

# MARRIAGE NULLITY IN CANON LAW

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**Abstract:** *Among the fundamental and inalienable human rights is of course ius conubii. This is a personal right which translates in judicial terms the natural trend of man to marriage which may not be touched by a human law without affecting the human dignity.*

*By this “right” the church has tried to be the oriflamme to provide and facilitate to each man the access to free marital life without any constraint from any authority meant to repress this freedom.*

**Keywords:** *human rights, ius conubii, marriage, to free marital life, human law, human dignity.*

Within the state framework, and having a distinct character towards the state, occurred a distinct entity, i.e. an association, a community or religious organization known by different names, the Church being the most well-known of them.

The church has used the law in order to make out of it an ancillary of its saving mission and by combining the judicial with the religious and moral-religious standards it built an own law, the canon law or ecclesiastical law (*jus ecclesisticum*) whose individuality and utility for its mission have been, without any doubt, proved and confirmed.

Therefore, the canon law is the rules by which the church authority sets forth how the members of the church must act or behave under particular circumstances in order their action to be positively rated as related to the religious believe and ethical standards.

As well as the legal standards, the canonical standards apply on individuals in time and space.

Through time they produce effects and apply only for acts committed during their validity time. As a principle the canonical standards come into force at the moment of their establishment and there is no deadline for the cessation of their action<sup>1</sup>.

In space the canonical standards apply only within the church and as far as the persons concerns they apply to all church members irrespective of their state.

In the next pages we will try to approach the subject of this dissertation under the point of view of canon law in the form regulated in the Romanian Orthodox Church and the Catholic Church.

## **A. The orthodox canon law**

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<sup>1</sup> The canonical doctrine does not know the abrogation acts (dissolution and total putting out of force), derogation (temporary or partial dissolution), subrogation (adding of a new part to an existing law), abrogation (removal of a part and partial replacement with other laws), or prorogation (prolongation of the validity of a law only for a certain period of time).

The Holy Sacrament of wedding is the holy work by which is finalized by grace the agreement to marry of two. The religious blessing of the marriage, i.e. wedding is also called with a general sense religious celebration of marriage.

According to the Orthodox Church the obstacles to wedding are divided into four categories: religious conditions, moral conditions, physical conditions and social conditions.

The main *religious* conditions which must be fulfilled by the receivers of the Holy Sacrament of Marriage are: the orthodox believe or the right believe; valid baptism; the capacity of being a full rights member of the church<sup>2</sup>; neither of the spouses is permitted to previously had a religious or civil registry marriage and if previously married they must obtain the civil and religious divorce; neither of the spouses are permitted to enter into a marriage more than three times; the persons must not be spiritual or religious affiliate in a degree not allowed by church in order to marry; both persons must have the same religion or confession (*mixta religio*) must not be heretic or schismatic (*disparitas cultus*); the male should not have taken the holy orders as priest or ipodeacon<sup>3</sup> and for the female there is also the interdiction in the old church to be part of a religious association of widows, presbyters, eremites, virgins, deaconess and not to have taken the holy orders as deaconess<sup>4</sup>; none of the persons is allowed to previously have given the oath as monk or sister or for celibacy; to have orthodox godfathers and godmothers that had a wedding celebration before the church and have the same denomination; to have religious dispense if such a dispense may be obtained if such impediments exists.

The main *moral* conditions which must be fulfilled by the receivers of the Holy Sacrament of Marriage are: to be aware, i.e. to have sound mind and be responsible; to be able to freely express their consent for the marriage; to be moral, i.e. not to have committed severe moral offence putting them in the moral incapacity to marry and making them morally unfit for entering into marriage ; the person to whom the priest candidates marry must be virgin<sup>5</sup> and, generally be in blameless moral condition<sup>6</sup>, i.e. not to be widow, divorced, etc.; not to be affiliated in a degree not permitted by church for marriage; to have a dispense for impediments if such a dispense is possible

The main *physical* conditions which must be fulfilled by the receivers of the Holy Sacrament of Marriage are: not to have the same gender; to have the needed health, i.e. not to suffer from illnesses that might endanger the health of other spouse or descendants; to have the physical integrity required by the family life and marriage goal, i.e. to have normal genitals; to have the marital age, i.e. the age required by civil and church law to be permitted to enter into a marriage; to have the physical capacity, i.e. potency needed for fulfilment o marital duties, that means not to lack this capacity due to infirmities; to physically appear for celebration of marriage and taking the Holy Sacrament of Wedding; not to exist a physical affiliation or alliance in an extent not permitted by church for marriage; to have a dispense for impediments if such a dispense is possible.

