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Imposed divorce as a discretionary right.

Imperative divorce as a potential right

Enforceable divorce as a potestative right, Impositive divorce as a potestative right

The enforceable divorce as a potential right

Murilo da Costa Machado1

SUMMARY

The aim of this paper is to analyze and study divorce from the perspective of current legislation.
especially after the entry into force of Constitutional Amendment 66/2010. Before the aforementioned
The constitutional amendment, for the proclamation of divorce, required the prior dissolution of the marriage.
The context stems from the historical evolution of the institutions of legal separation and divorce, encompassing...
through periods in which the motivation for the end of the marriage was discussed, until we arrived at the implementation.
of the so-called forced divorce. In seeking minimal state intervention from a perspective of
respect for individual freedoms, especially the freedom to choose the person with whom one wishes to remain.
married, without needing to state reasons for it, the legal viability of
Imposed divorce as a discretionary right.

Keywords: Divorce. Legal separation. Marriage. Potestative right. Divorce
mandatory.

1 INTRODUCTION

In Brazil, there is a large backlog of pending cases; this is due to several factors, including:
cultural aspects, even within the Brazilian legislative profile, cause delays in the progress of processes and...
There is a feeling among the population that the Brazilian judicial system is ineffective.

Among the numerous ongoing processes, family law, as a branch of private law,
which deals with the personal and financial relationships between people within a given family organization,
Without a doubt, it occupies a large part of the procedural collection. Among the topics of family law
One of the most common cases processed by the Judiciary is divorce.

In a new legal perspective that guarantees divorce, binding divorce emerges.
enshrined in Constitutional Amendment No. 66/2010, the dissolution of the marital relationship is now...

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carried out independently of a prior legal separation or proof of a time lapse.

Back in 2007, Federal Law No. 11.441/2007 already allowed divorces to be carried out in notary offices.

for those who did not have minor or incapacitated children, and the Superior Court of Justice, by

In the middle of Summary 197, it allowed divorce without the necessary division of assets, which was later...

enshrined in the Civil Code in its article 1,581 (Brazil, [2022]).

They are, therefore, since the Divorce Law2, Over these more than 40 years, numerous changes have occurred.

completely eliminates this civil law institution that announces the end of the marriage.

In this context, the present article aims to analyze the legislative evolution of the institute.

divorce in Brazil and its implications for Family Law, especially regarding the possibility

one spouse ending the marriage without the necessary consent, authorization, or

Prior communication to the other party.

To achieve the proposed objectives, the methodology used in this study was based on the analysis

Doctrinal and legislative. First, the main doctrinal works were examined.

related to Family Law and the institution of divorce, with the aim of understanding the

interpretations and theoretical evolutions over time. Then, decisions were analyzed.

case law from the higher courts, especially the Superior Court of Justice, which

They directly influenced legislative changes and legal practice in Brazil.

2. Chronological Aspects of Changes to the Institution of Divorce in BRAZIL

The classic concept of Family Law in the words of Beviláqua (1975, pp. 482-483),

> [...] is a complex set of rules that regulate the celebration of marriage, its validity and the effects that result from it, the personal and economic relationships of marital society, its dissolution, the relationship between parents and children, the kinship ties and the complementary institutions of guardianship and curatorship.

In today's times, in light of all the conceptual changes, Family Law has expanded.

Its normative scope regulates not only marriage, but all forms of presentation.

Family matters, whether formal or informal, ranging from property issues to personal matters.

Thus, the marital family is recognized as the first type of institution.

The term "familiar" emerges directly from civil marriage, where two people decide to unite to form a family.

[2] Federal Law No. 6,515, of December 26, 1977.

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nucleus of a new family. In this sense, as Dresch (2016) explains, the first Brazilian law
which dealt with the issue of family and civil marriage between a man and a woman as a responsibility
The Brazilian Civil Code of 1916 established the legal framework for forming a family. However, under that law, divorce was...
Forbidden. This impediment was based on dogmas established during the Middle Ages by
The Catholic Church is proving to be a major obstacle to legislative progress, given its strong...
The influence of the church on the state at that time.

With societal change and the emergence of a new family structure, it also became...
It is necessary for Family Law to adapt to other realities. In this sense, Law 6.515/1977
He then began to analyze the possibility of social separation and marital obligations, establishing the
marital separation and divorce (Brazil, [1992]). Then, the Federal Constitution/1988
It established new laws and laid the foundations for Family Law, for example.
based on the principle of human dignity, equality between spouses and children, organizations
plural families, freedom, among others (Brazil, [2024]).

Over the years, it has been noted that the Brazilian family has undergone significant conceptual changes.
and structure during the 20th century, and these changes were adopted by the 1988 Constitution of the Republic. At
the time of its proclamation, the Democratic Rule of Law was established in the country, electing
The principle of the dignity of the human person as the fundamental foundation that underpins the Republic.
Federative Republic of Brazil.

