

DIVORCE BY MUTUAL CONSENT IN NOTARY'S OFFICES AND ITS IMPACT ON FREE ACCESS TO JUSTICE

DANILO RAFAEL ANDRADE SANTAMARÍA¹, CINTHYA PAULINA CISNEROS ZÚÑIGA², CARLOS
ALFREDO MEDINA RIOFRÍO³, MIRANDA CHÁVEZ LUIS RODRIGO⁴

Universidad Regional Autónoma de Los Andes Puyo, Ecuador.

¹E-mail: updaniloandrade@uniandes.edu.ec

ORCID: <https://orcid.org/0000-0002-1405-5710>

²E-mail: up.cynthiacisneros@uniandes.edu.ec

ORCID: <https://orcid.org/0000-0002-3787-4161>

³E-mail: up.carlosmedina@uniandes.edu.ec

ORCID: <https://orcid.org/0000-0003-5335-6340>

⁴E-mail: Up.luismiranda@uniandes.edu.ec

ORCID: <https://orcid.org/0000-0003-2190-7595>

ABSTRACT

This research paper addresses the issue of divorce proceedings by mutual consent processed in notary's offices and their relationship with the free provision of justice. Within the framework of the Constitution of the Republic of Ecuador, which guarantees free access to justice, we seek to analyze whether the existence of notary fees for this type of proceedings violates this right. It should be noted that, according to the regulations, notaries have the exclusive power to process divorces by mutual consent as long as there are no minor children or children under their dependence. However, citizens have been paying for this service, which raises questions about the contradiction in the constitutional norm in relation to free justice. The research is supported by techniques such as the criteria of experts and professionals in constitutional law, which allow contrasting the positions of the researchers, and results in the identification of possible conditions that would require a reform in the Notarial Law.

Key words: free justice, republic of ecuador, divorces

INTRODUCTION

From the investigation carried out about the gratuity of divorce judgments and the collection for the notarial procedure generates a disagreement in society and a contradiction in articles 75 and 199 of the Constitution of the Republic of Ecuador, according to the latest reforms to the Notarial Law, the National Assembly granted an attribution to the notaries of the country to divorce by mutual agreement as long as they do not whether or not they have dependent children, this has caused in society for those who wish to divorce a high expense is almost 60% of the unified basic salary resulting in a sum of two hundred and eighty dollars the notary fee for the service.

Of the three public notaries that exist in the Pastaza canton, all concentrated in the city of Puyo, during the year 2021 and 2022 they have resolved 23 causes of divorce by mutual agreement, this has generated an income of six thousand four hundred and forty dollars (USD. 6,444, 00), despite the fact that Article 75 of the Constitution of the Republic of Ecuador determines: "Everyone has the right to free access to justice and to effective, impartial and expeditious protection of rights and interests, subject to the principles of immediacy and speed; In no case will it be defenseless. Failure to comply with judicial decisions will be sanctioned by law", a rule that is in contradiction with article 199 of the same norm that states: "Notarial services are public." In each canton or metropolitan district there will be the number of notaries and notaries determined by the Council of the Judiciary. The remuneration of notaries, the regime of auxiliary personnel of services, and the fees to be paid by users, will be fixed by the Council of the Judiciary. The values recovered by way of fees will enter the General Budget of the State as determined by the Law".

Given the latest reform to the Notary Law 2019, this value has been charged for divorce by mutual consent, despite the fact that the notary public system is an auxiliary body of justice as determined by article 177 of the Constitution of the Republic of Ecuador, and that reinforces it in the fourth



paragraph of article 178 of the supreme norm.

The need for this research work is to determine the contradiction that exists between the constitutional norms and therefore affects the users of the notarial service, that is, when collecting a notarial fee, violates article 75 of the Constitution of the Republic of Ecuador the right that all citizens have to free access to justice.

This work is important, because we can start from the need of the users in the collection of the notarial right issued by the same Council of the Judiciary and the contradiction that exists between rules, to be able to conclude with a possible reform to the Notarial Law in article 18 numeral 19, since the divorce procedure by mutual agreement is a voluntary procedure that is substantiated according to the provisions of the General Organic Code of Processes expressed by a public instrument or before a judge or judge of the Family Woman Children and Adolescents, this process will appear the spouses or cohabitants to the hearing voluntarily this divorce can be processed before a notary ratifying its decision to terminate the marriage bond or de facto union is here where the gratuity of the process is affected because the notary sets a fee Equivalent to 39% of a basic salary This value does not include the fee for the sworn statement and the recognition of signatures established in the notarial law, that is, this will have an additional cost to the equivalent rate of 60%.

