

Family in the Romanian Law History

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Abstract

“The family is both the fundamental unit of society as well as the root of culture. It ... is a perpetual source of encouragement, advocacy, assurance, and emotional refuelling that empowers a child to venture with confidence into the greater world and to become all that he can be.” (Marianne N. Neifert, Dr. Mom’s Parenting Guide)

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1. Introduction

Family is in every society from now or from the past the most important social institution, therefore its analysis is essential in the knowledge of the social life.

Family was considered to be the foundation of society, becoming an element of social stability, while the relationships within it establish all the relations in society.

According to the prelate Albert Holenstein presentation in „Marriage and family”, „the family is the place where people put down roots, so they can grow then; in the family, people can give life; human values live in family and are transmitted to future generations, values that are valid for life”.

2 Family institution

2.1 Family

The notion of „family” can be seen both sociologically and legally. From the sociological point of view, the family, as a special form of human community, designates the group of people united by marriage or family lineage, which is characterized by community life, common interests and mutual help, so that family relationships have a character of complexity that can not be found in other types of social relationships.

In the legal sense, family means a group of people within there are rights and obligations arising from marriage, adoption and other similar reports of family relationships, family being seen as a legal reality by regulation by law. The latin origin of the word „family” is *familia*, which stands for *famulus* – „house slave”. The meaning of this word has changed over time. In the past, family was practically owned by the man (*pater familias*). Between the members of that kind of family, there weren’t, in fact, family relations, but the family was considered more as a subordinate property. Although, the first form of family appeared in history was a matriarchal one (with the mother as the head of the family), and only later appeared the patriarchal family (with the father as the head of the family).

In Western culture, the term „family” implies a married couple, consisting of a mother and a father who have children, a family with children being considered the ideal model of a family in the society. There is another typological classification of the family: monogamous families, where only two people are married, the form that is now widely accepted; and polygamous families, in particular, one man being married with several women. Modern forms of family emerged as unmarried couples who are considered partners, with or without their children or adopted. Along the history, in Europe was differentiated the term „big family” where several generations can live together, or the term „small family” with a smaller number of family members.

The nuclear family, also called simple family, is composed of husband and wife with minor children, living and householding together. This combination is considered the minimal unit of social organisation, representing the core of all other forms of family structures. The extended family, also called „composed family”, includes in addition to the nuclear family and other relatives or other generations. This includes, besides the children and their parents: the grandparents (the parents of the two parents), the children’s uncles and aunts (the brothers and sisters of the two parents, along with their spouses), cousins of the childre (the sons and daughters of the children’s uncles and aunts), sometimes even great-grandparents (the parents of the children’s grandparents). Generally, in an extended family, there are living and householding together three generations: children, parents and grandparents. The single-parent family is that type of family where the children live with only one parent. This thing can happen for various reasons: as a result of divorce, separation of parents, the death of a parent, the adoption of a minor by an adult, or as a result of the decision of a woman to give birth to a child without being married or living with a man.

2.2 Marriage

Marriage is a certified union that two persons (usually of opposite sex) or more than two persons (in those countries that recognize polygamy) have decided to start a family, to live and to share their material goods and income in common. The marriage act creates a family relationship between the families of people involved. Marriage is an institution in which interpersonal relationships are acknowledged in a variety of ways, depending on the culture or subculture in which it occurs. Such a union, often formalized by a wedding ceremony, may also be called marriage. In some countries, even people of the same sex can get legally married. From a legal perspective, marriage forms a family group itself (Cristian Gânj, Rudenia și afinitatea în procesele civile).

People get married for various reasons, such as: legal reasons, social ones, affective reasons, and economical, spiritual or religious ones. These may include arranged marriages, family obligations, the legal establishment of a nuclear family entity, or the legal protection of children. The act of marriage usually creates legal obligations between the individuals involved. In some societies, these obligations also extend to the family members of those who get married. The term “marriage” is used in the sense of the Civil Code in two ways: as a legal act by which the future spouses agree to marry under the forms prescribed by law, and in the purpose of a legal situation, as a legal status of spouses. In our positive law system, the act of marriage is a bilateral legal act by which the spouses freely and fully equal consent to obey the legal statute of marriage. As such, the act of marriage is only the legal source of the state of marriage, needed to acquire the legal situation of a married person.

3.The filiation

The filiation represents a blood relationship, a biological one, that results in procreation and birth. Broadly speaking, it designates an uninterrupted string of births that links a person of her ancestor, and narrow is the ratio of the descendent of a person from his parents. In relation to the parent to whom it is established, the filiation (lineage) is divided into filiation from mother and filiation from father. After the nature of the relationship between parents on child birth or the date of conception, the filiation may be from marriage or out of the marriage, and if it is only done legally, by adoption, it's lineage from adoption. Parentage from the mother is also called motherhood and it can be from marriage or outside the marriage. This knows the same legal regulation, whether it is from marriage or outside of it. Filiation from the father, also known as paternity, represents the legal bound between a child and his father. Also, paternity may be from marriage or outside the marriage. Accordingly, there are is the child of the marriage and the child outside the marriage.

