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FAMILY AND SOCIETY IN THE CIVIL CODE OF 1864 AND IN THE FAMILY CODE OF 1954 IN ROMANIA

Апстракт: *Семејството како форма на човечката заедница, е тесно поврзано со еволуцијата на општеството. Иако е позната неговата традиционална страна, трансформациите што се појавија под влијание на социјалниот напредок се рефлектираа и во семејството, како во однос на односите меѓу неговите членови, така и во односите меѓу нив и општеството. Со текот на времето односот помеѓу семејството и општеството е двоен. Позицијата на општеството кон семејството беше регулирана со кодекси / закони. Во Романија, најважните кодекси кои имаа големо влијание долго време, беа Граѓанскиот законик објавен од владетелот Александру Јоан Куза во 1864 година и Закон за семејство, објавен во 1954 година под комунистичка власт. Двата закона ги отсликуваа местото и улогата на семејството во романското општество, со што се пресликаани концепциите на епохата за семејството, односите меѓу неговите членови, како и со општеството.*

Клучни зборови: *семејство, кодекси, законодавство, држава, општество, регулативи*

Regardless of the historical period, man has expressed a strong desire for living with *the others*, since solitude is not a characteristic trait of the human race. The formation of human groups and then the detachment from them of the monogamous and polygamous families is a historical reality supported by countless material evidence. The birth of human society and the state brought with it a political, legal, social, economic and religious perception of the family and implicitly of its members. The positioning, often antagonistic, of women and men, led to legislation that actually enshrined society's perception about the place and role of the two genders in society, hence of the family. From this perspective, we can say that the family, as a form of

human community, has a historical character, and through its umbilical connection with society, it can be seen as a social phenomenon.

From the etymological point of view, the term family comes from the Latin term *familia*, which in turn comes from *famulus*, whose initial meaning was that of house slave/servant, then of all the slaves/servants who lived under the same roof, and by extension, it acquired the meaning of household in its entirety, i.e. the master, his wife, children and servants. Broadly speaking, the family eventually included both paternal relatives (*agnati*) and maternal relatives (*cognos*), synonymous with *gens*, i.e. a community consisting of all the blood relatives.¹ Hence, the general features of the family contained in its general definition: “the historical form of human community, a group of people linked by inbreeding and kinship; a social group based on marriage, consisting of spouses and children; all the persons descended from a common ancestor; kin, lineage”.² The definition of the family involves several aspects, namely: *sociological* (“a specific form of human community, consisting of a group of persons united by marriage, parentage or kinship, which is characterized by community of life, interests and mutual assistance. From a sociological standpoint, moral, physiological, psychological and economic aspects appear within family relationships, which give these relationships a complexity that cannot be found in other categories of social communities”), *legal* (“the family designates the group of people among whom there are rights and obligations arising from marriage, kinship (including adoption), as well as from other relationships assimilated to family relations. In a narrow sense, the family as an elementary social nucleus includes the spouses and their unmarried descendants. In a broad sense, the family includes the spouses and their children, the parents of the spouses, as well as other persons with whom they have kinship relationships”), and *moral-Christian* (“the family is an institution of divine origin established since Creation. It was established through marriage, whose main characteristics were unity and indissolubility. Being instituted by God, the family has a sacred character, this character of sacredness being highlighted by its characteristics: perfect love, communion, unity and equality of its members”).³ It is to be noted that sociology looks at the family in terms of the relationships between its members and the inner workings of these relationships, which are directly related to the evolution of society; the law deals with the legal regulation of family relationships, and religion focuses on the relationships of family members with God and on their observance of the religious dogmas, especially from a moral-Christian perspective. Hence, the plurality of family definitions.

¹ Mihaela-Gabriela Berindei, „Accepțiunile noțiunii de familie din 1918 până în prezent”, *Dreptul românesc la 100 de ani de la Marea Unire. Dimensiuni și tendințe* (București: Universul Juridic), 70, <http://www.icj.ro/Volum-2018.pdf>

² On-line dictionary, <https://dexonline.ro/definitie/familie>.

³ <https://legeaz.net/dictionar-juridic/familie>.

