



Cases of Absolute and Relative Nullity Regarding the Institution of Marriage

Liliana Niculescu¹

Abstract: Considering the undeniable importance of marriage at the individual and social level, it is necessary that it benefit from a legal framework that gives it protection and stability. The Romanian legislator provided by imperative provisions the substantive and formal conditions for the conclusion of marriage. But, despite all the preventive measures taken by the legislator and the right of the registrar to refuse to celebrate the marriage, when one or more conditions are not met, situations may arise in which the marriage is void or voidable. Thus, the legislator did not exclude the possibility of violating the requirements of the law for one reason or another. For this reason, considering the real interest that the legal institution of marriage nullity generates, in this article, I proposed to address, based on the legislation in force and the doctrinal guidelines, after a short introductory part in which they are put in discussion of general aspects regarding marriage and its nullity, cases of absolute nullity, respectively, cases of relative nullity of marriage

Keywords: man; woman; marriage; family

1. General Considerations Regarding Marriage

1.1. The Notion of Marriage

Marriage is the solemn legal act, which a man and a woman who meet the conditions required by law to marry enter into by expressing their personal, free and full consent for the purpose of founding a family.

With the entry into force of the new Romanian Civil Code, marriage received a legal definition, the legislator showing in art. 259 para. 1 Civil Code that this is the

¹ Senior Lecturer, PhD, Dunarea de Jos University of Galati, Romania, Address: 111 Domneasca Str., Galati 800201, Romania, Corresponding author: liliananiculescu26@yahoo.com.

freely consented union between a man and a woman, concluded under the terms of the law.

The term marriage has several meanings. First, marriage means the legal act that those who want to marry conclude under the terms of the law. The legal act of marriage produces its effects from the moment it was concluded. Therefore, by concluding the marriage, the future spouses consent to the legal regime of marriage being applied to them, without having the possibility to modify it. From this point of view in the legal literature it is emphasized that the legal act of marriage belongs to the condition legal acts.

Secondly, it designates the legal status of marriage, called in legal language also “legal status of spouses”, “legal bond between spouses” or “legal status”. The legal status of marriage by which the matrimonial bond is designated is born by concluding the marriage as a legal act and is maintained throughout the duration of the marriage. Thus, the bilateral legal act of marriage, by which the future spouses freely and fully equally consent to submit to the legal status of marriage, constitutes the legal source of the state of marriage, necessary for acquiring the legal status of a married person.

In the legal literature, there are two more meanings of marriage:

- that of legal institution, i.e., the set of legal norms that regulate marriage. Thus, when a couple decides to marry, they agree to submit to a set of rules established by law that govern both the conditions of their union, their life together after the conclusion of the marriage and the termination of its existence.
- marriage celebration. The marriage celebration consists of the ceremony that takes place on the conclusion of the marriage. This celebration, also called a civil celebration, is different from the religious celebration, which can only be performed after they have acquired the legal status of married persons by concluding the marriage in front of the delegate of civil status.

1.2. Legal Characteristics of Marriage

Marriage serves certain purposes and presents, from the point of view of social needs and its purpose, extremely varied characters. From the definition of marriage as well as from the set of legal provisions that regulate it, the following legal characteristics of marriage result:

a) Marriage is secular. This civil (secular) nature of marriage results from the provisions of art. 259 para. (3) Civil Code according to which, the religious

celebration of marriage can only be done after the conclusion of the civil marriage. Similar provisions are also contained in art. 48 para. (2) of the Romanian Constitution according to which the religious marriage can be celebrated only after the civil marriage, the union concluded only religiously having no legal effect.

b) Marriage is a union between a man and a woman. For founding a family, a man and a woman have the right to marry. As one of the main purposes of marriage is procreation, a true marriage between two persons of the same sex cannot be conceived. But there are countries that allow “marriage” between people of the same sex.

c) Marriage has a solemn character. The solemnity of the marriage is highlighted, among other things, by the fact that it is concluded in a certain place, in front of a certain state authority, in a fixed day in advance and in the personal and joint presence of the two future spouses, the simultaneous expression of consent to marriage in the presence of two witnesses in front of the registrar, who after taking the consent of each of the spouses, declares them married.

