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COMPARISON ELEMENTS ON THE BACKGROUND CONDITIONS OF ANCIENT ROMAN AND CONTEMPORARY ROMANIAN MARRIAGE

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ABSTRACT: *The family is a biological reality achieved by the union of man and woman, and procreation. The model of the European family has its origins in the old Indo-European relative system, which founded marriage as its main source. From Roman antiquity up to present, we can observe and state that the family has represented the basic nucleus of human social organization, having marriage as magical, religious, and legal basis. We consider that it is interesting and useful to have a comparative perspective between the juridical regulations of the ancient Roman marriage and the one of the present, so much more that in Romania, a new Civil Code has been adopted, giving up the idea of a distinct code of the family. If in Rome marriage was preceded by an engagement (sponsalia), which was a natural practice, in our Romanian law, the new Civil Code, as novelty, regulates engagement as a promise of marriage with potential juridical effects. It seems edifying, as a constant along centuries, that there have been several conditions of imperative nature for the validity in the perfecting of marriage, both in Roman law, and in the present Romanian law. Two of these conditions, the accord and age, have represented in Roman law, and do also represent today indispensable elements in the legalization of marriage. It is worth observing that there is a similitude of essential requirements for marriage in both legal systems, so much more that there is a more and more diluted condition, with tendencies of annulment, in the legal practice of many European countries, and not only there. It is the condition of sexual differentiation of the potential spouses.*

KEY WORDS: *family, engagement, marriage, basic conditions, sexual differentiation.*
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From Roman antiquity to present day it can be found and sustained that family is the core of social humanoid organization, with the magical-religious and legal foundation the marriage. We think it is interesting and useful to make a comparative presentation of the marriage between the ancient Roman legal regulations and nowadays regulations, in the necessary background conditions of marriage, especially since Romania has adopted a new Civil Code, giving up the idea of a distinct family code[1].

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For the Romans, the natural source of parental power was constituted by marriage ("iustum matrimonium" or "iustae nuptiae"), other sources (adopting, adrogatio and legitimizing) representing only an artificial imitation of the effects of the former.

One of the novelties of the Civil Code in matters of marriage is to regulate engagement (art.266-270) which, unlike the Romanian "sponsalia"[2] does not make the marriage obligatory, conclusion or rupture not being subject to any formality, proven by any means.

Engagement is regulated in the codes of other European countries, such as the Swiss Civil Code (Art.90-95) and the Italian Civil Code. In Italian law there are two forms of engagement, "simple" (art. 79-80 of the Civil Code. Italian) without legal effect and "formal" or "official" [81 para. (1) Civil Code. Italian] for the validity of which are necessary background conditions and writing agreement ("public" inscription or private signature). In France, the silence of the legislature, doctrine and jurisprudence establishes engagement as a mutual promise to fulfill a marriage. French law allows posthumous marriage only exceptionally and with the consent of the President of the Republic, pursuant to art. 171 French Civil Code, as a consequence to the marriage promise made prior to the death of one of the fiancées which unlike the Romanian "sponsalia" it does not determine the entering into marriage, as the entering into marriage or dissolution of marriage are not subject to any formality which may be proved by any evidence .

Marriage - a sine qua non institution for the existence and continuation of the Roman family – was defined by legal consultant Modestinus (III century AD.) and Justinian (VI century AD.) as a union, a relation between man and woman, realizing an inseparable communion for life[3].

In the current regulation of Romania, marriage is defined as "the freely agre (Bodoaşcă, et al., 2013)d union between a man and a woman, done by law" [Art. 259 para. (1) Civil Code.] In some sources, the notion of marriage is necessarily and justifiably defined as "the consent of will of one man and one woman concluded with public order and morality, in order to found a family" (Bodoaşcă, et al., 2013) (Hanga, 1977) .

