

THE INTEGRITY OF CONSENT TO MARRIAGE IN THE ROMANIAN LAW AND THE FRENCH LAW

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Abstract in original language:

The marriage is a legal deed which results from an agreement of wills. For the valid formation of the marriage, the assent of the future husbands must be expressed in full freedom and given with full knowledge of the facts, which supposes for it to be excluded of vices. In the matter of the assent to the marriage the vices of the will are in the Romanian law: the error on the physical identity of the other husband, the fraud and violence and in the French right the error and violence, the fraud being excluded.

Key words in original language:

Marriage, assent, husbands, error, violence.

1. INTRODUCTORY NOTIONS

Marriage is a judicial act which results from an agreement of wills. For the valid creation of this agreement the consent to marriage has to be freely expressed by the future spouses.

The condition of existence of a free consent when the marriage is concluded results from the provisions Art. 16 paragraph (2) of the Universal Declaration of Human Rights which establishes that the marriage can only conclude with the full and free consent of the future spouses, provisions that have also been resumed in Art. 23 par. (3) of the International Pact on Civil and Political Rights¹, as well as from the provisions Art. 10 pct. 1 from International Pact on Economic, Social and Cultural Rights² according to which no marriage can be legally entered into without the free consent by the future spouses.

Free consent when the marriage is concluded is also required by the provisions of the Romanian legislation and of those of the French one. Thus, under the Romanian law, the stipulations Art. 48 par. (1) from the Constitution and of Art. 1 par. (3) from the Family Code which show that family is founded on the freely consented marriage between spouses. Under the French law, the requisite of freedom of consent is regulated by Art. 180 par. (1) from the Civil Code which provides that if a marriage has been contracted without the free consent of the future spouses or of one of them, it can be contested by the spouses, by the spouse whose consent was not free or by the judge.

¹ Adopted by the General Assembly of ONU la data de 16. 12. 1966, ratified by Romania through the Decree of The State Council nr. 212/1974 published in the „Official Bulletin” nr. 146 from 20. 11. 1974

² Adopted by the General Assembly of ONU by the rezolution 2200A (XXI) from 16. 12. 1966. Romania signed the Pact at 27. 06. 1968 and ratified it through the Decree of The State Council nr. 212/1974 publicat în „Buletinul oficial” nr. 146 from 20. 11. 1974.

Being a fundamental element in forming marriage, the will of the future spouses has to be freed from vices only this way the marriage can be concluded with the full and free consent of those who want to get married.

2. VITIATED CONSENT IN MARRIAGE

2.1 THE VICES OF CONSENT TO MARRIAGE IN THE ROMANIAN LAW

In the Romanian law, the vices of consent to marriage are regulated in Art. 21 paragraph (1) in the Family Code according to which the marriage can be annulled at the petition of the spouse whose consent has been vitiated on the grounds of error regarding the physical identity of the other spouse, on the grounds of falseness or of duress. Therefore, in the matter of marriage the vices of consent are the error on the physical identity of the other spouse, willful misrepresentation and duress.

Error

Error leads to the annulment of marriage only if it bears upon the physical identity of the other spouse (Art. 21 in the Family Code). It concerns a circumstance that is highly unlikely to arise in practice due to the conditions under which the marriage is concluded: the personal presence of the future spouses before the Registrar of Civil Status, usually after a preliminary acquaintance and identification of them by the Registrar of Civil Status.

Error on civil identity, that is on the civil status of the other future spouse (for instance, he or she is divorced, although the other thought that he or she was single; or one of the future spouses thought that the other belongs to one family, while he or she belongs to another) does not constitute a vice of consent to marriage, and neither does any other error, such as that on physical qualities, on temperament, professional qualification, economic status etc., produce any effects on marriage.

The fact that law considers only the error concerning the physical identity of the other spouse is accountable by the need to avoid the situations in which, by invoking all kinds of cases of error, it would hurt the stability of the marriage and elude the stipulations concerning divorce by camouflaging it in the form of an action in annulling the marriage.