d) Marriage is freely consented this is not only a character of marriage, but also a fundamental condition for the very existence of marriage.

e) Marriage is monogamous this character is established by art. 273 Civil Code establishing in imperative terms that the conclusion of a marriage by a person who is married is prohibited. This character follows naturally from the foundation of marriage, namely the mutual affection of the spouses. However, in the private international field, the recognition of polygamous marriages, which were legally concluded abroad, is admissible.

f) Marriage is concluded for life in principle, the bond of marriage is intended to last between the spouses for the entire duration of their lives, to be terminated by the physically ascertained death or the judicial declaration of the death of one of the spouses. However, the marriage can be dissolved by divorce - art. 259 par. (6) Civil Code or may be abolished in the event of the existence of a cause of nullity provided for by the Civil Code.

g) The marriage is concluded for the purpose of founding a family. This character of the marriage emerges from the provisions of art. 259 para. (2) Civil Code. Marriage is the creative source of the family, marriage concluded for purposes other than that of founding a family is a fictitious marriage and is struck by absolute nullity.

h) Marriage is a strictly personal act. It requires the free and personal consent of the future spouses. Marriage cannot be concluded by representation. Regarding this character of marriage, the legislator refers in art. 271, 287 par. (1) Civil Code.

1.3. Conditions for a Valid Marriage

From the entire regulation of the conclusion of marriage, the idea emerges that the legislator sought to ensure its stability by establishing a series of substantive and formal conditions that contribute to the formation of a valid marriage.

a) The substantive conditions for the conclusion of marriage are provided by art. 271-277 Civil Code: - consent to marriage; - marital age; - bigamy; - prohibition of marriage between relatives; - prohibition of marriage between a guardian and a minor; - alienation and mental debility; - the prohibition of marriage between persons of the same sex

b) Formal conditions at the conclusion of the marriage refer to the procedure for the conclusion of the marriage, carried out in stages, which aims, on the one hand, to ensure compliance with the substantive conditions prescribed by law (the existence of the substantive conditions and the absence of impediments), and on the other hand, guaranteeing the public recognition of the marriage and drawing up the document proving it.

2. Cases of Nullity Regarding Marriage

Given the importance of marriage and the serious consequences of its dissolution, the legislator created a separate regime (to some extent), distinct from that of nullity in common law. In the situation where the marriage ended with the non-compliance with the requirements that ensure its validity, the sanction that intervenes is the nullity of the marriage.

As a result, the marriage is considered never to have existed and will be dissolved. However, the nullity of the marriage does not operate as a matter of law but will have to be established by a court decision, this having constitutive effects of rights and being opposable *erga omnes*.

Thus, first, the registrar has the obligation to refuse to conclude a marriage if the legal requirements are not met, and any person can object. Secondly, even if certain requirements were not met at the conclusion of the marriage, the legislator seeks to

avoid, as much as possible, the dissolution of the marriage, through specific provisions regarding: the possibility of covering the absolute and relative nullity of the marriage, the putative marriage by which they are mitigated the consequences of the annulment of the marriage, in relation to the spouse in good faith at its conclusion, the situation of the children resulting from the annulled marriage in respect of whom it removed the effects of the nullity.

As in common law, in the matter of marriage nullities are classified into absolute nullities and relative nullities.

2.1. Cases of Absolute Nullity

A. Lack of gender differentiation

Regulating this requirement, the legislator remains consistent with the idea of traditional marriage as a freely consented union between a man and a woman, concluded under the terms of the law [art. 259 para. (2) Civil Code]. By establishing this requirement in art. 271 Civil Code the legislator wanted to show that only two people of the opposite sex can marry together, personally, and freely consenting to the marriage.

Hit by absolute nullity is not only same-sex marriage, but also marriage to people whose sex is not sufficiently well specified, so that, because of this reason, it is not possible to consummate the marriage.

Regarding the lack of sexual differentiation, it was stated that only serious malformations that prevent conjugal relations between spouses attract the nullity of the marriage, so in one case it was shown that “the circumstance of the congenital lack of the uterus and fallopian tubes does not lead to the conclusion that the defendant does not differentiate under the aspect of her husband's sex, as long as at the time of marriage she had normal external genital organs and ovaries of normal size, with the possibility of procreation, but in the technique of in vitro fertilization with the surrogate mother”.

