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## **MARRIAGE AND DIVORCE BETWEEN THE PAST AND THE FUTURE**

### **Family Law in a Multicultural Environment: Civil and Religious Law in Family Matters**

#### **A B S T R A C T**

In her paper, the author deals with the marriage and divorce throughout the Serbian history. There was a great difference between the period before and after the Second World War. In the period before the War, the religious form of marriage was legally valid throughout Serbia save in Vojvodina (northern part of Serbia), where since 1895 only the civil form of marriage was valid, whilst the religious one was allowed but created no legal effect.

Regarding the religious form of marriage, respective religious laws were applicable to the followers of different religions. For the Serbian people, most of which were and still are Orthodox Christians, the source of religious law was Marital Bylaw of the Serbian Orthodox Church (*Bračni pravilnik Srpske pravoslavne crkve*) of 1933, which the Serbian Civil Code of 1844 recognized as a legal source of law for the followers of the Serbian Orthodox Christian Church.

As it was under the Austro-Hungarian rule until the foundation of the Kingdom of Serbs, Croats and Slovenes in 1918, Vojvodina applied the Hungarian Marital Act of 1894, which designated the civil form of marriage as the only one that was recognized by the state. The reason for such a solution was Vojvodina's multicultural and multireligious environment as well as the intention to facilitate the conclusion of marriages between the people of different religious backgrounds. After the establishment of the Kingdom of Serbs, Croats and Slovenes, Vojvodina joined the new Kingdom and became part of Serbia. Yet, the law applied before the creation of the new state remained in force in the respective parts of the Kingdom until the Second World War broke out.

After the War, the religious marriage became a private and personal matter without any legal significance. Until the amendments of the Criminal Code of 1994, the conclusion of religious marriage was only allowed after the conclusion of the civil one. If this sequence was not respected, the head of the religious community who allowed the celebration of the religious marriage before the civil one was considered to have committed a criminal offense and could be prosecuted and punished. The amendments of the Criminal Code of 1994 abolished the celebration of religious marriage before the civil one as a criminal offense. Therefore, the religious marriage carries no legal consequences thereby leaving the civil marriage as the only form of marriage that creates legal effects.

Divorce was allowed both before and after the Second World War, but the grounds for divorce and their social value was quite different. Although divorce was not forbidden, it was not socially acceptable either; rather, it was socially stigmatized. Nonetheless, this situation was slowly changing, so that in the last decades the number of divorced marriages increased and became, one could say, a common thing. In her research, the author carries out an in-depth analysis of the differences between pre-war religious law and post-war civil law regarding marriage and divorce.

***Family Law in a Multicultural Environment:  
Civil and Religious Law in the Field of Marriage and Divorce***

The question of marriage and divorce has always been interesting both for the state and for the church and, during a long period of human history, many disputes for the predominance in the field of family life erupted between them.<sup>1</sup> In our country, marriage obtained the confessional character in 13<sup>th</sup> century, when Christianity and canon legislation of the Christian church was completely adopted. The main source of the religious law until 1933 (when Church passed the Marital Bylaw of the Serbian Orthodox Church) was Krmčija, a printed Slavic codex of canon law.<sup>2</sup> This situation lasted until mid-twentieth century, that is until the end of the Second World War. However, in other European countries, under the influence of Reformation, of philosophy in the period from the sixteenth to eighteenth century (Scholastic and the School of Natural Law), and finally of the French Revolution, marriage lost its religious character much earlier than it did in our country. The civil marriage was introduced in France in 1791, when the French Constitution proclaimed in Article 7 that “La loi ne considère le mariage que comme un contrat civil” (The law considers marriage only as a civil contract). After France, in other European countries civil marriage was introduced in the Netherlands in 1796, in Belgium in 1796, in Romania in 1864, in Switzerland in 1874, in Germany in 1875, in Hungary in 1895 (including Vojvodina), in Portugal in 1910, in Soviet Union in 1917, in Sweden in 1920, in Albania in 1929, and so on.<sup>3</sup>

In our country, the secularization of family law was definitely realized after the Second World War by separating the church from the state. Due to the socialist regime, the manifestation of people’s religious beliefs was very unfavorable. The situation is quite different nowadays. The religious freedoms and tolerance are very extensively guaranteed by the Serbian Constitution.<sup>4</sup> Religion is a private matter of each individual, who may

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<sup>1</sup> Lazar Markovic, *Porodичno pravo (Family Law)*, Belgrade, 1920, pp. 6-7 and D. Mickovic, *Od Justinijan do Napoleon, Reguliranje na razvodot na brakot vo Corpus Iuris Civilis I vo Code Civil (From Iustinian to Napoleon, Regulation of Divorce in Corpus Iuris Civilis and in Code Civil)*, in *Contemporary Law, Legal Science and the Iustinian’s Codification*, Skopje, 2004. Mickovic underlines that between XVI and XVIII century in the great part of Western Europe the Catholic Church lost jurisdiction over marriage, p. 419.

<sup>2</sup> L. Markovic, *op. cit.* p. 8-9.

<sup>3</sup> V. Bakic, *Porodичno pravo u SFRJ (Family Law in Federal Union of Republic of Yugoslavia)*, Belgrade 1982, p. 73.

<sup>4</sup> Article 44 of the Constitution reads:

Churches and religious communities are equal and separated from the state.

celebrate a religious marriage or get a religious divorce, albeit without creating legal consequences. Only civil marriage and civil divorce are valid. However, in the last fifteen or twenty years, after the fall of the Communist regime, the number of religiously celebrated marriages significantly increased. According to some unofficial appraisal, there were 80% more religiously celebrated marriages than during the Communist regime.<sup>5</sup> It is questionable whether it happened due to the growth of religious affections (feelings) of the people or due to some kind of fashionableness, or due to both. At any rate, we could say that this growth of religiously celebrated marriages did not produce greater marriage stability, because, as it will be mentioned below, the divorce rate is still quite high.

The dominant religion in Serbia is Orthodox Christianity. According to the census of 2002, 95 % of the population declared themselves as religious, among whom 84,98 % declared themselves as followers of the Orthodox Church.<sup>6</sup> Nevertheless, in reality, a sociological research conducted in 1991 on a sample of 4.804 Serbs from ex-Yugoslavia (ex-SFRY) showed that only 8,5 % of the interviewees declared to be genuine believers who accept i.e. obey all the religious rules, that 16,2 % were followers of the Orthodox Church who did not accept all that the Church preaches, and that as many as 47,3 % were not religious but had nothing against religion.<sup>7</sup>

The other traditional churches in Serbia besides the Serbian Orthodox Church are the Roman Catholic Church, the Slovak Lutheran Church, the Reformed Church, the Evangelical Christian Church (another Lutheran Church), and the Islamic and Jewish communities. Many other churches and religious communities also perform their religious duties freely and in accordance with their religious rules and rites.

