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THE CIVIL CODE AND THE REFORMS IN MACEDONIAN FAMILY LAW

Abstract: Macedonian family legislation has not undergone significant changes and reforms for more than three decades. The Family Law Act from 1992 largely took over and incorporated within itself the legal regulations and decisions from the time of socialism. On the other hand, dramatic revolutionary changes are taking place in marital and family relationships. The number of divorced marriages is increasing, the number of children born out of wedlock is increasing, the number of married unions is increasing. Outdated legal solutions that do not comply with the Convention on the Rights of the Child, numerous legal gaps create major problems in practice. The consequence of this is the judgments against our country pronounced by the European Court of Human Rights, which establish violations of the European Convention on Human Rights. In the Republic of North Macedonia, the drafting of the Civil Law is underway, and family law will be an integral part of it. The authors provide an analysis of the place of family law in the civil codification. They indicate that reforms should be carried out in the codification of family law and provide proposals for amendments and additions to the Macedonian family legislation regarding the legal regulation of extramarital union as well as the need for the regulation of the marriage contract. In the paper, the authors advocate for the adoption of the term parental responsibility in the Civil Law of Macedonia and indicate the need to foresee a legal possibility to take into account the child's opinion when decisions are made about his rights and interests. In the paper, the authors advocate for the provision of a special legal status and protection of the family home and for reforms in other important issues in family relations.

Keywords: family law, reforms, Civil Code.

1. Introduction

The most significant reform of family law in the Republic of Macedonia was made in 1992, when the Law on the Family[3] was adopted, which represented a

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”mini codification” in this area, because the parts of family law - marriage law, parental law, adoption and guardianship, which until then they were regulated in separate laws, they were united in one legal text. From then until today, despite the rapid and dynamic changes in the sphere of family and family relations[4], the Law on the Family experienced only a few changes, which related to the procedure of adoption, the regulation of domestic violence and the revocation of parental rights. A significant reform of family law is expected to be carried out during the drafting of the Civil Law of the Republic of Macedonia, of which family law will be an integral part. In 2010, the Government of the Republic of Macedonia made a decision on the establishment of the Commission for Drafting the Civil Code of the Republic of Macedonia.[5] The Commission for Drafting the Civil Code in its previous work has already prepared the preliminary drafts for obligations[6] and inheritance legal relations,[7] which are in public discussion and the work on the preparation of Book 5 of the Civil Law, which will regulate family law relations, is in progress.

In this text, a review will be made of the place of family law in the Civil Law of the Republic of Macedonia, and proposals will be made for reforms of family law in the sphere of the regulation of extramarital union, divorce, the exercise of parental rights and the protection of the rights and the interests of children. We think that with these changes, the regulation of family law relations in Macedonia will be in line with the changes in the family, the most significant international documents, as well as with the basic tendencies of the regulation of family law in European countries.

2. The place of Family Law in the Civil Code of the Republic of Macedonia

During the drafting of the Civil Law of the Republic of Macedonia, certain attitudes appeared, in our opinion completely unjustified, according to which family law should not be an integral part of the civil codification, but that family relations should be regulated by a separate law. The basis of the idea that family law should not be an integral part of civil codification is the division of civil-law relations into personal law (which should be regulated in a separate family law) and property law

67/10, 39/12 and 44/12

4 In recent decades, in all European countries, dramatic changes have occurred in the sphere of marital and family relations: the number of divorced marriages is increasing, the number of marriages is decreasing, the number of extramarital unions and children born out of wedlock is increasing, the number of single-parent and recomposed families is increasing and the birth rate is decreasing. More about the changes in the modern family in Martine Segalen, Sociologie de la Famille, Armand Colin, Paris, 2004; Mary Daly, Changing family life in Europe: significance for state and society, European Societies, Vol 7, Issue 3, September 2005; Graham Allan, Sheila Hawker, Graham Crow, Family Diversity and Change in Britain and Europe, Journal of Family Issues, Vol.22 No.7, October 2001.

5 ”Official Gazette of the Republic of Macedonia” no.4/2011.

6 See: Civil Code of the Republic of Macedonia Book Three ”Obligation Legal Relations”, Working material of the Commission for Obligation Law, Skopje, July 2013.

7 See: Civil Code of the Republic of Macedonia Book Four ”Inheritance Legal Relations”, Working material of the Commission for Family and Inheritance Law, Skopje, July 2013.

(which should be regulated in the Civil Law). However, it is not easy to separate these relationships, because they are closely intertwined: such is the situation with property relations between spouses, the right and obligation for support between spouses and parents and children, etc. Besides, there are other, more significant reasons why family law should be an integral part of the civil codification. The main purpose of codification is to cover a wide field of law and to be the most significant source of law in a certain area. Codification must not have gaps and its introduction should reduce the number of sources of law. In addition, the codification should be simple and understandable for every citizen.[8] Therefore, the main reason for the inclusion of family law in the Civil Law stems from the very essence of codification, which is to provide in one legal text, in a comprehensive and systematic way to regulate all issues that are important for citizens, from birth to death (and even after death, with the norms of inheritance law that apply to the distribution of inheritance after the death of the testator).[9] In addition, family law is an integral part of the most important Civil Codes in Europe, such as the French Civil Code and the German Civil Code[10] and this is the situation in all Western European countries that have civil codifications.[11]

