NEGATIVE SUBSTANTIVE REQUIREMENTS FOR THE CONCLUSION OF MARRIAGE (IMPEDIMENTS FOR MARRIAGE)

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ABSTRACT:
THIS ARTICLE AIMS TO ANALYSE THE NEGATIVE SUBSTANTIVE REQUIREMENTS FOR MARRIAGE, DENOMINATED IN DOCTRINE, AND THE IMPEDIMENTS TO MARRIAGE, I.E. THOSE CIRCUMSTANCES THAT PREVENT THE CONCLUSION OF MARRIAGE.

KEY WORDS: MARRIAGE, BIGAMY, KINSHIP, GUARDIANSHIP

1. Notion

Negative substantive requirements (impediments or hindrances to marriage) are factual or legal circumstances that prevent marriage from being concluded. From a legal nature standpoint, impediments are the legal limits to matrimonial capacity or to the right to marry (special incapacities).[1]

Indeed, the right to marry is a fundamental right of the person, consecrated by art. 48 par. (1) of the Constitution and art. 12 of the European Convention on Human Rights, but its exercise is subject to the laws of each country, which establish in concrete terms what are the legal conditions for the valid conclusion of the marriage are. At the basis of impediments there are biological, psychological, social and moral reasons.[2]

2. Classification of impediments to marriage

Impediments to marriage are classified according to the following criteria:

a) from the point of view of *sanctioning* their violation, the impediments are *dirimant* and *prohibitive*. The violation of dirimant impediments leads to the sanction of marriage annulment, while the violation of the prohibitive impediments implies only administrative sanctions for the

[1] M. Avram, *Drept Civil. Familia*, Hamangiu Publishing House, Bucharest, 2013, p. 55; S.P. Gavrilă, *Instituții de dreptul familiei în reglementarea noului Cod civil*, Hamangiu Publishing House, Bucharest, 2012, p. 24.
[2] M. Avram, *op. cit.*, p. 55; S.P. Gavrilă, *op. cit*., p. 24-25.

civil registry officer who celebrated the marriage while disregarding them.[1] In the regulation of the Family Code, guardianship was qualified as a prohibitive impediment, since the conclusion of marriage in violation of this negative substantive requirement was not sanctioned with nullity. In the regulation of the Civil Code, according to art. 300, the marriage concluded between the guardian and the minor under guardianship is hit by relative nullity, so the impediment is no longer prohibitive, but dirimant.[2]

b) from the point of view of their *opposability*, respectively of the persons between whom they exist, the impediments are *absolute* and *relative*. Thus, absolute impediments prevent the marriage of a certain person with any other person, and the relative ones prevent the marriage of a person only with another determined person. This classification is not confused with that of nullities in absolute and relative terms. For example, kinship is a relative impediment, since it prohibits marriage between relatives, but the sanction to be applied in the case of violation of this impediment is absolute nullity.[3]

3. Analysis of impediments to marriage

3.1. Bigamy

According to art. 273 of the Civil Code, it is forbidden to conclude a new marriage by the person who is already married.

The criminal law incriminates bigamy and punishes both the married person's act of concluding a new marriage and the person's act of marrying a person he/she knows is already married (article 376 of the Criminal Code).[4] In other words, the existence of an ongoing marriage prevents the conclusion of a new marriage. The principle of monogamy, emblematic to European civilizations of Christian inspiration, does not allow the contemporaneity of two or more marriages of the same person.[5]

The impediment arising from the existence of a previous marriage is also applied to foreigners who would like to marry in our country even if, according to their national law, polygamous or polyandry marriage is admitted, the principle of monogamy being of public order. Those married to more than one person (the national law permitting this under the provisions of private international law, the family status being governed by the *lex patriae*) will not be considered as bigamous within the meaning of our law.[6]

The impediment is dirimant, according to art. 293 of the Civil Code, since its violation is sanctioned with absolute nullity, and absolute (the married person cannot marry any other person).[7]

In the case of two *successive* marriages, the subsequent clarifications may be made, in relation to the *fate of the first marriage:*[1]

[1] M. Avram, *op. cit.*, p. 56; S. P. Gavrilă, *op. cit*., p. 25.
[2] M. Avram, *op. cit.*, p. 56.
[3] M. Avram, *op. cit.*, p. 56; S.P. Gavrilă, *op. cit*., p. 25.
[4] Art. 376 of the Criminal Code - Bigamy: "(1) The conclusion of a new marriage by a married person is punished with imprisonment from three months to two years or a fine. (2) The unmarried person who marries a person whom he/she knows is married shall be punished by imprisonment from one month to one year or a fine."
[5] E. Florian, *Dreptul familiei*, 4th Edition, C.H. Beck Publishing House, Bucharest, 2011, p. 28-29.
[6] Al. Bacaci, V.-C. Dumitrache, C.C. Hageanu, *Dreptul familiei*, Ediţia a 7-a, C.H. Beck Publishing House, Bucharest, 2012, p. 29.
[7] M. Avram, *op. cit.*, p. 56-57; S.P.Gavrilă, *op. cit*., p. 25.