The common characteristic of all those religions is that they protect marriage, and, irrespective of whether they allow divorce, they are very reluctant to grant it, because divorce is deemed an ultimate means for solving marital and familial conflicts. For example, in Koran, which allows repudiation (i.e. unilateral divorce by the husband and very rarely by the wife in the cases when the husband grants her this right), prophet Mohamed said that among all things that are permitted by Koran, repudiation is the most hateful for God.<sup>8</sup> The Protestant Church (as the Orthodox one) also allows divorce, but a clergyman will always, before divorce, very persistently advise the believers not to divorce and try to reconcile the quarreling spouses, especially when adultery or family violence are

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Churches and religious communities shall be equal and free to organize independently their internal structure, religious matters, to perform religious rites in public, to establish and manage religious schools, social and charity institutions, in accordance with the law.

Constitutional Court may ban a religious community only if its activities infringe the right to life, right to mental and physical health, the rights of child, right to personal and family integrity, public safety and order, or if it incites religious, national or racial intolerance.

<sup>5</sup> The newspaper "Glas javnosti" (Voice of Public), 15. 02. 2005, p. 4. (text: The Church understands when a husband and a wife hate each other)

<sup>6</sup> Dr Slobodan Markovic (2005), Crkva i politika, in: *Vera – znanje – mir*, Beogradska otvorena škola, (The Church and Politics, in: *Faith – Knowledge – Peace*, 2005, Belgrade's Open School), internet presentation: [http://www.nspm.org.yu/Debate/2005\\_CP\\_slmarkovic\\_klerika.htm](http://www.nspm.org.yu/Debate/2005_CP_slmarkovic_klerika.htm), last visited on April 2009.

<sup>7</sup> Ibidem.

<sup>8</sup> Mehmed Begovic (1964), *Serijatsko bracno pravo* (Sharia Marital Law, 1964), Belgrade, p. 107.

not the reasons why divorce is sought.<sup>9</sup> Marriage was much more respected than nowadays, and although not forbidden, the divorce rate was several times lower than it is today.

Before the Second World War in Serbia, excluding its northern part - Vojvodina, the celebration of marriage was the competence of the church and divorce that of the ecclesiastic court. However, since 1895, in Vojvodina (then part of Hungary), the Law enacted in 1894<sup>10</sup> placed the celebration of marriage under the competence of the state i.e. the registrar (civil marriage) and divorce under that of the state courts. The reason for that lay in the fact that many different nations lived in Hungary of that time. Since particularly Vojvodina was (and still is) a typical multicultural, multiethnic, multireligious and multinational community, the celebration of marriage between two followers of different religions, or with a non-believer, was a significant problem. Thus, it was considered that the conclusion of marriage shall be facilitated by the introduction of civil marriage as a mandatory form of marriage. In this way, religious differences were abolished as a marital impediment and left it to the bride and the groom to decide about the religious celebration of marriage, which was only optional.

Marriage is considered as a base of the family and its most important pillar. Under the Marital Bylaw of the Serbian Orthodox Church (hereinafter: MBSOC)<sup>11</sup>, orthodox marriage is a sacrament whereby two people of different sexes, through the rite prescribed by the Church, shall be connected by lifelong spiritual and corporal connection, for the sake of cohabitation, procreation, and the upbringing of children. Divorce is not desirable, but when family relations are very disturbed, divorce is allowed on the grounds laid down by the abovementioned Marital Bylaw. On the other hand, the question of marriage and divorce was also regulated by Serbian Civil Code (hereinafter: SCC)<sup>12</sup>, which recognized the competence of the church for the celebration of marriage (Article 91 SCC) and that of ecclesiastical courts for the dissolution of marriage including divorce (Article 99 SCC).

The causes of divorce were mostly based on fault and were very similarly regulated in the Serbian Civil Code, in the Marital Bylaw of the Serbian Orthodox Church, and previously in Krmchia (which was in effect until the enactment of MBSOC). Under SCC the causes of divorce<sup>13</sup> were: 1) adultery; 2) if one spouse acted against the life of the other by cruel and lethal means or acted as an accomplice; 3) the felony of which the spouse was convicted to penal servitude or durance for more than eight years; 4) if one spouse left Christianity and accepted a non-Christian religion;<sup>14</sup> and 5) intentional or unintentional absence of the other spouse. In the last case the absence must have lasted three to six years.

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<sup>9</sup> Personal interview with Mr Vladimir Obšust, vicar of the Slovak Lutheran Church in Novi Sad, conducted in January 2009, who said that their Church allows divorce, because marriage is not a sacrament, but if it is possible to preserve marriage, it is always better to try reconciliation of the spouses.

<sup>10</sup> Hungarian Marital Act no. XXXI of 1894, which was in effect in Vojvodina before the unification of Vojvodina with Serbia of 1 December 1918, remained in effect also after the unification until the outbreak of the Second World War.

<sup>11</sup> Marital Bylaw of the Serbian Orthodox Church, Geca Kon, Belgade, 1934, Art. 1.

<sup>12</sup> Civil Code of the Kingdom of Serbia was enacted on 25 March 1844 and was in effect until the end of the Second World War.

<sup>13</sup> Causes of divorce were laid down in Art. 94 and 95 CC.

<sup>14</sup> It was not a ground for divorce if one spouse changes creed, but remains a Christian.

In addition to the grounds for divorce set out by SCC, the Marital Bylaw envisaged a couple of others, such as intentional abortion, physical or mental illness of the spouse, moral corruption<sup>15</sup> and apostasy of the orthodox faith.

Neither SCC nor Marital Bylaw provided for divorce by mutual consent.<sup>16</sup> Although divorce has remained the competence of ecclesiastical courts, since the entry into force of the new Basic Marriage Act in 9 May 1946, they could proceed only after civil divorce had become legally binding.<sup>17</sup> Religious divorce has obviously been of certain importance for the genuine believers, since civil divorce was the only legally recognized cessation of valid marriage during the life of the spouses, and there was no need to get divorce before the ecclesiastical court, beside of civil one.<sup>18</sup> However, if the orthodox believer wanted to celebrate the second, third or even fourth marriage in the church, he or she had to get religious divorce. The former three marriages were removable impediments for the celebration of a new marriage. Celebration of the fourth marriage was possible only with the permission of the church, if the previous two marriages (not all three) were not divorced because of the applicant's fault. Yet if the applicant was culpable for divorce in the previous two marriages, the permission for the celebration a new (fourth) marriage would be granted after he or she had abided by the punishment of the ecclesiastical court.<sup>19</sup> The punishment mostly meant that a certain period of time had to pass before the new marriage could be celebrated.

Notwithstanding the fact that divorce was not forbidden, as it was and still is the case with Catholic dogma, the statistics show that the divorce rate before the Second World War was not high. Namely, in 1921 there were only 5,1 % of divorced marriages per 100 concluded, in 1925 there were 5,3 % per 100 concluded, in 1930 = 5,0 % , in 1935 = 6,1, in 1940 = 7,1 %<sup>20</sup> and only after the War did the divorce rate increase significantly, so that it never again fell under 11-12 %, whilst it was about 20% in the last decade.<sup>21</sup> There were many reasons for such a situation. The influence of faith was only one of the many other factors, such as the patriarchal structure of the family, economical dependency of women, who were very rarely employed outside the family, and for which they had to have the husband's permission, then a much higher birth rate, and so on.