In judicial practice it was decided that the un-acknowledgement by a husband of his wife's state of pregnancy at the conclusion date of the marriage, a state that resulted from the relations she has had with another man and which she concealed from her husband before marriage does not constitute an error on the wife's physical identity since it was her he wanted to marry and not another woman³, yet such a concealment delusive of the state of pregnancy can constitute a legal reason to annul the marriage on account of malicious concealment⁴.

Duress

³ District Court Timiș, civil decision nr. 37/1970, in *The Romanian Law Magazine*, nr. 6/1971, p.150.

⁴ The Supreme Court, civil section, decision nr. 1049/1976, in *Collection of Decisions*, 1976, p.160.

Duress vitiates the consent of the future spouse by fear it has caused as a result of physical constraint (by threatening the person with causing imminent harm). Duress includes an objective element, constraint, and a subjective element, the fear induced, which determines the lack of freedom of consent of the future.

The duress acts exerted on the spouse whose consent has been vitiated have to have a certain seriousness and intensity, putting them in the objective position of not being able to oppose marriage⁵. The duress acts have to be appreciated as against the psychic state of that spouse⁶.

Not considered a vice of consent to marriage (duress) is the so-called „reverential fear”, that is the one due to the feeling of respect that sons or daughters naturally have towards their parents or other ascendants and towards their normal teachings and advice. In practice it was decided that moral pressure exerted by the wife’s parents in order to urge her to get married does not frame within the notion of moral duress, being likely to inspire at most a mere reverential fear⁷.

Given the conditions in which the marriage is concluded, in practice, the cases of duress are very rare.

Willful misrepresentation

Willful misrepresentation can lead to the abrogation of marriage whenever, commissively or omissively, one of the spouses determined the other to conclude the marriage by fraudulent means; in other words, when the error provoked was the one to determine the consent to marriage. being an error provoked, willful misrepresentation contains a subjective element, that is the error, and an objective element, that is the malicious means used to provoke the error.

In the matter of marriage a vice of consent is only the main willful misrepresentation, that is the one that creates an error in whose absence the person in question would have by no means concluded the marriage, not the incident willful misrepresentation too, that is the one by which an error is created in the absence of which the spouse in question would have nevertheless consented to concluding the marriage. Thus, the malicious means used by one of the future spouses have to be determined for the other to show their consent. The decisive character of the fraud must be appreciated from case to case depending on the life experience, the preparation and other dates concerning the one who claims to be a victim of the malicious means⁸.

⁵ Supreme Court, civil section, decizia nr. 1119/1974, în I.G. Mihuță, *Al Lesviodax, Repertoire of judicial practice in civil matter de of the Supreme Court and of other judicial instances, years 1969-1975*, Editura Științifică și Enciclopedică, Bucharest, 1976, p.17.

⁶ The Supreme Court, civil section, decision nr. 1005/1974, în *Culegere de Decizii*, 1974, p.166-167.

⁷ People’s Court, sentence nr. 373/1961, L.P. nr.12/1961, p.103.

⁸ The Supreme Court of Justice, civil section, decision. 2196/1999 in *the Bulletin of Jurisprudence, 1990-2003*, Made by S. Angheni, M. Avram, R. A. Lazăr, I. Ionescu, Editura All Beck, București, 2004, p. 480.

Willful misrepresentation is the cause for the annulment of marriage when it concerns qualities of the person of the future spouse, which if the other spouse have known, he or she would not have concluded the marriage. Hence, these qualities are subjectively decisive in order to conclude the marriage, but at the same time, objectively necessary to conclude the marriage. If one of the future husbands would be misled by malicious means by the other with regard to his economic status, decisive as it were for concluding the marriage, the error thus provoked cannot devise an action in annulling the marriage. What cannot likewise be decisive in forming the agreement of will when concluding the marriage, not being a motive to annul the marriage, is the concealment, through malicious manoeuvres, by one of the spouses of his or her real age, as well as of having been married before because it does not refer to essential personal qualities that can jeopardize the marriage⁹.

