

Phenomenon of Divorce in the Modern World¹

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Abstract

In this paper, the author analyses the institute of divorce in the modern world. Given the fact that the institute of divorce is inseparable from the institute of marriage, in the introductory part the author points out to the specific characteristics of marriage in the contemporary society and discusses some factors which are presently perceived as the primary causes of instability of marital relations. In the central part of the article, the author provides an overview of divorce legislation in some European countries which are traditionally used as role models in the field of regulating family relations, thereupon focusing on the applicable divorce law in Serbia. In particular, the author looks into the process of liberalization of divorce legislation and examines its impact on the growing divorce rate in the contemporary societies.

Key words: *divorce, marriage, spouses, modern world, contemporary law.*

1. Introduction

Changed social conditions, the expansion of the human rights corpus and the liberalization of divorce law are some of the factors that lead to an increase in the number of divorces in the modern world. Divorces are more common in practice, and the great frequency of this sociological and legal phenomenon is best illustrated by the fact that during the last six decades, the number of marriages has been on a constant decline, while the number of divorces has been in constant increase (Kitanović, 2011: 114-131). In the context of the dramatic decline in the number of marriages, the increase in divorce rates is alarming.

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Marital crises are not solely a characteristic of the modern era, but in the earlier epochs of history they were usually ignored, given the fact that a marriage represented primarily economic, and then the emotional union of spouses. Today, however, marriage crises increasingly result in divorce. In the patriarchal and economically underdeveloped societies, spouses entering the marriage had to accept the imposed behavior patterns and successfully operate within specified limits, since their existence outside the family was much more difficult. The issues of compatibility of spouses or achieving personal happiness and satisfaction with married life were not important in such circumstances. In contrast, modern marriage is ideally based on emotional bonds, mutual love and affection of spouses, and if intimate expectations of partners are not met, the marriage has not achieved its purpose, so that divorces are more common.

Changes in the sphere of marriage and family, which are typical for modern society, are caused by numerous and various factors, including an increase in life expectancy, lower mortality rates, the urbanization process, the process of prolonged schooling. These factors were clearly emphasized and intensified in the second half of the twentieth century, which leads, compared to previous periods, to people, particularly women, marrying later in life (Meixner, 1999: 103-112). In a modern marriage, psychological, sexual, emotional and intellectual dissent, which have been held back for centuries as factors leading to the disorder of marital relations, emerge to the surface and become the grounds for divorce *par excellence* (Mladenović, 1974: 391). A marriage based on emotional feelings of spouses can very easily fall apart, since love is a variable category. Modern life, its pace and complexity, lead to depersonalization of social personality, which is why a man seeks full compensation in his family environment: the family and marital individualism makes up for his constrained social individualism (Mladenović, 1974: 385). If these desires are not met, the marriage has not fulfilled its purpose and is doomed to failure. Divorce becomes a real modern man right when his marriage has not provided a minimum of what reasonably is expected of it.

Though the level depends on the economic power of a particular country, marriage currently takes place within the context of a variety of measures of social welfare. As a result of not having to depend on marriage for financial support, spouses increasingly and without hesitation resort to divorce, when marriage no longer contributes to their personal happiness. Therefore, a successful and lasting marriage in modern society is increasingly rare, especially in the economically affluent countries. Similarly, informal unions between a man and a woman are becoming more popular, so that they gradually acquire an attribute of not only the socio-psychological acceptability, but also of the desirability in terms of achieving the highest level of human freedom

(Jović, 2006: 187-197). In fact, in the modern world, a marriage is in the process of collapse, as can be seen in the historically extremely low rate of marriages, which is why conceiving and raising children is increasingly detached from a marriage (Shaw-Spath, 2002: 59-67). In this context, there has been a crisis of marriage and family in modern societies for some time. It is so grave that it brings into question the survival of both family and marriage (Krause, 2000: 208-221). Europe is turning into a "society of loners", a traditional family with both parents and children is showing signs of dangerous erosion (Mladenović, 1996: 546).

