

SOME CONSIDERATIONS ON THE REFLECTION OF THE COMPENSATORY BENEFITS IN COURT JUDGMENTS

*Prof. univ. Ioana Nicolae, Ph.D.**
Transilvania University of Braşov, Faculty of Law

Abstract:

The new Civil Code, in addition to other innovations of the civil legislation, also introduced the compensatory benefits between the former spouses. The emergence of this new right has not escaped unnoticed by the spouses who call for the dissolution of marriage by judicial process; therefore the compensatory benefits can be found in the judicial decisions delivered after the entry into force of the new Civil Code. The way the litigants choose to judicially enhance this right, is not always the most adequate; therefore, although the innocent spouse could have benefited from compensatory benefits, the practice has proved that being entitled to the coverage of the significant imbalance produced by the divorce in one's living conditions, is not always equivalent to the admission of such an application in Court.

Keywords: *private law, civil law, compensatory benefits, jurisprudence.*

The entry into force of the new Civil Code¹ has introduced in the Romanian legal landscape, a new institution – the compensatory benefit between the former spouses – which did not previously exist in our law; but which is regulated, yet in different ways, in the French Civil Code (art. 270 and the following), as well as in the Civil Code of Québec.

Our Civil Code followed the model of the French Civil Code; the proposed texts being nevertheless much more synthetic than those in the model. Likewise, unlike the Romanian legislature, which established restrictive conditions for granting the compensatory benefits, the French legislature regulated this institution, regardless of the divorce fault and cause; therefore, any compensatory benefit is meant to compensate, as much as possible, the disparity provoked by the dissolution of marriage in the spouses' living conditions, due to the termination of the obligation of mutual support between spouses².

* E-mail: ioanan1977@yahoo.com.

¹ Law no. 287 from July 17th, 2009 regarding the Civil Code, published in Romania's Official Gazette, no. 511 from July 24th, 2009, with subsequent modifications and completions.

² See art. 270, French Civil Code.

The compensatory benefit introduced in this way, within our law, can be allowed to the plaintiff spouse³ if the divorce is delivered out of the defendant spouse's exclusive fault, in order to cover, as far as possible, a significant imbalance possibly caused in the claimant's living conditions. This, according to art. 390 par. (2) Civ. Code, can only be granted in case the marriage had lasted for at least 20 years; and according to art. 391 par. (1) Civil Code, can only be claimed once with the dissolution of marriage, either by formulating, in this respect, a supplementary application, in the framework of the divorce proceedings, or incidentally, by counterclaim. The legislator has unequivocally stipulated that the compensatory benefits shall be claimed once with the divorce, constituting, in essence, an effect of the dissolution of marriage, which means that it cannot be claimed either during the marriage of the parts, even if the spouses' facto separation occurred; or subsequently to the moment of marriage dissolution, by final court decision. Thus, in terms of the point at which the compensatory benefit can be asked, this is given by the moment of the formulation of the divorce action (principally or incidentally, where applicable).

The emergence of this new right in the legal landscape has not escaped unnoticed by the spouses who claim the dissolution of marriage by judicial process; therefore, in addition to other innovations brought to the civil legislation, the compensatory benefit can be also found in the court judgments delivered after the entry into force of the new Civil Code.

Out of the jurisprudential material, we selected several such decisions, precisely in order to illustrate the way in which the new juridical instrument is being employed in practice, by some litigants, in an attempt to cover the significant imbalance that will be produced by the divorce in the living conditions of the claimant to the payment of such compensation.

In a first case⁴, the defendant, by counterclaim, claimed that the plaintiff should pay a compensatory benefit in kind, in the form of a lifelong usufruct upon the share of 1/2 of an apartment – common property, acquired under the rule of the family Code – which constituted the most important asset of the parties.

On one hand, the Civil Code, as regards the form of the compensatory benefit, stipulates, at art. 392, that “it may be established either in money, as an aggregate amount or as annuities; or in kind, as usufruct upon movable or immovable property, belonging to the debtor”; and the usufruct can be constituted “either for the lifetime of the claimant to the compensatory benefit, or for a shorter period, which shall be established by the divorce judgment”. On the other hand, as regards

³ The collocation “plaintiff spouse” is considering both the titular of the main divorce proceedings, and the defendant in the main divorce proceedings, the titular of the counterclaim. For further details, see G.C. Frențiu, *Comentariile Codului civil: familia* [Commentaries to the Civil Code: Family], Bucharest: Hamangiu Publishing House, 2012, p. 341.

