

Material conditions for entering into marriage

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Abstract

Material conditions are facts and circumstances, without the fulfilment of which the marriage cannot be entered or their absence causes the invalidity of the marriage (Aliu, 91)

In KLF (Kosovo Law on Family), in Article 14, par. 1, is stipulated: Marriage is a legally registered community of two persons of different sexes, through which they freely decide to live together with the goal of creating a family, while Article 15 stipulates that the capacity to enter into wedlock is obtained with full capacity to act, and adulthood is obtained upon the completion of the eighteenth year of age.

However, in order to enter into marriage, adult persons must express their free will before the competent body, and also in order to enter into marriage, there must be no obstacles or prohibitions on marriage, which are provided by law and which are otherwise recognized also as negative conditions for marriage, because to enter into marriage they must not exist.

Thus, there are the following material conditions for entering into marriage: 1. Free will of spouses; 2. Adult age; 3. Opposite sexes; 4. Entering into marriage before the competent body. But for a marriage to be valid, it must not have: 1. Marital prohibitions, and 2. Marital bans.

Keywords: Marriage, spouses, free will, opposite sexes.

Introduction

Marriage is an agreement reached between spouses based on their free will. Free will is the essential and basic element of two persons as future spouses to enter into a living community called marriage. The free will of the future spouses is a key condition for the marriage, but at the same time a condition for the marriage to be valid, because if the marriage is entered and the basic principle of marriage is not respected, having a wilful marriage imposed in any form whether it be as error, deception or violence, whether mental or physical, intimidation, is cause to seek the annulment of that marriage.

The statement is made in writing or verbally (Podvorica, 72) The verbal statement is recorded in the minutes (Podvorica, 72) In the KLF, the free will of the spouses is provided in Article 18, which stipulates: "Marriage shall not be valid when the will has been obtained under coercion, threat or by mistake or any other lack of free will of the future spouses".

This statement of free will of the future spouses must be made personally by them, because in the KLF, Article 28 stipulates that in order to enter into wedlock, it is necessary that two persons of opposite sex in the presence of one another freely declare their will and full consent for marriage in front of the registrar, which means that the presence of two future spouses is necessary and marriage is not allowed through the representative.

While FCA (Family Code of Albania) provides for the consent of the spouses within the essential conditions for the marriage, where in Article 8 it stipulates that the marriage is concluded in front of the civil registration office clerk, upon the free consent of the future spouses. Whereas, in article 33 of the FCA, in the framework of the causes of the invalidity of the marriage, as the main reason is provided the free will of the spouses, where it is stipulated that the marriage concluded without the full and free consent of one or both of the spouses is void.

Vices are defects in the formation of the will, and this happens when a disturbing element intervenes, which has affected a will formed not freely, not normally. A disturbing element, in such a case, may be a misrepresentation of reality, which may also come as a result of the alcoholic beverages or psychotropic substances used. (Mandro, 185)

First of all, the expressed will to have a valid marriage must have certain qualities: a) be real, non-simulative (declared to achieve a certain goal and not for entering the marriage); b) be serious and not expressed as a joke; c) the two statements must be given at the same time, successively at the moment of the marriage. (Podvoroca, 72) The statement of the future spouses made separately must be made in accordance with the law, in order for the marriage to be valid. The expressed will of the spouses must be the true will, that is be the inner will in accordance with the expressed will, although this true will is difficult to be verified by the competent body (registrar). However, the registrar takes into account the positively stated will of the future spouses separately.

But, if it is later proved that the given statement of will has not been the true expression of his/her will and the expressed will does not correspond to his/her true inner will, this is a cause to request the annulment of the marriage.

2. Adult age

In terms of age for marriage, which has been provided as a condition for marriage since Roman law until today, the adult age for women and men has not been equal for both sexes in regard to the age limit for entering into marriage.

However, in today's legislation some progress has been made in terms of age equality for marriage for both sexes. In previous legislations, in regard to adult age, as one of the most important conditions, there was no equality, there were age differences for women and men as a condition for entering into marriage. For example, legally regular Roman marriages could be entered into only by persons who were in puberty, that is, women who had reached the age of twelve and men who had reached the age of fourteen. (Puhan, 180) From this it is noticed that the important and condition for having a valid marriage was the attainment of puberty, which was not the same for women and men, while age was only an assumption that puberty was achieved and not equal age for women and men to enter into the act of marriage.