The Romanian legal doctrine held that the definition of marriage given by the Roman jurists regarded marriage idealistically, because woman has never been equal to man, being subjected to him (Hanga, 1977) (Gidro, et al., 2009). We consider this legal and religious inequality reverberated - especially - in the life public where the woman was excluded, but in the family home she was considered the mistress of the house and seen as an "uxor" (wife), which gives the right to participate in religious ceremonies related to the domestic cult (Gidro, et al., 2009).

In the current law marriage (and implicitly the formation of a family) is regarded as a "fundamental right, patrimonial, absolute (opposable *erga omnes*), inalienable and

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[1] Law no.287/2009, entered into force on 1 October 2011.

[2] The term derives from "sponsio" that is a verbal convention made by the two family heads of the engaged couple. Engagement is a proposal in settling an obligation for a future marriage (*sponsalia sunt mentio et repromissio nuptiarum futurarum* – Digesta, 23. 2. 1.)

[3] Modestinus defines marriage as: "*coniunctio maris et feminae, consortium omnis vitae, divini et humani iuris comunicatio*"(union of man and woman, creating a community for life by sharing the divine and human law), Digesta, 23. 2. 1.; Iustinian defines marriage as: *nuptiae autem sive matrimonium este viri et mulieris coniunctio, individuam consuetudinem vitae continens* (marriage or wedding is the bond of men and women consisting of a community of inseparable life), *Institutiones* I. 9. 1.

imprescriptibly extinctive" (Bodoaşcă, et al., 2013), addressed by international legal instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, the UN Convention on consent to marriage, minimum age for marriage and registration of marriages, the Romanian Constitution.

Regardless of the historical period to which we considered marriage, regardless of the geographic area, or legal traditions "marriage is a social institution with an existence independent of the legal regulation of the state, equal union between sexes continues to exist regardless of the attitude of state authority in regulating it." (Aniței, 2012)

Both Romanian law (ancient, modern or contemporary) and the Roman one (whatever the marriage - cum manu or sine manu -) impose and require the fulfillment of some conditions, among which the background conditions stand out, without which the realization of marriage does not apply.

A common condition of the two systems of law is consent. The question is where to emanate from?

In the ancient Roman era, consent had to represent the will of the one who exercises paternal authority, without the need, not even in an advisory capacity, of the will of the intending spouses. If marriage involved a grandchild who was under the power of grandfather's parental authority, the consent of the latter was required first, and the consent of the father, to whom, by marriage, the child would bring descendants who would be heirs. A marriage contracted without the consent of those in authority of the spouses was unconceivable.

In the classical era appeared the idea that, besides the consent of both *pater familias*, the will of both spouses was required, an attitude that reflects the increasing diminution of the absolute power exercised by the *pater familias* and waiver of excessive formalism and rigor. Moreover, through *Lex Iulia maritandis ordinibus* from the time of Augustus, in order to encourage marriage, it was determined that, if the ascending unreasonably refuses to give consent, young people could address a magistrate to authorize the marriage.

If the *pater familias* does not expressly oppose the marriage, he is presumed to tacitly acquiesce to the establishment of such matrimonial ties. Also, if the head of the family is unable to express consent due to mental alienation, children can marry without his consent.

Consent to marriage should be regarded as having two functions: to attribute the power of *pater familias* but after some time it also had a protective function of the spouses, especially in the case of women.

Thus, a woman even *sui iuris* (independent of her father), needed the consent of the guardian, guardianship appreciated a long time as a perpetual power. Guardianship over women disappeared in the time of King Claudius (41-54 AD.), but until then a woman younger than 25 years needed the consent of ancestors, although she was no longer under their power, consent given on the purpose of help and protection. Over the age of 25 years the woman could marry by her own consent.

