Study analysis on the marriage and divorce institute in normativ aspects

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Xhemile SALIU[1]
[1*] *Faculty of Law, Univerity of Tetova, RNM*
[*]*Corresponding Author e-mail: xhemile.saliu@unite.edu.mk*

Abstract

The law that regulates marriage, is a special part of family law. This legal institute regulates and studies the relationships that arise with the marriage bond and also deals with the study of the possible consequences if it comes to the divorce of such a marriage. The legal norms governing the institute of marriage are of an imperative nature, while only a few of the legal norms have a clairvoyant character.

So, based on the definitions of the time, it is noticed that even before the existence of modern society, marriage was not seen as a personal and private act, but the opposite, it was considered a public act, which consequently interested the society as well. In an effort to give a definition, marriage represents a legal union between two persons of different genders, who aim for a common lifestyle and the realization of personal and property interests, thus forming a community in the direction of the contribution and development of the family.

Therefore, considering the importance of this institute in everyday life, we need to study it as such, starting with the reasons for its birth, how this institute was born and the main principles of marital law.

Like any other institute, this institute has its origins, so in this paper will be discussed and analyzed the historical aspect of marital law.

In addition, with the very existence of the marriage institute, in cases of unbearable conflicts between the couple, there is a need for regulation of the divorce institute. As such, this institute has its origins and its beginnings, so in this paper we will consider the historical aspects of these two institutes globally.

Keywords: marriage, divorce, their origins, marital law.

1. Introduction

Marriage as a legal institute, but at the same time as a community of special importance for family formation, there is and will always be the emphasis of many researchers from many scientific spheres, whether in the psychological, legal or economic sphere. Marriage, as such a legal institute, is a recognized social or ritual union between the spouses that defines the rights and obligations between these two spouses as well as the determination of their rights and obligations that may arise if the couple concerned have their biological or adoptive children involved. The definition of marriage differs across the world not only between cultures and religions, but also throughout the history of any particular culture and religion, developing as in the extension or narrowing of its definition, but it is typically an institution in which interpersonal relationships, usually intimate, are known or sanctioned. Being such an institution, the need arises to highlight its history, namely its legalization as a legal institute, as well as the recognition of the various types of marriage ties from the past to the present.

2. Summary analysis of legal regulation of the legal institute - marriage

Because marriage is considered a contractual agreement that is subject to legal proceedings, a newly married couple undergoes a radical change in their legal status. This change involves obtaining certain rights and obligations assigned to one another. In many societies, these obligations include coexistence in the same or close dwellings, provision of household services such as raising children, cooking and housekeeping, food security, housing, clothing and other means of support. Marriage rights include the joint ownership and inheritance of each other's wealth at different levels and, in monogamous marriages, the exclusive right to intimate relationships with one another (see monogamy).

Despite these generalizations, any past or present society has had its own concept of marriage and many have established marriage laws that reflect their particular cultural standards and expectations related to the institution in question. The ancient Roman law recognized three forms of marriage**.** ***Confarreatio*** was marked by a highly solemn ceremony involving many witnesses and animal sacrifice. It was usually reserved for patriarchal families.

Coemptio, used by many plebeians, was an effective buying marriage, while ***usus,*** the most informal variety, was marriage merely by mutual consent and testimony offered to expanded coexistence.

Roman law generally placed the woman under her husband's control in the same way as the children. According to Roman law, no slave can make a marriage with another slave or a free person, but the union of male and female slaves was recognized for various purposes[1].

So, by this time, the first beginnings of the legalization of the institute of marriage are highlighted. After this period with the formation of the first states and the formulation of the legal system of each of these states, the institute of marriage with the laws is legalized and normatized. However, not always the legalization of marriages was as it is presented today, i.e without discrimination of the partner at the time of the marriage bond. In the United States, in the past, there were discriminatory laws regarding marriages with black people.

In 1967, the Supreme Court of the United States reviewed a historic case called Loving v. Virginia. This case is an example of how marriage laws changed in the United States at different times.

Year 1664: Maryland became the first colony that explicitly prohibited interracial marriage (between British people and black men). In 1691, Virginia postponed the law to ban marriage between English people and Indians[2].

