

Marriage and the causes of its invalidity in the Albanian judicial practice

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Abstract

Marriage is an important social and legal act, and future spouses bind it to living and starting a family together. The expression of the free will of the parties is an essential element for the marriage. This paper presents the causes of the invalidity of marriage, looking at it from a theoretical point of view and according to local judicial practice. The invalidity of marriage as an institution of family law from a legal point of view has been regulated in Articles 33-49 of the Family Code. The purpose of this paper is to analyze the causes of the invalidity of marriage by looking at it in concrete cases in the Albanian judicial practice. From the research done, the cases of invalidity of marriage in our country are not numerous. The practical treatment of these cases is in the Court of the Tirana Judicial District, and very rare in the District Courts. At the end, the paper summarizes the conclusions on the cases of invalidity of marriage found in court practice.

Keywords: marriage, invalidity, Family Code, cause, spouses.

Introduction

The invalidity of marriage as an institution of family law from a legal point of view has been regulated in Articles 33-49 of the Family Code. From reading the provisions we notice that the Code has not given a legal definition to this institute. This has been done by the doctrine of family law, according to which the invalidity of marriage can be considered as a sanction of private law, which denies the consequences of marriage, when it is proved that it is concluded contrary to the essential conditions provided by the Code. of the Family for its existence and validity.

This paper aims to reflect on the treatment of the institution of marriage invalidity in the practice of local courts. The task is conceived in two main parts; in the first part are treated theoretical and procedural aspects of the invalidity of marriage, in the second part are reflected the causes of invalidity of marriage treated in the practice of domestic and foreign courts. For this paper we have referred mainly to the case law of the Tirana Judicial District Court. From our verification in the courts of first instance in the districts we have noticed that the institute of invalidity of marriage has not found any practical treatment. For some of the reasons for the invalidity of marriage for which we have not been able to find local practice, we have referred to foreign courts. The completion of the work is accompanied by the conclusions of the case

1. Marriage institute

Marriage represents a very important institute in family law that enjoys a special legal protection and a constitutional status. It represents a legal union between persons of

different genders aiming at a common life, as well as the realization of personal and property interests, by forming a community towards family contribution and well-being.¹

The human being is accompanied by the instinct of the union of the sexes; a union accepted both by moral and religious principles.²

By marriage we mean: biological, psychological, moral, legal and material-economic relations between a man and a woman. Marriage is a union of a man and a woman, regulated by law. Its main purpose is to create a family.³

2. Causes of invalidity of marriage

2.1 Marriage concluded without the purpose of cohabitation as husband and wife

Among the reasons for the invalidity of marriages treated more in the practice of Albanian courts has to do with related marriages without intending to live together as husband and wife, treated by the doctrine of family law as "fictitious marriages", category of action simulated legal. From a legal point of view, such a marriage has been entered on contrary to the provisions of Article 36 of the Family Code.⁴

The marriage that is entered into without the purpose of cohabitation purpose, at first sight meets all the formal conditions for the existence and validity of the marriage, but in essence, despite the fact that the spouses have expressed the will to enter into it they have not intended to enforce the rights and obligations arising from the marriage, but bind the marriage for the purpose of obtaining one or more certain advantages which they could not win or would win with difficulty without marriage. In interpretation of Article 36 of the Family Code, the Court of the Tirana Judicial District, in its decision no. 8867, dated 31.10.2018, which belongs to the plaintiff Z.S against the defendant R.S and a third person: the Office of Civil Status, with the object of ascertaining the absolute invalidity of the act of marriage, has stated that: *"(...) marriage concluded without the purpose of cohabitation is apparently a marriage in accordance with the terms of a regular legal marriage, but the spouses do not intend to enforce the marital rights and obligations arising from the marriage, but aim to gain the advantage deriving from the status of a married person.*

*So, marriage is used as a means to gain something that could not be obtained without marriage. The benefit achieved has no bearing on the declaration of invalidity of the marriage.*⁵

The decision of No.4804 dated 03.07.2019 of the Tirana Judicial District Court, which belongs to the plaintiff S.M against the defendant A.M, with the object of declaring the invalidity of the marriage show a interest for study. In this decision, the Court has concluded that the lawsuit must be dismissed on the grounds that:

"From the plaintiff's own explanations it is clear that the spouses have entered into a marriage on the basis of mutual consent, a marriage which is entered into after considerable acquaintance through electronic platforms and a brief acquaintance when they have been physically close

¹ Sonila Omari, Family Law, Second Edition, p. 38.