We must indicate that the notarial law is responsible for establishing what is related to consensual divorces is here where the problem arises since, this procedure in the notarial route involves the payment of notarial fees; For all the above, it is of great importance to investigate and deepen this figure of consensual divorce both in the judicial and notarial channels and determine if the constitutional principle of free access to justice is being violated.

METHODS

In the present research work we carry out different forms in the field of law using different forms which are: Inductive - deductive method, which will allow to achieve the proposed objectives help to verify the variables raised, for the effect a particular analysis will be carried out until reaching general conclusions and vice versa.

Analytical method - synthetic. - Through which the legal figure studied will be analyzed, according to what is enshrined in the Constitution of the Republic, General Organic Code of Processes, Treaties and international conventions, the Law, the doctrine of jurists and jurisprudence.

The legal figure of "Divorce", is as old as that of marriage, which are undeniably linked, because one decays from the other, if there was no marriage there would not be then divorce, born for the first time as it is known in the present in France and it was embodied in the French Civil Code in 1804, without neglecting to allude that its roots come from Roman Law, because history tells us that in the low Roman Empire, divorce was something unusual, until the arrival of the emperors, where it is stated that "marriages must be free" action that allowed the husband or wife could renounce it if they wanted at any time.

To understand and analyze more about divorce, Ecuadorian law cites it in the Civil Code, Art. Article 106.- Divorce dissolves the marriage bond and leaves the spouses in a position to remarry, except for the limitations established in this Code. Similarly, the person who was the plaintiff in the divorce proceedings may not marry within one year of the date on which the judgment was enforced, if the judgment was made in default of the defendant spouse. These prohibitions do not extend to the case where the remarriage takes place with the last spouse.

We can establish in itself, that divorce is a legal figure that aims to end the marriage and thus end the effects that derive from it, it is precisely contemplated as one of the causes of termination of marriage or in other words family disunion for several serious or justified causes.

Types of divorce

Ecuadorian legislation provides for two types of divorce:

- Controversial Divorce
- Divorce by mutual consent.

The legal figure of divorce is currently accepted and applied in most countries of the world, in this sense we proceed to carry out an analysis of comparative law:



In Mexico, divorce is defined as the definitive legal dissolution of a marriage, resulting in the separation of husband and wife, which gives the parties the right to remarry, according to the civil provision. Divorce indicator of social and family transformation with differential impact between the sexes: Study conducted in Nueva León, Blanca Martínez Tamez Valdez, 2016, p. 2.

We can verify or affirm that, this legal figure maintains the same essence as in Ecuador, since its main objective is to dissolve the marriage bond.

In general, at the level of the American continent and especially in South America, it should be noted that the process of dejudicialization of divorce by mutual agreement in the last decade has been notorious and adopted by many countries as detailed below: Cuba was the first country to dejudicialize divorce and open new paths so that it can be done through other alternatives demarcated from the courts. Decree-Law No. 154/1994 of 6 September 1994 on divorce by mutual consent or consent before a notary was adopted; then Mexico in the Federal Civil Code of 2000 regulated a divorce, which classified it as administrative, in which the authorizing official is the judge in charge of the civil registry. Decree No. 4436 of 28 November 2005 of the Ministry of Justice and the Interior of Colombia, on divorce before a notary, supplementary to art. 34 of the previous Act 10; Act No. 2006-62, amending the Ecuadorian notarial law, published in the Official Gazette No. 406 of 28 November 2006, article of which 6 amended art. 18 of that notarial law amended it into

Divorce by mutual agreement is also considered voluntary and fits when there is no justifiable legal cause or simply there is no conflict between the spouses, beyond the decision to divorce, there you can opt for the legal figure of "divorce by mutual consent", the Civil Code in this regard indicates that: "Art. Article 107.- By mutual consent, the spouses may divorce in a voluntary procedure that will be conducted according to the provisions of the General Organic Code of Processes."

