# Drept civil

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## THE PROBLEM OF WEDDING IMPEDIMENTS IN THE CONCEPT OF NEW FAMILY AND CIVIL LAW REGULATIONS

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În scopul întemeierii unei familii trainice şi sănătoase, atât din punct de vedere fizic, cât şi moral, care să-şi poată îndeplini funcţiile ce-i revin în cadrul societăţii, încheierea căsătoriei este supusă anumitor cerințe legale: condiţii de fond, impedimente la încheierea căsătoriei și condiţii de formă. Condiţiile de fond la încheierea căsătoriei sunt acele condiţii obligatorii care trebuie să existe pentru a se putea încheia căsătoria. Lipsa lor determină imposibilitatea încheierii căsătoriei. Ca natură juridică, impedimentele sunt limite legale ale capacităţii matrimoniale sau ale dreptului de a încheia o căsătorie (incapacităţi speciale). Condiţiile de formă şi, în special, încheierea căsătoriei în faţa reprezentantului de stare civilă constituie forma recunoaşterii sociale a căsătoriei, premisa ocrotirii acesteia de către stat. Cunoaşterea acestor dispoziţii, privind modul de încheiere a căsătoriei şi condiţiile de formă, contribuie la stabilirea unei atitudini sănătoase faţă de instituţia căsătoriei.

***Cuvinte-cheie**: căsătorie, rudenie, adoptator, curator, condiție de fond, impediment, condiție negativă, opoziție la căsătorie, etc.*

In order to establish a strong and healthy family, both physically and morally, capable of fulfilling its functions within the society, the conclusion of the marriage is subject to certain legal requirements: basic conditions, impediments to the marriage conclusion and formal conditions. The basic conditions to conclude a marriage are those mandatory conditions that must exist in order to get married. Their lack determines the impossibility of getting married. As a legal nature, the impediments are legal limits to matrimonial capacity or the right to get married (special incapacities). The formal conditions and, in particular, the marriage conclusion in front of the civil status representative is the form of social recognition of the marriage, the premise of its protection by the State. Knowing the provisions about marriage and formal conditions helps you to establish a healthy attitude towards the marriage conclusion.

***Keywords**: wedding, kinship, adopter, guardian, basic condition, impediment, negative condition, opposing to marriage, etc.*

**Introduction**. I started this approach, noting that many of those who want to get married do not know what conditions they have to follow for this, and after marriage, what are their obligations and rights, and more precisely what is their legal status. The conclusion of the marriage has been the subject of attention of many doctrines, since the earliest times, many of them have always sought to give the family an appropriate organization, in order to meet its purpose and important role. Moreover, no institution has such a decisive role for the human being and society as the family, standing next to it or losing its own or the public good side; it can also ruin the nations' wealth. It can be very well compared to a foundation and it is known that if the foundation is strong in a house, the building is firm, so the entire society progresses if the family is placed on sound ideas.

**The applied materials and methods**. The general methods of knowing the science of law, such as: historical, deductive, logical, analytical, comparative, structural and systematic, etc. represent the methodological basis of this research. These specific research methods have been used and combined, depending on the issues addressed in the paper. Thus, the first method used is the deductive method, through which the analysis of the texts of doctrinal speeches was carried out, a method that is found throughout the whole research. The analysis made by the author was different, combining the presentation of the theoretical elements with exact factual situations in the jurisprudence, so that the work is not only a rendering of doctrinal texts, but also a real analysis of concepts. Due to the comparative method, the problem of impediments has been studied through the approaches of the most well-known researchers. However, during the analysis of the subject, the author has also used some special methods of research such as: statistical, psychological, sociological, etc.

**The results and discussions**. The negative background conditions (impediments or barriers to marriage) are factual or legal circumstances that prevent marriage from being concluded. As a legal nature, the impediments are legal limits to matrimonial capacity or the right to get married (special incapacity). Indeed, the right to get married is a fundamental right of the person, given by the 48th article, passage (2) of the

Constitution and the 12th article of the ECHR, but its exercise is subject to the laws of each country, which exactly determine the legal conditions required to conclude a valid marriage. The biological, psychological, social and moral reasons are at the basis of the impediments.