The heterosexual character of marriage is of public order. Consequently, the legislator refuses to recognize, on the territory of Romania, the marriage concluded or contracted under foreign law between persons of the same sex, regardless of citizenship.

B. Material lack of consent to marriage

Marriage can only be concluded with the free and full consent of the future spouses, this being, at the same time, a constitutional principle provided for in art. 48 para. (1) of the Basic Law. The fulfillment of this legal requirement involves two aspects: the personal presence of the future spouses as well as the express expression of consent. In the situation of people who are unable to speak, as is the case of the deaf and dumb, consent can be expressed in any other way, but it must be unequivocal. The consent of the deaf and dumb, as well as that of people who speak another language that the civil status officer does not know, is given in the presence of an authorized interpreter, and a record is drawn up in this regard.

C. Bigamy

The existence of a previous marriage of one of the spouses at the time of the conclusion of the new marriage is a decisive impediment to the conclusion of the marriage being regulated by an imperative norm, the violation of which attracts as a civil sanction the absolute nullity of the newly concluded marriage.

The impediment stemming from the existence of a previous marriage is also imposed on foreigners who would like to marry on the territory of our country, even if, according to their national law, polyandrous or polygamous marriage is admitted, the principle of monogamy being of public order. Conversely, those married to more than one person (their national law permitting this under the provisions of private international law, family status being governed by the *lex pariae*) will not be considered as bigamy within the meaning of our law.

In the recent Romanian judicial practice, the absolute nullity of the marriage was established because bigamy was allowed by the national law of the husband (Turkish citizen, already married), but the wife was of Romanian nationality. The impediment is maintained even in the situation where one of the spouses converts to Islam shortly before the conclusion of the marriage, as long as the national law of the other spouse prohibits bigamy. Also, bigamy is regulated by the Romanian Penal Code as a crime that generates a state of danger for the normal development of family relations and for ensuring the monogamous character of the family,

D. Kinship in a degree prohibited by marriage

According to art. 274 para. (1) C. civil, marriage between relatives in the direct line, as well as between relatives in the collateral line up to the fourth degree inclusive, is stopped. Non-compliance with the prohibition established by the legislator leads, in terms of family law, to the absolute nullity of the marriage, according to art. 293 para. (1) C. civil, and in criminal terms it can constitute the

crime of incest, considering art. 377 Penal Code criminalizing sexual relations between direct relatives or between brothers and sisters.

By exception to the provisions of art. 274 para. (1) Civil Code prohibiting marriage between collateral relatives up to and including the fourth degree, the legislator established in para. (2) of the same article that for valid reasons, the marriage between relatives in the fourth-degree collateral line can be authorized by the guardianship court in whose jurisdiction the person requesting approval resides, the court ruling based on a medical opinion given in this regard.

In the case of kinship resulting from adoption, the provisions of art. 274 par. (1) and (2) Civil Code are applicable both between those who have become relatives through adoption, and between those whose natural kinship has ceased through the effect of adoption

E. Alienation and mental retardation

For the valid conclusion of the marriage, the consent must be expressed in full knowledge of the case. Therefore, it is necessary that the will expressed by each of the future spouses be a conscious one, that is, supported by discernment. The lack of discernment suppresses the conscious nature of the will, amounting to the psychic lack of consent. For these reasons, art. 276 of the Civil Code forbids the conclusion of marriage by the mentally insane and the mentally retarded (they are placed under special guardianship according to the amendments to the Civil Code of 18.08.2022), and according to art. 293 para. (1) Civil Code, disregarding the prohibition leads to the sanction of the absolute nullity of the marriage.

In the case of alienation or mental infirmity, it does not matter whether the person in question is placed under judicial prohibition. Also, the marriage is void, even if it was concluded in a moment of fleeting lucidity, because the prohibition of the conclusion of the marriage is justified in a social interest, namely the prevention of the procreation of a child with mental deficiencies. To establish the absolute nullity of the marriage it is necessary to establish through a psychiatric examination whether the husband was alienated or mentally deficient at the time of the conclusion of the marriage because only in this situation is the marriage struck by absolute nullity.

