

Divorce in France and Italy

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ABSTRACT

The divorce law was approved in 1792 by legislature but it was practically inapplicable due to the prediction of hard conditions for applying divorce like age limit for the 2 years after the onset of marriage, divorce restrictions and eventually to resolve all financial assets and allocate the half of couples' properties gained during the marriage to the children. Divorce law has been adopted in 1st Dec. 1970 despite the opposition of church and in 1974 the advocates of divorce could gain a brilliant victory with the majority public opinions. For the right of divorce has been delegated to both couple in the Act of 5th Dec. 1975 according to the types of divorce and the method of proceeding, and the conscience of judge in divorce case has been basically in to consideration of the legislator, however, the lack of moral consensus, mental disease are the reasons for divorce but if the divorce causes a severe discomfort for one party the court afford to reject the petition for divorce. In French new divorce law the case of alimony payments by propertied spouse has been eliminated, and the supporting unpaid alimony to those needful individuals has been forecasted by general treasury.

KEY WORDS: Divorce; law; rights; Italy; France.

INTRODUCTION

The little attention to the social issues in two recent decades has led to the expansion of social crisis which its example is the widening gap in some families. Accordingly, the increased social problems are rooted in different cultural, economical and society problems. Sociologists believed that it requires mobilization of all facilities and force of relevant organization in the community to confront with social problems. For when the constructive steps can be taken in encountering the social problems and phenomena that all involved structures would have realized the common understanding and a modern planning for their own role. At present the reviews show that divorce is the most important problem that different societies of the world are suffering from. The sociologist experts believe that when the divorce dissolves the marriage bond the parents would find a separate identity, but it is the child, who is abandoned insecure and unsheltered in the society, even if supported by one of the parents, again the society would interpret him/her as a helpless individual, the breaking apart of family members and deprivation of children from a common parental care after occurring divorce and family collapse would deprive them from having a blissful and advantageous family life and stigmatizing and damaging to the individual and familial identity of dissolved marriage children. Social pathologists believe that after the separation of parents it makes many psychological and mental problems for the children due to the lack of parental care, including cynicism to the opposite sex and unawareness to his/her spirits and individuation structure which its further damages would be uncovered after the marriage in these children and psychological and physical training problems, feeling guilty, disorder in personal and familial identity, the creation of stepfamilies and the possibility of increased tendency toward the crime and misdemeanor are material and moral destructive and damaging impacts on dissolved marriage children which could be accounted for. In this article, first, the issue of divorce in two countries of France and Italy under these coordinates would be addressed to, that in first section the legal reasons for applying divorce, in second section the divorce procedure and formalities, and also in third section the impacts of divorce and physical separation of couples would be discussed which in some cases the rights of some American and European countries have been referred to.

Section one: legal reasons for divorce

In French divorce law, the firm conviction of being sentenced to death for any of couples, criminal detention, incommunicado, permanent or temporary imprisonments have no final and binding effect on divorce verdict and the only attributable acts to the other spouse form the element of fault according to the

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Article 242 of new law. When the responsible judge of the petition related to divorce by the request of any couples would issue the decree by considering the assigned culpable acts of another party as unwise ones. The divorce is anticipated to the common consent of couples to the Articles 230,231, 232 of 1975 French law and related canons, and the marital judge would accurately evaluate the mutual consent of couples not only for the petition of divorce but for the assignment of temporary contract (determination of couples relationship during the procedure) and the plan of final contract (for determination of couples relationships after the issuing the verdict) and humanity aspects particularly alimony payment and child support (which somehow reduces the grief after divorce). Also individual on-demand divorce applications, the admittance of the next party and the related executive regulations have been anticipated in the Articles 233,234,235 and 236 of new law. Though the consent of couples for issuing the verdict at the presence of judge is essential, but the judge himself would make the decision on issues like children care, the way of alimony payment to needy, disabled wife and also the division of couples' properties. And this would impose the judge to make the decision by resorting to the equity and the specific situation of two parties and observance of the interest of common child if any. In U.S. the familial issues, marriage and divorce are implemented in each states according to the law and legal rights and consequently the laws vary. There are no markedly differences about the marriage among the states for the wedding ceremony would be in front of registration agent. But about the divorce the laws vary in different states, in some states a felony commitment can be the cause of divorce and in some other the announcement of marriage breakage licenses the dissolving. These "Connecticut, Illinois, Mines, Massachusetts, Ohio and Pennsylvania" are the states that realize the divorce as the result of fault or shortage in marriage life. In some states, the divorce laws have been established based on the failure on non-healing marriage that we can refer to as California, Colorado, Iowa, Michigan, Nebraska and Texas states. The states of Alaska, Verge Islands, New York, Vermont and New Mexico would propose 1 year or more for a voluntarily separation. Meanwhile the passing the separation period is not necessary in "Nevada" state. In case of a child's presence, someone who cares (usually the mother) would receive the alimony till the legal age of child and in case of remarriage it would be cut off.