3.1 Kinship

From a legal perspective, The Civil Code defines kinship in Article 405(1) as the link based on the filiation of a person from another person, or based on the fact that more persons have a common ancestor. After its source, we can distinguish between natural kinship (the one that is founded on the fact of birth and is based on blood relation ship) and civil kinship (created by adoption). The last one substitutes the natural kinship, the adopted and his descendants becoming relatives with the adopter and his relatives. After the family line (the line of people linked by kinship), we can distinguish between kinship in a straight line (or direct) and kinship in collateral. A final criterion, by the relationship between the parents, the natural kinship can be from marriage or outside of the marriage. The Romanian Law grants the same protection of kinship in marriage or kinship outside the marriage. The duration of kinship differs as it follows: the natural kinship is permanent, while the civil kinship lasts only as long as the adoption exists. There is only one case in which natural kiship ceases, when approving the adoption, but maintaining the impediment to marriage. The affinity, also called alianca, represents the relationship between one spouse and the relatives of the other spouse. This does not exist between the relatives of a spouse and the relatives of the other spouse, and there is no relationship or affinity between spouses. The affinity has its source in marriage and is does not appear in the case of cohabitation. Affinity also exists when kinship results from adoption, as well as when it results from outside the marriage.

3.2 Adoption

The adoption represents the legal document by which a person becomes the parent for a child who is not his biological son. Depending on the laws of each state, adoption can be realized by a married couple, a single person or a homosexual couple. After adoption, the adoptive parents gain the same rights as they have with their biological sons, while the parents who gave the baby up for adoption lose their paternity rights. Adoption is a special measure for the protection of children's rights, that establishes the filiaton between the adopter and the child (the adopted) and the kinship between the child and the adopter's relatives. In the ancient times, the act of adoption was seen as an act of charity to a single child or to a child who came from a family who could not give him a good living, while nowadays this act is seen as an experience of being able to enjoy the feeling of being a parent.

4. The evolution of the family in the history of the Romanian Law

4.1 Antiquity

In Romania, the archaeologists determined that the first people have lived here about one million years ago (Corvin Lupu, *Romanian Law History*, Sibiu, 2001). As it is known, the first form of organisation of the people in this territory was the cohort, in which a group of men were the spouses of a group of women. In the cohort, only the mother was known for certain, so that, under some assumptions, at that the woman had a dominant role in the society. Thus, the matriarchal society is supposed to be kept throughout the Stone Ages.

This way of marriage, in groups, generated conflicts that have marked the human psychic. Therefore, in the late Paleolithic Age, the relations between people belonging to different generations have been forbidden, and even some rules of conduct that included the prohibition on relations between close relatives appeared (incest). Gradually, it came to „marriage” pair, at which point it was revealed the true father of the child, which was unknown during the group marriage period. Also, changes were made in terms of filiation and the law of succession.

The transition from the tribal ordination to the political organisation of the state was completed during the Dacian king Burebista (82—44 B.C.), due to the numerous and profound social and economic changes, many of them archaeologically proven and with historical written sources, Greek and Latin ones. Regarding marriage, some information given by the poet Menandru refers to an earlier period in which polygamy was known in some Thracian tribes. Further information on the organization of the family were also transmitted to us from other ancient writers, such as: Herodotus, Horace and Ovid, mentioning that Dacians have practiced monogamy strictly, character that had been defended with great care.

The information that came to us are telling us that the wife was bought by a man from her parents, but the price was more fictional. The woman used to receive from her parents a number of goods, called dowry. This rule is a sign of development on property. However, Horace, good knowledge and keen observer of Dacian society, pointed out that the main dowry of the Dacian women were not the goods brought from the parents, but „loyalty and virtue” (Corvin Lupu, *Romanian Law History*, Sibiu, 2001). Also, the Dacians were punishing adultery with death.

4.2 Middle Ages

During IV-IX AD centuries, the family life has become the main form of social life. Family is the group formed of the closest relatives, with the kernel on parents and children. The Geto-Dacian family has transmitted to the Romanian family some features valued as democratic, compared to the Roman family which was regarded as aristocratic. The Romanian Common Law established a certain equality between spouses, as spouses' and children's work in the family household was the basis of their equal rights over the common goods.

This was the main catalyst for solidarity among family members. In relation to equality of the spouses, it's important to highlight the fact that both spouses were exercising the parental power over children, and the widow could have had by herself the guardianship over minor children, without the assistance of the family council. Marriage was achieved by the free consent of spouses and religious blessing. Divorce was also admitted on the same principle of equality regarding the reasons invoked. The vocation succession was based on equity between descendants or spouse.