Only in the former socialist countries, under the influence of the legislation of the Soviet Union, family law was not an integral part of the civil codifications. After the October Revolution of 1917, the reform of family law was one of the first priorities, and it began already in the same year, despite the fact that the country was undergoing a civil war.[12] The main goal of the Soviet authorities was to change the old family model and to a new one was built, in accordance with the basic principles of Marxism-Leninism, which is why a family law system radically different from the systems in the countries of Western Europe was built in the Soviet Union.[13] One of the basic characteristics of Soviet law was the separation of family law from civil law, so in 1918 the Family Code was passed, and the Civil Code of 1922 did not include family law. The main reason for this departure from the European civil law

8 See further Gunther in A. Weiss, "The Enchantment of Codification in the Common-Law World", Yale Journal of International Law, 25, 2000, p. 435.

9 L. Chanturia, Preface to the Civil Code of Georgia, Tbilisi 2001, p. 2.

10 According to James G. Apple and Robert P. Deyling, the formal and complete codification of civil law norms in the modern period began primarily in France and Germany. In the Code Civil family law was contained in Book I, and in the German Civil Code family law was regulated in Book IV. For more on the history of the civil law codification process in continental European law countries, see J. G. Apple and R. P. Deyling, A Primer on the Civil-Law System, Federal Judicial Center, Washington, D. C., 1995.

11 Family law was also an integral part of the Italian Civil Code of 1865, the Portuguese Civil Code of 1867, the Spanish Civil Code of 1889, the Dutch Civil Code of 1838, the Austrian Civil Code of 1811, the Swiss Civil Code of 1907, the Turkish Civil Code law of 1926. And in the Serbian Civil Law of 1844 (adopted under the influence of the Austrian Civil Law), which was applied for a long time on the territory of Macedonia, family law relations were also regulated.

12 For more on the development and characteristics of Soviet family law, see M. V. Antokolskaia, Development of Family Law in Western and Eastern Europe: Common Origins, Common Driving Forces, Common Tendencies, Journal of Family History, January 2003.

13 See O. A. Khazova, Family Law on Post-Soviet European Territory: A Comparative Overview of Some Recent Trends, Electronic Journal of Comparative Law, vol. 14.1, May 2010, p. 5.

tradition had an ideological character: the Bolsheviks believed that the Soviet family should be different from families in bourgeois countries and that family relations should be based on love, respect and help, not on material interests.[14] Under the influence of Soviet law, this concept of separating family law from civil codifications was accepted in all other countries of the socialist bloc. In this sense, Zbigniew Radwański points out that: "Communist doctrine determined that family law should be separated from civil law, which is why in the USSR, as well as in other "people's democracies", family law was regulated in separate Family Codes".[15]

After the collapse of the Soviet Union and the democratic changes in the former socialist countries, significant reforms were also carried out in the sphere of civil law. All the former socialist countries that adopted, or are in the process of adopting civil codifications, left the communist ideological matrix, returned to the original European legal tradition and included family law in their Civil Codes. For example, the former Soviet republics of Estonia, Lithuania and Latvia included family law[16] in their civil codes, which they adopted after separating from the Soviet Union, and family law was also included in the Civil Code of Georgia, adopted in 2001.[17] And Slovakia leaves the influence of Soviet law and in the Civil Law, which began to be prepared by a decision of the Government of Slovakia in 2009, it is foreseen that family law will be regulated in Book II of the Civil Law.[18] And Hungary follows the example of the other former socialist countries, so that the Civil Law that is being prepared will also include family law.[19] It is expected that in Poland, family law will be an integral part of the civil codification[20], and so it is in the latest version of the Civil Law of the Czech Republic, which contains five parts , and which is expected to be adopted soon, family law is regulated in Book II.[21] Due to the fact that family law is an integral part of the civil code differences of almost all European countries, as well as due to the need in one legal text, in a comprehensive and coherent manner,

14 *Ibidem.*

15 Z. Radwański, GREEN PAPER, An Optimal Vision of the Civil Code of the Republic of Poland, Ministry of Justice, Warsaw 2006, no. 21.

16 For the process of adopting civil codes in the countries of Central and South-Eastern Europe, see more at Peter Cserne, Drafting civil codes in Central and Eastern Europe, A case study on the role of legal scholarship in law-making, Pro Publico Bono Online, Támop Speciál , 2011. See also O. A. Khazova, op. cit., p. 1-2.

17 In the Civil Code of Georgia, family law is regulated in Book IV. See more in L. Chanturia, Preface to the Civil Code of Georgia, Tbilisi 2001, p. 2.

18 see more at M. Jurčova, Re-codification of Slovak Civil Law, Paper presented at the international conference: Perspectives on European Private Law, 7–8 May 2009 at the Faculty of Law, University of Santiago de Compostela

19 For the procedure for the bringing of the Civil Code of Hungary, see P. Cserne, op. cit. p. 12-23.

20 For the arguments in favor of the inclusion of family law in the Civil Code of Poland see more in Z. Radwański, op.cit., p. 21-25.