Willful misrepresentation constitutes a vice of consent and in the case in which the manoeuvres delusive are manifested in the form of reluctance¹⁰, that is by silencing certain situations whose knowledge by the other future spouse might have determined them to conclude the marriage. It is considered willful misrepresentation by reluctance the fact of willfully and wittingly concealing by one of the future spouses from the other, the disease that they suffer from or only its extent and its concrete manifestations, if the disease seriously affects the relations between the spouses¹¹, being incompatible with the normal unfolding of family life.

In order for the concealment of a disease to lead to the annulment of a marriage, it must present a certain seriousness. In the case of minor curable ailments that do not affect life, the spouse's health or the finality of the marriage, the omission to communicate them is irrelevant¹² since it would thus hurt the very institution of marriage and promote sanctions for irrelevant deeds in point of the purpose of the sanction stipulated by law¹³. In order for the annulment action to be granted proof must be given that the respective spouse had knowledge of that serious disease or of its forms of manifestation and that he or she deliberately fayed to inform the other spouse of the state of his or her health¹⁴. By virtue of Art. 1169 from the Civil Code proof of willful misrepresentation by reluctance, as a ground for acquiring nullity of marriage, is incumbent to the claimant¹⁵.

⁹ The Supreme Court, civil section, decision nr. 449/1977, n I.G. Miđuță, Al. Lesvioldax, *Repertoire of judicial practice in civil matter de of the Supreme Court and of other judicial instances, years 1975-1980*, Editura Științifică și Enciclopedică, București, 1982, p.13-14.

¹⁰ Supreme Court, civil decision nr. 779/1981, inCollection of Decisions, 1981, p.135.

¹¹ The Supreme Court of Justice, civil section, decision 764/1971, în I. G. Miđuță, *Probleme de drept în practica Tribunalului Suprem în materie civilă*, în Revista Română de Drept nr. 1/1973, p.119.

¹² The Supreme Court of Justice, civil section, decision nr. 324/1990, în Revista Dreptul nr. 9-12/1990, p. 232.

¹³ The Supreme Court of Justice, civil section, decision nr. 614/1978, in Culegere de Decizii, 1978, p.145.

¹⁴ The Supreme Court of Justice, civil section, decision nr.1373/1969, in I.G. Miđuță, Al. Lesvioldax, *Repertoriu..., 1969-1975, op. cit.*, p.17; The Supreme Court of Justice, civil section, decision nr. 2218/1984, in *Legislația familiei și practica judiciară în materie*, Ministerul Justiției, 1987, p. 267;

¹⁵ The Supreme Court, civil section, decision nr. 935 din 11. 03 2003, pe www. scj. ro.

In judicial practice it is established that causes for the relative annulment of marriage can be constituted by: the inability to perform the sexual act¹⁶; the inability to procreate¹⁷; pregnancy of the spouse, resulted from the intimate relations he had with another man, prior to concluding the marriage¹⁸, all these if they have been known and willfully concealed when the marriage concludes. Moreover, it has been decided that the genital malformation which does not constitute a sexual undifferentiating, but has the character of a disease which has been unknown by the other spouse, concealed from him, constitutes a cause for the relative annulment of marriage¹⁹.

2.2 THE VICES OF CONSENT TO MARRIAGE IN THE FRENCH LAW

With regard to marriage, from the provisions Art. 180 in the Civil Code it results that it can be attacked either because one of the spouses or both spouses failed to give free consent and, consequently, they underwent a violence, either because there was an error. Excluding the nullity of marriage for willful misrepresentation leads to rejecting the nullity action based on a cause of error which is not stipulated by the law, such as the error on the intelligence or on the character of the other spouse. But, if the willful misrepresentation involved the error of one the future spouses on the identity or on the essential qualities of the others, marriage obtains a judgment of nullity.