² Sonila Omari, Family Law, Second Edition, p. 45.

³ Ksanthipi Begeja, E Drejta familjare e R.P.S të Shqipërisë, Tiranë 1984, fq. 97.

⁴ Article 36 of the Family Code stipulates that: "Marriage entered into by spouses without the intention of living together as a husband and wife is invalid."

⁵ Decision no. 8867 dated 31.10.2018 of the Tirana Judicial District Court.

to each other. From these explanations, it is clear that the parties at the time of the marriage were intended to crown their feelings, in order to establish a stronger, formalized bond in the marriage, with the aim of living together. From the moment of making the decision to enter into marriage, until the marriage, which was not so immediate, that the parties, given their age, as well as their cultural and educational level did not think or understand the purpose for which they were making the decision to enter into marriage. (...) Referring to the marriage act, it resulted that the marriage was entered into about a month and 20 days after its promulgation. The plaintiff at no point in the trial claimed the existence of any other purpose than the intention to live and create a family together.”⁶

In recent years, there has been a large trend of cases where different persons have entered into fictitious marriages, to take advantage of the facilities to obtain documents of different countries, travel visas, residence in European Union countries beyond the legal deadline set by the Schengen agreement, or even to change the surnames due to the problems they have had with the Albanian or foreign justice bodies.

In the decision no. 8867, dated 31.10.2018, the Court of the Tirana Judicial District, which belongs to the plaintiff Z.S against the defendant R.S and the third person: the Office of Civil Status, with the object of ascertaining the absolute invalidity of the marriage contract, has stated that:

*"The court considers that the simulated marriage is entered into by the spouses in order for both or one of them to receive an advantage which they would not gain without entering into this marriage, which may be a property or non-property right. For the court, the secondary effects that the parties have intended to achieve must be verified, as well as the factual lack of cohabitation of the parties. During the trial, it was proved that the respondent had problems with the documentation abroad. According to the information of the Tims System, it turns out that he has returned to Albania "deported" from abroad during the years 2007, 2009, 2010, 2011, 2013, 2016. Due to the problems he had with his stay abroad, he had to declare with another surname, as a way that, at the time of crossing the border or staying abroad, not to be identified by the relevant authorities".*⁷

There are cases from practices, when the spouses do not marry for the common life, but take it as a game, without thinking about the consequences. The decision no. 2115, dated 07.03.2018, the Court of the Tirana Judicial District, which belongs to the plaintiff EH against the defendant JH and a third person: the Office of Civil Status, with the object of ascertaining the absolute invalidity of the act of marriage.

According to the plaintiff's explanations in the court session, it turns out that:

*"This marriage was concluded without the purpose of cohabitation, and more as a game between friends because since the moment of her relationship we have never cohabited together. Defendant J.H. also addressed the court with a statement stating that this was a marriage without the purpose of cohabitation, but was linked to the consent of both without considering the subsequent consequences. In this case, the court stated: In the circumstances when the legal marriage concluded between the plaintiff and the defendant has been entered into without the intention of living together as a man and a woman, it is invalid in reference to Article 36 of the Family Code."*⁸

⁶ Decision of No. 4804 dated 03.07.2019 of the Tirana Judicial District Court.

⁷ Decision no. 8867, dated 31.10.2018, of Tirana Judicial District Court.

⁸ Decision no.2115, dated 07.03.2018, of Tirana Judicial District Court.

There are cases that the marriage entered into, to achieve a profit you can't get if you weren't married. A case similar has been dealt with in the United States in the Joy Lynn Farr case against Larry Allen Farr. In this case, the Colorado Court of Appeals considered a woman's claim of invalidity of the marriage entered into not for the purpose of creating a joint marital life, but to stay with the ex-husband, based on his claim that he had a serious terminal illness. In this case, the Court found that the illness was the cause of this marriage, given that the woman would not remarry if that cause did not exist. Thus, in the trial, it was fully proven that the false health condition had been essential for the marriage and it was also essential to claim the invalidity of this marriage.⁹

The indirect case highlights the fact that the spouses did not intend to live together and start a family as the husband would die due to a terminal illness, but the marriage was done for other purposes as the wife knew very well that cohabitation would not continue.