21 P. Cserne, op. cit., p. 8. More about the arguments for the inclusion of family law in the Civil Code of the Czech Republic, see D. Elischer, The new Czech Civil Code. Principles, perspectives and objectives of actual Czech civil law recodification: On the way to the monistic conception of obligation law, Drejeto, Vol 19, No. 2, 2010, as well as in Z. Kralickova, Czech Family law: The right time for re-codification, The International Survey of Family Law, Jordan Publishing, Bristol UK, 2009, p. 163.

to regulate all relations from the sphere of civil law, the Commission for Drafting the Civil Law of Macedonia decided to regulate family law in Book 5 of Civil law.

3. Changes in the regulation of extramarital union

Extramarital union in the Republic of Macedonia is regulated by the Family Law of 1992,[22] and this legal provision is still in force today, without any changes. The legislator did not foresee that there must be no marital obstacles for the creation and legal effect of the extramarital union, as is the case in the majority of European legislation. Also, no form is provided for proving the existence and duration of the extramarital union. For these reasons, as well as the fact that the existing legal determination of extramarital union creates numerous problems in practice,[23] certain changes in its legal regulation are necessary. And in the past, we pointed out that changes are needed in the regulation of extramarital union,[24] and we think that the reform of civil law, started with the drafting of the Civil Law, is a good opportunity to change the current inadequate legal regulation of extramarital union. We think that the legislature needs to foresee that there should not be marital obstacles between extramarital partners in order for the extramarital union to produce a legal effect. In addition, in order to be able to prove its existence more easily, extramarital partners should have the possibility to register the union with a declaration at a notary, since those who do not do so will be exposed to the risk of proving its existence and duration, in case of termination of the common life. Moreover, taking into account that the number of extramarital unions is constantly increasing, in which the same family functions are performed as in families based on marriage, we consider that for extramarital partners who live together for longer than five years, and if they have children together for longer of three years, the right of legal inheritance should also be foreseen, according to the rules that apply to married partners.

22 In Article 13 of the Law on the Family, extramarital union is defined as: ”Community of life between a man and a woman which is not established according to the provisions of this law (extramarital union) and which lasted for at least one year, is equal to the marital union in terms of of the right to mutual maintenance and property acquired during the duration of that union”.

23 The failure of the legislator in relation to marital obstacles creates serious problems in practice, because there is a possibility that the extramarital union produces legal actions despite the fact that one or both extramarital partners are married or are closely related to each other.

24 See more in Dejan Mickovik and Angel Ristov, International Survey of Family Law, 2012; Dejan. Mickovic, Lidija. Stojkova, ”Extramarital union in modern families”, Eurodialog, no. 15, Student Word, 1999; Dejan. Mickovic, ”Legal regulation of extramarital union”, Pravnik, Association of Lawyers of the Republic of Moldova, no. 195-196, 2008, p. 8; A. Ristov, ”Extramarital Community”, Jubilee International Scientific Conference on the occasion of the 20th anniversary of the founding of the Faculty of Law in Veliko Trnovo, Ius est ars boni et aequi, University ”St. St. Cyril and Methodius”, Veliko Trnovo, 2012, p. 96-113.

4. Introduction and legal regulation of the marriage contract

The marriage contract is one of the most controversial contracts in family law, and in law in general. It has a large number of opponents, who believe that this agreement does not correspond to the modern character of marriage, which is concluded out of love and which is diametrically opposed to any property calculations. On the other hand, this contract has numerous supporters, who point out that it allows the free will of the spouses to be expressed, who can change the rigid legal frameworks for regulating property relations, and who believe that this contract allows " de-dramatization" during the divorce, because the spouses will not have to fight a long, difficult and uncertain "war" over the division of the property during the divorce.

In general, the main problem of the marriage contract, according to its opponents, is that it introduces the principle of interest and the desire for profit, which are characteristic of market relations, which introduces selfishness and egoism into a relationship that should basically rest on love, respect and helpfulness, willingness to sacrifice and selfless support of the partner. In this sense, a famous lawyer from New York, specializing in divorces, says: "You cannot regulate the human heart with a contract. You should trust the person you marry, not the legal document".[25] And other authors state that the basic problem with marriage contracts is that their conclusion expresses distrust in the spouse.[26] Moreover, a major caveat regarding prenuptial agreements is that they "destroy" the romance of marriage.[27] Some authors believe that the acceptance of the prenuptial agreement in the legal system means that much more attention is paid to the interests and well-being of the individual, instead of the well-being of the married couple, which has an extremely negative impact on the stability and success of the marriage and which often leads to divorce.[28] The marriage contract is often an indicator that there is no trust between the spouses and that is precisely why they try to protect their property and financial interests at the beginning of the marriage. According to Servidea, the very conclusion of the

25 Quoted in Allison A. Marston, Planning for Love: The Politics of Prenuptial Agreements, Stanford Law Review, Vol. 49, No. 4, April 1997, p. 889.

26 According to Ralph Underwager and Hollida Wakefield, a prenuptial agreement violates trust and hope between spouses, Psychological Considerations in Negotiating Premarital Contracts, in Introduction to Premarital and Marital Contracts: A Lawyer's Guide to Drafting and Negotiating Enforceable Marital and Cohabitation Agreements (Edward L. Winner & Lewis Becker eds., 1993).

27 According to Mary Rowland "the biggest challenge in creating a financial arrangement at the time of marriage is not whether it will be accepted by the court, but whether mixing money and love will destroy the romantic relationship" Linking Love and money, New York Times, Feb. 25, 1990.