If the Romanian Civil Code of 1864 stipulated the requirement of consent of the parents, grandparents or guardian, in the current regulation it is necessary for it to emanate from the prospective spouses that must have "intellective and volitional capacity", expressing their consent knowingly (Bodoaşcă, et al., 2013). The conscious and volitional nature of the legal act of marriage was required for the validity of consent, it should

emanate from a person with discernment, its lack excluding validity. In this sense, the insane or the mentally ill, whether or not under interdiction cannot marry (in absolute nullity), not even in moments of transient lucidity (art. 276 Romanian Civil Code). If lack of discernment is due to reasons other than insanity (one or both spouses are in a state of voluntary or involuntary intoxication, hypnosis, somnambulism, coma, etc.)., the civil officer shall postpone the marriage.

Consent must be *free* [art. 288 para. (1) of the Civil Code provides that the family is based on marriage freely consented of the spouses and, according to art. 259 para. (1) marriage is the union between a man and a woman, done by law[4].

Consent must be *full* (consent is full when is not affected by the ways: terms, tasks, conditions), *present* [consent is present when is expressed at the time of marriage, in the presence of the Civil officer as seen in art. 271 and 287 para. (1) Civil Code, promise of marriage having no legal binding], be expressed *personally and join***tly** by the spouses (the representation is not allowed in our law, Romania having reservation on item 2 of article. 1 of the UN Convention regarding the consent to marriage, minimum age for marriage and registration of marriages), to be *express* (express consent involves successive affirmative answers to the question of the Civil officer if they want to marry each other. The possibility of tacit consent is thus excluded. If the persons cannot speak, cannot hear or do not know the official language in which the solemnity of marriage is being held, consent is taken through an interpreter), *expressed in public*, in the presence of two witnesses [requirement stipulated by art. 287 para. (1) Civil Code and art. 29 para. (1) of the Act nr.119/1996] *and directly observed by the Civil officer* [according to art. 29 para. (1) of Law no. 119/1996 civil officer has an obligation to ensure the free and full consent of expression of intending spouses]. Also, the consent must be stated *in the intent of starting a family* [idea of consent expressed in order to start a family is not expressly established by the legislature, but indirectly results from different law articles: Art. 48 para. (1) of the Constitution provides that the family is based on marriage; art. 258 para. (1) in Civil Code states that "the family is based on free consented marriage of the spouses" and art. 259 para. (2) of the Civil Code states that "men and women have the right to marry in order to found a family"], the lack of intention in this regard and marriage for other purposes leading to nullity of marriage for fictitious (art. 295 Civil Code.).

To be considered valid, consent must not be vitiated by error on the physical identity of the other spouse [*error in personam*, Art. 298 para. (2) Civil Code.] as the error concerning the essential qualities of the person are not of great interest.

Bad faith is another vice of consent with a much wider scope than the error because it extends on the essential qualities of the future husband so the marriage wouldn't have been concluded if they were known (not declaring a serious illness, knowing that health is a necessary quality of marriage - art. 278 of the Civil Code.; inability to procreate, hiding pregnancy resulting from previous intimate relations, etc. It was considered that vitiation of consent cannot be retained as bad faith in the event that one spouse has hidden his/her financial situation, the fact that he/she has been married and divorced or widowed, political or religious affiliation, true age, and so on).

[4] To underline the idea, see art. 271 C. civ., art. 29 para. (1) from Law no. 119/1996, art. 48 para. (1) from Republican Constitution, and art. 16 section 2 from the Universal Declaration of Human Rights].

Violence vitiates the consent of future spouse induced by justified fear, without right, towards the other future spouse or a third party as a result of physical or moral coercion exercised against him (Lupașcu & Crăciunescu, 2012). In practice it is very difficult to find physical violence (due to the special, unique procedure of completing the marriage), and a marriage because of "reverent" fear springing from the respect towards parents or relatives cannot be canceled invoking vitiation of consent by moral violence.

A second common element in both Roman and Romanian law, which is compulsory, materialized in the validity requirement of the legal act of marriage, is the marital age, that of attaining puberty for men and women.

