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CONSIDERATIONS OF COMPARATIVE LAW IN THE MATTER ABSOLUTE NULLITIES IN MARRIAGE

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Abstract

In comparative law, the sanction with absolute nullity of a marriage concluded in breach of the substantive conditions is regulated differently, as the legislator has chosen to dissolve the marriage according to the seriousness of the defects (in Italian law) or a certain tendency to restrict to strictly necessary the causes of nullity and their effects, limiting them to the cases considered to be essential for the stability of the marriage and the validity of the marital union (in French law).

Keywords: *Absolute nullity, virtual nullity, non-existence of the act, sexual differentiation, limitation period*

INTRODUCTION

The origin of the term nullity is Latin, *nulli - nullo - nullae*, meaning without value (Guțu, 1973, p. 804), and the sanction of nullity is "the means prescribed by law not to allow the individual will to go beyond the limits that are imposed by the rules of positive law.

The full sanction consists in the destruction of the legal act by which the individual will disregarded the restrictions of the law" (Cantacuzino, 1998, p. 61).

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The civil sanction of nullity is not directed against the legal act as such, but against the *effects contrary to the law* (s.n.) produced against the flawed

background of the act, aiming to ensure the achievement of the purpose envisaged by the legislator by establishing the condition of invalidity (Florian, 2011, p. 46; Florian, 2016, p. 62; Pînzari, 2015, pp. 164-165). Therefore, the nullity retroactively abolishes the effects of the civil legal act because the conditions required by law (regarding the substance and/or form) for its valid conclusion¹, were not observed, the nullity having a threefold role (regardless of the field in which it intervenes): preventive, sanctioning and guaranteeing the principle of legality, theorists in the field classifying it according to certain criteria (Bodoaşcă, Drăghici, Puie, Maftai, 2013, pp. 241-242; Reghini, Diaconescu, Vasilescu, 2013, p. 58; Lupaşcu, Crăciunescu, 2017, p. 258).

The condition of nullity is that it has a cause present at the time of concluding the legal act, a cause that is decided exclusively by court. The effects of the nullity will be retroactive precisely due to the justifying cause of the nullity.

Therefore, it is not the nullity itself that has the gift of retroactivity, but *the finding of nullity (s.n.), so that the retroactivity refers to the decision in the annulment of the act, and not to the conclusion of the annulled act (s.n.)* (Florian, Pînzari, 2006, pp. 43-44).

I. CAUSES OF ABSOLUTE NULLITY OF MARRIAGE

The current comparative presentation of the causes of absolute nullity of marriage concerns the specific regulations of two European countries with old and solid traditions in this field.

We will first refer to the French legislation in which the annulment of a legal act on the ground of its annulment remains more limited in matters of marriage than in other legal acts. By widening the possibilities of opposition to marriage, the law prevents the nullity that could affect the marriage already officiated.

The development of the French legislation shows this tendency to restrict cases of nullity and their effects to the bare minimum, limiting them to those considered essential for the stability of marriage and the validity of the union. In that regard, the French case-law provides numerous examples of actions for annulment which are considered to be abusive (P. Murat 2015, pp. 130-131).

By mitigating the application of the system of nullities, on the one hand, not all irregularities are sanctioned with nullity, on the other hand, the nullity regime is itself modified in terms of its application and consequences.

¹ Article 1246 para. (1) The Romanian Civil Code provides: "Any contract concluded in violation of the conditions required by law for its valid conclusion is subject to nullity, unless otherwise provided by law."

Therefore, the general principles of nullity apply to marriage, but with important restrictions. The restrictive nature of the theory of marriage nullities is not an impediment for the actions for nullity to be in a constant increase. Thus, according to an *Infostat Justice* study from 2004, a number of 737 marriages were annulled by the High Courts (73.6%) and a number of 265 applications for annulment were rejected (26.4%). In 2010 there were 980 applications for marriage annulment before a High Court and 168 applications before a Court of Appeal, 179,433 divorce applications before a High Court and 15,204 applications before a Court of Appeal (Murat, 2015, pp. 131-132)

Instead, the French canon law adopts a different position, multiplying the cases of nullity in order to preserve the seriousness of the marital relationship (Murat, pp. 131-132)

Chapter IV of Title V of the French Civil Code, entitled "*Applications* (s.n.) for marriage annulment" (Article 180 of the French Civil Code), covers a number of cases of relative or absolute nullity, without this list being exhaustive.