On the other hand, it is in the nature and psychology of human kind to strive for certainty. Marriage an institution tested through the centuries, provides this type of security. Bearing in mind the importance and function of marriage as a framework of giving birth, raising a family and providing safety and protection for children, in recent years there have been notable efforts to strengthen it (Wardle, 2002: 167-175). In fact, the contemporary person is in a limbo, torn between the desire for a stable marriage which will fully satisfy one's deepest emotional needs, and difficulties encountered on the way to achieve these desires, which often question the value of marriage and family. Qualitative analysis of the process of individualization of marriage indicates not only that "the concept of marriage for all time is broached", but also that the very concept of "common life" has been reassessed. However, the surveys carried out among the population across Europe show that the family sector has kept a very high position on the scale of life goals, that living together has become a less instrumental target and a more emotional need of the individual *per se*, but it is difficult to achieve it in social systems which generate constant uncertainty, competition and mobility (Bobić, 2001: 197).

2. The influence of the liberalization process of divorce legislation on the increase of the divorcibility rate in the modern world

Of particular importance is the question of the impact of the liberalization process of divorce legislation on the increase in the divorce rate. In order to maintain the stability of marriage and the family, divorce legislation was extremely restrictive for a long time. However, there is no firm evidence of the relation between the degree of liberalization of divorce legislation and the number of divorces in a society. Therefore, the modern law has abandoned the idea that the stability of marriage would be threatened by a liberal divorce law, that is, that marriage would be strengthened by a rigorous law (Ponjavić, 2009: 887).

Modern divorce regimes usually do not advocate absolute freedom to divorce, rather the right to divorce has certain restrictions, for instance to preserve the marriage if this is necessary from some particular reasons. To illustrate this, the German Civil Code² acknowledges the safeguard clause (*Härteklausele*), which prevents divorce, even though the marriage is essentially failed, if the interests of a spouse or common minor children require preservation of its existence in the field of law (§ 1568 of the German Civil Code). However, in jurisprudence these clauses are applied very rarely, especially in favor of the spouse. Although the clause on the protection of children could theoretically thwart divorce, in a particular case there is usually a lack of a more serious scrutiny of the effect of the divorce on the welfare of the child. This may be the case due to the widespread view that the divorce of the parents is better for the children than life in a family with troubled relationships. In addition, the concept of joint exercise of parental rights after divorce is seen as a way to make divorce more bearable for children, because both parents are in contact with the child. However, the use of such a clause on the protection of children is not in accordance with the law and reality, regarding the present danger to the child to have a significantly reduced or completely lost contact with one parent after divorce (Schwab, 2008: 155).

On the other hand, though the French divorce regime does not include clauses that explicitly allow for the possibility of rejection of divorce in certain situations, in French jurisprudence decisions to refuse the application for divorce are not rare, and since the courts are free to reject the claim if the statutory requirements for divorce are not met. Thus, out of 114,620 divorce cases 4,167 cases were rejected in 2000. However, these rejection sare usually due to technical issues concerning the spouses' agreement on divorce and its consequences and the divorce is granted when these technical issues are resolved (Ferrand, 2002: 6).

Finally, Serbian divorce legislation is extremely liberal; going far beyond the concepts presented in other legal systems, in fact raising the right to divorce to the level of a constitutional right. The Constitution of the Republic of Serbia³ in Article 62 para. 1 provides that "*everyone has the right to freely enter into and dissolve a marriage*". This guarantees the freedom of divorce, so that

² Bürgerliches Gesetzbuch, Retrieved September 28, 2015, from <http://www.gesetze-im-internet.de/bgb/index.html#BJNR00190896BJNE009902377>.

³ Ustav Republike Srbije, Službeni glasnik RS 98/2006 (Constitution of the Republic of Serbia, Official Gazette of the RS, No. 98/2006).

rejection of divorce in the local court practice is no longer possible (Cvejić-Jančić, 2008: 216). At the same time, state intervention is limited, mainly to protect the interests of children, whereas the regulation of mutual relations of spouses is increasingly left to their initiative and consent, which supports the hypothesis of increasing privatization of family law (Ponjavić, 2006: 7).

Evidently, the stability of marriage and family is affected by many factors, legal regulation being just one of them. Then the question is whether this regulation is sufficient to lead to a change toward providing more stable marital and family relationships (Cvejić-Jančić, 2006: 15). Given that this is the embryo of family and the basis of social structure, it is necessary for modern marriage to be consolidated and stabilized, and its dissolution should not be left solely to its actors' will, through mutual consent, or individually. However, due to the changed customs and individual morals, the law cannot remain the only barrier in the domain of divorce (Ponjavić, 2009: 887).