F. Lack of solemnity

In relation to the provisions of art. 287 para. (1) Civil Code it can be stated that the solemnity of marriage requires the meeting of several elements: the presence of the

future spouses at the civil status service, together with two witnesses, on the set date, the presence of the civil status officer, the simultaneous, personal, and public expression of consent to marriage. The provisions of art. 287 para. (1) The Civil Code must also be respected in those cases where the law allows the marriage to be celebrated by the civil status officer outside the headquarters of the civil status service. The total lack of solemnity or only one of the elements of solemnity attracts the sanction of the absolute nullity of the marriage. The solemnity of the marriage does not include its registration in the register of civil status documents, since the preparation of the marriage certificate in the register of civil status documents is a formality after the conclusion of the marriage made by the civil status officer, according to art. 290 C. civil after the conclusion of the marriage.

G. Lack of publicity

The provisions of art. 287 of the Civil Code highlight not only the solemnity, but also the publicity of the marriage, showing that the future spouses are obliged to appear together at the town hall to give their consent to the marriage publicly. The phrase refers to a place where public access is allowed, even if no other person is present besides the spouses, the civil status officer and the two witnesses. On the other hand, the marriage concluded without allowing public access is a clandestine marriage, subject to absolute nullity, even if it was celebrated with the solemnity provided by law.

H. Incompetence of the civil status officer

Pursuant to art. 293 in conjunction with art. 287 para. (1) Civil Code, the marriage celebrated by a person who does not have the capacity of civil status officer is null. The nullity is covered, when the person has publicly exercised the respective powers, creating an appearance of legality that determined a common and invincible error (application of the error *communis facit* principle). Thus, according to art. 102 Civil Code, civil status documents drawn up by a person who publicly exercised the duties of a civil status officer, in compliance with all legal provisions, are valid, even if that person did not have this capacity, unless the beneficiaries of these documents knew, at the time of their preparation, the lack of this quality

I. Matrimonial impurity

According to art. 272 para. (1) civil code, the marriageable age is 18 for both men and women, given that the text does not distinguish. In exceptional cases, the marriage can be concluded from the age of 16, in compliance with the cumulative

requirements imposed by art. 272 par. (2)-(5) Civil Code. The marriage concluded before the age of 16 for both the man and the woman, i.e., during the period of legal puberty is struck by nullity, this aspect is expressly regulated by the provisions of article 294 par. (1) Civil Code. Although the violation of the legal provisions regarding the matrimonial age attracts absolute nullity, this nullity can be covered, if, until the nullity is established, the following situations occur:

- the spouse who was not of legal age to conclude the marriage has, in the meantime, turned 18 years old, so that both spouses will be 18 years old by the time the court decision becomes final.
- until the declaration of nullity by the court, the wife gave birth to a child or became pregnant. Nullity of marriage is covered for these reasons not only when the woman has reached the age of 16, but also when the man is the one who was not of age at the time of the marriage, as the text makes no distinction. In addition, if the presumption of paternity applies to the prepubescent husband, then the presumption of puberty must also apply to him, if the wife has given birth to a child or become pregnant.

The marriage is maintained even if a stillborn child is born or if the woman interrupted the course of the pregnancy, because it was thus proved that, despite the pubertal age, spouses can have normal conjugal relations.

J. The fictitious marriage

By fictitious marriage is meant that marriage at the conclusion of which the consent of the spouses was not sincere, but simulated, in the sense that by concluding the marriage, interests outside of its true purpose, which is the foundation of a family, were pursued (art. 295 par. 1 Civil Code)

In the case of fictitious marriage, it is possible that both spouses pursued other interests, not concluding the marriage for the purpose of starting a family, in which case the fictitiousness is bilateral or there are cases where only one of the spouses pursued obtaining secondary results of the marriage or defrauding the law, and the other spouse to have sought the conclusion of a real marriage, in which case the fictitiousness is one-sided. In this case, for the spouse in good faith upon its conclusion, the marriage will not be fictitious, but putative.

In jurisprudence, we encounter cases of formal marriages because several minors agreed, at the urging of a third party, to get married because they had no other possibility of obtaining travel documents, i.e., a passport and could not leave the

territory of Romania except with the consent of their parents, but they refused to give their consent.