In Germany the first marriage and family law was imposed on 14th June 1971 and the approved Act of 1st July 1976 created a basic evolution in marital law especially in divorce section. The Act of 20th Feb. 1986 authorized the judge in specific cases to comply with justice and equity. The subject is the equity between the spouses and both of them are responsible for the home and family. The title in which the future couples would be nominated is not necessarily husband's name. Division of labor in marital life would be done by the agreement between the couples. Occupational activities and children training is the common responsibility of spouses. The judge would investigate about the durability of the marriage, in case of incurability; the subject divorce would be examined. The breakage of marriage is the only stimulus for divorce and the judge as an ethical personality is not looking to weigh the correct practice of each couple according to his/her own beliefs, especially those moralities and beliefs that very due to the time and place. If the German couples lived separately for 5 years, divorce would be automatically done according to the Article 1568. The ability of parents about child custody would be disregarded and the judge in case of discretion can ignore their agreement.

Section 2: Divorce procedure

In France, the procedure includes general and specific rules pertinent to different cases of divorce and has been codified with certain precision. The court in the city of couples' joint resident is the only competent body for adjudication of divorce and its relevant outcomes. If any of couples has taken other residency, the eligible court is the court which is within the area that wife and her children are living in. In other issues, the competent court would be the respondent's residency, unless the couples had chosen the competent court based on their own mutual consents. For handling the divorce case, one or more of the judges in city would be adopted through the decision of chef judge. The judge of marital affairs is a new gesture in France law and has broad authorities over the trial and sentencing the phase and even ever after. This judge is competent in investigation and making decision at the common request of couples, exclusively from the presenting the petition till the termination of the trial. But in other types of divorce, he acts like chef judge at the preliminary stage and his/her authorities would be different whether the divorce is based on the cutting off the joint life and or the mutual consent.

Firstly the judge of marital affairs has the authority to invite the parties through a simple and inexpensive way of ordinary or customary mail needless to the notification officer. And in general, he also has

exclusive jurisdiction about child custody and adjustment of alimony according to the circumstances and situations. But in Italy law, after request for divorce and prior to the trial, the investigating judge determined and taken the mission by the chef judge attempts for making the peace between the couples. If they didn't compromise with each other after adequate attempts, the trial would be initiated according to the procedure of civil law in Italy and at the day of trial the investigating judge would read a full report of his/her efforts done for compromising and the court would issue the decree about the case raised. If the petition for divorce has been filed by one of the couple citing to expiry date of 5 years from the date for subtraction of conjugal rights, the trial would rarely be held presently but any way the divorce decree would be researchable and appealable.

1. The revision ways: there are ruling principles in divorce claims that are distinctive from the principles in other claims. For instance, under the Article 249 French Civil law, the parties can't afford to accept voluntarily and consensually refusal of the revision of court vote, and this way would prevent the consensual divorce, otherwise the couples would easily condemn themselves by being absent in the trial and then admit the decree. In divorce petition the courts of appeal are responsible for investigation due to the Supreme Court vote in 15th Feb.1916. The revision paths are the same ways that are usual in the public law as: protest, appeal, discrimination, civil application. But the ways of appeal for divorce have two characteristics: for the reason of being absence before the court the deadline for objection varies with other legal objections deadlines and according to the Article 240 French Civil Code, one month instead of 8days has been in to consideration for signifying to the other party and the legal deadline would be eight months in case of inability to signify the vote which it necessitates the distribute of vote through a special means.

2. The separation would be implemented after the termination of the trial, thus first of all the divorce decree would be recorded in local identification card which the marriage had been conducted and additionally would be registered in the margin of marriage document and identification card. (Article 251 French Civil Code). The registration of divorce decree is necessary for the third parties who may have profit. The third parties who are dealing with these people should be aware that whether if he/she is single or married for the effects are legally important and noticeable from the beginning of divorce. According to the Article 252 French Civil Code the divorce would impose the effects from the date of ratification but sometimes it is prior to the date of issuing the verdict and takes the effectiveness to some people and to the others after the date of registration. The effects of divorce are 3 types and would be initiated in three different periods.