- if the first marriage was not validly concluded and is nullified, and the person concludes a second marriage, there is no bigamy, even if the first marriage is declared null after the conclusion of the second marriage, because nullity has, in principle, retroactive effect;

- if the first marriage is dissolved by divorce, there is no bigamy, but only if the second marriage is concluded after the date of the final divorce decree or, as the case may be, from the date of the divorce certificate being issued by the civil registry officer, in the case of divorce by administrative means and by the notary, respectively, in the case of divorce by notary;

- If the first marriage ceases through the death of one of the spouses, there is no bigamy if the date of the second marriage is after the date of death. If the spouse of the first marriage is declared dead by court decision, what is of interest is the date of death established by court order, and this date must be before the new marriage is concluded by the surviving spouse.

According to art. 293 par. (2) of the Civil Code, if the spouse of a person declared dead has remarried and after that new marriage the declaration of death is annulled, the new marriage is valid and the first marriage is dissolved on the date of the new marriage. It is a case of *apparent bigamy* solved by the legislator in favour of the second marriage, considering that it is the one that produces effects through the existence of family relations in fact. Art. 293 par. (2) of the Civil Code expressly provides that the spouse of the deceased person must have acted in good faith at the conclusion of the second marriage. Only in this case there is no bigamy and the effect of the dissolution of the first marriage occurs on the date of the second marriage. If, however, the spouse of the dead person acted in bad-faith, that is, he/she knew that in reality the dead person was alive, then he/she is guilty of bigamy and the second marriage is nullified, since it was concluded with the violation of the impediment resulting from the existence of an earlier undissolved marriage.[2].

Therefore, in order to be able to marry, each of the future spouses must be unmarried (i.e., he/she must be single; a former spouse from a null or annulled marriage; divorced; widow/widower).[3]

The proof of the lack of this impediment is made by the prospective spouses, who state in the marriage statement that there is no such impediment, and by presenting, if necessary, a document stating that the previous marriage of one of the future spouses has ceased, was nullified or dissolved.[4]

3.2. Kinship

According to art. 274 par. (1) of the Civil Code, it is forbidden to conclude marriage between relatives in a straight line and between the collateral line up to the fourth degree, including.

[1] M. Avram, *op. cit.*, p. 57; S.P. Gavrilă, *op. cit*., p. 25-26.
[2] M. Avram, *op. cit.*, p. 57.
[3] A. Gherghe, *Consideraţii privind condiţiile de valabilitate ale actului juridic al căsătoriei*, în *Noul Cod civil. Studii şi comentarii, vol. I, Cartea I şi Cartea a II-a (art. 1-534),* by M. Uliescu (coord.), M. Duțu, M. Uliescu, B. Pătrașcu, S. Neculaescu, I. Dojană, T. Ţiclea, F. Pavel, R. Dimitriu, L. Uță, I. Boți, Gh. Buta, S. Angheni, I. Urs, S. Cristea, D. Dobrev, D. Lupașcu, C.-M. Crăciunescu, A. Gherghe, C. Jora, M.G. Berindei, Universul Juridic Publishing House, Bucharest, 2012, p. 647-648; D. Lupașcu, C.M. Crăciunescu, *Dreptul familiei,* 2nd Edition, edited and updated, Universul Juridic Publishing House, Bucharest, 2012, p. 69.
[4] N.C. Aniței, *Dreptul familiei,* Hamangiu Publishing House, Bucharest, 2012, p. 40.

For both moral and medical reasons, marriage is prevented between relatives in a straight line regardless of the degree of kinship, as well as between the collateral line relatives up to the fourth degree including, without any distinction as to whether the kinship is natural, that is, based on the descendancy of a person from another person or on the fact that several persons have a common ascendant [art. 405 par. (1) Civil Code] or the kinship is of civil nature, resulting from adoption [art. 405 par. (2) Civil Code]. [1] It is a dirimant impediment (it is sanctioned with absolute nullity) and relative (it exists only among relatives prescribed by law).[2]

Affinity, i.e. the relationship between a spouse and the relatives of the other spouse [art. 407 par. (1) Civil Code] has no relevance to marriage, therefore "in laws" may marry each other.[3]

