsibility and ease the tension between the parties until the final decision enters into force. In the Netherlands, preliminary provisions will have a hearing within three weeks after filing the petition, although this will also depend on the court's availability.

Another suggestion in the aforementioned direction could be the provisional divorce decree, or ***decree nisi.*** The concept stems from the common law system where divorce proceedings usually consist of two-tier processes. Such two-tier proceedings do not usually exist in civil law countries. For instance, in the Netherlands, divorce proceedings or court proceedings in general do not issue a ***decree nisi*** or ***decree absolute.***

117 Case C-184/14 A v B [2015] CJEU 479

The first tier, granting the ***decree nisi,*** is essentially a confirmation that the court sees a valid legal reason for the divorce. In the UK, the decree nisi is a provisional decree of divorce pronounced when the court is satisfied that a person has met the legal and procedural requirements to obtain a divorce. The procurement of the ***decree nisi*** does not, however, legally end a marriage.

About six weeks after the procurement of the ***decree nisi,*** the spouse(s) may obtain a ***decree absolute.*** This period can be reduced in certain exceptional circumstances. The ***decree absolute*** is the final decree which actually dissolves the marriage. In the latest UK law reform, the Lord Chancellor of the divorce proceedings may adjust the period between the two decrees, as long as the total period of the divorce proceedings does not exceed 26 weeks (6 months).

3.3.2. Appointment of Guardian *Ad Litem* for the Child

Presently, children do not have an independent voice before the court. Parents have their children's best interests at heart and aim to work out mutually agreed-upon arrangements for the sake of their children. However, there are situations where parents are caught up in their own issues and lose sight of what is best for the child's welfare. In this context, when presenting their cases, parents may not sufficiently bring the children's best interests to the court's attention. As a result, the court may not have the full facts regarding the child's interests when arriving at a decision. Guardian ***ad litem*** appointment is particularly helpful in high-conflict proceedings involving disputes over custody of and access to children or in highly acrimonious situations where there is a high possibility that the child would be adversely impacted and conflicted in sharing his/her views.

In the UK (England and Wales) dual representation by a guardian and legal representative to prepare and provide support throughout proceedings is ensured[118]. The advantage of this approach is twofold: the child receives both legal and personal assistance, which on one

118 European Union Agency for Fundamental Rights, 'Child-friendly justice: Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States' (2017) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-child-friendly-justice-children-s-perspective_en.pdf> accessed 10 November 2021

side decreases the potential traumatisation, and on the other side contributes to the effectiveness of the proceedings by offering swift and multidisciplinary intervention.

3.3.3. Differentiated Case Management

Implementing and monitoring a case management plan for the prompt and efficient scheduling and disposition of family law cases is undoubtedly of great assistance for the effectiveness of every divorce system. The "Differentiated Case Management Plan" is usually designed with the intent to intervene early in contested domestic cases such that parties are given multiple opportunities to avoid litigation. In addition, following the child-centred approach families are assessed for non-legal problems such as substance abuse or domestic violence, and referred to the appropriate resources. Finally, divorcing and separating parents are given skills to mitigate the effects of the family dissolution on their children. In sum, the goal and purpose of aggressive case management is to lessen the burden on the family docket by resolving cases via alternative means and avoiding future litigation by referring families to supportive community services.

Differentiated Case Management tracks are therefore used to differentiate standard and expedited family law matters as a way of establishing benchmarks and scheduling goals. Three "tracks" are commonly used:

- Expedited Track: case is uncontested, or issues are limited/simple. Cases with custody issues, unless abuse is alleged. Cases assigned to this track are scheduled in a way that helps the parties reach resolution within a certain limited period of time.

- Standard Track: issues are more involved or cases where abuse is alleged.

- Complex Track: issues are complex enough to require extended discovery and/or more extensive investigations/evaluations. At the Court's discretion, a case may be assigned to the "Complex

Track" if the issues presented require special attention or the additional time[119].

However, the court organisation should be cautious with the division of the cases, and to take into account that one of the most troubling phenomena in contemporary courtrooms is the minimization of domestic violence allegations in divorce proceedings. One solution could be in cases where the divorce proceeding is preceded by a domestic violence application, or where the two are simultaneously pending before the same court, both the cases to be assigned to the same chamber for examination. This practice, despite occasionally being questioned, allows for the court to gather general impressions and find the crossroads between the separate conflicts and aims at avoiding contradictory decisions.

3.3.4. Simplification of the Required Court Documents

Any court proceedings come off as complicated to the ordinary person, and therefore it is essential to simplify the access to and the required documents for divorce proceedings. This can be done by means of reducing the number of court documents to be filed. This way, documents are consolidated, and the information provided presently is placed in fewer documents. Court documents that serve no real purpose should be removed altogether. In addition, electronic services can be introduced, such as creating electronic court forms with guidance notes and placing them on the court's website. This facilitates greater and easier accessibility to court documents. In conjunction with this, easier online access to official documents such as birth and marriage certificates should be facilitated.

In Scotland, the website of the Scottish Courts and Tribunals has a dedicated section for accessing the legal requirements for the application of divorce[120]. This leads then to the automatic downloading of a single Word document containing all the needed

119 Circuit Court for Worcester County Family Support Services Division, 'Family Law Differentiated Case Management Plan' <https://mdcourts.gov/sites/default/files/import/circuit/worcester/pdfs/dcmplan.pdf> accessed 10 November 2021

120 Scottish Courts and Tribunals, 'Simplified Divorce and Simplified Dissolution of Civil Partnership Forms' <https://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms/simplified-divorce-and-simplified-dissolution-of-civil-partnership-forms> accessed 10 November 2021

forms and requirements. Moreover, there is also a link to an online guidance note which explains the divorce proceedings and what information is needed in the court documents[121].

3.3.5. Introducing a Pre-Filing Consultation Session

The objective of a pre-filing consultation session is to help parents understand the importance of co-parenting and the practical issues arising in a divorce that may have an impact on children, and helps the parties make an informal decision on the divorce. Moreover, it helps the parties realise that they must prioritise the welfare of their children before filing a divorce in court and provides insights on the adversarial tactics and inevitable escalation of a contested divorce. Usually this would be appropriate in cases where consensual divorce is not an option to give the divorcing parents a chance to consider their children's well-being early, before the divorce process formally starts.

In Croatia, spouses having a minor child together are obliged to attend mandatory counselling at the competent social welfare centre prior to the initiation of judicial divorce proceedings. Mandatory counselling is a form of aid provided to family members to reach an agreement on family matters, conducted by an expert team at the social welfare centre situated in the place of the child's residence or in the place of the parents' last common residence[122].

3.3.6. Court-Mandated Family Mediation

Mediation programs can be very beneficial to people who are divorcing as well as to those who have long been divorced but who find themselves in a dispute in their post-divorce relationship. Not only can it save money, but it promotes positive dispute resolution rather than adversarial procedures. This issue has been discussed

121 Scottish Courts and Tribunals, 'Simplified Divorce and Dissolution of Civil Partnership Guidance Notes' <https://www.scotcourts.gov.uk/rules-and-practice/guidance-notes/simplified-divorce-and-dissolution-of-civil-partnership-guidance-notes> accessed 10 November 2021

122 Natasa Lucic, 'Protection of the Right of the Child to be Heard in Divorce Proceedings – Harmonization of Croatian Law with European Legal Standards' <https://hrcak.srce.hr/ojs/plugins/generic/pdfJsViewer/pdf.js/web/viewer.html?file=https%3A%2F%2Fhrcak.srce.hr%2Fojs%2Findex.php%2Feclic%2Farticle%2Fdownload%2F6538%2F3448%2F> accessed 10 November 2021

also in the light of the new Brussels II*ter*, which again reiterates the general importance of alternative dispute resolution (ADR) in family cases. Invited by the court and, where appropriate, with the assistance of Central Authorities, the parties are encouraged to resort to mediation or other ADR methods as soon as possible and at any stage of the proceedings, "unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings".

Particularly in pending fault-based divorce disputes, parties should be referred to mediating services through a specialised mediation centre to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. Making attendance at mediation compulsory would encourage them to exercise their own authority over their situation whilst still retaining control of the decisions that ultimately need to be made. It has particular importance also in enforcement proceedings of divorce judgments in order to avoid force, coercion, or violence in the implementation of decisions, for example, visitation arrangements, and to avoid further traumatisation[123].

All Member States make provision for the possibility for courts to invite the parties to use mediation or at least to attend information sessions on mediation. Although still, it is not compulsory, in Czech Republic participation in information sessions on the use of mediation is obligatory, on a judge's initiative. In Norway, couples filing for a divorce with children under 16 must attempt mediation before being able to start a court procedure. The purpose is to help parents to reach an amicable agreement regarding where children should live, concerning the exercise of parental responsibilities and visiting rights, to ensure that the children's best interests are taken into account[124]. For family mediation to be successful, however, the main principles of mediation must be respected, in particular

123 Parliament Resolution (EU) 2016/2066 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (Mediation Directive) OJ C337/2

124 Council of Europe, 'Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice' (2010) <https://rm.coe.int/16804b2cf3> accessed 10 November 2021

the independence and impartiality of the mediator - who must be specially trained - and the confidentiality of the process[125].

In UK the Court has a duty to consider alternative dispute resolution and must consider, at every stage in proceedings, whether alternative dispute resolution is appropriate, and to stop the court proceedings directing the parties to the particular method of ADR[126.]

In assessing the appropriateness of a referral, the court shall ascertain whether there is a history of family abuse. This principle is reiterated not only in relation with the application, but already at the stage of drafting legislation which regulates domestic mediation procedures[127]. Despite the obvious caveat that the use of ADR in high-conflict family disputes can put the victim at a disadvantageous position due to fear, can prolong the proceedings and subject the victim of violence to additional abuse, the states should not exclude disputes of sensitive nature (such as family mediation in cases of domestic violence) in their entirety. It must be noted that Brussels IIter regulation explicitly mentions this issue in Recital 43, in line with the Guide to Good Practice Child Abduction Convention, which Part V explores mediation. Introduction of safeguards is recommended instead (via duties of a mediator or criteria based on which a judge can recommend or order parties to try mediation) to protect the weaker party. National legislators are also encouraged to introduce additional safeguards with regards to domestic violence cases (in France, for example, in case of domestic violence, mediation cannot be conducted unless the victim explicitly demands; if the domestic violence occurs again after the mediation was started, no further mediation sessions can be initiated)[128].

125 Parliamentary Assembly, 'Family Mediation and Equality of Sexes – Recommendation 1639' <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17171&lang=en> accessed 10 November 2021

126 The National Archives, 'The Family Procedure Rules 2010' <https://www.legislation.gov.uk/uksi/2010/2955/part/3/made> accessed 10 November 2021

127 European Commission for the Efficiency of Justice, 'European Handbook for Mediation Lawmaking' <https://rm.coe.int/cepej-2019-9-en-handbook/168094ef3c> accessed 10 November 2021

128 European Commission for the Efficiency of Justice, 'European Handbook for Mediation Lawmaking' <https://rm.coe.int/cepej-2019-9-en-handbook/168094ef3c> accessed 10 November 2021

At the stage of application, mere physical presence of a victim of domestic violence in a mediation session with her abuser could pose safety concerns about her wellbeing that may prevent the victim to fully participate in mediation or to attend mediation at all. Even where both parties agree to mediation, attention needs to be paid to specific circumstances such as possible indications of domestic violence. The very fact of a joint meeting between the parties in the course of a mediation session might put the physical or psychological integrity of one of the parties, and indeed that of the mediator, at risk[129]. The court (and subsequently at every stage of the process the mediator) should pay particular regard to whether violence has occurred in the past or may occur in the future between the parties and the effect this may have on the parties' bargaining positions, and should consider whether in these circumstances the mediation process is appropriate;[130] Long-distance mediation might also be of interest for cases where there are allegations of domestic violence and one of the parties indicates that, though wishing to mediate, the prospect of being in the same room with the other party would be very difficult[131]. As a rule, courts should employ a uniform model of screening in order to detect domestic violence, collect cross-referenceable data, and reduce arbitrary variation between local courts.

129 HccH, 'Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Abduction: Mediation' <https://assets.hcch.net/docs/d09b5e94-64b4-4afe-8ee1-ab97c98daa33.pdf> accessed 10 November 2021

130 Council of Europe Committee of Ministers, 'Recommendation No. R (98) 1 on Family Mediation' <https://rm.coe.int/rec-98-1e-on-family-mediation/1680a3b3ef> accessed 10 November 2021

131 HccH, 'Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Abduction: Mediation' <https://assets.hcch.net/docs/d09b5e94-64b4-4afe-8ee1-ab97c98daa33.pdf> accessed 10 November 2021 para 174.

Chapter 4

TURKISH DIVORCE SYSTEM

This chapter will be focusing on the Turkish divorce system, where analysis of the current normative framework, including existing legislation, regulations, legislative proposals, and case-flow practices is provided based on the results of the roundtable meetings conducted within the Project with stakeholders.

