

COMPARATIVE ASPECTS BETWEEN THE NULLITY OF MARRIAGE AND DIVORCE

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The present article contains similarities and differences between the divorce and the nullity of marriage. It refers to the possibility when the divorce covers the nullity of a marriage, and my opinion about the existing law in this case.

Key words: *marriage, divorce, dissolution, annulment, nullity of a marriage.*

The family is a social phenomenon. Marriage is a civil legal act and its legality is an applicable condition every single time. We can accept the existence of a family without a formal regulation in this respect, but a legally binding marriage contracted without interference from the administrative organs of the state cannot exist.

The marriage is an *intuitu personae* act and the spouses must request its dissolution personally. Nowadays, contrary to previous conceptions, divorce does not constitute a matter of exceptionality, putting forward an alternative administrative solution for the dissolution of a marriage, which proves to be much more amiable than the judicial one.

Either spouse is entitled to demand the dissolution of the marriage that they believe to be impossible to carry on. Divorce is a right of the spouses, resulting from serious and irreparable damages caused to the relations between them, when the continuation of the marriage is no longer favourable to the development of family relationships. In today's society, the indissolubility of marriage ceases to have any logical or social-legal justification.

Namely, the point of the dissolution of a marriage highlights the issue arisen from the social character of the marriage. The marriage, as a family basis, is a matter of interest to both the spouses and the society. All family relationships are interfered by a social interest. Divorce suits have a highly educative impact, considering that future generations should appreciate the meaning and the scope of the marriage. The social character of the marriage determines the administrative state institutions to intervene and checking

the grounds for divorce, the will of a spouse or the common will both the spouses being insufficient to undo a marriage.

The State, through the legal provisions, has preserved itself the possibility of intervention in marriages that were contracted through violations of legal provisions. Thus, we mention the institution of the annulment, which derogates from the rules of common law under a specific sanction. The nullity of a marriage is more severe, compared to the dissolution of a marriage by divorce. Namely because sometimes, when contracting a marriage the requirement for the valid conclusion of a marriage are consciously violated, and the party who acts in bad faith disregards the sincerity and the legal intentions of the spouse acting in good faith. If in divorce suits the plaintiff spouse must prove that the wrongful acts of the defendant spouse affect family relationships and make it impossible to continue life together, then in cases of finding a marriage invalid, the person claiming the invalidity must prove that when contracting the marriage the spouse acting in bad faith has intentionally violated the legal provisions established for the conclusion of the marriage.

Legal provisions regarding the nullity of the marriage protect the enforcement of the law when contracting a marriage. They explain their reasoning on grounds of public policy, or the need to protect the interests of the bona fide spouse that needs to be protected.

Nullity intervenes to punish non-compliance with the legal provisions regarding the validity of marriage. However most of the times they do not affect family relationships. The nullity regards mostly the enforcement of social order and the personal interests of the spouses.

When one or both spouses have acted culpably when contracting the marriage, nullity occurs as a measure of punishment. However, even in cases when both spouses act in good faith, for example, two people who are getting married without knowing that they are linked by family ties, such a marriage would be invalid. In this case, the nullity is seen as a safeguard against unlawful conduct and warns society against such behaviour.

In family law, the nullity of marriage is a consequence of infringing the impediments to marriage. Because they are of a prohibitive nature, nullity is exactly what happens when legal prohibitions are not respected.

When the law or the doctrine refers to the dissolution of a marriage, we understand that it can take place only by divorce, by a court decision, or by a decision of the local civil status institutions. While the annulment of a marriage means bringing an action in court in order to annul a marriage. Unlike divorce, which may take place by means of an agreement between the spouses, nullity must be requested and demonstrated before the court and is found only by a judgment.

Next I want to emphasize that we cannot equate the nullity of a legal act and non-existent legal act, this takes on a special hue if marriage annulment. An action for the dissolution of a marriage is not and cannot be identical to that of the annulment of a marriage. We have differences regarding the reasons underlying the action as well as different legal effects in the future relations of former spouses. On the other hand, after an annulled marriage, the two people are believed to have not been married, and although they should not be considered as former spouses since they did not have the quality of spouses, in practice this particular appellation is still used. The more correct expression would be - parties whose marriage was annulled. Understand that legally the so-called former spouses were not actually spouses proves to be quite difficult for people outside the legal realm.

We note that unlike the in cases of divorce, the law exhaustively determines grounds for nullity of a marriage. We cannot invoke the nullity of the marriage for reasons other than those stipulated by the law, on the other hand, the grounds for divorce will be considered every time by the court which would decide on the continuation or dissolution of the marriage.

Once the grounds for nullity of a marriage are established, the court declares it invalid. In case of divorce, the court statutes on the reasons given and appreciates the possibility of continuing the marriage.