⁴ Court of Bacău, civil judgment no. 4382 from 9.05.2012 [portal.just.ro – accessed at the date of 7.10.2015, time 13: 45].

the object of the usufruct, art. 706 Civ. Code, stipulates that it may constitute any movable or immovable, tangible or intangible assets, including a patrimony, a *universitas facti* or a share thereof.

Unlike the common property in shares, as the ideal share of the real estate on which the defendant wanted the establishment of a lifelong-usufruct right, could not be determined, given that the spouses' condominium-property right upon the assets acquired during marriage, assumes the asset belonging to both spouses, without their having an established ideal share of the property right thereupon, the Court could not have admitted that counterclaim, even if the defendant had proved a significant imbalance, and the marriage of at least 20 years had been dissolved out of the plaintiff's exclusive fault.

To resort to the compensatory benefit, transforming it from a legal instrument capable of covering, as far as possible, a significant imbalance produced by the dissolution of marriage through divorce, in the living conditions of the claimant to compensation, into a legal instrument aimed at rendering unavailable the real estate – dwelling – common property, throughout the defendant's life⁵, with a view to its not being subjected to partition, constitutes, moreover, a misappropriation of this institution from the purpose for which it was introduced by the Romanian legislator; consequently, the Court rightly dismissed the counterclaim to compensatory benefit.

As results from the civil judgment delivered in that case, the defendant claimed that the plaintiff should pay a compensatory benefit in kind, as lifelong usufruct, on the ground that the plaintiff lacked the financial means to ensure the payment of a monthly amount; and that the divorce would have consecrated the termination of the matrimonial regime; being therefore unable to commit in a legal partition-process, with all the consequences it entails.

The wife's choice to request a compensatory benefit in kind, as an usufruct, proved to be inadequate in relation to the legal standard that regulates the object of the usufruct right, as well as the to the legal regime of the commons acquired during marriage, in the sense that, if a real estate is a common good, the usufruct upon it cannot be granted by way of compensatory benefit⁶. Furthermore, the plaintiff had agreed to pay his wife a life annuity amounting to ¼ of his retirement benefit, which the defendant had refused, an aspect that only strengthened the conviction of the Court that there were not the material difficulties, those which had determined the defendant's option.

⁵ This seems to be a recurrent theme in the divorce proceedings; for instance, in another case, the defendant stated in contestation that she did not agree to the divorce, as she would not sell the apartment where they lived – see C.A. Suceava, judgment no. 993 from 18.09.2013 [portal.just.ro – accessed at the date of 7.10.2015, time 13: 45].

⁶ See Law Court of Sector 2, civil judgment no. 5386 din 18.04.2012, quoted by M. Avram, *Drept civil: familia [Civil Law: Family]*, Bucharest: Hamangiu Publishing House, 2013, p. 147, n. 2.

Under such circumstances, when there is not a major change in material terms, the one which determines the request of a compensatory benefit, even if the spouses had been co-owners of the respective apartment, each of them holding a share of $\frac{1}{2}$ of the ownership, the ideal shares being therefore established, the Court still could not admit the counterclaim, although the marriage of the parts dissolved out of the plaintiff's exclusive fault.

Although the dissolution of a marriage that has lasted for at least 20 de years, out of exclusive fault of one spouse, entitles the other one to the compensatory benefit, if the divorce determines a significant imbalance in the living conditions of the claimant to the compensatory benefit, the admission of a claim with this object shall be still conditional on verifying the existence of the significant-imbalance condition.

Thus, in a case⁷, although all conditions for granting the compensatory benefit were apparently fulfilled, the Court dismissed the plaintiff's claim, because of her omission to motivate in what the significant imbalance consists.

In motivating the claim whereby she requested the dissolution of marriage, out of the defendant's exclusive fault, the plaintiff emphasized that the defendant, out of jealousy, had not allowed her to work, for which reason, once having reached old age, when she was no longer capable of performing lucrative activities, she could not benefit from any retirement benefit, having no income.

Although following the evidence adduced, the Court ordered the dissolution of marriage, out of the defendant's exclusive fault, as regards the claim for the defendant to pay a compensatory benefit as a life annuity, it seemed groundless, as the Court could not verify the existence of the significant-imbalance condition.