To the etymology and definitions, we must add the classification of the family, which can be polygamous and monogamous in the beginning, while during the evolution of society, other types have appeared, such as the nuclear family and the extended family, the family of origin and procreation, of residence and interaction, normal and dysfunctional, parental and single-parent, matriarchal, patriarchal and egalitarian.⁴

Although the family, regarded as a complex social reality, and its inner world, has raised many questions and presented many problems over time, its scientific research started only relatively late, in the second half of the 19th century. The capitalist society, with its industrialization and economic development, brings with it a series of transformations that also influence the traditional family, in the sense that the work of a single family member is no longer sufficient, women and even older children being forced to enter labor, and the expansion of the nuclear family alone, without the help of the extended family, can hardly deal with difficulties such as disease, old age or conflicts.⁵

One of the pioneers of the historical research of the family was the French mining engineer and sociologist Frédéric Le Play (Pierre-Guillaume-Frédéric Le Play, 1806-1882), who studied working families onsite and developed the method known today as a *case study*. He considered the family as the most important agent of social stability and moral authority over industrialization and its inherent conflicts, supporting the theory that cyclical changes in society are related to the ups and downs in family morale, thus opposing the theory that regarded society as being in a continuous progress.⁶ Another researcher who dedicated his studies to the family was the Swiss Johann Jakob Bachofen, (1815-1887), a well-known jurist and young anthropologist, who in his work *Das Mutterrecht* (Mother Right, 1861) tried for the first time a scientific presentation of the history of the family, suggesting that the mother's right preceded the father's right.⁷ He adopted some ideas on kinship put forward by American anthropologist Lewis Henry Morgan (1818-1881), the real founder of anthropology, known especially for his studies on kinship systems, but also for his ample theory of social evolution, theories found in his work *Systems of Consanguinity and Affinity of the Human Family* (1871), by which the author inaugurated the modern anthropological study of kinship systems as a basic principle of organization in most pre-industrial societies.⁸ For Émile Durkheim, a supporter of the structuralist conception of the fam-

⁴ Marieta Avram, *Drept civil. Familia* (București: Hamangiu, 2016), 3, https://www.hamangiu.ro/upload/cuprins_extras/drept-civil-familia_extras.pdf

⁵ Petru Iluț, *Sociopsihologia și antropologia familiei* (Iași: Polirom, 2005), 17. https://www.academia.edu/4366281/SOCIOPSIHOLOGIA_%C5%99EI_ANTROPOLOGIA_FAMILIEI

⁶ Frédéric Le Play, <https://www.britannica.com/biography/Frederic-Le-Play>.

⁷ Johann Jakob Bachofen, <https://www.britannica.com/biography/Johann-Jakob-Bachofen>.

⁸ Lewis Henry Morgan, <https://www.britannica.com/biography/Lewis-Henry-Morgan>.

ily, the modern family incorporates “abbreviated formulas of historical development,” the author recognizing at the same time that history has also involved a contraction, a shrinkage of the number of family members as well as of its economic importance. The shrinkage of the family is correlated with the extension of the social environment from the village to the city and from the city to the state. It also means the gradual ruin of “family communism”. That is, the things we possess jointly, which cement the family life, are increasingly becoming individual goods”.⁹

A series of other theories on the family appeared, the most important and with the greatest impact on the sociology of modern family being during the interwar period. The American William Goode, in his work *The World Revolution and Family Models* (1963), brings to attention some striking, relatively new ideas, including: “the family and parenthood as causal forces of history, arguing that not only industrialization led to the nuclearization of the family, but also the other way around; the distinction between ideal family models and the effective configuration of families in different cultural contexts; the diversity of the models of interaction between the family and other institutions undergoing social change,” his studies leading to the rediscovery of the dynamic dimension of the family, and the diachronic approach to the problem of ages and generations (“the cycle of family life”) leading to bringing individual, family and societal changes into a reciprocal relationships.¹⁰

Starting from here, the research on the family has expanded more and more, including other fields, such as history, sociology, anthropology, psychology, ethnology etc., much contemporary research becoming multidisciplinary.