Legislators of all law systems, regardless of the historical period covered, have set a minimum age for marriage for a variety of reasons: physiological (biological) [from a physiologically point a view the minimum age for marriage is considered to be the real puberty age, when the spouses are able to have intercourse and procreate; because today real puberty age is different depending on several factors, Romanian legislator has set a minimum age for marriage that is greater than the puberty age] mental (intellectual) [before founding a marriage the spouses should be aware of the importance of the legal situation of marriage and the effects it produces, with special focus on the obligations that arise as a result of the marriage], eugenics (improvement of population by genetic measures) and legal (the spouses must be able to assume consciously, freely and independently the arrangements that marriage entails).

The Romans had a controversy about when puberty begins, proculian school setting a minimum age (14 years for boys) and sabinians believed that puberty must be determined after a preliminary and individual investigation (*habitu corporis*). Regarding girls, the minimum marriage age was established quite early, being 12 years old. Finally, the opinion of proculians remained the official one, being acquired by Justinian (Gidro, et al., 2009). Justinian regulation on the minimum age of marriage was taken by Phanariot legislator in our country during the transition from medieval legal structures to the modern type. In the Calimach Code (1817) the legal age for marriage was fixed at 12 years for girls and 14 for boys.

In the contemporary Romanian law, the former family code established the minimum age for marriage of 18 years for men and 16 years for women [article 4 para. (1)], in exceptional circumstances the woman being able to marry from the age of 15 years [para. (2)]. Under the fundamental principle of full equality between men and women in the current Civil Code the legislator sets the same minimum age of marriage for men and women, respectively 18, which coincides with the age of civil majority (French Civil Code provides a minimum age for marriage at 18 years, for both sexes, with the possibility of exemptions for good reasons. The Portuguese Constitution provides the minimum age of 16 years for both men and women).

Through exception [art. 272 para. (2) Civil Code.], the legislature allows the marriage before the adult age if the following conditions are met: the child who wants to be married has reached the age of 16; the existence of good reasons (the future wife is pregnant, birth of a child, serious illness, etc.); the existence of a medical opinion; the existence of parental consent or, where appropriate, the guardian's consent, and in their absence the consent of the person or authority that was empowered to exercise parental rights; the existence of the authorizing guardianship court in whose jurisdiction the child

resides (Gavrilescu , 2013) (Bodoaşcă, et al., 2013) (Lupaşcu & Crăciunescu, 2012) (Hageanu, 2012) (Gavrilă, 2012) (Gavrilescu, 2009) (Avram , 2013).

In contemporary Romanian law, as in the Roman one, there is a maximum limit of age up to which one may enter marriage, which may be completed by *extremis vitae momentis*[5]. Neither the contemporary Romanian legal system, nor the Roman one imposed the condition of age difference of the intending spouses, but in the Romanian jurisprudence an age difference between spouses which is too big may be an indication of a fictitious marriage, sanctioned by absolute nullity [Art. 295 para. (1) Civil Code. Nullity of marriage for fictitious reasons may be covered if, until the final judgment the spouses cohabited, the wife conceived a child or two years of marriage passed, Art. 295 para. (2) Civil Code. The Romanian Country Correction Law[6] states that the age difference on the future spouses is recommended, however. " . . not a man of 50 years and a woman of 12 or 15 or a woman of 50 years and a man of 20. . not an old man and a young woman or an old woman and a young man. . . because it isn't proper, but on the contrary it's also shameful, imputation and mockery "Glava 198 (Chelaru , 2003).

For the Romans, a third background condition required by *ius civile* for the validity of marriage was civil *ius conubium*, which means the right to enter into legitimate marriage, according to the rules of *ius civile*. Marriage involves an agreement to bring the woman under power, that is a legal act, which was not possible only for Roman citizens, Prisc Latins (*veteres*), members of the Latin Confederation or pilgrims who are recognized as *ius conubium*. *Ius conubium* was granted by imperial constitutions, to some veterans who wanted to contract a legitimate marriage with peregrine or Latin women, immediately after release; those who were born of such marriages became Roman citizens and fell under the power of ancestors[7].

