

# Procedures for Concluding and Divorcing Marriage in the Civil and Church Law (Orthodox Christian Variety): Macedonian Case

Ilija Despotovski<sup>1</sup>

**Abstract** - The paper presents a comparative overview of the procedures for concluding and divorcing marriage in the civil and church (Orthodox Christian Variety) law, with particular reference to the differences between civil and church procedures. In text were elaborated the procedures and practices in the Macedonian civil and ecclesiastical code regarding the conclusion and divorce of the. The in-depth and extensive processing of the phenomenon, the development and the current state of marriage law in the Macedonian civil and ecclesiastical legal system has been used. In this context, the paper investigated the extent to which these two types of rights express, on the one hand, complementary positions for the procedure of marriage and divorce, but also on the other hand what are the differences in the stands between these two legal systems. Regarding the method, in the master's thesis were used analysis of content, discourse analysis, comparison and analysis of legal documents. The paper clearly outlines the current weaknesses of the family legal legislation in North Macedonia and proposes outbound solutions and guidelines for eventual harmonization of the same with the Orthodox Christian position.

**Index terms** - marriage, family, spouses, conditions for marriage, family law, civil law, church law, marriage law, divorce, sacred secret.

## 1. INTRODUCTION

Marriage or the legally regulated living of two people in a community is a more dimensional phenomenon in society. Whenever we talk about marriage and family and the problems associated with it, science raises the red alarm for the treatment of a very sensitive topic! It is no coincidence that a number of lawyers consider the part of law that has dealt with this issue - family law - as the most complicated and ungrateful part of legal practice. For example, only if one thinks about how and in what way will a lawyer, juror, jury or judge determine that the intensity of love, mutual respect, understanding and helping spouses has decreased to the point that cohabitation is no longer possible between the spouses, or whether both spouses have reasonable motives for the divorce, will see how difficult, tedious and ultimately ungrateful the work is under marital and family law. These are just some of the myriad of situations that arise before legal and other practitioners in the divorce process and all the consequences that accompany it.

Portrayed in this way, the subject of the research can be said to have long occupied the interest of scholars, the church and church dignitaries, but also politicians and political planners - the latter, especially in terms of demographic calculations and the effects of family on election results! In this regard, legal considerations for framing this very important aspect of human life can be considered as a post festum manifestation of previously clearly differentiated group interests. However, marriage is not just a politically or economically manageable framework that could be used for demographic and politically

manipulative purposes - marriage has often been, is and will hopefully be the result of love and mutual respect and understanding between two beings - a relationship that must to be regulated and legalized by an appropriate institution.

It is also a relationship that provides for appropriate rights and duties, both in the period of validity of the marriage and in the case of termination of marriage through divorce proceedings.

The whole procedure of getting married and starting a family, since there is organized community living, has been the subject of serious debates, legal projects and church policies. Sociologists consider marriage, along with the taboo of incest and the need to believe in the supernatural, to be one of the most widespread cultural universals - that is, common elements present in almost all known cultures today. Therefore, the treatment of such an important constant in the life of people and societies, could hardly be reduced to the political interest crystallized within a specific legal-political project - usually in the form of law! The problem of marriage and family today necessarily implies a much broader perspective and multidisciplinary approach.

## 2. PROCEDURES OF CONCLUDING AND DIVORCING MARRIAGE ACCORDING ORTHODOX CHRISTIAN CODE

According to the teaching of the church, Marriage is a Holy Mystery, one of the seven Holy Mysteries in the Orthodox Church. According to Christian teaching, marriage was established in paradise by the Creator himself (Gen. 2: 21-25).

<sup>1</sup> PH. D. Candidate, University of Sts. Cyril and Methodius – Trnovo, Republic of Bulgaria, ile\_despotovski@hotmail.com

What big secret actually happens in marriage? According to the Orthodox Christian point of view, two bodies come together and a new one is created from them. That is the secret of love! Because, if two do not become one, one will not give birth to many, but only two will remain. Starting from the exegetical interpretations of the biblical scenes from the first books of the Old Testament of the Holy Scriptures, the creative wisdom of God from the very beginning divided one into two parts and, wanting to show that even after the division will remain one, arranged so that one is not enough for the birth of a new man! Because he, who is not united through the bonds of marriage, is not a whole but only a half. The mystery of marriage, according to church teaching, is that God made one out of two and then out of two, and He still does today; so that even now man is born of one, because man and woman are not two people, but - one!

Marriage is a secret of human nature, the work of the creative wisdom of God, which, creating man in the form of a sexual couple, united the first created man with the woman in one being. The Old Testament scene that speaks of part of the ribs of the first man - Adam, as the beginning of the creation of woman (in the case of Eve), to this day in the church process of marriage is interpreted as the return of the torn rib in its entirety. The most vivid example of the merging of two bodies into one through marriage.

With marriage, according to the Orthodox-Christian chronology, the history of the Church in heaven begins - with marriage begins the history of the New Testament Church. But on the other hand, throughout the New Testament we will not find a single word about the institution of marriage by Christ or His apostles.

So, according to the Bible, marriage is a remnant of paradise on earth, so it is a base that was not destroyed by the Flood (Noah's Ark and the rainbow!) Nor by other disasters. That is why the Christian marriage in the Church is special and is called secret, because in marriage the man becomes one being with his wife, just as the Son of God Christ ceased to be only God, and became man for the community of His people so that they could become His Body [1].

When the Holy Apostle Paul in the New Testament calls marriage a secret, he alludes that in marriage man not only satisfies his selfish needs for mutual, secular existence, but also realizes something very important for the purpose for which he was created: i.e., enters the sphere of eternal life, because through the resurrection of Christ that sphere has already been discovered and can be experienced and shared. Calling marriage, a secret, the Holy Apostle Paul affirms that marriage also has its place in the eternal kingdom of heaven. Husband and wife become one person and one body, just as the Son of God ceased to be only Himself, that is, God, so he became a man for the community of God's people, to become His Body. That is why the Gospel narratives so often compare the

kingdom of God to a wedding celebration that fulfills the prophetic visions of the Old Testament of marriage between God and Israel - the chosen people. Hence, true Christian marriage can be unique, not because of some abstract law or ethical form, but because it is a mystery of the kingdom of God, which introduces man to eternal joy or eternal love [2].