28 In this sense, Underwager and Wakefield point out that the marriage contract glorifies independence and individual interest. According to them, this undermines the sense of partnership and equality that is necessary for a successful marriage. See more Edward L. Winner & Lewis Becker (eds.) Psychological Considerations in Negotiating Premarital Contracts, in Introduction to Premarital and Marital Contracts: A Lawyer's Guide to Drafting and Negotiating Enforceable Marital and Cohabitation Agreements 1993). p. 280.

marriage contract is a strong indicator that the spouses are preparing for divorce at the moment of its conclusion.[29]

Against these criticisms of the marriage contract, there are a number of arguments that it should be provided for in the legal system and that it has positive effects on the marital friends and their children. With the possibility for the spouses to enter into a marriage contract, their free will is realized and it is possible for them to regulate their property relations in a different way than the one provided by the law. Supporters of the marriage contract believe that it is not an expression of insufficient trust between the spouses, but that it is an expression of true sincerity, which is the basis for a successful marriage, as well as a confirmation that the spouses have no hidden intentions when concluding the marriage. According to some authors, the very fact that the spouses are discussing the conclusion of a marriage contract is a ”reflection of the stability of the relationship and the maturity of the spouses”.[30] One of the strongest arguments in favor of the marriage contract is that it protects the spouses in the event of a divorce. , because it solves all property issues and prevents long, expensive and traumatic procedures for resolving property relations after divorce.

The marriage contract is not regulated in the Family Law of the Republic of Macedonia, unlike several European countries, such as France, Germany, Switzerland, and several former socialist countries (Croatia,[31] Serbia,[32] Russia,[33] Bulgaria,[34] Montenegro, Republika Srpska, Hungary),[35] which, in addition to the legal property regime, allow the spouses to choose or arrange the model of the marital property regime themselves. And in the theory, there are authors according to which no property matrimonial regime is always appropriate and adequate to satisfy the needs of every married couple. Not only do different married couples have different needs and desires, but also their demands regarding economic (property) relations can change during the marriage. That is why it is very important to determine what

29 For the arguments in favor of the marriage contract see more in K. Servidea, Premarital Agreements and Gender Justice, Yale Journal of Law & Feminism, 6/1994, p. 279.

30 See Irena Majstorović, Marriage contract – a novelty of Croatian family law, Zagreb, 2005, p. 225.

31 For Croatian law, see in detail: M. Alinčić, D. Hrabar, D. Jakovac-Lozić, A. Korać-Graovac, Obiteljsko pravo, Narodne Novine, Zagreb, 2007, p. 514-518.

32 For the marriage contract in Serbian law, see: S. Panov, Family Law, Faculty of Law, University of Belgrade, Belgrade, 2010, p. 356-368; G. Kovaček Staniћ, Family law: partnership, child and guardianship law, Faculty of Law in Novi Sad, Novi Sad, 2007, p. 125-129; M. Draškić, Family law and child rights, JP Službeni glasnik, Belgrade, 2009, p. 408-412; M. Počuča, Porodično pravo, Privredna Akademija University, Novi Sad, 2010, p. 324-326.

33 For changes in Russian law, see more at: A. M. Nechaeva, Family Law, Jurayt, Moscow, 2011, p. 77-78.

34 ”The introduction of the marriage contract institute can be defined as the heart of the legislative reform carried out by the new Family Code in the field of marital property relations.” E. Mateeva, Family Law of the Republic of Bulgaria, VSU ”Chernorizets Hrabar”, Sofia, 2010, p. 164. For details on the marriage contract, see: C. Tsankova, M. Markov, A. Staneva, V. Todorova, Commentary on the new Family Code, IC ”Labor and Law”, Sofia, 2009, p. 105-133; M. Markov, Family and inheritance law, Sibi, Sofia, 2009, p. 58-63.

35 For the marriage contract in comparative law, see more at: G. Kovaček Stanić, Uporedno omnivne pravo, Univerzitet u Novi Sadu-Pravni Fakultet, Novi Sad, 2002, p. 62-72.

the married partners can agree on outside the basic legal property regime and to regulate their own property relations.[36] We think that the marriage contract should be introduced and regulated in detail in the Civil Law of the Republic of Macedonia.[37] On the basis of the marriage contract, future or current spouses, as well as extramarital partners, will be able to regulate their mutual property rights and obligations in front of the notary, which will bring to the fore the possibility for the partners to regulate their property relations independently and of their own free will during the duration of their community as well as in case of its termination.

5. To replace the term ”parental right” with ”parental responsibility”

In the last few decades, in all European countries, significant changes have occurred in the content of parental rights, changes that put the obligations of parents in the foreground, as well as the need for greater respect for the interests, but also the autonomy of the children's will. These changes are closely related to the acceptance of the UN Convention on the Rights of the Child, which talks about parental responsibility, not just parental rights, and which treats children as subjects of rights, not as objects whose protection needs to be protected engage the parents and the state. The new concept of the rights and obligations of parents, which is based on their obligations to the child and which provides rights to parents only if they are in charge of the upbringing, education and protection of the child, has also led to a change in the term used for the designation of parental rights and obligations, so that instead of parental right, a term used in the Law on the Family of the Republic of Macedonia,[38] the term parental responsibility[39] is used more often. The term parental responsibility better indicates the essence of the relationship between parents and children, within which parents have primarily obligations and responsibilities, and the rights provided by the law are determined only so that parents can perform their duties towards children. The term ”parental responsibility” has been used in a large number of important international documents relating to children's rights in recent decades.[40] This term is gradually being accepted in a large number of European

36 See more in Mary Ann Glendon, The Transformation of Family Law, The University of Chicago Press, Chicago and London, 1999, p. 135-136.

