

The Fundamental Human Right to Marry and to Family Life and their Protection in the Legal Framework of the Republic of Macedonia

Albana Metaj - Stojanova

MSC. ALBANA METAJ - STOJANOVA

Abstract

The right to family life is a fundamental human right, recognized by a series of international and European acts, which not only define and ensure its protection, but also emphasize the social importance of the family unit and the institution of marriage. The right to family life has evolved rapidly, since it was first introduced as an international human right by the Universal Declaration of Human Rights (UDHR). The family structure and the concept of family life have changed dramatically over the last few decades, influenced by the everchanging social reality of our time and the decline of the institution of marriage. Aside from the traditional European nuclear family composed of two married persons of opposite sex and their marital children, new forms of family structures have arisen. LGTB families are at the centre of the ongoing debate on re-defining marriage and the concept of family life. The aim of this paper is to analyse the degree of protection accorded to family life and to the right to marry, which has long been recognized as one of the vital personal rights essential to the pursuit of happiness by free men by both, international acts ratified by the Republic of Macedonia and the legal system of the country. The methodology applied is qualitative research and use of the analytical, historical and comparative methods. The paper concludes that in general

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Republic of Macedonia has a solid legal framework, in compliance with the international law, that protects and promotes the right to family life.

Key words: family; marriage; the right to family life; the right to marry; LGTB marriages;

1. Introduction

Family and marriage are pre-legal and pre-state natural structures that have accompanied mankind from its beginnings to the present day. The social and state interest in regulating and disciplining marital and family relationships has been high throughout all stages of human evolution. Initially through moral and religious norms, and later through legal norms, society has always intervened in the regulation and protection of the institution of marriage, which traditionally constitutes the main basis for family creation. The strengthening of a country or a society depends greatly on the strengthening of the family because there is a very complex relationship between the part and the whole (Mandro 31).

The legal doctrine broadly recognizes that the social interest in family life's legal protection is closely related to the social functions of the family. The functionalist theory on family has its origins in the work "Social Structure" of the prominent anthropologist George Murdock, published in 1949. The functionalist perspective identifies four basic functions of the nuclear family, which are: regulation of the sexual behaviour of family members, the reproductive function, the economic cooperation function, and the educational function, which according to Murdock may be equated to the socialization of children (Murdock 260-295). The numerous transformations that the family structure has undergone, especially starting from the second half of the 20th century, enabled the emergence of other functions of post-modern families such as the function of family to provide protection, affection as well as emotional support for its members (Trpenovska et al. 78-82; Podvorica 40-43; Omari 22-23; Aliu and Gashi 50-55).

The reproductive function of the family in all historical stages of human society's development has always been and continues to remain one of its key functions. This function derives from the need for self-preservation and continuation of mankind. The essential significance of reproduction for society and the state is also expressed in the traditional prohibition of

sexual relations that cannot be of reproductive character. On the other hand, by excluding same sex couples from marriage, the state indirectly places reproduction as a marital condition (Weitzman 1112-1113). It should be noted, that under current conditions, when more and more children are born in cohabitations or the so called extra-marital families, or by a single parent even through assisted reproduction techniques, the institution of marriage is losing its reproductive exclusivity. According to Eurostat data, in 2012, in EU countries, 40% of children were born out of wedlock. (Eurostat, *Marriage and divorce statistics*, 2012)

One of the most important developments of family law in recent decades is the recognition and legal protection offered to cohabiting or factual families, as well as guaranteeing equal rights to children born in and out of wedlock. The debate over the legal recognition of same-sex unions is ongoing. Within the EU some member states have recognized the right to marry of LGTB couples, others have recognized the registered partnership of these same-sex relationships, while there are countries that have not addressed the issue in their legislation. In June 2015, USA was added to the list of countries that have legalized marriage between same-sex persons. On June 26th, 2015 the Supreme Court of the United States in a historic decision ruled that the fundamental human right to marry shall be guaranteed to homosexual couples as well. (*Obergefell v. Hodges*, 576, 2015) Within European Union there are 11 countries that recognise same-sex marriage. Belgium, Denmark, Spain, France, Luxemburg, the Netherlands, Portugal, Sweden and the United Kingdom have already recognised same-sex marriages, while Ireland and Finland are in the process of doing so. (Eurostat, *People in the EU*, 2015)

Family is an important economic unit because it meets some of the basic needs of family members such as food or shelter. The educational function of the family is related to the fact that families do not only produce biological beings, but also social human beings, providing the children with a set of rules about how to behave in society. The emotional function of the family expressed in the psychological, emotional, and affective support that family members offer to each other, is becoming more important.