First- what that is about the financial treatment between wife and husband which begins from the date of divorce petition.

Two- what is pertinent to the dissolution of couples which begins from the date of final vote of court.

Three- the impacts of divorce related to the third parties would be from the date of divorce registered, that is, the spouses can't refer and cite to the third parties unless the divorce decree has been registered.

Section three: the effects of divorce

In France the divorce decree due to the financial relationships between the couples would be taken the effect since the invitation of the next party in the presence of judge, but one spouse can apply for the alleged effect as the criteria for calculation since the date of doing the fault of the next party which has provided the marriage bond at the stake. There have been many regulations developed about the family name of the couples after the divorce occurred and the wife can use her husband's family name in case of his consent, unless the marital dissolution has been occurred due to marriage cut off and to the consent of husband which the wife has formally the right to use his family name. In case of any spouse exclusive fault, the other party can apply for the compensation of material and spiritual losses. After the divorce the rights and task of parents about the child custody would remain unchanged. The supervision of children may be granted to one of the spouses and or in some exceptional cases to the third party and if any of the parents has responsibility for supervision, the other spouse has the right to meet her/his child and monitor his/her education and training. The participation of parents in expenses, caring and training of the children and the payment of alimony to the next party after the divorce have been anticipated in the new divorce law in France. The alimony payment from the debtor to the creditor may be in the form of pension according to the inflation and needfulness from any party. In case of the sufficient financial support of the payer of alimony, the capital investment would totally or partially supersede the pension payment. In case of non-receiving and or debtor refusal in alimony payment, the beneficiary can claim for recovering the maintenance from the general treasury. There is slight difference concerning the above rules about the alimony payment and child custody in Italy. But the role of

state in the right of child custody to the third party and providing the non-paid alimony could not be observed. Also, the wife has no right to use her husband's family name after the occurrence of divorce.

The judge, in France can establish the similar regime of physical segregation without leading to the separation of property. The length of physical segregation time in France is 6 years and each of the couples after three years can apply it for a divorce. If the decree for the physical segregation has not been issued due to the consensual agreement it would be no more convertible for a divorce unless to their common reclaim which in this case they must wait for 6 years and apply for a divorce citing to the dissolution of marriage. But in Italy law, the doctrine stresses that the common life would not be restricted to the marital cohabitation and the separation which led to physical segregation has a broader meaning. The period of physical segregation in Italy is about 5 years after the cutting off the marital relationship and any of the spouses can apply for a divorce. But in these situations most of the women prefer to continue the marriage life and don't confront with social and psychic insecurities. The sociologists believe that despite of legal divorce, the emotional divorce is a pervasive phenomenon in the country, due to the social and cultural restrictions, financial problems, forcing families and other factors which prevent the marriage cut off, many families are there that the couple are not mentally willing to continue the common life, after a long period of conflict and quarrel would pass the stage of enmity and hatred and reach to the indifference situation, more than 90 percent of men who separate their women would easily remarry and the divorced women have less possibility to remarry and inevitably they are forced to marry single men having several children from their ex-wife. China People Government announced the new law in April, 1950 and in its second anniversary. "Sales marriage" has been cancelled in China which was conventional in past days and monogamy has been institutionalized but yet the old traditions have been rooted and buying and selling the girls is done through the money. The management of the house is based on the law and the consensual agreement and husbands are more active than before in housework and children education. Since the recall of Mao Zedong in 1956 based on fertility limitation and reduction in population growth, the family planning has remained firm and constant either about men or women. In this vast county the belief of inequality between men and women has rooted in the minds and the hatred of woman and female aversion is a part of custom. While in a country like Turkey, the divorce would not be done without petition in Turkish Civil Code. Therefore, first each of the couples should propose the lawsuit to the court. In divorce legal cases, the adultery which is a tool of petition for divorce, so any of the couples can submit their request for separation to the court citing to the adultery of spouse. In case of amnesty, the lawsuit is unheard no more and the attack and misconduct if any one, either husband or wife has incurred the attack or misconduct the loser can file a lawsuit to the court citing to it. In case of amnesty, the lawsuit is unheard no more and the crime commitment would be no dignity to the next party. Leaving the wife is also a mean for divorce lawsuit. Therefore, if any of the couple who leaves the house for the intent of lack of commitment for 3 consecutive months the next party can submit the petition for divorce in the court. The insanity or madness is a legal mean for divorce lawsuit. If the insanity has been lasted for three years, and would be intolerable for the maintenance of the common life, the next party can file a lawsuit. The impacts of the divorce, it has three significant effects.