3. Legal regulation of divorce in the modern world

Divorce, which is premised on an irreversible breakdown of marriage or as a serious and lasting disruption of marital relations in contemporary legal thought is usually accepted as a right. In granting a divorce, the blame for the violation of marital duties is irrelevant to the initiating the procedure provided that no fault divorce has been established in the law, as is the case in many countries today. This allows "free exit from the marriage", though what it means in an individual case varies from country to country. Some countries accept a comprehensive system of divorce based merely on the collapse of the marriage, while others accept divorce "a la carte", allowing for different divorce causes on which to obtain a divorce (Ponjavić, 2009: 875). Indeed, some divorce law includes guilt as a necessary causes for divorce, so that the principle of guilt has not entirely lost its importance. In practice, the most common causes of divorce are adultery and physical and/or psychological violence, so it can be concluded that violence and infidelity are a sad feature of modern marriage and family life (Panov, 2012: 166). Therefore, it is still today controversial in doctrine on what principles divorce legislation should be shaped or whether the objective divorce system should be accepted or whether certain faults as divorce causes should be kept (Schwab, 2008: 145).

Thus, the German law has accepted an objective cause of the divorce, which is formulated as a failure or a marriage breakdown - *Scheitern* (§ 1564 of the German Civil Code). The marriage has collapsed when the life union between the spouses has broken down and cannot be expected to be re-established (§ 1565 I of the German Civil Code). Divorce is possible if the

spiritual foundations of marriage are irreversibly destroyed in one or both spouses. Since the court is in a delicate position, because it must determine the degree of disorder of marital relations in the proceeding, assumptions about the decline of marriage have been introduced in order to avoid interference with the intimacy of the spouses and to alleviate the position of the court. In this way it is irrefutably presumed that the marriage has failed, if the spouses live separately for one year and if both have filed for divorce, as well as if one spouse applies for a divorce, and the other consents with divorce during the divorce proceeding (§ 1566 I of the German Civil Code). In this context, one can speak of the existence and the special position of divorce with consent in the German divorce system. Finally, it is indisputably presumed that the marriage has failed when the couple has lived apart for three years (§ 1566 II of the German Civil Code). However, if the spouses have lived apart for one year, divorce is possible if the continuance of marriage is unbearable to the petitioner for the reason contained in the person of the respondent (§ 1565 II of the German Civil Code). If the spouses jointly file for divorce, they are required to achieve and present the court a comprehensive agreement on the consequences of divorce. When it comes to divorce at the request of one spouse, the German law recognizes the specific procedural institution that provides merging a divorce proceedings with a proceeding for arranging the consequences of divorce, thereby creating conditions on deciding both on divorce and its consequences in the same proceeding. This procedural mechanism eliminates the need to conduct separate proceedings for arranging the contentious consequences of divorce, it brings a dose of safety in mutual relationships of spouses and promotes the idea of a clean break between the spouses after divorce (Kitanović, 2012a: 356).

The objective divorce system is also accepted in the Swiss positive law, which allows divorce whenever marriage has lost its meaning and the purpose of its existence, regardless of the specific causes that have led to the marriage collapse, where the guilt of spouses is significant only in exceptional circumstances (Kitanović, 2009: 1124). The Swiss Civil Code⁴ prescribes two forms of divorce, divorce on joint request of spouses and divorce on the complaint of one spouse. The legislature favors dissolution of marriage on the joint request, depending on whether the spouses have reached an agreement on divorce and its consequences, subjected to disposition of the parties, or whether they have only reached an agreement on divorce, while they cannot agree on the consequences of divorce in general, or they can agree on them but only in fragments, when the disputed consequences will be regulated by the court (Art.

⁴ Zivilgesetzbuch, Retrieved September 28, 2015, from <http://www.admin.ch/opc/de/classified-compilation/19070042/index.html>.