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<sup>15</sup> As moral corruption were considered: abnormal sexual intercourse; avoidance of marital duty out of overt malevolence; conviction of felony or misdemeanor resulting in the loss of all honorable rights, if committed during marriage; intentional and permanent molestation and maltreatment of the spouse.

<sup>16</sup> L. Markovic mentions that under the Article 218 of the Ecclesiastical Authorities Act the impossibility of cohabitation (because of antipathy, hatred and other behavior unacceptable to the other spouse) was also a ground for divorce. A general, non-fault divorce ground was thus introduced in Serbian law, op. cit. p. 91- 92.

<sup>17</sup> Dimšo Perić, *Crkveno pravo (Canon Law)*, Belgrade 1997, p. 277.

<sup>18</sup> The annulment of marriage is another way of cessation of marriage while the spouses are alive, but such marriage is not valid - it is null and void and there are many differences between divorce and the annulment of marriage.

<sup>19</sup> Dimso Peric, op. cit. p. 265 -266.

<sup>20</sup> These data are taken from the Statistical Yearbook of Serbia and Montenegro for 2005. More in O. C. Jancic, Summary and analysis of the current law regulating marital and quasi-marital relationships in the new Serbian Family Law (2008), in *Marriage and Quasi-marital Relationships in Central and Eastern Europe*, ed. by L. D. Wardle and A. S. Loveless, BYU Academic Publishing, Brigham Young University, 2008, p. 85.

<sup>21</sup> In 1945, for example, there were 12,9 % divorced marriages per 100 concluded, in 1950 =11,7 % , in 1955=15,3 % and in 2002 the number of divorced marriages rose to 22,9 % per 100 concluded. Similar was the situation in 2006 (20,6 %) and in 2007 (20,98 %).

After the War, the political, social and economic system significantly changed and that also had a great impact on family life, marriage, divorce and especially on the position of the church and the believers. The communist ideology was that “the religion is opium for the people”, for which reason religion was proscribed for the members of the Communist Party, while the believers (non-members of the Communist Party) had to conceal their religious feelings because they would be stigmatized as reactionary. However, some of the most faithful followers of the church managed to keep their faith until the present day, when the social and political climate changed and democracy prevailed over the intolerance.

The most important changes happened in family life. The civil marriage was the only recognized form of marriage for all citizens. The principle of equality between men and women was proclaimed by our first postwar Constitution (1946) and more and more women started to work outside the family. The wife and the husband got the same rights and duties in the family and the husband’s authority over the wife and the father’s over the children were abolished. The size of the family decreased. The familial collectivity called *zadruga*, in which more than one generation of relatives lived and worked together, was replaced by nuclear family. Marriage and divorce was regulated by the Basic Family Act (1946), which was the uniform and compulsory federal law for all six republics of that time (Serbia, Croatia, Montenegro, Bosnia and Herzegovina, Slovenia, Macedonia, and two Autonomous Provinces - Vojvodina and Kosovo and Metohija). The Marriage Act diversified the grounds for divorce: beside the ground for divorce based on fault, there were also the no-fault ones. One of them was “the disturbance of marital relations and unsupportable cohabitation”, which became a very widespread cause of divorce.

However, if only one spouse was exclusively culpable for divorce, he or she could not bring an action for divorce. For example, if the husband or the wife would leave the other spouse, only the innocent spouse could be a plaintiff. Therefore, the so-called “dead marriages” arose in our postwar judicial practice. Dead marriage means that the spouses lived separately for a long period of time but their marriage could not be divorced until the innocent spouse gave his or her consent. “The exclusively culpable” spouse who wants divorce could not file an action before the court as long as the other one did not want to divorce, although their marriage has no content any more (the ‘empty shell’<sup>22</sup>). The “exclusively faulty spouse” usually cohabited with some other person and had children born out of wedlock with his or her new partner, but could not legalize neither the new relationship nor the status of the children. Namely, if common marital life between the spouses would become unsupportable, nobody could force one spouse to remain with other, nor hinder him or her to abandon the family home and to establish a new one with another person out of wedlock.

Our jurisprudence found a solution for “dead marriages”: it recognized the right to bring an action for divorce after a long-term separation also to the “exclusively culpable spouse” by starting to consider that the initial “exclusive fault” became ordinary after a certain period of time. In the beginning, the lapse of three years of separate life was required, but later only one year was sufficient. In this way the importance of exclusive fault decreased, which created the tendency of diminution of the fault in general. Consequently, the new Marriage and Family Relations Act (hereinafter: MFRA) of 1980

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<sup>22</sup> The word is used in the English literature (see Jonathan Herring, *Family Law*, Oxford, Pearson-Longman, 2007, p. 122).

did not at all prescribe the grounds for divorce based on fault. There were only two grounds for divorce: a) serious and permanent disturbance of marital relations (Art. 83 MFRA), and b) divorce by mutual consent (Art. 84 MFRA).<sup>23</sup>

In the first case the right to claim divorce was enjoyed by both spouses, even the one who was exclusively culpable for the breakdown of marital life. The fault for the breakdown of marriage was only relevant for the spousal maintenance. Namely, the court could dismiss a claim for maintenance if one spouse had conducted coarsely and indecently without a serious reason caused by the other spouse, or if his or her maintenance claim represented an obvious injustice for the other spouse (Art. 288 para 4 MFRA). Although the significance of fault for divorce was greatly diminished, marriage still had some legal protection. For example, ex-MFRA proclaimed the marital duty of fidelity, which the new Family act does not provide for. The spouses do not have this duty any more, because that falls within the ambit of their private life. Since 1980, adultery is not a separate cause of divorce, but it may be relevant only if it led to a serious and permanent disturbance of marital relations (Art. 83 MFRA and Art. 41 of the Family Act).

The new Family Act of 2005 retained the same grounds for divorce i.e. serious and permanent disturbance of marital relations (Art. 41 FA) and divorce by mutual consent (Art. 40 FA), although there have been slight differences in the definitions of grounds and of conditions for divorce. Yet despite the fact that democratic changes definitively occurred in 2000, the religious form of marriage has not been introduced. As a matter of fact, there were even no requests to that effect. Neither churches nor NGOs have had such pretensions. The position of the Orthodox Church, which gathers the majority of believers in the country, was and still is quite weak and without power as it is the case, for instance, with the Catholic Church in Croatia, Poland and Lithuania. In these countries the religious form of marriage has not also been recognized during the long-lasting rule of the socialist/communist postwar regime, but nowadays it is equal to the civil one.