In ancient Roman law, *conubium* was a condition which was not only the differentiation between citizens and pilgrims, but even among the citizens. Thus, up until *lex Canuleia*, in year 445 BC, plebeians did not enjoy the *ius conubium*, in which case it can be said - correctly - that we are in the presence of a pronounced political difference which had the purpose to maintain privileges for patricians.

In classical Roman law, to recognize *ius conubium* it was required to comply with requirements regarding the lack of impediments to marriage, which, if they existed at the time of marriage, it would not be able to fulfill, non-compliance with these conditions drawing the penalty of annulment. Some of the impediments in the legal system were found in old Romanian law, and some of the old Romanian law provisions still exist today.

For example, we include: lack of family ties cognation between the spouses, affinity links, absence of guardianship status, prohibiting marriage between adulterous husband and his accomplice, banning widow to remarry sooner than 1o months and later than 1 year after the death of her husband, and so on; some specific Roman impediments were

[5] In Tsarist Russia marriage was prohibited after the age of 80 (Ionaşcu, 1941); Under the French Civil Code allowed posthumous marriage - in exceptional circumstances and with the authorization of the President - if necessary formalities were adopted, consent being clear on this. The consequences of such marriages are limited. (Corhan, 2001)

[6] Pravila cea mare din timpul domnitorului Matei Basarab, 1652.

[7] Gaius, *Institutiones*, I. 57.

taken early in the territory of Roman Dacia, recalling in this respect, banning marriages between Daco-Roman with provincial women resident in the province they ruled.

As we mentioned above, another background condition required by law to start valid marriage, common to both systems, represents the lack of kinship between future spouses (art. 274 of the Civil Code.). For the Romans, this impediment was considered the direct line to infinity, and sideline to grade VI - in old age - later reduced to grade IV, ban remaining in the same form in the present Romanian legislation, stating that Romanian modern law marriage was prohibited between relatives up to the eighth grade (Anon., 1958).

The Roman Empire allowed marriage between collaterals if there is at least one degree distance from the common ancestor (Gidro, et al., 2009). Roman jurist-consult Gaius informs us that taking your brother's daughter in marriage is allowed, a practice that came into use when Emperor (*divinus*) Claudius married (in AD 49.) with Agrippina, the daughter of his brother; however, it was not allowed to take his sister's daughter in marriage, these things being appointed by the Imperial Constitution[8].

The impediment of natural kinship - based on moral and biological grounds - is an impediment to the initiation, the penalty of which is nullity, whether in marriage or kinship, even though the latter was not established by law.

Impediment based on kinship is true for adoption (civil kinship), the ban on degrees, straight and collateral is identical to the natural kinship; moreover in this case, the marriage between the adoptee and his natural relatives is prohibited, because of the link of blood (biological considerations).

In the case of medically assisted human reproduction with third donor, kindred and biological parentage is unknown, so the impediment of kinship will refer to parentage and kinship assigned by law (Florian, 2011).

As an exception to the impediment of kinship (both natural and civil) the current Civil Code allows marriage between first cousins (fourth degree of kinship) for good reasons (pregnancy, birth of a child) and only with the court guardianship in whose constituency resides the person asking permission. The court will be able to decide on a particular medical opinion given in this regard [art. 274 para. (2) Civil Code.].

Guardianship is also impediment to marriage, the Romans forbade marriage between tutor and pupil, and the Romanian legislature forbade marriage between guardian and minors who are under guardianship (Art. 275 Civil Code., text took from the provisions of art. 8 of former Family Code).

The guardianship is an institution created in favor of the minor without parental care, so that there is a moral impossibility between guardianship and the status of married person, because the guardian cannot be at the same time legal guardian and husband. In this way the legislature intended to imprint the high morality of guardianship relationship between guardian and ward, not accepting the existence of marital relations between them (Romoșan , 2012).