Another case, which is worth mentioning, is in the Family Code of Albania of 1982, where there was such a difference and it was: for women 16 years old, and for men 18 years old, to meet the condition for entering into marriage. However, today, most countries in their legislation have set the standard of reaching the age of 18 for

entering into the act of marriage. It is normal that this condition is as a result of the fact that while entering into the act of marriage, as a very important act, the person must have reached the age of mental and physical maturity, because at the moment of entering into marriage the person must take over duties, responsibilities and rights simultaneously as a future spouse, as a future parent.

However, regarding this age limit for marriage, defined by most laws, as an assumption (presumption) of achieving physical and mental maturity, there are exceptions where the laws themselves very clearly state something as an exception to the above rule where in order to enter into the marriage act, the future spouses must be 18 years old. This exception has to do with the fact that the law enables the marriage even before reaching this age, as a condition determined for marriage, but to enter into marriage before this certain age, the future spouse, who has not reached this age, must request permission from the court to enter into marriage. The future spouse, who is also called the petitioner, must apply to the court for permission to enter into marriage, while the court examines all the reasons, reasons that push a person to apply for a marriage license before the age of 18. Many circumstances can be taken as reasons for which the court can decide, such as the pregnancy of the woman or even the birth of the child, then the court must analyse many reasons related to the situation of the person who requests permission; it seeks the real motive which pushes the future spouses to enter into marriage, then the court also sees the psycho-physical maturity which the petitioner has reached, whether s/he can really enter into marriage.

Thus, the court requests a clean bill of health of the petitioner which it receives from the Medical Centre. Then, the court examines the report of the Centre for Social Work which asks for the opinion of the psychologist of the relevant centre on the status of the petitioner whether s/he is really ready to get married, whether s/he has reached the mental age for such a thing. This opinion on the status of the petitioner is made by the Centre for Social Work where the petitioner himself comes from. The court itself takes concrete actions during the hearing by listening to the petitioner him/herself, then it also hears the opinion of his/her parents. The court also hears his/her chosen one with whom s/he wants to marry.

The court, based on the motive of the petitioner, on his statement, on his parents' statement, based on the findings of the respective centres such as the Medical Centre and the Centre for Social Work, decides whether to allow the marriage or not to the minor person.

Another very important issue to discuss is that they have not reached the age of 18 and want to get married is the definition of the age limit under 18 years, i.e., if the law provides that persons have set a certain other age. Thus, most states in their legislation stipulate the age limit under 18 years to be considered by the court the request of the petitioner to enter into marriage setting the age of 16 as the limit below which persons can apply for a permit by the court to enter into marriage. In the group of these legislations is also KLF. However, some states in their legislation provide that persons can enter into marriage even before reaching the age of 18, but have not set a limit that they cannot be younger than 16 years.

For example, the Family Code of Albania provides that marriage may be entered into between a man and a woman who have reached the age of 18. The court of

the country where the marriage takes place, for important reasons, can allow the marriage even before this age, but does not mention what important reasons may be, as it does not mention the limited age under which they cannot request to obtain permission to enter into marriage and thus leaves the opportunity open to persons who are under 18 years of age.

3. Opposite sexes

“Marriage is a legally registered community of two persons of different sexes, through which they freely decide to live together with the goal of creating a family.” Thus it is provided, according to the KLF, in Article 14, where it is very clearly stated that the difference between the sexes is an essential condition and natural element to enter into the act of marriage, as an act which, in addition to having its own importance of natural element, makes marriage different from other ways of social organization. This condition also expresses the principle of monogamy of marriage, according to which the principle of marriage is the legal union of only one man and one woman. (Aliu, 93)

This is also provided as a basic principle in the Constitution of the Republic of Kosovo (Article 37), within the framework of fundamental rights and freedoms, which states that based on free will, everyone enjoys the right to marry and the right to have a family as provided by law. Whereas our law, as we pointed out above, recognizes only the marriage of two persons of opposite sexes. The lack of opposite sexes is an absolute hindrance in terms of wedlock. This condition is essential even in FCA, even in such cases, if we do not have the opposite sex, it is not about a valid marriage, but about the absence of marriage in general. By fulfilling this condition to enter into marriage, the main and natural purpose of marriage is fulfilled, a condition that the couple in their joint life give birth to offspring and this purpose is natural to be achieved with the marriage of two people of opposite sexes.