According to Turkish Civil Code (TCC), various aspects of divorce cases, such as custody arrangements, determination of spousal support and compensation claims, and establishment of a personal relationship with children cannot be dealt with separately from the divorce dispute and this may result in long-lasting procedures and several intervals between hearings. This may eventually traumatise the parties and the children, particularly if there is violence involved. Additionally, since the judicial interpretation of the Turkish Civil Code (TCC) excludes any possibility of divorce purely based on irreconcilable differences, every divorce must be fault-based, which contributes to further frustration and anger during the proceedings. Therefore, there is a need to assess possible options for improving divorce procedures in view of better protecting women and children, including but not limited by introducing fast-track and simplified procedures, providing options for reconciliation, when appropriate, and allocating separate places for family courts, where children can spend time before interviews and their nutrition and hygiene needs can be met.

Divorce grounds in Turkish Civil law can be divided into four general types, which are discussed below.

- Consensual divorce (Art. 166/3 TCC): Consensual divorce takes place, where both the spouses must agree upon an agreement in detail about divorce and its economic consequences and if there are any, on custodial issues. After the approval from the family

court judge, the agreement is referred to in the final judgment and divorce is awarded. One-year duration of the marriage is a precondition in that regard.

- Specific grounds for divorce relying on fault: Adultery (Art. 161), Attempt on life of one spouse by the other, cruelty or insult (Art. 162), Conviction of a spouse for a humiliating crime and leading a dishonourable life (Art. 163), Desertion (Art. 164), and Mental illness as a specific divorce ground but not levelling it as fault (Art. 165).

- Irretrievable breakdown of marriage (Art. 166/1, 2): Also called the "general ground for divorce", this ground for divorce allows for each spouse to file for divorce, if the marriage union has irretrievably broken down in case the continuation of common life cannot be expected. Aside from consensual divorce and scarce decisions on fault-based grounds for divorce mentioned above, irretrievable breakdown of marriage under Art. 166/1, 2 is the most commonly sought-after divorce ground. At first look this specific rule seems to refer to a divorce proceeding, free of fault[132]. As will be revisited hereafter, the implementation of this divorce ground is quite the opposite, always including determination of fault.

- Separation period of three years with additional conditions is also considered irretrievable breakdown of marriage as per Art. 166/4. If three years has elapsed following denial of a previously denied divorce request, and for whatever reason "joint life" could not have been formed, this constitutes a legal fiction/assumption thus constituting the fact that marriage has been irretrievably broken down. In that case, each of the spouses may request for divorce. And divorce cannot be contested as per Art. 166/2 by the other spouse.

It can be therefore concluded that Turkish divorce law offers a hybrid system, with the inclusion of both fault and no-fault divorce grounds, with the addition of the possibility of consensual divorce. This means that under Turkish divorce law, both consensual and non-consensual

132 Art 166/1: *"If the marriage union has irretrievably broken down in such a way that it cannot be expected of them to maintain the union, each spouse can file for divorce".*

divorce are possible; however, closer observation reveals that the "general ground for divorce" i.e., Art. 166/1 is ultimately not exempt from fault.

4.1. Fault Divorce in the Turkish Divorce System

4.1.1. Comparative Rectitude Implications

As mentioned above, Art. 166/1 gives the opportunity to each spouse to demand divorce under the principle of irretrievable breakdown of marriage in case the continuation of common life cannot be expected. Nevertheless, the second paragraph of the article deems this divorce ground dependant on fault inspection. As prescribed by Art. 166 TCC para 2 first indent, the spouse with the "lesser fault" is offered the procedural option to contest the divorce[133]. Although the second sentence follows with a number of exceptions to this objection option[134] recognition of a right to contest only to the spouse with the lesser fault compels the court to determine fault of the spouses.

The main legal consequence of this option, offered to the defendant spouse, is that in various respects it exposes the divorce proceedings to fault investigation. Following the sense of the provision, it appears that if there is such an objection, the court must first decide if the objection is raised from the "lesser faulted spouse". Furthermore, even if there is not such an objection, courts almost always tend to weigh the fault of the spouses, with the ratio of 'protecting the wife'. The explanation behind this general practice is that in most divorce cases if the faulty spouse is given the option to file and maintain a divorce award, the wife who is willing to maintain the marriage, would be stripped from the economic and sometimes social protection shields that the marriage offers. In other words,

133 Art. 166/2: *"In the cases specified in the above paragraph, the defendant has the right to object if the plaintiff is at more fault. However, if this objection amounts to an abuse of a right and there remains no interest worthy of protection for the defendant and the children in the continuation of the union, it can be ruled for divorce"*.

134 If the objection to divorce can be regarded under against the general good-will principle (i.e., abusing of a right), and the contesting spouse and the children will not benefit from sustaining the marriage, than divorce can be awarded, regardless of the objection of the spouse that is at lesser fault.

with the incentive of protecting the wife from an "easily" obtained divorce ruling by the demand of the "faultier" husband.

The outcome from implementing such a judicial approach is always applying the fault principle, regardless of the social and economic status of each of the spouses. This implementation, even if it may be logical in the majority of divorce cases in Türkiye, undermines the application of the 'irretrievable breakdown of marriage' principle and renders it inapplicable. Such practice, although based on good will, brings forth the actual problem of a divorce system – that it is purely based on fault.

The diminished effectiveness of the Turkish divorce system is a direct consequence of this practically purely fault-based approach. It should be noted that, even in case Art. 166/2 is revoked and/or its problematic implementation is improved, liberating the divorce proceedings from fault investigation would not be possible. As pointed out already, not only custody arrangements but especially the determination of spousal support and most specifically compensation claims (both monetary and non-monetary) are also dealt with within the divorce proceeding and all are almost completely dependent upon determining which spouse has lesser and which - greater fault. Therefore, in search for better legal schemes and better practices in order to minimize the damaging outcomes of the current Turkish current, not only the legal scheme of divorce grounds but also the continuous and direct link to fault should be evaluated with criticism.

4.1.2. Case-Flow Practices Related to the fault Determination

Aside from consensual divorce, the ground in the majority of the divorce cases is irretrievable breakdown of marriage. Specific grounds for divorce linked to fault (adultery, attempt against life, cruelty or serious insult, infamous crime or discountable conduct, wilful desertion, mental illness as a specific divorce ground but not being fault-based due to its nature) are rarely awarded. The numbers published by TUIK (Turkish Statistical Institute) for the year of 2020 are as follows:

Boşanma Nedeni - Cause of Divarce

Yıl Year	Evlilik Süresi (Yıl) Duracion of marriage	Toplam Total	Zina Adultery	Cana Kast ve Pek Fena Muamele Attern pt Against life, crueltyor serious insult	Cürüm ve Haysiyetsizlik Infamous crime or dishonorable conduct	Terk Willful desertion	Akıl Hastalığı Insanity	Geçimsizlik Incompatibility	Diğer Other	Bilinmeyen Unknown
2020	Toplam - Total	135 022	105	16	59	85	18	131 235	967	2 537

Among the specific fault grounds, it can be observed that adultery and desertion are the basis in the majority of the claims. An important fact about the case-flow practices is that almost most divorce grounds are demanded alternatively, where for example adultery is the main ground[135], and if it is not accepted, the alternative being the irretrievable breakdown of marriage (incompatibility). This practice strikes with its significance, since almost all divorce cases end up with the required inspection of fault of both spouses, which is the ultimate outcome of Art. 166 (irretrievable breakdown of marriage).

The fault determination therefore is usually inevitably prevalent and a dominant procedural issue. Given that mostly the first instance courts deal with fault allegations, they need to investigate and rule on the economic consequences of divorce (spousal support and damages claims) being dependent on finding the lesser faulty spouse. The natural outcome of this fault inspection is most definitely significant delay of the proceedings.

Following the ruling of the first instance court, almost in all cases the ruling is appealed and the higher courts – RCA (Regional Court of Appeals) and Court of Cassation - in the stated order evaluate the case. This re-evaluation also includes a new assessment of the fault distribution as decided by the first instance court, which naturally prolongs the process.

135 Article 236/2 regulates that, if divorce is caused by adultery or attempt against life, the property distribution amount of the spouse at fault can be reduced or revoked completely in light of the equity principle. This regulation is regarded to provoke the application of divorce by adultery and attempt against life and submit relevant allegations, and even to fabricate evidence. See, Saibe Oktay Özdemir, Türk Hukukunda Boşanma Sisteminde Revizyon İhtiyacı, PPIL, 2015, p. 34, 35, https://dergipark.org.tr/tr/download/article-file/410998.

Another significant issue is that the small number of applications based on grounds of adultery, attempt against life, cruelty or serious insult and infamous crime or dishonourable conduct and even insanity, can be misleading. It cannot be concluded that allegations on these issues are not included in the divorce proceedings as the statistics presented here most likely take into account only the final decree of divorce cases[136]. It is almost absolute that taking into account the alternative demand practice, divorce on both the grounds fault and irretrievable breakdown is almost always demanded simultaneously. Severe allegations of fault[137] exist in almost all divorce cases, with their negative impact on the children involved.

From a procedural point of view, aside from the shortcomings of fault determination, the divorce proceedings are handled with the application of the written trial procedures of the Turkish Code of Civil Procedure, which does not contain at present specific regulations with regards to divorce proceedings. A number of pitfalls were discussed that can be derived from the mentioned Code, which will be explicitly mentioned infra. In general, it can be stated that the Code of Civil Procedure, with its strict written trial process rules and lack of compatible rules to the distinctive needs of divorce proceedings is also one of the main reasons of both prolonging the process and other pitfalls with traumatizing effects to the spouses and the children.

4.2. Particular Pitfalls

In this section, the outcomes of the discussions on the effectiveness of divorce proceedings conducted on 13th to 14th of October and 22nd of November will be shortly summarized and discussed. Particularly, the problems and proposed solutions in ensuring the effectiveness of Turkish divorce proceedings and application of the procedures without causing secondary trauma on the spouses and children should be analysed.

136 Oktay Özdemir, p. 34, fn. 12.

137 Which are deemed to amount to violation of personality rights, see, Oktay Özdemir, p. 34.

The conducted meetings showed that the main issues to be addressed in the family courts for strengthening its effectiveness and the protection of the rights of vulnerable groups are delays caused by both the law and the implementation of courts, sporadic specialisation, and lack of fast-track procedures for certain types of cases. Furthermore, improving practices relating to the protection of women's access to family court trials, child-friendly justice, and mediation deserve closer look.

As a major issue, the length of the divorce process (trial procedures, joint review of the claims other than the divorce, prolongation caused by court's workload and case-flow management, attorneys, and parties, fault-based divorce) and its reflections on the parties and children in the divorce proceedings will be addressed first.

The following problems in implementation of divorce procedures (in context of confidentiality, approach, and behaviours of court personnel, testimony, and statements of the children) and their effect in causing secondary trauma will be also examined.

4.2.1. Length of the Divorce Process

The excessive length of the divorce proceedings is the primary problem, and it introduces further complications both for the parties and the children during the process.

The unwanted ultimate effects of the length of the divorce proceedings on the parties and the children can be divided into various subcategories, some of which are:

i. Increase of domestic violence

ii. Complicating the divorce proceeding and prolonging its outcome causes the victim spouse's dependency to the relationship

iii. Never-ending reciprocal allegations of fault by the parties

iv. Polarization of the spouses, which are also parents of the child that should be brought up in a most possible peaceful relation between parents

v. Prolonging the possibility for the parties involved for establishing and maintaining life after divorce.

To demonstrate the main reasons for these effects, the first and foremost one in the Turkish divorce system and its current state is the sole dependency on fault. It was discussed during the roundtable meetings that the existing problems essentially originate from the fault principle and its existence in both the divorce grounds and the economic consequences of divorce. It was the general understanding during the roundtable meetings that these problems can be overridden by abandoning the fault-based grounds for divorce, or at least legislating a simple (irretrievable breakdown of marriage) ground for divorce and maintaining its appropriate implementation by the courts free of fault. This also entails the consequent disconnection of the fault element from the economic consequences of divorce, i.e., spousal support and damages compensation claims.

The challenging issue discussed at the meetings in this regard is how to formulate an effective system of spousal support and damages compensation claim free of fault allegations. Under Turkish law, although not stated explicitly neither by the doctrine nor by the judiciary, the spousal support is supported by monetary damages claims. The result is that the spouse with "more fault" is required to pay an extra amount, which by its social nature actually aims to remedy the remaining economic inequality. Thereby, abolishing such damages claims leaves the beneficiary spouse who's at lesser fault, this being most likely the wife who has no other means of support and/or an education/job, dependent upon a small amount of spousal support. In sum, freeing the divorce grounds system of fault and from damages claims might have the reverse effect by introducing unwanted economical dependency (which is usually a very low amount).

The secondary factor prolonging divorce proceedings is the current Code of Civil Procedure of Türkiye, and its lack of specific provisions that satisfy the specific needs of divorce proceedings. Many solutions to specific problems can be proposed here - overall, legislating a specific Code of Procedure for Family Courts should ease most of the procedural issues. To specify the procedural problems and the root

causes based on the discussion in the roundtable meetings, lengthy divorce procedures are derived from:

i. Proof of fault
ii. Joint review of financial claims and custody with the divorce
iii. Written trial procedures of the Civil Procedure Code
iv. Lack of fast-track divorce procedures for specific cases (i.e., cases with domestic violence elements)
v. Court's (and of appellate court's) workload and lack of effective and consolidated case-flow management

These problems can be identified to stem from two root causes: substantive legal issues – mainly the fault principle, and procedure law issues.