With the coming of Christ, marriage no longer has as its primary purpose the continuation of the human race and the family lineage, although birth is still considered an important element of it. According to the Christian belief, Christ i.e., the Savior came into the world and brought with Himself proof of the resurrection from the dead, thus giving Christian marriage a new purpose and meaning - the acquisition of eternal life for man, woman and children through salvation.

The wedding service in the Orthodox Church begins with the words: "Blessed is the Kingdom of the Father and of the Son and of the Holy Spirit, now, always and in all ages. Amen." This outline emphasizes the importance of marriage, as well as its purpose. According to the Church canons, those Orthodox Christians who marry outside the Church are separated from its Holy Mysteries. Some people are offended by this; they consider the Church to be too strict in this case. But the question arises: What is it that gives marriage validity? From a spiritual point of view, the question arises, what makes marriage meaningful?

Unlike wedding ceremonies, in almost all non-Orthodox Churches, marriage in the Orthodox Church is not an agreement - a legally based agreement, by which vows and promises are exchanged between two persons. In fact, by marriage, the two persons establish a small, family church, in which they can glorify the True God, striving, at the same time, for the salvation of their souls. It is a family church, obedient to the Church of Christ. As Saint Basil the Great says, it is natural to get married, but it must be something more than natural, it must be a relationship between two persons, born under the auspices of the Church [3].

From the above we can conclude that for the church marriage is not just a legally based agreement, i.e. agreement, for it is a connection of two persons united in one divinity! Just as in civil law, i.e., family law, it is clearly defined what marriage is, the rights and obligations arising from it, the manner of concluding and terminating it through the Family Law, so also the Church through its rules established by the Church law in the area of Marriage law has established them in the same way as the state. So, in the following section we will look at and explain marriage and its significance from a church legal point of view within the Orthodox Christian version of belief.

As we mentioned before, as in family law, of which marital law is an integral part, so within the framework of church law, as an integral part of it is also marital law. Marriage law is a set of norms that regulate the relationship in marriage and the mutual rights and duties of the spouses regarding their

children. These include: the conditions for concluding a marriage, the marital obstacles, the manner of concluding the marriage, the dissolution of the marriage, as well as the regulations on the personal relations of the spouses and the consequences of concluding the marriage. Many of the secular jurists consider marriage law to be a private law, but more recently secular and ecclesiastical jurists have included it as a kind of family law [4].

The individual will of the spouses plays a big role in the marriage and it has many elements of an intimate character. But at the same time, marriage is the foundation of a family, and the family is the basic cell of any society. According to the teachings of the Orthodox Church, marriage is not only a natural phenomenon, but it is also a church institution, raised in a supernatural institution, between a man and a woman! Marriage rules have more of a moral character than a legal one, because their execution depends on their good will. Accordingly, marital law encompasses moments of both moral and legal nature. The church sees marriage as a divine institution, while marriage is viewed by the state as the product of an economic and social institution [4].

In Christian literature we do not find any specific definition of marriage, but all Christian lawyers use the definition of the Roman lawyer *Hernius Modestus* which reads: Marriage is a relationship between a man and a woman, united for life, a union of human and divine law. *Hernius Modestus* is a student of the famous Roman lawyer *Ulpianus* who is the author of many legal works. Although the definition is pagan, it is still accepted in the Orthodox Church. The Holy Apostle Paul speaks of the relationship between a man and a woman as a mystery and compares it to the relationship between Christ and the church. The bond of marriage is therefore a great mystery, because it contains the grace of God and contains the bond between Christ and the Church. Therefore, even after Christian teaching, marriage should be sanctified by God's grace. Here is mentioned the definition of *Petar Mogila* which is emphasized in *Krmcija* - a special book - *Trebnik* which is used in the Slavic Orthodox services primarily in the Balkans. Marriage is a sacred secret, established by God, when a man and a woman declare before the priest and before the Church that they want to be husbands, to enter into an unbreakable bond of love and friendship for mutual help to avoid the sin of fornication and the birth of children in glory to God [4].

*Modestine's* aforementioned definition highlights three important characteristics of marriage: physical, ethical, and religious-legal:

- Physical quality occurs with a complete difference between a man and a woman. A normal marriage can't be imagined regardless of gender. The Holy Bible tells us about that. *Modestine* envisions marital union as a relationship between a man and a woman, but in other words it is a monogamous principle in which three persons can't participate or one person

can be in a relationship with two people. If the monogamous principle is violated, it will mean that the real idea of marriage is violated.

- The ethical quality speaks of the inseparable union of man and woman in all life relationships. Here the moral side of the two comrades in sacrifice is shown and the covenant given before God and the Church is fulfilled.
- The religious-legal feature indicates the marital contact of the whole religious and legal life [4].

Byzantine ecclesiastical jurists and Christian canonists unanimously comment on this part as the religious unity of the husbands. Although *Modestine* could not talk about marriage as a secret, he went into the essence of marriage and its definition is perfect for the Christian understanding of marriage. In other words, the Orthodox Christian idea of marriage requires high moral love, complete self-denial, and unconditional faith in love. Here love is required to be as strong as death.

