

CONTINUITY AND NEW LEGAL ASPECTS REGARDING THE NULLITY OF MARRIAGE

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Abstract

The New Romanian Civil code (Law no. 287 of 2009), that has entered into force on October 1, 2011, is an innovative, reforming code, both in respect of civil legal relations, as well as of legal relations of family law and of commercial law, aspects that are incorporated in its structure.

With regard to the legal relations of family law, that naturally belong to the Civil code, the current regulation brings a series of updates and significant legislative amendments.

This study aims to be a detailed analysis of the aspects of continuity, but mostly of the novelty aspects concerning the nullity of marriage. Thus, the former dichotomy of the nullity sanction as express nullity and virtual nullity becomes inapplicable in the case of the nullity of marriage, since the current regulations establish only the cases of express nullity of marriage. This study outlines, in particular, the new regulation on the cases of absolute nullity of marriage, and on the cases of relative nullity of marriage.

Keywords: Romanian Civil Code, nullity of marriage

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1. Preliminary remarks

The coming into force of the New Civil code on October 1, 2011 already represents, for the theoreticians and practitioners of law, a landmark moment in the area of general regulations of the social relations with private character.

At the same time, considering the vastness and the complexity of the regulated social relations, as well as the detailed presentation of these regulations, that is, in some cases, excessive, the current Civil code will be, for a long period of time, an opportunity for reviewing, comments, for various interpretations, assessments, as well as for criticisms, otherwise inherent to a legislative work of such dimensions, as was the case of the coming into force of the 1864 Romanian Civil code.

Regarding family relations, that have naturally been incorporated in this code, a series of updates and numerous legislative amendments have been made, of which the most significant are: the bringing back into practice of the engagement, as a mutual promise for concluding a marriage, the introduction of a plurality of matrimonial regimes,¹ the divorce by mutual consent through administrative, notary public and of parental authority procedures².

Analyzing the fundamental institution of family law – the marriage, we have considered useful to review the regulations regarding the nullity of marriage presented in the new Civil code, an area that has a series of updates, especially regarding the relative nullity of marriage. We will briefly present, for the time being, a theoretical approach, since the cases in which this sanction, specific to the civil legal act, but applicable to the marriage as well, are rare.

We will begin our analysis by firstly sketching the concept of civil nullity, customizing it then in the field of nullity of marriage, and afterwards thoroughly analyzing the cases of absolute and relative nullity of marriage as provided by the current Civil code.

2. The notion of nullity in Civil law. The regulations of nullity in the new Romanian Civil code

Given that family relations are a species of civil legal relations, in which the parties have special states, such as husbandship, parenthood, childhood etc., in order to delineate the notion of the nullity of marriage, we consider that we should relate to the notion of nullity in common law, respectively in civil law.

Thus, in the specialized legal literature, the nullity is defined³ as “the sanction that abridges the civil act of the effects that are contrary to the legal norms edited for its valid completion.”

¹ The New Civil code regulates the separation of property regime and the conventional community property regime, besides the community property regime as legal matrimonial regime, applicable when spouses have not opted for a conventional matrimonial regime.

² Art. 483 paragraph (1) of the Civil code defines parental authority as “the set of rights and duties that concern both the person as well as the property of the child and that equally belong to both parents.”

³G.Boroi , C.A. Anghelescu , *Curs de Drept civil. Partea generală* , Editura Hamangiu , 2012, p.218.

Another definition⁴ states that nullity is a civil sanction that intervenes when completing legal acts in violation of the conditions of validity of substance or form, imposed by the law.

In our opinion⁵, nullity is a civil sanction applied to the effects of the legal act completed in violation of the validity conditions stipulated by the law.

The current Civil code regulates nullity in Book V – *Obligations*, Title II– *Sources of Obligations*, Chapter I – *Contracts*, Section 4 – *The nullity of contracts*, art. 1246 – 1265, unlike the previous Civil code in which the nullity did not have a unitary regulation, being discussed in scattered provisions, in the content of various articles of the code.