4.2.2. Problems and Their Root Causes Derived From the Fault Principle

Implementation of the Code Numbered 6284 on the Protection of Family and Prevention of Violence Against Women

One of the central issues relating to the implementation of the fault principle is the abusive interpretation of the Code numbered 6284 on the Protection of Family and Prevention of Violence against Women by the spouses and/or their lawyers. Anticipating that a restraining order will eventually be used as evidence in the divorce case, false allegations are frequently raised. Two consequences can be mentioned here – first, the misuse of the mentioned Code not only slanders its integrity but also soils its perception by the public opinion which in time can have dire effects (the similar process occurred during the discussion about the Istanbul Convention). Second, since the protection measure that is most often met in a restraining order is the removal of the spouse/father from the family home, in frivolous use of this option, the result would be traumatizing the children.

Evidence Fabrication and Illegal Evidence

As mentioned in the above paragraphs, to prove adultery, evidence fabrication and illegal obtaining of evidence is frequently used. Some lawyers collaborate with detectives, and even offer their clients the use of spy software to obtain evidence. The Constitutional Court ruled several times with regards to illegally obtained evidence[138] and the impropriety of such actions must be therefore underlined[139].

Effects of Criminal Cases in Determining the Fault

The effect of related judgments in criminal cases is also problematic. Although Article 74(1) of the Turkish Code of Obligations regulates the impartiality of the civil court judge in determining fault from criminal court decisions on acquittal, the implementation by is diverse. In Court of Cassation rulings, it is accepted that the existence or non-existence of an incident cannot be re-evaluated after the ruling of a criminal court[140]. In the mentioned case, the criminal court acquitted the husband in regard to his alleged violent act, and Court of Cassation subsequently ruled that this action could not be regarded as faulty in the divorce proceedings. In another ruling, Court of Cassation considered insult incident even though there was an acquittal decision due to procedural issues[141]. The general principle therefore should be that the family court judge's discretion on fault evaluation and the unique rules of criminal law should not be entangled, and harmonious interpretation should be sought in order to achieve fairness.

Another issue related to existing criminal proceedings between the same parties, usually following domestic violence acts, is the

138 2018/30296 E., 07.09.2021; 2014/2704 E., 16.11.2016; 2012/1146 E., 31.12.2014; These rulings demonstrate, although first instance courts and higher courts do not allow submission of illegally obtained evidence, still the practice and applications to include such evidences subsist.

139 As discussed in the case of M.P. v. Portugal, App No 27516/14, ECtHR – 7 September 2021. With regard to the legal system, where the way evidences are obtained (in this case accessing the content of letters or telecommunications without the consent of the correspondents and disclosing the content thus obtained) are punishable under criminal law, the interference in private life resulting from the disclosure of such information has to be limited, so far as possible, to what was strictly necessary.

140 Court of Cassation 2. HD., 25.06.2018, 2016/17962 E., 2018/7972 K., (lexpera.com.tr).

141 Court of Cassation 2. HD., 07.02.2019., 2018/2350 E., 2019/704 K., (lexpera.com.tr).

withdrawal of the criminal complaint by one of the spouses. Court of Cassation and the doctrine does not ipso facto accept the withdrawal as intention of forgiveness/mercy, and this constitutes another problematic issue regarding fault evaluation that will be discussed ***infra*** shortly[142].

Interpretation of Forgiveness by One Party

Regarding compensation claims in divorce, overall, the distribution of fault and the phenomenon of mercy are frequently addressed. If an attitude that is claimed to be faulty is forgiven by the spouse retroactively, the said attitude is not taken into account when evaluating the faulty behaviour. In the judgments of Court of Cassation "faulty behaviour is forgiven or at least tolerated" is a phrase that is frequently used in a standard way. It is contrary to the law to take such a declaration of intent as the basis of the decision unless it is explicitly presented before the court. It is clear that an inherent declaration of intent as the act of mercy being taken as the basis in evaluation of fault is not compatible with law while there is an ongoing divorce lawsuit that is not renounced. In the judgments, the spouses "seemingly" making–up at certain times, living together or the mere fact that they are not divorced are accepted as acts of mercy. Even physical violence can be subject to said rulings of mercy and not accounted for in the fault distribution if divorce is not

142 Gençcan, s. 643, 644; Erdem, s. 109, dn. 185; Badur/Ertem, s. 108; Regarding adultery committed by the spouse, within the scope of article 444 of the previous Penal Code, the spouse without fault renouncing the complaint he/she lodged cannot be accepted as a will of mercy under the TCC and thus the right to file a divorce lawsuit continues to exist and about this issue according to Velidedeoğlu, p. 189; "the woman renouncing the complaint in a criminal action is aimed at saving the man from the punishment and it doesn't mean that the man is forgiven and in order for the act of mercy to be accepted, there must be an explicit declaration of intent or at least an actual attitude or behaviour attesting to the act of mercy. In addition, the person asserting the phenomenon of mercy must prove it through concrete evidence", Yarg 2. HD., 27.02.2018, 2018/1054 E., 2018/2622 K., (lexpera.com.tr).

filed shortly after the violent act[143]. Although the case law is diverse, withdrawal of divorce application is also considered as of the intent of mercy.

Secondary problem is that after the existence of the act of mercy is acknowledged, all the other incidents that happened before the said act that could constitute fault are not taken into account in evaluation of the faulty behaviour, which leads to unfair determination of fault. For example, in a case where it is decided that there is no need for penal proceedings due to the fact that the parties reconciled after the mother abused the child, the marital union continued and as such acts are considered forgiven, they cannot be levelled at the wife's fault[144]. In another case, the woman, plaintiff in a divorce case, returned to the matrimonial home after her husband subjected her to domestic violence. Returning home was accepted as an act of mercy and it was ruled that it was not possible to take the said violent incident into account in evaluation of faulty behaviour[145].

There is no legal regulation fostering this practice. Court of Cassation and the local courts might have developed such an approach in order to expedite and clarify the process due to the incomprehensive structure of the evaluation of fault. However, the consequences of this problem might be severe. It must be kept in mind that in many cases the wife is not filing a divorce lawsuit right after going through such incidents purely due to economic challenges and the fact that she tries to protect the well-being of her children. In such circumstances, it is clear that the free will which must be a precondition of the act of mercy does not exist.

143 Court of Cassation 2. HD., 01.06.2016, 2015/18546 E., 2016/10826 K., (lexpera.com.tr); Court of Cassation 2. HD., 01.06.2016, 2015/18583 E., 2016/10785 K., (lexpera.com.tr); Samsun RCA, 4. HD., 06.03.2020, 2019/3113 E., 2020/801 K., (lexpera.com.tr); Bursa RCA, 2. HD., 26.11.2020, 2019/821 E., 2020/1552 K., (lexpera.com.tr); Yet in a recent ruling of Court of Cassation, the court ruled that since physical and verbal violence was not a one-time event and was continuous, continuing to live in the same house cannot be interpreted as mercy and thus these acts can be included in fault distribution evaluation. See, Court of Cassation 2. HD., 22.06.2021, 2021/3914 E., 2021/5175 K., (lexpera.com.tr). Nevertheless, the visibility of physical violence only when its continuous is not in line with the general principles of the Code numbered 6284 on Protection of Family and Prevention of Violence against Women and the Istanbul Convention.

144 Court of Cassation 2. HD., 27.02.2020., 2019/8588 E., 2020/1636 K., (lexpera.com.tr).

145 The Court of Cassation Assembly of Civil Chambers (YHGK), 05.12.2019, 2019/106 E., 2019/1293 K., (lexpera.com.tr); Similarly see, YHGK, 23.01.2020, 2017/2065 E, 2020/46 K., (lexpera.com.tr).

To mitigate the risks, related to the unclear application of the act of mercy principle, it can be proposed that although there are decisions with reasonable solutions within the framework of individual cases, due to its conflicting structure and uniformity it should not be taken into account in evaluation of fault as long as the declaration of intent is not clear in terms of act of mercy.

Another pitfall derived from legislation is the lapse of right to file for divorce in cases of forgiving the spouse after his/her adultery, and attempt on life. Both Art. 161/3 and Art. 162/3 state that, the forgiving spouse does not have the right to sue. These regulations might be the underlying starting point of the rulings of Court of Cassation regarding forgiveness in divorce cases that rely on irretrievable breakdown of marriage, under which, such loss of right to sue due to forgiveness is not legislated. Furthermore, the lapse of the right to sue for divorce as per adultery and attempt to life grounds after the passing of 6 months or 5 years (Art. 161/2; Art. 162/2) are also problematic. After the prescribed period has elapsed, i.e., 6 months after learning about the incident (either adultery or attempt to life) or the general time limit of 5 years beginning from the date of the incident (either adultery or attempt to life), the law prevents applying for divorce according to these specific fault grounds, divorce can still be demanded under the irretrievable breakdown ground (Art. 166/1) and adultery and attempt to life can be regarded in fault evaluation. Bearing in mind the diverse interpretation of forgiveness as put forth in the previous paragraph, in order to prevent the likelihood of interpretation of the act of not filing for divorce in the short period of time prescribed by law, i.e., 6 months, as forgiveness by courts, time limit that is regulated under Art. 162/2 should be re-evaluated in light of need for revision.

Rulings on the Fault Distributions

In regard to the "equal fault" rulings, TCC Art. 184 regulates partly the rules of procedure on divorce. The provision suggests judicial discretion of the family court judge (Art. 184/b.1) and their freedom to evaluate the evidence (Art. 184/b.4). Broad interpretation of these powers may result in problems with fault inspection when the spouses have clearly stated their willingness to divorce. The main problematic

outcome in line with fault inspection and the judge's discretion is the frequent use of the concept of "equal fault". First instance judges, in the effort to pronounce divorce find themselves in a dead-lock in determining the "faultier" spouse and rule for equal fault of the spouses in order to refrain from the problematic fault determination issue. Application of "equal fault" causes unjust rulings at times and it can be argued that rulings involving this concept mostly affect women[146]. The root cause of this problematic implementation is again the compulsory nature of the fault principle and currently it is almost impossible to expect judges to interpret the law consistently. This may seem as an easy way out of the fault predicament, but then Court of Cassation overturns such local court rulings and demands explanation of the fault distribution, which inevitably prolongs the proceedings[147]. Still at times Court of Cassation also uses this exit strategy as well, with the justification that even if fault distribution is not presented, it was understood that the spouses do not want to stay in marital relationship and thus it would be unjust to force them to remain married; then without fault evaluation rules for divorce[148].

Second problem arising from "equal fault" rulings is the unjust outcome of not having a proper distribution of fault, which also means denial of compensation for damages. In a case where the husband did not provide housing, prevented the wife to connect with her family, did not provide economic support, and showed violent behaviour, (i.e. physical violence) and in return the woman was in breach of her "fidelity obligation", the court ruled for equal fault[149]. Similarly, husband physically abusing the wife v. the wife leading an economically frivolous lifestyle, not wanting the husband's family in the house and calling the husband "stupid" in public was regarded as equal fault[150]. As can be seen from these examples, even domestic violence can be considered non-existent[151].

146 Özlük/Saral, s. 287, 289.

147 Court of Cassation 2. HD., 04.03.2019, 2018/3222 E., 2019/2070 K., (lexpera.com.tr).

148 Court of Cassation 2. HD., 04.03.2019, 2018/3222 E., 2019/2070 K., (lexpera.com.tr).

149 Court of Cassation 2. HD., 04.11.2020, 2020/3210 E., 2020/5405 K., (lexpera.com.tr).

150 Court of Cassation 2. HD., 03.12.2019, 2019/4319 E., 2019/11919 K., Local court ruling took into account the disagreements between spouses since the day they married and the will of both spouses to divorce and reasoned that at this point irretrievable breakdown had occurred.

151 Please see fn. 125-128.

Even though both TCC and the Constitution prescribes gender equality, judicial discrimination can be observed in divorce proceedings. The positioning of infidelity versus domestic violence, even if unintended, may be interpreted as gender bias against women and confirms the social norms on gender discrimination[152].

For instance, in a case where the husband is violent against both the wife and the child, and the wife in return is unfaithful (not described how), woman is found at more fault[153]. In another case, the wife has been unfaithful by engaging into relationship (not specified if sexual or not) with more than one man, the husband is violent against the wife and "performs ill-suited behaviour that is not in line with 'father-daughter' relationship against the child", the woman is again found at more fault[154].

In a Court of Cassation's Assembly of Civil Chambers ruling on violence vs. trust shaking behaviour the court ruled that the husband who executed physical violence against the wife that was treatable with a minor medical intervention was at lesser fault. During the criminal proceedings on the act of violence, the criminal court deliberated unjust provocation by the wife and ruled for a reduced sentencing. In line with the "unjust provocation" justification of the criminal court, Court of Cassation held that the wife's trust shaking behaviour was behind the husband's one time committed act of physical violence, causing sorrow and rage on the husband that led to the act of violence[155].