According to the civil judgment delivered in this legal cause, the plaintiff did not motivate what constituted the imbalance, but she only made a simple statement in the sense that, at that moment, she was no longer capable of conducting lucrative activities. So that he Court were able to verify the existence of the significant-imbalance condition, she should have mentioned that "during marriage, she was provided with living conditions that proposed expenditure amounting to X lei, and she had a much smaller income".

Thus, as no evidence was adduced by the plaintiff - evidence meant to prove, *in concreto*, the deterioration of her living conditions, respectively the income and the expenditure of the parts during marriage, their amount, as well as the income she would have after the dissolution of the marriage, the Court dismissed the her claim to be granted the compensatory benefit, as unfounded.

Therefore, in order to benefit from this instrument meant to compensate, as far as possible, the disparity provoked in the innocent spouse's living conditions, due to the termination of the obligation of mutual support between spouses, the

⁷ Court of Constanța, civil judgment no. 4145 from 8.04.2015 [portal.just.ro - accessed at the date of 7.10.2015, time 13: 45].

litigants who are going to avail themselves of the new institution of the compensatory benefit will not only have to obtain the dissolution of marriage, out of the other spouse's exclusive fault, but will also have to adduce evidence whereby the significant imbalance might be quantified.

Our Civil Code illustratively enumerates the criteria for establishing the compensatory benefit, par. (2) of art. 391; and stipulates that, in establishing the compensatory benefit, there will be taken into account both the resources of the spouse who claims it, and the means of the other spouse; the effects exerted by the termination of the matrimonial regime; as well as any other predictable circumstances likely to modify them, such as the spouses' age and health, the contribution to raising the minor children, which each spouse has had so far and will have henceforth, the professional training, the possibility to conduct a revenue-producing activity, and the like. The formulation of the indicated legal text shows that the judge seized to such a claim, can likewise consider any other predictable circumstances that are grounds for allowing the compensatory benefit, the enumeration in the text not being, in this sense, limiting. As it was justly emphasized in the doctrine⁸, "the compensatory benefit results not only from the arithmetical comparison of each spouse's resources; in its granting, there being also necessary to consider the repartition of the role had by each of them in their common life, as well as the choices made in common, which might prove harmful to the not guilty spouse, either at the moment of the divorce, or subsequently."

These criteria will be considered by the Court, when ruling upon the scope of the compensatory benefit, with a view to restoring "an *equilibrium* in terms of the innocent spouse's living conditions, so as to alleviate the trauma (s)he might experience, after a marriage of at least 20 years, dissolved without his/her fault and consent".⁹ In terms of the condition for the duration of the marriage to be of at least 20 years, it is worth mentioning that this term does not require to be fulfilled on the date of the Court notification for divorce, but the term must be fulfilled until the date of the judgment.

Approached from this perspective, of the trauma caused by the deterioration of his/her de living conditions, the compensatory benefit might be granted only if

⁸ M.M. Oprescu, M.A. Oprescu, Marius Șcheaua, *Noul Cod Civil comentat și adnotat. Despre familie [The New Civil Code Commented and Annotated: About Family]*, Bucharest: Rosetti Publishing House, 2015, p.266.

⁹ C.-M. Crăciunescu, *Efectele divorțului cu privire la raporturile dintre soți, precum și dintre părinți și copiii lor minori [Effects of the Divorce in terms of the Relations between Spouses, as well as between Parents and Their Minor Children]*, p. 6. [Paper presented on the occasion of the Conference in Civil-Law matters, organized at NATIONAL INSTITUTE FOR MAGISTRACY (INM), between June 13th-14th, 2013, in the framework of the Swill-Romanian project "Asistență pentru consolidarea capacității instituționale în domeniul formării judecătorilor și procurorilor pentru aplicarea noilor legi" [Assistance for Strengthening the Institutional Capacity in the field of Judge- and Prosecutor-Training, for the Application of the New Laws], National Institute for Magistracy (INM)-lex.ro – accessed at the date of 1.10.2015, time 11:58].

and in so far as the living conditions that the innocent spouse benefited previously to the divorce, were to be significantly modified, following the dissolution of marriage, in such a way that (s)he might be traumatized.