It may be processed through a notary, as estimated in paragraph 22 of the

Article 18 of the Notarial Law: 22.- To process the divorce by mutual consent and termination of the de facto union, only in cases in which there are no minor children or under their dependence as provided for in the Law, and if there are dependent children, when their situation in relation to custody, visits and maintenance is resolved with a mediation act or judicial resolution issued by a competent judge.

In this regard, divorce by mutual consent can be

Process in two ways:

1. Judicial proceedings (voluntary procedure)
2. Via Notarial

Once the divorce has been executed by mutual consent or whatever its form, since these effects are taken into account, in general, the reciprocal obligations that exist between the spouses are terminated, but in addition to these the following occurs in the same way:

- 1.- Spouses who have carried out the corresponding process to dissolve the marital ties that united them before the law may re-contract a civil marriage, even among themselves, in compliance with the right to marriage as established by the Constitution of the Republic.
- 2.- As is logical, the conjugal society is totally extinct, in such a way that the bienes that could be acquired after having made the corresponding divorce, will be of sole partencia and separately from the person who acquired said good, without the fear that it can be shared.
- 3.- The existing obligation that entails marriage in reference to mutual aid and support will cease when the same spouses or former spouses no longer have a legal relationship, and in the same way they will not go on to form a family as determined by law in the case of marriage.
- 4.- In relation to inheritance issues, the second order of succession with respect to the surviving spouse is also extinct, so if one of these were to die the other spouse does not become part of the corresponding inheritances in his capacity as heir

Like any judicial procedure, a procedure is proposed to be able to elaborate a divorce by mutual agreement both by civil judicial means, and by notarial means with the sole purpose of following the due process that the same law establishes that must be followed to protect rights and these are the following:

- 1.- Presentation of the petition: those interested as spouses must recenar as an initial step the



divorce petition itself that is available on the page of the council of the judiciary, complying with all the legal requirements analyzed, in addition to attaching the corresponding marriage certificate

2.- Notification of the bar association: This is a requirement which does not appear in the notarial law, it has been analyzed by the Ecuadorian Federation of Notaries, with the sole purpose of avoiding any type of procedure that is very accelerated or cumbersome, with which it also has to be established in said institution, with the date of its registration, from which the corresponding terms of time of the divorce process can be counted.

3.- Recognition of signatures: This is a common act in which once the application is registered, and the corresponding procedure begins, the notary in charge of the divorce must make the recognition of the forms and rubrics of the intervening parties, then setting the date, day and time to hold the corresponding hearing with which the spouses will be notified.

4.- The hearing: The hearing in the case of divorce by mutual consent in a notary will be established in a time not less than 60 days after having begun the process with the recognition of the forms and rubrics, in this hearing in which the spouses must ratify their will to divorce, in addition said hearing may be postponed only up to once with a limit of ten days to the date on which the hearing which should have been done originally.

5.- Act of authorization of the divorce: With the corresponding ratification of the spouses to terminate the existing marital ties, the same notary must raise the corresponding registry in which the existing marriage bond must be established, which once legalized must be delivered immediately to the parties involved.

6.- Marginalization: With the corresponding copies granted of the divorce act, the Civil Registry will have to officiate, for its corresponding marginalization of the act carried out, in order to inform the aforementioned entity and register the new civil statuses of the interested parties.

7.- Incorporation of the marginalized act to the protocol: Once the corresponding registry in the civil registry has been marginalized, the person in charge of the institution will have to record in a copy sent, the reason for its corresponding registration and marginalization, which has to be returned to the same notary and incorporated into the notarial protocol book.

According to article 301 A.- Each notary or titular notary will have one or a substitute notary, who must meet the same requirements as the holder and will replace him in cases of temporary absence. For this purpose, the notary or notary holder shall send to the Provincial Directorate of the Council of the Judiciary the name of his notary or substitute notary, who may not be his spouse or cohabitant or relative up to the second degree of consanguinity or first of affinity, and the documents that prove compliance with the requirements. The falsity of the documents or information sent will cause the dismissal of the notary or notary holder. The notary or notary holder shall be jointly and severally liable civilly and administratively for the actions of the notary or substitute notary in the exercise of his functions. In no case shall the notary or substitute notary replace the holder when the absence is due to suspension or dismissal of the notary or notary holder as a result of disciplinary action."