According to art.1246 paragraph 1 of the new Civil code, “Any contract concluded in violation with the conditions required by law for its valid completion is null if the law does not provide another sanction.”

3. *The notion of nullity of marriage. The regulations of the nullity of marriage in the new Romanian civil code. The classification of the nullity of marriage*

Applying the sanction of nullity to the civil legal act in the field of family law, the doctrine⁶ defines the nullity of marriage as “the sanction for violation of the legal requirements regarding marriage”.

According to our opinion⁷, “the nullity of marriage is the civil sanction that consists in the annulment of marriage with retroactive effect from the date of its completion in violation of the legal requirements regarding marriage, considering that the legal act of marriage has not ever been concluded”.

In the new Civil Code, the nullity of marriage is regulated in the content of Book II-A – *The Family*, Title II – *The Marriage* , Chapter IV –*The Nullity of marriage*, art. 293-306.

Legally, the sanction of nullity of the civil legal act has been subjected to a series of classifications.

Two of these classifications are valid in the case of the nullity of marriage as well.

Thus, depending on the nature of the interest protected by legal provision infringed on the completion of the civil legal act, the most important classification of nullity is the following: absolute nullity and relative nullity.

Absolute nullity occurs in the case of concluding a legal act in violation of public policy legal norms that protect public interest.

Relative nullity occurs in the case of concluding a legal act in violation of private policy legal norms that protect private interest.

⁴C.T.Ungureanu , *Manual de drept civil. Partea generală. Persoanele* , Editura Hamangiu , 2011, p.234.

⁵I.Apetrei ,*Drept civil. Partea generală*, Casa de Editura Venus , Iași, 2005, p.239.

⁶I.P.Filipescu, A.I. Filipescu, *Tratat de dreptul familiei* , ed. a VIII-a , Ed. All Beck, București ,2006 , p.201.

⁷I.Apetrei , R.O.Andone, *Dreptul familiei*, Casa de Editura Venus, Iași, 2005, p. 41.

Depending on the manner in which the nullity is legally consecrated, this civil sanction is classified as express nullity (textual or explicit) and virtual nullity (tacit or implicit).

Express nullity is directly stipulated by law. Most cases of nullity are part of this category.

Virtual nullity results from the expression of the legislator, or from the violated legal provisions.

In the latter respect, art.1253 of the new Civil code, entitled *The virtual nullity*, states that: “Except where the law stipulates the sanction of nullity, the contract is dissolved when the sanction of absolute nullity is observed, or, when appropriate, the relative nullity must be applied in order to reach the purpose of the violated legal provision.”

Unanimously, the specialized legal literature published previously has been stating⁸ that the cases of virtual nullity of marriage existed in the Family code; the marriage between partners of the same sex and the fictive marriage.

Regarding the marriage between persons of the same sex, the doctrine considers that we are dealing with a case of virtual nullity, because this kind of nullity results from the violation of the provision that a marriage can be concluded exclusively between a man and a woman, this provision being implied in art. 48 paragraph (1) of the Constitution and in the provisions of art.1 paragraph (4), art. 4 paragraph (1), art.5, art. 24 paragraph (1), art. 25 and art. 47-52 of the Family code.

The fictive marriage was considered to be a case of virtual nullity, because it resulted from the manner in which the legislator regulated the purpose of a marriage (that of starting a family).

According to art. 277 of the current Civil code, entitled *The prohibition or equivalence of cohabitation with marriage*, “marriage between persons of the same sex is prohibited” [art.277, paragraph (1)].

Furthermore, art.295 of the Civil code, entitled *The fictive marriage*, paragraph (1) states that: “the marriage that is concluded for purposes other than starting a family shall be null and void”.

At the same time, all other cases of nullity of marriage in the previous regulation, have acquired an express consecration in the current regulations.

Under the present circumstances, in which all the cases of nullity of marriage have been endowed with special provisions by the new Civil code, the category of the virtual nullity of marriage is no longer stipulated in the new regulation, presenting interest only when it comes to classifying the nullity of marriage as absolute nullity and relative nullity.