For certain conditions of marriage conclusion, the absence of the text providing for nullity in case of non-compliance is explained by the fact that these are the least serious irregularities, the problem arising in the most serious situation. Related to all these aspects, the French doctrine retained three interpretations (Murat, 2015, pp 132 – 134):

1. In a first interpretation, the legal list of nullities is considered to be limiting and there are no other cases of nullity than those provided for in the texts.

The principle of "No nullity without text" applies to this interpretation, as this rule is due to the importance of marriage, the stability of the institution and its public order character.

Today, this interpretation is considered outdated, being criticized by a detailed and rigorous analysis.

2. In a second interpretation, it is considered fair to admit the existence of virtual nullities.

At present, it is recognized that if the law makes a condition for the valid conclusion of the marriage, it is obvious that the legislator understood to sanction by nullity its absence, not being necessary an express stipulation. This is also the reason why Chapter IV of Title V, Book I of the French Civil Code is entitled "*Applications* (s.n.) for marriage annulment" and not *cases* of nullity (s.n.). Rationally, the classic thesis of "no nullity without text" would be almost impossible to support in several situations, such as: sexual identity (this being before Law No. 404 of May 17, 2013 which paved the

way for marriage between persons of the same sex) or the total absence of the marriage officer who could not be sanctioned with nullity because it was not expressly targeted by the legislator. The French case-law has not been "hindered" by the above-mentioned principle and has declared null and void in the absence of the text of the law (Murat 2015, p. 133).

However, the French doctrinaires recommend a certain caution regarding virtual nullities, arguing that the saying "no nullity without text" nevertheless expresses a simple truth: nullity is a major sanction in the case of marriage due to the effects of maximum gravity it produces and should not be used too easily.

3. In a third interpretation of the French doctrine it is argued that in the face of difficulties in accepting nullities *not provided for by law* (s.n.) one must resort to a sanction that would be the *non-existence of the legal act of marriage* (s.n.).

The theory of the non-existence of legal acts is not specific to either the institution of marriage or private law, but it is given special importance due to the possibility of applying the principle "no nullity without text". According to this theory, the non-existent marriage would be the one that lacks a constitutive element, a situation encountered in the following cases:

a) total absence of consent (but the Law of 19 February 1933 amending the French Civil Code provided for this case absolute nullity - art. 184 of the French Civil Code). Referring to this aspect, in the French doctrine, it was not always obvious that dementia should be considered a lack of consent to marriage within the meaning of art. 146 of the French Civil Code. For this consent to be lacking, the individual must not have understood at least in part the meaning and importance of the word "yes" they uttered. It is a matter of fact which reverts to the sovereign judgment of the trial judges. It was considered that the mere finding of an impossibility, depression or mental destruction is not sufficient to establish the absence of consent; on the contrary, however, they are certainly likely to lead to the pronouncement of nullity pursuant to art. 146 of the French Civil Code *global mental disorders* (s.n.). In a judgment, the Court of Cassation ruled that the obligation to prove the absence of consent rests with the person contesting the validity of the marriage. (Murat, 2015, p. 46).

The marriage of the mentally insane has an exceptional character in the French law, so that the adult under guardianship or curatorship can marry if they receive authorization; the possible obtaining of this authorization does not, however, eliminate the need to express a valid consent of the person concerned at the time of the marriage performance.

If the state of dementia is proved *at the time of the marriage performance* (s.n.), despite the authorizations granted, the provisions of art. 146 of the French Civil Code and the action for nullity remains probable (Murat, 2015, p. 46).