In cases where the husband has been violent against his wife (being convicted by the criminal court for domestic violence acts), and in

152 Özlük/Saral, s. 287, 289; For the evaluation of Yargıtay rulings on adultery and its elective gender-biased implementation and the associated description of "judicial violence", see, Rabia Sağlam, Zinanın Hukuk-İçi ve Hukuk-Dışı Soykütüğü, İnÜHFD, 2020, p. 296, https://dergipark.org.tr/tr/download/article-file/1147299.

153 YHGK, 04.07.2019, 2017/2417 E., 2019/871 K., (lexpera.com.tr).

154 Court of Cassation 2. HD., 17.06.2019, 2019/3825 E., 2019/7270 K., (lexpera.com.tr).

155 YHGK, 24.02.2016 T., 2014/813 E., 2016/157 K., (lexpera.com.tr). The "trust shaking" fault-related behaviour of the woman entailed engaging in communication with another man on her Facebook account, intimate photo with that said man, long and frequent phone calls with that man during night-time with another phone number. Although during deliberations it was argued that, zero tolerance to violence was paramount and ruling for non-monetary damages in favour of a violent husband would violate this rule; the ruling was justified with the application of the rule that regulates damages claims in divorce and its direct line with the reasons that led to divorce.

return the wife performed acts that shake trust and infidelity, the Court have found equal fault[156]. The aforementioned "trust shaking acts" concept is fully developed by the courts in the case law. Mostly lacking the details of the said acts, it can be deduced from the rulings that since infidelity in its own is almost impossible to prove, acts that do not amount to the breach of the duty of fidelity are included in this vague concept. An example from the case law could be that the husband's phone records show calls with a specific number on different times of the day and the husband lacks proper explanation about the calls[157]. The ambiguity of the concept, and its common use by the courts hinders legal certainty. This concept is one of particular examples for Court of Cassation's long time case law practices on divorce cases, where even though an effective system on its own has been established by honourable judges of Court of Cassation based on judicial discretion power, it has at times pitfalls and can sometimes be unsatisfactory to the current state of the divorce problems.

As a conclusion, the tolerance for acts regarding the duty of faithfulness differs, depending if these acts have been committed by the wife or by the husband. Aside from the obvious breach of the equality principle, general positioning of the court practices acts as an intermediary for domestic violence frenzy, which is the current situation in Türkiye at the moment.

In the presence of so-called "namus" - chastity related honour, domestic violence still does not gain its deserved importance. In a case where the wife applies domestic violence to her husband with the help of her daughter, and the husband then accuses both his wife and his daughter that they conjugate with other men, the court ruled that the husband was at more fault due to his statements against honour and integrity[158]. In other words, the court held the accusations of dishonourable behaviour as faultier behaviour than the use of violence.

156 Court of Cassation 2. HD., 20.02.2020, 2019/8028 E., 2020/1364 K., (lexpera.com.tr).

157 Court of Cassation 2. HD., 27.01.2020, 2019/6055 E., 2020/378 K., (lexpera.com.tr).

158 Court of Cassation 2. HD., 11.02.2019, 2017/1304 E., 2019/810 K., (lexpera.com.tr).

The inability to perform sexual acts, even though regarded as fault regarding both spouses, at times demonstrates an easy-going approach in favour of the male spouse. In a case where the husband stayed silent to his family's interference and could not perform coitus, and in turn the wife insulted the husband and neglected the household chores, Court of Cassation ruled for equal fault[159]. In a similar case, where the wife insults the husband and the husband cannot perform coitus, the high court again rules for equal fault[160]. A related issue is the fault distribution in favour of the wife even though both spouses without any physical impediments fail to perform coitus. As stated in several Court of Cassation rulings dissenting opinions[161], leaving the burden of the act on the husband in fault determination allows for the dominant positioning of the male, determining gender roles that should be avoided by the judiciary.

The implementation about the time limit of the fidelity duty is also conflicting. If acts of infidelity that occur after filing divorce are taken into account in fault evaluation, the first negative outcome that follows would be prolonging of the proceedings, given that infidelity allegations can even be introduced even before the higher court instances. An associated unwanted outcome of permitting acts of infidelity to be admitted in the divorce proceedings and relating fault to these acts that occurred after the divorce application, would be to expect from parties to refrain from forming emotional and physical ties to other people until the divorce ruling is final. Taking into account the duration of these proceedings, such an expectation would be a clear violation of personality rights of the parties.

Second, taking into account facts that occur after filing for a case is against the general rules of procedure law. This rule of general procedure, except for infidelity is almost always applied properly, sometimes even when domestic violence takes place after filing for divorce, i.e., during the prolonged divorce proceedings. Arguably if

159 Court of Cassation 2. HD., 06.02.2020, 2019/7520 E., 2020/844 K., (lexpera.com.tr).

160 Court of Cassation 2. HD., 03.02.2020, 2019/7274 E., 2020/622 K., (lexpera.com.tr).

161 Court of Cassation 2. HD., 04.10.2012, 2012/3919 E., 2012/23549 K., (lexpera.com.tr); Court of Cassation 2. HD., 16.05.2013, 2013/658 E., 2013/14022 K., (lexpera.com.tr); Court of Cassation 2. HD., 18.06.2014, 2013/25001 E., 2014/13730 K., (lexpera.com.tr); Court of Cassation 2. HD., 15.09.2014, 2014/15386 E., 2014/17395 K., (lexpera.com.tr).

this rule of procedure were to be stretched, it would be expected to be in favour of taking into account acts of violence that occurred after filing for divorce, rather than its existing practice of bending in favour of acts of infidelity. Lastly, an overlooked rule of law that offers a solution to this diverse and commonly argued implementation of courts can be remarked. Taking into account an act of infidelity that happened after the commencement of divorce proceedings would lack legal causal link with the events that led to divorce-having occurred after the spouses already decided to divorce-, which is the sole base of the evaluation in fault determination in divorce cases.

An overall observation as to the pitfalls caused by the fault principles is that, bearing in mind the problems listed so far (non-exhaustive for sure), the rulings on fault in divorce are not consistent, legally foreseeable and some are against the equality principle, based on the cases reviewed above. The cause of this is the lack of the concrete criteria in determination of fault. It is however clear that the fault of the spouse during marriage is almost certainly an issue that cannot be tested by general criteria which implies that the only possible solution is to create a suggestive list of the fault norms that can be argued or alleged, limiting the irrelevant or insignificant behaviours. Of course, this should be supported with the necessity of turning the courts' focus to the irretrievable breakdown of marriage instead of fault.

4.2.3. Problems and Their Root Causes Derived From Procedural Law Issues

As stated above, another factor prolonging divorce proceedings is the current Code of Civil Procedure, and its lack of specific provisions that satisfy the specific needs of divorce proceedings. Overall, legislating a Code of Procedure for Family Courts should ease most procedural issues, and yet is a secondary solution.

Written trial requires claimant and defendant memos and subsequent replies. Mostly linked to fault allegations, several other declarative statements are usually submitted. Inspection of the allegations among those, if and when they need further correspondence with other institutions, cause delay.

The problem gets more serious because the main evidence used in the proceeding are naturally the witnesses' statements. Although the judge has discretion to choose or limit its number, the petition is almost always packed with a big number of witnesses. The first problem therefore is the subpoena process of the witnesses, which sometimes take months (caused by unknown or changed address of the witness).

Another relevant issue with taking witness statements is the reciprocal allegations of each side, and their likely compromised integrity. In Court of Cassation rulings, the integrity of the witness statements is one of the recurring issues. Court rulings do not take into account abstract and broad witness statements that do not rely on specific facts, stating at the same time that without further serious and convincing evidence, such statements are regarded to be true. Blood relations or other close relations, in itself, do not hinder the integrity of the witness statements[162].

One of the main prolonging effects of the Procedure Code was mentioned to be the "pre-review process" Art.137 ff of TCPC. This procedural process, although it may be effective in various types of cases, is deemed to be deterring the proceedings in some cases. But the majority view was that the pre-review process was fundamental, especially since at the pre-review hearing the judge announces the evidences that the parties base their arguments (namely, no party can announce new evidence after the pre-review hearing).

The assessments done by higher instance courts regulated under the TCPC, also seems to be ineffectively prolonging the proceedings. Both authorities (RCA and Court of Cassation) evaluate the fault allocation, an issue that is already accomplished by the local court. The contradicting evaluations and rulings of both courts could be another problem. In regard to the economic aspect, there are various examples for monetary and/or non-monetary compensations for

162 Court of Cassation 2. HD., 18.02.2019, 2017/4490 E., 2019/1205 K., (lexpera.com.tr).

damage, which the second and third instances assess in different way reaching contradictory outcomes[163].

Judicial discretion of the judges and its implementation can be listed as a root cause. Maybe this is an understandable pitfall taking into account the workload; however, the judges can be observed to both go outside the discretionary power in some issues, and also sometimes refrain from using this power to acquire a quick solution. It can be argued that the cause of this problem is also the fault principle being the direct focus both in legislation and the proceedings. The judges sometimes find themselves with the power of "ruler" of finding the faulty party and legally "punishing" them. On the opposite, the hesitancy to use the judicial discretion in favour of fast-tracking some procedural issues, when possible, can be caused by either personal lack of enthusiasm as direct outcome of work overload, or by lack of knowledge of the limits of their power. Still, the main reason behind this hesitancy seems to be the "grading" system of the judges internally, which affect their assignments and promotions to higher courts.

Law no 4787 on Family Courts Article 7 and TCC 195/3 regulates the rule of the family court judges duty to offer reconciliation to the parties before evaluating the merits of the case. This process should be avoided in abuse and/or domestic violence cases, and as such the judges should be made aware of this principle.

4.2.4. Problems in Implementation of Divorce Procedures and Their Effect in Causing Secondary Trauma

During the roundtable meetings, it was observed that generally the family courts personnel are highly equipped, legally or conscientiously, about the sensitivity and the likely secondary traumatizing effects of divorce proceedings. Therefore, observations and proposals in this subject would be on procedural issues, mostly on child testimony and statements, and children's being caught in crossfire during fault allegations. Also, emphasis should be added

163 One may ask why than Court of Cassation does not rule for the exact amount in mind and save lots of time. This is also caused by the strict rules of civil procedure law, which can be summarized that Court of Cassation is in theory not allowed to assess the specific issues of the case.

on the coordination of relevant authorities, i.e., family courts and Ministry of Justice ("MoJ") and its centralization system of family court specialists for further collaborative implementation.

Factors Causing Secondary Traumatisation

In preventing secondary trauma, the physical conditions of courthouses, in order to make the experience more child friendly and efficient for both parties can be assessed, and improvements can be proposed. At the current state, the setting of the courthouses can be regarded unfit for children, both in physical and psychological terms, i.e., there are not any specialized waiting rooms for children, no individual entrance for children to the courthouses, no specific security in place, and no child and infant friendly facilities. Bearing in mind the stressful, if not traumatizing, effects of being in a courthouse filled with all types of people, especially in highly populated cities, the necessity of separating the child's experience of being in a courthouse in order to protect the child by isolating the child from the chaos of the courthouses cannot be disregarded.

Lengthy divorce proceedings increase the traumatic effects on children, and it is a well-known fact that in addition, the uncertainties experienced in this process have derivative negative implications. It is obvious that the divorce proceedings being based on the principle of fault strains the relationships between the parents. The spouses, obliged to prove each other's fault, refrain from engaging in cooperation in order to meet the basic needs of the child and to protect them from the effects of divorce. This fault-based hostility also causes conflict about the custody of the child, even when there are seemingly suitable parents that could otherwise perform joint custody, if given the opportunity to put the struggle of fault distribution aside. Similar observation can be made about the tension among parents over the fight of acquiring custody, which in turn exacerbates the secondary traumatisation of the parents and the children.

Assignment System for Experts

In the previous system, which was recently abandoned, an expert used to be assigned to each court and the judge used to work in cooperation, consulting the expert whenever needed. The new regulation introduces a centralized system which prescribes that the experts are gathered in a central pool, and they are assigned to the court or requested by the judge on the basis of individual cases. The centralization system has caused some pitfalls, but some stakeholders also consider the new system to introduce solutions to the pitfalls of the previous system. As for the main pitfalls, the new system is considered to stand in the way of the judge duly benefitting from the experts, but also lead to long waiting periods when the experts are needed. On the contrary a pro-argument for the new centralized system pointed out by a judge during the first meeting was that the new system allows for a judge to be able to work with different experts, when s/he requires a new examination in the case, which would offer fresh eyes on the matter. Another pro-argument expressed by the experts was, with the introduction of the centralized system, the previous inequalities of workload among experts would be overcome.

One specific pitfall reported was that the centralized system exposes the child to expert examinations several times. Another related pitfall mentioned is the waiting period of expert appointment which eventually increases the adverse effects of the prolonged trial on the child. From another point of view, the insufficient number of experts prolongs the duration of the proceedings and in cases where the personal contact with the child is to be established through an expert, the lack of experts makes it practically impossible for the court to act swiftly as required[164]. In addition, as each time a different expert is appointed to one pending case to deal with the same individual dispute, the judge and the expert cannot effectively work in harmony and the cooperation that is aimed to that end is also put at risk. It was pointed out during the meetings that the delays are unavoidable with each new appointment the expert

164 It should be noted that, as expressed by the MoJ during the roundtable meetings held on the 22nd of November, around a number of 500 experts would soon be recruited by the MoJ.

needs to address the case from the very beginning, taking time to get familiar with all the materials, which could be quite complex and time consuming. It should be pointed out that the latter pitfall was confuted by the MoJ, stating that judges could request a certain expert from the pool, in order to refrain from the said pitfall.