4.3 XIV-XV Centuries

During the XIV-XV centuries, the Romanian law referred to the family as a special relationship between people, whether stemming from a common biological origin (blood relatives), or based on certain religious principles (relatives by alliance), or resulted from baptism and matrimony (spiritual relatives). (Emil Cernea, Emil Molcuț, *Istoria statului și dreptului românesc*, 2013)

A special marital relationship was created between spouses by marriage. It established reciprocal rights and obligations, both among themselves and between them and the children resulted from the marriage. Also, parents had no absolute right over children, therefore they could not sell them. But in this case, the focus was on the obligation of maintenance and protection.

Regulations on marriage took shape especially from traditional elements, Daco-Romans, but also from the influences that the Christian church had. Marriages were made through a religious Benedict, expressing the relationship between the act of the marriage and the will of heaven. Also, no written act was completed on this occasion. Marriage ceremonies expressed the need of the parental consent, which was offered with another ceremonial occasion, at the petition and the establishment of dowry. However, there were marriages made “by run”, by “kidnapping” the girl with her consent. Typically, these marriages were followed by efforts to force parental consent.

In terms of dowry, Geto-Dacian traditional element, it was a right of both young future spouses. This was the equivalent of the work done by them in the family household. The dowry was constituted by public exclamations made during the celebration.

Another important item to note is represented by the succession. The *causa mortis* transmission of goods was achieved both legally (for lack of expression of the will) and testamentary. According to legal inheritance, legally children and the soul ones, both boys and girls, had an equal succession vocation over the native goods or over the purchased ones of their deceased parents, while natural children only succeed over their mother’s heritage. Regarding the stepchild, he had equal rights of inheritance as the legally one, but only over his natural parent’s heritage. In addition, the law recognized the right of inheritance to the surviving spouse, in competition with the children. As an interesting element, it is observed that parents could disinheritance their children, if they were criminals or disrespectful. Increased legislative difficulties were put in the way of marriage between a free person and a slave. According to the regulations of that time, the free person who married a slave was losing her freedom, becoming a slave. In addition, children resulted from such marriage were born slaves.

4.4 Late Feudalism and Modern Era

A new element is the dowry papers, appeared in the eighteenth century. During this period, dowry began to lose its importance gradually, to lose its traditional image. Now it is only constituted for the further wife, and not for the husband too, eventually reaching some kind of deal for the spouses. For this reason, the girls’ parents always took various measures to protect the integrity of dowry materialized in modern dotal regime.

4.5 Phanariot Regime

Phanariotism was a new political, economical, social and cultural system imposed by the Gate. The historian Vlad Georgescu defines the Phanariot Regime as: „a social, political and cultural structure, in which could fit all those eager to accept and comply with a code of values based on conservative

ortodoxy, on the anti-Western traditionalism and on respecting the relationship of allegiance to the Gate". Regarding kinship, family, engagement and marriage, they were still governed by the Byzantine Law. Kindship could be spiritual (performed by baptism) or by blood. Adoption and guardianship were set after the highest and most modern European standards.

The succession was remitted by will or without a will, *ab intestat*. Vocation for succession belonged to all three blood categories. The surviving spouse received a part in usufruct (equal with the part of a child), but in use only if the spouse was in competition with the children, or with a rate ranging between 1/6 and 1/3 in full property, when there were no children or when the spouse came in competition with children resulted from another marriage of the deceased spouse. However, without other successive relatives, the surviving spouse was gaining the whole inheritance, and in the absence of any heir, inheritance became vacant and, of course, was collected by the state. Also, the successional reserves and the third part. The third part represented that part of the inheritance intended for burial and memorial expenses of the deceased. Girls married with endowment had no right to demand the performance of the goods' report or adding dowry assets to the succession, to acquire, thus, successional vocation. According to the Code of Callimachi, natural children came into competition with the legitimate ones, and according to the Code of Caragea, the natural children only came on their mother's succession.

Being a period with values based on conservative orthodoxy, marriages between Christians and non-Christians, between slaves and free people were banned. Dowry, which was constituted only for the wife at that time, could be lost in case of adultery and the goods were moved, in this case, in the husband's property. Thereby, the wife didn't have to answer for the acts of the husband (and vice versa), nor parents for the acts of their children.

4.6 XVIII-XIX Centuries (Transylvania)

After 1653, when the Ottoman armies have been defeated under the walls of Vienna and rejected in the Balkan Peninsula, Turkey's power and influence in Central Europe decreased a lot. During this period, Transylvania's Law retained strong feudal prints in content and form.