Looking back a bit and creating a chronology of the topic of divorce in Brazil, it becomes clear that...
which was with Constitutional Amendment number 09, of June 28, 1977, regulated by Law
Federal Law No. 6,515, of December 26, 1977, which introduced divorce. This amendment was authored by...
from then-Senator Nelson Carneiro, having been the subject of much discussion and controversy, especially
due to the influence of the church on the State. With divorce, it became permissible for a person to...
to end a marriage and be able to marry again. Before that, once married, such a condition
It remained for the rest of his life.

With the Divorce Law, remarriage became permitted, but only by a single spouse.
The term "desquite" (legal separation) was changed to "separação" (separation) and remained in effect for a long time.
as a stage and a condition for divorce.

Only with the 1988 Constitution were divorce and marriage permitted in a civil manner.
unlimited, which certainly brought about an extraordinary change from the point of view regarding respect for
Freedom of individuals. However, it remained in the original wording of Article 226 of the Federal Constitution.
In 1988, the requirement was imposed that divorce be preceded by a separation process lasting more than...
two years (Brazil, [2024]). Only in 1989 did Federal Law 7,841, of October 17, 1989, repeal
Article 38 of the Divorce Law eliminates the restriction on the possibility of multiple successive divorces.

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In 2007, Federal Law No. 11,441, of January 4, 2007, came into effect, allowing
Divorce and separation through administrative means, that is, through an extrajudicial registry office.
While eliminating the need for a court process, legal representation is still required.
and the condition that the couple does not have minor or incapacitated children (Brazil, 2007).

In 2009, an amendment was made to the Introductory Law to the Civil Code, making it compatible.
The time lapse for divorces carried out abroad in relation to current constitutional regulations.

Due to the influence of the Brazilian Institute of Family Law (IBDFAM), the proposed constitutional amendment began its legislative process.
of Divorce, which was later enacted as Constitutional Amendment Proposal No. 66, of June 13, 2010, becoming
It is explicitly stated in our Constitution, in paragraph 6 of article 226, that marriage can be dissolved by divorce.
That is to say, there is no longer any time requirement for the divorce to take place.
divorce (Brazil, [2024]).

2.1 Imposed Divorce as a Potestative Right

Given the numerous legislative changes over time, and also considering the
numerous aspects of our Federal Constitution, the strong cultural relations and, moreover,
especially understanding the concept of a citizen's freedom to interact and, furthermore, the
Regarding the contractual aspect of marriage, the idea of forced divorce arises.

It is important to point out that the legal concept of marriage should not be confused with the
religious concept. Current legislation deals with the legal concept and not the religious one, the latter being of
personal application, whereas the former has legal efficacy. In this context, in a cognition
In summary, marriage reveals itself as a kind of formal contract of wills between two people.

If no further time limits, reasons, and/or division of assets are required, then divorce itself...
It becomes a discretionary right, meaning that one of the parties can declare that they no longer have an interest.
to remain married without it depending on the consent or acceptance of the other party, in such a way
that divorce has become an imposed measure with no option to refuse its acceptance, and therefore,
Legal measures must be taken to register and record the divorce in the marriage records.
of the parties.

Unfortunately, a few judges still resist granting divorces without hearing from the parties involved.
from the other party. But the issue should go further; the person should be allowed to go to the registry office and
to request the issuance of a document declaring your divorce from your spouse, it being the responsibility of the registry office,
In a subsequent act, the other party is notified. However, unfortunately, forced divorce...
It is not yet being done through administrative means.

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Regarding the constitutional amendment introduced in § 6 of article 226, the doctrine of Lobo ([2010], [unpaginated] *apud* Tartuce, 2024, p. 1279) is as follows:

> In Brazilian law, there is broad doctrinal and jurisprudential consensus regarding of the normative force inherent in the Constitution. Let the constitutional norms be... rules or principles do not depend on sub-constitutional norms for these to prescribe what those [laws] have already prescribed. Section 6 of Article 226 of The Constitution qualifies as a rule-norm, since its factual basis is... precisely determined: marriage can be dissolved by divorce. without any prior requirement, solely by the will of the spouses.

Regarding the viability of forced divorce, Tartuce teaches (2018, p. 340 *apud* Peixoto, 2020, [unpaginated]):

> With the aforementioned Amendment, divorce acquired the status of a right. potestative, which is opposed to a state of subjection – the other subject has who submits to the situation imposed by the one who desires the end of the marriage. Passarama no longer requires temporal requirements, nor are discussions permitted. neither regarding fault as grounds for the dissolution of marriage sanctions for failure to fulfill marital duties.

The author Farias (2004, p. 115 *apud* Peixoto, 2020, [unpaginated]) describes that “divorce It would be a discretionary right of termination, given the power of one spouse to seek the termination of the "marital partnership, through their exclusive declaration of will."