However, over time, limited marriage was transformed into a modern marriage, which is considered a civil transaction and only monogamous mergers between the couple are allowed. Nowadays, in general, the legal capacity of a person to marry is the same in much of the western world and is subject to only a few obstacles (removing obstacles that have existed from the aspect of the human race), like; affinity, age restrictions (which are recognized in most countries by a minimum of 12 years of age or younger between the ages of 15 and 21), and limitations due to mental incapacity. In the United States of America, the federal act; The Defense of Marriage Act (1996) defined marriage as a legal union between a man and a woman and allowed states to refuse to recognize same-sex marriages that were committed in other states. Many US states

[1] Surabhi Sinha, November 26, 2013/ Marriage Law/ Enclycopedia Britannica

[2] A brief history of marriage law in the United States/familytree.com

adopted laws similar to the Act, or changed their constitutions with the same effect. However, in 2013, the Supreme Court of the United States stated that the definition of a marriage act is unconstitutional[3].

While, apart from the United States, marriage as a legal institution found its regulation within the legal system even in different European countries. Thus, the drafters of the French Civil Code considered marriage as a fundamental institution of a civilized society. Given the diversity of religious attitudes in France, they decided that only married ceremonies celebrated before secular officials should be legally valid. This did not deprive the clergy of various religious beliefs to celebrate religious marriage ceremonies, but these did not have any legal effect and had to take place after the secular ceremony to avoid any confusion. Parental control over child marriage was partially restored; consent was required for boys under the age of 25 and girls under 21 years of age. After 1900 the formalities of marriage diminished and the parental control was reduced. The 20th century statutes gradually restored the revolutionary rule that parental consent was not needed when the parties were over 21. In 1974 the majority's age for this and other purposes was reduced to 18.

In France under the old regime, the family was centered on the man whose authority and strong power was inherited from the Roman paterfamilias tradition (head of the family). Although the Revolution preached that women were equal in terms of rights with men, the Revolution did little to apply that view to the law. The code makers saw no reason to change the traditional situation, and Napoleon himself favored the woman's submission to her husband. The code expressly stated that she owed him to obedience. With very few exceptions, she had no legal capacity to act. Without the written consent of her husband, she could not sell, give, mortgage, buy or receive property through donations or offspring. Statutes in the 20th century, however, severely diminished the husband's authority over his wife and provided him with full legal capacity. In 1970, the old language stating that "the husband was the head of the family" was abandoned in favor of a new principle of shared family decision-making power, which did not extend to community property management.

Marital property regimes since than, have been revised in many places and the trend is towards a partnership on married property, where each party has control of the property that it had existed before marriage. Although the Napoleonic Code provided for a statutory regime (unless a special marriage contract had been concluded), according to which all spouse's income would be the property of the community and this property should be equally divided between them or their heirs in the dissolution of marriage, again the husband was equipped with all the active powers, even on the wealth of his wife.

In 1965, the movable property owned by each spouse before marriage was excluded from the community fund, which now, in the absence of agreement to the contrary, consists only of the fruits of spousal labor or savings during marriage. By acquiring legal capacity at the beginning of the century, a French woman was free to manage and dispose of her income and wealth, but it was not until 1985, because after this year the man's long dominance in property management joint was replaced by a system of equal management between spouses[4].

While in the Republic of Germany we have a little different situation regarding the legalization of marriage. Since 1875 the marriage was supposed to be a civil ceremony with the presence of a recorder who could not be a priest. Celebration in the church could be followed by the civil

[3] Brian Duignan, jun, 2013/ Revised to mention that in 2013 the U.S Supreme Court declared unconstitutional the definition of the marriage in the Defense of Marriage Act.

[4] Civil Law- Romano- Germanic; Marriage and Family; by Paolo Carozza, Mary Ann Glendon, Max Rheinstein, 2013.

ceremony. Marriage can be declared void at the request of one of the spouses or public prosecutor for various reasons, such as lack of form or affinity, but the consequences of such nullity approximate those of divorce: however, children are not necessarily illegal. The provisions of the German Civil Code concerning women's rights in marriage were less restrictive than those of the French Civil Code. After the Second World War, almost all the rules contrary to the principle of equality of men and women were abolished. The common marital-ownership regime, with the husband who administers and uses the property of a woman, was replaced in 1957 by a special management system and equal sharing in the value of purchases made during marriage. After the death of a spouse, the surviving spouse has the right to a generous share in the estate. Caring for the person and property of children belongs to both spouses, according to German civil law[5].