The reason behind the special national and international protection enjoyed not only by the family, but also by the institution of marriage, as the main basis for family formation, is linked to these important social functions of the family. Through special legal protection, family and

marital relationships gain the importance of protected legal values (Alincic et al. 6).

During the 20th century, the institution of marriage experienced a "perfect storm": the expectation that it should be emotionally fulfilled, women's liberation, contraception, and the no-fault divorce revolution have contributed to the decrease of the number of marriages and the increase in the number of divorces (Coontz 263-281). These developments have influenced changes in family dynamics and family structure and the emergence of new family types such as the single parent family or the recomposed family, also known as step-family.

In the recent past, the religious idea that the main purpose of marriage is conceiving and rearing children prevailed. Nowadays, the idea that marriage is a valuable social institution based not only on reproduction, but also on a unique marital friendship that implies the existence and development of reciprocal feelings such as love, respect and mutual support (George 141-153).

Marriage is a valuable social institution because it has a positive impact on the psychological, emotional and financial well-being of spouses and children. Thus, married people suffer less from depression and are emotionally healthier than the unmarried (Uecker 67-73); children who grow up with their married biological parents have a higher level of quality of life than those who grow up in a single-parent family (Parke 8-9); divorce increases poverty for children and women (Doherty et al. 9); married people are generally much happier than divorced or unmarried persons (Fagan et al. 25).

For all the above mentioned reasons, family and marriage constitute not only social institutions, but also very important legal institutions, protected by international acts and state legislation. The right to family life and the right to marry are recognized as basic human rights that rest on the foundations of the very existence and survival of our society.

2. Protection of the right to family life by the international law

The first international act that has recognized the right to a family life and the right to marry as a fundamental human right is the Universal Declaration of Human Rights (UDHR), which was adopted on December 10th, 1948.

Thus, Article 12 of the UDHR sanctions the right to private and family life, guaranteeing the family life of the individual and the absolute prohibition of any interference with his privacy, family, home or correspondence. In the sense of Article 12, private and family life is guaranteed not only from the unfair, arbitrary or abusive interferences or attacks, but also from the interference of state authorities and organs (Article 12 of UDHR).

Article 16 of UDHR defines the right to marry and create a family by stipulating the main principles of its creation. Paragraph 3 states that the family is the natural and fundamental group unit of society and is entitled to protection by society and state. The article defines the positive obligation of the state to protect the family, but without providing any concrete definition of the family concept and the persons entering its circle (Article 16 of UDHR). It reflects the principle that all individuals, without any limitations due to race, nationality or religion have the right to create, enjoy and maintain intimate relationships, not affected by unnecessary interferences. The right to marry also means that adults should be provided with an appropriate legal framework that enables the recognition and protection of their relationships.

Article 25 of UDHR provides for special care and assistance for motherhood and children.

Member states are responsible for ensuring that these fundamental rights are equally enjoyed by all citizens.

Moreover, the right to family life and the right to marry are enshrined in a series of international and European acts, which not only define and ensure their protection, but also emphasize the social importance of the family unit.

The need for further elaboration of the fundamental rights set out in the UDHR, resulted with the adoption of two new covenants in 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The ICCPR aims at setting a legal framework to ensure the implementation of civil and political rights. Regarding the right to family life, the ICCPR provides two articles, namely Articles 17 and 23.

According to Article 17, no one should be subjected to arbitrary interference in his private and family life, in his or her personal environment, or in his personal correspondence (Article 17, paragraph 1 of ICCPR). Family is created by the marriage of men and women of

marriageable age (Article 17, paragraph 2 of ICCPR). Also, ICCPR protects the family as it is considered to be the natural and fundamental unit of society. This protection must be ensured both by society and the state.

The ICCPR provisions recognize the social importance of family units and oblige member states to define special rights for the families and to respect these rights. The ICCPR affirms the principle of equality (Article 26 of ICCPR) by stating that its rights belong to everyone, regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 2, paragraph 1 of ICCPR).