The law provides that in case of a dissolution of a marriage, there could be established a term for reconciliation, which is given to the spouses for any further possibility of maintaining and continuing the family. When it comes to the nullity of a marriage, no reconciliation term can be established. The grounds for nullity can either be ascertained by a judgment or confirmed; a reconciliation in this case not being admissible.

We may have a situation when a marriage is voidable but the spouses do not know the grounds for nullity. This marriage does not work exactly as expected by the spouses. However, no steps are taken towards a divorce. The spouses may agree themselves to take a probation period, make some compromises, without initiating any action. As such, no one would decide to verify the validity of the marriage. Thus, it is tacitly agreed on the continuation of a voidable marriage.

The nullity of a marriage, unlike the nullity of other legal documents can be validated, even in cases of absolute nullity. Thus, the Family Code provides for the possibility for the situation when the marriage was contracted by a minor who has not reached the matrimonial age if the minor's interests require it or if there's no agreement for the termination of the marriage.

Regarding fault in divorce, it belongs to at least one of the spouses. The fault, in cases of nullity may not belong to any spouse, and such a marriage cannot be considered valid.

If in cases of divorce we could drop the action, when we talk about an action in nullity, dropping it may not be possible in all the cases, or at least not at any procedural step. This would mean that the court should allow the law to be removed from the application, giving the request for waiver of action for nullity of a marriage without checking the proof. If the grounds for revocation put forward in the application cannot be proved, there is no risk that divorce may validate a void marriage. On the other hand, specific for an action in confirming the invalidity of a marriage is its confirmation even in situations of absolute nullity, of course when there are higher interests and values to the nullity.

The divorce implies ulterior motives to the contraction of a marriage and produces effects only for the future. When it comes to the action for the cancellation of a marriage, it may be requested by anyone who demonstrates an interest in this regard. The annulment of a marriage may be required for reasons that existed at the time of contracting the marriage and were not known to the prospective spouses or implied by other interested parties that ought to know them. Once a marriage has been found void, this decision would produce effects for the past as well. Naturally, due to the dissolution of a marriage, all future obligations cease to exist. When in cases of an annulment, it is considered that the obligations between the parties have never existed.

Divorce may prove to be a path more convenient to the parties. Specific for action for divorce is that it requires a validly contracted marriage.

We recognize that both the court and the representative of civil status institution may be convinced that the present spouses can no longer continue together their marriage for various reasons and the parties are thus issued divorce certificates. In such circumstances, the question that arises is what to do with such a marriage and what will be the fate of the judicial decision that has dissolved such a marriage; who is entitled to seek the annulment and request correction of the judicial error when final judgment has already produced its effects. We believe that such a jurisdiction, when the parties are not interested in the legal correctness (because we appreciate one when the divorce covers an annulment) may belong to the prosecutor, who comes most often to defend the interests of society, must be guided in his work by the triumph of the law. There are also no impediments to the representative of the civil status institutions, because he must be interested in the legal correctness as part of the exercise of his duties. However, we also disagree this time that *error communis facit ius* should distort reality since it is already too often far from equity.

The court cannot itself one-sidedly meet this demand for two reasons. Admittedly, say that by some possibility the court has found out about the family link between the former spouses whose marriage has been dissolved. Firstly, the court cannot one handily decide to review its own decisions. On the other hand,

it could easily send such a request to the prosecutor in order to adapt the judicial practice to the reality. The Family Code expressly stipulates that a marriage cannot be declared invalid after its dissolution, except when it was contracted between relatives whose marriage is prohibited or by a person who, upon registration of the marriage is already married.

However, if the parties do not press to prove such a reality, it is unlikely that the state bodies will intervene in such a situation.

From a procedural standpoint, such an action should not pose significant difficulties. The divorce that has been declared by the civil status institution is canceled with admission of the action for annulment. Admitting a nullity action, we understand that retroactively it puts the parties in their position previous to the conclusion of the legal act.

In **conclusion**, I can say that the marriage must be legally binding. The legality of marriage can be questioned throughout its duration, even after its dissolution, considering that the grounds for absolute revocation are imprescriptible. Since the law prescribes a specific behavior and there is no other reason to exclude its effects we cannot accept another attitude of the society towards the justice system.

Protecting family relationships that flow from a marriage does not mean keeping the marriage *in extremis* at any price. The divorce is a right of the spouses, the exercise of which may be required before the administrative bodies of the State. Nullity is a legal sanction if at the time of contracting the marriage not all the legal requirements have been complied with. If the requirements set by the law for the contraction of a marriage were not violated, its nullity cannot be required.

The divorce entails strong grounds for the impossibility of continuing a marriage, the causes not being limitative. On the other hand, the grounds for nullity are exhaustive and may not be extended.

Both the divorce and the nullity do not operate *de jure*. In both cases, we need a state decision to this effect, except that the judgment on the dissolution of a marriage takes effect *ex nunc* and the judgment that annuls a marriage has retroactive effects, taking effects *ex tunc*.

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