111 and 112 of the Swiss Civil Code). In addition, the right to divorce can be accomplished by filing a petition if the couple have been living apart continuously for at least two years (Art. 114 of the Swiss Civil Code). Only subsidiary and in the interest of fairness, if waiting for separation period to expire seems unacceptable, may the fact that spouses' cohabitation has become unbearable to the extent that the continuance of marriage no longer makes sense be used as the reason for divorce (Art. 115 of the Swiss Civil Code). However, this cause of divorce must be very restrictively applied, since its possible abuse could lead to a quick divorce against the will of one spouse, i.e. the repudiation, which cannot possibly be in line with the original idea of the legislature that, by prescribing the cause of the divorce, had in mind those difficult life situations in which an immediate divorce is a salvation for one spouse (Hausheer, Geiser and Aebi-Müller, 2007: 118).

The French Civil Code⁵ prescribes two models of divorce by consent: divorce by spouses' agreement (*divorce par consentement mutuel*; Art. 230-232 of the French Civil Code) and divorce on the basis of acceptance of a definitive marriage breakdown (*divorce accepté; d'acceptation du principe de la rupture du mariage*; Art. 233-234 of the French Civil Code). With the first model of divorce by consent, the spouses must achieve and present the court a divorce agreement and the complete agreement on its consequences, while in other forms of consensual divorce spouses agree that their marriage has suffered a definitive breakdown, whereas the consequences of divorce will be regulated by the court. Moreover, two more causes of divorce are foreseen: divorce due to a definite violation of the marital relationship (*divorce pour altération définitive du lien conjugal*; Art. 237 of the French Civil Code) and divorce based on fault (*divorce pour faute*; Art. 242 of the French Civil Code). Although at the time of the last reform of divorce laws (beginning of XXI century), one of the drafts of law proposed abandonment of faults as divorce causes, foreseeing only divorce by consent and divorce due to permanent and irreversible disorder of marital relationships, the French legislator has kept the fault as the cause of divorce, considering such a solution to be in accordance with the current needs of French society. However, the main concern of the legislator is favoring agreements of spouses, where the newly introduced institution of modifications of the grounds for divorce petition in the course of divorce proceedings is especially important (*modifications du fondement d'une demande en divorce*) (Courbe, 2004: 55-56).

⁵ Code civil, Retrieved September 28, 2015, from <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721>.

Russian Family Law⁶ acknowledges a general cause of divorce defined as the inability to realize family life. The legislator has limited the power of competent authorities to investigate the specific reasons for divorce in case there is a spouses' agreement, since the reached agreement indicates that the marriage has irretrievably failed and that the continuance of marriage is no longer possible. In addition, divorce by consent is closely related to the administrative procedure, which has a long tradition in the Russian divorce system. According to Russian law, a divorce can be obtained in an administrative proceeding if the spouses do not have joint minor children and have agreed on divorce consequences, as well as when one spouse is incapacitated to work, when it is judicially determined that a spouse is gone, and when one spouse is sentenced to imprisonment for a term exceeding three years. If the spouses have minor children, divorce can be obtained only in the judicial process, which occurs in two forms - the disputed and undisputed, depending on whether the spouses have arranged the consequences of divorce by their agreement, primarily those concerning children, or the court will decide on their well-being (Art. 19-21 of the Russian Family Law). Although the court is given great authority in terms of scrutinizing the parents' agreement on children, in practice there is a noticeable tendency that judges do not examine these agreements or they simply submit them to a marginal testing (Antokolskaia, 2002: 17).

Swedish Law on Marriage⁷ treats marriage as a voluntary union between a man and a woman. Therefore, a wish of only one spouse to terminate the marriage is enough to obtain a divorce. If the other spouse agrees, the divorce can be obtained immediately, unless the spouses have children under the age of 16, when the mandatory period for reflection lasts for six months. Also, if one spouse does not agree to divorce, although there are no children under the age of 16 in the marriage, the six-month reflection period must necessarily precede divorce (Part 5, Art. 1 and 2 of the Swedish Law on Marriage). The Swedish law is, therefore, characterized by specific divorce system, which leaves the fault for the violation of marital duties, as well as the irreversible breakdown of marriage as a cause of divorce, whereby the primary importance is given to reflection period, after which the court must impose a divorce.

⁶ Семейный кодекс Российской Федерации, Retrieved September 28, 2015, from <http://www.zakonrf.info/sk/>.

⁷ Äktenskapsbalken (SFS 1987:230), Retrieved September 28, 2015, from <http://www.sweden.gov.se/sb/d/3288>.

