"Russian Divorce Law: In the International Avant-Garde or Rear Guard? 1
Olga A. Dyuzheva, Moscow State University, Russia

According to Max Reinstein, in the 20th century Russia served as an international lab of family law for the rest of the world1. East European countries and the allies of the USSR from other geographical destinations used the Soviet family law as a pattern to build their national family law systems after the World War II. The other countries observed these experiments for much too long and started their divorce law reforms after the United Kingdom passed its Divorce Reform Act in 1969.

Russian divorce law underwent tremendous development in the 20th century. From the pre-revolutionary period with its regime of religious divorces that were practically unobtainable2, Russia jumped in December 1917 to a regime of no-fault divorces easily obtainable either from a court or from a municipal authority3. Thus we have to recognize that at this stage Russia definitely was in the avant-garde of the family law developments.

What were the reasons to liberalize divorces to that extend in 1917? First of all the Bolsheviks had to fulfill their promises to liberalize family law in general. These promises were the part of their program which helped them to gain the political power in the country: (i) equality of man and woman in the family, (ii) equality of children born in and out of wedlock, and (iii) freedom of divorce.

The other reason of course was a part of the bolshevik’s struggle over the influence of the religion on the religiously diverse population of the country (Christianity, Islam, Buddhism, Paganism). Needless to say that after an intense resistance religious institutions lost this battle: the registrars of births, deaths and marriages were withdrawn from clerical entities and transferred to the newly created municipal departments of registration of the acts of the civil status of citizens. The new laws recognized only the marriages registered in these municipal departments while religious marriages, solemnized after the adoption of new laws, were not valid45.

Liberalization of divorce was really necessary because a lot of parties to collapsed marriages were divorced de facto and lived in cohabitation with their new factious spouses. They wanted to legalize their unions especially because children born to
them where either considered adulterous (i.e. illegitimate) or were registered as legitimate children of the formal (de jure) husband of the child’s mother.

In the Soviet period divorce (as many other parts of Family Law) was the object of further experiments as well: in 1926 the administrative procedure of divorce performed by a municipal official became the sole means of obtaining a divorce, with the judicial procedure being abolished. There was almost no need in this procedure because the marriages did not necessarily needed registration any more as cohabitation was recognized by law as a legal form of marriage equally to the registered marriage⁶.

In 1944 there was an about face, with the administrative procedure being scrapped in favor of a new-style judicial procedure of very complicated character -- again making divorce almost unobtainable, especially for those who lived in rural areas: the divorce petition should be filed with the local court while the hearing should take place in the court of the region that was commonly far away from the place of residence of applicants considering the geographical length of regions in Russia.

Finally the Family Law Code of 1969⁷ brought everything back to the first Soviet regime of 1917.

Thus, for most of the 20th century, experiments in Russian/Soviet divorce law had the value of showing the rest of the world what should or should not be undertaken in divorce policies.

Since 1996 we have the fourth Russian Family Code in force⁸. It retains both the judicial and administrative procedures for legal dissolution of marriages. The administrative procedure, which is easy and not time-consuming, is designed for spouses who mutually consent to the divorce and having no common minor children. Administrative divorce can also be obtained by one spouse if the other spouse is legally missing, is legally incapable or sentenced to prison for more then three years. From our point of view, the administrative procedure is an advanced form of divorce, as it gives to a broken family an indisputable right to obtain easy and relatively painless divorce. However, the rights of a missing, legally incapable, or imprisoned spouse are not fully protected.

The judicial procedure also has its strong and weak points. The only three bases for pursuing judicial divorce are (i) lack of consent of one spouse, (ii) the existence of a minor children born to the divorcing couple, or (iii) the refuse of one spouse who generally consents to divorce to show up in person for administrative procedure. But it is still real no-fault divorce. One of the shortcomings is the surviving traditional Soviet rule (Art. 17 of the Family Code) banning a husband from initiating a divorce from a pregnant wife or if her child in less then one year old without wife’s consent.
What keeps the Russian Family Code away from the avant-garde position internationally?