The scientific research preceded the legal classification of the family, given its social importance. Starting from the Roman law that legislated marriage for the first time and until today, the legislation regarding the family and marriage has known a progressive historical evolution. The Romanian society has always adapted to the historical time by legislating issues intrinsically related to family and marriage. **The Civil Code of 1864**, promulgated during the reign of Al. I. Cuza, represented a combination of influences of the regulations of the Civil Code of Napoleon from 1804, of the Italian one, of some Belgian and French legislative norms, as well as certain dispositions from the old Romanian law. It was promulgated in 1864 but entered into force on December 1, 1865 and remained valid, except for the repeal or replacement of some articles, until October 1, 2011, when the new Civil Code entered into force. The old Code was structured into three Books and included 1914 articles, the first Book, *About Persons*, being repealed in 1954, after the adoption of the Family Code.

⁹ Iluț, *op. cit.*, 20.

¹⁰ *Ibid.*, 21-22.

The old code addressed the family on several levels: *marriage acts* (Ch. III, art. 49-62), *marriage* (Title V, About Marriage, Ch. I, About Marriage and the Qualities and Conditions Required for Celebrating the Marriage, art. 127-150; Ch. II, About the Formalities Related to the Celebration of the Marriage, art. 151-152; Ch. III, About Oppositions to the Marriage, art. 153-161; Ch. IV, About Applications for Nullity of Marriage, art. 162-184, Ch. V, About Obligations Arising from the Marriage, art. 185-193; Ch. VI, About the Rights and Obligations of the Spouses, art. 194-208; Ch. VII, About the Dissolution of Marriage, art. 209; Ch. VIII, About the Second Marriage, art. 210) and *divorce* (Title VI, About Divorce, Ch. I, About the Causes of the Divorce, art. 211-215; Ch. II, About the Established Cause for Divorce, Section I, About the Formalities of Divorce for Established Cause, art. 216-248; Section II, About Provisional Measures That Can Be Taken in Case of Divorce for Established Cause, art. 249-250; Section III, About the Reasons for Denying the Request for Divorce for Established Cause, art. 251-253; Ch. III, About Divorce by Mutual Consent; art. 254-276; Ch. V, About the Effects of the Divorce, art. 277-285).¹¹ These legislative regulations show the importance given to the foundation and the well-being of the family. Thus, the announcement of the marriage in “two publications, within eight days, on Sunday, at the door of the parish church and at the door of the communal house” (art. 49) and the stipulation that “In case of opposition, the registrar will not be able to celebrate the marriage until the annulment of the opposition is known to him, by its withdrawal by the person who presented it, or by a judgment. The registrar who will not act accordingly will be sentenced to a fine of three hundred lei and to compensation for all expenses and damages incurred by the parties.” (art. 54) reflect the seriousness with which the union of the future spouses was viewed. The submission of the required documents was lengthy and responsible, both for the future spouses and for the local community. This legal act conditioned the marriage: men under the age of 18 years and women under 15 could not marry (art. 127), parental consent was required if the man was under 25 years old and the woman under 21 (art. 131). Also, “In direct line, the marriage between ascendants and descendants and between in-laws in the same line, regardless of the kinship resulted from lawful or unlawful union is absolutely forbidden” (art. 143), this article and others in this chapter regulating from a moral point of view the conclusion of the marriage according to the relations of blood or religious kinship between the future spouses.

The act of marriage also entailed certain duties, such as “feeding, supporting and educating their children” (art. 185) or giving food to parents and parents-in-law (art. 187-193), as well as rights and responsibilities of the spouses (“Spouses owe each other faith, support and help”, “The husband owes protection to the wife, the wife owes obedience to the husband,” “the wife is obliged to live with her husband and fol-

¹¹ *The Civil Code of 1864*, <https://lege5.ro/Gratuit/heztqmrq/codul-civil-din-1864>.

low him where ever he will find appropriate to establish his home; the husband is obliged to receive her and provide her with everything she needs, as best he can and according to his station in life," "The wife can make a will without the authorization of her husband" (art. 194 -196, 208).