The Bible says nothing about the form of marriage. The relationship between the state and the Church refers only to the conclusion about marriage, but not to the creation of its validity. Some famous Roman jurists say that marriage is not a hostage but a consent. Marriage is an agreement between two free parties. Slaves in Byzantium were not free and therefore had no right to marry, or *nuptias non concubitus, sed consensu facit*. From this definition given by *Modestine* it follows that cohabitation with a single woman is marriage, not concubine and assumes that a slave woman can't give her free consent and that, therefore, cohabitation with her can never be called marriage! This was considered the basis of civil law in ancient civilized countries. The essence of marriage lies in the consent which, in turn, gives meaning to the legal substance of the marriage consent or the marriage contract [2].

Christianity is not dependent on the attitude of the Roman authorities and therefore does not fully accept their marriage laws [4]. In relation to this assertion, there is a different understanding in the Christian literature which can be seen expressed in the following way:

*The Christian Church both during the persecution and during its alliance with the Roman Empire accepted Roman law governing marriage. Even when Christianity became the dominant state religion, the ancient definition of marriage as a treaty continued to be accepted in state law and even in the Ecclesiastical Nomocanon in fourteen titles. It is also found in the Slavic version of the Nomocanon, the so-called Krmcija book (Cormillary book) which was the basis for canon law in Slavic countries until the early nineteenth century [2].* For a long time, the church did not know about a special act of marriage, but only accepted civil registration. Already in the second century, *Tertullian* testified that there was a wedding in the church with the blessing of a bishop during the act of the Holy Liturgy. So, the normal formula for marriage in the ancient church was twofold and in accordance with the state

and the church. Accordingly, the marriage was performed together with the Eucharist (mystery of thanksgiving - I D), sealed with a blessing. All this is expressed in the Scriptures, where it is said that marriage is a great mystery, where the kingdom of God is equated with marriage between God and the Church. Accordingly, the attitude of the Church towards marriage is seen from a scene from the Gospel (John 2: 1-11) where Christ came to Cana of Galilee as a guest and thus confirmed the marriage. During the reign of polytheistic kings, marriage was conducted according to ecclesiastical principles [4].

When we talk about the termination of a marriage, especially about a divorce from a religious and ecclesiastical point of view as such, it should be noted that it is not approved, but tolerated. The Roman Catholic insistence on the legal inviolability of marriage and the complete impossibility of divorce to remarry, while their former spouse is still alive, has long been and is still the subject of much debate. The Roman Catholic tradition and canonical rules for divorce and remarriage are based on two assumptions:

- 1) that marriage is a legal agreement and for Christians that agreement is unbreakable;
- 2) that the marriage contract refers exclusively to earthly life and that, therefore, it is legally dismissed through the death of one of the spouses.

The Orthodox-Christian approach starts from different perspectives: 1) marriage is a sacred secret, it belongs to the eternal life of the kingdom of God and therefore is not released through the death of spouses but is created between them if they wish and if there is given;

- 2) as the Sacrament of marriage is not a magical act but a gift of mercy, spouses being human beings, may have erred in receiving mercy for marriage when they were not ready for it or may prove incapable of seeking it to fertilize that mercy, in such cases, the church can recognize the fact that mercy has not been received, so it can tolerate separation and allow the marriage to re-enter [2].

The dispute over whether the Bible permits divorce and remarriage relates to Jesus' words found in Matthew 5:32 and 19: 9. The phrase "except for adultery" is the only place in the Bible where God's seemingly permits divorce and remarriage. Many researchers and exegetes think that this "phrase-exception" should mean infidelity after the time of "engagement". In the Jewish tradition, men and women were considered married, even after the time of the engagement. Hence, the only acceptable reason for divorce is to show immorality after the time of the engagement. The Greek word *καταδολιευση*, which translates as "infidelity of husbands", can describe any kind of sexual immorality. It can mean fornication, prostitution, adultery, etc. Hence, Jesus' words likely indicate that there can be divorce in the event of sexual immorality. Sexual relations are an integral part of the family

bond - "both will be one flesh" (Genesis 2:24; Matthew 19: 5; Ephesians 5:31). Therefore, the breakdown of that relationship with sexual relations outside of marriage can be considered as a sufficient reason for divorce [5].

The church, therefore, neither recognized divorce nor allowed divorce. It was considered a great sin, but the church never stopped giving sinners a new chance and was always ready, if they repented, to receive them again. It was not until the tenth century, after the emperors, when the Church received a legal monopoly on the registration and recognition of all marriages, that it became obliged to issue and divorce. He usually did so in accordance with the laws of the Roman Empire, and later in accordance with the laws of the countries in which Orthodoxy flourished. But this new circumstance largely erased from the consciousness of the faithful the uniqueness of the Christian dogma of marriage. Both the Christian marriage and the Christian divorce of the faithful began to seem to them as simple formalities that gave them outward legitimacy for acts that were generally quite illegitimate from a Christian point of view. The Christian empire continued to allow divorce and remarriage as a perfectly normal social practice. The laws of the Christian emperors, especially those of Constantine, Theodosius, and Justinian, established different legal bases and conditions in which divorce and remarriage were permissible ... Divorce as an act of simple dissolution by mutual consent was tolerated until the law was issued by of the Emperor Theodosius II in 449. However, it was re-enacted by Justin II in 556. The Code of Justin II was not replaced until the eighth century! During that period, divorce with the right to remarry was allowed only on the basis of adultery but also on the basis of political betrayal, murder planning, disappearance of one of the spouses for more than five years, unjustified accusation of adultery and finally taking monastic vow by the spouses. No ecclesiastical father ever rejected those imperial laws as contrary to Christianity. There was an obvious agreement of opinions that such laws considered inevitable. Emperors like Justinian I sincerely sought to issue Christianity-inspired legislation and, in formulating it, used the competent advice of bishops and theologians. Many of these theologians opposed the imperial will when it violated Christian Orthodoxy, but did not oppose the legal regulation of divorce. On the contrary, many mentioned that legislation as a fact:

*One who can't abstain after the death of his first wife or who has separated from his wife for a valid reason, such as fornication, adultery or other evil deed, if he is a man and remarried or if he is a woman remarried the divine word does not condemn or excludes him from the life of the Church but tolerates him because of his weakness [2].*

The very definition of marriage emphasizes that it is inseparable, because spouses are bound to each other for lifelong fidelity. Such inviolability of marriage, according to the teaching of the Orthodox Church is an important feature. This



is confirmed by the Savior, the Lord Jesus Christ, with the words: What God has composed, let not man put asunder. Divorce between spouses can occur due to death or some other reason that crosses the red line for inseparability of marriage[4].

