MINISTRY OF NATIONAL EDUCATION AND RESEARCH

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# SUMMARY OF THE THESIS ,,SUBSTANCE CONDITIONS SET OUT BY THE ROMANIAN LEGISLATION FOR THE VALID CONCLUSION OF MARRIAGE ”

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SIBIU
2016

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Keywords : family, engagement, marriage, spouses, procreation, consent, matrimonial age, bigamy, kinship, tutor, homosexuality, hermaphroditism, discernment, vices of consent, nulity, putative marriage, fictitious marriage, civil partnerships, guardianship court, Civil Code/Civil Law.

## III. THESIS SUMMARY

In the 1st chapter, entitled „About family", I started from the Latin origin of the *family* term (which represents the total of members in a home or race – *familia, ae*) and I briefly analysed the meanings this expression had over time, both from sociological, but especially juridical point of view.

With view to the family functions, three of them are identified today by the doctrinarian lawyers as having a major significance: the biological, the economical and the educational.

*The biological function* is fundamental for society, but, so as every culture and society may reproduce (biologically) its individuals, two conditions are necessary: sexual differentiation between spouses and their capacity to procreate.

Currently there is a visible discrepancy – on the birth rate level – between the states well developed from economic, cultural, social point of view, where birth rate is low (this is due especially to the emancipation by education of the woman-spouse) and those with a weak economic development and with a conservatory evolution in which the religious norms are dominant, fact which leads to growth of birth rate above what would be natural and sustainable from economic and educational point of view.

From juridical perspective, *the economic function* of the family is materialized in various mutual obligations of the spouses, namely: to contribute, depending on the means of each of them to the domestic costs and granting mutual material support [art. 325 par. (1) and (2) Civil code]; maintenance between family members (art. 516, 524 and the following of the Civil Code), but also in other significant provisions related to the spouses community of assets (art. 329 following Civil Code, related to their employment, and their incomes resulted from employment, etc.

Concerning the third function of family, the *educational* it is indubitable the fact that the basic family education, is an essential dimension of the spirituality of

the future human being, *the seven years from home* (s.n.) sometimes, unfortunately, leaving the mark in a negative irremediable way upon the personality and actions of the individual, completing his/her character structure.

As an immediate level following the family framework, responsible for the child's education is also the social framework (the social framework and the school of various levels), and the state, through the norms dictated in this matter establishes rules that concern the relations between parents and children.

In the 2nd chapter, entitled „Reasons related to the family relations in various historical phases and geographical area", we make an incursion in time with view to the family – organization, relations, institution -, starting from Mesopotamia and reaching the Carpathian-Danubian-Pontic area.

A common feature of the analysed archaic societies was the inferior position of women compared to the man (except for the Egyptian society, in which the woman was raised to a position of dignity acknowledged in the ancient world, being considered a real master of the house, could be a priestess of some temples or could hold supreme political positions, like for example, Cleopatra). The men from the wealthy class were entitled to „secondary wives" and to an unlimited number of concubines (Assyrian used to call them „women of the palace"). Although the Brahman laws recommended monogamy, the Indians allowed polygamy, the woman's role being reduced only to the reproductive function. The Jewish men were allowed to have several wives providing the existence of a solid economic situation in order to pay the woman's father the amount necessary, and in case of the Persians only one of the wives was considered „privileged", being raised at the rank of master of the house.

The parents' consent for children's marriage was absolutely necessary, the marriage had to be recorded in a document drawn up in the witnesses presence and preceded by an engagement (the Romans would call it *sponsalia*), occasion when the future husband would give the bride-to-be an amount of money.

Also, the man could divorce any time, without solid reasons, could repudiate or could get another woman as inferior wife.

A different situation is represented by the Roman archaic civilization that applied the monogamy principle throughout its existence, the bigamy and polygamy being prohibited.

Specific for the eastern Middle Ages and for the Byzantium, reported to the family relations and the multitude of kinship relations, is the strong and determinant influence of the Church by imposing some marriage interdictions.

In the Geto-Dacian family polyandry was excluded, but also monogamy was not fully practiced (Herodotus clearly mentions polygamy practiced by Thracians, therefore, including the Geto-Dacian branch).

The Geto-Dacian customs mention monogamy only in the 1st century B.C. under Burebista king, when social stratification is consolidated.

After the Roman conquest, the dualism between the Roman law, on the one hand and the customs of the natives, on the other hand, imposed new rules related to the conditions necessary to validly officiate a marriage. Thus, the peregrines could not get a valid marriage under the Roman law (*ius civile*) because they did not have *ius conubii* (the right to enter a legitimate marriage), but they could marry according to their national legislation. If spouses were Deditei peregrins they could marry in virtue of *ius gentium* (people's rights), while slaves' marriage was not recognized in Dacia or in other province of the Roman Empire.