Art. 295 par. (2) The Civil Code expressly provides that the nullity of the marriage is covered if, until the court decision becomes final, the spouses cohabited, the wife gave birth or became pregnant, or two years have passed since the conclusion of the marriage. These causes of coverage of nullity are fully justified, since, as long as family relations have been established in fact, even if at the conclusion of the marriage another goal was pursued, nullity is no longer justified, since the goal pursued by the legislator has been achieved.

2.2. Cases of Relative Nullity of Marriage

The new Civil Code carefully regulates the causes of annulment of marriage, these consist in the lack of consent required by law for the marriage of a minor (art. 297 Civil Code.), vitiation of consent through error, fraud or violence (art. 298 Civil Code), the temporary lack of discernment (art. 299 Civil Code), as well as the marriage concluded by the guardian with the minor under his tutelage.

A. Lack of consent or authorization required by law.

Based on art. 297 para. (1) in conjunction with art. 272 para. (2) and (4) Civil Code represents a case of relative nullity of the marriage, the lack of consent of the parents or of one of the natural parents or married adoptive parents or, who, being divorced, jointly exercise parental authority or the lack of consent of the parents or of one of the parents from outside of marriage and cohabiting, the lack of consent of the parent who exercises parental authority alone because the other parent is deceased or unable to express his will or, being divorced, the exercise of parental authority was withdrawn from him by the divorce decree. By exception to the provisions of article 272 paragraph (1) C. Civ. which shows that a marriage can be concluded if the future spouses have reached the age of 18, paragraph (2) of the same article provides that for valid reasons the minor who has reached the age of 16 can marry on the basis of a medical opinion, with the consent of the parents his or, as the case may be, the guardian and with the authorization of the guardianship court in whose district the minor has his domicile.

B. Consent vices

The possibility of annulment of marriage for defects of consent is regulated by art. 298 Civil Code, the legislator establishing in paragraph 1 of this article that the

marriage can be annulled at the request of the spouse whose consent was vitiated by error, fraud, or violence.

- Unlike common law, in the matter of marriage, the error is considered a defect of consent only if it affects the physical identity of the other spouse, a fact that has led to an extremely limited application of the provisions of art. 298 para. (2) Civil Code. Thus, no other error such as on some physical or mental qualities, on the character, temperament, regarding professional training, social or material condition or even on the civil status of the future spouse (for example the fact that one of the future spouses did not know that the other was divorced or had a child out of wedlock) does not affect the validity of the marriage.

- The mourning. Unlike the spontaneous error, which is not admitted by law as a cause for annulment of the marriage unless it concerns the physical identity of the other spouse, the error caused by cunning means has a much wider field of application. But the dol must bear on certain qualities essential aspects of the future spouse or on essential aspects, decisive for the conclusion of the marriage regarding which there is an obligation to inform and which, if he had known, the spouse whose consent was vitiated would not have concluded the marriage. Thus, taking into account the special nature of the marriage, attracts its relative nullity only the main dol (the one that bears on some determining elements, essential to the conclusion of the marriage) not the incidental dol (that bears on some elements that are not decisive for the conclusion of the marriage). The legal texts also penalize dol committed by silence, i.e. dol through reluctance; thus, the failure of the spouse suffering from a serious illness to communicate the state of his health to the other spouse can constitute grounds for annulment of the marriage if it is proven that the defendant spouse recognized, prior to the marriage, the disease from which he suffers and that he deliberately did not communicate it to the other spouse on the occasion of the conclusion of the marriage, the proof of this element falling to the applicant.

- Violence is considered the most serious vice of consent because it leads to the total disappearance of the will. Violence consists of physical or moral coercion exerted on the future husband with the aim of causing him to conclude the marriage. Physical coercion is very rarely encountered in practice due to the solemn nature of the marriage, especially the fact that it is concluded in the presence of the registrar. In contrast, moral coercion is much easier to encounter. Most often it manifests itself in the form of a threat of serious, considerable, imminent, and illicit harm that determines consent. Acts of violence must be

directed against important values, such as life, person, honor or property. Violence can also cause the cancellation of the contract when it is directed against a close person, such as the husband, wife, ascendants, or descendants of the party whose consent was vitiated. In common law, violence exercised by a third party causes the cancellation of the contract, according to art. 1220 para. (1) Civil Code, if the party whose consent was not vitiated knew or should have known of the violence committed by the third party. In native law, simple fear arising from respect, in the absence of violence, does not trigger the annulment of the legal act, an idea also valid in the matter of marriage, fear stemming from the feeling of affection towards parents, relatives or close persons not being able to cause the annulment of the marriage.