It can be concluded that, the long waiting periods are mostly associated with the lack of experts, and it is clear that the level of cooperation and interaction between the institution that is in charge of appointment of the experts based on individual cases and the courts is not adequate. As it became clear from the roundtable meetings, the courts criticised the belated appointments of the experts but the institution in charge of the appointments responded that this was due to the specific requests made for experts, stating that the appointment demands could be met more quickly if pedagogues were demanded. However, as the centralized system does not inform the courts about the fact that pedagogues could be appointed more easily due to the lack of expert psychologists, it can be concluded that the delays experienced in most of the cases stem from this inefficient communication caused by bureaucratic reasons.

The specific demands of experts, composed of three members (psychologist, pedagogue and social worker) by the courts also reveals to be one of the delaying issues of experts. The demand of appointing a committee of experts derives from the family court judges' conviction of Court of Cassation consistently demanding a committee report. In other words, it is the family court judges' conviction that if ruling is based on the examination report prepared by a pedagogue only, Court of Cassation would reverse the judgment and may demand a report prepared by a committee, composed of three people[165]. On this matter, at the roundtable meetings rapporteur judge of Court of Cassation explained that such decisions requiring expert committee reports were individual

165 See *"The important point in custody arrangements is protection of the interests of the minor and securing their future and that the decisions should be made after all the evidence is examined meticulously taking into account the claims put forward by the parties during the proceedings and the new developments that unfold- ….-Making an evaluation based on an expert report prepared by a pedagogue only is faulty- That a decision should be made by the court by evaluating all the evidence after receiving the report of the expert committee composed of 3 persons, namely "a psychologist, a pedagogue and a social worker" within the scope of the family court and hearing the witness…"* YHGK, 04.04.2018,. 2-1575/672, (lexpera.com.tr).

case based and only when conflicting expert reports were present, such committee formation was required.

Here, the focus should be on whether it is possible to appoint an expert to accompany each one of the children throughout the divorce process and the potential contributions of the examinations being conducted exclusively by these experts. However, bearing in mind the unwanted effects of the previous system, in order to solve the above-mentioned pitfalls (instead of maintaining the previous system with introducing solutions to its own specific pitfalls), MoJ has chosen to centralize the expert appointment system. Introducing its own pitfalls, whether it is the right choice or not, centralization of the expert pool has been recently established by the MoJ, and it is doubtful whether a system change will occur to the previous system, which appears to be more child friendly and less time consuming.

Hearing of Children

In finalized divorce judgments of 2020, among 135,022 divorces, 124,742 children were involved in contested custody proceedings[166]. Taking into account these numbers and the imperfections of the current system, the direct adverse effect of divorce on the children is apparent. The courthouses are not suitable places to hear the children as witnesses and it is widely acknowledged that the children might experience anxiety and stress in the courtroom when appropriate safeguards and measures to mitigate the stress and discomfort are not being taken.

As is mentioned in the roundtable meetings on several occasions, the involvement of children in the divorce proceedings lead to major problems discussed below. First and foremost, the decision to examine the life conditions and psychological situations of the children made by the judge following the divorce lawsuit is considered to be a decision that is made at a too early stage in the process. As a result of this, in the case that the essence of the decisions made in the early stages of the case does not include the problems that come up in the subsequent stages, the child is heard

166 https://data.tuik.gov.tr/Bulten/Index?p=Evlenme-ve-Bosanma-Istatistikleri-2020-37211

several times by the experts during divorce proceedings. In addition, preparation of a preliminary examination report at the beginning of the case while there is no data as to the individual case is not beneficial and raises doubts to its usefulness. This process naturally only prolongs additionally the duration of the proceedings.

During the roundtable meetings, a specific reported aspect of the early hearing of the child is the notification of the other spouse and/or the child about the divorce by the expert. This in turn causes both the other spouse and the child frustration and traumatization.

Another phenomenon that might be detrimental for the children during the proceedings is hearing of the child in the capacity of a witness. Bearing in mind the psychological effect of the divorce and the likelihood of the child already blaming him/herself for the divorce, being a part of the proceedings as a witness advances the traumatizing effects. In most cases, being directly linked to the struggle between spouses to attain proof of fault allegations the child is listed as a witness, which consequently leaves the child in a position caught in between the fight of his/her parents.

Yet another drawback derived from the incompatibility of the Code of Civil Procedure with the divorce proceedings is that the statements made by the child regarding abuse and/or violent incidents cannot be taken as evidence in case the child is not listed in the initial witness list[167]. If the child has made statements and expressed views during the expert interview and these statements cannot be taken into account while evaluating the fault of the parties, this approach might lead to unfair results. The rigidity of the rule as to the fact that the scope of the witness list cannot be broadened, puts forth its incompatibility with the divorce proceedings. As a matter of fact, and as explained in the previous paragraph, prolongation of the proceedings and pecuniary interests of the spouse with whom the

167 *"Although the court accepted that the plaintiff-defendant party (husband) inflicted violence on and threatened his wife in the latest incident, the witnesses of the defendant-plaintiff party (wife) do not have any statements with regards that the plaintiff-defendant man inflicted violence on his wife and threatened her. It is not legally possible to take the statements of the joint child K2 to the social worker during the interview about custody as a basis for the divorce provision since the defendant-plaintiff party (wife) did not include the children as a witness in her witness list submission. There is no other evidence in the scope of the file regarding the violence and threats of the man. In this case, violence and threats cannot be evaluated as fault"*, Ankara RCA, 2. HD., 15.1.2020, 2018/377 E., 2020/32 K., (lexpera.com.tr).

child lives depend completely on proof of fault. Therefore, as long as the judge does not take into account the statement of the child who is not a witness, his/her approach victimizes the child too. The framework of the judge's authority to decide ex officio is aimed at making sure that he/she takes into account all kinds of issues of his/her own accord. Not exercising this authority due to the structure of the procedure that is incompatible with the divorce law puts the families in a position to present their children as witness as to the irretrievable breakdown of the marital union.

Chapter 5

COMPARATIVE ANALYSIS

This chapter will focus on comparing the best practices found and the problems and proposed solutions in ensuring the effectiveness of Turkish divorce proceedings, exploring the possible options and offering several recommendations for making the divorce system efficiently applicable in preventing (re)traumatization of the parties involved.

5.1. Intended Outcomes

5.1.1. Simplification and Liberation of the Divorce Proceedings

The proposed actions should include:

- Introduction of no-fault divorce based on the irretrievable breakdown of marriage free of fault investigation for the economic consequences alongside with the traditional fault-based divorce.
- It would be fair to state that, both introduction of no-fault and the other following recommendations to the legal framework of the Turkish divorce system, if legislated it may result in an acute increase in divorce rates. But this outcome would be expected to last only for a short period, and in contrast decline in extreme spousal violence is a documented fact in other jurisdictions that went through similar revisions and decline in domestic violence of all kinds is expected anyhow.

5.1.2. Better Compliance with International and European Standards on Striving for Substantive Gender Equality in Divorce Proceedings

The proposed actions should include:

- Abolition of any different standards of fault for wives than for husbands.
- Tools to promote consistency in the interpretation of "comparative rectitude"[168].
- Provisions linking grounds for divorce and financial consequences to eliminate opportunities for husbands to abuse these provisions to avoid any financial obligations towards their wives in the event where dependence between the divorce ground and financial matters applies.
- Training of legal practitioners and members of the judiciary to achieve the right impact in practice and tools to this effect should be issued. Furthermore, the independence and impartiality of judges and their awareness of gender equality should be assured[169].

5.1.3. Child-Friendly Divorce Proceedings

The proposed actions should include:

- Reaffirmation that all frameworks, legislation, policies, practices and other measures relating to children must be guided by international human rights law, and in particular the UNCRC and its general principles, non-discrimination, the best interests of the child, and participation, including through the establishment of comprehensive, inter-institutional policies between child

168 Turkish Judiciary is reaching different conclusions in cases where the acts leading to divorce were committed by the woman compared to those where such acts were committed by the man. Source: Concept of Fault, Post-Marital Maintenance Obligation and Discrimination against Women in the Turkish Judicial System Betül Özlük* and Melek Saral**

169 *Shadow NGO Report on Türkiye's First Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* <https://rm.coe.int/turkey-shadow-report-2/16807441a1> accessed 10 November 2021, p 12

protection and welfare authorities and other key bodies, adequate resourcing, and continuous and periodic training of child protection, migration, justice, and other relevant officials on the rights of children, including intersectional discrimination[170]. Introduction of set of tools at national level that promote accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.

- Preparation, dissemination and promotion of guidelines and checklists to ensure child-friendly divorce proceedings.

- Counteracting the excessive formality in the average courtroom by ensuring consistent use of specially equipped premises and procedures for hearings of children, including as a witness.

5.2. General Recommendations

5.2.1. Liberating the Irretrievable Breakdown of Marriage Ground Regulated Under 166/1 TCC from Any Implications of Fault

- This outcome could be achieved in two ways: at legislative level, the abolition of the second paragraph of the said article[171], and at the level of implementation, by limiting the judicial use of the second paragraph to exceptional cases. The second suggestion seems to be unrealistic taking into account the constant use of the fault principle according to the wording of the Art. 166/2. It is following that without legislative change a transformation in the judicial practice would not be viable.

- It must be noted that during the roundtable meetings, abusive

170 CMW and CRC, Joint General Comment No. 3 and No. 22, paras. 13 and 18.

171 Art 166/1: *"If the marriage union has irretrievably broken down in such a way that it cannot be expected of them to maintain the union, each spouse can file for divorce"*. Art. 166/2: *"In the cases specified in the above paragraph, the defendant has the right to object if the plaintiff is at more fault. However, if this objection amounts to an abuse of a right and there remains no interest worthy of protection for the defendant and the children in the continuation of the union, it can be ruled for divorce".*

practices that would occur if this provision were abolished, was pointed out. The hesitancy was primarily about making divorce directly available to a spouse that is in complete fault, which derives from the incentive to protect the woman that has no means of economic stability and at no fault. In this regard the importance and necessity of introducing an adequate social support scheme for minimizing the damaging outcomes for the non-self-sufficient women was emphasized.

- Yet again, even when the second paragraph is abolished, the demands of spousal support and compensations for damages would result in fault determination. The best additional option to be offered would therefore be the elimination of damages claims regulated under Art. 174 TCC. Furthermore, the spousal support determination would be in need of a revision in order to be calculated regardless of the fault distribution, and to be solely dependent on the parties' economic and personal statuses.

- Bearing in mind the paramount effect of such a revision, another recommendation for the divorce claims under Art 166/1 (irretrievable breakdown of marriage) damages compensations claims could be only limited to cases where domestic violence is effectively proven.

5.2.2. Abolition of the Precondition of a Rejected Filing of Divorce Under Art. 166/4 with the Option to Divorce After a 3-Year Legal Separation Period

The 3-year period is also regarded as too long and can be recommended to be shortened.

- Abolishing the pre-condition of a rejected divorce claim would eliminate the prior divorce claims to meet this condition and correlatively decrease workload of family courts. This recommendation was accepted in unison in the roundtable meetings.

- Also, the exact determination of factual separation may not be possible due to the difficulties to maintain two separate households, and therefore this condition should not be regarded

as absolute. Accordingly, emphasis to that effect could be added in judge's guidelines, especially when spouses still live under the same roof, but actual separation can be proven.

5.2.3. Lifting of the Required One-Year Duration of the Marriage as a Pre-Condition in Consensual Divorce in Order to Effectuate Divorce

- In view of the CEFL principles that recommend the reflection period when the spouses have children under the age of 16, taking into account the prolonged divorce proceedings in the Turkish system, specified reflection period can be offered. To avoid unwanted prolongation of the proceedings and at the same time to protect the interests of the parties involved, the length of such reflection [172] period should be defined by specific legislative provisions on minimal and maximal duration.

- A similar reflection period may be offered without an age restriction to spouses who have a child with special needs.

- During the roundtable meetings, shortening the one-year requirement to 3 or 6 months was suggested. It was pointed out that even if the reflection period solution was chosen, the periods should be regulated as short as they can be.

- Legal framework of the binding effect of the parties' agreement of consensual divorce and its consequences that has been approved by the local court as per Art. 184/5 TCC should be regulated. As the agreement's appeal by parties can be at stake, even after its approval by the local court or after the finalizing of the divorce ruling. These appeals are in relation with law of obligations demands (i.e., apart from allegations of mistake, ***dolus***, adaptation) and the possibility if any and the limit to the demands should be legally regulated, and as such the application of Court of Cassation on this issue should be accordingly rectified.

172 See. 3.1.5 Reflection Period

5.3. Recommendations Relating to Specific Pitfalls

5.3.1. Recommendations to the Problems Derived from the Fault Principle

An overall observation as to the pitfalls caused by the fault principles is that, bearing in mind the problems listed so far (non-exhaustive for sure), the rulings on fault in divorce are not consistent, lack legal foreseeability and sometimes can be regarded against the equality principle. The cause of this is the lack of the concrete criteria in determination of fault. But divorce and fault of the spouse during marriage is almost certainly an issue that cannot be specifically divided into criterions. There may be a listing of the fault norms that can be argued or alleged, limiting the irrelevant or insignificant behaviours. But of course, this should be supported with the necessity of turning the courts focus to irretrievable breakdown of marriage.