The most evident failure of the Orthodox Church in our country occurred recently, when the Prohibition of Discrimination Bill was submitted to the Parliament. All the seven traditional churches and religious communities in the country signed the petition against some provisions of the Bill. They mostly opposed the provisions on the prohibition based on sexual orientation (Art. 21 of the Bill) as well as the alleged limitation of the status and freedom of churches (Art. 18 of the Bill). While the objections regarding churches were adopted and text of the said provisions adapted to the churches' petition, the objection regarding sexual orientation was rejected.<sup>24</sup> For the sake of truth, the regulation of the question of sexual orientation and of the protection of all people against any kind of discrimination is a matter for the state. Churches may and ought to retain their own rules in that field, but it is up to the state to regulate all secular matters without religious impact. What churches have omitted after the democratic changes in our society is to seek legally recognized competence to celebrate religious marriages, which would then represent

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<sup>23</sup> Some authors argued that MFRA actually prescribed three grounds for divorce. The third one was the impossibility to achieve the functions of marriage due to other reasons, such as disappearance, mental illness of one spouse or similar reasons (M. Draskic, *Porodичno pravo*, Beograd, 1998, pp. 132-135). As a matter of fact, Art. 83 MFRA *in fine* prescribed it, but we can say that it is only a special circumstance leading to a serious and permanent disturbance of marital relations. It is evident that a serious and permanent disturbance of marital relations happens when one spouse becomes mentally ill or disappears, but it is also possible to take it as a separate ground for divorce.

<sup>24</sup> The Newspaper "Politika", 26. March 2009.

parallel a legal form of marriage. Such advocacy of the churches could be understood as compatible with the extension of the rights of the believers to have their religious convictions acknowledged. Until now there has not been any similar petition of the churches.

In Croatia and Poland the religious form of marriage has existed since 1998. In Croatia religiously celebrated marriage has firstly been recognized only to Catholics, but soon afterwards “the Croatian Government concluded similar agreements with the Serbian Orthodox Church, the Croatian Islamic Union, the Evangelical Church in Croatia and the reformed Christian Church in Croatia”.<sup>25</sup> According to the Report on the respect for religious freedom of 2005 released by the Croatian Bureau of Democracy, Human Rights and Labor, until 2005 the state concluded the concordats with altogether 15 churches and religious communities in Croatia. That means that religious marriages concluded before these religious authorities enjoy legal validity.<sup>26</sup>

In Poland the Family and Guardianship Act was amended in 1998. On the basis of the Concordat concluded between the Holy Apostolic See and Poland, the celebration of the religious marriage has been granted beside the civil one.<sup>27</sup>

In Lithuania the 1992 Constitution (Art. 38) provides for an unconditional recognition of religious marriage but such a radical change entailed a great deal of legal uncertainty.<sup>28</sup> Namely, it lacked the rules on efficient exchange of data on concluded marriages between different churches as well as between those churches and the state civil register. That caused legal uncertainty regarding the compliance with substantive conditions for the conclusion of marriage. The solution was found in the 2000 Civil Code, which laid down the conditions that must be fulfilled to grant the religious marriage the same effect as those granted to the civil marriage.<sup>29</sup> Hence, beside the civil one, the religious marriage has been introduced as a legal form of marriage in all three countries for the first time after the Second World War.

### ***The European and international approach to a problem of marriage and divorce***

What is the approach to marriage and divorce in comparative law and European and international instruments? The first impression is that the changes are obvious. Marriage is not any more considered as the main pillar of the family, which may also be cohabitation between a man and a woman or between homosexuals. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) does not define family but it does protect private and family life (Art. 8). The concept of private and family life is much larger than the notion of marriage and encompasses different forms of family

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<sup>25</sup> D. Hrabar, The protection of weaker family members: The Ombudsman for children, Same-sex unions, Family violence and Family Law, in *The International Survey of Family Law*, General Editor Dr. A. Bainham, Jordan Publishing Limited, 2004, p. 119.

<sup>26</sup> See: [http://zagreb.usembassy.gov/root/pdfs/rrights\\_report\\_2005\\_hr.pdf](http://zagreb.usembassy.gov/root/pdfs/rrights_report_2005_hr.pdf), last visited in May 2009.

<sup>27</sup> A. Maczynski, The influence of European Family Law on the Family Law of countries acceding to the EU, in *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Ed. Katharina Boele-Woelki, Antwerp –Oxford-New York, 2003, p. 245.

<sup>28</sup> S. Keserauskas, Moving in the same Direction? Presentation of Family Law Reforms in Lithuania, in *The International Survey of Family Law*, Gen. Editor Dr. A. Bainham, Jordan Publishing Limited, 2004, pp. 322 and 233.

<sup>29</sup> *Ibidem*.

relations. It includes not only marital relations and relations between the marital parent and the children, but also the relations between the non-marital ones, then homosexual and transsexual relations and so on (e.g. the protection of the right to personal contact between the child and the person with whom close emotional ties have been developed). The said Convention protects the right to marry and the right to found a family according to the national laws governing the exercise of this right (Art. 12). However, the European Convention stressed that the right to marry and to found a family is guaranteed to men and women of marriageable age i.e. to two persons of different sex. The case-law of the European Court of Human Rights does not protect only the traditional family and family ties but, in accordance with the theory of human rights and fundamental freedom protects also other private and family ties. The concept of marriage and family has been significantly expanded.

The Charter of Fundamental Rights of the EU (2007) laid down similar rules regarding the protection of private and family life (Art. 7), the right to marry, and the right to found a family (Art. 9) as the European Convention. Neither of them contains a definition of family nor protects marriage as the only basis of the family. However, the Charter of the EU explicitly prohibited discrimination based, among other things, on sexual orientation (Art. 21), which is not mentioned in the European Convention. Prohibition of discrimination based on religion (Art. 14 of the European Convention) or belief (Art. 21 para 1 of the European Charter) is guaranteed by both instruments. That means that the Member States of Council of Europe (47 states) and European Union (27 states) shall ensure the implementation of equal treatment of all persons in all fields of social, religious, family, political, economic life, etc.

Moreover, it is very important to point out, for a better understanding of the essence of the Charter, that the *developmental principle* is the leading principle of the European Union. It is expressed in the Preamble of the Charter with the following words: “To this end, it is necessary to strengthen the protection of fundamental rights *in the light of changes in society, social progress and scientific and technological developments* by making those rights more visible in a Charter (Preamble, recital IV)”.

As regards divorce, we may say that today the essential question is not whether divorce should be granted or not, but mostly which grounds for divorce should be laid down, to what extent a divorce procedure should be facilitated or aggravated, and how to harmonize a divorce law of different national legislations as much as possible. Divorce is nowadays recognized in all European countries except in Malta, which still persists in prohibiting divorce. It is questionable for how long it may remain so, because it is contrary to human nature to force someone to stay with some person for the whole life, even if it is obvious that the marriage was a failure, that it is irretrievably destroyed, and that the spouses have been living separately for many years. Withal, it is not in accordance with the theory of human rights, because the concept of the indissolubility of marriage leads to the creation of the “dead marriages”. Therefore, after the legal or factual separation of the spouses, there remains only a “dead marriage” or “empty shell,” which is not in the interest of either of the spouses.