The International Covenant on Economic, Social and Cultural Rights specifies the economic rights of families by placing them within a mandatory legal framework. ICESCR requires states to accord to families the widest possible economic protection and assistance. It is recognized the right of everyone to enjoy fair and favourable working conditions which ensure a decent living for themselves and their families (Article 7(a)-ii of ICESCR); the widest possible protection and assistance to families as natural and fundamental units of society (Article 10 of ICESCR), as well as the right of everyone to an adequate standard of living for themselves and for their family (Article 11 of ICESCR). This special protection is accorded to the family because it is not only regarded as natural and fundamental unit of society, but also as responsible for the care and education of children (Article 10, paragraph 1 of ICESCR).

Adequate standard of living includes the right to adequate food, clothing and housing and to the continuous improvement of living conditions (Article 11, paragraph 1 of ICESCR).

The UDHR, as well as the ICCPR and the ICESCR were integrated in the internal legal system of Macedonia by way of succession from the former Yugoslavian federal state.

Another important international act is the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), a convention aimed at combating discrimination against women in marriage and family life (Article 16 of CEDAW). Macedonia has succeeded its obligations as a ratifying state party to the CEDAW on 17 September 1991. (Ristova-Aasterud, 2012)

In a European context, the most important act regarding the right to family life is the European Convention on Human Rights (ECHR). Article 8 provides for the right to respect for private and family life of every individual, including the right to respect for one's home and

correspondence. These rights should be recognized by public authorities, which cannot interfere with their exercise. Only when it is necessary in a democratic society, in the interests of public security, for the protection of public order, health and morals, or for the protection of the rights and freedoms of others, the intervention of public authorities is allowed, but in any case it must be at the level provided by law and compliant with the principle of proportionality (Article 8 of ECHR).

Article 12 of the European Convention on Human Rights provides that a man and a woman who have reached marriageable age have the right to marry and to have a family under national laws governing the exercise of this right (Article 12 of ECHR). Historically, requirements for entering the marriage union, marital relations between spouses, parent-child relationships have also been influenced by social morality, religion, and traditions of different countries, hence this broad regulation of the right to marry, which gives priority to national laws is understandable. For this very reason, the recognition of same-sex marriages is left to the discretion of the member states of the Convention.

The European Court of Human Rights, which was established in 1959 by the ECHR, is competent to assess alleged human rights violations, as set out by the ECHR. Court's judgments are binding on the member states of the ECHR. In the legal system hierarchy, international conventions have priority over domestic law, thus, the Court's case law has led member states to alter their legislation in accordance with ECHR provisions.

All the aforementioned international acts, ratified by R.M. provide protection for family units and marital life, without giving definitions of what family or marriage is, which as fundamental social and legal institutions of society and the state are defined by the domestic legislations of the member states, based on each country's traditions, moral views and religion.

The right to family life of children is addressed in several conventions, of which the most important one is the 1989 Convention on the Rights of the Child (CRC), which articulates the children's rights in a more complete way. The CRC recognizes that the family provides the best environment for child rearing and that the child should be brought up in a family environment, surrounded by an atmosphere of understanding, love and happiness because it recognizes that families have the most important role in child rearing. This act also mentions the child's right to family life. In particular, the child has the right to know his or her parents and to be cared

by them, as far as this is possible (Article 7, paragraph 1 of CRC). A child, as any other family member, has also the right to be free from any arbitrary interference with his or her family or home (Article 16, paragraph 1 of CRC). Furthermore, the child has the right to not be unjustifiably separated from the parents, against their own will (Article 9, paragraph 1 of CRC) and to preserve family relations (Article 8, paragraph 1 of CRC). The fundamental guiding principle of CRC is the principle of protecting the best interests of children, so separating a child from the family environment is legal and permissible if it is in accordance with the best interest of the child.