Both the doctrine and the legislation make a difference between the conditions and the impediments, as the fulfilment of the conditions is proved by the documents that are filed in the marriage file (birth certificate, marriage declaration, etc.), and the impediments are declared only by the future spouses or are invoked by to third parties by opposition to marriage, or invoked by the civil status representative, who also has the obligation to verify those declared by the spouses or the third parties.

In the doctrine we find a multitude of criteria, depending on which the impediments to marriage are classified, but three of these criteria are of greater practical significance. So:

a) According to *the sanctioning of breaking the impediment*, the impediments can be: voidable and prohibitive. The impediments are voidable when their violation implies the sanction of absolute nullity of marriage. The category of voidable impediments includes: bigamy, blood relatives, straight lineage resulting from adoption, alienation or mental debility, same-sex marriage. The prohibitive impediments do not attract the absolute nullity of marriage, but only administrative penalties for the official who was not vigilant to observe them. The impediments to marriage between the adopter's children with the adopter or his children (i.e. between the adopted brothers) and between the guardian and the minor under protection are prohibitive.

b) According to *the people to whom the marriage stops*, the impediments are: absolute and relative. According to the second criterion, the impediments are absolute when they stop the marriage to any person. There are absolute impediments, such as: bigamy, alienation or mental debility and same-sex marriage. When the marriage is banned only for certain people, the impediments are relative, so this category includes: natural kinship, adoption, guardianship, etc.

c) According to *the criterion of the reasons or purposes for which they were provided*, the impediments are of physical, psychic and moral nature. This classification is not legal, but it explains the purpose of the impediments. Thus, physical impediments are justified by biological, physiological, and moral considerations (e.g. blood relatives); the impediments resulting from adoption and guardianship are justified by moral reasons; the impediments resulting from alienation and debility are justified by biological, psychological and social considerations.

All the impediments to marriage are expressly provided in the 15th article of the Family Code. Thus, the marriage is not admitted between:

a) people, of whom at least one is already married;

b) close relatives up to the fourth degree, brothers and sisters, including those with a common parent;

c) the adopter and the adopted person;

d) the adopted person and the adopter's close relative up to the second degree including;

e) the curator and the minor person under his or her guardianship, during the period of the guard;

f) people who, at least one, is provided with a measure of judicial protection (provisional protection, trusteeship or guardianship) and when there is no authorization provided by law at the conclusion of the marriage;

g) people who are sentenced to imprisonment while they are doing penance;

h) people having the same sex.

As regards the first limitation provided by the law, namely that ***the marriage between people of which at least one is already married***, it is only an impediment that is imposed by the virtue of the principle of monogamy [1, pp. 12-15]. Thus, a person can successively conclude more marriages, but not simultaneously. The violation of this provision, which in fact violates the principle of consecrated monogamy, is called bigamy (polygamy) and it is sanctioned by the 41st article of the Family Code. The impediment is voidable, since its violation is sanctioned with absolute nullity and absolute (the married person cannot marry any other person).

In the case of two successive marriages, we can make some specifications regarding the destiny of the first marriage:

- if the first marriage was not valid and it is being nullified, but the person concludes a second marriage, there is no bigamy even if the first marriage is declared null at the end of the second marriage because the nullity has, in principle, retroactive effect;

- if the first marriage breaks out by divorce, there is no bigamy, but only if the second marriage is concluded after the date of the final divorce or, as the case may be, from the date of the divorce certificate being issued by the civil status officer, in the case of the administrative divorce;

- if the first marriage is terminated by the death of one of the spouses, there is no bigamy, if the date of the second marriage is after the date of death, in the case the spouse from the first marriage is declared dead by the court's decision, only the date of death

established by the court order presents interest, and this date must be before the new marriage is concluded by the surviving spouse.