In the Romanian Middle Ages, in virtue of *Ius Valachicum* (or *Ius Valachorum*), the family relations were governed by the canonical rules imposed by the Byzantium Christian Church, the family of the Romanian Middle Ages being in essence Christian family. Therefore, partly, the absolute power of parents upon children was eliminated, the inequality between sexes acquired a „divine consent", the marriage – preceded, and in this situation, by an engagement, named „entrusting" – was considered a *sacramentum*, and the dotal regime was regulated as traditional matrimonial regime.

In the 3rd chapter, „Marriage in its temporal evolution", by the historical and compared methods, is analysed briefly, at the beginning the engagement in various archaic geographical area (Mesopotamia, China, the Roman Empire, Byzantium, but also on the territory of our country, both in seniority and in the current Romanian legislation), but also in temporal evolution.

The section 3. 2., „Marriage", is described a brief history of marriage, old institution that knew in time various changes, nowadays being a social institution fundamental and very important of the private law, fact which determined its legal regulation in all law systems.

*Section3. 3.*, „Substantive conditions for marriage formalization in their temporal evolution" assesses these requirements through the historical method on the country's territory, starting from Dacian times and reaching the regulations previous to the Family Code.

In *subsection 3. 3. 1.* It is mentioned that in case of Dacians and other old peoples, marriage was officiated by purchasing the bride from her parents by the husband to be, the price varying depending on the honesty and beauty of the girl, otherwise, they have purchase their man.

In patriarchy, the consent to marriage will be of the two men, heads of the family.

In certain circumstances girl's kidnapping is practiced (either with her consent or not) in order to „force" the hand of the one entitled to give his consent, the finality of the girl's theft being different, depending on the case: conciliation or conflict between the relatives.

After the Dacia conquest by the Romans the Dacian-Roman juridical dualism is imposed, therefore related to the marriage consent, it must come from the one exercising paternal authority, later admitting the will of the two spouses.

The influence of Christianity and its legitimation in 313 AD By the emperor Constantine the Great replaced the agnatic kinship (civil) with the blood kinship

(cognatic), and on marriage formalization the parents' consent was no longer determinant. Also, marriage between free people and women of humble condition.

In the Romanian medieval law marriage acquired a religious character when the Church took over the enactment right.

Therefore, marriage was made by religious blessing, the family relations fell under the incidence of canonical law.

Practically, the necessity that the future spouses should have the „blessing" (approval of parents and priests was maintained, and the noble families needed for their children's marriage the consent of the ruler.

A significant moment related to the regulations in the family was the appearance of the two codes of laws: Calimach Code – Civil Code of Moldova – (1817), with Byzantium influences, but also French and Austrian, as well as Caragea Enactment (1818) in Wallachia.

Through the appearance of the first Romanian Civil Code in 1865, the marriage was secularized, and through the Constitutions from 1866 (in art. 22) and 1923 (in art. 23), was ruled that the issue of the marital status documents will be in the duty of the civil law that will always precede the religious blessing.

The Law from 15 March 1906 (following the French pattern) abrogated art. 134 – 138 of the Civil Code bringing a series of new rules concerning the consent on marriage.

In *subsection 3. 3. 2.* is analysed the matrimonial age, other substantive condition on marriage formalization, marking the time of acquiring the legal capacity to formalize a marriage, capacity that derogates from the common law rules.

In the Romanian medieval law the minimum age for marriage was 14 years for boys and 12 years for girls, rules provided in the „Law Amendment", respectively 15 years for boys and 12 years for girls, according to the rules provided in the „Law of Govora" from Wallachia.

Related to the age difference between the future spouses, the „Law Amendment" recommends that there shouldn't be a big age gap between them, so the wedding should be „as it is not due, what is still shame, imputation and mockery" (gl. 230).

Marriage had to „be made within a timeframe of up to four years as from the engagement date", according to the Calimach Code (gl. 83 – 85) and up to three years, according to the Caragea Law (chapter 15, § 3, letter g).

The Romanian Civil Code from 1865, following a French model took a lot of regulations from marriage matter, so the matrimonial age was imperatively established at 18 years for men and 15 years for women (art. 127). With view to the French regulation the Romanian legislator does not require that respective ages should be fulfilled, therefore, it is sufficient that the youth enter the $18^{th}$ year, respectively the $15^{th}$ year since their birth.

The sanction for failing to comply with the age condition is marriage nullity that may be required by any of the spouses (without justifying any interest), by any person interested and by the Public Ministry.

The age exemption, for serious grounds, could be given according to art. 128 Civil Code (1865) by the Lord (in the meaning of Chief of State).

Up to the present no legislation established a maximum age up to which marriage could be officiated, this being made even *in extremis vitae momentis* (on the death threshold).