The marriage could be dissolved only by the death of one of the spouses or by divorce, and the second marriage could be concluded only ten months after the dissolution of the first one (art. 209-210). The divorce could be requested only in cases of adultery, violence or serious insult made by the other spouse and in the event of incarceration of one of the spouses (art. 211-213), the case being judged by the civil court after the presentation of evidence, the hearing of parties and witnesses, often resorting to the mediation of the parties. Thus, "When the request for divorce is made for reason of violence, harshness, or serious insults, even after all is well established, the judges have the right not to immediately admit the divorce. In this case, before deciding, they will authorize the wife to leave her husband's house, without being obliged to receive him to her, if she does not want to; and they will sentence the husband to pay an alimony commensurate with his means if the wife does not have sufficient income to support herself. One year after starting the divorce proceedings, if the parties do not resume their cohabitation, the plaintiff spouse may have the other spouse summoned before the court within the period prescribed by law to hear the final decision, which will then admit the divorce", art. 241-242). If the couple had children, "The temporary custody of the children will be granted to the husband for the period of the divorce proceedings unless the court decides otherwise at the request of the mother, or the family, or the public prosecutor, for the benefit of the children" (art. 249).

The divorce could also be obtained by mutual consent with the fulfillment of certain conditions: the husband had to be 25 years old and the woman 21 years old, and the marriage duration should have been at least two years; after the wife turned 45 and the marriage had lasted for 20 years, this consent was no longer possible (art. 254-256).

Particular importance is given in this Civil Code to the effects of the divorce. Thus, after the dissolution of the marriage, the spouses could never remarry each other (art. 277); the divorced woman could remarry only after 10 months had passed from the divorce decision (art. 278); in case of adultery, the guilty spouse could never marry his/her "accomplice" (art. 279); regardless of the reason, except for the divorce by mutual consent, the spouse who loses the divorce will lose all the benefits "set in his/her favor either through a marriage contract or during the marriage" and if these benefits will not be sufficient "to ensure the livelihood of the spouse who was granted the divorce, the court may order and take steps to give him/her an alimony from the other spouse's fortune, but this sum will not exceed one third of the whole income; this alimony may be revoked when it is no longer necessary" (art. 280-281).

Regarding the situation of the children after the divorce of the parents, they were entrusted to the spouse who had won the divorce, but they could also be entrusted for upbringing and education to the other spouse or to a third party if there was a request to this end and the necessary material means for ensuring the best conditions for the minors (art. 282-283). The law also stipulated the material rights of the children even after the divorce of the parents. If the parents divorced by mutual consent, the children were entitled to half of the fortune of each parent (art. 284-285).

The Civil Code of 1864 established the matrimonial regime as a regime of separation of property, as well as the dowry regime, with the possibility of choosing the matrimonial regime and of concluding solemn matrimonial agreements made solemnly both before concluding the marriage and publicly, and which could not be changed after the conclusion of the marriage. Art. 1224 reflected the gender inequality, as the man was considered the head of the family, while the woman was subjected to the man's "marital power", since the woman was considered incapable of legally exerting her rights in the absence of a prior "marital permit".¹² These regulations were repealed when the Constitution of the People's Republic of Romania came into effect in 1948 and then of the Family Code in 1954, which proclaimed gender equality and the community of property during marriage, the separation of property being regarded as backward and inappropriate to the new social realities of the communist regime.

What is striking is the longevity of this old Civil Code, which leads to the conclusion that its provisions and principles were applicable to family life and legislated family relations relatively objectively, both between the spouses and between them and their children, as well as with other members of the extended family.

The transition to communism brought with it a series of legislative changes designed to reflect the new social relations. The Constitution of 1948, at art. 21, stipulated that "The woman has equal rights with the man in all areas of state, economic, social, cultural, political life, as well as private law. For equal work, the woman has the right to equal pay with the man" and at art. 22, which referred to family life, "Marriage and the family enjoy the protection of the State. The mother, as well as the children up to the age of 18, enjoy special protection, established by law. The parents have the same duties to their children born out of wedlock and those born in wedlock. Only the civil status documents issued by the State bodies are valid".¹³ For the first time, the equality of women and men was proclaimed legislatively, which gives, at least from

¹² Olga Pisarenco, „Evoluția istorico-juridică a instituției regimului matrimonial contractual”, *Revista Națională de Drept*, no. 5, (2012), 44, https://ibn.idsi.md/sites/default/files/imag_file/39_47_Evolutia%20istorico-juridica%20a%20institutiei%20regimului%20matrimonial%20contractual.pdf