37 More about the arguments in favor of the introduction of the marriage contract in the legal system of the Republic of Macedonia can be seen at: D. Micković, A. Ristov, ”Bračni uvgar u makedonskom i uporednom pravu”, Pravni život, Udrženje pravnika Srbije, Beograd, 2012; A. Ristov, ”Is the marriage contract necessary in the Macedonian family legislation” Notary, no. 23, Chamber of Notaries of the Republic of Moldova, Skopje, 2013, p. 31-45.

38 Parental rights in the Family Law of the Republic of Macedonia are regulated in Part 3 of the Law, Article 44-Article 95.

39 The term parental responsibility is used in the revised Brussels II Regulation, as well as in the documents of the Council of Europe - in the Council of Europe Recommendation No R (84) 4 on ”Parental Responsibilities”, as well as in the White Paper on Principles Concerning the Establishment and Legal Consequences of Parentage (2002) CJ-FA(2001) 16 Rev.

40 Article 18 paragraph 1 of the UN Convention on the Rights of the Child stipulates that states will make every effort to respect the principle that both parents have joint responsibility for raising

legislations, which indicates a fundamental change in the conception of rights and the obligations that parents have in relation to children.[41] Because of this, we think that in the Civil Law of the Republic of Macedonia, in Book 5, where family relations will be regulated, the term ”parental right” used in the current Law should be abandoned for the family and to accept the term ”parental responsibility”. With this, Macedonian legislation would be in line with the most important international documents and with the general tendency in European legislation. This change does not only have a terminological meaning, but it will more adequately express the new ideology in the realization of parental duties, which is primarily based on the obligations of parents in relation to their children.

6. Anticipating the possibility for the child to be able to express his opinion in all procedures in which his rights and interests are decided

In the context of the exercise of parental rights, it is important to take into account the autonomy of the child and the influence of his will and his wishes, especially if he, given his age and maturity, is capable of forming a relevant opinion on matters concerning of his rights and interests, which fall within the domain of the parents' competences. This issue is also relevant in terms of the child's opportunities to express his will before the state authorities that decide on certain issues related to the rights and interests of the child. These are essential issues, because only if parents and state authorities really take into account the views, opinions and wishes of the child can we talk about the real application of the UN Convention on the

and developing the child. The term parental responsibility is used in the Hague Convention on the Protection of Children and Cooperation in the Field of International Adoption from 1993, as well as in the Convention on the Exercise of the Rights of the Child from 1996. This conception, which dominates international documents, is elaborated in Recommendation 1121 of the Parliamentary Assembly of the Council of Europe, which states: ”The powers of parents and other adults in relation to children derive from the obligation to protect and should not exist except in measure which is necessary to protect the person and property of the children”. For the acceptance of the term ”parental responsibility” see more in Grataloup, S., L'efant et sa famille dans les norms Europeans, L.G.D.J., Paris, 1998, p. 315.

41 In France, until 1970, the term ”paternal authority” was used because of the dominant role of the father in the care of children. In 1970, this term was changed to ”parental authority”, and after the adoption of the Convention on the Rights of the Child, in 1993, the term ”parental responsibility” was adopted in France. A report by the Council of State of France states that the replacement of the term ”parental authority with parental responsibility” is justified by ”the concern to take into account the evolution of the parental role in our society” See more at Huet – Weiller, Ganghofer, R (ed) Le droit de la famille en Europe, Son evolution de l'antiquité a nos jours, Presses Universitaires de Strasbourg, Strasbourg, 1992. And in England, with the adoption of the Children's Act of 1989, the term ”parental responsibility” is used. According to Cretney, words such as ”rights” and ”authority” have unpleasant connotations, and because of this, it is considered that the powers of parents should be described as ”responsibility” or ”obligation”. Cretney, S. M., Family Law, Sweet & Maxwell, London 1997, p. 168. The term ”parental responsibility” is used in Belgium (see H. DE PAGE, Traité élémentaire de droit civil belge, T. II (Les Personnes), Vol. 2 (by J.-P. MASSON), Brussels: Bruylant, 1990, p. 947. The term ”parental responsibility” is also used in the Norwegian Children Act 1981 and, since 2008, by Law 61/2008 in Portugal. See more in Nigel Lowe, A Report for the attention of the Committee of Experts on Family Law, CJ-FA (2008) 5, p. 13.

Rights of the Child, which considers the child as a subject of rights, not as a passive object of protection.[42] This concept is also accepted in the most important European Convention in this area, the European Convention on the Exercise of Children's Rights.