Regarding the marriage of the adult protected by guardianship, Law no. 308/5 March 2007 brings a reform regarding the legal protection of the above mentioned persons. Thus, the marriage of the adult under guardianship requires the authorization of the guardianship judge or of the family council, if one has been established. The parents or the entourage will simply be consulted for the opinion, according to art. 460 para.2, French Civil Code. The authorization will be given only after the hearing of the future spouses (Murat, 2015, p. 81). The appeal is accepted by the guardianship judge against the decision of the family council that authorized the marriage of an adult under guardianship from the moment when the latter's consent could not be received and when no element allows us to believe that there was the will to contract marriage. If the family council has to listen to the future spouses, on the other hand, it cannot make them participate in the deliberation. This would be an irregularity that could invalidate the decision of the family council (Murat, 2015, p. 81). Compliance with the rules on guardianship is no longer necessary when guardianship ended with the death of the adult, and in the event that a posthumous marriage is envisaged, the authorization of the President of the republic is sufficient. The adult under guardianship is obliged to express his / her consent valid at the time of the marriage performance, regardless of whether the authorization is necessary or not (Murat, 2015, p. 81).

In the case of the marriage of the adult under guardianship, art. 460 para. 1 French Civil Code provides that the authorization of the curator or, in the latter's absence, of the guardianship judge is necessary, the decision of the latter being susceptible to appeal within 15 days, according to art. 1239 French Civil Procedure Code.

As in the previous case, no medical opinion is required.

The action for annulment of the marriage cannot be exercised by the curator on the grounds that the latter would not have given their authorization if more than one year had elapsed (the one-year term was extended to five years by Law no. 399/4 April 2006) (Murat, 2015, pp. 80-81) without a complaint from him/her, since they became aware of the marriage (Murat, 2015, pp. 80-81).

We do not believe that the solution of the French legislator to extend the scope of those who can conclude a valid marriage to adults under

guardianship or curatorship is the most appropriate. These institutions (guardianship and curatorship) are created precisely for the protection of persons unable to protect themselves and in order to protect their interests, or a simple authorization allowed by the curator or the guardianship judge to conclude the marriage does not replace a valid consent from legal view and could remove the harmful consequences that could occur in such a marriage due to lack of discernment, even if these people also have moments of temporary lucidity.

Such people have their own world that goes beyond the realm of reality, they lose their critical sense and are unable to integrate socially. In addition, there is a danger of unhealthy offspring (of course, this can happen outside of marriage), and from a social point of view they will not understand the meaning of the act of marriage and what its implications are.

We do not consider that the prohibition on marriage would violate the fundamental right to marriage provided for in both domestic and international regulations (such as Article 16 of the Universal Declaration of Human Rights and Art. 12 of the European Convention on Human Rights).

b) gender identity (this before Law no. 404 of 17 May 2013 which authorized same-sex marriage). In the French law, the lack of sexual differentiation between future spouses is no longer a situation in which absolute nullity of marriage can be claimed because Law no. 404 of 17 May 2013 opened the way for same-sex marriage. Prior to the promotion of this law, same-sex marriage was prohibited under the French law. In this regard, the Bordeaux Court of Appeal upheld the judgment of the court which ruled on the nullity of marriage between two persons of the same sex, the Court stating that the difference in sex is a condition of the existence of marriage.

The Court of Cassation dismissed the appeal against the Bordeaux Court of Appeal, stating that under the French law, "marriage is a union between a man and a woman" and that this principle is not contradicted by any provision of international conventions in force in France.

The Constitutional Council, notified through a priority issue of constitutionality, stated just as clearly that the provisions of art. 144 and 75 of the French Civil Code, which raise the issue of the need for sex differentiation between spouses, are in accordance with the Constitution and do not affect the right to have a family life. Nor do they violate the principle of equality when the legislator establishes differently in different situations. The Constitutional Council considered that the issue highlighted the competence of the legislator and that it could not replace its assessment with its own (Murat, 2015, pp. 71 – 72).

For identity of legislative reason, the marriage of the transsexual person who changes their sex *after* (s.n.) the conclusion of the marriage, acquiring the same sex with the partner (spouse) from the marriage, is no longer struck by absolute nullity.

In contrast, hermaphroditism, which prevents the possibility of procreation and normal relations between spouses, being a definitive genital anomaly deriving from a genetic error, is a cause of absolute nullity even if it is not expressly provided for in marriage in several European legislations (French Civil Code, Italian Civil Code, Civil Code of the Republic of Moldova, Romanian Civil Code). The reason why this virtual nullity cannot be covered is the general interest protected by the establishment by law as an impediment to marriage of this anomaly;

c) total absence of the performance. Accepting the theory of the non-existence of the act would allow the principle of "no nullity without text" to be overturned and would lead to consequences different from those of absolute nullity. As an example in this sense, the non-existent marriage would not be susceptible to confirmation even by prescription after 30 years (according to art. 184 and 191 French Civil Code, the action in absolute nullity is prescribed after 30 years, and the one of relative nullity after 5 years - articles 181 and 183 of the same code) and could not benefit from putativity (Murat, 2015, pp. 133 - 134).