Reasons for divorce according to the Orthodox Church are:

- 1) When one spouse commits such an offense that entails the death penalty;
- 2) when the man or woman came to such a situation that can be considered equal to physical death;
- 3) when adultery is committed in the marriage or such an act which can be considered adultery;
- 4) when there is no necessary physical condition for marriage;
- 5) when the man or woman has a desire to commit to a restrained life.
- 6) in this part should be added here as reasons for divorce and intentional displacement and apostasy from the Orthodox faith as purely ecclesiastical reasons rejected by the state [4].

### 3. PROCEDURES OF CONCLUDING AND DIVORCING MARRIAGE ACCORDING MACEDONIAN CIVIL CODE

The Law on Family of the Republic of North Macedonia, as we said in the section dedicated to the concept and meaning of marriage and its termination from a legal point of view is provided in Article 6. There, marriage is defined as a legally regulated community of life of man and woman in which interests are exercised of spouses, family and society. In particular, in order to be able to explain the manner of marriage which also has a legally provided framework, we must first explain the conditions for marriage, without whose existence the marriage can't be concluded and the conditions for the validity of the marriage, as well as for the form in which it is concluded which arises from the existence of the conditions for conclusion and the conditions for validity.

#### 3.1.CONDITIONS FOR CONCLUDING A MARRIAGE AND VALIDITY OF THE MARRIAGE

In family law theory, it is common to divide the conditions for marriage into material and formal, where the formal conditions for marriage include those that meet the requirements set by law in terms of form, and in material conditions (important, essential) enter the conditions without which the marriage can't take place, but also the non-existence, the absence of all those circumstances that call into question its validity. The Law on Family of the Republic of North Macedonia provides for two types of conditions:

- a) existence of essential (essential) conditions without which the marriage can't be concluded and
- b) non-existence of circumstances, so-called marital obstacles, so that the concluded marriage can be valid [6].

The assumption of the existence of material and formal preconditions for marriage within the framework of civil marriage law, leads to the conclusion that the state as a supervisory body for the legalization of a relationship between a man and a woman takes care of who and with what characteristics enters into marriage. This is especially important in terms of exposing the seriousness of marriage to spouses, their rights and obligations, society's expectations of them as well as exposing the seriousness and procedure for a possible divorce or termination of marriage

#### 3. 2. ESSENTIAL CONDITIONS FOR MARRIAGE

The term essential conditions for concluding a marriage includes those elements that constitute a *conditio sine qua non* for the conclusion of the marriage itself. Without their existence, given the nature of marriage as an institution, its conclusion is impossible [6].

The essential conditions for marriage are provided in Article 15 of the Law on Family - Consolidated text (Official Gazette of the Republic of Macedonia No. 153 of 20.10.2014) and it reads: *"Marriage may be entered into by two persons of different sexes with a freely expressed will before a competent authority, in a manner determined by this Law". From this position of the member, he can conclude that the essential or important conditions for the marriage are:*

- 1) *gender diversity of the persons entering into marriage;*
- 2) *freely expressed will to marry and*
- 3) *the freely expressed will of the persons who want to get married to be given before a competent state body.*

*The diversity of the sexes of the persons who enter into marriage is a condition that lies in the very nature of marriage and the fulfillment of its basic function, and that is the provision of offspring as a condition for the continuation of the human race [6].*

The consent of the declared will to conclude a marriage is the most important condition, because the basic intention of this condition is that the freely expressed wills coincide with the goal he wants to achieve, which actually means that the statements can be clearly and unequivocally seen that there is a common intention for marriage. Hence it is necessary for them to coincide in terms of the affirmative, because the negative statements, although they coincide, do not have as their result the conclusion of the marriage. Expressions of will must be explicit, which means that they are usually given verbally, in words. Only in exceptional situations, when it comes to a deaf and hard of hearing person, a statement given not in words but also in writing or by some other action that does not call into question the expressiveness of the will to conclude a marriage will be considered pronounced. Statements of will, further, should be given at the same time in order to provoke an appropriate legal action [6].

The last condition is the freely expressed will to conclude a marriage to be given before a competent state body. According to the positive legal regulations of the Republic of North Macedonia, the competent state body for concluding a marriage is the Registry Office of the married couple within the Ministry of Rights.

### 3.3. MARITAL BARRIERS

A part from the existence of the essential conditions without which a marriage cannot be concluded, it is necessary for there to be certain circumstances or assumptions, for the marriage thus concluded to be valid. With the fulfillment of the first category of conditions (essential) the marriage exists, and the non-existence of the second category of conditions, circumstances or assumptions, which hinder the conclusion of the marriage called marital obstacles, the concluded marriage, the marriage that exists make it valid! It is about conditions, circumstances, conditions, in a word, assumptions that negatively affect the content, meaning and the whole of the marriage. Given its importance both in relation to family members and in relation to its position in the wider social community, in which the family, and in relation to its position in the wider social community, in which the family, whose most important basis is marriage, it is the smallest but most important cell [6].