*Subsection 3. 3. 3.* From its appearance on the current territory of Romania, monogamy was specified in laws, enactments and codes, the violation of this principle being sanctioned with absolute nullity in civil matter and by various punishments in the criminal law.

Under the influence of the Christian church and of the Byzantium law, the theandric and bigamy offences were serious facts both for the woman who married two men and for men, the punishments being tough, starting from the imprisonment,

walking undressed through the fair (naked), seizure of assets, to the capital punishment - death.

In addition, the codices of the 18th century punished the priests who officiated the second marriage without dissolving the first one.

The Civil Code from 1865 (in art. 1305) prohibits polygamy: „It is prohibited to get a second marriage without dissolving the first one".

*Subsection 3. 3. 4.* The proximity of blood between close relatives is the oldest impediment for marriage established to provide a healthy origin, and later on for reasons related to the morality of the family relations.

In the early feudalism period, in the migration period, on the territory of former Dacia, according to *Ius Valachicum*, the kinship was either natural (proximity of blood), or conventional, as for example: twinning on the estate and outlaw twinning.

In the medieval law, the close relatives were counted up to the seventh degree and in the written law up to the eighth degree.

Also an impediment was the kinship by alliance (also named by *affinity*), so marriage was prohibited up to the eighth degree, only exceptionally it is lowered the degree to seventh.

The sanction for the violation of this impediment was „hard work" because this wedding „is not a real marriage, but a mixture of blood".

And the spiritual kinship (that was born by „the divine sacrament of baptism") was an impediment to marriage, together with the adoption between godfather and godson or between the adopter and the adoptee, as well as between the direct relatives up to the eighth degree, from both sides.

In Calimach Code marriage was not allowed between blood relatives in straight line to infinite (§ 92), for the one in affinity was prohibited in straight line „boundless" (§ 93), and for the spiritual was prohibited up to the third degree (§ 94).

The Civil Code from 1865 takes over, following the pattern of laws and Calimach Code, the forms of kinship that stops the valid formalization of marriage.

*Subsection 3. 3. 5.* The Christian church blamed and condemned homosexuality, considering it a perversion, absolutely incompatible with the Christian moral and practices, refusing the formalization of so-called *marriages* (s.n.)

The idea of heterosexuality to officiate a valid marriage was consolidated in all laws that regulated marriage and family in time, on the one hand by the words used to designate the people between whom marriage could be officiated, words that clearly show the sex of the person, and on the other hand the entire content of defining marriage that has as goal the family foundation, with the well-defined purpose of procreation.

Thus, *the Law Amendment* states: „Marrying means joining a man and a woman . . .”(gl. 198) ; *The Chosen Codex* names marriage „joining man with the woman . . .” (Chapter 20); *Caragea* Law (chapter 16, § 1): „wedding is the union between man and woman”; *Calimach* Code (cap. 2, § 63): „convention through which two persons, man and woman are united . . . “ , and gl. 88 specifies: „only two persons can be validly joined, namely a man and a woman”; „a contract between *persons of different sex. . .”*.

Also, the sexual differentiation results from the traditional language like: groom-bride, but also from the denomination mentioned in the contemporary legislations of husband-wife.

*Subsection 3. 3. 6.* In virtue that the custodian has for the minor person under his/her custody, the laws from the old Romanian law stopped the marriage between the custodian or his/her descendants and the minor during the custody, namely up to the age of 25-30 („Chosen Codex”, cap. 235; „Romanian Learning Book”, gl. 42, Z. 11; „Law Amendment”, gl. 200, 212). Also Caragea Law institutes the prohibition of formalizing marriage between custodian (trustee) and the minor in favour of whose the custody was instituted („the trustee should not marry the one under his custody as long as he is her trustee” – chapter 16 § 5), without sanctioning her, On the other hand, the regulations from the Calimach Code institutes an exception in

the meaning that the custodian can marry „the one who is under his custody only if her father would have engaged her with him or if he allows this by testament" (the third chapter, „For marriage drit", § 98). Also, the Moldavian laws stop the marriage between the minor and the father, brother and son of the custodian (still under parental guidance).

As what custody is concerned, the Civil Code from 1865 borrows the provisions from the Calimach Code (§ 98 and 99), preventing marriage between the custodian and the minor, but also between her and the father, brother or son of the custodian.

The court can agree to marriage between the categories of persons listed above, provided before marriage the custodian gives account about his/her administration and the marriage should be in the minor's advantage.

*Subsection 3. 3. 7.* With concern to the existence of discernment, as substantive condition on marriage formalization, the Calimach Code (§ 72) provides that „those completely mad, those with no brains, those crazy and young are not able make a strong marriage".