It is likely that the sacred institution of marriage is as old as the housewife religion in the Indo-European race, because one cannot be conceived without the other. This religion taught the man that marital union is nothing but a link between the sexes or a transient condition that united spouses, through the strong bond of the same religion and the same

[8] Gaius, *Institutiones*, I. 57.

beliefs (Fustel de Coulanges, 1984). Moreover, the wedding ceremony was so solemn, with so serious effects that it should not surprise us that men felt that this ceremony is not permitted and only possible for one woman in every home. Such a religion could not recognize polygamy. It is even considered that such a union is indissoluble and that divorce is almost impossible (Fustel de Coulanges, 1984).

In the current Romanian law, the lack of the married status, background condition for responsible and valid conclusion of marriage, is provided in art. 273 Civil Code that is marginally called "Bigamy". According to this article a marriage is prohibited for a person who is married already[9]. So those who want to marry must be single, divorced or widowed.

A foreign citizen – based in our country – is prohibited a marriage that would be contrary to the principle of monogamy, but his marriages concluded abroad will not be dismantled for bigamy (Florian, 2011). A marriage concluded in violation of these provisions is sanctioned by absolute nullity of subsequent marriage [art. 293 para. (1) Civil Code.].

The existence of bigamy status is assessed in relation to the time of conclusion of the second marriage (the so-called "subsequent marriage"), differing only in that situation in which the bigamist husband is either: in a first marriage that is not closed or that was not terminated by death of spouse or a declaratory judgment that became final or the subsequent marriage ended before the date of the final judgment of absolute or relative invalidity to the first marriage; bigamy exists when - although divorce proceedings started (whether judicial or administrative) – the person remarries before the date of the final divorce judgment by the civil officer or public notary.

Monogamy was always the base of family relationships on Romanian territory inhabited today, knowing that in marriage the husband had a principal wife (among many wives), as he was the principal husband (among many spouses) (Vasiu , 2009); while monogamy was imposed for reasons of preserving private property and transfer to followers, it was also due to the influence of Christian precepts.

With the advent of Christianity in the Roman Dacia there disappeared any trace of polygamy in the Daco-Romanian family and in the Romanian family, the entering into marriage according to church canons being a definite proof to substantiate the Christian element of marriage and family (Negoiță, 2013).

Although today there are countries in the world with polygamy and polyandry legislation[10] the vast majority of modern states prohibit, by their laws, bigamy, punishing it as a criminal and civil violation (prison and nullity of the legal act of marriage).

If up until the advent of the new Civil Code, sex difference was not expressly provided for in the former family code, currently it is regulated in art. 259 para. (1) and

[9] In the Romanian legal doctrine the marginal name of "Bigamy" is considered as wrong art. 273 Civil Code because it is "the effect of the conclusion of a new marriage by a married person. And, what the legislature wants to prevent is not bigamy, but the conclusion of a new marriage by a married person that is the cause that attracts bigamy. Therefore, what stops a marriage is the existence of a previous marriage, the status of married person at the time the new marriage, not bigamy, which is a case of absolute nullity of marriages"; (Gavrilescu, 2014). We concur to the draft law ferend to replacement of "bigamy" by "quality of married person" as the marginal name of art. 273 Civil Code.

[10] Polygamy is tolerated by the Hindu law. Polyandry occurs in Malaba and in Punjab brothers can get married with 12, 13 women in common. For Muslims, the purpose of marriage is procreation and therefore, for a man to have as many children as he can, he may have up to four wives simultaneously.

(2) of the current Civil Code, in that the legal act of marriage is the union of free consent between a man and a woman, and art. 277 Civil Code reinforces the idea of sexual differentiation in marriage by banning same-sex marriage, the penalty for failure to comply with the substantive conditions being nullity. Romanian law does not recognize marriage concluded abroad between persons of the same sex, or registered civil partnership.

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