¹³ Constitution of the People's Republic of Romania of 1948, published in the Official Gazette no. 87 bis/13 April 1948, http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?id=1574

this point of view, a clear proof of democracy and modernity of the first Constitution adopted by the new regime established in power in Romania. Because the old Civil Code no longer corresponded to the new social realities, its first book was replaced by the Family Code, adopted by Law no. 4 of January 4, 1953, amended and supplemented by Law no. 4 of April 4, 1956 and republished in the Official Gazette no. 13 of April 18, 1956. The paper reproduced the republished text with the amendments brought to it by Decree no. 779/1966 (Official Gazette no. 64 of October 8, 1966), Law no. 3/1970 (Official Gazette no. 70 of June 25, 1970) and Decree no. 174/1974 (Official Gazette no. 108 of 1 August 1974).¹⁴ It contains 161 articles grouped into three titles, chapters and sections. These refer to marriage (conclusion, nullity, effects, personal and patrimonial rights and obligations of the spouses, dissolution), kinship, maternal and paternal filiations, the legal status of the child, adoption, the obligation of maintenance, the protection of those with deprived capacity, of those with limited capacity and other persons (minor children), interdiction, guardianship and guardianship authority.

Compared to the old Civil Code, the Family Code brings a series of novelties;¹⁵ the role of protector and supporter of the family belongs to the state, which undertakes to protect “the marriage and the family; it supports, through economic and social measures, the development and consolidation of the family”; the state “defends the interests of the mother and child and takes special care for the upbringing and education of the young generation”; “The family is based on a freely consented marriage between the spouses”; “Family relations are based on friendship and mutual affection between its members, who are obliged to give each other moral and material support”; “In the relationships between the spouses, as well as in the exercise of their rights towards their children, the man and the woman have equal rights. The parental rights are exercised only in the interest of the children” (art. 1, 2); “A man can marry only if he has reached the age of eighteen, and a woman only if she has reached the age of sixteen. However, for good reasons, the marriage of a woman who has reached the age of fifteen may be approved. The approval can be given by the Executive Committee of the People’s Council of the Municipality of Bucharest or of the county within which the woman has her domicile and only on the basis of an approval given by an official doctor” (art. 4); “It is forbidden for a man or for a woman who is already married to marry someone else” (art. 5); “The man and the woman have equal rights and obligations in the marriage” (art. 25); “The spouses decide by mutual agreement in all matters relating to the marriage” (art. 26).

Regarding the matter of material goods, the Family Code legislates the notion of *common property*, which means any goods acquired during marriage. However, it also admits the spouses’ own goods, which are: “a) goods acquired before the conclusion

¹⁴ Family Code of 1953 updated, <http://legislatie.just.ro/Public/DetaliuDocument/81>

¹⁵ Family Code of 1953, <https://lege5.ro/Gratuit/he2dknbr/codul-familiei-din-1953>

of the marriage; **b**) goods acquired during the marriage by inheritance, bequest or donation, unless the bequeather has provided that they will be joint property; **c**) goods for personal use and those intended for the exercise of the profession of one of the spouses; **d**) goods acquired as a prize or reward, scientific or literary manuscripts, sketches and artistic projects, inventions and innovations, as well as other such goods; **e**) the insurance policy or compensation for damages caused to the person; **f**) the value that represents and replaces an own good or the good into which this value has been transferred" (art. 31). These can be managed jointly but can be alienated only with the consent of the other spouse, and if one of the spouses is a debtor, a division of the joint property is made by the judge and only those belonging to the debtor can be subject to enforcement (art. 33-35). In case of divorce, the assets are divided between the spouses by agreement or in court, by the judge (art. 36).

The situation of the children is closely monitored, the law coming with a series of regulations concerning their situation from birth to adulthood, the obligations of parents to them and vice versa, whether they are in the biological family or are adopted. There are also regulations concerning the monitoring of the parents by the guardianship authority, which aims to monitor the child's situation, taking into account exclusively the best interests of the child, both in the case of guardianship and in the case of interdiction or trusteeship.