Natural kinship. The blood tie between two people is an impediment both in a straight line, based on the descendancy of a person from another person [art. 406 par. (1) Civil Code], irrespective of the degree of kinship, and in the collateral line, based on the fact that several persons have a common ascendant [art. 406 par. (2) Civil Code], this time only up to the 4th grade, inclusive, i.e. until cousins in the first degree; [4]; in all cases, it is irrelevant if kinship is from marriage (from the same marriage or from different marriages) or from outside marriage.[5]

Adoptive kinship. The impediment based on kinship also applies to adoption. In this respect, according to par. (3) of art. 274 Civil Code, the impediment works both among those who have become relatives by adoption (civil relatives), and among those whose natural kinship ceased by adoption.[6]

Therefore, in the case of adoption, the impediment exists in two respects[7]:

a) as regards the relations of the adopted person with his/her natural relatives, that is to his/her family of origin, although, as a result of the adoption, he/she shall cease to have any legal relationship of natural kinship. The marriage between the adopted person and his/her natural relatives is forbidden, because this impediment is based on the existence of a blood link;

b) as regards the relations between the adopter and his/her relatives, on the one hand, and the adopted person, on the other hand, marriage is also forbidden, since adoption, being of full effect, is assimilated to the natural kinship.

Thus, marriage is forbidden between: the adopter and the adopted person, the ascendants of the adopter and the adopted person; the adopter and the descendants of the adopted person; the ascendants of the adopter and the descendants of the adopted person; the children of the adopter and the children of the adopted person; those adopted by the same person, but also between those whose natural kinship ceased as effect of adoption.[8]

[1] E. Florian, *op. cit.*, p. 31.
[2] M. Avram, *op. cit*., p. 57; S.P. Gavrilă, *op. cit*., p. 27.
[3] E. Florian, *op. cit*., p. 31.
[4] Art. 406 par. (3) Civil Code: "The degree of kinship is established as follows: a) in a straight line, according to the number of births: thus, the children and the parents are relatives of the first degree, the grandchildren and grandparents are relatives of the second degree; b) in collateral line, according to the number of births, ascending from one of the relatives to the common ascendant and descending from he/she to the other relative; thus, brothers/sisters are relatives of the second degree, uncle or aunt and nephew, of the third degree, first degree cousins, of the fourth-degree. "
[5] E. Florian, *op. cit*., p. 31.
[6] M. Avram, *op. cit.*, p. 58; S.P. Gavrilă, *op. cit*., p. 27.
[7] M. Avram, *op. cit.*, p. 58; S.P. Gavrilă, *op. cit*., p. 27.
[8] N.C. Aniței, *op. cit.*, p. 41.

Kinship outside marriage. As for the kinship outside the marriage established by law, the prohibitive effect is unquestionable. If kinship outside the marriage is not legally confirmed, since blood relativity, as a matter of fact, exists whether or not it has been formally consecrated (for example by voluntary parentage recognition) and taking into account the rationale for establishing the fact that kinship is an impediment to marriage, the opinion was expressed that what affirmed in doctrine under the previous regulations, namely that the impediment of kinship is operative under the condition of proving the existence of the relation of kinship to forbidden degree, keeps its actuality.[1]

Assisted Human Reproduction. In the case of human assisted reproduction with a donor third party, the actual parental and biological relationship, other than the legal relationship, is not known, no connection can be established between the donor third party and the child thus conceived [art. 441 par. (1) Civil Code], as neither the child's thus conceived filiation can be disputed for reasons related to the medically assisted character of conception [art. 443 paragraph (1) of the Civil Code]. As a result, the impediment of kinship will be related to the filiation and kinship attributed by the law.[2]

On the other hand, in order to avoid the formation of endogamous marital couples under the cover of the confidentiality principle of information regarding assisted human reproduction [art. 445 par. (1) of the Civil Code], the perspective of marriage can be integrated into those exceptional situations in which such information is allowed to be transmitted in order to prevent the risk of causing serious harm of a medical nature [art. 445 par. (2) and (3) of the Civil Code]. Thus, on the basis of court authorization and under conditions of confidentiality, as provided in art. 445 par. (2) Civil Code, such information may be communicated to the competent authority, in this case the civil registry officer handling the marriage file.[3]

Dispensation. By way of exception to the rule that prevents marriage between relatives in collateral line up to the fourth degree inclusive, marriage may nevertheless be permitted between relatives in collateral line of the 4th degree [art. 274 par. (2) Civil Code], that is to say, between first cousins (art. 406 par. (3) lit. b) Civil Code], without distinguishing between natural and adoptive kinship [art. 274 par. (3) Civil Code].[4]