The contemporary Serbian Family Law⁸ prescribes the two models of divorce - divorce on filed complaint and divorce by mutual agreement. If the spouses opt for divorce by consent, they are obliged to make a written agreement on divorce which must include a written agreement on the exercise of parental rights and a written agreement on the division of joint property (Art. 40 of the Serbian Family Law). The agreement of spouses on the exercise of parental rights, will be entered by the court into the judgment of divorce, if deemed to be in the best interests of the child (Art. 225 para. 1 of the Serbian Family Law). Thus, the courts are not entirely devoid of control authority, but there is a trend of diminishing the authoritative power of the courts, so that their authority, compared to bygone times, is far lesser (Ponjavić, 2008: 236).

Divorce by consent is in our applicable law designed so that the spouses are obliged to also regulate the property by agreement, thus eliminating the need to conduct procedures for the division of marital property, which is of great importance, since these procedures in domestic jurisprudence belong to the complex, lengthy and exhausting processes. This condition is profiled with the intention to mildly discipline the spouses to put extra effort so that their divorce will be indeed the result of the reached agreement regarding the most important issues of their future relationships (Draškić, 2005: 140). The reached agreement on the division of assets is an indicator of the maturity of spouses, who despite the conflicts that undoubtedly exist between them, have found the strength to regulate their property with the dissolution of marriage (Kitanović, 2012b: 238). While making the agreement the spouses are free to carry out the division of assets in accordance with their needs and desires. Therefore, they need not divide common property into equal shares, nor are they obliged to take into account the contribution of either of them while acquiring the property. If, however, the spouses signed a (pre)nuptial agreement, the division of property will be made in accordance with its terms. However, since it is the institute, which has no long tradition in Serbian law, this type of contracts has not yet been fully established in our country (Ignjatović, 2008: 499). In addition, the court without scrutiny enters the reached agreement on the division of property into the decision by which divorce is granted by mutual agreement (Art. 225 para. 2 of the Serbian Family Law).

If, however, the spouses cannot agree on divorce and on its consequences, and marital relationships are seriously and permanently disturbed or common life cannot be objectively maintained, one spouse can initiate divorce procedure

⁸ Porodični zakon Republike Srbije, Službeni glasnik RS 18/2005, 72/2011 (Serbian Family Law, Official Gazette of the RS, No. 18/2005, 72/2011).

by filing a petition for divorce (Art. 41 of the Serbian Family Law). Yet, in this situation, it is desirable that the spouses reach an agreement on the exercise of parental rights and the division of joint property during the settlement process, where the authority of the court in respect of these agreements is identical to those which it has in the proceeding initiated by request for divorce by mutual consent (Art. 240-246 of the Serbian Family Law). In any case, raising the right to divorce to the level of constitutional law in our legal system is the open way for free exit from marriage, where divorce has become quick and simple no matter what the initial act has commenced it, while regulation of the divorce consequences by spouses' agreement is in the foreground.

4. Conclusion

The institute of divorce has gone from absolute prohibition of divorce, through its admissibility in limitedly cases based on the behavior of spouses, to the abandonment of fault as a cause for divorce and providing more and more freedom to spouses in terminating their marriage. In accordance with modern trends in the field of regulating relations in marriage and family, modern divorce regimes are characterized by a high degree of liberalization, whereby most legal systems accept objective divorce system, which is based on the breakdown of marital relations with divorce seen as a remedy. However, the principle of guilt has not entirely lost its significance, as some modern legal systems recognize divorce based on the violation of marital duties by a spouse.

In addition, marriage is treated as a private law relationship whose basis is the consent of the will of the spouses, so that divorce by consent occupies a special position in modern divorce systems, regardless of the fact whether it is rated as a special way of dissolution of marriage or it is present within the general causes of divorce.

Contemporary divorce systems usually do not promote absolute freedom of divorce, but the right to divorce has certain restrictions, if the preservation of marriage is necessary from justified reasons, which are in the interest of common minor children or a spouse who opposes the divorce. However, even though marriage is an extremely important institution, it is debatable whether it is justifiable to limit the possibility of divorce in the present stage of social development, what are the mechanisms by which it is feasible to do so, and what is the effectiveness of these mechanisms in the field of educational influence on spouses and decrease rates of divorciality in the modern world.

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