As our legislation recognizes marriage between two persons of the opposite sex¹ so do the legislations of the countries of the region. Also, the European Convention for the Protection of Human Rights in its Article 12 recognizes only marriage between two persons of biologically opposite sexes. This shows that this convention not only prohibits marriage between persons of the same sex, but also explicitly states the phrase “biologically opposite” and marriages of persons undergoing sexual organ transplants.²

¹ See: European Convention for the Protection of Human Rights, Article 12.

² However, various organizations, especially homosexuals, who are more vocal in allowing same-sex marriage, are protesting more and more every day about allowing same-sex marriage, claiming that in this way, with these prohibitions, are also violated human rights and freedoms, because people have the right to do what they want with their private life, but, except in the Netherlands, which has allowed such a thing to happen and persons of the same sex have the right to enter into marriage. The same-sex marriage act came into force in the Netherlands on 1 April 2001, which provides that persons of the opposite sex or two persons of the same sex may enter into marriage. It is worth noting that in the Netherlands, despite this innovation, the principle of a monogamous marriage applies, i.e. that no one in the Netherlands can marry more than one person at a time and anyone wishing to get married cannot already be married or be a party in another form to another person as a future spouse. The consequences of marriage between two men or two women are very similar to those of a marriage between a man and

3.1 Bisexual persons. - There are people who have bisexual tendencies. Bisexuality is a form of sexual orientation, where individuals are attracted to persons of the same sex and the opposite sex. (Bedenik, 2009, 5) However, the dilemma lies when such persons express the will to enter into marriage and crown it, whether that marriage will be lawful, or will it be void. Finally, new views have emerged in family legal theory, according to which proving the bisexuality of one spouse does not automatically mean the absolute annulment of the marriage, if the dominant organ is opposite to the sexual organ of the other spouse.

According to such opinions, in concrete cases one can speak of misconceptions of the essential qualities of the spouses, which consequently have the relative annulment of the marriage. (Podvorica, 74)

3.2 Change of sex. - Another phenomenon is transsexualism. Trans is a general term used for people, identities, behaviours, and groups that deviate from gender roles. (Gavrić, 2011, 22) It is about people who want to get married and have changed their sex, or even people who have gotten married but later change their sex with medical intervention. In the first case, we are dealing with persons who through transplantation, i.e. with medical surgeries, change their sex and want to get married. However, when entering into marriage, the official person enters into marriage only on the basis of the difference between the sexes, based on the civil status books, and if there is this difference, then he/she enters into marriage, because KLF only recognizes the marriage of two sexually different persons. However, in the case when persons change their sex after entering into marriage, this is a reason to request the dissolution of the marriage.

It is important to mention that these phenomena deprive the human reproductive capacity, therefore such sterile marriages do not fulfil either the natural or social purpose of marriage, and therefore the consequences are that the desire of people of the same sex to marriage, then the provisions of the German Civil Code (GCC) do not apply, but some other provisions apply, on which Germany, like many other countries, has issued special laws to regulate these forms of cohabitation.

Germany has done this with the issuance of the Law on Marital Community, where this law is special and regulates marital relations and other relations between persons of the same sex. Many other countries have done the same, issuing laws regulating relations in the form of cohabitation.

The material conditions for entering into marriage are also psychologically evident. (Podvorica, 74) This group of individuals is born into one gender but identifies emotionally with others. The point is that these people think they were born wrong and want to correct the body to it.

a woman. There is no change in the law which regulates the surname of the spouses, support, obligations of the partners to each other, prohibitions to enter into such an act. Apart from the Netherlands, which has become the first country to legalize same-sex marriage, other countries, although not yet doing so, have come up with another solution regarding this problem that emerged at the turn of the new century, finding other ways of creating a union. An example is Germany, where German law stipulates that as a precondition for marriage, persons wishing to marry must be of different genders. However, German law has provided for other ways of resolving cases in case of happening.

