

Revista Românească pentru Educație Multidimensională

Romanian Journal for Multidimensional Education

ISSN: 2066 – 7329 (print), ISSN: 2067 – 9270 (electronic)

Coverd in: Index Copernicus, Ideas. RePeC, EconPapers, Socionet, Ulrich Pro Quest, Cabel, SSRN, Appreciative Inquiry Commons, Journalseek, Scipio, EBSCO

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Revista Românească pentru Educație Multidimensională, 2010, Year 2, No. 4, August, pp: 79-89

The online version of this article can be found at:

<http://revistaromaneasca.ro>

Published by:

Lumen Publishing House

On behalf of:

Lumen Research Center in Social and Humanistic Sciences

Regulation of the main principles that govern the family relationships according to the stipulations in the Family Code and the new Civil Code

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Abstract

The paper analyses the principles that govern the family relationships from the point of view of the Family Code and of the Civil Code (in force by Law no 287/2009) needed both for the settlement of those aspects related to the family relationships in those matters where the legislation is not explicit enough or does not contain any regulation, and for the assessment of the extent to which the stipulations of the Family Code or of the Civil Code that refer to the family relationships round themselves off with the stipulations of other normative papers.

Keywords:

family; family relationships; principles that govern the family relationships; Family Code; the new Civil Code.

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1. The concept of family

Etymologically, the term *family* comes from the Latin word *familia* (*ae*), which means all the members in a house or kindred.

The term of “family”, introduced in the Romanian Countries, after 1696, by Neo-Greek channel, designates the social group made up of spouses and their children, group formerly named „fămeie” (from the Latin word *familia*). This term is opposite to that of “house”, which used to designate mainly, the group of natural bodies connected both by blood relationships and by clientele-like interests.

The traditional Romanian family is *nuclear* (that is it was made up only of the spouses and their descendents), *patrilineal and patrilocal and of the log-like pattern* (that is the children established, after the marriage, their own households, except for the youngest who was supposed to live in the paternal home) (Dariescu, 2008:77-80).

The concept of family may be analyzed from two perspectives: sociological and juridical.

From a *sociological* point of view, the family as a specific form of human community designates the group of persons united by marriage, affiliation or relationship, who belong to the same life, interest and mutual help community (Stănoiu, Voinea, 1983:5-15).

The sociologists distinguish between two types of family:

- *The simple or nuclear family* made up of parents and their unmarried children;
- *The extended or large family* made up of other persons besides those mentioned in the first case (Check, Filipescu, 2006:12).

The concept of family was not defined from a *juridical* point of view, in the Family Code. As well as this, we can find references on the concept of family, in different internal regulations (for example, Art. 48, subclause 1 of the *Constitution*,² Art. 117 of the *Law* no. 114/1996, etc) and international regulations (for example Art. 16 subclause 1 of the Universal Declaration of Human Rights³).

As a consequence, specialty literature⁴, based on the legislation in force gives a different definition to the concept of family. Thus, *strico sensu*, the family

² According to this article „The family is built on the marriage freely consented to by the spouses, on their equal rights and on the parents’ right and duty to secure the children’s upbringing, good breeding and education”.

³ According to Art.16 subclause 1 „starting with the marriagable age, the man and the woman, regardless of their race, citizenship, or religion have the right to get married and build a family”.

⁴ For further details see: T., Bodoaşcă. *Dreptul familiei*, All Beck Publishing House, Bucureşti, 2005, pp. 3-10; A., Bacaci. V., C., Dumitrache. C., C., Hageanu. *Dreptul familiei*, 6th edition, C. H. Beck Publishing House, Bucureşti, 2009, pp. 1-4; E., Florian. *Dreptul familiei*, 2nd edition, C. H. Beck Publishing House, Bucureşti, 2008, pp. 1-4.

comprises the spouses and their underage children, while *largo sensu* the concept of family comprises, besides the spouses and their underage children other categories of people. As well as this, the family is defined as being the natural and fundamental element of a society, being generated by the juridical act of marriage, legally performed, between a man and a woman, made up of the spouses and their children who do not possess full exercise capacity, as well as of other people deliberately stipulated by the law, where the reports between its members are regulated from a juridical point of view and are governed by the principle of solidarity.

2. The juridical concept of family according to the stipulations of the Civil Code (Art. 258)

The Civil Code adopted by the Law no. 287/2009 does not define the concept of family in the Art. 258 entitled *Family*, 1st Title entitled *General dispositions*, 2nd book-*On family*, although the specialty literature (Bodoaşcă, 2005) suggested that the New Civil Code should work out this shortcoming. Under the circumstances, we advocate for the definition of the concept of family given by the doctrine (Bodoaşcă, 2005) thus: the *family* is the natural and fundamental element of the society generated by the juridical act of marriage, legally performed, between a man and a woman, made up of the spouses and their children who do not possess full exercise capacity, as well as of other people deliberately stipulated by the law, where the reports between its members are regulated from a juridical point of view and are governed by the principle of solidarity.