The exceptional character of marriage between these persons is underlined by the special requirement of authorization by the tutelage court on the grounds of sound reasons and on the basis of the special medical opinion given in this respect. In the absence of authorization, the marriage is hit by absolute nullity under art. 293 par. (1) Civil Code, which refers to the entire article 274 of the Civil Code.[5]

The authorization is within the jurisdiction of the guardianship court in which the applicant is domiciled. As regards the range of factual circumstances which satisfy the requirements of the proper grounds for marriage, taking into account the assertions in the literature, as well as the judicial practice promoted under the auspices of previous similar provisions under the condition of the "sound reasons", they generally revolve around the pregnancy status of the prospective wife or the fact of the birth of a child; such a conclusion

[1] E. Florian, *op. cit*., p. 32.
[2] Ibidem.
[3] Ibidem.
[4] Ibidem.
[5] Ibidem.

seems to be encouraged by the requirement expressly established by the tutelage court to rule "on the basis of the special medical opinion given in this regard" [art. 274 par. (2) 2nd thesis of the Civil Code].[1]

3.3. Guardianship

In compliance with art. 110 of the Civil Code, the guardianship of the minor is instituted when both parents are, as the case may be, deceased, unknown, deprived of the exercise of parental rights, or have been subjected to the criminal punishment of the prohibition of parental rights, are under judicial interdiction, are missing or have been declared dead by a court of law, and if, at the end of the adoption, the court decides that it is in the interest of the minor to establish a guardianship.

According to art. 275 of the Civil Code, the marriage is prevented between the guardian and the minor who is under his/her guardianship.

The impediment resulting from guardianship is based on moral considerations and seeks to protect the minor who is under guardianship, as the guardian has the duty to care for the minor, being obliged to ensure the minor's care, health and physical and mental development, education, teaching and professional training, according to his/her skills. These relationships should not be adversely affected by the possibility of a marital relationship between the guardian and the person under his/her guardianship.[2]

In art. 300, the Civil Code sanctions with relative nullity the marriage concluded between the guardian and the minor person under his/her guardianship. Thus, the impediment resulting from tutelage is dirimant because its violation leads to the nullity of the marriage concluded, and it has a relative character because it prevents the conclusion of marriage only between the guardian and the minor person under his/her guardianship.[3]

With the termination of guardian's duties or the termination of guardianship, marriage becomes possible; also, the marriage can be concluded between the person who has acquired full legal capacity and his/her former guardian.[4]

3.4. Insanity, mental deficiency and temporary lack of mental faculties

According to art. 276 of the Civil Code, the mentally insane and the mentally deficient are prevented from marrying.

In the old regulation, art. 9 of the Family Code provided that the mentally insane, the mentally deficient, as well as the persons suffering from a temporary lack of mental faculties were prevented from marrying, for as long as they had no discernment of their deeds.

It is noted that, unlike art. 9 of the Family Code, the Civil Code regulates the hypothesis of insanity and imbecility as an impediment to the conclusion of marriage distinctly from the hypothesis of the person suffering from temporary lack of discernment, which constitutes merely a cause of relative invalidity of marriage.[5]

[1] Idem, p. 32-33.
[2] A. Gherghe, *op. cit.*, p. 653.
[3] Idem, p. 653-654.
[4] E. Florian, *op. cit.*, p. 33.
[5] M. Avram, *op. cit.*, p. 59.

Insanity of mental deficiency are an absolute impediment, since its violation is sanctioned with nullity, and absolute because the person in such a situation can not marry any other person.[1]

The mentally insane or mentally deficient can not marry whether or not they are put under interdiction and whether or not they are in a moment of lucidity.[2]

Insanity or imbecility is an impediment to marriage because, in the view of the Civil Code, such a state is incompatible with the purpose of marriage.[3]

According to art. 211 of the Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code [4], within the meaning of the Civil Code, as well as the civil law in force, by the expressions *mental insanity* or *mental deficiency* is meant a mental illness or a psychic disability which determines the psychic incompetence of the person to act critically and predictively from the point of view of social-legal consequences that may arise from the exercise of civil rights and obligations.

Mental illnesses such as schizophrenia, oligophrenia, and other severe mental conditions which seriously and permanently affect the person's discernment, even if he or she knows some temporary periods of lucidity, can be classified as mental insanity and mental deficiency. That is why performing a psychiatric expertise in a process involving the invalidity of marriage for violation of this impediment is indispensable.[5]

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[1] Ibidem.
[2] C.C. Hageanu, *Dreptul familiei și actele de stare civilă*, Hamangiu Publishing House, Bucharest, 2012, p. 35.
[3] M. Avram, *op. cit.*, p. 60.
[4] Published in the Official Gazette n. 409 of 10th of June 2011.
[5] M. Avram, *op. cit.*, p. 60.