The main *social* conditions which must be fulfilled by the receivers of the Holy Sacrament of Marriage are: to be citizen of the state where marriage is celebrated and to be

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<sup>2</sup> The person in question must not have been excommunicated under anathema or under any other punishment which might hinder her/him to receive the Holy Sacrament of Wedding as for example the simple interdiction to receive the Holy Communion.

<sup>3</sup> Canon 26, ap.6, VIec.

<sup>4</sup> Canon 15, IV, ec.

<sup>5</sup> Nov.Just. VI, 1,3,22,42 Big Code of Law, Glavele 58 and 61

<sup>6</sup> Canon 17, 18; ap.44 VI, ec.

legally competent as far as the civil rights concerns, not to stand under interdiction; to have full social freedom, i.e. not to be in prison or in other situation restricting their ability to take the decision to marry and to be able to fulfil it without the consent of dependants; to have the approval of the superior authority or competent bodies if such an approval is needed for persons under special conditions; to perform the registry office marriage in advance and to lay down the proof; to have the needed dispense, if applicable.

### **B.Catholic canon law<sup>7</sup>**

As opposed to the law of Oriental Churches, in the Latin canon law the spouses are fulfilling the act of marriage and not the priest or deacon who by this is merely assistant. The catholic canon law of marriage refers only to those who received the baptism from the Catholic Church<sup>8</sup> and not to those who abandoned this church by a formal act<sup>9</sup>.

#### **1. The consent**

The first paragraph of the canon referring to consent was not changed as compared to the previous code: “the marriage is established based on the consent of the parties lawfully expressed among persons having legal competence; in this consent cannot intrude any human power”<sup>10</sup>In Canon no.1057 we can read: “the consent to marriage is the intended action by which a man and a woman give and receive themselves to each other by an irrevocable union for establishing the marriage.”By this is specified that the body is not reduced to the corporal entity as the concept includes the person by itself i.e. the soul. According to the canon standards: “the following person do not have the capacity to marry: 1) those lacking full spiritual faculties; 2) suffering from a severe form of discernment deficiency regarding the rights and reciprocal duties needed for the marriage; 3) because of psychical causes are not able the undertake the essential obligations of the marriage.”

#### **2. Errors in assessment of the person and of her/his qualities**

If the defective assessment of the person as natural person obviously invalidates the marriage<sup>11</sup>, in spite of the fact that such type of error is not very close related to the reality, the concept of error has evaluated both in canon and civil law.

#### **3. Fraud**

The concern for not infringement the law of indissolubility has always determined the Catholic Church to exclude the frauds from the causes of marriage nullity. In spite of this, just like the French civil code, the canon law took into consideration, in practice, the fraudulent character of error.

#### **4. Doctrinal error**

This name is given to the error which may affect both an essential propriety of the marriage (unity and indissolubility) and his dignity as a sacrament. Such an error does not alter the marriage consent “as long as it does not have an influence on will”<sup>12</sup>, with other words when it is kept in the conceptual field.

#### **5. Simulation**

The horse sense assumes that the consent is “in accordance to the words and signs used in marriage celebration” too<sup>13</sup>. Such a presumption cannot resist before a contrary proof because it is possible to simulate the consent either by rejecting the marriage itself in

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<sup>7</sup> Dreptul canonic, Ediția a 2-a, Editura Dalloz, 1999

<sup>8</sup> Canon no. 1059

<sup>9</sup> Canon no. 1086

<sup>10</sup> Canon no. 1057

<sup>11</sup> Canon no. 1097

<sup>12</sup> Canon no. 1099

<sup>13</sup> Canon no. 1101, paragraph 1

spite of appearances or by exclusion from consent of one of its fundamental proprieties or elements<sup>14</sup>. This last type of omissions are named partial simulation in order to distinguish them from total simulations, but this individualization is a faulty one as both have the same result: marriage nullity.

