



ORIGINAL PAPER

Modern Processes in the Legal Regulation of the Family, Marriage and Divorce

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Abstract:

Divorce, which most directly affects the family, marriage, spouses, children, the property brought or created in the family, the status of the individual in the society, but also the personal happiness of the people in many ways, from the ancient Rome to the present, is in the focus not only of legal sciences and legislation, but also of psychology, sociology, history, economics, medicine, ie as if there is no sphere of research and thinking that does not deal with divorce.

Positive legal solutions today and finding ways to improve legislation in the future is a difficult task for a young researcher, but the ideas for eventual filling of some legal gaps in the Macedonian legislation governing divorce will have practical value for the scientific and professional public that deals with this issue. Here, too, should be emphasized the similarities and differences between the two legal systems: the Roman as "eternal inspiration" and the modern Macedonian *de lege lata*, *de lege ferenda*.

Keywords: *Divorce; family; spouses; the individual; children.*

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The eighteenth and twentieth centuries are periods characterized by the understanding and legal regulation of marriage as a very important institution that had a great influence in determining the social status not only of the spouses but also of the children. It was considered that the marriage lasted until the death of the spouses and the divorce was treated as an exception that was allowed in strictly provided conditions, ie "the divorce was allowed only for the most serious violations of marital obligations". (Mickovik,, Ristov 2015: 35). Marriage, the status of children and the divorce, were regulated by legal norms. However, the second half of the twentieth century brought significant changes in family law, while Mickovi and Ristov quote Vilekens to highlight new developments reflected in the need for individual freedom, autonomy of the will and gender equality embedded in European countries family law systems that emphasize the equalization of the rights of children from legal marriages and illegitimate children, the legal regulation of the extramarital union and what is especially important for our research is the liberalization of divorce. (Mickovik,, Ristov: 35). So, one of the most important reforms in family law was the reform of the divorce system. Mickovik and Ristov quote Ansel who says: the biggest news is that the only reason for divorce is accepted and that is the failure of the marriage So, the blame for the divorce is removed and several reasons are foreseen for divorce by mutual consent of the spouses, or at the request of one of them. It follows that the will of the spouses is in the focus of the divorce in modern European legislation in the field of family law. But this process of liberalization of divorce has been slow, especially where the influence of the Catholic Church has been dominant in regulating marital and family relations (Italy and Ireland at the latest).

The emphasis of individual freedom and the pursuit for personal happiness, or the pursuit of happiness, are woven into the modern concept of divorce, which begins in the Scandinavian countries, through the former Soviet Union and Eastern European countries, and most recently is implemented in southern Europe, where Italy and Ireland show the most stubborn views under the influence of the Catholic Church.

Divorce liberalization processes have started to be implemented or present in Macedonia as well. It happens very often today a marriage to end in/with divorce. In modern Macedonian law there is a liberal and modern concept of divorce but based on rules provided by law.

Changes in marriage and the family are an integral part of changes in the society, which derive from the changing of moral, religious, ethical and legal values and norms. Liberalism and individualism characterize the value and the moral system of modern society, which is radically different from medieval, traditional society. Liberalism is basically a conception according to which every person is free and has an inalienable right to seek and achieve his/her happiness. According to the dominant value system in modern civilization, the right of man to achieve happiness is considered a natural right that no one can deny or take away. This applies to all areas of the social system, including marital and family relationships. According to Freed and Foster, "modern man differs from past generations in the way he has won the moral right to seek happiness in marriage" (cited in Michel 125, 210). This is a key transformation, because in the past dominated the concept of marriage according to which family and social interests were in the foreground, and not the realization of happiness and personal desires of spouses. (Mickovik 2008: 247-248).

One of the most significant changes in the sphere of marital and family relations in European countries in recent decades is the dramatic increase of divorces. In the

European Union countries, the number of divorces increased from 170,000 in 1960 to 636,000 in 1993, and in 2006 the number of divorces increased to 1,040,000. During the period from 1990 to 2000, in the countries of Western Europe, the divorce rate (which shows the number of divorces per 1000 inhabitants) was 2.24, in Northern Europe 2.36, and in Southeastern Europe only 0.84. The divorce rate in Serbia was 0.76, in Croatia 0.91, in Slovenia 0.97, in Bulgaria 1.15 and in the Republic of North Macedonia only 0.38. (Kalmijn, 2007).

Some authors believe that modern society and its value system "push" for divorce, unlike in the past when it was the opposite - social norms exerted strong pressure on spouses to maintain marriage at all costs. Individualism and the need for personal fulfillment, independence and autonomy of the individuals are the basic imperatives of modern society.