In several European legislations, an obligation is explicitly provided for parents, when exercising parental rights, to take into account the opinion and attitudes of the child. The Italian Civil Code stipulates that parents have the right and obligation to support, educate and bring up their children, taking into account their abilities, natural inclinations and aspirations.[43] And the courts in Italy take into account the wishes and autonomy of minors. The court in Bologna in 1973 ruled that a minor can leave his parents' home in order to maintain the relationship that they have forbidden.[44] The right of the child to autonomy is also provided for in the jurisprudence of other European countries, and for the right of the child to make decisions for himself and for his rights and interests, the case of Gillick v. West Norfolk and Wisbeach Area Health Authority in Great Britain is particularly significant.[45] With the decision in this case, a new institution appeared in English jurisprudence: a mature minor under 16 years of age, which opens numerous dilemmas. Namely, it is not clear how it will be determined whether the minor has sufficient understanding and intelligence to be able to make decisions for himself and for his rights and interests and whether this may lead to the danger of jeopardizing the rights of children. According to Cretney, it is a question of fact that is decided on a case-by-case basis, depending on the complexity of the issues in question, as well as the emotional and intellectual maturity of the minor.[46] The right of the child to express an opinion that should be taken into account is also provided for in other European legislations. In Switzerland, the Civil Code stipulates an obligation for parents to take into account their opinion when making important decisions for the child.[47] Moreover, starting from the child's level of maturity, he has the right to independently organize his life in Switzerland.[48] And

42 Article 12 paragraph 1 of the UN Convention on the Rights of the Child stipulates that "To a child who is capable of forming his own opinion, member states provide him with the right to his own opinion, the right to freely express that opinion on all matters relating to the child, in that his opinion is given due attention in accordance with the years of life and maturity of the child.

43 See more in Lenti, L., Droit de la famille: Italie, Juris-Classeur de Droit Comparé, Éditeur Michèle Klein, Paris 1997.

44 See more in Boulanger, F., Droit civil de la famille, Aspects comparatives et internatiounaux, Economica, Paris, 1994, p. 238.

45 In this case, the mother of four girls under the age of 16 questioned the decision of the Department of Health and Social Security according to which doctors can, in exceptional cases, give advice and prescribe treatment in the field of contraception for girls under the age of 16 age, without parental consent. Mrs. Gillik asked the court to annul this decision, because it violates her rights as a parent. With the final decision of the House of Lords, the lawsuit was dismissed. The reasoning of the court decision states: "The right of parents comes after the rights of children to make their own decisions when they reach an age and intelligence sufficient to form an opinion and decide in areas and issues that require a decision." See more in Meldeurs-Klein, M-T., La personne, la famille et le droit, Trois décennieas de mutations en occident, Brylant, Bruxelles, L.G.D.J. Paris, 1999, p. 359.

46 Cretney, op. cit., p. 170.

47 Article 144 paragraph 2 of the Civil Code of Switzerland.

48 See more in Guillod, G., Droit de la famille: Suisse, Juris – Classeur de Droit Comparé, Éditeur

in the Czech Republic, the legislator takes into account the opinion of the child.[49] The Family Law stipulates that when a child is capable of forming his own opinion and understanding the measures that apply to him, he has the right to receive from his parents all the information necessary to express himself about all the measures of the parents.[50] In France, the child's right to express his opinion is provided by the amendments to the Civil Law of 1993 year,[51] and the right of the child to express his opinion in some countries, such as Poland, is also provided for in the Constitution.[52]

The Republic of Macedonia does not ensure consistent application of Article 12 of the UN Convention on the Rights of the Child, despite the fact that the Law on Child Protection stipulates that the opinion of the child should be taken into account when deciding about him and his rights and obligations.[53] However, in the Family Law, where they are regulated the most important issues related to the rights and interests of children there is no general provision that the child's position should be taken into account when deciding on his rights. In certain articles of the Family Law that refer to the maintenance of the child's personal contacts with the parent, when the parents do not live together,[54] or adoption,[55] and guardianship,[56] the law stipulates an obligation to take into account the child's opinion. However, for some extremely important decisions, such as the question of which of the parents the child will live with after the divorce, the Family Law does not stipulate an obligation to listen to the child and take his opinion into account. For this reason, we think that the Civil Law of the Republic of Macedonia should provide for a general obligation for all state authorities, when making decisions about the child, to have the obligation to listen to the child and take into account his views, according to his age and maturity, and that obligation to be explicitly provided for in all parts of the law that regulate issues related to certain rights and interests of children.[57]

Michèle Klein, Paris, 1999.

49 Generally, the child has a right to be heard in any proceedings that decide essential matters relating to the child (Sec. 31 para. 3 Czech Family Code).

50 Zuklinova, M., Droit de la famille: République Tchèque, Juris-Classeur de Droit Comparé, Éditeur Michèle Klein, Paris, 1999, p. 11..

51 According to Article 388-1 French CC (since the Act of No. 93-22 of 8 January 1993) the minor child can be heard before the court or before the person appointed by the court, in any proceedings related to the child.

52 Article 72 sec. 3 of the Polish Constitution provides a rule, according to which, when assessing a child's rights, the public authorities and persons responsible for the child should hear and, to the extent possible, take the child's opinion into consideration.

53 Article 3 b of the Law on Child Protection stipulates that the state has a duty to ensure children the right to express their views on all matters that concern them and that children's views should be given due consideration in accordance with their age and maturity

54 Article 79 paragraph 2 of the Law on the Family stipulates that when determining the personal relationships and direct contacts of the child with the parent, the center for social work informs the child and takes into account his views and opinions depending on the age and level of development and informs him about the possible consequences of the decisions.

55 Article 103 paragraph 1 of the Law on the Family stipulates that the adoptee who is older than 12 years should give his consent for the establishment of the adoption.