### **6. Total simulation**

“That one who plays off wants to play off”. The simulation of the marital consent may not be imagined without a positive act of will that is not similar to an alleged act. Therefore it is important not to take a strained consent for a simulated consent.

### **7. The refuse**

As against the total simulation, the refuse involves the intention to enter into marriage but this intention becomes inefficient because it is accompanied by a clear intention to banish an inherent element of the marriage union: either one of the “essential proprieties” (unity and indissolubility), or one of the “essential elements” i.e. the mutual support of the spouses and the conception and education of children. In this case is needed a will act too (it is desired a "different", dissoluble marriage with-out children, etc.) and such an act consists of a “concept” in opposition to marriage. The refuse of unity, indissolubility and conception can properly be more often found than the refuse of the mutual support of the spouses, not providing of such a support is rather the result of incapacity than of refuse, at least generally speaking.

### **8. The conditioning**

While the Code of 1917 took into consideration three forms of conditioning the future, the nowadays code has not kept this distinctions and the Canon no. 1102 simply states: “the marriage occurring as a consequence of a conditioning of the future may not be validated”.

The second paragraph of the canon takes into consideration the possibility of a marriage concluded under a condition related to past (“I only marry you when you did not have a previous relationship”) or the present (“I only marry you if you are virgin”): the marriage is valid or not “if the condition object exist or not”.

### **9. Violence and fear**

In Canon no.1087 of the Code of 1917 we can read: “The marriage entered into as a consequence of severe violence coming unduly from outside from which a person is able to escape only by choosing the marriage” is not valid and "any other fear even if it is a source of the contract does not lead to the nullity of marriage”.

This second paragraph has not been retaken by the Code of 1983 and that means recognition, in some extent, as in fact it is done by the jurisprudence, of the option a previous lack of interior freedom to exist which may lead to the nullity of marriage.

### **Obstacles to marriage in canon law**

“Are allowed to marry all those not standing under a law interdiction”. The right to marriage has been always recognized by the Church and it is suffice to quote from the encyclical *Pacem in terris* of 11 April 1963 of Pope John the 23<sup>rd</sup>: “Anyone is entitled to the freedom to choose his way of life. Consequently anyone has the right to establish a home ... or to follow the sacerdotal and religious way” (1,15).

The Code of 1983 does not contain anymore the interdictions named prohibiting in the old law which makes the marriage unlawful. In spite of this, the interdiction of a

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<sup>14</sup> Canon no. 1101, paragraph 2

mixed marriage "without having the permission of the competent authority"<sup>15</sup> seems to be a disguised obstacle.

Only the supreme authority of the Church is recognized as having the power "to really declare the moment when the divine law hinders or makes void a marriage" and also "to set forth other interdictions for the baptized people".<sup>16</sup>

The code contains twelve invalidation interdictions. The interdiction referring to spiritual affiliation existing between the person solemnizing the baptism (not necessarily the priest) and godfather and, on the other hand, the baptized person has not been kept (Canon no. 768 of the Code of 1917). In return, the affiliation relationship created by adoption is neither from now on an invalidation interdiction, while the Code of 1917 had the same opinion as the civil law by considering a marriage as void if it has been decreed by law.

#### 1. Age (Canon no. 1083)

"The man is not allowed to marry before reaching the age of sixteen years and the woman the age of fourteen years".<sup>17</sup>

The required age for a valid marriage is not determined only by the capacity of fulfilling the sexual intercourse. The maturity of judgment needed for giving a true consent plays an important role especially because the age stipulated in the Code, applying to all countries, may be considered a little bit to low in some of these countries (The French civil code is more severe Article 144).

#### 2. Impotence (Canon no. 1084)

As against the secular law, the canon law designated the impotence, of male and female, as an obstacle leading to the annulment of marriage "by its nature" and that indicates that no dispense may be granted. It is meant the incapacity to fulfil the sexual intercourse (*impotentia coeundi*) and not infertility (*impotentia generandi*). The latter one does not mean an obstacle but according to the Canon no. 1098 it might be interpreted as fraud.

The incapacity to fulfil the sexual intercourse must be prior to marriage and, above all, it must be incurable. By this the jurisprudence means: incurable if not exceptional or unlawful means are used which may endanger the life of persons.