A practical situation that needs to be elucidated occurs when a person's spouse declared dead has remarried and after that the declaration of death is void, the new marriage is valid and the first marriage is dissolved on the date of the new marriage. This is a case of seemingly bigamy solved by the legislator in favour of the second marriage, taking into account that it is the one that produces effects, through the fact that family relationships exist and that the spouse of the person declared dead was in good faith at the conclusion of the second marriage. Only in this case there is no bigamy and the effect of voiding the first marriage occurs on the date of the second marriage. If, however, the spouse of the person declared dead was in bad faith, that is, he knew that in reality the deceased spouse is alive, then he is guilty of bigamy, and the second marriage is nullified, being concluded with the violation of the impediment which resulted from the existence of an earlier marriage.

The impediment of blood ***kinship***, which is opposed to marriage between close relatives, has been known since the ancient times. It imposed itself, in order to ensure a healthy ancestry as well as for moral considerations of family relations [10, p. 63]. Therefore, breaking the impediment resulting from blood kinship is sanctioned both by the nullity of the marriage and by the incrimination of the sexual intercourse between the first-degree relatives up to the third degree, including brothers and sisters in collateral line. According to the 15th article, the first passage, letter b) of the Family Code, the marriage between ***the first-degree relatives, up to and including the fourth degree, brothers and sisters, including those with a common parent***, is forbidden.

The second, third and fourth degree relatives are excluded from the text of the law, which implies that these relatives may marry each other. We consider this to be inadmissible, at least from the biological and medical points of view, because it is considered that the unions between close relatives are thought to have an unfavourable influence on family life and do not provide healthy descendants. Perhaps this is an error of the legislators and we believe that this will be corrected. In our opinion, this impediment should be reformulated as follows: "*The marriage between the first-degree relatives, indefinitely, and between the relatives up to the fourth degree inclusive is forbidden*."

Two clarifications are necessary with regard to this impediment: kinship is an impediment regardless of whether it is from the marriage or not: for identity of reason, the kinship which is not from the marriage is an impediment to marriage, even if it was not legally established.

And the relationships resulting from ***adoption*** are an impediment to marriage. Family law, i.e. the 15th article, part (1), letters c) and d) of the Family Code [3], provides that the marriage is interrupted: between the adopting person and the adopted one; the adopted person and the adopter's close relatives up to the 2nd degree inclusively. Here we can add that the marriage between those adopted by the same person is also forbidden.

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

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 ceases 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 connection;

b) As regards the relations between the adopter and his relatives, on the one hand, and adopted person, on the other hand, the marriage is also forbidden, because the adoption, being full of effects, is assimilated to natural kinship.

This impediment is justified primarily by the moral considerations, because practically, the people mentioned in the 15th article, part (1), letters c) and d) of the Family Code [3] lead a common family life. Secondly, it means a legal consideration, namely, avoiding the overlapping of the relationship of marital kinship, resulting from marriage, with those resulting from marriage.

The Family Code also provides that during the trusteeship ***the marriage between the curator and the minor person under his guard is also stopped***. Obviously, the impediment works as long as the trusteeship exists. The marriage becomes possible after the person stops to be a curator or the court closes the trusteeship. We consider that this impediment is justified by the following reasoning: to protect the person under guard against a marriage concluded by the curator because of material interest; in order to avoid influencing or distorting the consent of the person under guardianship.

Another impediment provided in the 15th article, passage (1), letter f) of the Family Code [3] consists in ***prohibiting the conclusion of a marriage between the people, towards whom a judicial protection measure (provisional protection, trusteeship or guardianship) is established and there is no authorization provided by law at the conclusion of the marriage***.