Error

In the regulation of the French Civil Code the error is a cause for the annulment of the marriage when it bears on the person and on the essential qualities of a person. This conclusion is arrived at by analyzing the provisions at Art. 180 paragraph. 2 in the Civil Code from which it results that if a spouse has been in error concerning the person or the essential qualities of the person of the other spouse, they will be able to ask for the nullity of the marriage.

Error on the person is looked at in the French doctrine as an error on the physical identity of the other spouse (an unlikely hypothesis when a person is substituted in the room of another) or on the their civil identity (for ex. one of the spouses presents themselves as belonging to a family it does not belong, one of the spouses has usurped the civil status of a defunct person etc.)²⁰.

¹⁶ The Supreme Court, civil section, decision nr. 2042/1976, in *Revista Română de Drept* nr. 5/1977, p. 67.

¹⁷ The Supreme Court, civil section, decision nr. 629/1975, in *Revista Română de Drept* nr. 11/1976, p. 42.

¹⁸ District Court Arad, civil sentence nr. 51/1972, notes by A. Pişcoreanu, in *The Romanian Law Magazine* nr.5/1973, p.111-114; Supreme Court, civil section, decision nr. 1049/1976, în *Legislația familiei, op. cit.*, p. 268;

¹⁹ Supreme Court, civil section, decision nr.1196/1972, in *Collection of Decisions*, 1972, p.199.

²⁰ To this effect see J. Carbonnier, *Droit civil. Introduction. Les personnes. La famille, l'enfant, le couple*, Presses Universitaires de France, Paris, 1955, 1956, Quadrige, 2004, p. 1172; F. Terré, D. Fenouillet, *Droit civil. Les personnes. La famille. Les incapacités*, Éditions Dalloz, Paris, 2005, p. 342; P. Courbe, *Droit de la famille*, 4^e éditions, Armand Colin, Paris, 2005, p. 48, F. Eudier, *Droit de la famille*, Armand Colin, Paris, 2003, p. 39.

Where the error on the essential qualities of the person is concerned, it has been shown in the judicial French literature that it is insufficient for the respective qualities to be essential for public opinion, instead they have to be essential for the spouse who is the victim of the error²¹ since these are essential qualities that they expected to find in the other spouse²². It is necessary for the error to have had a decisive character for the spouse who is the victim of the error in that if they had known the absence of the quality in the other spouse the moment the marriage act is concluded they would not have given their consent to it, a fact that can be proven by any means of proof²³. The duty of proof of the existence of the error is incumbent on the claimant²⁴. In the French law it has been considered that an error on the essential qualities is constituted by: an error on the respectability of the other spouse (for ex. they have a criminal record, they practiced prostitution etc.), an error which bears on the mental state of the other spouse or on their ability to have sexual relations, an error which bears on the existence of a religious marriage or a divorce, an error on the religious convictions of the other spouse²⁵.

Duress

Physical duress, existing at the moment of solemnizing marriage, is hard to find due to the solemnity implied in the conclusion of marriage. Moral duress is susceptible to vitiate the consent to marriage when manifesting in the form of pressure exerted on a person to coerce them into marriage, but it can also result from a previous physical duress²⁶.

Until the amendment of Art. 180 Civ. C. by Law no. 399 from 04. 04. 2006²⁷ the mere reverential fear for parents or ascendants did not constitute coercion to vitiate consent neither in the French civil law (Art. 1114 Civ. C.)²⁸. Nowadays, however, Art. 180 par. 1 Civ. C. provides for the exerting of a coercion on the spouses or on one of them, also including the reverential fear for an ascendant constitute a case of nullity of marriage.

²¹ See F. Terré, D. Fenouillet, *op. cit.*, p. 344

²² See F. Eudier, *op. cit.*, p. 40

²³ See F. Terré, D. Fenouillet, *op. cit.*, p. 344 și urm.