Identified Pitfall 1: Abusive Use of the Code Numbered 6284

Options for improvement: Limited acceptance by the courts of domestic violence protection order as evidence in divorce cases

Recommended option and arguments:

- This practice can easily be prevented by training the lawyers that such actions, albeit procedurally possible, are inappropriate, and that preventive orders in accordance with the Code 6284 should not be misused in divorce cases (naturally with the exception of real and evidence-based violence cases). In this regard the cooperation of the Bar association can be appropriately expected.

- Written guidelines and trainings should be developed for the bar associations and courts to limit misguided use of 6284 applications.

- There should be a written statement requirement for the courts in Code numbered 6284 on the Protection of Family and Prevention of Violence against Women preventive order ruling, with the

explanation that this order pursues specific aim regulated by Code numbered 6284, and without further evidence the use of the ruling as evidence in divorce cases would be limited.

- Additional regulation should be made either to the Code numbered 6284 itself, or in the future Family Court Procedure Code if legislated regarding the non-evidentiary effect, in principle, of the preventive orders in divorce cases.

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- Either as a statement in the preventive order ruling or with a specific regulation legislated on the matter, the rule should be in itself containing major and evidence-supported violence cases as an exception.

- The wording of the rule should not prevent actual domestic violence events to be invisible in the divorce proceedings, and the target should remain the misuse practice of preventive measures in vain hope to use it as manipulative evidence or bargaining power during divorce proceedings.

Identified Pitfall 2: Proof of Fault Related Evidence Fabrication and Illegally Obtained Evidence

Options for improvement: The main root cause is the fault principle; therefore, the only realistic option would be its abolition, and reregulation through provisions for adequate safeguards. Aside from deserting the fault principle, awareness raising, and effective implementation of the sanctions regulated under the Attorney Code numbered 1136 on such matters.

Recommended option and arguments:

- The German example of offered courses for divorce and family lawyers, on evidence submission and its implications in the divorce proceedings could be recommended.

- In cooperation with the bar associations country-wide, easier and

frequent access to specialized trainings for lawyers and trainee lawyers can be recommended.

- Introducing 5 years of effective practice as an attorney as pre-condition to represent clients before Court of Cassation can be recommended.

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- Specialized trainings and courses would only offer voluntary participation; therefore, their effectiveness could be arguable.
- The 5-year recommendation would need specific legal revision in the Attorney Code numbered 1136 and yet, its acceptance could be highly desirable.

Identified Pitfall 3: Failure to Maintain Unified Application in the Divorce Proceeding Regarding Domestic Violence; Both for the Effect of Criminal Case Rulings and the Effect of Withdrawal of Complaint During Criminal Proceedings

Options for improvement: Court of Cassation's application which renders the criminal court's ruling a preliminary issue, results in prolonging the divorce proceeding. Therefore, fault assessment in the divorce case should be within the the family court judge's discretion and the unique rules of criminal law therefore should be avoided.

Recommended option and arguments:

- It is true that the civil court judge's independence from the criminal court's assessment of fault and damage and its non-binding effect on the civil proceedings, also the non-binding effect of acquittal decisions given by the criminal court is regulated under Art. 74/1 Turkish Code of Obligations (TCO), however trainings and practical tools can be offered to counteract existing conflicting implementation to this liberty and to achieve uniform application.

- Also, withdrawal of complaint during criminal proceedings and its subsequent interpretation as forgiveness or act of mercy may result in inequitable rulings in cases of domestic violence and its inability to be regarded as fault in the divorce proceedings. For that affect, guidelines to unify the rulings and trainings can be recommended.

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- Considering the persistent case law with diverse outcomes, the effectiveness of such guidelines may be insufficient. Emphasis during trainings on the prolonging and unequitable outcomes of these diverse rulings could be influential.

Identified Pitfall 4: Frequent Use of "Mercy/Forgiveness" of One of the Spouses in the Fault Determination

Options for improvement: The abolition of this inconsistent and subjective concept is the only possible option, and in addition it is one of the urgent matters that need substantive reform. Although there are decisions with reasonable solutions within the framework of individual cases, due to its conflicting structure and uniformity issues, the concept of "mercy/forgiveness" should not be taken into account in evaluation of fault as long as the declaration of intent is not clear in terms of the act of mercy.

Recommended option and arguments:

- The foremost recommendation would be abolition of fault evaluation on divorce proceedings.

- Otherwise, guidelines for judiciary and/or introducing a legal framework that contains concrete principles on interpretation of forgiveness should be drafted.

- As discussed in the roundtable meetings, the evaluation and the ruling discretion can be recommended to be left to the discretion of family court judges, rather than higher court judges, which have direct physical contact with the parties.

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- It may be suggested that the concept of forgiveness, which is only applicable to the grounds for divorce related to adultery and attempt on life in Articles 161 and 162 of the TCC, should be widely applied to all grounds for divorce in the practice of the Court of Cassation, and that guidelines should be given on the concept of "tolerance", which is created in the practice of the Court of Cassation and which constitutes an expansion of the concept of forgiveness through misinterpretation. However, effectiveness of these would uncertain but they would probably provide freedom of action towards consistent application of the concepts. Legal framework with concrete instructive guidelines would advance the expected uniform application by the courts.

If fault is not to be abolished, discretion granted only to first-instance family court judges in determining the occurrence of "mercy/ forgiveness" would be a sensible option, taking into account their level of contact with the parties in comparison to the higher court judges.

Identified pitfall 5: Lapse of Right to File for Divorce in Cases of Forgiveness After Adultery of the Spouse, and Attempt on Life (Art. 161/3; Art. 162/2, 3)

Options for improvement:

- Both articles are in their own specifics in need of evaluation and legal revision. Regarding the attempt to life regulation (Art. 162/3), during the roundtable meetings it was stressed that there is almost no application of this regulation. So, in terms of implementation issues, this article does not create actual problems. Yet in a theoretical view, the existence of forgiveness and its effect of loss of the right to divorce in attempt to live, is also in contradiction with the general norm regulated under Art. 23 TCC which regulates protection of personality rights, therefore also abrogation of Art. 162/3 is still recommended.

- Regarding the lapse of right to file for divorce after forgiveness of the adultery, the prior article (Art. 161/2) already offers time lapse provisions. Bringing forth the issue or the concept of forgiveness not only offers ambiguity to the concept in application of the law, but also gives rise to the priorly argued application of the forgiveness concept, out of context, i.e., in divorce cases of irretrievable breakdown of marriage.

Recommended option and arguments:

- The starting point of the six-month time limits for lapse of right to file for divorce regulated under Art. 161/2 and 162/2 is the moment of acknowledging the reason, i.e., adultery or attempt to life. During the roundtable meetings it was pointed out that the six-month time limit could be extended, taking into account the time needed for comprehension, gathering evidence and economic or physical restraints in specific cases could be more than six months. Therefore, a revision that introduces a longer period, such as one year could be recommended.

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- Abrogation of Art. 162/3 on forgiveness of attempt to life would submit a theoretical legal order to the Civil Code, rather than a solution for a practical problem. Nevertheless, such revision of the Code could be regarded as a principal gain in legal terms.

- The rules on forgiveness and the time limits regarding adultery (Art. 161/2, 3) are accepted to be in line with the protection of family life, and in plain words, not letting couples bring forth old issues to the divorce case. This ratio may cause hesitancy of abrogation of the said articles. The only clear way to prevent this pitfall would again be introducing the no-fault divorce system.

Identified Pitfall 6: The "Equal Fault" Blanket Rulings of the Judiciary

Options for improvement: Coherent application should be achieved. However exhaustive lists or guidelines cannot be offered since each

divorce case and its specifics are unique. The only sensible option would be freeing Art. 166/1 from fault, and in very exceptional limited cases letting the parties demand fault evaluation from the court.

Recommended option and arguments:

- Freeing the divorce proceeding of fault could be the only solution, bearing in mind that this concept has derived from the fault principle and its problems in implementation. In cases where fault distribution is irrelevant and/or impossible, but the irretrievable breakdown is clear, Court of Cassation's overturning of local court decisions could be re-assessed.

- As pointed out during the meetings, separation of the judicial process of the economic consequences of divorce could also be offered.

- To refrain from having the same arguments only after having ruled for divorce, as stated in the best practices[173], introduction of "joint fault" instead of equal fault could have satisfactory effects. The concept of joint fault would also free the judicial process from the calculation of fault implications of the concept of "equal fault".

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- Aside from the introduction of the no-fault system, the offered recommendation would not yield a permanent and general solution. Therefore, legislative framework would be highly recommended.

- Separation of the divorce claim from the economic consequences and giving the judge legal means to first rule for the divorce, and deal with the economic consequences that are still left depending upon fault distribution would seem to be a practical solution, yet not a thoroughly effective one, since the spouses would still be dealing with proof of fault issues with its traumatizing effects to primarily children and also to both of the spouses.

173 See p. 25 ff.

Identified Pitfall 7a: Gender Bias in the Judicial Determination of "Fault"

Options for improvement: In the hope to refrain from general recommendations that state the paramount underlying reason i.e., social gender norms, recommendations will be listed ***infra***, discussing one specific bias problem at a time.

Recommended option and arguments:

- A normative framework of no-fault divorce should in principle include specific exceptions such as domestic violence, and definite prohibition of application of "equal fault" in cases of domestic violence. Further education on no tolerance to social norms that result in gender discrimination on all judicial levels could be recommended.

- The positioning of infidelity (seen as unsubstantiated adultery suspicion), and the "trust shaking" behaviour (suspicious behaviour dependant on social positioning of the wife – and much less the husband - either way meddling with the private particularities of a marriage in terms of gender norms) in court rulings should be abolished. Aside from a specific legal framework that prevents such arguments being heard by the family court judge, in fault distribution, personal rights to physical integrity must always outweigh the likely infringing effects of infidelity to the other spouse. Guidelines to that account can be offered since many rulings are present that favour infidelity over violence[174].

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- These concepts are created by case law, which was overwhelmed by the unlimited variations of each divorce case and their unique characteristics and needed to invent such concepts. Therefore, without a legal framework, either to abolish fault principle or

174 Court of Cassation 2. HD., 17.06.2019., 2019/1533 E., 2019/7174 K., (lexpera.com.tr); Court of Cassation 2. HD., 14.03.2007, 2006/16069 E., 2007/4035 K., (lexpera.com.tr); Court of Cassation 2. HD., 23.03.2021, 2021/1110 E., 2021/2529 K., (lexpera.com.tr); Court of Cassation 2. HD., 16.05.2012, 2011/16923 E., 2012/13235 K., (lexpera.com.tr).

to limit and/or unify the implementation of such concepts, guidelines could only offer a confined solution.

Identified Pitfall 7b: Gender Inequality in the Access to Proper Representation

Options for improvement: Although access to proper representation offers assistance and support to both spouses, the socio-economic position of women also cause unfavourable outcomes in terms of being unable to afford proper representation during the divorce proceedings, which causes loss of rights due to strict rules of procedure. Focusing on improving the effective use of legal assistance and support, the accompanied cooperation of the bar associations and the NGOs (Gelincik offices in courthouses in particular) is vital.

Recommended option and arguments:

- The spouses are mostly unaware of this assistance and although assistance is made available by bar associations and NGOs, a solution that actuates the parties to obtain such assistance should be designed. An administrative framework that requires directing the unrepresented spouses to the bar association offices for referral to pro bono representation could be effective in that regard. Improving the publicity of such representation can be recommended. Consequently, this pitfall may be overridden by a realistic proactive approach in cooperation with the Bar associations and the courthouse administration.

- Another solution to be offered would be a legislation that mandates legal aid in divorces where children under the age of 10 are involved. Legal assistance is currently provided if requested and only under certain conditions if there is a child involved, i.e., under the age of 18. Regulating mandatory legal assistance for spouses that are not represented by a lawyer even without request (especially since it was pointed out during the roundtable meetings that most women do not even have knowledge of this opportunity and thus remain unrepresented during divorce) where children under a specific vulnerable age are involved can be in the best interests of the child.

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- Indeed, the practical possibility of such assistance regarding representation could have work force drawbacks. For that reservation, use of specialized workforce of the candidate judges and lawyers could be offered. Another option would be the assistance of law clinics carried out by Law Faculty students, in the meantime keeping in mind the supervision issues for possible legal repercussions of such assistance.

5.3.2. Problems Derived from Procedure Law Issues

Identified Pitfall 8: The Unsuitable Nature of the Current Code of Civil Procedure to Divorce Proceedings

Options for improvement:

- It is clear that the ideal case would be adopting a Family Code Procedure, but it is also a matter of extensive discussions. Therefore, the focus here will be shifted to the procedural applications of the general provisions that are currently available. In this regard, re-evaluation of evidence submission procedure to prevent prolonging of the divorce procedure would be highly advisable. The issue of taking into consideration events that occur after filing for divorce, which also present an outcome of gender bias regarding the time limit of the fidelity issue should be dealt with in a normative manner but also should be safeguarded for a coherent application on all judicial levels.