4. Entering into marriage before the competent body

4.1 Formal form of entering into marriage. - If the other basic conditions are met, such as: adult age, sex difference, free will of the spouses to enter into marriage, then in order to produce legal effect, the marriage must be formed and in this way we have the last act, entering into marriage in the form provided by law.

The marriage is concluded before the competent body where our legislation has provided that the marriage is solemnly performed, in the premises specially designated for this purpose,³ but the marriage can also take place in other premises, if this is requested by the future spouses and if their request is made for reasonable causes.⁴

Whereas the procedure before the civil registrar takes place by submitting a request from persons wishing to enter into marriage to the registrar, to freely express their will and consent for marriage.

Participating parties in the marriage are the spouses, two witnesses and the registrar. In case the registrar finds that there are no obstacles and prohibitions for the marriage, he informs the future spouses about the legal provisions regarding their rights and obligations. The registrar should then ask the prospective spouses separately if they agree to marry each other.

After getting the consent statements for entering into marriage, the registrar declares the marriage entered into.⁵ The registrar registers the marriage in the marriage registry book and the same book is signed by the spouses, the two witnesses and the registrar. Immediately after the marriage, the spouses are issued a certificate from the civil registry.⁶ Civil marriage is obligatory, while our legislation stipulates that religious marriage can also take place, which is not obligatory, but first there must be a legal marriage and it must be proven by documentation issued by the competent body and have evidence that even religious marriage is entered into before the religious body by the spouses.

After that, the civil registrar registers the religious marriage and issues the certificate of religious marriage. The form of civil marriage is also provided in the FCA, by making a request to the future spouses or the person appointed by them with a special power of attorney and continuing with the same procedures before the civil registrar. This code also provides for the religious form of marriage with similar provisions as in our law. With the solemn ritual, which permeates the atmosphere of the marriage, it becomes possible for the act of marriage to remain in the memory of all those interested in the environment in which the marriage took place and to which the married couple belongs. (Podvorica, 92)

Failure to comply with this basic condition for marriage in the form provided by law is a cause for annulment of marriage, because as such, the marriage, if entered into by not respecting the form provided by law, is invalid.

³ Kosovo Law no. 32/2004 on Family, Article 27, par. 1, entered into force on 16.2.2006.

⁴ Ibid., Article 27, par.2.

⁵ Ibid., Article 31.

⁶ Ibid., Article 35.

4.2 Persons participating in entering into marriage. - The parties involved in entering into marriage are the spouses, two witnesses and the registrar. (KLF, Article 28, par.3. The participation of the two future spouses is necessary and the marriage procedure cannot be continued without their presence. KLF, in Article 34, adds that in case on the date of the marriage the bride, groom or both do not appear and do not justify their absence, the request for marriage will be considered withdrawn. According to some modern legislations, in very specific cases and for reasonable reasons, the official person may allow the marriage to take place with the special authorization of one of the spouses. (Mandro, 148) The most typical case would be that of the bride expecting to give birth and that of the groom called up for military service in the multinational forces, abroad. (Mandro, 148) Both persons of the opposite sex must freely express their will and consent to enter into marriage and must do so before the registrar. So, the civil registrar is the official person who makesthe marriage official, if there are no obstacles and prohibitions of marriage according to the KLF. However, in the case of an act of entering into marriage, the presence of two witnesses is also required. Anyone with the capacity to act can be a witness.⁷

4.3. Marriage transcription in the marriage registers - After the civil registrar declares the marriage entered into, he must transcribe it in the marriage registry. The following facts about the bride and groom are registered in the marriage registration book: a) name and surname; b) year of birth; c) personal number; d) statement on the surname which the spouses have chosen after the marriage; e) date and place of marriage; f) residence and address of the married couple; g) address before entering into marriage; h) name and surname of the parents of the groom and the bride; i) name, surname and address of witnesses and j) name and surname of the official person before whom the marriage is entered into.⁸ The civil registrar registers the marriage in the marital register, which is also signed by the spouses, the two witnesses and the civil registrar. The spouse who has changed the surname signs the transcript with the new surname.⁹ Marriage is considered entered into even if the spouses refuse to sign the marriage registration in the registry books of the marriages, according to KLF and FCA, because it is considered entered into at the moment of declaration of the will. (Podvorica, 99) After registration, the civil registrar issues the marriage certificate to both spouses and this serves to prove that the marriage is entered into. (Podvorica, 99) After the marriage, the spouses are issued a certificate from the marriage registry.¹⁰