Within the Ecuadorian legislation, when referring to the definition of notary as established in the Ecuadorian Notary Law in its article 6, it establishes them as those officials who are granted the power to give public faith to be able to authorize, request of part, contracts, the acts and documents that are determined in the law.

Therefore, notaries can be considered as those people who are part of the judicial function, these public officials being in charge of the authority to be able to record in public and authentic writing the business produced from the interaction of natural and legal persons.

Last but not least, a notary must be a lawyer who applies a public function to have some experience, with a boast of authenticity, the acts in which he intervenes and especially in those of voluntary jurisdiction as established by the same laws of Ecuador.

As it could be previously established, the notary public is that official of the judicial function who is in charge of being able to give public faith of any act that can be carried out in front of his authority, this being the maximum representation of this act the public deed, for which the notarial agent will give public faith in all legal systems; The function of the notariat being a legal professional contains three basic functions or aspects and are the following:



a) The molding function:

The same that basically consists of the action in which the notary molds the legal act performed, being able to provide it with a legal essence, for which the nature and legality of the act is qualified, admitting that this to its interventions be considered by the intervening parties or can also reject it if it declares it adverse; Therefore this paragraph tries to state that the notary being a legal professional who had to meet certain requirements to take the expensive and taking into account that he knows of law this grants or evaluates with the corresponding legal criterion the acts that reach his jurisdiction in addition to ensuring that they have the requirements established by law.

b) The managerial function:

This function is basically about the work that the notary must take care of in a more professional and ethical way such as advising, giving advice and instructing as an expert in the law, in addition to trying to encourage a conciliation between the parties and coordinates wills.

c) The authenticator function:

This function basically consists in investing all the notarial acts of a true legal act, which makes them capable of establishing themselves on their own in judicial legal relations, so that they can be executed by the coercive power of the same state.

Keep in mind that, a couple of spouses who for any reason want to end their marriage, will seek help or legal advice to be able to finalize their situation and know what procedure and before what authority to request the termination of their marriage bond, that is why they go primarily to a lawyer so that he can dissolve his doubts, establish the procedure to be followed and that can advise them in their divorce process, in fact in the Single Form for Divorce Petition by Mutual Consent, in its final part can appear, optionally, a lawyer trusted by the petitioners.

In this case that is studied in the research project, since there are no dependent children, only the possibility of divorcing before a notary is exposed, with no option other than to pay for its procedure according to the notarial fees, fees that are established in the Regulation of the Integral Notarial System of the Judicial Function, issued by Resolution No. 216 of the Council of the Judiciary in 2017. In the case under study, an estimate of what a couple of spouses must pay to be able to divorce by mutual consent in the notarial way and to be able to end their marriage bond will be prepared.

Article 81 of the Regulation of the Integral Notarial System of the Judicial Function, establishes that: For divorce by mutual consent, a rate equivalent to thirty-nine percent (39%) of a Unified Basic Salary is fixed, in this value is not included the fee for the sworn statement and the recognition of signatures established in the notarial law. (Regulation of the Integral Notarial System of the Judicial Function, 2017, p. 14) I have the right emphasis. That is to say that, in our country, when the Unified Basic Salary (SBU) of the Ecuadorian worker in 2020 is 400 North American dollars, the notarial fee concerning divorce by mutual consent would be around \$ 156 North American dollars plus VAT \$ 174.72, without considering what is stated in the last lines of the cited article, which does not include the fee for the sworn statement and the recognition of signatures that are essential requirements for the promulgation of divorce by mutual consent.

In this case, the value of \$ 12.00 plus VAT \$ 13.44 per applicant must be added to the notarial fee, that is, a total of \$ 28.88 for recognition of signatures and also for the concept of sworn statement of not having conceived children, that the woman is not in a state of gestation and that freely and voluntarily they wish to terminate their marriage bond the value of \$ 20.00 plus VAT \$ 22.40 and for additional grantor the value of \$12.00 plus VAT \$13.44, i.e. a total of \$35.84. Although this divorce called express for shortening times to spouses who wish to culminate with their marriage bond in a faster way, fulfills its function of agility and speed, but conditions the user to have to cancel for notary fees and extra expenses.