No matter if the impotence is absolute (towards any persons) or relative (towards certain person).

#### 3. Bond (Canon no. 1085)

If a person is bonded by a prior marriage, even unconsumed, he/she is not allowed to marry if the former spouse is still alive. The Christian marriage has a monogamous character and one of its top priorities is even the unity.

As a conclusion "a concluded and consumed marriage cannot be dissolved by any human instance for any reason, but only by death."<sup>18</sup>

#### 4. Denomination differences (Canon no. 1086)

The marriage entered into by two persons, out of which one has been baptized by the Catholic Church or entered into this Church and has never left it by a formal instrument and any other not baptized person is not valid.

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<sup>15</sup> Canon no. 1124

<sup>16</sup> Canon no. 1075

<sup>17</sup> Canon no. 1083

<sup>18</sup> Canon 1141

“Do not be bound together with unbelievers” wrote St. Paul in the Second Epistle to the Corinthians (6,14), but in his first epistle he preaches the separation of an “improper” bond only for the cases in which a Christian was living together with a non-Christian.

In the case of marriage of spouses belonging to different denominations they need a dispensation for denomination differences which may be easily granted. After receiving the baptism they must not renew their consent and their marriage becomes a sacrament.

#### 5. Holy order (Canon no. 1087)

Before the 4<sup>th</sup> century, both in western and eastern world, no canon law, general or particular, was interdicting the ordination of married men or their obligation to separate from their wives and to be abstinent. This is the practice kept by the eastern Churches inclusive the Catholic Church in this area, with the only exception of marriage after ordination (monks do not marry).

As far as the Latin Church concerns, two different distinctions occurred in the 4<sup>th</sup> century. The first one does not allow a priest to marry after his ordination and the second one does not allow to a married man to have sexual intercourse to his woman after his ordination (he is allowed to continue to live with her).

In spite of being often mentioned, the canon standards regarding abstinence have been frequently breached, up to the moment the Gregorian reform (of Pope Gregory the 7<sup>th</sup> in the 12<sup>th</sup> century) brought more efficiency by being more rigorously controlled. At the end, in the second synod of Latran, in year 1139, the interdiction for clergy, starting with sub-deacon has been recognized as having an annulling character from canonical point of view: “We do consider, declares the synod, that such a bond (entered into by a person belonging to clergy) is not a *real marriage*.”<sup>19</sup>

The abolition by Pope Paul the 6<sup>th</sup> of the sub-deacon order has not changed the principle of mandatory celibacy for the clergy of the Latin Church<sup>20</sup> and the breach of law makes one passible of *latte sententiae*<sup>21</sup> punishment.

#### 6. Perpetual chastity oath in a religious institution (Canon no. 1088)

This interdiction according to which the “persons bounded by a perpetual chastity oath in a religious institution” cannot enjoy a valid marriage is linked to the previous interdiction.

The interdiction to marry, which applies to the immaculate persons, monks (not necessarily priests) has been applied by various punishments over the centuries but not by making void the bond. As well as for the ordinate persons, the second synod of Latran of 1139 declares void the marriage entered by “ordinary clergy and monks”.

The Canon no. 1088 valid nowadays has a strict interpretation. It refers to persons, men and women, which publicly make an oath, i.e. “received in the name of the Church and by an authorized superior”<sup>22</sup>, a perpetual chastity oath in a religious institution defined by the Code as “a society in which the members may make public perpetual or temporary oaths by own law which may be renewed when they expire and have a common life in brotherhood”.<sup>23</sup>

#### 7. Abduction (Canon no. 1089)

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<sup>19</sup> Canon no. 7

<sup>20</sup> Canon no. 1087

<sup>21</sup> Canon no. 1394

<sup>22</sup> Canon 1192

<sup>23</sup> Canon 607

The interdiction regarding abduction appears between the man and the woman he abducted or retains in order to marry her. The goal of this canon is to protect the woman freedom.

For this interdiction to be accomplished there are needed three conditions: a) a man to kidnap a woman (not vice versa) or to seize her (at his place or somewhere else), b) against her will; c) the sequestration to be done with the goal of marriage and not for another goal. The interdiction does not apply when the woman “at the moment of separation from abductor and being free” chooses „suddenly to marry” and that is also why dispense is not applicable.