The 1954 Family Code remained in force until July 25, 1993, although in the meantime certain amendments or completions were made: Decree no. 779 of 1966, amending some provisions of the law on divorce, Law of No. 3 of March 26, 1970 on the regime of protection of certain categories of minors, Decree no. 174 of July 30, 1974 for the amendment of some provisions on divorce from the Code of Civil Procedure and the Family Code .

Going through the two codes, leads one to the conclusion that they reflected the characteristics of the society that issued them. Prince Al. I. Cuza, in his desire to modernize the country, appealed to the theory and legal practice of the developed countries of Europe, drawing on their legislation in order to draft a modern civil code, in accordance with the development of European society. He inserted norms of Romanian law in this mainly French-inspired code, thus managing to create the premises for the exercise of a modern European-type justice. The provisions regarding the family mirrored the relationships between its members, but also the public perception of the family, which had to fit a certain social pattern. Society's position towards the spouses and certain aspects of the family, such as the public recognition of the husband's supremacy and subordination of his wife, the husband's privileges and the woman's "freedom" dependent upon the consent of the husband, the matrimonial regime and the property regime, etc., denote the intrinsic and bidirectional connection between

society and family. Hence, the idea that “the family is a social institution, which can be seen simultaneously as an integral part of the social system and its product”.¹⁶

Regarding the family structure, it remained identical to the previous laws, tributary to the old traditions, but, unlike the Napoleonic Code, the new Romanian Code recognized the equality of the spouses in invoking divorce grounds.

Of particular importance was the introduction of the civil marriage and divorce, followed by the establishment of specialized services within the state authorities.¹⁷

However, the official position towards the family, considered a social institution that deserves legislative regulations in view of its proper functioning, remains important, the family relationships having a special importance for the health of a society. Even if the Civil Code of 1854 does not promote gender equality, which was not possible because society had not reached this stage, it is a big step in the direction of modernizing the 19th century Romanian society, of the attitude towards the spouses and especially towards children.

After 1947, in the context of the one-party political regime and the process of the strengthening and legislative consecration of the leading political role of the single communist party, the Romanian society underwent a series of changes which were reflected at a legislative level. The new governing regime, in stark contrast to the old economic and political regulations, begins with the amendment of the Constitution of 1923 and continues with “the entire administrative legislation of organization and functioning of the central and local executive, legal, fiscal, educational systems, etc., including a profound institutional and personnel restructuring together with a new state apparatus based on an adequate legislation”, maintaining at the same time the old legislation / codes, but with ample modifications adapted to the new socio-political realities.¹⁸ Thus, the communist perception of the family had to be reflected at a legal level as well. Proclaiming gender equality, women’s repositioning in various areas of society, their inclusion in the party structures and their promotion in the whole of society, their contribution to the entire state and party policy, the special care that the state showed to the family, protecting the mother and the child, and providing material support, led to legislative changes that reflected precisely these changes.

The two codes formed the basis of other codes / laws that were enacted over time. The family has always been considered an element of stability in people’s lives.

¹⁶ Mihaela Gotea, *Rețeaua socială și conflictul marital. Constrângeri și oportunități* (Cluj-Napoca: Presa Universitară Clujeană, 2014), 14.

¹⁷ Elena Ursu, „Codul Civil din 1865”, Chișinău, 2012, 6, <https://www.scribd.com/doc/108676696/Referat-Codul-Civil-Romanesc-din-1865>

¹⁸ Ioan-Iosif Santai, „Evoluții și tendințe privind sistemul, sistematizarea și izvoarele dreptului român contemporan”, *Universul juridic*, no. 10, 2017.

Hence, the formation of a certain image about the family and its members, about the stable relationships between them, about their rights and obligations in relation to the other members, about the economic, patrimonial, legal, psychological aspects, etc. within the nuclear and the extended family. Given the fact that the contemporary society has known a rapid pace of development and, implicitly, of change, the family has undergone mutations which have been reflected in the legislation. These two codes, although issued in different historical periods, have many points in common, the principles that formed their basis having many similarities. They present roughly the same general picture of the family, with only small differences, hence their longevity. They have a special importance both from a historical and legal point of view, being true landmarks in everything related to the Romanian space.

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