- Overall, the lack of specific procedural rules in line with the divorce proceedings, and the unsuitable nature of existing general rules of civil procedure can be stated as the paramount problem that needs to be overcome.

- Here some improvements in the implementation of the existing procedural rules will be listed.

Recommended option and arguments:

- Promoting application of Art. 240/3 and 241 of Turkish Code of Civil Procedure[175] can be emphasized in judicial trainings and included in future guidelines. As explained in the best practices chapter, similar to the changes in the Czech Republic[176], a new system for serving court documents i.e., "presumption of service" in order to end the delays of subpoena serving problems unless they contain allegations about violence or directly or indirectly affect the best interest of the child could be offered.

- Similarly, the existing electronic serving system and its effective use should be evaluated. In the roundtable meetings it was pointed out that there is misuse of such option by the lawyers in order to have better control and to be able to delay the procedure, if this would serve the interest of the client. To overcome this problem further evaluation for possible legal framework solutions in cooperation with the bar associations can be recommended.

- The promotion of use of the electronic mailing system (UETS (National Electronic Notification System) can be emphasized in trainings of judges and its use in prevention of delay can be listed in the guidelines. Limiting fault allegation submissions in a procedural phase manner, i.e., after the completion of memoranda phase could be recommended, as well as re-evaluation of the judicial procedure of written statements to a fast-track procedure or even an oral procedure could be recommended; all of which should be in detail evaluated and regulated under a specific code of procedure applicable specifically to divorces.

- The general restriction to take into account facts that occur after filing for divorce should be legislated in an orderly manner. It is clear that such an approach would suit the divorce proceedings' own characteristics. Such practice provides for conflicting rulings for instance whether to take into account infidelity issues during

175 Art. 240/3 regulates the legal fiction of withdrawal from hearing of a witness regarding issues of unclarity of the listed witnesses. Art. 241 regulates the judge's discretion of declaring the unnecessity of hearing the rest of the listed witnesses, in cases where adequate information was obtained through the hearing of the other witnesses about the issue to be proven.

176 See Par. 3.2.1.

divorce proceedings. Also, when domestic violence is involved, a solution to be offered is special legislative provisions to unify the diverse approaches of the courts.

- In relation to these specific procedural issues, either legislating a specific code that regulates provisions on divorce proceedings or a separate chapter included in the present Code of Civil Procedure is highly recommended and has been demanded by all stakeholders during the roundtable meetings. Promoting prompt and consistent application of such prospective rules of procedure, training of judges and the lawyers would be recommended as well for most effective outcomes.

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- Normative framework that contains specific rules of procedure for the specific needs of the divorce proceedings, if regulated in detail with concrete specifics and bearing in mind the exceptions on sensitive matters such as domestic violence or issues on the best interest of the child would be expected to have a vital time-saving effect on the divorce proceedings.

- However, both consistent implementation by judges and comprehension period for lawyers would require a reasonable adjustment timeline, which conversely would raise the question of the actual effective implementation of such revisions. This possible outcome could also be overcome with extensive training and distribution of guidelines.

- When courts take into account the facts that occurred after divorce is filed several adverse effects can be observed. Such approach not only prolongs the proceedings, but as explained in the relevant chapter, results in conflicting and at times gender-biased rulings. Court of Cassation's position to weigh the severity of the events and make a case-by-case justification to either take into account or dismiss these submissions, even if there are specific rules regarding the issue in procedure law, suggests that such a regulation that prohibits considering events that occur

post-divorce claims in a clear and strict manner would only offer effective results. In any case, such a regulation should give the judge appropriate discretion to take into account severe events and/or domestic violence issues, with the caveat that in order to deter further misconduct on the discretion, the regulation should offer concrete examples or concrete ratio explanations to such exceptions.

Identified Pitfall 9: Organizational Issues of Local Courts and Appointment of Judges

Options for improvement: In order to fast track divorce proceedings, a number of organizational points of improvement can be recommended. These include, division of caseload, reform of the appointment system of judges, and assessment of the workload problem.

Recommended option and arguments:

- Divorce cases with a preceding domestic violence application could be recommended to be assigned to the same chamber for examination, which could reduce the workload of family court judges.

- As pointed out by a family court judge during the meetings, aside from divorce cases, family courts judicial authority assigns to the family judges a great number of other types of cases (annulment of marriage, post-divorce custody claims, adoption, protection orders during marriage, paternity etc). A division of power between family courts chambers, such as, separating the appointment of claims other than divorce to specific first instance courts in cities where there are more than 5 family courts may help with the workload of the divorce case judges.

- The workload in family courts also should be assessed from a statistical point of view. It is known that after a divorce ruling there are always subsequent requests regarding spousal support and custody. Most of these requests are retaliative, and such abusive procedural behaviour should not be encouraged within the limits of the right to a fair trial.

- Appointment of young age judges to family courts should be carefully re-evaluated. The amended version of the regulation on appointment of family court judges only offers preference for married persons with children, over thirty years of age[177]. The previous version of the code before the amendment in 2004 sought these requirements as conditions rather than suggestions. It is recommended that appointment of judges that meet these criteria should be applied as far as possible and the appointment of judges under the age of thirty could be recommended to only include the young judges that are personally interested/invested in family law and/or that request to be appointed to family courts.

- Since specialization is of paramount importance in family courts, revising application of the general rules of judge's assignment procedures of the Council of Judges and Prosecutors and introduction of exceptions for family court judges can be recommended.

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- The application for protection and preventive orders can be made in any jurisdiction. If divorce cases with a preceding domestic violence application are to be assigned to the same chamber for examination, although this would reduce the workload, this implementation may, for example, oblige the parties to attend divorce hearings in a different city than their residence, causing unwanted burden on the spouses and possibly the children This recommendation on jurisdictional power could be submitted with exceptions of unwanted burden to the parties.

- Division of cases between chambers, prevention of appointing young and inexperienced judges to family courts, and revision on family court judges' conditions to demand new assignment is an administrative issue under the authority of the Council of Judges and Prosecutors. To achieve actual change on these institutional issues emphasizing the significance of specialization

177 Art. 3 of the Code on Family Courts numbered 4787.

of family court judges, reports submitted to the Council of Judges and Prosecutors with plausible solution options can be worth pursuing.

Identified Pitfall 10: Appellate Structure

Options for improvement: Appeals to both RCA and Court of Cassation prolong the process considerably. This duality of appellate instances also creates conflicting implementation. Regulation of an effective and time efficient appellate system could be discussed, and a limited number of appeals could also be evaluated in that regard.

Recommended option and arguments:

- Resolving the implementation of conflicting awards between RCA and Court of Cassation (esp. with regards to fault distribution and the amount of compensation damages and/or spousal support claims) can be overcome with concrete jurisdictional power regulations, i.e., distribution of substantial and procedural issues to be dealt with each court and thereby avoiding dual chain of appeals.

- Limited number of appeals should be evaluated carefully in light of the right to a fair trial under Art. 6 ECHR. Family court judges with more than 15-year experience throughout the country could be appointed to a specifically created Court of Cassation Chamber for contested divorces. There are indeed many experienced family court judges around the country and being appointed to Court of Cassation's specialized chamber for divorce, they can be

exempt from the points award system of the judiciary applied by the Council of Judges and Prosecutors[178].

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- Concrete normative legislation would be needed in order to distribute scope of power between the two high courts. In that respect if an actual effective appellate system can be maintained, limiting the number of appeals should not hold much unwanted effects.

- Possible obvious disadvantage would be that such recommendation could only be achieved through a revision in the appellate system, which in itself could be unrealistic at this point.

Identified Pitfall 11: Seeking Balance in the Use of Judicial Discretion

Options for improvement: The judge's discretionary power in minor but time-consuming bureaucratic issues may be specifically emphasized and in order to prevent unwanted delay effective and uniform use of the power of discretion can be promoted.

Recommended option and arguments:

- This emphasis can be regulated in the specific rules of the future Family Court Procedure Code that should be legislated. Training of judges may be recommended which involves preparing

178 Judges are divided into four classes in order to determine their level of seniority within the scope of the Law No. 2802 and dated 24.02.1983 on Judges and Prosecutors (Art 15). In addition to the basic criterion of working duration, criteria such as "whether they cause the accumulation of the work they perform, the amount and tenor of the work they have done, the legal remedy evaluation forms" are also taken as a basis for promotions among these seniority levels (Art 21/c). About the "legal remedy evaluation form", although it includes the provision that "the approval or reversal of the judgement does not require a positive or negative evaluation on its own" in the 3rd paragraph of the relevant article, it is also regulated in the same provision that an evaluation will be made as "very good, good, moderate and poor", taking into account "causing the files to be rejected due to incompleteness", "the right and timely conduct of the trial in accordance with the procedural provisions" and the success in concluding the case are included. This scoring system can be interpreted as leaving the family court judges no choice but to follow the unique practices of the 2nd Civil Chamber of the Court of Cassation, which is in charge of divorce proceedings.

guidelines especially with regards to judicial discretion- its limits and also its effective use in preventing delays in the proceeding is recommended.

- Law no 4787 on Family Courts Article 7 and TCC 195/3 regulates the rule of the family court judges duty to offer reconciliation to the parties before evaluating the merits of the case. This process should be avoided in abuse and/or domestic violence cases, and as such the judges should be made aware of this imperative avoidance.

- In a similar concept, court mandated family mediation could be offered as one of the best practices. One root cause of the hesitancy of the judges to actively use the said power is the scoring system of the judges, and this can only be overcome with a special appointment scheme concerning family court judges, in line with their above-mentioned specialization. If they are to be scored, surveys can be offered also to the children that take part in the proceedings.

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- Determining hard lines for the limits of the discretion while still promoting effective use in favour of time effective proceedings can be hard to establish, therefore this pitfall may not be overcome without solving the root problem, which is the fault system.

- Such emphasis on the discretionary power, without further concrete description of objective and determinable rules of a legal framework and effective training may cause diverse implementations and as such, should be codified with caution, not to be too vague to prevent being open to different interpretations. Refraining from the duty of offering reconciliation in abuse or violence involved cases cannot be emphasized enough, and in achieving absolute prevention of this activity recurring emphasis should be included in recurring trainings. Family court judges, in relation with the general habit of divorce cases, offer reconciliation, but in violence and abuse-related cases, even the

offer of such a concept may traumatize the spouse and victimize further the child, causing trust issues related to the justice system.

- Court mandated family mediation may be an effective option if practiced properly. Some reservations can be made to this option to be effectively applied. The court appointed mediators own personal views of social gender norms and lack of competency to refrain from gender bias to that effect should not be disregarded when evaluating this option as an applicable best practice in Turkish society.

5.3.3. Problems in Implementation of Divorce Procedures and Their Effect in Causing Secondary Trauma

Identified Pitfall 12: Hearing of the Child by Experts at an Early Stage, Causing Repetitive Hearing of the Child and Secondary Trauma to the Child

Options for improvement: This pitfall mostly derives from judicial practices and as such improvement can be offered in a judicial implementation level. Judges have the discretion to grant the needed orders without consulting experts and use of this power could solve the repetitive hearing of the child in cases of clear abuse or violence.

Recommended option and arguments:

- Training and introduction of guidelines about the judicial discretion of judges to withhold application to experts until the file contains the required documents by the expert examination must be offered.

- If early hearing of the child is needed, the experts' training should include the sensitive issue of declaring the divorce application by the experts. To refrain from this traumatizing effect, the experts, before directly approaching to meet with the child, can be encouraged to inquire if the divorce claim has been served to the other spouse and if so, if the child has been notified about the situation by his/her parents.

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- The option of consulting experts can always be used in specific cases like abuse or domestic violence, so emphasizing the freedom but pointing out the use of consulting to experts at early stages of the proceeding would offer a viable solution to the problem. Another expected advantageous result would be prevention of early approach of experts to the child which causes immature notification of the divorce between parents, which is surely traumatizing for the child and even in times the spouse.

Identified Pitfall 13: Systematic Problems of Appointment of Experts

Options for improvement: Options for improvement, as this pitfall causes several problems in various aspects, are diverse. Promoting cooperation between organizations in order to prevent long waiting periods of experts is crucial. Main cause can be reported as the amendment of Art. 5 of the Family Court Code numbered 4787, dated 17.10.2019[179]. The revision that offers assigning of experts on request of the family court from MoJ could be recommended to be amended to its prior state.

Prolonged appointment of experts is one of the paramount issues that necessitates a solution. Amending the legislation to its prior state would be a fundamental and most effective solution. The insufficient number of experts and its effects on prolonging the proceedings, the level of cooperation and interaction between MoJ and Family

179 "Use of Experts", Art. 5 states: *"Family courts benefit from psychologists, pedagogues and social workers assigned to the courthouses by the Ministry of Justice to..*
1. conduct research and examination on the causes of conflict between the parties regarding the matters requested by the court and to report on the outcomes before the substance of the case is examined or during the hearing of the case,
2. be present at the hearing when deemed necessary by the court, to work on the requested issues, and deliver an opinion,
3. perform other duties assigned by the court,
preferably among those who are married and have children, are over the age of thirty and have a postgraduate education in family issues.
In the absence of these officials, in the cases of their unavailability or when there is any actual obstacle for the
performance of the task by them or a need for another specialisation, staff in other public institutions and organizations or self-employed individuals are used".