4. Cases of absolute nullity of marriage in the new Civil code

The absolute nullity of marriage is regulated in *Chapter IV – The nullity of marriage, Section 1 – The absolute nullity of marriage*, art.293-296.

⁸ Al. Bacaci , C. Hageanu , V. Dumitrache, *Dreptul familiei* , ed. a IV-a , Ed.All Beck , București, 2005, p. 106-107.

Thus, according to art.293 paragraph (1), the marriage that is concluded in violation of the provisions of art. 271, 273, 274, 276 and art.287 paragraph (1) is void and null.

Specifically, the sanction of absolute nullity of marriage shall apply, according to the current regulation in the following cases:

- marriage between persons of the same sex, because, according to art.271 of the Civil code, “marriage is concluded between man and woman... .”

- lack of consent to marriage, considering that this is mandatory, according to the provisions of art.271, “...by personal and free consent...” of future spouses;

- bigamy, under the infringements of art.273 of the Civil code, according to which “the marriage with a person who is already wed is null and void”; as in the previous regulation, in case the spouse of a person previously declared dead remarried, and afterwards, the declaratory judgment of death is annulled, the new marriage remains valid, if the spouse of the one declared dead concluded the second marriage in good faith; in this case, the first marriage is considered null and void on the date of the second marriage;

- marriage in natural or adoptive lineal or collateral kinship to the fourth degree, in violation of the provisions of art.274 of the Civil code; for good reasons, marriage with natural relatives (or persons became relatives by adoption) in collateral kinship to the fourth degree can be concluded, according to the new Civil code, with the authorization of the court within whose district resides the one requesting this approval, based on a special medical notice given in this respect (according to the previous regulation, the approval could have been given by the general mayor of Bucharest or by the president of the county council of the applicant’s residence);

- marriage with an insane or a mentally deficient person, disregarding the provisions of the art. 276 of the Civil Code;

- violation of the conditions of solemnity and publicity of marriage, established by art. 287, paragraph (1) of the Civil code; however, according to art.287 paragraph (2), in cases stipulated by law, the civil status officer can celebrate the marriage in places other than the civil service status office, under the other conditions of solemnity and publicity of marriage;

Along with the cases of absolute nullity of marriage listed in art.293 paragraph (1) of the Civil code, other cases of absolute nullity are distinctly penalized:

- marriage with a minor who has not yet reached the age of 16 (impuberty), according to art. 294 paragraph (1); however, paragraph (2) of the same article, stipulates the possibility of not applying the nullity of marriage, if, by the time the court decision is final, both spouses have reached the age of 18, or if the wife has given birth or has gotten pregnant;

- the fictive marriage⁹ (concluded in other purposes than starting a family), according to art. 295, paragraph (1); also, in this case, the nullity of marriage cannot

⁹ As we have already mentioned, the current Civil code consecrates the absolute nullity of the fictive marriage, thus confirming the opinions previously expressed in the legal

be applied if, by the time the court decision is final, the cohabitation of spouses intervened, the wife has given birth, has gotten pregnant or 2 years of marriage have passed [art.295 paragraph (2)].

The action of vindicating the absolute nullity of marriage can be advocated by any interested person. However, the prosecutor cannot bring the action to court after the termination or the dissolution of the marriage, except he/she is acting to protect the rights of minors or persons under interdiction. The absolute nullity of marriage is imprescriptible.

5. Cases of relative nullity of marriage in the new Civil code

The relative nullity of marriage is consecrated in Chapter IV – The nullity of marriage, Section 2 – The relative nullity of marriage, art. 297-303.

The innovations of the new Civil code are truly significant with regard to the relative nullity of marriage, both in terms of the cases in which it may occur, as well as in terms of the legal regime applicable to the relative nullity of marriage.

If the previous regulation of Family law provided that marriage was sanctioned with relative nullity only in the case of vices of consent (error, fraud and violence), the new Civil code provides that, beside the vices of consent, there is another series of cases in which the marriage is annulled, some of them being formally regarded by the doctrine and the legal practice, *de lege ferenda*, as future cases of relative nullity of marriage.