Unlike the Moldavian law, regulation of the Civil Code from 1865 regarded the illnesses of the future spouses only under the psychic aspect of consent, so the only prohibition was for the marriage between mental patients. They could get married in their periods of mental lucidity.

*Subsection 3. 3. 8.* The regulations from the old Romanian law provide other impediments for marriage, prohibitions that are not found at present in the legislation in force. From these we will remind: the expression of viduage (viduity) or the mourning year, the spouses divorce, difference in faith, difference in social condition, undissolved engagement, etc.

In *chapter 4*, entitled „Substantive conditions provided by the current legislation to formalize a valid marriage", are presented in the order established by the legislator, the substantive conditions on marriage formalization, namely: existence of consent, the matrimonial age of the future spouses, lack of kinship

between the future spouses, lack of custody between the future spouses, existence of discernment of the future spouses and existence of sexual differentiation between future spouses.

With view to the expression of free consent of the future spouses one must state the fact that it is provided both in the Civil Code [art. 258 par. (1), art. 271 and art. 278 par. (1)], and in the Romanian Constitution [art. 48 par. (1)], but also in various internal and international documents ratified by Romania, as for example: art. 16 from the Universal Declaration of Human Rights or art. 1-3 of the O. N. U. Convention related to the consent to marriage, the minimum age for marriage and recording of marriages.

The consent has specific validity conditions, like: to exist, to come from a person with discernment, to be free and fully expressed, to be personally expressed by the future spouses in the same circumstance, publicly, before the registrar and two witnesses and to be actual.

A particular situation, never met in the European legislations and not only is presented by the French legislation that provided „posthumous marriage", formalized under certain conditions, situation created between the two world wars, the reasoning being the legitimation of children born after the death of their father during the war.

Such a unique situation among legislations of family law is criticised even by the French doctrinarians: „what matrimonial significance has marriage to a defunct, which ceases when it ends".

As what the consent vices are concerned in the French legislation, unlike the Romanian legislation (in which error is a consent vice only when it related to the physical identity of the other spouse) the error is a cause of relative nullity of the marriage also when it bears upon the essential qualities of the person who is to get married.

Another particularity presented by the French legislation is the fact that mourning does not come as consent vice, but has its origin in an old tradition that

devoted the adagio that „dans le mariage il trompe qui peut" („in marriage cheats the one who can cheat").

On the other hand in the Romanian legislation, the mourning is consent vice that consists in an error made in bad faith to determine a person to sign a civil juridical document, that otherwise he/she would not have signed. Thus, from the evidence administered the result is that previous to marriage formalization, the parties lived in a notorious concubinage of three years and that for a three year period the appellant presented the respondent to relatives as future wife. The wife of the appellant – heard as witness declared to the court that the respondent said he would marry the defendant and that he agreed to have a child with her. Related to these circumstances taking into account the life experience of the plaintiff, who is older than the defendant with 13 years, was married before and has two children, one may conclude that the claimed allegations of the defendant in the meaning that she was pregnant and if she does not accept marriage she will have on conscious both her and the child conceived cannot be considered as cunning means of the nature and gravity of those that would have determined the plaintiff to agree to marriage formalization.

As what violence is concerned, as consent vice, we should notice that with view to the French juridical regulation where, since 2006, the French Civil Code provides that the reverential fear for an ancestor is a case of nullity of marriage [art. 180 par. (1)], in our legislation, the reverential fear – resulted from the respect due to parents – is not a cause of marriage cancellation on grounds of vitiation of consent by violence.

The minimum matrimonial age is provided in art. 272 Civil Code, but also in various international normative documents like: Universal Declaration of Human Rights (art. 16), O. N. U. Convention related to consent to marriage, the minimum age for marriage and recording of marriages etc.

Therefore, the current Civil Code (Law no.287/2009) taking the provision related to minimum age for marriage that removed discrimination based on sex that

existed on marriage formalization in the Family Code, states: „Marriage can be made if future spouses have the age of 18 ” [art. 272 par. (1)].

From this rule the Romanian legislator institutes an exception in the meaning that the minor who fulfilled the age of 16 can marry based on a medical approval, with the parents' consent or, as the case may be, of the custodian and with the authorization of the custody court in whose circumscription the minor has his/her residence.

In case one of the parents refuses to give their consent for the marriage, the court decides upon this divergence, taking into account the superior interest of the child [art. 272 par. (2) Civil Code].

The French regulation is more flexible and expressly provides that in case of disagreement between father and mother, this circumstance values consent, in other words, is sufficient the approval of one of them in this respect.

In our opinion this solution is criticisable, being discretionary for the parent who gave the consent, with the risk of violating the superior interest of the minor child. For this, the regulation of the Roman legislator, that assigns the prerogatives of consenting the court that will rule objectively, taking into account the superior interest of the child, seems to be more suitable.