The Family Law of the Republic of North Macedonia stipulates the conditions under which a marriage becomes valid, i.e., if there are such, the marriage will not be considered valid, because there are marital obstacles. Marriage obstacles are regulated from Article 16 to Article 22. Pursuant to Article 16 paragraph 1 of the Family Law - Consolidated text stipulates that a person who has not reached 18 years of age can't get married. In Article 17, the legislator provided that a person could not enter into a new marriage until the previous marriage had ended. Article 18 paragraphs 1 and 2 of the same law states that persons who due to a manifest form of mental illness with the presence of psychotic symptoms or residual signs of the disease, due to which they are unable to understand the meaning of marriage and can't enter into marriage. obligations arising from it, which are at the same time incapable of reasoning. Also, marriage can't be concluded by persons who are mentally retarded, and belong to the group of persons with severe and most severe mental retardation IQ below 36. As an obstacle to a valid marriage, the legislator provided for the defects of the expressed will, for which As we have said, it is the most important element for concluding a marriage, so Article 19 of the Law on Family - Consolidated text states that marriage is not valid when the consent to conclude a marriage is given under duress or in error. Finally, Articles 20, 21 and 22, as a condition for an invalid marriage, provide for these reasons according to which blood relatives in

a straight line (grandfather, grandmother, mother, father and grandchildren), as well as born brothers, cannot marry each other. and sisters, brother and sister by father, that is, by mother, uncle and child by brother, uncle and child by sister, aunt and child by brother, aunt and child by sister, nor first cousins. They can't marry: father-in-law and daughter-in-law, son-in-law and mother-in-law, stepfather and stepmother, stepmother and son-in-law, regardless of whether the marriage, due to which they came into such a relationship, has ended. Extramarital affair is an obstacle to marriage just like marriage.

From all the above we can conclude that our legislator as marriage obstacles due to which the existence of a marriage can't be considered valid has provided:

1. juvenility;
2. marriage;
3. manifest form of mental illness and retardation in mental development and inability to reason;
4. lack of free will and
5. kinship.

Marital barriers can be divided according to several criteria. One of the most important is certainly the one that starts from the social significance of the circumstances that enable, hinder or delay the marriage. According to this criterion, marital barriers are divided into those that lead to the absolute nullity of the marriage and barriers that lead to the relative nullity of the marriage. The first group includes: minors under the age of 16, marriage, the manifest form of mental illness, inability to reason, as well as the lag in the metal (mental) development and kinship. The second group includes: minors over 16 years of age, moderate mental retardation and severe inherited family illness and lack of willpower [6]. Also, marital impediments can be categorized as irreversible and removable, permanent and temporary.

Minority as a marital obstacle in family law is expressed in such a way that it is associated with the acquisition of legal capacity and marital maturity, which means that by nature marriage is a specific agreement, family-legal agreement, it is necessary to meet the condition required for all contracts in civil law, and that is the business capacity when concluding them. General business ability is acquired upon reaching the age of 18 and upon reaching the age of majority. Marital maturity usually coincides with business capacity and means the degree of development of the person, both full and general physical, which is a guarantee that she will understand and properly perform the obligations arising from the marital community [6].

Minority as a marital obstacle can be presented as absolutely null, void, and removable marital barriers. What does this mean, in the Family Law - Consolidated text in Article 16 paragraph states that the competent court may, in an out-of-court procedure, allow the marriage of a person who has

reached 16 years of age, if it determines that it has reached physical and mental maturity required to perform of the rights and duties that occur in the marriage, and after previously obtained opinion from a health institution and provided professional assistance in the center for social work. It follows from this if a person over 16 years of age can conclude with an appropriate court decision and medical documentation and in this way the minor enters the group of relatively null and void marriage barrier. Therefore, those persons who have not reached 16 years of age can't get married under any circumstances, even if it is concluded, will be considered absolutely null and void.

The existence of marriage as a condition for an invalid marriage arises from the principle of monogamy which was discussed in the part of the term and the meaning of marriage from a legal aspect. As long as, as stated in Article 17 of the law quoted above, a person may not enter into marriage until the previously concluded marriage is terminated. This provision contains the absolute nullity of such a marriage and in addition, in such a case entails criminal liability provided by the Criminal Code of the Republic of North Macedonia.

People who due to a manifest form of mental illness with the presence of psychotic symptoms or residual signs of the disease are not able to understand the meaning of marriage and the obligations arising from it, which are also incapable of reasoning, as well as people who are mentally retarded. (mental) development, and belong to the group of people with severe and most severe mental retardation IQ below 36, listed in Article 18 of the Family Law, the legislator provided as a condition for an invalid marriage arises from the need to fulfill the nature of marriage, in which two persons will be able to fully exercise their rights and obligations arising from it. However, paragraph 2 of this article stipulates that persons who are classified as persons with moderate mental disabilities, or with mild mental disabilities, as well as persons with severe inherited diseases in the family, may enter into marriage after having previously obtained an opinion on genetic construction issued by the *Institute for Mental Health of Children and Youth Skopje* or other appropriate institution dealing with genetic research, so that such a marital obstacle from absolutely null in paragraph 1 of Article 18 grows into a relatively null marital obstacle.

Coercion and delusion appear as defects of the will to marry. Coercion as such is not defined in family law, and an analogy is made with the provisions of the *Law on Obligations* and the following is provided:

"If the contracting party or a third party with an unauthorized threat causes a justified fear in the other party so that the latter has concluded an agreement, the other party may request its annulment. The fear is considered justified if the circumstances show that the life, body or other significant good of the contracting party or a third party is endangered with a serious

danger. From this analogy it can be concluded that for the existence of coercion it must be established that there was fear caused by a serious threat. There are three types of misconceptions in marriage law in most countries: a) misconduct in a natural person - there is a case when it is thought that one person is married, and in fact is married to another person; b) delusion in the civil person - exists in case of false representation of the person with whom the marriage is concluded and c) delusion in the essential qualities of the spouse - occurs in case of existence of some of his qualities or some circumstance that would deter him the other spouse, if he / she was acquainted with it at the moment of the marriage, which is of such a nature that as a consequence there would be a serious and permanent disruption of the marital relations, and an example of such a delusion is the permanent and dangerous serious illness, pregnancy of a woman from another person, etc." [6].