After 1970, when Italy - which have been deemed as a strong defender of the indissolubility of marriage - introduced divorce, many Catholic countries changed their legislation and permitted divorce. Firstly, it was the case with Spain, which introduced a divorce in 1982, then Argentina in 1987, Ireland on the basis of the Constitution of 1996

and the Family Law (Divorce) Act from 1996, then Chile in 2004, and Peru in 2008. As it was said, the only remaining countries that are still against divorce are Malta in Europe, and the Philippines in Asia.<sup>30</sup> Northern and southern American, Asian, African and Australian countries are not any more faced with the challenge of divorce. Divorce is nowadays an absolute necessity of the modern era and we witness a desperate need for divorce in the fact that after divorce was granted in Peru, there were over 3.6 million divorce cases pending in Peru's court system.<sup>31</sup> Since Peru has about 29,180,900 inhabitants, that means that there are 123,3 divorces per 1000 people.

Some other problems regarding divorce are nowadays more important than the simple question of whether or not to grant it. Having in mind that the world of today is more connected than ever before and that in the European Union the free movement of persons, goods, services and capital are guaranteed,<sup>32</sup> the essential matter is how to harmonize divorce laws of different countries. Differences between national legislations are remarkable, such as concerning the grounds and conditions for divorce, then the consequences of its dissolution, and so on. Some countries have more liberal regimes of divorce, while others have more restrictive regimes and require many additional conditions for getting divorce. We will concentrate mostly on European countries.

### *Divorce by consent of the spouses*

The essential tendency in divorce law is to facilitate divorce and alleviate the consequences of the fault. In one word, modern divorce law should not let the conflicts between the spouses escalate, that intolerance and misunderstandings between them prevail during the divorce proceeding. Therefore, almost all European countries allow divorce by mutual consent, allowing the spouses to consensually settle their mutual personal and property relations, as well as such relations regarding their minor children or major children incapable to take care of themselves. The ground for divorce based on irretrievable breakdown of marriage is the second one that does not consider the fault as essential for divorce. On the other hand, mediation, reconciliation and a reflection period before divorce

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<sup>30</sup> Philippine law, in general, does not provide for divorce inside the Philippines. The only exception is with respect to Muslims, who are, in certain circumstances, allowed to divorce. For those not of the Muslim faith, the law only allows annulment and legal separation. By annulment, marriage comes legally to an end, which is not the case with legal separation. However, Art. 26 of the Family Code provides that “all marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except those prohibited under Articles 35 (1), (4), (5) and (6), 36, 37 and 38. (17a). Those Articles refer to marital impediments which lead to annulment of marriage. Where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall have capacity to remarry under Philippine law. (Such as has been amended by Executive Order 227).

<sup>31</sup> See at: <http://www.livinginperu.com/news-6342-politics-perus-congress-passes-speedy-divorce-law>, last visited in May 2009.

<sup>32</sup> Preamble, recital 3: “The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment”.

should also serve to assist spouses to avoid and alleviate distress and bitterness, and to allow them to divorce peacefully and as friendly as possible.

Many European countries do not even provide for the fault-based grounds for divorce. This is the case with Bulgaria, Czech Republic, England and Wales, Finland, Germany, Hungary, Italy, Ireland, the Netherlands, Poland, Russia, Spain, Sweden, Switzerland, Serbia, Montenegro, Bosnia and Herzegovina (both entities),<sup>33</sup> Croatia, Slovenia, Former Yugoslav Republic of Macedonia.

The most widespread pattern of grounds for divorce is divorce by mutual consent or upon application of one spouse accepted by the other one. Marriage may come to an end by consent in Austria (Section 55a Austrian Marriage Act),<sup>34</sup> Belgium (Art. 233 Belgian CC),<sup>35</sup> Bulgaria,<sup>36</sup> Croatia (Art. 42 and 43 Family Act), Federation of Bosnia and Herzegovina – entity of Bosnia and Herzegovina (Art. 44), France,<sup>37</sup> Germany,<sup>38</sup> The Netherlands,<sup>39</sup> Greece (Art. 1441 GCC),<sup>40</sup> Montenegro (Art. 57),<sup>41</sup> the Republic of Srpska – an entity of Bosnia and Herzegovina (art. 54, 55), Serbia (Art. 40),<sup>42</sup> Former Yugoslav Republic of Macedonia (Art. 42),<sup>43</sup> Slovenia (Art. 64),<sup>44</sup> and so on.

There are some differences as regards the conditions under which the consensual divorce will be granted. The main requirements are related mostly to the agreements regarding the children and mutual relations between the spouses, such as spousal maintenance after divorce, division of joint property, family home, use of the family name and similar issues. This way the contemporary laws try to decrease the dramatization of divorce and heal the preceding conflicts. For the spouses (and especially for their children), it is always much better to let them settle their relations on their own. They know better than anyone else whether they could and should save their marriage. If they manage to reach agreement about essential consequences of divorce, it at least means that their marital life could indeed not be maintained any more and that they, for the sake of future of both their children and themselves, have to leave behind marital intolerance and incompatibility.

The preconditions for consensual divorce in Austria are quite severe. Spouses have to reach agreement on the principal place of residence or custody of the children, on the

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<sup>33</sup> Formerly one of the six federal units constituting the Socialist Federal Republic of Yugoslavia, Bosnia and Herzegovina gained its independence after the referendum held on February 28/March 1, 1992. The country is politically decentralized and comprises two governing entities, the Federation of Bosnia and Herzegovina and the Republic of Srpska, with District Brčko as a *de facto* third entity.

<sup>34</sup> Marianna Roth, *European Family Law in Action, Volume I: Grounds for Divorce*, eds. K. Boele-Woelki, B. Braat, I. Sumner, Intersentia, CEFL 2003, p.71.

<sup>35</sup> Walter Pintens, *op. cit. supra*.

<sup>36</sup> Velina Todorova, *op. cit. supra*.

<sup>37</sup> Hugues Fulchiron, *The New French Divorce Law*, in *The International Survey of Family Law (2005)*, Gen. ed. Andrew Bainham, p. 243.

<sup>38</sup> O.Cvejić Jancić, *Razvod braka u našem i stranom pravu (Divorce in our and Foreign Law)*, Dnevnik, Novi Sad, 1987, p. 114-115.

<sup>39</sup> *Ibidem*, p. 116.

<sup>40</sup> Achilles G. Koutsouradis, *European Family Law in Action, Volume I: Grounds for Divorce*, eds. K. Boele-Woelki, B. Braat, I. Sumner, Intersentia, CEFL 2003, p. 84.

<sup>41</sup> *Porodичni zakon, Službeni list Crne Gore br. 1/2007 (Family Act, Official Gazette no. 1/2007)*.