56 Article 135 paragraph 4 of the Law on the Family stipulates that when appointing a guardian, the center for social work takes into account the wishes of the person under guardianship.

57 For more on the regulation of the possibility to take the child's point of view into account when

7. Provision of the special legal protection of the family home

In the Family Law and in general, in the legislation of the Republic of Macedonia, no special legal status is provided for the family home. At the same time, it is indisputable that the family home is a necessity without which the existence of the family and the realization of its functions cannot be imagined. It represents a central hub that connects spouses, parents and children in the exercise of family rights and duties.[58] Despite these characteristics, the family home has not enjoyed special legal protection in family law for a long time.[59]

It becomes the subject of interest of science and of the reforms in modern legislation in the last few decades, which is why it acquires special legal protection. By providing for the special protection of the matrimonial home in family law, greater protection of children and the family is ensured. In modern family law legislation, the matrimonial home is regulated by special legal rules that limit ownership in a certain way in the interest of the children. The issue of the special status of the family home becomes relevant when the spouse to whom the children are entrusted for care and education has not independently resolved the housing issue. Therefore, a very common occurrence after the divorce is the sale of the family home and the relocation of the children to a new environment, which has a negative impact on their development.[60] Bearing this in mind, legislators are faced with the dilemma of how to establish a balance between the interests of spouses and children and the interests of creditors in relation to the family home.[61] The most significant argument in favor of the provision of special legal protection of the family home is the interests of the children.[62] In most cases of divorced marriages, the children who are entrusted with the care and upbringing of one spouse, which is usually the mother, are forced to

solving issues related to him, see Borče Davitkovski, Gordana Bužarovska, Gordan Kalajjiev, Dejan Mickovic, Comparative review of the leagislation of the Republic of Macedonia and the Convention on the Rights of the Child, Ministry of Justice, UNICEF, Skopje, 2010 p. 104-112

58 See more about this at: A. Ristov, "The legal status of the family home in Macedonian and comparative family law" Pravnik, no. 251, Association of Lawyers of the Republic of Macedonia, Skopje, 2013, p. 14-17; A. Ristov, "The legal status of the Marital Home in the Macedonian and Comparative Law", Iustinianus Primus Law Review, Skopje, 2012.

59 See: P. Petot, Histoire du Droit Privé Français, La Famille, Editions Loysel, Paris, 1992; J. Bart, Histoire du droit privé, Montchrestien, Paris, 1998.

60 Several reasons and arguments are present in the theory for the provision of special legal protection of the family home. For more on this see: T. Altobelli, "The Family Home in Australian Law", Australian Institute of Family Studies Conference, University of Wollongong; Kovaks, "Matrimonial Property Law Reform in Australia: The Home and the Chattelst Expedient. Studies in the Art of Compromise', University of Tasmania Law Review, 1978-1980, p. 227; P. Wessner, "Le divorce des epoux et l'attribution juduciare a l'un d'eux de droits et obligationas resultant du bail portant sur le lpgement de la famille", 11 e Séminaire sur le droit du bail, Neuchâtel, 2000, p. 3; Withnall, "Negligence and the House that Jack Built" Otago Law Review, 7 (2), 1990, p. 189; G. Kovaček Stanić, Uporedno family law, University of Novi Sad – Pravni fakultet, Novi Sad, 2002, p. 74.

61 Altobelli, op. cit., p. 12.

62 For more on child protection measures, see S. Bubić, N. Traljić, Roditeljsko i starateljsko pravo, Pravni fakultet Universitat u Sarajevo, Sarajevo, 2007, p. 193-218.

move from the marital home.[63] Changing the home and the environment in which the children lived has a stressful effect on their development, and they experience the move very emotionally.[64] Precisely because of this, the treatment of the family home is increasingly becoming a subject of interest in the courts and the theory who represent him the opinion that when deciding on his fate, the principle of the best interest of the child should be taken into account. In practice, this interest is realized by the child staying in the family home, close to his friends and the school.[65] As an argument for the provision of special protection of the family home, the trend of non-payment of alimony by the spouse, which is present in almost all societies, including the Macedonian one,[66] as well as the fact that the special regime of the family home allows judges more flexibility when deciding on his fate. This is confirmed by the rich judicial practice in the countries where discretionary right is left to the courts in making decisions.

Because of all this, we think that there is a need in the Civil Law of the Republic of Macedonia to provide for special legal protection of the family home. This protection would apply both for the duration of the marriage and in the event of a divorce. When the marriage last, we think that it is necessary to provide a solution according to which the disposal of the matrimonial home is limited by the consent of the other spouse, despite the fact that the matrimonial home is the exclusive property of one of the spouses. In the case of divorce, provisions could be provided according to which the court will be able to make a decision depending on the legal regime of the matrimonial home, primarily starting from the best interest of the children, the property position of the spouses, as well as their incomes. These solutions would significantly improve the position of children, taking into account the principle contained in the UN Convention on the Rights of the Child that decisions should be made in the best interest of children.[67]

In addition to these changes that we propose to make in the family legislation of Macedonia, when adopting the Civil Law, it is necessary to accept the concept of a joint exercise of parental rights after divorce,[68] to foresee the possibility of divorce

63 According to Funder, in the 80s, one out of three marriages ended in divorce, and one out of six children left the matrimonial home before they reached 18 years of age. This number increased in the 90s. In 1974, 25505 children were affected by the divorce of their parents, while in 1993 this number grew almost twice, it was 48055. According to the research done, 85% of the children after the divorce of their parents continued to live with the mother.