The participants have dissolved their marriage bond by not having dependent children, to reach this task they have had to carry out some procedures such as the sworn statement to end their marriage bond, not having procreated children, in which the woman is not in a state of gestation and attach together with copies of their ballots and ballots and the registration of their civil marriage together with the Single Form for Petition for Divorce by Mutual Consent.

In the notary where the witnesses have chosen to carry out their procedure, the attached documents



will be reviewed and their signatures and rubrics will be called, and a day and time will be designated for the realization of the hearing where together and by voice they will express their willingness to divorce, after that the notarial act was raised, to which we have had access, where it is evident that what is described in this topic is reflected. The couple to be able to divorce by mutual consent without dependent children have had to obligatorily cancel the following items, 28 for notarial fees, for Sworn Statement, \$ 35.84, for Recognition of Signatures and Rubrics \$ 28.88 and for Divorce by mutual consent \$ 174, 72, giving a total value of \$ 239.44. A value that without a doubt, they would have omitted when there was the possibility of taking their divorce by mutual consent in the ordinary jurisdictional channel, under the sponsorship of a free legal clinic, when it was evident that said couple did not have the necessary economic resources to be able to pay for their divorce.

Access to justice is an essential right that must be guaranteed in a democratic, participatory and egalitarian society. In simple terms, it is the right of all people to use legal tools and mechanisms to have their rights recognized and protected. All this in a free / free way, according to the Dictionary of the Royal Spanish Academy defines it as "free or without cost" (Dictionary of the Royal Spanish Academy, 2008, p.244) There is no access to justice when, for economic, social or political reasons, people are discriminated against by the law and justice systems. In practice, access to justice means that a level playing field must be guaranteed so that people can go to court and seek the corresponding protections and guarantees effectively.

The principle of free access to justice is a constitutional principle, but it is also contemplated in the Constitution as one of the rights of protection, so much so that article 75 *ibidem* states: Everyone has the right to free access to justice and to effective, impartial and expeditious protection of his rights and interests, subject to the principles of immediacy and speed; In no case will it be defenseless. Failure to comply with judicial decisions shall be punishable by law.

DISCUSSION

We put to consideration the most important discussion that is to analyze whether the reform of the Notarial Law in article 18 is appropriate since the constitutional norms contradict each other, article 75 of the Constitution of the Republic of Ecuador determines that access to justice is free and article 199 indicates that the Council of the Judiciary will be *quine dicta* the rate of notarial rights, considering that the notarial public service is an auxiliary organ of justice, it is not an administrative procedure separate from what is the judicial function in accordance with article 177 of the Constitution of the Republic of Ecuador.

CONCLUSION

When focusing on divorce by mutual agreement, in terms of its procedure we can point out that this can only be carried out in the notarial way and this is where the problem of this research project lies, when presenting the single form for divorce petition by mutual consent, along with the other requirements that the law requires, To later appear at a hearing where together and live voice express their willingness to separate, this diligence is raised in notarial act and the spouses are divorced, making it clear that the entire procedure detailed above requires the payment of notarial costs.

REFERENCES

- [1] Lindao Ramos, C. P. (2017). *The exclusive power of notaries to process divorce by mutual consent Violation of the right of free access to justice?*
- [2] Abramovich, V. (n.d.) *lines of work on economic, social, cultural rights; Tools and allies. Scope of the right to justice.*
- [3] Fernandez, M. p. 42. *acceso_a_la_justicia_juan_mendez.pdf*. (n.d.).
- [4] *DEL_Acceso_a_la_Justicia_un_ enfoque_desde.pdf* Birgin, H., Kohen, B., & Abramovich, V. (2006).
- [5] *Access to justice as a guarantee of equality: institutions, actors and comparative experiences.* Editorial Biblos. Capeletti, M. & Gath, B. (1983)
- [6] *Access to Justice.* La Plata. Bar Association. P 22.
- [7] Falquez Jaramillo, C. A. (2018). *The principle of gratuity in divorce by mutual consent without minor*



children (Bachelor's thesis, University of Guayaquil Faculty of Jurisprudence, Social and Political Sciences).