This trauma supposed by the legislator to arise when a major modifications of the living conditions occurs, in such a way that the compensatory-benefit right holder need not provide evidence for this trauma, but only for the significant imbalance determined by the divorce in his/her living conditions. The compensatory benefit cannot be cumulated with the maintenance allowed granted under the art. 389; yet it is possible to cumulate with the compensations regulated in art. 388. The maintenance allowance referred to by the text of the art. 389 concerns the divorced spouse's right to receive it, if (s)he is in need, due to a labour incapacity occurred either before or during the marriage. The maintenance can be likewise allowed if the labour incapacity occurs within a year from the dissolution of marriage; yet the legislator conditions its allowance on the labour incapacity having been caused by circumstances related to the marriage. The interdiction to cumulate the maintenance allowance with the compensatory benefit, envisages that both of them aim at compensating the imbalance produced by the divorce in the life of the spouse who claims their payment. Notwithstanding, we must not lose sight of the fact that we are dealing with different institutions, not only in terms of regulation, but also in legal terms. The text of the art. 388 shows that, separately from the compensatory benefit, the innocent spouse who suffers damage by the dissolution of marriage, can claim for the culpable spouse to bring him/her compensations. There is about the compensation for material or moral damages caused to the innocent spouse, by the dissolution of the marriage.

With a view to ensuring the divorced innocent spouse, a life as close as possible to the one during marriage, the Court will only have to compare his/her living conditions before and after the dissolution of marriage, respectively the extent to which the innocent spouse's life, at least in material terms, will undergo a major change; being therefore compelled to apply other standards, due to the lesser available means, after the dissolution of marriage.

The Civil Code, in art. 325 stipulates, on one hand, that the spouses are obliged to provide each other with mutual material support; and, on the other hand, that the spouses are obliged to contribute, in relation to the means of each of them, to the expenditure incurred during their marriage. Thus, it may happen that, during marriage, the innocent spouse lead a comfortable and carefree life, as the incomes of the spouse out of whose exclusive fault, the divorce was delivered, had always been clearly superior to those of the innocent spouse¹⁰. In such a situation, the duration of the marriage, of over 20 years, and the absence of fault in its dissolution, shall entitle the innocent spouse to the compensatory benefit, even if

¹⁰ Also see in this respect Court of Botoșani, decision no. 161A din 9.09.2013 [portal.just.ro - accessed at the date of 7.10.2015, time 13: 45].

the assets and incomes that ensured him/her higher living standards within wedlock, constituted the other spouse's own property.

Practically, the Court shall have to establish if and to what extent the innocent spouse's incomes and own property can ensure him/her, after the dissolution of marriage through divorce, a life as close as possible to the one during wedlock; the Romanian legislator imposing nevertheless the condition of a "significant" imbalance, as a prerequisite for granting the compensatory benefit¹¹.

As we have more examples of judicial practice, in matters of compensatory benefit, it will be interesting to follow what interpretation will jurisprudence give to the significant character of the imbalance, in the innocent spouse's life conditions, respectively which criteria will be used in order to determine where the wedlock comfort ends and where the trauma caused by the deterioration of his/her life conditions begins.

In this way, despite the restrictive conditions upon its allowance, the compensatory benefit is a welcome tool, rendered available to the innocent spouse, whose marriage is dissolved by divorce after at least 20 years and without his fault

Nevertheless, as shown in the presented examples, the practice proves that to be entitled to the coverage of the significant imbalance produced by the divorce in one's living conditions, is not always equivalent to the admission of such a claim.

In conclusion, we can only say that the vigilance of the judge who ensures the application of the law, in its letter and spirit, as well as the diligence of the lawyers in efficiently defending the interests of the parties, constitute the prerequisites for this new institution to fulfill the purpose for which it has been introduced by the Romanian legislator, respectively the alleviation of the significant imbalance likely to emerge as a consequence of the divorce, in the innocent spouse's life conditions.

References

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¹¹ The French legislation imposes no condition as regards the importance of the imbalance, in such a way that a small difference between the spouses' incomes does not constitute an impediment to the allowance of the compensatory benefit. For further details, see E. Fortis, *Divorce (conséquences)*, Encyclopédie juridique Dalloz: Répertoire de droit civil, September 2011, p. 47 (updated June 2015) [dalloz-avocats.fr– accessed at the date of 28.09.2015, time 9:37].

[5] Court of Constanța, civil judgment no. 4145 from 8.04.2015 [portal.just.ro accessed at the date of 7.10.2015, time 13: 45].

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[8] Court of Botoșani, judgment no. 161A din 9.09.2013 [portal.just.ro – accessed at the date of 7.10.2015, time 13: 45].

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