For a detailed analysis of this impediment, it is necessary to specify which people fall within the category of those who benefit from a temporary protective measure. Thus, according to the 65th article, part (1) of the Civil Code of the Republic of Moldova [4] a person who has reached the legal age or who has acquired full capacity in another legal way and who, due to a mental illness or physical, mental or psychological deficiency, cannot, fully be aware of his/her actions or express the will, may benefit from a protective measure, established according to his/her state or situation. The judicial protection measures vary according to the intensity of intervention in the person's life. If the previous civil law provided the lack of legal capacity and the establishment of guardianship as the sole protection measure, the new changes in the civil law propose diversification to respond to the need to adopt the measure to the specific situation of the individual concerned. The proposed measures are:

a) Temporary protection, which is for a short period of time (maximum 12 months). The court will designate a temporary guardian who will assist (approve) the person protected in certain documents or represent him/her in those documents. The temporary protection does not affect the legal capacity of the protected person, except in the area in which the temporary guardian acts;

b) The trusteeship lasts for a maximum of 5 years. The court will designate a curator who will assist the protected person in certain legal documents by consent or he will represent him/her in some legal documents. With regard to these documents, the person *is limited in legal capacity*, but he remains able to conclude all other documents.

c) The guardianship lasts for a maximum of 5 years. The court will designate a guardian who will represent the protected person in all his documents. The guardianship has the effect of depriving of the legal capacity, except for the documents expressly permitted by law (e.g., current documents of little value) and by the court's decision (the court may expressly state which acts may be concluded by the guardian).

And if we have to go back to the impediment, the marriage of the person, in respect of whom the trusteeship has been established, *is allowed at the person's own will* on whom the protection measure was established, if the court did not order to establish the trusteeship, that this is only allowed with the consent of the curator or, in the case of the curator's refusal, with the authorization of the guardianship authority. In accordance with the 120th article of the Civil Code of the Republic of Moldova, the marriage of the person, to whom the guardianship was established, is permitted only with the authorization of the family council or, in its absence the guardianship authority, after hearing the future spouses and, where appropriate, the parents [4].

With regard to this impediment, certain clarifications are required, namely:

- If the person is subject to the temporary protection measure and does not affect his / her legal capacity, he / she may conclude the act of marriage by himself/herself, provided that he / she is assisted by the temporary guardian;
- If the person is subject to the protection measure in the form of a trusteeship, a measure which limits him / her in the legal capacity, the conclusion of the marriage is allowed at the person's wish, only if the court has not ordered by a decision that it is possible only with the curator's consent or guardianship authority;
- If the person is subject to protection in the form of guardianship, the measure that leaves the person without the legal capacity, the conclusion of the marriage is only allowed with the permission of the family council or the guardianship authority and after the hearing of the future spouses and, if appropriate the parents.

The family law also ***prohibits the marriage between the people sentenced to imprisonment, while they are in prison***. This impediment is part of the category of relative impediments and it is justified by not respecting the purpose of the marriage and the family provided by law. Or, the foundation of the family relationships is the content of marriage, its necessary and determining cause [7, p.13]. The conclusion of the marriage generates a multitude of relationships of a different nature: social, moral, legal.

The personal effects are the main category of the marriage consequences, which subordinates its class to patrimonial effects and materializes in a broad spectrum of marital relationships lacking in economic content, and their valuation in money is impossible. The doctrine of the Family Law[8, pp. 76-82] believes that through the personal effects of the marriage, we must mainly understand the following non-patrimonial obligations that the spouses assume through the marriage: granting mutual moral support; marital fidelity; common dwelling; marital duties, etc. Moreover, the spouses have the obligation to agree on all marriage issues. This obligation is based on the mutual trust and respect that one owes to the other one. The spouses will decide together on both their public and private lives, will make decisions on all their acts and deeds, as the consequences of a spouse's acts or deeds can influence the other one in various forms and intensity. This impediment has been included by the legislator, at least, because when one of the spo-

uses is sentenced to imprisonment this leads to the impossibility of achieving the goal of getting married and having a family. Or, to conclude a marriage with another purpose than that of having a family is sanctioned with nullity.

Regarding the last impediment to marriage, that of ***sexual differentiation between the future spouses*** (provided by the 15th article, passage (1), letter h [3], although the tendency of European doctrine and jurisprudence has gained a new dimension by legislating of same-sex marriages (currently, in Europe, 15 countries accept same-sex marriage), our legislator has explicitly and unequivocally stipulated the condition of sexual differentiation: "same-sex marriage is forbidden" [3, art. 15, letter h].