The greatest danger for the stability of marriage is the constant search for happiness if it is no longer fulfilled in the existing marriage, the realization of which is imposed as an imperative, and every difficulty is experienced as a scandalous need for realization of the most sacred rights (Mickovik 2008: 247-248). Modern civilization is hedonistic and it imposes a conception of marriage according to which the spouse becomes an instrument for achieving happiness and pleasure. If this does not happen, everyone thinks that he/she made a mistake in the selection and has the right to go to the judge and ask for the termination of the contract. In this sense, Badinter (305,15) points out that the politics that prevails in marriage today is all or nothing. According to Badinter, the social, economic, and religious imperatives that favored marital stability are no longer strong; most people today think that it is better to make more attempts with the hope of achieving an ideal community, than to accept a lifelong compromise. (Mickovik, 2008: 248-249).

The key question that arises when analyzing all the listed changes in marriage and family is why they occur; and what are the social, economic and cultural factors that lead to a radical transformation in marital and parental relationships. According to many authors, the most significant change that occurs in modern societies and leads to a radical rearrangement of all aspects of married, family and intimate life is the emergence of widespread social acceptance of individualism, ie giving top priority to the individual and his desires, needs and interests. In this sense, Bawin-Legros says: "The individual becomes the basic cell of society" (Bawin, 2001: 50).

This is an absolute novelty, which is not characteristic of any previous stage in the development of Western civilization. Always and everywhere the individual and his personal desires have been subordinated to the interests of the family, community, church or the state. The ideology of individualism, which advocated the liberation of the individual from all limitations and barriers is not new, it is the result of the Enlightenment philosophy. However, in modern industrial society, the individual was not free and autonomous, despite the existence of a free economy based on market principles and a democratic political system. Analyzing the position of the individual during the period of the Industrial Revolution, Lipovetsky says: "In everyday life, in the fashion of living and in sexuality - individualism was limited in its expansion by ideological armor, institutions, traditional morality and authoritarian discipline." (1997: 187). In this period of European history, the individual was in the background, and he was expected to sacrifice himself in pursuit of "higher interests". Emphasizing the subordination of the individual in the modern period, Touren states that "the morality of

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the modern period is a set of rules to be observed in the interest of society, which can not prosper unless the individual sacrifices" (Touraine 1992: 329).

Individualism, which is accepted in modern society as one of its basic characteristics, according to many authors, is the main reason for the dynamic changes in the family in Europe. According to Cherlin, the acceptance of individualism that occurs in Western countries with the advent of capitalism has led the individual to not seek the meaning and the significance of life in respect for authorities such as the church, family or community (which was characteristic of traditional society), but in the pursuit of personal happiness and contentment, which is largely related to the close relationship with the spouse and the children. Because of this, in modern times the family is closed in terms of community, the importance of religious and customary norms diminishes, the choice of spouse is free, and the nuclear family represents a community in which close emotional ties are established between partners and between parents and children. However, in modern society, individualism does not stop at the threshold of marriage or family; on the contrary, individualism enters the family, destroys the idyllic and harmonious family atmosphere and puts in the foreground the interests and needs of each member of the family. Cherlin believes that individualism has a destructive role for the family because "personal emotional satisfaction and the pursuit of happiness come to the forefront, even if it means conflict with the interests of the spouse and children and leads to divorce." (Jamieson 1998: 35). Elizabeth Badinter also talks about the impact of individualism on marriage and the family, pointing out that putting the individual in the foreground, greatly destabilizes marriage in all European countries. (Badinter 1986: 307).

These changes in marital and family relations in European countries are also happening today in the Republic of North Macedonia. Unlike other countries, ie Western and Northern Europe, in North Macedonia, the family and marital relations are stronger and more significant; the number of divorced people in the Republic of North Macedonia is lower than in these European countries, but under the influence of global processes, the number of divorced marriages has increased in recent years.

Termination of marriage with divorce. Concept and properties of development

Divorce is a legal instrument that puts an end to family relationships arising from marriage. The purpose of marriage is consortium omni vitae. When this spiritual and interesting community is over, cohabitation is a difficult situation or problem to resolve. In these cases it is a matter of divorce (Omari 2010: 223).

Divorce can be defined as a way of termination of a valid marriage during the life of the spouses by a decision of a competent court, adopted in a certain procedure only if there are reasons provided by law. Divorce is a legal way of terminating the marriage, unlike the natural way of terminating the marriage, when the marriage is terminated by the force of law with the death of one or both spouses, or with the declaration of one of the spouses as dead. This definition of the term divorce, provides an opportunity for the following assumptions, ie features: first - that only a valid marriage can be divorced, second - a divorce can be requested during the life of the spouses, third - the divorce is decided by competent court in a procedure provided by law, and fourth - the marriage can be divorced if there are reasons provided by law (Hadzivasilev 1987: 175).