Thus, following the example of the relevant European codes, dating back to a long time, the arrangement of the marriage institute was foreseen by the Constitution of Former Yugoslavia, where the basic foundations of this institute are found in concrete laws. Thus, we had ***the basic law on the marriage of Former Yugoslavia***, which the law underwent some changes in 1965. Under that law, the institution of marriage is regulated in detail, where Article 1 of the same article provides that marriage is a living community between man and woman, which is regulated by law[6].

Also, Article 8 of the same law regulates the ownership aspect of spouses who have entered into marriage, and from the article in question we can see that the legal traditions of European codes have been followed, as it is foreseen that the property which the spouses have acquired through work, during the time they were married, appears as a joint property of the spouses in question. According to this law, how much will the participation of each of the spouses in the common property, in case of dispute, will decide the court, depending on the contribution of one or the other spouse, taking into account and evaluating all situations[7].

After the independence of the Republic of Macedonia from the Former Yugoslavia, our state is also being re-examined and the legal system is restructured, starting with the constitutional behavior and then by the adoption of concrete laws. Thus, having the foundations of the institute of marriage in many European codes since before, even having the basis for the normative of the same institute, also in the Basic Law on Marriage in Former Yugoslavia, for the Republic of Macedonia it was easier to rely on the proper juridical norms of the laws and codes in question. Thus, starting with the Constitution of the R.M where the foundations of the marriage intent are laid, this institute is regulated normatively also in the law on the family

This law regulates the rights and obligations between spouses, but also extends its normation in regulating their parental relationships. Therefore, we can see that the law of R. Macedonia has taken the name of the Family Law, because normative regulation does not focus solely on regulating the relationship between the married couple but expands their powers, rights and obligations even in their parental aspect.

Thus, this law provides that marriage is a community created between male and female, regulated by law, through which the interests of spouses, family and society are realized through

[5] Civil Law- Romano- Germanic; The main categories of German private Law, Marriage and Family; by Paolo Carozza, Mary Ann Glendon, Max Rheinstein, 2013.

[6] Службен весник на Социјалистичка Федеративна Република Југославија, среда, 23 јуни 1965, Белград, број 28, година XXI, Претседател на Законодавно-правната комисија на Сојузната скупштина, Јово Угрчиќ, с. р.; Основен закон за бракот (пречистен текст), 1965, neni 1.

[7] Службен весник на Социјалистичка Федеративна Република Југославија, среда, 23 јуни 1965, Белград, број 28, година XXI, Претседател на Законодавно-правната комисија на Сојузната скупштина, Јово Угрчиќ, с. р.; Основен закон за бракот (пречистен текст), 1965, neni 8.

this community. Relationships between spouses are based on a free decision on marriage bonds based on their equality, mutual respect and mutual assistance[8].
However, this institute, which for centuries has been recognized in most of the codes around the globe, as a community between male and female, where one of the goals is the addition of humanity, contemporary times, this institute in many laws is altered, i.e the definition of this institute changes itself.
So in German law, now we have changed definition of this institute, where it is foreseen that life partnership can also be linked by two persons of the same gender[9]. Thus, in recent centuries, it is universally known that the institution of marriage is subject to regulatory changes in terms of its definition. Thus, since 1984, the first US government body adopts the right to legal partnership for same-sex couples.
So in Berkeley we have the first approval on this kind of marriage, nearly three decades ago. Also, Hawaii's Supreme Court in 1993, addressing the issue of whether marriage is a civil right, the judges asked the question; how can legally justified the deprivation of marriages between couples of the same sex, when marriage is considered as a civil right?[10]
Thus, from the aforementioned years, the fundamental legal changes on the institute of marriage begin, stipulating that marriage is no longer a communion between male and female, but should be given the possibility for each person to choose whether or not he wishes to have a marriage with the opposite sex, or with a partner of the same sex!!! So, we can say that the first laws in modern times that allow homosexual marriages were adopted during the decade of the 21st century. On May 19, 2014, fifteen countries: Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, United Kingdom, Uruguay and some sub-jurisdictions nationals (parts of Mexico and the United States) allowed homosexual couples to marry.
Surveys in different countries show that we have increased support for legal recognition of homosexual marriages and equal support is provided by people from different races, regardless of ethnicity, age, religion, political affiliation, social and economic status.
But in the Republic of North Macedonia, such spirit and readiness for a radical change in the normative definition and actual change of the marriage institution is not yet!!!. Consequently, one of the standards required by the European Union for the integration of our country into the EU is also non-discrimination in terms of sexual orientation, ie the aspect of allowing married couples of the same sex!!
According to FUERES, in the Republic of North Macedonia, there is still no pronounced freedom, ie there is no freedom, because of the non-existence of same-sex marriages[11].
Irish citizens, chose the issue of marriages among same-sex couples, through referendum, remains to be seen in the future than, the North Macedonian population stands ready to allow such a radical change!!!