3. The right to marry and the right to family life in Republic of Macedonia

According to Macedonian legislation, the family is a living community consisted of parents, children and other relatives, provided they reside in a common residential unit or a common household. The family is created with childbirth and adoption (Article 2 of the Law on Family of R.M.). According to the Labour Relations Law of Macedonia, female employees during pregnancy, childbirth and parenting, are entitled to a 9 month paid leave, while if two or more children are born (twins, triplets etc.), the paid leave from work is 15 months (Article 165, paragraph 1 of the Labour Relation Law). Also, to a female employee who has adopted a child, is granted the right to be absent from work until the child reaches 9 months of age, and in the case of adopting two or more children, until the children reach 15 months of age (Article 165, paragraph 6 of the Labour Relations Law).

According to the official website of the State Statistical Office of R.M., during 2015, 89% of the total number of births in the Republic of Macedonia consists of children born in wedlock (<http://www.stat.gov.mk/>). Society and the state cannot remain indifferent to the regulation of the institution of marriage and marital relations, especially if we keep in mind that marriage continues to constitute the main basis for family formation in R.M.

The dual nature of marriage as a legal institution, in which not only the private interests of spouses, but also the public interests of society and the state are realised, appears in the definition of marriage offered by the lawmaker. Marriage is defined as a community of life of a man and a woman regulated by law, in which not only the interests of both marital

partners, but also the interests of the family and society are achieved (Article 6, paragraph 1 of the Law on Family), (Article 5 of the Law on Prevention and Protection against Discrimination). The principle of institutionalisation, expressed through legal regulation of marriage and marital relations, is one of the fundamental principles of marriage in R.M. (Trpenovska et al. 90).

Macedonian legislation, like all modern legislation, does not treat procreation as the main purpose of marriage, at least not directly. If the legal definition of marriage was to be expressed on this matter, then childless marriages should be divorced and infertile people who cannot give birth should be excluded from entering into marriage. However, the legal requirement for spouses' gender affiliation leads to the fulfilment of the social need for conceiving and rearing children, by securing the participation of both parents in an ongoing marital union. The state interest for demographic growth in the Republic of Macedonia is clearly expressed through the social policies for promoting reproduction, undertaken in recent years. With the entry into force of the Law on Child Protection, Macedonia implemented the parental compensation measure for the birth of the third child. According to Article 38 of the Law, the mother realises a parental compensation for her third, born alive child. "Parental compensation for the third child is done in the form of a monthly payment of 8048 Denars for a ten-year period" (Article 39 of the Law on Child Protection).

In June 2014, through a government initiative for some constitutional changes, a further intensification of the institution of marriage and its traditional definition was sought. The package of constitutional amendments contained the proposal to add a constitutional definition of marriage as a living community only between a man and a woman. Pursuant to the Constitution of Macedonia, the Republic provides particular care and protection for the family, while the legal relations in marriage, the family and cohabitation are regulated by law (Article 40, paragraphs 1, 2 of the Constitution of R.M.).

Considering, on the one hand, the challenges currently faced by the institution of marriage, the efforts to redefine and change the traditional structure of marriage and its deinstitutionalisation, and on the other the moral, ethical and religious principles of all communities in the RM, according to which marriage is understood only as a union between a man

and a woman, the purpose was to protect and further promote the concept of marriage in society (Proposal for amending the Constitution of 2014).

The proposed constitutional changes were supported by the Parliamentary Committee on Constitutional Affairs (Report No. 09-2593/2, date 16.07.2014), but were not voted by the Parliament. Although this initiative was not finalized, its importance lies in reflecting the intent to further protect the institution of marriage in its traditional sense, at a time when the debate over legal recognition of same-sex marriages in other European countries and not only, it is more than ever present. It should be noted, however, that Macedonia is not isolated and detached from contemporary trends and phenomena that have brought about changes in the traditional family structure and have caused the emergence of new types of families such as cohabitation or the factual extra-marital family; single-parent family; families created by procreation through bio-medical assisted reproductive technologies and factual relationships among same-sex persons. Article 13 of the Law on Family equates the cohabitation that has endured more than a year, to the marriage community in terms of property rights and mutual sustenance. The Law on Biomedical Assisted Fertilization notes that such fertilization procedures shall be implemented on a request of a married or unwed couple, or a single woman (Article 12 of the Law on Biomedical Assisted Fertilization).

Under these conditions, it is important that family law strives to maintain the balance between respecting the actual values and moral principles of society on the one hand, and the fundamental freedoms and individual rights on the other.