2.2 It is invalid the marriage between persons with direct sexual relations

It is invalid the marriage between persons with direct sexual relations, that is, between the newborn and the newborn, and in the eighth line between brother and sister, uncle and niece, and children of brothers and sisters.¹⁰

In our case law there are no such cases; they are almost non-existent, due to the strong traditions that our country has to respect the blood relationship.

2.3 Marriage concluded by a person suffering from a severe mental illness or mental retardation

Is invalid the marriage with a person who suffers from a serious mental illness or has a mental retardation, which makes him unable to understand the importance and purpose of this institute. From a legal point of view, such a marriage is contrary to the provisions of Articles 12¹¹ and 35¹² of the Family Code.

Severe mental illness or mental retardation makes a person unable to understand the purpose of marriage, and in these circumstances his consent, even when expressed from the point of view of external will, is erroneous or obscured by the impossibility that his psyche tolerates to understand the importance of concrete action and its consequences in the future.¹³

In a case tried in the Tirana Judicial District Court, the plaintiff, in that process, was represented by its legal guardian, appointed by the Court at the end of the process for the removal of the capacity to act. Exactly, in the decision No.8971, dated 09.11.2016, the Court of the Tirana Judicial District has reasoned that: *"In this trial it was fully proved that the citizen N.T (P), who continues to be connected in the legal marriage with the*

⁹ Decision of the Court of Appeals of Colorado, USA, case No. 09CA0238 dated 04 February 2010.

¹⁰ Prof. Dr. Arta Mandro, "Family Law", "Emal" Publishing House, Tirana, 2009, p. 175.

¹¹ Article 12 of the Family Code stipulates that: "A person who suffers from a severe mental illness or has a mental retardation cannot marry, which makes it impossible for him to understand the purpose of marriage.

¹² Article 35 of the Family Code stipulates that: "Marriage entered into by a person suffering from a serious mental illness or mental retardation, which renders him unable to understand the purpose of the marriage, is void."

¹³ Prof. Dr. Arta Mandro, "Family Law", "Emal" Publishing House, Tirana, 2009, p. 121.

defendant I.P, suffers from a serious mental illness with the diagnosis of Schizophrenia with Morbus Parkinson that makes her unable to understand the purpose of her marriage. In these conditions and as above, this marriage, with reference to Article 35 of the Family Code is a void marriage, a marriage which after the decision becomes final, with reference to Article 49 of the Family Code is considered not to have been entered into."¹⁴

2.4 Existing marriage as a cause of absolute invalidity of newly concluded marriage

A marriage entered into at the time of a valid and unresolved previous marriage, is void. From a legal point of view, such a marriage is contrary to the provisions of Articles 9¹⁵ and 41¹⁶ of the Family Code.

In the decision no. 10625, dated 25.10.2013 of the Tirana Judicial District Court, which belongs to the plaintiff N.D, against the defendant B.D, with object: Marriage invalidity, the cause of declaring the invalidity of marriage is the existence of a previous marriage of the plaintiff, fact certified by the documentation submitted to the trial by the Civil Registry Office.

The Court reasoned that:

"In cases where the legal marriage concluded between the plaintiff and the defendant is concluded at the time when there was a previous legal marriage of the plaintiff with another citizen with reference to Article 41/1 of the Family Code, the marriage between them is invalid. (...)Article 9 of the Family Code provides that: "A newly married person may not enter into a new marriage until the previous marriage has been declared invalid or has not been dissolved."

2.5 The invalidity of the marriage due to its connection contrary to the procedure and form provided by law

When we talk about invalidity arising from the form of marriage, we have in mind the criteria set out in Article 30 and Article 42 of the Family Code. The conditions provided by these provisions are cumulative, so they must all be met at the same time as we are in front of a valid marriage. The lack of even one of these conditions leads to the invalidity of the marriage.

These requests are in accordance with those of the law "On Civil Status" according to which marriage is regularly entered into by the civil registrar, in the civil offices municipality / municipal unit / commune, which reflects the common will of future spouses, in the presence of no less than two witnesses.¹⁷

In the decision no. 8687 dated 27.10.2009 The Court of the Tirana Judicial District, which belongs to the plaintiff A.Q against the defendant G.Q, with object: marriage invalidity, has ascertained the invalidity of the marriage, as it has been proved that the defendant in that process has never been to the employee of the civil status to enter into a marriage contract, the less voluntarily accepted the marriage contract and the signing of the marriage contract act.