Article 297 of the Civil code states that the new cases of relative nullity of marriage are the lack of parental or legal guardian's consent, and the absence of the authorization granted by the court of guardianship in case of the marriage with a minor of minimum 16 years of age. The annulment of the marriage can be claimed only by those whose consent was necessary. It is only natural that the new Civil code – that provides that the valid completion of marriage to a minor of 16 is conditioned by the double consent of the legal guardian and of the court of guardianship – to sanction the absence of this double consent by annullability of marriage, considering that they are of no major importance in legally concluding the marriage.

Regarding the vices of consent, the regulations of the new Civil code are similar to the previous ones stated in the Family code, making the same remark regarding the error, that, in the field of marriage, may constitutes a vice of consent only in case it regards the physical identity of the other spouse.

The current civil code consecrates a new case of the nullity of marriage – the lack of discernment on concluding the marriage, thus expressing the solutions provided by the legal practice for this case of nullity of marriage, even though the previous regulation identified it as a case of absolute nullity.

Thus, the classical legal doctrine states, *de lege ferenda*, that the lack of discernment on concluding the marriage should not result in applying the absolute nullity to the marriage concluded in this manner and that relative nullity should be applied instead.

literature, regarding the application of absolute nullity in cases of marriages concluded in other purposes but starting a family.

Furthermore, the former Supreme Court¹⁰ ruled likewise, stating that nullity is absolute only in the case of spousal insanity or mental illness, since these persons are completely without discernment, while, in the case of temporary lack of discernment, the nullity is relative.

The recent legal literature considers that in these cases relative, not absolute nullity should be applied, considering the fact that it is aberrant that a person temporarily lacking discernment would not be offered the possibility of confirming such a marriage.

Moreover, it is considered that¹¹ it is abnormal for any interested person to request the annulment of a marriage, as long as the one temporarily lacking discernment doesn't.

One last hypothesis of marriage annulability and a novelty of the new Civil code also, is the case of a marriage concluded between the legal guardian and the minor person in tutelage. In the previous provisions of the Family code, guardianship was one of the prohibitive impediments¹² to marriage; consequently, the civil status officer who concluded the marriage without noticing the existence of this impediment would have been sanctioned, but the validity of marriage was not affected in any way. The prohibitive impediment was based on the presumption of captation which the legal guardian, as future spouse could exert on the spouse¹³ in guardianship, but also on moral reasons, since the guardian's responsibilities are related to the growth and education of the protected minor, being similar to parental responsibilities.

The current legislator has appreciated that a far more stern sanction should be applied in such cases, and that the marriage concluded in this manner should be sanctioned, replacing the prohibitive impediment of the previous regulation with a case of relative nullity of marriage.

With respect to the aspects of a procedural nature, the annulability action has a personal character, and can be advocated only by one of the spouses, not by the successors. However, if the annulability action has been started by one of the spouses, it can be continued, in case of the plaintiff's death, by any of his/her successors.

The time limitation on the annulability action is, as in the previous regulation, of 6 months and it depends on the nature of the relative nullity of marriage.

Thus, in the case of annulability of marriage because of the lack of the consent required by the law, the time limitation of six months will start on the date

¹⁰C.S.J., s. civ., dec. nr. 153/1990, in G. Lupsan, *Dreptul familiei*, Ed. Junimea, Iași, 2001, p.93.

¹¹Ibidem.

¹²The impediments to marriage are considered to be the factual or legal circumstances that prevent the valid conclusion of a marriage. Depending on the sanction applicable for their violation, the impediments to marriage are classified by the legal doctrine as diriment impediments and prohibitive impediments. The diriment impediments entail the nullity of the marriage concluded with their existence, while the prohibitive impediments entail the sanctioning of the civil status officer who had concluded the marriage.

¹³T.Bodoaşcă, *Dreptul familiei*, Ed. All Beck, București, 2005, p.84.

on which those, whose consent or authorization was necessary for concluding the marriage, had taken notice of the conclusion of the marriage by ignoring these consents.