Nevertheless, as this problem must be solved with celerity by the ferend law, the court should rule in *emergency regime* (s.n.).

Bigamy is another impediment to marriage, the failure to take into account the public order prohibition, provided by art. 273 Civil Code being sanctioned with absolute nullity of the second marriage, also attracting a criminal sanction, as it is a crime (art. 376 C. pen.).

Inexistence of the kinship between future spouses (provided by art. 274 Civil Code) is another substantive requirement on marriage conclusion, the Romanian legislator stops marriage between relatives in straight line, endlessly, and between the collateral relatives up to the fourth degree, including.

Marriage formalization between relatives in degree prohibited by law is sanctioned with absolute nullity, in civil plan, on the criminal plan being qualified as incest crime (art. 377 Criminal Code), with the mention that, in collateral line, the incest goes up to the second degree including, namely between brothers and sisters.

The kinship is an impediment to marriage regardless if it results from marriage, outside marriage or adoption.

From the rule mentioned above the Roman legislator institutes an exception [provided by art. 274 par. (2) Civil Code] through which is allowed marriage formalization between relatives of the 4$^{th}$ degree, in collateral line (the so called "kinship dispensation"), for serious reasons based on a medical certificate, with the authorization of the custody court, from the residence of the person asking the consent.

Another impediment to marriage, that of custody (instituted by art. 275 Civil Code), is justified by the preoccupation of the legislator that the custodian through the position towards the minor person, under his/her custody to influence his/her consent to marriage.

The sanction for marriage formalization between custodian and the person under custody is its relative nullity (art. 300 Civil Code), but also the criminal law incriminates as crimes certain juridical facts committed by the custodian upon the person under his/her custody.

In case conscious character is lacking of the will of the person who will get married due to a mental disorder, the law prohibits the marriage of the alienated and mentally deficient under the sanction of absolute nullity [art. 276 Civil Code corroborated with art. 293 par. (1) Civil Code]. On the other hand, in case of marriage of a person without mental faculties due to disease or other reasons, the sanction is relative nullity (art. 299 Civil Code).

With regard to the last substantive condition to formalize marriage, that of sexual differentiation between future spouses (provided by art. 277 Civil Code), although the tendency of the European jurisprudence doctrine acquired a new

dimension through the enactment of marriages between persons of the same sex, the Romanian legislator provided, this time (by the amendment of the Civil Code) *expressly* (s.n.) and unequivocally, the condition of sexual differentiation: "Marriage between people of the same sex is prohibited [ art. 277 par. (1)].

# IV. CONCLUSIONS AND PROPOSALS OF *LEGE FERENDA*

The importance and topicality of the subject of this work ”Substance Conditions at conclusion of marriage”, result from the changes and supplementations made by the Romanian lawmaker with the appearance of the new Civil Code of 1st October 2011.

The legal provisions regarding the substance conditions at conclusion of marriage are provided in Book II. About family, Title II. Marriage, Chapter II. Conclusion of marriage, art. 271 – 277 Civil Code.

By change of optics, where it considered necessary, the Romanian lawmaker wanted that the main institutions of family law, in this case, family and marriage, institutions which make the object of our research, should be regulated unequivocally so as not to leave room for interpretation, but also for harmonization with the legislation in the field of European Union Member States or with the signatory states of bilateral and multilateral agreements to which Romania is Party.

We must mention that where our point of view was in opposition with the lawmaker’s point of view or where we considered that the lawmaker had an ambiguous expression or omitted to regulate a situation, we made proposals of *lege ferenda* motivated.

A special attention in this work we paid to the regulations in the field of other states such as: France, Italy, Republic of Moldova, regulations on which we exposed our point of view arguing pro or against those rules.

In our legislation the notion of marriage had many definitions across time depending on the historical age to which we referred, but also the moral-religious norms which dominated the the regulations in the field for a long time. Since the Family Code and the current Civil code do not define marriage, this was left to the doctrinaires, without finding a complete definition of this notion. By analysing art. 259 Civil Code we notice that in it we can fiind all five meanings of the notion of

marriage, which are legal act, legal situation, fundamental right of any person, (religious) ceremony, but also marriage institution.

Although it is a civil legal act, marriage has derogatory validity conditions from the common law, because of its special nature, but also the principles and imperative nature of norms which govern and regulate this matter.

In our scientific step we focused the research in the following directions:
1. novely elements brought by the Civil Code in the matter of substance conditions to marriage; 2. Changes of legal texts in this respect; 3. Completions of legal texts; 4. Eliminations of certain conditions or syntagms from the legal articles or even some legal articles; 5. Situations still unregulated by the laws in the field; 6. Controversial doctrinary issues; 7. Particular situations encounterd in foreign legislations. Î

1) *Novelty elements in the matter of substance conditions to marriage*

If now in Europe 15 countries accept the marriage between persons of the same gender, the Romanian lawmaker introduced in the Civil Code, as a novelty element, the express condition of sexual differentiation [art. 277 para. (1): "The marriage between people of the same gender is prohibited"], this idea being emphasized also in other legal texts such as: art. 258 para. (4) and art. 259 Civil Code.