Kinship as a marital obstacle is expressed in three ways: blood kinship - is contrary to the generally accepted civilization standards of marriage for moral, ethical, biological and social reasons marriage of the same between blood relatives in a straight line (grandfather, grandmother, mother, father and grandchildren), as well as brothers and sisters born, brother and sister after father, i.e. after mother, uncle and child from brother, uncle and child from sister, aunt and child from brother, aunt and child from sister, nor first cousins, in accordance with Article 20 paragraph 1 of the Law on Family, in addition to this article in paragraph 2 does not indicate that marriage and persons whose kinship from paragraph 1 is based on adoption and as such has the character of kinship with adoption and last according to Article 21, paragraph 1, a father-in-law and a daughter-in-law, a son-in-law and a mother-in-law, a stepfather and a stepmother, a stepmother and a stepson may not marry each other, regardless of whether the marriage, due to which they came into such a relationship after the wedding. However, such a marital obstacle has been removed because, in accordance with paragraph 2 of this Article, the competent court may, in an out-of-court procedure, allow such relatives to enter into marriage with each other.

#### 4. SIMILARITIES AND DIFFERENCES BETWEEN CHURCH AND CIVIL LAW IN REGULATING MARRIAGE

So far, marriage and the termination of marriage have been considered from both aspects separately, that of the state through positive legal measures and that of the church. From the attached it can be concluded that both the state and the Church in their approaches contain as much similarities in relation to marriage and divorce, specifically for divorce, so also in certain aspects they contain some diametrically different views.

Let's start with the very setting of the marriage. As already presented, the state defines marriage through its mechanisms in a way that elevates it to the level of law, which as such, precisely regulates the marital union as a relationship between (still) two persons of different sexes, who through their freely expressed will enter into marriage. They give their consent for establishing a marital relationship before a competent body determined by the state. This does not mean that the Church in its rules and dogmas arising from canon law does not know such a way of concluding a marriage, on the contrary, the Church in this respect identifies with the state, and the two institutions in the same way determine and regulate the relationship of man and woman in such a relationship. The difference is that the state knows the church way of concluding a marriage, it recognizes it, but not to the extent that it would produce legal action! Thus, anyone who wants to get married under religious customs, must have previously gotten married in a civil law sense, under the rules set by the marriage law as part of family law of the Republic of Macedonia or any other secular state. Through this one can notice the secular significance of this arrangement, because the meaning that the state has for marriage refers to what is happening now and, in the moment, while the church, as opposed to the state, sees this meaning in a divine way which is outside of the earthly event, through the spiritual embodiment of an invisible connection between the two persons and from there it follows that marriage is the Sacrament.

In terms of which of the conditions for marriage and the conditions for the validity of the marriage, the state and the Church coincide, it is important to note that both start from the fact that such a marital union must be composed of persons from different gender, the relationship between the two persons must be expressed with free will, and such expressed will, as determined, must be expressed before a competent state body by the state, while unlike the state, the Church prescribes marriage in the form prescribed by her.

In order for a marriage to be valid, several conditions must be met that are provided by both the state and the church. On the contrary, both institutions predict situations under which it is impossible to get married and call them marital obstacles! The state has defined as marital obstacles: juvenility, marriage, kinship, a manifest form of mental illness and inability to reason and retardation in mental and psychological development and lack of will. The church, on the other hand, has introduced as marriage barriers some of those that exist in the state, for example minors, (but unlike the state which has provided a lower limit of 18 years of life, the church can register a marital union and persons under at least 16 years of age, after obtaining the necessary documents through a court procedure). The church, as a marital obstacle, considers the age of less than 16 years for a boy and 14 years of life for a girl, but because of that, unlike the state, the Orthodox Church provides

the age limit by which marriage can no longer be concluded, while in the state has no such restrictions! The state and the church are of the same opinion in terms of marriage and blood relationship, and in the same way they understand and comprehend it, as well as in terms of mental illness and inability to reason and mental retardation and lack of will are of the same opinion that such marital barriers make the marriage invalid. Unlike the state, the Orthodox Church, in addition to these marital barriers, also provides for: spiritual kinship, the existence of previous four previous marriages, differences in faith, differences in religion, sacred rank, monastic vows, lifelong prohibition of marriage based on law, final expulsion from the church community, annulled marriage, adultery between persons wishing to enter into marriage as a marital obstacle, fraud and misconceptions about the inability of the spouse to perform marital duties, etc. The church goes much deeper into the meaning of marital obstacles, and thus differs from the state because it requires the marital relationship to be the purest in every possible sense. Also, unlike the state, the church envisages marital prohibitions that the state does not recognize. Although marital prohibited and, if they can be conditionally called infringements, they have a lower intensity in terms of the cost of the validity of the marriage, they can end with the expiration of a certain period of time. The similarity of this part between the state and the church can be located in the fact that for both institutions some marital obstacles can be removed and some not.

Also, in terms of the way and place where the marriage takes place, the state and the church have their similarities, although the character of them is different and both have provided in which way it should be done. Civil marriage is concluded before a registrar, church marriage before a clergyman.

Regarding the exhaustive statement of the rights and obligations arising from the conclusion of marriage for spouses, it can be said that the views of the state and the church are diametrically opposed. The state has determined such rights in accordance with the spirit of equality of spouses, they are the same as they jointly decide on choosing a place of residence, running a household, raising children, and decide on the choice of surname within the legal possibilities. According to the rules of the church, the man has special rights over the woman because he is the one who is considered the head of the family. The woman comes to live with the man and the woman MUST take the man's surname, etc., not that such rules were not previously provided by the state, but with the development of society such rules have been overcome.