<sup>42</sup> *Porodичni zakon, Službeni glasnik RS 18/2005 (Family Act, Official Herald RS no. 18/2005)*.

<sup>43</sup> *Zakon za semejstvoto "Služben vesnik na Republika Makedonija" br. 83 /2004 (Family Act, Official Gazette no. 83/2004)*.

<sup>44</sup> *Zakon o zakonski zvezi in družinskih razmerjih, Uraden list RS 15/1976, 16/2004 (Marriage and Family Relations Act, Official Gazette no. 15/1976, 16/2004)*

contacts with the children, and on the maintenance of the children unable to provide for themselves, on the division of the matrimonial property (e.g. dwellings, a car) and of savings, on the maintenance of the spouse, and finally on renouncing any reciprocal maintenance claims.<sup>45</sup> In the judicial practice of Austria in 2000, the majority of marriages were divorced upon the consent of the spouses i.e. 17.420 out of a total of 19.552<sup>46</sup> divorced marriages, which is 89.09 %, although the preconditions for divorce are very stringent. That means that the spouses manage to achieve agreement, although it is not easy, but only if it is allowed by law.

In Bulgaria the preconditions for consensual divorce include the agreement of the spouses on all consequences of divorce, such as custody, access to and maintenance of the children, division of property, use of the matrimonial home, the payment of maintenance and the use of family name (Art. 101 Bulgarian Family Code).<sup>47</sup> If the interest of the children has not been met by the spousal agreement, the court may leave an additional deadline to the spouses to improve their agreement. The Bulgarian case-law shows that divorce based on irretrievable breakdown of the marriage slightly prevails over the number of consensual divorces. In 1998, 1999, 2000 and 2001 there were 55%, 56%, 57% and 51% of the divorce based on irretrievable breakdown of the marriage respectively as opposed to 45%, 44%, 43% and 49% cases of the divorce by consent.<sup>48</sup> However, it should be stressed that the rate of consensual divorce is quite high (around 50%).

In Germany the consensual divorce may be granted only if the spouses had lived separately for one year (Art. 1566 I German CC) and have agreed on the following consequences: on the spousal maintenance and maintenance of their children, on the family home and any household effects (par. 630 I, 3 Zivilprozessordnung).<sup>49</sup> The spouses also have to declare that they have reached an agreement on parental care and on contacts with their children, and that they will not seek any courts orders thereon or, if they will, that they will do it jointly.<sup>50</sup>

The provisions of the French Code Civil relating to divorce were changed in 2004 in order to mitigate the consequences of divorce.<sup>51</sup> The condition for consensual divorce is that the spouses have settled the consequences of their divorce by agreement. The judge shall encourage spouses to reach agreement out of court. The agreement may encompass all or part of the effects of divorce. Their agreement is subject to the approval of the judge, who shall verify that the test of fairness has been met and “that the interests of each spouse and of the children are protected (Art. 268 para 2)”.<sup>52</sup> Similar to that is the divorce based on Art. 373-2-3, which lays down that spouse applies to the judge competent for matrimonial matters “for the approval of the agreement by which they organize the manner of exercising parental authority and fix their contributions to maintenance and education of the children.”<sup>53</sup>

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<sup>45</sup> M. Roth, op. cit. p. 29.

<sup>46</sup> M. Roth, op. cit. p. 99.

<sup>47</sup> V. Todorova, op. cit. p. 312.

<sup>48</sup> V. Todorova, op. cit. p. 100.

<sup>49</sup> Dieter Martiny, in *European Family Law in Action, Volume I: Grounds for Divorce*, eds. K. Boele-Woelki, B. Braat, I. Sumner, Intersentia, CEFL 2003, p. 242.

<sup>50</sup> *Ibidem*.

<sup>51</sup> H. Fulchiron, op. cit. p. 247.

<sup>52</sup> *Ibidem*.

<sup>53</sup> *Ibidem*.

Regarding divorce by consent, the Serbian Family Act provides in Article 40 that the spouses have to conclude a written agreement on divorce, which must contain a written agreement on the exercise of parental rights and division of joint property. The agreement on the exercise of parental rights may refer to joint custody or independent exercise of parental rights. The consensual divorce is neither conditioned by the duration of marriage nor by the period for reflection or any other conditions (the preliminary period of separation, the minimum age of the spouses, reconciliation, mediation, and so on). The agreement on the spousal maintenance is not a precondition for divorce. A similar solution is adopted in the Family Act of Montenegro (Art. 57) except that it provides that the husband does not have the right to divorce during the pregnancy of his wife and until their child reaches one year of age, save if the woman gives her consent to divorce (Art. 58 MNFL). In the Federation of Bosnia and Herzegovina (an entity of Bosnia and Herzegovina), the spouses may apply for divorce after the lapse of a period of six months of its celebration and if the spouses reach, in mediation proceedings, an agreement on parental custody, on the maintenance of the child, on visitation, on the parents' right to contact with the child with whom he or she does not live, and on spousal maintenance (Art. 44 FA). The court shall dismiss the application for divorce by consent if the agreement regarding children is not in their interest. The husband does not have the right to sue for divorce during the pregnancy of his wife and until the child reaches one year of age, which means that during that period he may apply for divorce only if his wife agrees to divorce or upon a joint application (Art.43 FA). Mediation is obligatory if the spouses have common children (Art.45 FA).

Under the Croatian Family Act both spouses may apply for consensual divorce (Art. 42 para 1). The *spouse* does not the right to sue for divorce during the pregnancy of his wife and until their child reaches one year of age (Art. 42 para 2).<sup>54</sup> The Bosnian Family Act regulates this provision much more clearly, because it uses the term “a husband” instead of “a spouse.” The mediation proceedings shall be carried out if the spouses have minor common or adopted children or those that they have to look after in spite of their majority (Art. 44 CFA), irrespective of whether a court proceeding is initiated by an application of a spouse or by their joint, consensual application. Moreover, reconciliation too, is compulsory when the spouses have dependent children mentioned in Article 44, and that even if one of the spouses lives abroad in cases when the court assesses that there are no great difficulties for the absent parent to participate in reconciliation. There is no other precondition for divorce by mutual consent. The court shall ask the spouses at the first hearing whether they have agreed on the any questions regarding their children, but they do not have to do that before the beginning of the court proceedings (Art. 46 para 2).

In Slovenia spouses have to agree on all spousal consequences of divorce (division of joint property, tenancy and spousal maintenance) in the form of an executive notarial inscription, then on upbringing, maintenance and contacts between parents and children (Marriage and Family Relations Act, Art. 64). The court shall ascertain whether the interest of the common children are safeguarded by the parental agreement, followed by an opinion on children by the Center for social work. Spouses are obliged to appear before the Center for social work in order to take part in the advisory conversation.