**First of all it’s Art. 17**, that puts a limit on one of the most important principles of Russian Family – principle of freedom of divorce. A list of family law principles did not appear in any of the previous Codes but were defined by doctrine and were included in all the university family law books. The acting Family Code gives a limited list of these principles which regretfully does not specify principle of freedom of divorce. However this principle is deeply rooted to the principle of freedom and voluntary nature of marriage cited in the Art… of the said Code. However if there is freedom of marriage then as a part of it there should be freedom of its dissolution.

How does the Art. 17 violate the principle of freedom of divorce? It limits the right of a husband to initiate divorce if his wife is pregnant or has a baby under the age of one year without wife’s consent. This rule is applicable even if husband is not a father of the existing or to be born baby. Ironically even if the court orders to withdraw paternity of the husband (Art. 53 of the Family Code) he still cannot apply for divorce though he can stop paying alimony to his wife and child support to the baby.

This provision first appeared in the Fundamentals of the Family Legislation of the USSR and the Union Republics of 1968. The goal of this provision was (an still is) to protect a pregnant woman or a new mother and her baby from negative emotional and economic consequences of divorce procedure at any price. The question of violation of the rights of a man (husband), who is not necessarily even the biological father of the baby, was raised to full extend before the State Duma (the chamber of the Parliament of Russian Federation) during the hearings on the draft of the now enacted Family Code. Regretfully the result of the discussion was not in favor of the erasing of this article from the draft. The matriarchal approach on the family law issues developed during the Soviet era prevailed among the members of the Parliament.

**Secondly** the grounds for the administrative divorce executed according to the demand of just one spouse. As was admitted above there are three grounds for such a divorce: (i) the other spouse is legally missing, i.e. the court order proclaimed him/her legally missing after one year of absence at the place of his/her permanent residence with no information provided about his/her whereabouts (Art. 42 of the Civil Code); (ii) spouse is legally incapable, if the court order he/she is proclaimed legally incapable due to his/her mental condition (Art. 29 of the Civil Code), and (iii) spouse is sentenced to imprisonment for not less than three years.
The procedure of the administrative divorce is very simple. Spouse files an application with the municipal department of registration of civil status of citizens and after one month waiting period divorce is granted and the divorce certificate is issued. No questions are asked about the causes of divorce and there is no way to protect the interests of the other spouse if they are violated by divorce and its consequences.

Let us discuss **divorce with the legally missing spouse**. Though he/she is proclaimed missing by the court the reasons for him/her being missing are usually unknown. It is possible that he/she is taken as a hostage, or kidnapped, or is exploited as a slave worker, or was injured and lost his/her memory. A missing spouse can even be a victim of the contract murder ordered by his husband or wife who after a year goes to court and obtains court order that his/her spouse is legally missing and then goes to municipality and obtains an easy divorce. One year of absence is not a long period and there might be all kinds of other reasons why spouse is missing sometimes against his/her own will. Being divorced without even knowing about it is a violation of rights of a missing spouse.

One can say of course that it would be violation of rights of the spouse of a missing person to prevent him/her from divorce. This will be violation of the principle of freedom of divorce as well. We do not vote for this. We just think that in such an uncertain situation the rights of a missing person in divorce will be better protected if divorce will go granted by court. Court can ask all kinds of questions, do further investigation of whereabouts of the missing spouse and finally after the judge gets aware that there is no way to contact missing spouse the divorce order could be finally obtained.

Today however there is no choice in obtaining divorce with the missing person. The Family Code provides only for administrative divorce and the court procedure is not available.

**Divorce with the legally incapable spouse** is another example of insufficient protection of rights within the administrative divorce. The Family Code (Art. 16) says the applicants for such a divorce might be the other spouse (which is natural, he/she has a right to be divorced) and the legal guardian of the incapable spouse. It means that the legal guardian expresses the will of the incapable person.