Moreover, the Romanian lawmaker went further by prohibiting the civil partnerships between persons of the same gender [ art. 277 para. (2) and (3) C. civ.]

From our point of view, we consider that Romanian society is not prepared psychologically or morally-religiously and from legal point of view for the notarization of homosexual marriages (and we hope that it shall never be ready for such a "union"). On the other hand, the sexual orientation of some country fellows does not entitle us to have discriminatory tendencies and misconceptions towards

homosexuals, we do not have the right to marginalize them and a criminal incrimination is not applicable.

From here up to notarizing the marriages between couples of the same gender is a path we qualify as *prohibited way* (s.n.).

We could though show a more permissive attitude regarding a potential *civil partnership between people of the same gender* (s.n.), given the tendency of European jurisprudence which evolved so that homosexual unio benefits from the protection given by art. 8 ("family life") and art. 14 ("non-discrimination") from the European Convention of Human Rights, even if such a partnership does not fall under the incidence of art. 12 of the Convention above [ "the right of *man and woman* to get married" (s.n.) ].

Having in view all these issues, we do not agree to the "requirement" of Romanian lawmaker when it prohibits the *civil partnerships between persons of the same gender* (s.n.) concluded or contracted abroad [according to art. 277 para. (3) Civil Code.] because we cannot claim that they would bring prejudice to the law order in our country.

2) *Changes of legal texts*

a) It is noteworthy that the current Civil Code took up the change made by Law no. 288/2007 for amending and supplementing the Law no. 4/1953 (Family Code) regarding the minimum age for marriage, so that it is 18 years old both for man and woman [art. 272 para. (1); in regulation of art. 4 of Family Code it is 18 years old for man, respectively 16 years old for woman].

b) The current Civil Code also took up the change made by the law quoted above regarding the approval of parents for the marriage of their minor children who did not reach 18 years old, without making a distinction between genders. By the requirement of approval of parents we return to an older practice regulated by the Civil Code of 1864, which, under the sanction of nullity, provided that men up to the age of 25 years old (not fulfilled), women up to 21 years old (not fulfilled)

needed the consent of parents in order to get married. The Law of 15 March 1906 changed the age of man for whom it required the consent of parents, by making it equal to the woman's age, 21 years old (art. 131 Civil Code), therefore until 1954 when the Family Code came into force, the man who had the age between 18 and 21 years old and the woman who had the age between 15 and 21 years old needed the consent of their parents to get married.

c) Art. 293 para. (2) of Civil Code changes art. 22 of Family Code, so that the law does not consider as bigamy the situation when the husband of a person declared dead remarried and afterwards the declarative decision of death is annulled. The condition that the second marriage stays valid, as the first was considered annulled, on the day of conclusion of the new marriage is that *the spouse of the person declared dead was of good faith* (s.n.), so that the person who remarries will be guilty of bigamy and the subsequent marriage will be struck by absolute nullity.

d) Paragraph (2) of art. 6 of Family Code (based on which the general mayor of Bucharest or the president of the County Council in the territorial radius of which has domicile the person who demands the approval of marriage between the fourth kinship degree) was amended by paragraph (2) of art. 274 Civil Code which allows the conclusion of marriage between fourth kinship degree in collateral line (the so-called kinship allowance) for justified reasons, based on a special medical approval given by the competent body to authorize the marriage which is the *guardianship body* (s.n.) from the domicile of the person who asks for approval.

*3. Completions of legal texts*

The new Civil Code supplemented the old art. 6 of Family Code by paragraph (3) of art. 274 which prohibits marriage in case of civil kinship, the provisions of paragraphs (1) and (2) of art. 274 shall apply both between those who became kinship by adoption and between those whose natural kinship ceased by effect of adoption.

We consider that such a supplementation is welcome because at the base of interdiction there are the biological reasons (assurance of a healthy descendence) to which moral reasons are added.

Therefore, even if the kinship relations between the adopted person and his natural kins are extinguished as a result of adoption which has full effects, the blood relation subsists, cannot be extinguished, the natural kinship remains the obstacle to marriage in case of adoption.