C. Lack of discernment

In contrast to the insane or the mentally retarded for whom the prohibition to marry is absolute, in the case of the person temporarily lacking in discernment the prohibition operates exclusively for the period of time in which he has no discernment of his actions (e.g. in case of drunkenness, delirium, hypnosis, etc.) so that they are unable to consciously consent to the conclusion of the marriage because during periods of remission it is assumed that they act with discernment and express a valid consent to the marriage. Practically, in the matter of marriage, the common law treatment is applied for lack of discernment, art. 1205 para. (1) Civil Code stipulating: "A contract concluded by a person who, at the time of its conclusion, was, even if only temporarily, in a state that made him unable to realize the consequences of the act is voidable its.

D. Existence of guardianship

Guardianship is a legal impediment to marriage expressly provided for by the provisions of art. 275 Civil Code under which the marriage is stopped between the guardian and the minor person under his guardianship. The conclusion of the marriage in violation of this provision attracts the sanction of relative nullity according to art. 300 Civil Code which shows that the marriage concluded between the guardian and the minor under his tutelage is voidable. Such a case of concluding a marriage is very difficult to encounter in practice, since, beyond the fact that the law stops and sanctions the conclusion of a marriage between the guardian and the minor person under his tutelage, if he marries, he needs the consent of his guardian, or, the guardian cannot meet the capacity of future husband of the minor and that of the person who must approve his marriage.

The marriage between the guardian and the minor person under his guardianship is stopped, and its conclusion attracts the sanction of relative nullity only if it takes place during the existence of the guardianship. Marriage is possible between the minor and his former guardian after the termination of the guardianship if the situation that led to the establishment of the guardianship or the termination of the guardian's function by removing him from the guardianship or replacing him is no longer mentioned and after the guardianship court gives the guardian discharge.

3. Conclusions

The main creative factor of the family, marriage represents one of the most important acts that a person can perform in the course of life, and which is closely related to the social order.

The law provides for a series of impediments to marriage, representing constraints of a social nature imposed with the aim of protecting the morality of marriage: bigamy, kinship, guardianship, alaziness and mental debility, lack of sex difference, etc. Failure to comply with the conditions required by law for the valid conclusion of marriage, as a legal act, is sanctioned, as in common law, with nullity, which can be absolute or relative.

Nullity of marriage should not be confused with divorce. Both annulment and divorce end the marriage, but there are essential differences between these institutions. The causes that determine the nullity of the marriage consist in non-compliance with some conditions imposed by law, before or simultaneously with the conclusion of the marriage, while the causes that lead to divorce are subsequent to the conclusion of the marriage.

Unlike divorce, the consequences of which are only for the future, nullity produces, in principle, retroactive effects, the marriage being considered as never having been concluded. Between the nullity or annulment of the marriage on the one hand, and the dissolution of the marriage through divorce on the other hand, there is no connection, thus, the exercise of one of the actions cannot be conditional on the non-exercise of the other.

As such, an action requesting the annulment of a marriage or the declaration of its nullity cannot be rejected as having no object, on the grounds that, at that time, the marriage was dissolved by divorce, because the grounds and consequences of the

annulment of the marriage are different than those of the dissolution them through divorce.

References

*** (2011). The Civil Code, republished pursuant to art. 218 of Law no. 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code, published in the Official Gazette of Romania, Part I, no. 409 of June 10.

Baias, Flavius-Antoni; Chelaru, Eugen; Constantinovici, Rodica & Macovei, Ioan (2021). *New Civil Code commentary on articles*. Bucharest: C.H. Beck.

Gavrilescu, Alin-Gheorghe (2014). *Nullity of marriage*. Bucharest: Universul Juridic.

Pricopi Adrian (2007). *Family Law*, 3rd Edition. Bucharest: Ed. Romania de Maine Foundation.

www.scj.ro.

www.portal.just.ro.