²⁴ See L Stasi, *Droit civil. Personnes. Incapacités. Famille*, Paradigme, 2006, p. 141.

²⁵ See P. Courbe, *op. cit.*, p. 49, F. Terré, D. Fenouillet, *op. cit.*, p. 344; C. Renault-Brahinsky, *Droit de la famille. Concubinage. Pacs et mariage. Divorce. Filiation*, Montchrestien, 2006, p. 84.

²⁶ P. Courbe, *op. cit.*, p. 49.

²⁷ J. Of. din 05. 04. 2006

²⁸ See F. Terré, D. Fenouillet, *op. cit.*, p. 342; P. Courbe, *op. cit.*, p. 50.

3. THE SANCTION OF THE VICES OF CONSENT

3.1 ACTION IN ANNULING MARRIAGE

3.1.1 PERSONS WHO CAN INVOKE RELATIVE NULLITY

In the case of vitiation of the consent, the marriage annulment action only concerns the spouse whose consent was vitiated by error, willful misrepresentation or duress, having a strictly personal character.

Hence relative nullity can only be invoked by the spouse whose consent was vitiated, as provided in Art. 21 par. (1) Family Code. The other spouse does not have the right to invoke relative nullity since the protection of the sanction of annulment does not concern his consent, who was not vitiated. Being an action with a personal character the creditors of the spouse titular of the right to annul are not entitled to enter action obliquely. Likewise, neither the heirs of the spouse titular of the right to action, cannot begin nor can they continue the annulment action, since each time the law-maker wanted for an action to be continued by the heirs he provided it expressly, as is the case of the action in establishing the filiation towards the mother, the action in establishing paternity, the action in denying paternity.

Under the French law, the annulment action for the vitiation of consent by error can only be begun by the spouse who is a victim of the error and the annulment action for the vitiation of consent by duress can be begun either by the spouses or by the one spouse whose consent was not free, and by the prosecutor (Art. 180 Civ. C.).

3.1.2 PRESCRIPTIBILITY OF THE ACTION IN ANNULING MARRIAGE

The prescriptible character of the action in annulling marriage results from the provisions Art. 21 par. (2) in the Family Code according to which the annulment of marriage in the case in which it was concluded by vitiating the consent of one of the spouses, can be demanded by him or her within 6 months from the cessation of the duressor from the discovery of the error or of the fraud. Under the French law, the term under which the relative nullity of marriage can be invoked on account of the vitiation of consent by error or by duress is within 5 years (Art. 181 Civ. C.) from the date on which the spouse became aware of the error or the duress ceased.

3.1.3 CONFIRMING MARRIAGE AS RELATIVELY NULL

Relative nullity can be confirmed by the spouse whose consent was vitiated because only they are interested in applying the sanction. The confirmation can be express– made through a written or oral, or tacit –without using by the entitled spouse of the opportunity to ask, in legal terms, for declaring a marriage null and void. Under the French law to the relative nullity of marriage can be confirmed expressly or tacitly by the spouse whose consent was vitiated, after the cessation of the duress or after having known the error, the validity of marriage thus being retroactively ensured²⁹.

Since the right to demand the annulment of marriage for vices of consent is a personal right of the spouse whose consent was vitiated, the law-maker makes the respective spouse "the only

²⁹ See F Terré, D. Fenouillet, *op. cit.*, p. 360.

judge of the validity of their marriage”³⁰, instead leaving him the liberty to claim the marriage as null and void, to be able to declare expressly that it deems it valid. In order for this declaration of express renunciation of the marriage annulment on grounds of vice of consent to be valid, it must be given after the discovery of the error or fraud or after the cessation of the duress for only then does the declaration emanate from a free will of the spouse. In the case of the tacit renunciation, the spouse whose consent was vitiated, although free in his consent continues to cohabit with their spouse in the period in which he or she was entitled to ask for the annulment of marriage.

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³⁰ Tr. Ionașcu, *Course of civil right, family law*, litographed, București, 1945, p. 252.