Both French doctrine and jurisprudence have been reluctant to the theory of the non-existence of the act, very few consequences of this theory being in fact of little interest: for example, it is of little use to say that in one case the court rules nullity and in another finds that there is no existence of it (Murat 2015, pp. 133-134).

Further we present some general aspects regarding the sanction of nullity of marriage in the Italian law.

In the Italian law, non-compliance with the provisions on the celebration of marriage is sanctioned differently, depending on the seriousness of the defects, as follows: (Auletta, 2011, p. 163)

- 1 - minor ones can lead to irregularities regarding the celebration;
- 2 - more serious vices, at the invalidity of the marriage;
- 3 - certain anomalies are causes of non-existence of marriage.

1. *Irregularities in the celebration* (such as: omission of publication or non-compliance with the temporary ban on remarriage) entail a pecuniary sanction incumbent on the justice of the peace and possibly on the spouses responsible for the defect.

2. *The causes of invalidity* of the marriage are born from:

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- violation (infringement) of impediments (except for the temporary prohibition of remarriage);
 - lack of discernment and the existence of vices of consent;
 - simulated marriage.

In addition to these causes, there are others that are not explicitly mentioned, but are deduced from the subject of contracts (for example, the lack of an essential element).

The Italian rules do not provide data for the individualization of the type of invalidity that leads to the existence of the defect, i.e. if the marriage is null or void (for literary purposes, for example, the rules state that a marriage can be *challenged* and, at the same time, in certain cases, there is talk of its *nullity*, according to Articles 124 - 125, Italian Civil Code).

The distinction has major practical implications, the annulable marriage producing effects different from the null one. The general limitation period for an action for annulment is ten years (Article 2946 of the Italian Civil Code). On the other hand, there are no time limits for appealing if a general interest has been infringed.

According to the Italian law, the causes of nullity are considered: the existence of a previous marriage (bigamy), the impediment of crime and kinship, affinity and adoption.

Less serious are the causes of marriage annulment, such as the marriage celebrated by the minor or the forbidden court, the presence of a consent defect, the simulated marriage.

3. Regarding the *non-existence of marriage*, since it does not produce effects, it legitimizes the spouses to evade marital obligations and to conclude a new marriage. In this case, the non-existence is reduced to those hypotheses - the limit in which there is an apparent marriage ceremony; in reality, the actual celebration is also completely missing if the consent is expressed by two people of the same sex because the sex difference between the spouses is a characteristic element of the marriage covenant in the Italian law. In the absence of total celebration, it was considered excluded the non-existence of marriage celebrated in Italy (Auletta, 2011, p.166) between citizens of different nationalities (including one Italian), by the Catholic worship minister who did not have the approval of government nor did it read Articles 143, 144, 147 of the Italian Civil Code or in the absence of witnesses (Auletta, 2011, p. 165).

Instead, it is considered as existing (valid) the marriage celebrated under a false name (in the concordat marriage) whose transcription was annulled. This fact is considered by the Italian judicial practice to be irregular and is subject to rectification. Unconsumed marriage is also considered to exist.

In the Italian law, a cause of the *non-existence of marriage* (s.n.) is represented by “certain anomalies”, described in the Italian doctrine as “profound and appearing in connection with the structure and functions of the business” (Auletta, 2011, p. 165), the jurisprudence considering the presence of minimum conditions necessary in all cases where two persons of the opposite sex have expressed their consent before a justice of the peace. Gender difference is an essential, defining element of the marital relationship in the Italian law, so that hermaphroditism, characterized by non-sexual differentiation, is not subject to a condition of marriage (*per a contrario*, it is a cause of *non-existence* of marriage).

The Italian law does not expressly provide by law for absolute nullity due to lack of sexual differentiation.