From the legal texts cited above, we can conclude that only by exercising the fundamental right to marriage, a man and a woman can acquire the status of "spouses" and the conclusion of the marriage, as a principal effect, leads to the founding of a family. Being considered the "natural and fundamental element of the society", the family cannot be concluded through a same-sex marriage. As some authors claim that the same-sex marriage, being against the natural, does not give birth to the family as a natural and fundamental element of the society, such a marriage cannot cause the emergence of a natural family [2, p.15-20].

The 12th article of the ECHR [5] provides that, from the legal age, men and women have the right to get married and to found a family in accordance with the national laws governing the exercise of this right. The text therefore means the marriage between a man and a woman. The 9th article of the Charter of Fundamental Rights of the European Union, signed on the 7th of December 2000 and being in force on the 1st December 2009, also provides that the right to get married and to found a family is guaranteed by the national laws governing the exercise of those rights. It is true that ECHR jurisprudence in this area has evolved significantly in recent years. Thus, the Court held that the provisions of the 12th article of the Convention do not result in the right of same-sex couples to conclude a marriage and the Member States are not obliged to regulate homosexual marriages. At the same time, the Court establishes that the unions of people of a different sex or of the same sex enjoy the protection of the 8th and 14th articles of the Convention [5]. Under these conditions, the states are obliged to give recognition and protection to family life based on both marriages, that have the family as the basis, namely the traditional family, as well as the family relationships that are not marriage-based, including same-sex unions.

An extra step was taken in the case of Schalk and Kopf against Austria by the judgment of 24 June 2010 [11]. Thus, on the one hand, the Court held that the 12th article seems unable to establish the idea of the right to homosexual marriage, the margin of appreciation recognized by the states in this field still remains important. The Court upheld the previous jurisprudence, through which it has stated that "*although it is true that there are a number of contracting states that extended the marriage to same-sex partners, this reflects their own vision of the role of marriage in those societies and cannot be deduced (...) from the interpretation of the fundamental right as established by the Contracting States in the 1950 Convention*." Accordingly, neither the ECHR nor the Charter of Fundamental Rights of the European Union obliges the Member States to regulate the marriages between people of the same sex.

From this perspective, the 15th article, part (1), letter h) [3] agrees with the Court's current view of this institution as regards the prohibition of same-sex marriages. On the other hand, the Court held that although the homosexual union does not fall under the 12th article of the ECHR, it benefits from the protection of the 8th article "*family life*" and the 14th article "*non-discrimination*" of the Convention [5], which requires the States to offer these couples the possibility of legal recognition of their relationship through an appropriate regulation.

The heterosexual character of the marriage is of public order. From the theoretical point of view, the sex of each of the future spouses is established with the birth certificate, which contains a heading in this respect. Concluding a marriage without fulfilling this condition leads to absolute nullity, being a condition of the marriage essence. Practically, this condition may be of interest to people whose gender is not sufficiently differentiated. The judicial practice has decided that "the hermaphroditism is a definitive genital abnormality that prevents procreation and sexual relations between the spouses" and the solution that is required is the absolute nullity of such a marriage. The court must determine on a case-by-case basis, on the basis of medical evidence, whether a "genital malformation" constitutes or not, a lack of sexual differentiation such as to prevent marital relationships between the spouses [6, p. 21].

This character also raises legal issues in the case of so-called "transsexualism", as well as in the event of a subsequent change in sex. Being named in some medical papers, "the paranoid sexual metamorphosis,"the transsexualism is mainly characterized by an obsessive desire of a person to change his/her sex, through the intimate and authentic feeling of being part of the

opposite sex. In another form, the transsexual is the one that physically belongs to a sex, but psychically has the feeling of belonging to the other sex. This person tries through surgery to adapt physical characters, mental manifestations [9, p.138].