64 According to statistical data from 1996 in Australia, almost 19% of families (467,200) were single-parent, consisting of one parent and child/children. The matrimonial home was sold in 40% of cases, in 35% it was assigned to the woman, and in almost 20% it was assigned to the man.

65 See more in M. F. Davis, "The marital home: equal or equitable distribution?" University of Chicago Law Review, Vol. 50, No. 3, p. 1089-1090.

66 So M. F. Davis, op. cit., p. 1089-1090.

67 Article 3 paragraph 1 of the UN Convention on the Rights of the Child stipulates that in all activities related to children, the interests of the child are of primary importance, regardless of whether they are carried out by public or private institutions for social protection, the courts , administrative authorities or legislative bodies.

68 In the Republic of Macedonia, there is no precise legal provision that parents continue to jointly exercise parental rights after divorce. See more in Dejan Mickovik, Angel Ristov, The Exercise of Parental Rights After Divorce in Macedonian Family Law, International Survey of Family Law, Jordan

by mutual consent, when the partners do not have children, after the mediation to take place at a notary, and not at the court, to provide for the obligation for the partners who divorce by mutual consent, except for the custody of the children, to agree on the alimony and the division of the joint property. In addition, it is necessary to simplify the adoption procedure, which is now very complicated and long-lasting, to provide a reward for the guardian, with which he would perform the guardianship function more efficiently and responsibly, and to separate the provisions on domestic violence, which are now covered in the Family Law and in the Criminal Law in a separate Law on Domestic Violence. We think that with these amendments, family law in the Republic of Macedonia, which will be included as an integral part of the Civil Law, will be in accordance with international standards, with the general tendencies in the legal regulation of family law relations in European countries, and that with these changes will ensure greater protection of the rights and interests of all family members, especially children.

7. Concluding Remarks

The reform in civil law and the drafting of the Civil Code in Macedonia is an opportunity to make reforms in family legislation, especially those related to divorce and the exercise of parental rights after divorce. Divorce should be interpreted as termination of marriage, not the termination of parental rights.

The existing legal solutions and the judicial practice indicate that changes are necessary to the secondary regulation in the area of children's rights. Namely, they indicate the need to foresee a legal possibility to take into account the opinion of the child when decisions are made about his rights and interests. In the Family Law of the Republic of Macedonia, Article 12 of the Convention on the Rights of the Child is not consistently implemented, which represents one of the basic weaknesses of Macedonian family legislation. Considering that our country has ratified this Convention, there is an obligation on the part of the competent authorities to apply it. In addition, we think that the term "parental right" should be replaced with "parental responsibility", which will indicate that parents have primary responsibilities in relation to children, and their rights are determined only so that they can fulfill their responsibilities and obligations to children. Extramarital union in the Republic of Macedonia is regulated by the Family Law of 1992, and this legal provision is still in force today, without any changes. The legislature did not foresee that there must be no marital obstacles to the creation and legal effect of the extramarital union, as is the case in the majority of European legislation.

The marriage contract is not regulated in the Family Law of the Republic of Macedonia, unlike in many European countries. The legal regulation of the marriage contract makes it possible to express the free will of the spouses, who can change the rigid legal frameworks for the regulation of property relations and who are considered that this contract enables "de-dramatization" during the divorce of the

Publishing Limited, 2013, pp. 251-265.

marriage, that the spouses have to wage a long, difficult and uncertain ”war” over the division of property upon divorce.

All these changes to the family law in the Republic of Macedonia will be covered as an integral part of the Civil Law. This will enable compliance with international standards, the general tendencies in the legal regulation of family law relations in European countries from one side, and ensuring on greater legal protection from another side.

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ГРАЂАНСКИ ЗАКОНИК И РЕФОРМЕ У МАКЕДОНСКОМ ПОРОДИЧНО ПРАВО

Апстракт: Македонско породично законодавство није претрпело значајне промене и реформе више од три деценије. Закон о породици из 1992. године у великој мери је преузео и у себе уградио законске прописе и решења из времена социјализма. С друге стране, дешавају се драматичне и револуционарне промене у брачним и породичним односима. Повећава се број разведених бракова, повећава се број деце рођене ван брака, повећава се број брачних заједница. Застарела законска решења која нису у складу са Конвенцијом о правима детета, бројне правне празнине стварају велике проблеме у пракси. Последица тога су пресуде Европског суда за људска права против наше земље које констатују кршење Европске конвенције о људским правима. У Републици Северној Македонији је у току израда Грађанског законика, чији ће саставни део бити и породично право. Аутори дају анализу места породичног права у грађанској кодификацији. Указују да треба спровести реформе у кодификацији породичног права и дају предлоге за измене и допуне македонског породичног законодавства у погледу правног регулисања ванбрачне заједнице, као и потребе регулисања брачног уговора. У раду се аутори залажу за усвајање појма родитељска одговорност у Грађанском закону Македоније и указују на потребу да се предвиди законска могућност да се при одлучивању о његовим правима и интересима узме у обзир мишљење детета. У раду се аутори залажу за обезбеђивање посебног правног статуса и заштите породичног дома и за реформе у другим важним питањима породичних односа.

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