The same situation was valid regarding family and kinship, where there were kept the old ways, for the most part, except the right of peasants, mentioned above, to marry without the consent of the nobles whose estates they lived and worked on.

4.7 Romanian national state

The union of Moldova and The Romanian Country, performed by the double election of Alexandru Ioan Cuza, was followed by many years in which the country was reformed and the unifying process was completed, the ruler having to face a strong opposition of the conservative forces who didn't like the progressive reforms. The family relationships were legislated, mostly, based on previous laws. It was enshrined the equality of spouses on divorce pleas. Furthermore, paternity research was forbidden, under the pretext of legitimate family.

Regarding the goods that spouses have brought into the marriage, it was introduced the principle of the right of choice between the separation of goods regime, the community of goods and the dotal regime. The couple could also create a special regime to those in code for their goods. However, if at the time of marriage, the spouses weren't specific about the treatment of goods, it was automatically concluded that they have opted for the separation of goods. Thus, each spouse

managed his own assets, and the goods acquired during the marriage belonged to the spouse that could make the prove that he or she is the one who acquired them.

5. Origins of the Romanian family and outside influences

The family is, as noted above, the group of relatives, the closest ones, with the kernel on the parents and their childred.

The Romanian family has inherited particular traits from the Geto-Dacian family, with more democratic features, but also from the Roman family, with aristocratic ones. Thus, the Romanian customary law established a certain equality between spouses, while in the Roman family, *pater familia* had full powers. Also, the parents had no right of life and death over their children, which could not even be sold, but on the contrary, it was transmitted a maintenance and protection obligation.

A Daco-Roman origin is the characteristic feature of free consent of the spouses to marry each other. Thereby the Romanian custom allowed the young spouses to know each other and agree about the marriage, unlike the laws from the Eastern Roman Empire, under which only parents had the right to decide their children's marriage. In the Romanian Common Law, there were no regulations of any kind regarding the engagement; this appeared later, under the influence of the Byzantine Law, that enshrined engagement as a semi-marriage.

Another element regarding family is that in the old Romanian family, both spouses were exercising parental power over their children. In case of the death of her husband, the widow was exercising alone the guardianship over her minor children, without the assistance of the family council, or later, the supervision of the Court, as it was provided elsewhere in modern legislative regulations.

6. Family institution nowadays

Marriages og the XXI Century are at a high level compared with those of the past ages, although the institution of marriage is now tested to the limit. This must deal with the problems so suddenly imposed to the social organisation by the increasing of women's liberties, rights which have been so long denied to them during the slowly evolution of the mores in the past generations.

Today, marriage is defined as the freely consented union between a man and a woman, completed in accordance with the legal provisions, in order to start a family, and regulated by the mandatory rules of law. Nowadays, for a marriage, the legislature has provided that certain background conditions are needed, as well as the compliance with some formal conditions, as in the presence of certain circumstances, it has forbidden marriage. There are expressly provided some background conditions to the marriage: the matrimonial age, communicating the health status and consent of the intending spouses.

In Romania, as in all developing societies, the family underwent profound changes: from the expansion of celibacy cohabitatio, to the diminishing role of parents in the marriages of the young ones, from the declining of the birth rate to the increase of divorce. Transition to the market economy has put the Romanian family to face with new situations, among which the worst are those related to unemployment and poverty. Perhaps this explains the declining birth rate, given the fact that young people homelessness makes it difficult to start a family and it directly affects the quality of life. Marriage that thrives in a home is, really, the most sublime human institution. It has always

been and it will remain the ultimate human dream of the temporal ideal. Although this dream is seldom fully realized, it persists as a glorious ideal, always attracting the humanity which is progressing to greater efforts for the people's happiness. But some concepts of the reality of the marriage should be given to the young people, before they are thrown into the stringent demands of family associations. Idealizations of the young should be tempered by some degree of premarital disillusionment. However, there shouldn't be discouraging the juvenile idealization of marriage, these dreams are the evocation of the future scope of the family life. This attitude is stimulating and useful at the same time, on condition that they won't become insensitive to achieve practical and ordinary needs of the marriage and the family life that would follow.

7. Conclusions

Marriage, as an institution, has appeared long before Christianity. It has constantly progressed, from the unorganized mating into the promiscuous horde, with numerous variations and adaptations, until the appearance of marriage criterias which ended up culminating in the realization of the pairs, unions of only one man with only one woman, to establish a more elevated social home.

Marriage was often in danger, and social mores largely appealed to the support of property and religion. However, the real influence which forever safeguards marriage and the family resulting from it is that biological fact, simple and innate, that men and women can not do without each other, wheather it is the most primitive persons or the most cultured mortals. Marriage is a freely consented alliance between two persons of different sex, concluded according to the law, basically for a lifetime, in order to start a family, being regulated by mandatory rules of law. Family is a fundamental value of each society.

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