Firstly- divorce would dissolve the marriage and financial regime of couples.

Secondly- sometimes the decree of divorce cause the deprivation of some rights from husband or wife which the decree has been issued upon him/her and sometimes it brings about some convictions.

Thirdly- the divorce would impose a special situation for the children

1; the dissolution of marriage and the financial regime of couples would lead to some effects which are as the follows:

A- The quality of couple would be disappeared and the rights and tasks which any of the couples have toward each other would be ousted. As the result of divorce, the loyalty task- residing in a house and support, the rights pertinent to inheritance, wills and the alimony rights would be disappeared.

B-according to the article 299 French Civil Code, as the result of marriage dissolution the common name would be removed.

C- In case of passing the date in which the law has decreed (300days) husband and wife can remarry and according to Article 296 Civil Code the date would be granted from the first decree of the court, but if the wife is pregnant, after childbirth, the date would be reinforced according to the formalities which have been decreed.

D- Couple's property refinement: as the result of occurring divorce the couple's property would be refined, but in this case many problems would be produced for individuals like children who survive after the couple

death. The temporary resolution would be carried out for these problems according to Article 300 French Civil Code.

Second- some rules would be deprived from or the conviction of guilty husband or wife and the issue of divorce decree against him/her.

a- loss of rights has several issues, any one of couple will lose the right for using minor property and this is considered as one of the real penalties in Civil law and also the interests which encircle the couple's financial affairs and may have had mutual aspect would be lost and the other party would preserve these benefits according to Civil law Article 229, that means the benefits which is derived from the marriage agreement, such as gift which may be included in the marriage agreement but those gifts given during the marriage are excluded.

b- This may occur that husband or wife would be sentenced to punishment in divorce conflict, in such a way that the guilty person would be granted in favor of the next part to pay the alimony and the damages resulting from a lawsuit and thereby the harm which is reached to the innocent person due to the divorce would be restored. Thus, if there is a mutual fault, this maintenance and the payment for damages would be faded.

Third- there are changes which occur in the situation of children. This is important because during the marriage the parents and children have a common life but after the divorce the family would be broken apart and in short after the divorce occurrence the child custody would be granted to one of the couple. French Civil law has allowed privilege between the parental right and child custody.

a- the parental right- Divorce would not supposedly affect the parental right, and in fact the guilty of parents would not affect the children and the couple should be able to exert and continue the rights as previously done.

b- The keep and protect right, this is the right in which to be able to keep and protect the children at home. There would be no problem in this case during the marriage for the children are legally residing in the same location of their parents but after the divorce occurrence this would be disrupted. The provisional measures which have been previously mentioned, may determine the task of children protection but this should be known that these provisional measures may be faded by the final decree of the court and then it would be the duty of court to determine the keep and protect task of children considering their benefits. Basically this right would be granted to the spouse who has been the dominant in the divorce petition and the other party reserve the right just to meet the child, nevertheless, in case of considering as discretion by the court, the task of keeping and protecting the child can be granted to the next spouse or the third party such as grandparents.

Conclusion

In our consideration, these ultimate views are neither reflective of truth nor constructive and the facilitation of divorce regulations can't afford to deny the crisis of the contemporary family and it can not be admitted that the family has lost its value and would be faded from the sight. Family as a small social group has been constructed based on kinship ties. The members of this group have a common livelihood and are jointly responsible for children training. The life reveals that family as the most significant social entity has not lost its importance. In fact the modern family is transiting a hard stage which can be known the family crisis. But we know these problems due to the procedure of family reconstruction and its emancipation from outdated aspects. Normally, the life realities of a community would impact its specific effect which the experience of our own country has revealed these realities. Each state is responsible to study the family relationships and formulate a policy which facilitates the process of family reconstruction. Unfortunately, the Russian Government has turned away from the family after the complete transformation. The family has been abandoned which this situation has impacted upon its social status. The crisis of contemporary Russian family has been observed in various fields. The economic foundations of family, the social status and its task have brought the crisis. Significant changes also have been emerged in the structure of family and its worthwhile tendencies. The collapse of family status as a social entity and the transition of its position in the hierarchy of social values are the major problems of family. But the survey of law in Italy and France seems that the gentleness, softness and applicability of divorce regulations in France compared with Italy has been sensible and tangible that this would be derived from the notions of French lawyers and the dynamicity of law in this country.

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