“The relationships in the family are based on equality, mutual respect, mutual assistance and sustenance, as well as the protection of the interests of the minor children” (Article 3 of the Law on Family), while “the relationships between the spouses are based on the free decision of the husband and wife to stipulate a marriage to their equality, mutual respect and mutual assistance” (Article 6, paragraph 2 of the Law on Family). Thus, marriage is a strong and stable relationship based on the principle of equality, mutual trust and respect, understanding and mutual help assistance between spouses, values that are passed on to future generations.

The principle of monogamy in marital relations, widely accepted by all Western legislation, is another basic principle of marital law, while marriage is defined as a relationship only between a man and a woman.

"Monogamy, assuming it is the only valid form of marriage, cannot be practiced by an individual. It requires a culture that knows and supports it, through public opinion and formal institutions" (Raz 162). Monogamy enjoys comprehensive cultural, moral, social and institutional support. The legal support enjoyed by the principle of monogamy is expressed in the various provisions. In R.M. a person cannot stipulate a new marriage, unless the previously stipulated marriage has terminated (Article 17 of the Law on Family). And if this happens, then he is criminally liable. According to the Criminal Code, the person who stipulates a marriage, while being married, will be sentenced from three months up to three years in prison (Article 195 of the Criminal Code). The Albanian Criminal Code, for example does not include bigamy in the category of criminal offenses. Western civilization and modern legislation do not accept the stipulation of a second marriage without terminating the first one, and often such action constitute a criminal offense, while Arab and African countries widely practice the principle of polygamy, based on the arrangement of the Qur'an according to which, a man is allowed to tie up to four marriages (Omari 37-38).

Marriage is a durable and continuous living community of a man and a woman because only such a long-lasting bond guarantees the upbringing of children in a favourable environment. However, it often happens that reality is far from the ideal concept of marriage and marital relationships degenerate at such a point that family life does not offer emotional, psychological and affective support to family members, but instead turns into a source of continuous tension and conflicts. Therefore, if marital affairs are not based on equality between spouses, mutual respect and mutual assistance, or do not develop according to spouses' expectations, given the fact that personal relationships between spouses necessarily contain subjective elements and depend on their personal evaluation, the legislation allows the divorce of the marriage in court proceedings for reasons determined by law.

Despite the formal legal framework that supports marital and family life, in R.M. in the period 2005-2015 the number of divorces has increased by 41.8% and the number of births is in constant decrease ("Macedonia in Figures" 13, 74-75). One of the main factors influencing the increase of the divorce rates and the decrease of the number of births are the difficult economic conditions in the country, which lead to inadequate living conditions for its citizens. According to the latest News Release of the State

Statistical Office, about 50 percent of the young people up to 29 years of age are unemployed, while the general unemployment rate for 2016 was 24% (News Release on Labour Market, No: 2.1.17.06)

4. Conclusions

The legal framework of the Republic of Macedonia offers a solid legal protection regarding family and marital life, which continues to be the main basis for family creation. The legal system recognizes and protects other forms of family, apart from the traditional nuclear family. Thus, cohabitations that have lasted more than a year are legally protected, while the family can also be created through biomedical assisted reproductive techniques. It should be noted, however, that Macedonia is not isolated and detached from contemporary trends and phenomena that have brought about changes in the traditional family structure such as the recognition of marriage among persons of the same sex. Although the current morality of Macedonian society is contrary to the legal recognition of marriages among persons of the same sex, I consider that in the future, Macedonia will also face the pressure of LGTB rights organizations to recognize marriages or unions between same-sex persons and the legislation will have to maintain the balance between respecting the actual values and moral principles of society on the one hand and the individual's freedoms and rights on the other.

Despite the formal-legal protection enjoyed by the family and the institution of marriage, the number of divorces in Macedonia continues to increase, while the number of births is declining. On the one hand, the growing number of divorces is linked to the increase in expectations that spouses have from modern marriages, compared to traditional marriages. On the other hand, economic factors are undoubtedly affecting not only the termination of marriages, but also the decision of young people to not enter into marriage and to not procreate. In the current situation when young people have difficulties in finding a job that suits their qualifications and increasingly decide to migrate to countries where the job is well paid, it is important that the government undertakes appropriate measures to ensure adequate living for the citizens and to increase the economic standard of citizens, through employment policies and average wage increase.

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