Article 1441 of the Hellenic Civil Code provides that the marriage must have lasted for at least one year before the spouses may apply for consensual divorce. The reason for

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<sup>54</sup> Emphasis added.

this requirement is to allow reconsideration, so that light-headed and hasty divorces are avoided. They must reach a written agreement on the dissolution of marriage as well as custody and visitation rights concerning their minor children. Such an agreement will be confirmed by the Court and will remain in force until the final decision has been reached in this matter.<sup>55</sup>

The requirements for consensual divorce are quite high in Hungarian Law. To obtain divorce by mutual consent, spouses have to present their agreement on children (custody, maintenance, the right to contact with the parent with whom the child does not live), on spousal maintenance, on the right to use the matrimonial home after divorce, and on the distribution of common property excluding immovable property. This agreement shall be judicially settled. If divorce by consent is based on the fact that the spouses had lived apart for at least three years, the spouses have to prove during the divorce proceedings that the issues of custody and maintenance of the children have been properly settled.<sup>56</sup> In Hungary during 2000 a total of 23,968 marriages were dissolved, of which 18,440 marriages (76,94%) were dissolved by mutual consent.<sup>57</sup>

### *The irretrievable breakdown of marriage*

By relevance and popularity, the irretrievable breakdown of marriage is a second cause of divorce. In the USA for example “by 1989, forty-nine states and the District of Columbia had explicitly adopted some “modern no-fault” ground for divorce”, among which in twenty American jurisdictions divorce is generally available solely upon modern no-fault grounds (“irretrievable breakdown” of marriage or “irreconcilable differences” between the spouses).<sup>58</sup> In thirty others, the legislatures have added at least one no-fault ground for divorce as an alternative to fault-based grounds.<sup>59</sup>

In European countries the irretrievable breakdown of marriage has also been widely accepted, explicitly or implicitly. It is laid down in all six ex-Yugoslav states, then in Austria, Belgium, Bulgaria, Czech Republic, Denmark, Germany, England and Wales, Italy, Spain, Finland, France, Greece, Hungary, the Netherlands, Portugal, Russia, Norway and many others. Although there are differences as to how it is regulated in national legislations, the general characteristic of this ground for divorce is that it is a no-fault ground for divorce and that the insistence on the spouse’s faultless behavior has been abandoned.<sup>60</sup>

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<sup>55</sup> Achilles G. Koutsouradis, in *European Family Law in Action, Volume I: Grounds for Divorce*, eds. K. Boele-Woelki, B. Braat, I. Sumner, Intersentia, CEFL 2003, p. 290 and 314.

<sup>56</sup> Emila Weiss, Orsolya Szeibert, in *European Family Law in Action, Volume I: Grounds for Divorce*, eds. K. Boele-Woelki, B. Braat, I. Sumner, Intersentia, CEFL 2003, p. 243.

<sup>57</sup> *Ibidem*, p. 106. The same authors allege that in the other cases statistics do not investigate the facts upon which the complete and irretrievable breakdown are based.

<sup>58</sup> L. Wardle, L. Nolan, *op. cir.* p. 651

<sup>59</sup> *Ibidem*.

<sup>60</sup> The literature contains very ample explanations of the pros and cons of the fault-based and the non-fault divorce. See more in: Jonathan Herring, *Family Law*, Pearson-Longman, 2007, pp. 118-122, Lynn D. Wardle, Laurence C. Nolan, *Fundamental Principles of Family Law*, Buffalo, New York, 2006, pp. 646-658.

In our Family Law the no-fault cause of divorce is greatly liberalized and deprived of any subjective elements and consideration. Namely, to get a divorce it is sufficient that one of the spouses decides not to live together with the other spouse any more. It is prescribed that “any spouse has the right to divorce if the marital relations are seriously and permanently disturbed or if the marital cohabitation objectively could not be expected (Art. 41 FA)”. Marriage is always deemed as seriously and permanently disturbed if one of the spouses so affirms. Divorce proceedings are urgent if the spouses have a child and shall be ended at most in two hearings (Art. 204 FA). Mere personal statements of the spouses are sufficient evidence to prove the disturbance of marital relations. Even if only one of the spouses wishes to divorce, the other one has no efficient means to prevent divorce. Marital cohabitation could not be objectively expected for instance in case of mental illness or disappearance of the other spouse. On the one hand, the judge is not entitled to ask the spouses to disclose the reasons for divorce and, on the other hand, spouses are not obliged to disclose these. The essential concern of the court should be to ensure the best interest of the child. The mediation is provided as a part of divorce proceedings, but it is not compulsory. The reflection period has not been laid down. It happens very rarely that the application for divorce is dismissed.

Many new provisions of the Family Act secure a much greater degree of privatization of family law than it was the case with the previous one. What is more, our new Constitution (2006) provides that “everyone shall have the right to decide freely on entering or *dissolving* marriage”.<sup>61</sup> One may say, indeed, that is up to the spouses to take care of keeping their marriage sound, vital and functional, and not up to state to prevent divorce when one or both of them wish to divorce. The emphasis should not be put on how to prevent divorce but how to ensure a better functioning of marriage despite all the challenges and temptations of modern life. However, maybe some precautions should have been taken into account to prevent light-headed divorces, such as a period of reflection or foregoing separation of the spouses, but only if they have dependent children to the marriage.

This ground for divorce is regulated in the same manner in Montenegrin as it is in Serbian law (Art. 56, 317, 330), while in other ex-Yugoslav countries it is regulated similarly. In Slovenia, the condition for divorce is that “the marital life is not bearable any more, regardless of the causes (Art. 65)”. Participation of the spouses in the advisory conversation before the center for social work is compulsory; otherwise the court shall dismiss the divorce application (Art. 71). In Croatia, the condition for divorce upon application of one spouse is that the marriage relations are “gravely and permanently disturbed” and that the spouses had lived separately for at least one year (Art. 43). Mediation before divorce is compulsory (Art. 47). The Family Act of the Federation of Bosnia and Herzegovina does not prescribe the aforesaid separation as a condition for divorce (Art. 41 and 49), while the other provisions are the same as in Croatian law. In the Republic of Srpska, the Family Act provides for divorce on the basis of gravely and permanently disturbed marital relations followed by intolerable common life (Art. 52). Disappearance of the spouses which lasted for two years is also a specific, no-fault ground for divorce (Art. 53) in the Republic of Srpska. The spouses are obliged to attempt reconciliation before the guardianship authority (Art. 60).

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<sup>61</sup> Art. 62 para 1 Constitution of Republic of Serbia (Official Herald RS no. 83/2006).