The decision reasoned that: *"In conditions where the defendant has not appeared in person*

¹⁴ Decision No. 8971, dated 09.11.2016 of the Tirana Judicial District Court.

¹⁵ Article 9 of the Family Code provides that: "A newly married person may not enter into a new marriage until the previous marriage has been declared invalid or has not been dissolved."

¹⁶ Article 41 of the Family Code stipulates that: "Marriage concluded during the continuation of a previous marriage of one of the spouses is invalid."

¹⁷ Articles 46 and 47 of the Law on " Civil Status".

*before the civil registrar, and therefore has not signed and has not expressed consent to the marriage, which is contrary to the legal provisions of the provisions of the law." above, and when, according to the decision of the aforementioned court, it was proved that the marriage act, which is one of the essential conditions of the marriage bond, has been falsified, this marriage shall be deemed not to have been entered into. "*¹⁸

In the decision no. 4870 dated 28.05.2008 of the Tirana Judicial District Court, which belongs to the plaintiff S.M against the defendant A.M, with object: marriage invalidity, has emphasized that our Family Code does not recognize the connection of marriage with representation, but only with the physical presentation of future spouses, who express their free and full will to bind it.¹⁹

2.6 Invalidity of marriage arising from vices in the expression of the will of the spouses

Another reason for the invalidity of marriage treated in the practice of Albanian courts is its connection when one of the spouses is under the influence of a threat, without which the marriage would not be entered into.

The marriage entered into by mistake for the spouse is declared invalid. There is a mistake about a person when one of the spouses marries a person who is not the one he wants to marry. In the decision No. 1208, dated 30.01.2014, the Court of the Tirana Judicial District, the plaintiff claimed that not only did he not consume the marriage with the defendant but also that he was in the conditions of error regarding the essential qualities of the defendant, which if he knew, he would not marry. Mistake or misrepresentation distorts the desired element and results in an unwanted marriage. In terms of error, this leads to the invalidity of the marriage, because consensus, consent is a habit due to the error on the identity of the person.²⁰

Conclusions

Referring to the domestic case law, cases of invalidity of marriage are much rarer, compared to cases of dissolution of marriage, despite the fact that in many of the lawsuits for divorce, we are not before a valid marriage, but we can be in front of an invalid marriage. This fact is probably due to the fact that these cases are not only not disclosed to the court by the parties, but also to the fact that the court in many cases has been negligent in investigating the legal relationship since its inception, but only with what has been sought in the object of the lawsuit by the parties themselves.

The growing tendency for the invalidity approach has to do with the fact that the parties do not want the consequences that come from the dissolution of the marriage and not having as real purpose the pursuit of a marriage then seek solutions through invalidity.

In no analyzed decision where the consequences have been resolved, the court has not ruled on the liquidation of the property regime and the division of property placed during a void marriage, but only on the manner of exercising parental responsibility for the children.

18 Decision no. 8687 dated 27.10.2009 of the Tirana Judicial District Court.

19 Decision no. 4870 dated 28.05.2008 of the Tirana Judicial District Court.

20 Decision No. 1208, dated 30.01.2014 of the Tirana Judicial District Court.

References

- Arta Mandro, "Family Law", "Emal" Publishing House, Tirana, 2009.
- Family Code of the Republic of Albania, approved by law no. 9062, dated 08.05.2003.
- Ksanthipi Begeja, Family Law of the Republic of Albania, Tirana 1984.
- Sonila Omari, "Family Law". Second edition. Tirana, 2008.
- Decisions of the Courts of the Republic of Albania.
- Decision no. 4870 dated 28.05.2008 of the Tirana Judicial District Court.
- Decision no. 8687 dated 27.10.2009 of the Tirana Judicial District Court.
- Decision no. 1208, dated 30.01.2014 of the Tirana Judicial District Court.
- Decision no. 8971, dated 09.11.2016 of the Tirana Judicial District Court.
- Decision no.2115, dated 07.03.2018, of the Tirana Judicial District Court.
- Decision no. 8867 dated 31.10.2018 of the Tirana Judicial District Court.
- Decision no. 4804 dated 03.07.2019 of the Tirana Judicial District Court.
- Foreign court decisions
- Decision of the Court of Appeals of Colorado, USA, case No. 09CA0238 dated 04 February 2010.