However the wording of the Family Code is very direct: to obtain administrative divorce there should be mutual consent of both spouses expressed in their joint application. The legal guardian is not a spouse. So if he/she gives consent to divorce then it is his/her own consent given assumably in the interests of the incapable spouse, but literally speaking it is not consent of the spouse.
him/herself. The municipal authority is not competent to explore if the divorce is indeed meets the best interests of the incapable spouse. Court can do it but the guardian and the other spouse will not go there. The Family Code is contradicting its own statement in the Article 19 that administrative divorce can be obtained by mutual consent of spouses allows if we apply Article 16 divorce with the incapable person without his/her consent\textsuperscript{12}. If a “capable” spouse and the legal guardian of the incapable spouse decide to get the divorce the Code does not give any opportunity to initiate the divorce in court. What if there is a conspiracy between them against the interests of the incapable spouse? Still nobody can prevent them from obtaining divorce from municipality after a month of submitting the application.

And finally **administrative divorce with the spouse who is imprisoned** for a period of more than three years. Let us assume that the court made a mistake (regretfully it happens in Russia today more often than it was in the last decades of Soviet regime) and the imprisoned spouse did not commit a crime he was accused to. His human rights were already violated by the unjust court verdict. Now he is getting divorced without his consent. Is not it too much? However our sympathy should not exclude those who indeed committed crimes. Are they a second rate people who should be divorced without their consent? Our understanding of the problem is that any imprisoned person should have a right to obtain divorce in court. The Family Code regretfully does not give them this right.

Why could it happen that the country that signed all international treaties on human rights mistreats a large group of its citizens so badly?\textsuperscript{13} From our point of view it is the anachronism of the period of Stalin’s purges when life of an inmate was not a big value at all. The public generally believed that millions of imprisoned people were real criminals and as such deserved all possible disrespect to their rights. However the other side of the medal was that if husband/wife of the spouse accused in treason could easily abrupt the marital ties then they sometimes managed to avoid arrest as a family member of the traitor.

Whatever caused the rule on administrative divorce with inmates in past is intolerable today. This rule does not meet the international standards of human rights and should be changed in favor of judicial divorce.

Talking about divorces with inmates and with legally incapable spouses we can try to help them by interpretation of Article 42 of the Code on Civil Procedure\textsuperscript{14}. This article says that the action in court in favor of protection rights, freedoms and legal interests of citizens can be initiated by the public prosecutor if they cannot do it themselves due to the health condition, age, legal incapability and other reasonable excuses. Some scholars believe that provisions of this article can be applied to the divorces of incapable and imprisoned spouses\textsuperscript{15}. However the right for divorce is an individual right of a person and any sort of substitution here
is not permissible. From our point of view Article 45 of the Code on Civil Procedure can be partially applied if the interests of the said categories of individuals had been already abrupt by the administrative divorce. Prosecutor can oppose in court such a divorce if he proves that human rights were violated.

Surprisingly the Decree of the Plenum of the Supreme Court of Russian Federation on Divorces does not cover this problem at all. In the private conversations with a Supreme Court Judge we asked a question why the Decree does not touch these painful problems. The answer was that there are not enough precedents (if any) on this topic in Russian courts and if there are no precedents then there is no reason to raise this question in the Decree of the Plenum. So the problem is left by judiciary for the academic discussions only.

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There is a well received opinion among Russian family law scholars that one of the main advantages of the new Family Code is that it widened opportunities for spouses to make decisions related to their divorce themselves without intrusion of the authorities. We do not oppose the idea that divorce should be easily obtainable if rights and interests of the individuals involved are well protected. However the campaign for availability of divorces should not leave outside its borders the individuals with special needs or in special situations which make them a weak party in the divorce and require special rules to guarantee their rights and legal interests.

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1 This report has been prepared with the help of Consultant information database.


2 One can find the impressive examples of almost non-availability of divorce in the Russian Empire in Leo Tolstoy’s novel “Anna Karenina” (wife committed adultery, moved in with her lover, gave birth to a child but divorce was still not obtainable and she finally committed a suicide) and in his play “The Living Corpse” (because of non-availability of divorce husband imitated a suicide to make his wife free to marry a man she loves; after the fraud is unveiled he committed a real suicide).


13 The number of inmates in Russian prisons is enormous. The enmates body is steadily growing after the President of Russia established moratorium on execution of capital punishment.


16 These Decrees contains the official interpretation of laws by Supreme Court. They normally contain generalization of court practice from all level of courts on a specific subject (like divorce, paternity, child custody disputes) mostly couple of years after the new law/code is in force.