4. *Eliminations of conditions or syntagms from the content of legal articles or even some articles of law.*

a) As a novelty element, the obligation of mutual communication of health condition, which represented a prohibitive substance condition to the conclusion of marriage in the regulation of Family Code (art. 10), in the current Civil Code (art. 278) is provided as a formality for the conclusion of marriage, not affecting its validity if the disease is usual and can be cured.

b) The lawmaker eliminated the syntagm "approval given by an official doctor" from the regulation of art. 4 para.(2) of Family Code, the current Civil Code provided the necessity of a "medical authorization" [art. 272 para. (2)], by this rephrasing it is understood as sufficient that the doctor has practice right.

5. *Situations still unregulated by the legislation in the field*

Unfortunately, the problem of unjustified or abusive refusal of parents regarding the approval of marriage of their minor child "was omitted" this time by the Romanian lawmaker, unlike the French law where the refusal of parents is permitted, even if it has a discretionary nature, being criticized by the French doctrine itself.

6. *Controversial doctrinary issues*

A problem which generated controversies in Romanian legal doctrine is the kinship outside of marriage which was not proven.

Theoreticians argued pro and against it being an obstacle to marriage. With reference to this situation, we share the opinions by which kinship outside of marriage represents an obstacle to marriage by the blood connection, not after it was legally or not established, according to the author quoted by us in page 191, note 514. We also agree to the opinions expressed by the authors quoted on page 191, note 515, according to whom when the natural kinship is notorious, well-known and acknowledged by an obvious possession of status, it would be outrageous not to take it into account.

The French doctrinaires also asked the question if filiation which is not legally established can be or not an obstacle to marriage.

The doctrinary opinions favourable to acceptance of an obstacle wich has as substantiation the natural kinship not established, but known is founded on the moral reasons of the state of fact, which were invoked in French jurisprudence who established that in some cases, the situation presented above cannot be about the lack of legal establishment of filiation as obstacle to marriage.

With reference to the kinship allowance given in view of marriage between kins in collateral line of fourth degree, we contradicted with reasons, we believe, the statement made by some doctrinaires that the allowance only concerns (s.n.) primary cousins, because on one hand, the legal text does not distinguish between fourth degree collaterals, and on the other hand, the moral reasons intervene for which it should be prohibited marriage between the other categories of persons in the fourth kinship such as nephew in relation to grandfather's brother.

7. *Particular situations encountered in foreign legislations*

a) We acknowledge the existence of a *unique* situation (s.n.) among the family law legislations. Thus, the French legislation regulates "posthume marriage"

(art. 171 French Civil Code) appeared in interwar period; the reason for which the French lawmaker considered necessary this regulation would be the identification of children born after the death of their father in the war.

In this special case of posthume marriage the purpose for which marriage is concluded, the foundation of a family is not accomplished and neither are some requirements of consent: to be current, given in person in front of a competent authority and in presence of witnesses, to be expressed simultaneously, in the same circumstance and in the same place.

This situation is criticized even by French doctrine and the European Court of Human Rights statuated that "the right to marriage does not include the right to posthume marriage (. . .)".

b) A situation which "derogates" from all the common norms of legislations which follow the French and Anglo-Saxon systems in the matter of kinship as obstacle to marriage is encountered in the legislation of Republic of Moldova. For example, art. 15 paragraph 1 point b) of Family Code states that marriage is not permitted between kins in straight line up to the fourth degree inclusively, *brothers and sisters, including those who have a common parent* (s.n.). Therefore, *per a contrario*, family legislation *allows* (s.n.) the marriage between an uncle/aunt with nephew/niece, without mentioning the primary cousins, who are fourth degree kins, to whom the law removes any obstacle by law in view of marriage.

c) we notice a difference between the approach of the Romanian and French lawmakers regarding the "reverential fear". Thus, while the Romanian legislation does not provide anything in this respect, in France, since 2006, the Civil Code provides that the exercise of a constraint on the spouses or one of them, including reverential fear towards an ascendant, represents a nullity case of marriage [art. 180 paragraph (1) French Civil Code].

d) In case of disagreement between father and mother to the marriage of their minor child, in the French law this circumstance equals to consent (art. 148 2$^{nd}$ thesis, French Civil Code), compared to our regulation which provides that the

guardianship court will decide [art. 272 para. (2) Civil Code, corroborated with art. 31 para. (3) of Law no. 272/2004 for protection and promotion of child's rights].

In our opinion, the solution adopted by the French lawmaker is discretionary for the parent who gave his approval, there is the risk of violating the higher interest of the minor child, so we believe it is more suitable the regulation of our law which attributes the prerogatives of approval to the guardianship court in the conditions of the law. Yet, because this problem must be solved fast, *de lege ferenda*, we believe that the guardianship court should pronounce itself *in emergency regime* (s.n.).

e) Unlike the regulations from the Romanian law, polygamous marriages legally officiated abroad, according to the national laws of the spouses, produce certain effects on the French territory such as: food effects, successoral effects, the right to social prestations, heir alimony. This norm is valid only if the marriage is considered valid and the national laws of each spouse authorize bigamy, which is considered a bilateral obstacle.

f) Unlike the Romanian legislation in the field, the marriage of mental alienate has an exceptional nature in French law, thus the person of age under guardianship or receivership can get married if he/she receives authorization; the possible obtaining of this authorization does not make disappear the expression of a valid consent of the interested person at the moment of officiating the marriage.