#### 8. Crime (Canon no. 1090)

The secular law has named this interdiction as complicity to adultery. Abolished in 1904 he was part of French civil code for about hundred years.

At Jewish people the adulterine woman and her accomplice were punished with death.<sup>24</sup> “At Rome, Augustus declared that a woman sentenced for adultery is not permitted to marry.”<sup>25</sup> As far as the adultery of the husband concerns, often hard to be proved, this was ignored by law. At the apparition of Novela 134 (Chapter 12) from year 556, occur measures against the adulterine husband who marries his accomplice.” In the canon law of the Catholic Church the case of relationship based on the promise of marriage is deemed as a crime and that was also the law contained in the Code of 1917. It was easy to receive dispense for such a "crime" and perhaps that is why the actual Code has not kept this “crime”.

At the time being the interdiction aims only the conjugal crime itself, and does not allow, on one hand, the marriage of those who murdered the husband or the wife of a person he/she wants to marry, and on the other hand, “of those who killed their spouse by a physical or moral action”.<sup>26</sup> In this case is not necessarily needed the intention of marriage to exist at the moment of crime.

#### 9. Consanguinity (Canon no. 1091)

The consanguinity or blood affiliation makes void a “marriage between all ascendants and descendants both lawful and natural”, i.e. direct line. By collaterally line the marriage is not permitted “up to the 4th degree of affiliation inclusive”, with other words between cousins, and between the children and brothers of grandparents and vice versa.

The Code of 1983 has not kept the registration way and has adopted instead the civil (and Roman) registration way. It has reduced the range of interdiction which in the previous code applied also to cousins. Furthermore, it has removed the renewal of the interdiction and consequently the obligation to apply for more dispenses granted by the local Ordinary.

#### 10. Affinity (Canon no. 1092)

The affinity or the relationship by marriage which bonds the husband to all wife’s relative and vice versa, interdicts the marriage at any degree or in direct line. Up to the Code of 1917 the affinity was originated not only in a valid marriage but also in unlawful sexual intercourse (*affinitas ex copula illicita*). The code of 1917 has reduced the interdiction to affinity in indirect line “up to the 2<sup>nd</sup> degree included” according to

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<sup>24</sup> Lev 20, 10; Deu. 22,22

<sup>25</sup> D 48, 5, 12, 13

<sup>26</sup> Canon no. 1090

canonical specification that at the time being does not anymore exist. The interdiction for collaterally line comes no more in discussion.

11. Public honour (Canon no. 1093)

The public honour is a half-affinity. It “occurs by a *void* marriage after a common life has been established or from a *manifest or public concubinage*”. The interdiction “does not allow the 1<sup>st</sup> degree marriage in direct line between the man and the natural relatives of wife and vice versa.” The old law has taken into consideration the interdiction for public honour having as source the engagement, this interdiction being abolished by the Code of 1917, which preserves only those of an invalid marriage (a strict civil marriage of the spouses ruled by a canonical form) or of a public or manifest concubinage (the interdiction does not apply if the concubinage has not a public character). The code valid nowadays retakes the previous code and reduces its area.

12. Affiliation by lawful adoption (Canon no. 1094)

“All those bounded by affiliation as consequence of adoption, in direct line or of 2<sup>nd</sup> degree in indirect line are not allowed to marry each other” (Canon 1094). The canon law has late taken into consideration the affiliation by adoption. The Roman law interdicts the marriage between the parents and the adoptive children and between the adoptive brother and sister. It seems that these stipulations got lost during the Middle Age when even the adoption disappeared. The interdiction occurs in the Gratian's Decree (13th century) but the old theologians have no attached to much space in commenting it and sometimes they hesitated on its judicial dimension. The Code from 1917 overlaps the civil law: according to the Church the marriage is void when this was precisely mentioned by law.

Since then, the interdiction has still an invalidation character according to the provision of Canon no.1094. We have to point out that this applies to the legal affiliation occurred by adoption. In the case of *de facto* adoption there is no interdiction. Dispense from interdiction is granted by the local Ordinary who must take into consideration the provision of the French Civil Code (Article 366).