In England and Wales the sole ground for divorce is the irretrievable breakdown of marriage, set down in the Matrimonial Causes Act of 1973 (hereinafter: MCA).<sup>62</sup> It is not possible to file a petition for divorce until the couple had been married for one year. To get a divorce based on the said ground, the petitioner has to prove one or more of the five facts set out in section 1(2) of the MCA, which read: 1) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent; 2) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; 3) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; 4) that the parties to the marriage have lived apart for a continuous period of at least two years preceding the presentation of the petition [...] and the respondent consents to a decree being granted; 5) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition. As it is outlined in English legal theory the first three of the five facts are clearly fault based,<sup>63</sup> while all of the five are quite demanding. The MCA was criticized<sup>64</sup> and the new Family Law Act 1996 was passed. Yet the new Act proved too controversial and plans to implement the 1996 Act have been formally abandoned. Consequently, the law of divorce continues to be governed by the unsatisfactory Matrimonial Causes Act 1973.<sup>65</sup>

In Germany marriage can be dissolved if it has failed. Under the German Civil Code (Art. 1565) such a failure is considered to have occurred where a marital community of the spouses no longer exists and there can be no expectation that the spouses will restore it.<sup>66</sup> The Article 1566 of the Code provides for two conclusive presumptions for the failure of a marriage: first, if the spouses have been separated for a year and both spouses file a joint petition for divorce or the other spouse consents to the divorce, and second, where the spouses have been separated for three years.

This principle is qualified by three exceptions (so-called “hardship clauses”), but, as quoted by a German author, they do not play a significant role in practice.<sup>67</sup> A fault for divorce can be of some relevance for example to prevent hasty divorces (if spousal separation lasted for less than one year) and in case of hardship clauses, but courts have been very cautious in applying it.

In Austria, beside divorce based on fault and divorce by mutual consent of the spouses, the Austrian Marriage Act (hereinafter: AMA) also provides divorce on the ground of irretrievable breakdown (Section 50-55 AMA). Irretrievable breakdown has to be corroborated by several grounds laid down by the law. Such grounds are behavior due to mental disturbance (Section 50 AMA),<sup>68</sup> mental illness (Section 51 AMA), infectious or repulsive illness (Section 52 AMA) and the breakup of domestic community (Section 55AMA). The last ground means that domestic community has to have ceased for a period of three years and marriage has to have broken down irretrievably.

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<sup>62</sup> Nigel Lowe, in *European Family Law in Action, Volume I: Grounds for Divorce*, eds. K. Boele-Woelki, B. Braat, I. Sumner, Intersentia, CEFL 2003, p. 78, Herring, *op. cit.* p. 102.

<sup>63</sup> N. Lowe, *op. cit.* p. 168-171.

<sup>64</sup> See J. Herring, *op.cit.* pp. 107-110.

<sup>65</sup> N. Lowe, *op. cit.* p. 58.

<sup>66</sup> D. Martiny , *op. cit.* p. 172

<sup>67</sup> *Ibidem*, p. 265.

<sup>68</sup> In Austrian judicial practice, the examples of mental disturbance are hysteria, drug addiction, depression, confusion, etc., see M. Roth, *op. cit.* p. 395.

In Russia,<sup>69</sup> the irretrievable breakdown of marriage is the only formal ground for divorce. Mutual consent is not considered to be a separate ground for divorce, though marriage is supposed to be irretrievably broken down if both spouses have agreed to divorce. The Russian Family Code (hereinafter: RFC) provides for two types of divorce proceedings: administrative and court proceedings. The administrative procedure is applicable under two conditions: that the spouses do not have minor common children and that they have agreed on divorce (Article 19 para 1 RFC). The Department for Registration of Civil Acts shall issue a divorce certificate after the expiration of one month after the application for divorce. The court procedure differs significantly when it comes to contested and non-contested divorce, but in both cases the spouses are not obliged to disclose the reasons for divorce. One may say that this ground for divorce is a clear no-fault ground. The new Family Code rejects the paternalistic view that a judge can decide better than the spouses themselves about the reasons sufficient to dissolve marriage.<sup>70</sup> Moreover, the new Code has diminished state intervention in the private lives of spouses as much as possible. Fault has no influence on divorce as such, but could be of some importance for ancillary matters, like maintenance claims.<sup>71</sup>

In Norway the irretrievable breakdown of marriage does not exist as a specific ground for divorce. Instead, each spouse may demand divorce after a certain period of time (mostly one year of separation or two years of non-cohabitation) without having to obtain consent or fulfill any condition.<sup>72</sup> The competent authority does not have the right to reject or postpone the dissolution of marriage. Each spouse can demand divorce without revealing the reasons for divorce. The consent of the other spouse or anyone else is not needed. Divorce is the competence of the County Governor and the court. Most divorces are granted administratively by the County Governor but only a few cases are decided within the ordinary court system. In 2000, the percentage of divorce after the separation of the spouses was 93.8%, while that after the termination of cohabitation was 4.3%. Only 0.3% of the marriages were divorced on the ground of abuse, and in 1.6% of the cases the ground for divorce was unknown.<sup>73</sup>

Very similar is the situation in the majority of the other European states as regards the grounds for divorce based on fault, which are themselves less relevant than no-fault grounds.

### *Conclusion*

When discussing the present-day status of marriage and divorce, it might be said that the once traditional, patriarchal family and marriage meant all to a person who, if without family (and particularly a woman without a husband), was stigmatized and considered less worthy - is nowadays not the same any more. The theory of human rights has been putting an emphasis on the individual, his or her personal improvement and

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<sup>69</sup> The Russian Family Code (1995) entered into force on 1 March 1996.

<sup>70</sup> See Masha Antokolskaia, in *European Family Law in Action, Volume I: Grounds for Divorce*, eds. K. Boele-Woelki, B. Braat, I. Sumner, Intersentia, CEFL 2003, p. 183-185.

<sup>71</sup> *Ibidem*, p. 194.

<sup>72</sup> Tone Sverdrup, in *European Family Law in Action, Volume I: Grounds for Divorce*, eds. K. Boele-Woelki, B. Braat, I. Sumner, Intersentia, CEFL 2003, p. 403-414.

<sup>73</sup> *Ibidem*, p. 135 and 108.

affirmation rather than to the servility and to obsolete rules of the past. The social reality is that the space for personal freedom, aspirations, ambitions and endeavors of individuals is more ample and stimulating than before the Second World War, especially regarding the familial and social status of women and children. The traditional (patriarchal) marriage and family have lost their legal pre-eminence for determining personal status, whereas many other forms of “living together” or cohabitation enjoy legal protection. This does not mean that marriage and family do not have any importance at all. On the contrary, for a large number of people marriage and family are very important, “sacred” institutions. However, their forms have changed. Divorce law should be in accordance with the new social meanings of marriage and family. It is quite probable that future divorce regimes will not be more severe than in most of the modern world. One may expect that it will even be lightened so that the state would intervene mostly to contribute to the creation of such family, social and legal ambiances that the best interest of the child is safeguarded. Admittedly, the best interest of the child would be that his or her parents live together in harmonic relations without serious conflicts and disturbance, but it is bound to remain only as an ideal pattern of family life. A small number of families, if any, ever reach such an ideal. If that is so, the grounds for divorce and divorce proceedings should not be aggravated, because nobody could force the spouses to stay together if only one of them does not want it. Therefore, focus should instead be on the protection of the wellbeing of dependent children and on the fair adjustment of the consequences of divorce, with a firm encouragement of mutual agreements of spouses.