In the case of marriage annulability for consent vices or for lack of discernment on concluding the marriage, the 6 months time limitation will start on the date of the termination of violence, or, as appropriate, on the date on which the harmed party had experienced the fraud, the error or the temporary lack of discernment.

Finally, in the case of marriage annulability for the existence of guardianship between spouses, the 6 months time limitation will begin on the date the marriage has been concluded.

Article 303 of the new Civil code offers the possibility of not applying the annulability of marriage in the case of complying with certain conditions provided by law.

Therefore, the relative nullity of marriage in case of lack of consent required by law, applicable to marriage with a minor of 16 of age, is waved if, by the time the court decision is final, the consent or the authorization required by law has been attained.

The annulability of marriage for consent vices is not applicable in case the spouses have lived together for 6 months from the date of the termination of violence or on the date on which the harmed party had experienced the fraud, the error or the temporary lack of discernment.

In all cases, the nullity of marriage is not applied if the spouses have, meanwhile, reached the age of 18, or if the wife has given birth or has gotten pregnant.

6. *The effects of the nullity of marriage in the regulation of the new Civil code*

The effects of the nullity of marriage are regulated in art. 304 – 306 of the new Civil; code, consecrating the following: the institution of putative marriage, the situation of children from a null marriage and the opposability court decision of finding and annulling a marriage.

The institution of putative marriage (the void or the voidable marriage, given that one or both partners had concluded the marriage in good-faith), as an exception to the retroactive nature of the nullity of marriage, is consecrated similarly to the previous regulation.

Thus, the partner that has concluded the marriage in good faith has the advantage of maintaining, until the court decision is final, the same status of a spouse as in the case of a valid marriage. In this case, the patrimonial relations between former spouses shall be subjected to the provisions in matters relating to divorce, as in the regulations of the Family code.

In the current regulation, the dissolution of marriage has certain effects of patrimonial nature, in terms of matrimonial regime, the right to compensation, the maintenance obligation of former spouses and the compensatory gains.

Regarding the matrimonial regime, this ends, according to art. 319 of the new Civil code, by nullity, termination or annulment of marriage. As a result of the

termination of the matrimonial regime, this shall be liquidated according to the law, by mutual agreement, or, in case of disagreement, in court. The marriage liquidation is the act that is elaborated by a notary public, or, where appropriate, a final court decision.

Clearly, the provisions of art. 304 paragraph (2) of the Civil code, according to which "...the patrimonial relations between former spouses shall be subjected to the provisions in matters relating to divorce", will generate different opinions, assuming that only one of the spouses concluded the marriage in good faith. These provisions, of generic nature, do not clarify¹⁴ the case in which the spouse that concluded the marriage in bad faith beneficiaries of the effects of putative marriage, with regard to the patrimonial relation between former spouses. It is certain that the spouse that concluded the marriage in bad faith cannot claim the rights deriving from the matrimonial regime¹⁵, but, in case the liquidation of the matrimonial regime is initiated by the spouse that had been in good faith when concluding the marriage, his/her initiative is considering the existence of a matrimonial regime applicable to both spouses, thus, implicitly, to the spouse that had in bad faith when concluding the marriage.

With regard to the right to compensation, provided that the new Civil code grants this right only to the innocent spouse, we consider that this right should be granted in case only one of the spouses has been in good faith and he/she has suffered prejudice caused by the other spouse, as a consequence of applying nullity of marriage.

The legal maintenance obligation between former spouses, as a result of applying the nullity of marriage, or of marriage annulment, shall have a mutual character, assuming that both spouses had concluded the marriage in good faith. In case only one of the spouses concluded the marriage in good faith, it is only he/she who will benefit of a pension.

Finally, in terms of compensatory gains¹⁶, they can be granted only in case the marriage had lasted for 20 years, according to art. 390, paragraph (2) of the current Civil code. The family law doctrine¹⁷ has already expressed the opinion according to which the compensatory gains represent an inessential interest in the context of the nullity of marriage, given the condition that requires a long period of time prior to the pronouncing the nullity of marriage. Theoretically speaking, this possibility exists only in the case of nullity of a bigamous marriage, of mutual kinship or of nullity of marriage between persons of the same sex.