[8] Закон за семејството, пречистен текст, Службен весник на РМ, бр. 153 од 20.10.2014 година.

[9] Act on Registered Life Partnerships of Germany, of 16 February 2001 (Federal Law Gazette I p. 266), last amended by Article 2 of the Act of 20 July 2017 (Federal Law Gazette I p. 2787) This Act was adopted by the German Bundestag as Article 1 of the Act of 16 February 2001 I266. It entered into force on 1 August 2001 pursuant to Article 5 of this Act. The Act is compatible with the Basic Law pursuant to Federal Constitutional Court Decision of 17 July 2002 Federal Law Gazette I p. 3197 (1 BvF 1/01, 1 BvF 2/01).

[10] Marriage Rights; A short history- Tom Head, March, 17/2017

[11] Нетпрес.ком.мк/ За Фуере, во Македонија нема слобода, бидејќи нема геј бракови; 21 мај 2015.

3. Summary analysis of legal regulation of divorce

While the marriage institute is universally recognized by all legal systems in the world, divorce has not had the same legal fate. Usually, in cases where a marital couple does not find a common language within marriage, there is a possibility of divorce among partners. However, this fact has not always been the case. In the past, based on religious traditions (usually ecclesiastical traditions), marriage was considered sacred and as such it was considered eternal, namely any attempt to break the marriage was considered intolerable and sinful. If we go back to ancient times, when it was the main role in some of the societies, marriage was considered a church institution, so divorce was considered as ecclesiastical competence.

Marriage was eternal and divorce rarely appeared, though the church occasionally allowed a divorce "mensa et toro", which allowed the partners to live separately if there was considerable cruelty among them but not allowed to re-marry. In the eighteenth and early nineteenth centuries in England, it was possible to get a divorce from the Act of Parliament, but such an option was open only to the rich.

The Matrimonial Causes Act from 1857 was the first divorce law which found the general application[12]. From this period, the divorce already assumes juridical connotation, ie its competencies are handed over to state bodies, more specifically to the civil courts.

Whereas, in the states of east, where the rules of the Islamic faith apply, we have another situation, from that ecclesiastical. Namely, in countries where Islamic rules are practiced, divorce is permitted, but the rules are strict and should be applied consistently. In many Muslim countries, courts are codified in the Sharia law through a process called "tafriq." Depending on the country (the state), the court may act in accordance with the traditional sheriatical divorce or instead of enforcing divorce under the legal rules. Thus. A couple may appear before the court with an indictment for termination of marriage (divorce).

After that, they are required to meet with a counselor during a quarterly period called ***"iddat".*** The counselor will try to reconcile the couple before allowing them to move forward with divorce proceedings. If the counseling fails, the divorce of the couple goes to the judge who will decide whether to allow them to end their marriage (by examining the facts)[13]. So, from this we can see that in the states where the shari'a law applies, we have a procedural combination in terms of divorce. If divorce does not apply according to Shari'a traditions, it will be implemented according to legal procedures, where as a basis are the manner of divorce according to European civil codes.

While in the United States, divorce is a matter of state rather than federal law. In recent years, however, federal legislation increasingly affects spouses' rights and responsibilities in terms of divorce. The laws of the state of residence at the time of divorce govern; all States recognize divorces given by any other state through the committee principle set out in Article IV of the US Constitution[14].