The divorce is still one of the oldest legal institutions, and it was created as a side effect of marriage and disruption of cohabitation between a man and a woman. (Draskic 2009: 138).

Only a valid marriage can be divorced between living spouses. Historically, divorce has existed since the marriage took place. The reasons that led to divorce depended on the way how the marriage was signed. The patriarchal reasons for divorce were mainly expressed by the husband. The earliest period recognizes two main reasons for divorce: adultery and female infertility. Roman law, later recognized divorce by agreement (*divortium bona gratis*) and (*repudium*) as a unilateral divorce. Marriage is still a social fact, not a civil legal relationship. For this reason, divorce is very easy, and a unilateral statement from an authorized person is still sufficient. (Pocuca 2010: 106).

In all modern family legislations, just like in the Macedonian one, the most common way to terminate a valid marriage is divorce. Divorce is a way of termination of a valid marriage during the life of the spouses by a court decision, if the reasons determined by law are met (Mickovik, Ristov 2015: 155). From this definition arise the peculiarities of divorce, firstly - with divorce only a valid marriage ends, secondly - the marriage can be divorced only during the life of the spouses (this is a personal right that does not pass to the successors), thirdly - the marriage can be divorced only by a decision of a competent court, in a procedure determined by law (divorce is a legal way of terminating the marriage) and fourth - divorce can be carried out only if there are reasons for divorce provided by law (marriage is an institution of special social importance, it is not just an institution of a personal and private nature of the spouses, so that it can be divorced only for reasons determined by law).

Marriage may be dissolved by mutual consent of the spouses. If the spouses have joint minor or adult children over whom their parental rights have been extended, it is necessary for them to submit an agreement on the manner of exercising parental rights and duties about the maintenance and upbringing of the children.

The court will make a decision for divorce after mutual consent of the spouses if it finds that they made that consent freely, seriously and unwaveringly (Mickovik, Ristov 2015: 138).

Divorce is a way of terminating a valid marriage, ie the marriage must not be affected by reasons of nullity because if the marriage is null, it is declared null and void and it is not a divorce. Termination of marriage can be carried out only if the spouses are alive. (Balili, et al. 2006: 377,378).

There are a number of different factors that influence divorce in modern civilization. In parallel with the increase of the number of divorces, since the sixties of the twentieth century, a huge number of studies are being conducted in order to determine the causes of this phenomenon.

In all European countries, last decades of the twentieth century come to the liberalization of divorce, the reduction of the impact of guilt during the divorce, and the acceptance of the divorce model based on the failure of the marital relationship. Divorce was accepted in all countries by mutual consent of the spouses, and some countries also accepted unilateral divorce (Viltanen, Gonzales, 2006).

Conclusion

Today, Macedonian family law regulates divorce by mutual consent of the spouses, divorce at the request of one of the spouses and divorce by de facto termination of the marital union for more than one year. All three reasons for divorce are

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conceptually inherited from Roman law. It is especially important that divorce in Roman law, as a legal concept has lasting values, the idea that marriage and divorce should be free as a legal concept created in Rome is woven into further human history to the present.

The reasons for divorce in modern conditions are numerous. Marriage has a multidimensional character (legal, sociological, economic, psychological) and it has gone through a series of changes throughout history. But it has always been considered a permanent relationship, in which descendants are born and raised, and it is the most unsuitable environment for the child care and upbringing. However, in people's lives for some reason the relations between the spouses can be disturbed and their life together can become impossible and harmful both for them and for their descendants. In such conditions, the most desirable solution is divorce and the so-called a good divorce - a divorce without shocks and insults, and especially without the abuse of children born or adopted during the/in marriage.

Marriage is a voluntary union of life between spouses. In the past, the stability of marriage was insisted upon, in which parents were to solve problems and ensure a healthy and stable life for their children, both minors and children whose parental rights had been extended.

Marriage, after the last decade, has undergone major changes that, like an earthquake have affected its whole functioning. The dynamic way of life, the individual and his/her desires are in the center of attention; the search for personal happiness; employment and emancipation of women; individual preoccupation for material well-being and better career have contributed to increasing divorces in the modern world and also in North Macedonia. The number of divorces is increasing rapidly and fewer children are living together with their two parents (promoting the binuclear family or the composite family). Individualism and the need for independence of the individuals, pose a great danger to the functioning of marriage in modern times, thus particularly reducing its stability.

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Article Info

Received: March 04 2022

Accepted: May 06 2022

How to cite this article:

Bekteshi Shaqiri, F. (2022). Modern Processes in the Legal Regulation of the Family, Marriage and Divorce. *Revista de Științe Politice. Revue des Sciences Politiques*, no. 74, 162-168.