However, compensatory gains cannot be granted to both spouses, even if both of them had been in good faith, since the Civil code states that they can

¹⁴E.Florian, *Dreptul familiei*, Ed. 3, Editura C.H. Beck, București, 2010, p.85.

¹⁵Ibidem.

¹⁶ According to art.390 paragraph (1) of the current Civil code, "in case the divorce is pronounced due to the exclusive fault of the accused spouse, the plaintiff can benefit of gains, that would compensate, as much as possible, the significant imbalance, caused by the divorce, to the life of the plaintiff."

¹⁷E.Florian, op. cit., p.84.

exclusively be granted to the spouse that won the divorce exclusively, once the other spouse had been found guilty.

As in the previous regulation, art. 305 paragraph (1) of the Civil code states that the nullity of marriage has no effect on children, who will maintain the status of children in marriage. Consequentially, in terms of rights and obligations between parents and children the provisions for the dissolution of marriage shall similarly apply.

Thus, the court of guardianship shall decide, at the same time with the annulment of marriage, over the relations between the parents and the children resulted in the void marriage, depending on the best interest of children, on the conclusions of the psychological investigation, as well as, when appropriate, on the parental consent. Specifically, the court of guardianship will rule on the exercise of parental authority, on the child housing, on the rights of the separated parent, as well as on each parent's contribution to child raising, education, tuition and professional training costs.

The nullity of marriage shall have no effects on the mutual succession vocation between parents and children.

7. Conclusions

In the current Civil code, the nullity of marriage has undergone a series of innovations and legislative modifications, justified by the opinions expressed by theory and jurisprudence prior to the new regulations, and determined by the current social and juridical context.

First of all, with regard to the existent classifications present in the classical doctrine of family law concerning the nullity of marriage, after the entry into force of the new Civil code, the only relevant classification remains the following: absolute nullity and relative nullity of marriage. The former dichotomy between express nullity and virtual nullity is no longer valid, since, in the new Civil code, all nullity cases (including marriage between persons of the same sex and the fictive marriage) have been separately covered, which resulted in a clear and accurate regulation of all the situations in which the nullity of marriage is applicable, no longer offering the opportunity for further interpretations.

If, with regard to the cases of absolute of marriage, compared to the previous regulation, the current regulation brings punctual amendments, the significant innovations being introduced in the case of relative nullity that have been considerably re-evaluated.

Therefore, if the previous regulation established the consent vices as exclusive situations that led to relative nullity of marriage, the current Civil code extends the series of these cases.

Given that the new Civil code provides that the valid conclusion of a marriage with a minor of 16 years of age is conditioned by the existence of a double consent, of the legal guardian and of the court of guardianship, it was only natural for it to provide a sanction for the absence of this double consent, namely the sanction of relative nullity of marriage, and also to provide the possibility of not applying the relative nullity of marriage, assuming that the double consent has been obtained by the time the court decision is final.

The new code also regulates the temporary lack of discernment on concluding the marriage, as a new situation of relative nullity of marriage, case which the legal doctrine and jurisprudence specialists have previously discussed upon, prior to the adoption of the new civil code, soliciting, *de lege ferenda*, the replacement of the application of absolute nullity, too drastic for this situation, with relative nullity.

Finally, the legislator considers, according to the new Civil code, that the marriage between the legal guardian and a minor under tutelage should be sanctioned with relative nullity, thus transforming the prohibitive impediment of the former regulation which lead only to the administrative sanctioning of the civil status officer who concluded the marriage, in a more serious situation whose effects are borne by the marriage itself, given that the guardian, as a substitute parent, should focus his/her entire attention to raising and education the minor under tutelage, which means that the affectionate relation between the guardian and the minor under tutelage should be similar to that between parent and child.

If, from a theoretical perspective, the nullity of marriage can be approached in this manner, that can inherently attract other interpretations or opinions in the legal literature, the judicial practice in this field will certainly suggest new corrections and proposals for solving a series of details that will pose problems in the future.

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