Conclusions

Marriage is an ancient social institution. Due to its great social importance, marriage is protected by the state and society. Everyone has the right to marry, regardless of gender, sex, race or nationality. The right to marry is a fundamental right of every human being and is a right guaranteed by imperative legal provisions, constitutions and international conventions. The material conditions for entering into marriage

⁷ Kosovo Law no. 32/2004 on Family, Article 28, par. 4.

⁸ Law no. 46/2004 on Civil Registry, Article 27, par.1.

⁹ Ibid., Article 27, par. 5.

¹⁰ Law no. 46/2004 on Civil Registry, Article 27, par.7.

are: a) Free will of spouses; b) Adult age; c) Different sexes; d) Marriage before the competent body. a) The free will of the spouses.

The free will of the future spouses is a key condition for the marriage, but at the same time a condition for the marriage to be valid. The will to enter into marriage should not be the will expressed as a result of physical and mental violence, deception, error and intimidation. b) It is normal that this condition is consequent, that to enter into the act of marriage, as a very important act, the person must have reached the age of mental and physical maturity, because at the moment of entering into marriage the person must take on duties, responsibilities and rights at the same time as a future spouse, as a future parent.

In most legislations, the age of 18 years is taken as a presumption of attainment of physical and mental maturity. c) Different sexes. - The difference of the sexes is an essential condition and a natural element to enter into the act of marriage, as an act which, in addition to its importance, makes the marriage different from their ways of organizing the natural, social element. c) The marriage before the competent body. - The marriage is concluded before the competent body where our legislation has provided that the marriage is solemn, in premises specially designated for this purpose, where participants are the spouses in person, two witnesses and the registrar, as the latter ascertains the absence of marital obstacles and prohibitions and after getting the statements of the parties separately on the consent to enter into marriage, declares the marriage entered into.

These conditions are provided by imperative legal norms and non-compliance with them results in the nullity of the marriage. Causes of nullity of marriage are the following marital obstacles and prohibitions: lack of free will of the spouses to enter into marriage, previous marriage as long as it is not legally terminated, lack of capacity to act, kinship of blood in a straight line without limitations, and in the indirect line up to the fourth degree, the kinship of adoption, as well as the kinship of blood, the kinship of marriage for persons in the affinity of marriage; father-in-law and daughter-in-law, son-in-law and mother-in-law, stepmother and stepson, stepfather and stepdaughter, regardless of whether the marriage has ended, the relationship between which brought about this relationship and guardianship during the time of guardianship. Marital obstacles and marital prohibitions differ from each other, the difference lies in the fact that they are not of the nature of the same legal force, while the other difference exists in the violation of interest.

Recommendations

The Law on the Family of Kosovo should be amended where necessary, such as, for example, in Article 49, which deals with the contractual agreement on the possession and administration by spouses, which states that the spouses shall carry out the administration and disposition of the joint matrimonial property together and in agreement.

There is no mention how that agreement is made, is such an agreement validated and where is such a thing done? Here I recommend that the Law be amended and that

the agreement entered into by the spouses be notarized. Also, in Article 67, Right to File a Claim states that persons eligible in filing a claim for the annulment of marriage due to reasons provided for in this Law are the spouses, the public prosecutor and all other persons who have a direct legal interest in the annulment of marriage, by not providing a legal deadline within which this right can be exercised, except in point 2 of this article regarding the right to file a claim for the annulment of marriage belongs only to the spouse who has suffered mental illness or due to other reasons suffered incapacity to act where is emphasized that the claim may be filed within one year from the date, the aforementioned reasons ceased to exist. Here I recommend that for each marital obstacle be provided a legal deadline within which the right to file a claim can be exercised.

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