Before the last decades of the 20th century, a spouse seeking divorce had to give cause and even then he would not be able to get a divorce. Legalizing divorce without fault in the United States began in 1969 in California in accordance with the legislation signed by then-Ronald Reagan governor and was completed in 2010, where New York was the last of the fifty states to legalize

[12] Cambridge Family Law Practice (CFLP); A brief history of divorce; 18 april, 2012.
[13] Sharia Law on Divorce by Beverly Bird.
[14] Divorce/ Scope of Full Faith and Credit Clause of the Federal Constitution". Yale Law Journal. 15 (8): 426–428. 1906. JSTOR 785616.

it[15]. Since the mid-1990s, some states have adopted covenant marriage laws that allow couples to voluntarily make a divorce more difficult for themselves than in the typical act of divorce without fault. In the United States, mediation (MEDIATION) has become a growing way of resolving divorce issues.
It tends to be less contradictory (especially important for each child), more private, less expensive and faster than traditional litigation[16].
Even in the period of existence of the Former Yugoslavia, we had the arrangement of divorce as an opportunity given to the legal acts of married couples. Thus, the reasons for the divorce were quoted in the Basic Law of the Former Yugoslavia marriage. Namely, according to this law, divorce was possible if due to the incompatibility of nature, long-term misunderstanding, inevitable animosity, or because of which other cause, marital relations have worsened so much that common life has become unbearable; in these cases, each of the partners may seek divorce. It will be considered in particular that the common life of spouses has become unbearable if the two partners bring before the court justified causes jointly seeking divorce. If the disorder of marital affairs is created solely by the fault of one of the spouses, the right to seek divorce; is accepted only to the other partner[17]. Indeed, as an interesting fact and as a legal norm sanctioned in the same law is also the aspect of seeking divorce because of the betrayal of the marital partner[18], the resean which in modern laws, including the law of the family of the Republic of North Macedonia, is not foreseen.
The law on the family of the Republic of Macedonia also foreshadows divorce as a way of ending the marriage. Under this law, marriage can be divorced with the consent of the spouses. If spouses have minor juvenile children or adult children over whom parental rights have been extended, it is necessary to present an agreement on the manner of exercising parental rights and obligations and the manner of keeping and educating children. Marriage may be divorced at the request of one of the spouses if marital affairs are so disrupted that common life has become unbearable. Also, the marital partner may seek divorce if the marital community actually ceased for more than a year[19].

4. Conclusion

Even so, by examining from the historical aspect the variability that has undergone marriage and divorce normatively, we can conclude that this normative change is and will always adapted to suit the actual changes that occur in everyday life. As the number of divorces increases globally every day, even such increases are made by more diverse causes, the need for this aspect to be regulated in more detail in the future is alredy known.
Marriage today as a relationship between two individuals is taken more seriously and comes with higher emotional expectations than ever before. But marriage as an institution exerts less power over people's lives than before. Unfortunately, it no longer appears as a key mechanism for regulating intimate behavior, including reproduction or interpersonal organization.

[15] Lovett, Kenneth; Blain, Glenn (1 July 2010). "New York legislators approve no-fault divorce". New York Daily News. Retrieved 18 November 2017.
[16] "Divorce: Hoffman, David A.; Karen Tosh (1999). "Coaching from The Sidelines: Effective Advocacy in Divorce Mediation"; Massachusetts Family Law Journal; 1999.
[17] Глав а IV ПРЕСТАНОК НА БРАК; ОСНОВЕН ЗАКОН ЗА БРАКОТ; Службен весник на СФРЈ, 23 јуни 1965, Белград, број 28, член 53.
[18] Глав а IV ПРЕСТАНОК НА БРАК; ОСНОВЕН ЗАКОН ЗА БРАКОТ; Службен весник на СФРЈ, 23 јуни 1965, Белград, број 28, член 54.
[19] Закон за семејството на Република Македонија, член 39, 40, 41, Службен весник на Република Македонија, број 153, 20 октомври, 2014, понеделник.

Erosion of the role of marriage in social life co-ordination has been described as the "Deinstitutionalization" of marriage (Cherlin, 2004). Historian Nancy Cott noted that the process is similar to what happened in Europe and America when lawmakers declared the state of their state religion (Cott, 2000)[20].

Thus, considering the crisis of marriage in real life, the de-institutionalization of marriage and the increase of the number of divorces at the global level, it is a need that in the future not only the legal system and legal norms be adapted to the factual situation but even in the legal system to create logical mechanisms in order to reduce marriages that will necessarily lead to failure and to create adequate legal mechanisms to prevent accelerated and well-conceived divorces, because of the consequences of suffering the couple, then if we include the children, ultimately the whole situation will have an indirect impact on the whole society as well.

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