Courts should be increased to an adequate level. It should be noted that, as expressed by the MoJ during the roundtable meetings held on the 22nd of November, around a number of 500 experts would soon be recruited by the MoJ.

Recommended option and arguments:

- Amending the legislation to its prior state would prevent the long periods for expert appointment and the identified pitfall by experts during meetings about having different experts throughout the proceeding examine the file and its time-consuming outcomes, would be eliminated as well. In cases where visitation rights need to be executed in accompany of an expert, the court appointed expert system would prevent further delay, which would also assure a fundamental right of both the child and the parent.

- Lack of communication caused by bureaucratic reasons could be prevented by further discussions between these institutions and trainings of both judges and the MoJ officials and preparing guidelines to that effect and promoting taking initiative for an effective solution on each case regarding children. Furthermore, under Family Court Code Art. 5/last paragraph the discretion and power to use free-lance experts if necessary is regulated. The use of this option within the limits of judicial discretion can also be emphasized both in trainings and guidelines. Lawyers' demands for formation of a committee was also pointed out during the roundtable meetings to be one of the factors that caused family courts to ask for appointment of the expert committee. Prolonging effects of such demands, when and if unnecessary, should be stressed during trainings by the bar associations.

- Another solution to the centralization system of the experts and its negative outcomes would be the appointment of a specific expert by the MoJ on each divorce case, to accompany the children during contact to the proceedings and the potential contributions of the examinations being conducted exclusively by these experts.

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- Centralization aimed at experts undertaken by the Ministry has started recently and it is doubtful whether the relevant authorities will be inclined to proceed with the previous system.

- One of the reported causes of the introduction of the centralization system of the experts, which is imbalance of workload distribution between different courts, is purely an institutional problem. As such it cannot justify introduction of a dysfunctional replacement/amendment of the pre-existing and proposed working system. Equality concerns or etc. cannot justify an issue of organization that is directly in relation to the best interest of the child in divorce proceedings.

- On the other hand, the diversity of experts appointed to cases in the current centralized system was also reported as a favourable effect of the new system. Indeed, in a non-centralized system with specific experts that are permanently appointed to a specific family court, if and when inadequate or unqualified experts exist, the best interest of the child would definitely be infringed. But it is arguable if such a pitfall would be adequate to justify the centralization of the system that apparently prolongs the proceedings.

- Amending the specialist/expert system to its prior state, may require an increase in the work force and close and effective governance[180], but considering its positive outcomes regarding the prevention of prolonging the proceedings and most importantly protecting the best interest of the child by deterring traumatization as much as possible, this option still can be argued to be a better option.

180 Such as the information received in roundtable meetings about the use of free-lance experts as per Art. 5/last paragraph of the Family Court Code that has been abused by experts that are already appointed to specific family courts: The practice was de facto converted into delaying court work and giving priority to such free-lance appointment cases.

Identified Pitfall 14: The Practice of Court of Cassation that Requires a Committee Report

Options for improvement: The hesitancy of local courts to rule on issues without the assessment of a committee of experts leads to delay since formation of said committee takes more time than referring to a singular expert. This hesitancy has been the result of a ruling of the General Assembly of Court of Cassation and the following rulings of Court of Cassation in some specific cases. Taking into account the said Court of Cassation rulings' dates, they are prior to the amendment of Art. 5 of the Family Court Code. The amendment centralized the system of appointment of experts to be held by MoJ and mentioned specialists no longer work directly with the local family courts. Since the three experts as stated in the Court of Cassation rulings, (psychologist, pedagogue and social worker) are no longer permanently employed in family courts, it can be observed that Court of Cassation no longer insists on a formation of a committee report, unless there are specifics of the case demands it. The misinterpretation that leads to such implementation by local courts should be assessed.

Recommended option and arguments:

- Local court judges' hesitancy to that regard can be overcome via training and guidelines. Local courts perception of Court of Cassation's requirement to such committee of experts should be overcome by emphasizing in trainings and guidelines that, with the exception of specific cases- as is the situation in Court of Cassation's rulings, such as a special needs child, abuse or violence allegations- the need for a committee to rule about the matters that relate to the child should not be regarded compulsory.

- Unless communication and cooperation between these courts is procured, the guidelines would only state the obvious without proper implementation outcomes. Therefore, an instructive ruling of either Court of Cassation or the General Assembly of Court of Cassation specifically stating the unique particulars of cases which require such committee reports assistance, also asserting

that this is not always the expectation on their part could be recommended/encouraged.

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- Overcoming this pitfall by training and distribution of guidelines would not be as effective as the second recommendation which offers for a guiding ruling on this misinterpreted issue.
- On the other hand, acquiring Court of Cassation to rule on such a specific issue is at best unlikely, but dialogue could offer viable solution on overcoming this drawback.

Identified Pitfall 15a: Hearing of the Child

Options for improvement: Including the child physically into the already traumatizing experience of divorce also introduces the unwanted drawbacks of causing the child anxiety and stress during the visits to the courthouses and the courtrooms. Only with proper safeguards and actively implemented measures the stress and the discomfort caused to the child during the divorce process could be mitigated. The competent approach of judges, experts and courthouse officials is also of vital importance to achieve such prevention and protection of the child from the unwanted negative effects of the divorce proceedings.

As pointed out during the roundtable meetings, the erroneous implementation usually derives from judges' practices. Regarding the physical surroundings of courthouses and their traumatizing effects, with sufficient funds, positive revisions that will have a paramount effect of preventing child traumatization could be easily effectuated.

Recommended option and arguments:

- Establishing a system that is based on appointment entailing minimum waiting periods at least in the stages corresponding to the visits paid by the children to the courts within the realms of possibility,

- Concerning non-consensual divorce demands, files that include children under the age of 12 could be subjected to an earlier hearing appointment system, being given priority, and this may even have a separate priority level when children under the age of 7 are involved. To that end, legislation organizing the system can be offered.

- Mandatory separate entry of court houses for children, and prospective separation of family courts from the other wings of the courthouses.

- Urging effective use by the judges and the experts of such rooms already established in the majority of the courthouses throughout the country, called judicial interview rooms (AGO).

- A more child-friendly environment can be proposed (featuring a different design instead of a bleak court environment with restrooms designed for children, playrooms and differentiating the personnel as in the paediatrics units of the hospitals through the use of certain accessories such as apron, scarf and brooch, availability of breastfeeding rooms and baby changing tables).

- Bearing in mind the current number of newly appointed young judges to family courts, annual training on consulting the children, and the repercussions of divorce proceedings to the child could be highly recommended.

- Trainings and guidelines can be recommended to include emphasis on rendering confidentiality orders a fortiori in relation to abuse or domestic violence allegations.

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

- Among the recommendations that are operational, normative framework to ensure their application must be regulated, without which, the recommendations would only be proposals that are not actuated. Even after the regulation of normative framework, actual implementation should be aimed by active governance.

- Regarding the operational recommendations, it should be pointed out that this is also an issue of funding. Several solutions can be proposed in this regard; however, some of them might have limited positive impact due to the current situation and the need for general major reform. Although it is possible to propose separate entry doors for the divorce parties and their children and positioning the court and the clerk's office in a different block within the premises, such changes do not seem too realistic at this point.

- Trainings of the family court judges on issues of hearing of the child, if held mandatory and county-wide, effective results can be expected.

Identified Pitfall 15b: Hearing of the Child as a Witness

Options for improvement: The child is often heard as a witness in the divorce proceedings. The judge hearing the child as witness without having sufficient psychological knowledge, and without support from an expert, is worrisome for the child. There is no protective regulation regarding hearing the child as a witness in Turkish procedure law. Therefore, research should be conducted as to how this issue transpires in reality and the focus should be on the need for a law on this issue containing protective measures in the field of private law.

The particular problems of hearing the child as a witness is twofold:

Firstly, the strict rules of law of procedure refrain the judges from taking into account the statements of the child in fault distribution if they are not listed as a witness. The outcome of the necessity to list and hear the child as a witness should be dealt with in light of the best interest of the child principle. Secondly, the judge's discretionary power should be exercised in a manner that every statement of the child included in the case file to be taken into account, in the effort of refraining numerous hearings of the child.

Recommended option and arguments:

- The number of times the child is heard by court officials could be limited, thus eliminating as much as possible the traumatizing effects of the hearing of the child as a witness.

- Nevertheless, children are usually the sole witness to abuse and violence, and the strict application of witness statement rule of procedure, should be amended as to allow statements of the child during expert examination regarding statements of abuse and violence.

- Since there is no existing age limit to witness status in the current Code of Civil Procedure therefore regarding this pitfall only operational, procedural, environmental and use of judicial discretionary power related issues can be evaluated as primary matters of improvement.

- Trainings and inclusion in guidelines about the judge's judicial duty to inform and warn the parties about the negative outcomes of hearing the child as a witness can be suggested. In that regard recommendations can be that the extent of the questioning of the witness and in what regard the questions should be inclined should be established by the judge prior to the hearing of the child, in order to carefully and sensitively superintend and determine the questions to be addressed to the child.

- Similarly, the judges can be encouraged to give information to the child about the use of the right to refuse to testify as per the rules of Civil Procedure Code, and as such this discretionary power can be emphasized in judges' trainings and listed in the guidelines.

- A more child-friendly environment can be proposed also when children are presented as witnesses. Apart from that, it is of great importance where and by whom the child which was abused and exposed to some form of violence is heard, and as far as the material conditions of the courthouses are concerned, it is in the majority of the cases not possible to ensure appropriate conditions. In light of the same consideration points, promoting increase of confidentiality orders when children are concerned

is highly recommended. If the report prepared as a result of the examination conducted by an expert psychologist contains answers to the questions of the judge, it can be proposed to introduce legal framework in order to actively enable the judge to refrain from hearing the child as witness.

- Overall, these pitfalls can be recommended to be overcome by specific regulations on children's hearing of witnesses in the prospective Family Court Procedure Code if legislated, with the paramount emphasis on reducing the number of hearings of the child as possible.

Possible cons/disadvantages of the option, yet still arguing for its effectiveness:

Among the recommendations that are operational and already in the judge's discretion, without related normative framework to ensure their application the recommendations would only be proposals that are not effectively implemented.

V. Conclusion

Türkiye has made considerable progress in the judiciary sector, through a number of reform and democratisation packages. Yet the experiences shared by the relevant stakeholders during the roundtable meetings show that various aspects of divorce cases, such as custody arrangements, determination of alimony and compensation claims, and establishment of personal relationship with children, due to the fact that such issues cannot be dealt with separately from the divorce dispute, may result in long-lasting procedures and several intervals between hearings. These drawbacks are also linked to the current legislation on the grounds for divorce and its implementation dependant on fault distribution to the spouses. Accordingly, particular importance as to the unsatisfactory functioning of the Turkish divorce system is attached to the fault-based divorce as the court is in every case practically compelled to rule on the fault for the marriage breakdown. There is therefore an urgent need to liberate the divorce system from the fault principle and to implement options for improving divorce procedures in view of better protecting women and children, including but not limited by introducing fast-track and simplified procedures, providing options for reconciliation, when appropriate, and extensive training for judges and lawyers.

The recommendations in this report suggest extensive reform on multiple levels: development of possible legislative amendments and practical tools regarding the divorce case-management, spousal support and compensation determination, custody arrangements, implementation of ADR mechanisms in the field of family justice, when appropriate and improvement of legal procedures suited for the distinctive properties of divorce proceedings along with dealing with domestic violence. Naturally, such fundamental changes must take account of the country-specific societal norms and preserve the core values of the society, as long as they are in line with general rules of human rights. Conducted gradually, the proposed reform would however not only improve the effectiveness of the divorce proceedings, reduce the secondary traumatic effects of the prolonged proceedings, ensure proper access to justice and

protection for the vulnerable groups, but it will result as well in greater compliance with the international standards and also would be in line with the consensus in doctrine about the need for reform on divorce grounds that was surprisingly left aside when the new Turkish Civil Code of 2001 was legislated.

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This report, prepared under the Joint Project on "Improving the Effectiveness of Family Courts: Better Protection of the Rights of Family Members" co-funded by the European Union and the Council of Europe, addresses relevant international standards, in particular based on the jurisprudence of the European Court of Human Rights, to support effective implementation of family court procedures in general, with a special focus on the prevention of secondary traumatisation. It presents examples from the European countries on the general functioning of the divorce system and presents recent reforms in the field of family justice from a comparative perspective. This review shows that the introduction of no-fault divorce and the general trend towards simplified procedures, as well as the liberalisation of divorce rules in substantive and procedural law, have left the door open for amicable separation, better protecting the interests of children and thus leading to a reduction in the rate of domestic violence.

Within the framework of the analysis based on the best practices from Europe, the report provides several recommendations for ensuring the effectiveness of Turkish divorce proceedings, preventing the repeated traumatisation of the divorcing parties and explores possible options for making the divorce system effective. In this context, liberating the irretrievable breakdown of marriage ground regulated under Turkish law from any implications of fault is strongly recommended at legislative level and at the level of implementation.

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