Just as the manner and procedure according to which the marriage is concluded is provided by the state and the Church, so is the procedure for the divorce to be conducted. The divorce procedure in both institutions is provided as a court procedure! Before the state, the marriage is divorced by a divorce decree by the civil courts, while in the Church the judgment is



rendered by the Church court, which also provides the conditions under which the marriage can be divorced. From the previously mentioned positions of the two institutions regarding the divorce, one gets the impression that the state does not go very deep into the reasons for divorce, or at least not as deep as the church does! It is important for the state to ensure the disorder of the spouses' relations as a reason for the divorce, and as the exhaustively listed reasons that cause the disorder of the marital relations. Unlike the state, the church lists the reasons for divorce in more detail, and also blames one or both spouses for the divorce. The request to establish guilt for the divorce of one or both spouses, in the case of the church is also related to the rules and conditions under which in the future one or both divorced spouses can, i.e., can't enter into a new marriage. It should be noted that unlike the state, the church provides a kind of gradual and gradual interpretation of marriages, which differentiates the meaning of the first, second, third, etc., marriages by the fact that ONLY the first marriage is BLESSED by the church, while the possible second, third and so on. ALLOWS them!

These lexical differences in the evaluation of the first, second, etc., in the order of marriages by the church, are made first and foremost, because of taking into account the nature of marriage as a sacred secret and the path through which believers, in the case of spouses, they gain the salvation of their souls. Hence, it is clear that the soteriological component in the interpretation of marriage as a sacred secret by the church, in importance and significance goes beyond the everyday and earthly aspects of the goals, interests, positions, basic human rights and freedoms of spouses. With this in mind, it is clear why very often the clergyman or the respective church person is much more rigorous in examining the justified reasons for divorce, and far more cautious in proposing the dissolution of a marriage through church divorce, in contrast to the experts employed by the state with appropriate marriage counseling!

There are also differences in the consequences of divorce. The church as a consequence of the marriage considers the punishment it imposes on the basis of the guilt determined by one of the spouses, while the state considers as a consequence that considers only those that arise from the divorce from the marriage. In the case of the state, the consequences refer to the changes that occur in the part of the surname of the spouse, who changed it during the marriage, in relation to the joint life, the upbringing and support of the children, etc. On the other hand, in the case of children born within the marriage which is the subject of divorce proceedings, the church pays special attention, especially considering the fate and the potential for leading a godly life of the children with one of the parents. Divorce from this perspective, the church perceives and as a process that in the future can dramatically affect the Christian virtues and abilities for the salvation of children's souls.

From the attached it could also be noticed that the church, unlike the state, recognizes the institute of obsolescence of marriage in a period of six months or three years.

## CONCLUSION

It is obvious that there are more similarities in the attitude and position regarding the regulation of marriage and the family of the church and the state, than there are differences. This situation is understandable for the reason that quite often, at least as far as the societies with predominantly Orthodox Christian population are concerned, the church law complies part of the provisions in the marital law (especially the decisions from the divorce procedure) with the provisions in the civil code! In this paper, an attempt was made to point out in more detail the moments of complementarity and disproportion of the provisions in the canon and civil law in the part that refers to the conclusion of marriage, termination and divorce. Within the detailed legal views and actions, processes and rituals by both institutions, it was possible to see certain moments in which the church has a slightly different point of view from the state. This is especially true of the more rigid exegesis and ecclesiastical jurists, who, adhering to the written regulations of the ecclesiastical canons, seldom or almost never allow the dissolution or divorce of a marriage, guided by the imperatives of perceiving marriage as a framework in which above all, are spouses and their children striving for the salvation of their souls. On the other hand, one can't but emphasize the trend of a kind of frivolous or worldly assessment of marriage by many young spouses, who despite the vow made before the church, "for better or for worse" to the first marital difficulty selfishly and individually pull everyone to their side, while not taking into account the sanctity of the marital relationship. Also, we must not forget the practice, the future spouses during the preparations are not properly prepared by the priest who undertakes the obligation to marry them. This especially refers to the proper information about the premarital exam!

From the above it is noticed that there is a serious discrepancy between the normative and the positive, when it comes to the church regulation of marriage and the termination or divorce of the marriage. Therefore, the provisions of the canon law in the area of marital and family law, in the pre-wedding euphoria of the newlyweds, very easily acquire the character of a traditional-ritual decor. However, from the church-legal practice one can easily notice a certain condescension or more precisely arbitrariness of the responsible clergy in such situations, in which they often adhere to decisions that do not contradict the provisions of the marriage law in the civil code. This situation explains why the church practice in regulating marriage is increasingly bypassed and succumbed to the onslaught of the consumer view of society, in which the family

- that basic cell of society - is perceived or exhausted in its exclusively consuming function!

The stated remarks on the tolerance of the legal practice in the part of concluding, termination and divorce of the marriage, should not be perceived as an isolated phenomenon conditioned by the flexibility of the clergy and citizens responsible for this issue, excluding the massive social changes in each area. from social reality. In the introduction, the stated social repercussions on marriage and the family inevitably leave traces on the legal practice of both institutions. The rapidity and massiveness of social change affect, among other things, and because of that quite often the immature actions, decisions and immaturity of the spouses of the role that in marriage, practically put before the finished responsible persons in the church and the state. In order to reduce the suffering of the spouses or to prevent the suffering of the children, the divorce proceedings end very quickly, without taking into account the responsibilities that the spouses took upon concluding it. The fast way of life, the blind race for earnings (usually fast), the imperative for socially successful and attractive status, undoubtedly do not allow a more serious deepening of the meaning and purpose of marriage and family, first as a basic cell of society and then as a sacred secret in the orthodox church.