In our view, the Italian legislature considered that this cause of invalidity was so obvious that it was no longer necessary to regulate it expressly. The explanation could subsist in the moral considerations on which a heterosexual marriage is based, moral norms that have their origin in the ancient law, more precisely, in the ancient Roman religious norms.

As is well known, Italy has a different situation from Western countries in terms of the type of marriage. Thus, the concordat marriage - an alternative to civil marriage and an option for Catholics to enter into a religious marriage with civil effects (under clearly stipulated conditions) - is based on unshakable religious principles, springing from ancient Roman norms: *procreation* (s.n.), the indestructible character of family and marriage, monogamy, marital love etc.

The purpose of marriage in Latin-Roman antiquity was procreation, to ensure the continuity of the family and the Roman domestic religious cult. Yet, to procreate two people of different sex are absolutely necessary: female and male, otherwise the reproductive function of the family is non-existent. Even though in Roman antiquity and especially in the Greek antiquity homosexuality was tolerated, being commonly practiced, the ancestors of the Italians never accepted the conclusion of a marriage except between a man and a woman. Testimony in this sense is the famous definition of marriage given by the Roman juriconsult Modestinus: *Nuptiae sunt coniunctio maris et feminae* (...), that is, marriage is the union between *man and woman* (s.n.).

Regarding the prohibition of concluding a marriage of the mentally insane or debilitated (by art. 85 Italian Civil Code), some doctrinal voices (Auletta, 2011, p. 27) consider that it would be more appropriate a solution that, by modifying the rule in force, to allow the judge to assess the ability of the forbidden to make a conscious choice of marriage.

In one case², it was noted that a subject with Down syndrome should not be excluded from the celebration of marriage because they are able to make a conscious marital choice.

We believe that the Italian magistrate's solution deserves some brief comments regarding those affected by Down syndrome. It is known and scientifically proven that Down syndrome is not a disease, but a genetic change that has always belonged to the human condition, being universally present in all peoples and socio-economic environments in a proportion of 1 to 800 newborns, stating that its incidence varies from one geographical area to another.

The specialists in the field (doctors, geneticists) say unanimously that although this syndrome is not curable, the possibility cannot be ruled out that some of them may lead an independent life, the support they need in adult life requiring emotional relationships, as well as all the other people. Each person with Down syndrome is unique in their own way, their behavior, abilities, interests and achievements differing from case to case. The emotional life of these people can be the same as that of all other individuals, many of them being able to have an independent married life in the community they are part of, being necessary to eliminate any prejudices.

In this context of medical and psychological conclusions, a legal solution is naturally needed. The sentence given by the Italian judge, in principle, we consider to be correct from a human and medical-psychological point of view. However, we do not believe that such a solution could be used as an argument of universal judicial practice valid for all situations in which a person affected by such a syndrome would like to marry.

Is the judge entitled to decide in such cases who can and who cannot conclude a marriage?

Our answer is categorically affirmative, stating that the magistrate's solution must be based not on their strictly personal findings - not having the necessary specialized knowledge and skills - but on a medical and psychological expertise performed by professionals in the field.

Therefore, we believe that the people affected by such a syndrome, if they wish to enter into a marriage, should obtain authorization to do so from a court whose decision is subject to natural remedies. A judgment based on the conclusions of professionals in the field, whatever the solution, would remove, at least in theory, the risks of exclusion from marriage and the violation of a fundamental human right, that of marriage, eliminating the discrimination based on prejudice and subjective and superficial appreciation.

² Varese Tribunal, October 6, 2009, G.I., 10, 846.

CONCLUSIONS

A Regardless of the country or type of legal system in which nullity is generally applied, it is one of the most severe civil law sanctions, and the nullity of marriage, in particular, derogating from the rules of common law in this matter, is all the more serious due to its consequences, considering that the legal act of marriage was never concluded, therefore, the rights and obligations between the spouses never existed, the specific personal and patrimonial relations being extinguished.

As marriage is of particular importance both personally and socially, both Romanian and foreign legislators have sought to reduce as much as possible the particularly serious effects caused by the dissolution of marriage, thus creating a legal regime somewhat different from that of nullity in the common law, looking for solutions to restrict the cases of nullity, to reduce the limitation periods of the action for annulment, to cover the possibility of cases of absolute nullity a.s.o.

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