Certainly, the State should seek to position itself more discreetly regarding the coexistence and intimacy between people, reinforcing the idea of minimal intervention in relationships. family members. In this sense, Gagliano and Pamblona Filho (2021, p. 531) emphasize that:

> As we have publicly argued, Family Law, in its new From this perspective, it should be governed by the principle of minimum intervention. breaking free from anachronistic shackles of the past, in order to forge a system open and inclusive, facilitating the recognition of other forms of arrangement family, including blended families (second, third nuptials, etc.). In this vein, therefore, the end of the affection that united the as a couple, there was and is no point in trying to force a relationship. that it would no longer be sustainable.

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Regarding this topic, the Brazilian Institute of Family Law – IBDFAM issued the following statement. statement:

> **Statement 18** - In divorce and dissolution of stable union proceedings, the
> The rule should be a partial judgment on the merits (article 356 of the New CPC), in order to that the end of the conjugal relationship be decreed, following the demand with the discussion of other topics (IBDFAM, 2015, [unpaginated]).

Given the aforementioned doctrinaire manifestations within the Brazilian legislative context, Especially when interpreted systematically in light of the Federal Constitution, there is no room for digressions that suggest a path different from the one that guarantees people's freedom and their rights. to end a marriage that can no longer be sustained by the unilateral will of one of the parties, That is to say, even if the other party does not want it that way.

3 METHODOLOGY

The research followed a deductive approach, moving from general to specific arguments. Initially, we explored broad concepts of Family Law and divorce, and then... Let's focus on the specific legislative changes and their practical implications.

In terms of scale, the research was exploratory, conducted through a survey. bibliographic material to promote familiarity with the topic and cognitive development regarding it. subject.

Regarding the method, the research was qualitative, aiming at an in-depth understanding of... Concepts and practices. The focus was not on measuring numbers or figures, but rather on detailed analysis. of the topics in question.

The data collection techniques involved bibliographic and documentary research. especially the legislation observed in the historical chronology regarding the topic. We used studies related to the topic, such as books and academic articles, as well as the analysis of legal norms and decisions. judicial decisions to reflect the courts' understanding of the issue.

This methodology allowed for a comprehensive understanding of the transformations in the institute of Divorce in Brazil and the development of recommendations for future legislative reforms within the scope of Family Law.

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4. ANALYSIS OF RESULTS

The context proposed in this work is of great relevance to the study of family law. because it addresses the power to establish a new form of divorce, among those provided for in the legal system. Brazilian legal system. Although it is common for couples to aim for the maintenance of their In addition to the union, it is equally important that the legislator allow its dissolution based on criteria that Respect the autonomy of the parties' will in respect for the dignity of the human person. Despite this... Even though divorce is already a reality, its dissolution often occurs through a procedural process. A polarized system does not meet the desires for freedom in our times. In this sense, this work It provides an opportunity for discussion about the new type of divorce that is being... constructed based on doctrinal and jurisprudential interpretations, aiming for an understanding A logical and dignified approach to law, which certainly meets the aspirations of contemporary society.

Overall, this study contributes to strengthening the necessary interpretation of Family law in relation to the topic of divorce. Mandatory divorce, as a discretionary right, guarantees the freedom and dignity of people, especially in a society still marked by Religious taboos, which often prove hypocritical in the face of the pragmatic reality that surrounds them.

FINAL CONSIDERATIONS

The debate surrounding mandatory divorce as a discretionary right reveals the importance due to the constant adaptation of the legal system to the demands of contemporary society. After More than four decades after the regulation of divorce in Brazil, it is evident that the legislation needs... To keep up with social and cultural changes in order to guarantee the effectiveness of individual rights and... promoting justice.

The history of divorce reflects the evolution of the concept of family and marital relationships in Our society. From overcoming the idea that marriage is indissoluble to the current discussion. Regarding mandatory divorce, we observe a trajectory marked by legislative advances and case law that seeks to ensure the autonomy and dignity of individuals involved in relationships. matrimonial.

The possibility of mandatory divorce as a discretionary right represents a step forward. further in consolidating the principle of individual freedom within the context of family relationships. To Eliminating excessive requirements and simplifying the process of dissolving marriage, this modality The practice of divorce contributes not only to relieving the burden on the Judiciary, but also to... The guarantee of a more accessible and efficient justice system.

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However, it is important to emphasize that the implementation of mandatory divorce must be accompanied by educational measures and support for families, aimed at mitigating potential impacts. negative aspects and promote a culture of dialogue and mutual respect. Furthermore, reflection on the role The State's role in regulating family relations must continue, in order to guarantee a balance between The protection of individual rights and the public interest.

In short, mandatory divorce represents a significant advancement in the field of civil law. family, demonstrating the capacity of the legal system to adapt to the demands of society. Contemporary. Essentially, we are experiencing times of respect for the autonomy of the parties' will. as a consecration of the dignity of the human person, and it cannot be otherwise when addressing this topic. such as the dissolution of marriage, which naturally begins with the desire of two parties to establish a commitment to mutual life, which should logically be permitted to either of them, without requiring any requirement, based solely on their will, to invalidate such a commitment.

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