The French law also provides the possibility of concluding a marriage by a person of age protected by guardianship, so that by Law no. 308 of 5 March 2007 it introduced the need of authorization of the guardian or in his absence, of the guardianship judge [art. 460 para. (1) French Civil Code].

With reference to the solution of the French lawmaker of extending the scope of those who can conclude a valid marriage to the persons of age who are under guardianship or receivership, we argued that we do not think suitable this solution, without considering that by the interdiction to get married, these persons would be violated the fundamental right to marriage set out by internal regulations of the states and in international agreements.

In Italian doctrine there are voices who want to change the rule in force (art. 85 Italian Civil Code prohibits the marriage of alienate or mentally disabled person), proposing a solution which allows the judge to evaluate the capacity of the prohibited to make an aware matrimonial choice.

In this case too we pronounced ourselves by arguing that in this case, depending on the type of disease (in this case, Down syndrome) there should be an authorization in this respect from a court of law whose decision is subjected to the natural means of appeal. A court decision founded on the conclusions of professionals in the field, regardless of the solution, would remove at least theoretically, the risks of exclusion from marriage of these categories of persons and violation of a fundamental human right of getting married, eliminating the discrimination based on misconceptions and subjective and superficial appreciations.

In Jordanian legislation (art. 8 of Civil Status Law no. 61/1976, amended and republished by Law no. 82/2001) it is likely that ”AL QADI” (supreme chief invested with the assignments of civil status officer) approves a marriage, *at the request of either of the future spouses* (s.n.), if one of the Parties has mental disabilities, provided that he/she argues the request based on medical certificates and this marriage would be to the benefit of that Party (the disabled).

g) A novelty in the legislation of some countries (Germany, Austria) is the possibility left by lawmaker that the parents do not complete the column from the birth certificate of the child regarding the sexual identity of the child, by indicating only “X – undetermined gender”. This situation refers to the hermaphrodite person who has the right to demand the establishment of gender by medical way.

h) A particular situation specific to the Muslim law system, which is not found in the European law systems, is provided by art. 7 stipulated in the law quoted above, which prohibits marriage with a girl below 18 years old, *if the difference of age between the spouses is higher than 20 years* (s.n.). ”AL QADI” can allow however, the conclusion of marriage in such a case only if it is convinced that the

woman agrees (is not forced by any relative etc) and the conclusion of marriage would be to her benefit and advantage.

i) With reference to matrimonial age, in the Hashemit Kingdom of Jordan, it is suitable to make the following observations: although both spouses must have reached the age of 18 years (as per art. 5 of Jordanian civil status law), ”QADI AL QUDA” (the supreme religious chief of ”AL QADI”) can approve the officiation by ”AL QADI” of marriage of the minor boy aged above 15 years old, if there are plausible reasons and he would have advantages or benefits (would take advantage) by marriage. On the other hand, a girl who reached 15 years old can get married only if she wants it (at her request) and does not have guardian (father, grandfather), otherwise, ”AL QADI” rejects the request based on art. 6 of Jordanian Civil Status Law.

j) Still recent is the fundamental change of the concept of marriage and family from French law by introduction of art. 143 in French Civil Code which stipulates that the “marriage can be contracted by two persons of different genders or the *same gender* (s.n.)” By this specification the French lawmaker opened the path to marriage of homosexual couples, measure which is criticised by the French doctrinaires with conservative opinions about marriage, as traditional connection between a *man* and *a woman* (s. n.), for the purpose of founding a family. This major change of legislative optics generated a series of changes in the French Civil Procedural Code and will require a reconstruction of the law regarding filiation on another reason than the biological one which it supports now.

In the drawing up of the Ph.D thesis we focused our scientific step first of all on the Romanian and foreign legislation in force, but also on the doctrinary opinions from the Romanian legal literature and compared law. Where it was required, we exemplified with jurisprudence from our country, from abroad, with decisions of European Court of Human Rights, by stating our point of view with reasons, on the side of solutions given by the courts of law.

We believe that although – without contestation – the legislation in the field of family law was much ”enriched” with welcome rules (introduced by appearance of the New Civil Code which repealed the Family Code), most of them being proposals of *lege ferenda* of Romanian doctrinaires, it is still required a more careful examination of lawmaker of issues insufficiently or ambiguously regulated and sometimes, unregulated, as this time too the theoreticians in the field have noticed, by proposing solutions for elaboration.

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