The question was whether such a person could get married. From the point of view of law, the marriage to a person with anatomic gender is valid, and not to his imagination. If the sex change was registered with the civil status service, the male transsexual, who became a woman, can only marry a man, and the female, who became a man after the surgery, can only marry a woman.

The issue of transsexualism is distinct from the issue of same-sex marriages or unions.

In the case of transgendered identity and the change of sex through medical intervention, the provisions of the 66th article, passage (2) letter c) of Law no. 100/2001 on civil status documents, which stipulate that in the documents of birth and, where appropriate, marriage or death, there shall be mentioned the changes in the civil status of the person, including the situation of the change of sex. Therefore, the law recognizes the effects of sex change through medical intervention, both in terms of civil status and name.

This means that the gender difference, as a prerequisite for the validity of the marriage, takes into account not only the biological sex, but also the gender resulting from a medical intervention. The person who has acquired a new sexual identity through the effect of a medical intervention may, therefore, marry a person of the opposite sex to the sex thus acquired. Therefore, the condition of gender difference is fulfilled, as sex can no longer be determined solely on purely biological criteria.

Even though there is no explicit legal provision in civil and family law, the solution is unambiguous, following the ECHR's jurisprudence.

Thus, in 2002, the Court stated that, indeed, the 12th article of the ECHR guarantees the right for a man and a woman to get married and to found a family, but it admitted that the criterion of determining the sex can no longer be exclusively biological. Since the adoption of the Convention, the marriage institution has been strongly shaken by the evolution of the society, and the advances in medicine and science have led to radical changes in transsexuality. In this regard, the ECHR considers that it is artificial to assert that people who have undergone a sexual conversion are deprived of the right to get married, since, according to the law, it is possible to marry a person whose sex was changed.

Therefore, taking into consideration the 8th article of the ECHR, it cannot be denied the legal recognition of the sex change which was operated, so that there is no justification for depriving such a person of the right to get married, according to the 12th article of the ECHR. The problem of person's sexual "conversion" is, however, distinct (by appropriate modification of civil status documents) from the question of the right to get married. The Court also reiterates that the fact that the new couple cannot procreate is irrelevant because it is not an essential element of marriage and the right to found a family also implies the right to adopt. It follows that the person who has undergone a medical intervention to change the sex may marry a person of the opposite sex to the sex as a result of the medical intervention. But here, we consider that the obligation to communicate this circumstance to the future spouse should be held, in the absence of this communication, the marriage is cancelled for the deceit.

Some possible legal complications may, also, occur if the person who is taking a medical intervention to change the sex is already married. Under these circumstances, there can be a situation of a same-sex marriage, the case in which two hypotheses can be distinguished:

- if there has been no clear gender distinction since marriage, then that marriage is null and void;
- if a cause for invalidity cannot be identified as soon as the marriage is concluded, then the marriage fate after the medical intervention of one of the spouses' sex changes is discussed.

Two situations can also be identified here: a) if the other spouse didn't approve such a medical intervention, then he may ask for the divorce for the impossibility of continuing the marriage, for the fault of his spouse who has changed his/her sex: b) if the other spouse approved such a medical intervention, then he can no longer ask for divorce and the transsexual spouse's fault cannot be held. On the other hand, it is no longer possible to continue the marriage between two people of the same sex. Some authors considered that in the absence of an explicit regulation and applying the rules of common law, the solution should be the inefficiency of the marriage, but others opted for the termination of the marriage on the date when the civil status record is mentioned about the change of the sex through assimilation with the "death" of one of the spouses as a cause of the marriage termination.

In **conclusion**, at what has been discussed, we can confirm with certainty that the family and marriage have had an evolution over the time and the transformations of economic and social life, the morals, the traditions and the customs have influenced them. We can also mention that between marriage and family,

on the one hand, and the social life as a whole, on the other hand, there is a permanent process of influence, conditioning and adjustment. At the level of family life and in the relations between the partners, the changes do not have the same essence and depth as those in social life and, above all, they do not automatically establish themselves. The changes that have happened in the family patterns are also the result of the convergent action of cultural, psychological, legal and moral factors.

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