The paper showed in detail in which situations and for which conditions the church and the state have similar and in which situations different positions. Regarding the conditions for marriage, it was found that both institutions prescribe a clearly expressed free will between the two spouses, then the persons who get married to be of different sexes. Regarding the differences regarding the conditions for marriage, it was determined that the current Family Law of the Republic of Macedonia does not recognize marriage concluded according to religious customs and regulations, and in accordance with this provision, the Civil Code does not recognize Orthodox Christian marriage. by the church. On the other hand, the church in the Republic of Macedonia seduces a clergyman marriage after the spouses have previously brought a certificate for civil regulation of their marital relationship. From this position arise many situations in which the state is placed in a superior position in relation to the church, and accordingly, there is an asymmetry that does not presuppose reciprocity. Some of these situations are as follows: the church does not allow the conclusion

church marriage in cases when one of the spouses is found guilty of the death penalty (this case is radical and practically legally irrelevant, given that in the Republic of Macedonia the death penalty is not provided as a sanction), but therefore, the state does not provide for an obstacle to marriage if one or both spouses are found to have a mortal sin; The state, through the appropriate institution for concluding a marriage, allows the legalization of a marital relationship through the presence of

two witnesses for whom there are practically no preconditions, i.e. the state and the marriage law within the civil code allow persons of different religions to witness the marriage. or declared atheists, unlike the state, the church provides strict prerequisites for witnesses, i.e. the godfather and elder as witnesses to the church process of marriage - they are expected to be baptized, denominated believers and possibly confessed before the rite, the same so it is desirable to be in a first marriage; civil marriage has a more liberal and thus superior framework in terms of the church, when it comes to the lower and upper age of future spouses - that is, the state provides adulthood as a condition for marriage and does not specify an upper limit for marriage, while the church, although allowing the marriage of persons (male) under the age of 16, (while for girls only 14 years of age is sufficient) still does not allow the marriage of persons over the age of 70 for a man and 60 for a woman.

On the other hand, the research presented so far has shown that there are many similarities in the conditions for marriage, which make civil and church law complementary. Such points of overlap between the state and the church refer to: the gender diversity of the persons entering into marriage (it should be noted that the Republic of North Macedonia and its Family Law STILL provide for gender diversity as a condition for marriage, although it should be noted that the invasive and militant initiatives of the relevant non-governmental organizations in this regard will probably in the near future place the Republic of Macedonia among the countries that allow homosexual marriage!), and both institutions in their legal regulations postulate the marital relationship on the freely expressed and with nothing hindered the will of the future spouses to conclude marriage and that the conclusion of the marriage is performed before an appropriate body of both institutions, thus obliging the spouses to responsibilities to the other spouse and to the competent authority, but also expect appropriate assistance from the authorities if problems arise in marriage.

Related to the conditions for marriage is the question of possible obstacles to marriage. Marital barriers are closely related to the conditions of marriage and are often considered synonymous. The similarities in terms of marital impediments in ecclesiastical and civil marriage refer to the following: both institutions cite juvenility as an obstacle to marriage (although, as noted, the two institutions have different lower limits); The next obstacle is marriage, i.e. both the state and the church exclude the possibility of marriage to a person or persons who are still in a previously regulated and valid marriage, with this both institutions sharply prevent the potential for bigamy; then, both institutions assumed the mental or mental maturity of the persons entering into marriage and considered mental illness and mental retardation as a marital impediment; perhaps one of the points for consensual consent of the church

and the state regarding marital obstacles is precisely the question of the kinship of future spouses (although generally the two institutions in their legal framework provide for a ban on marriage between relatives, still in determining in the depth of kinship ties the church seems to go deeper by anticipating, in addition to blood, twin, triune, spiritual, and kinship adoption as obstacles to marriage).

However, there are some differences in terms of church and marital barriers and how the most significant appear the following: the church lists far more marital barriers than the state and its more rigid position is based on insisting on the sanctity of marriage, unlike the state, family law in Orthodox-the Christian variety prescribes a whole range of permissible and irrevocable marital barriers such as difference in faith and creed and, the priestly and monastic act which imply in the first case the marriage to take place before the ordination and in the second the marriage is forbidden, a lifelong ban on marriage, exclusion, excommunication or anathema of the person from the life of the church as well as adultery. It is very interesting to consider the last marital obstacle within the church marriage law and it refers to the joint work behind the scenes or an agreed divorce between the spouses. Namely, the church, insisting on the sanctity of marriage, does not accept

insufficiently convinced persons to enter into a marital relationship, especially since in such cases the reason for divorce is stated as amicable and voluntary (on both sides) termination of the marital relationship. The church believes that if they do not provide strong enough reasons that there is love, understanding and mutual respect, but also respect for God and the church, her doubt in the sincerity of future spouses gives her the right not to allow such a marriage. This moment or this potential situation, the church perceives as a conspiracy by the spouses against God, having in mind above all that the marriage is done before God, for the sake of God and in God. This marital impediment may be the most difficult to determine, but it is a paradigm that the state could take into account a little more seriously in the following exhaustive statements of marital impediments in the marital law, primarily due to the growing number of marriages due to interest and premeditation to apply damage to the state.

However, this issue remains interesting in the light of new debate on rights of sexual minorities and social movements for broaden frame of civil liberties. We can expectable a further tension between progressive views of liberal and secular government and conservative standpoint of orthodox church. Family law undoubtedly will face a new challenge.

IJSER

## REFERENCES

- [1] <https://mk.orthodoxwiki.org/%D0%91%D1%80%D0%B0%D0%BA>
- [2] Маендорф, Ј. *Брак православна перспектива*, Скопје: Скопска православна епархија, 2012
- [3] <https://bigorski.org.mk/slova/pouchni/pravoslaven-brak/>
- [4] Македонска православна богословија, „Свети Климент Охридски“ Скопје, Црковно право (втор дел) брачно право и црковно - судска постапка, Скопје: 2006.
- [5] <https://www.gotquestions.org/Macedonian/Macedonian-divorce-remarriage.html>
- [6] Спировиќ - Трпеноска, Љ., *Семејно право*, Универзитет Св. „Кирил и Методиј“, Правен факултет Јустинијан Први, Скопје, 2008.

IJSER