3. The regulation of the general principles that govern the family relationships in the Family Code

Knowing the general principles that govern the family relationships helps at giving the solutions in those matters where the legislation is not explicit enough or does not contain any regulation, and for the assessment of the extent to which the stipulations of the Family Code that refer to the family relationships round themselves off with the stipulations of other normative papers (Dariescu, N., Dariescu, C., Petraru, 2009:2-30).

According to the stipulations in the Family Code, specialty literature⁵ has established the following principles the family relationships are based on:

⁵ For further details: T., Bodoaşcă. All Beck Publishing House, Bucureşti, 2005, pp. 34-41; A., Bacaci. V., C., Dumitrache. C., C., Hageanu. *Dreptul familiei*, 6th edition, C. H. Beck Publishing House, Bucureşti, 2009, pp. 8-10; E., Florian. *Dreptul familiei*, 2nd edition, C. H. Beck Publishing House, Bucureşti, 2008, pp. 7-12; G., C., Frenţiu. B. D. Moloman. *Elemente de dreptul familiei și de*

1. The principle of family and marriage protection. Art. 1 Subclause 1 of the Family Code specifies that: „The State protects the institution of marriage and the family, it supports the development and the consolidation of the family by economic and social measures”

2. The principle of maternity and child protection. Art. 1 Subclause 2 of the Family Code specifies that: „The State protects the mother and child’s interests and shows special care for the upbringing and education of the young generation”.

3. The principle of free consent of the future spouses when contracting the marriage. According to the stipulations in Subclause 3 of article 1 in the Family Code, “the family is based on the marriage freely consented to by the spouses”.

4. The principle of monogamy. Art. 5 in the Family Code, specifies that „marriage is forbidden for the man or the woman who is already married.” If this principle is broken the sanction stipulated by the Family Code is the absolute nullity of the second marriage. From a criminal perspective this act refers to the bigamy offence and involves the punishment of detention.

5. The principle of the equality between the spouses. Art. 1 Subclause 4 of the Family code specifies that „The man and the woman have equal rights with respect to the relationship between the spouses, as well as to the exercise of their rights towards the children.”

6. The principle of exercising their rights and of fulfilling their parental duties towards their children. According to Art. 1 Subclause 5 and Art. 97 last Subclause of the Family code, the parental rights are exercised only in the children’s interest, regardless if they are from wedlock, out of wedlock or adopted, under the control and actual guidance of the tutorial authority.”

7. The principle of granting mutual moral and material support between the members of the family. Art. 2 of the Family Code stipulates that “The family relationships are based on friendship and mutual affection between its members, who have the duty to offer moral and material support to each other.”

4. The regulation of the general principles that govern the family relationships in the Civil Code

The stipulations in the Civil Code regulate the following principles that concern the family relationships:

1. The principle of the marriage freely consented to by the spouses;
2. The principle of marriage and family protection;
3. The principle of maternity and child protection;

procedură civilă, Hamangiu Publishing House, București, 2008, pp. 39-43; I., Apetrei. Raluca – Oana, Andone. *Dreptul familiei. Students’ book*, Venus Publishing House, Iași, 2005, p. 6-7.

4. The principle of respecting and promoting the superior interest of the child;
5. The principle for the protection of the children and young people;
6. The principle of the children's equality of rights;
7. The principle of exercising the rights and of fulfilling their parental duties towards their children;
8. The principle of equality between the spouses;
9. The principle of granting mutual moral and material support between the family members;
10. The principle of monogamy.

1. The principle of the freely consented marriage between the spouses is regulated in the Romanian Constitution, which specifies in Art. 48, Subclause 1 that "The family is established on the marriage freely consented to by the spouses". Subclause 1, article 258 of the Civil Code, specifies that: "The family is built on the marriage freely consented to by the spouses"⁶. As well as this, Subclause 2 Art. 259 of the Civil Code, specifies that "The man and the woman have the right to get married in order to build a family".

The need that this principle be observed has determined its deliberate stipulation also in international papers that refer to human rights, out of which we would like to mention:

- Art. 16 of the Universal Declaration of the Human Rights, specifies that: "Starting with the marriageable age, the man and the woman, regardless of their race, citizenship or religion, have the right to get married and build a family. They have equal rights when contracting the marriage, throughout the duration of the marriage, and upon its dissolution. (1st point). Marriage can be contracted only with the full and free consent of the future spouses (point 2). The family is the natural and fundamental element of the society and has the right to be protected by the society and the state" (point 3).
- Art. 12 of the Convention for the protection of the human rights and of the fundamental freedoms stipulates that: "Starting with the marriageable age, the man and the woman have the right to get married and build a family, in conformity with the national laws that regulate the exercise of this right."

The doctrine shows *stricto sensu*, that this principle with constitutional value means that the harmonious will of the future spouses is the only subjective, relevant and indispensable factor when contracting a marriage. The agreement or the opposition of the parts or of other persons do not have

⁶ The stipulations in paragraph 4 of the Art. 259 of the Civil Code provide that „The present Civil Code defines as spouses, the man and the woman united by marriage.”

juridical connotations. The freely consented character of the marriage means that there are neither privileges nor discriminations of social, racial, ethnic or religious nature when people exercise their fundamental right of getting married and building a family.

2. The principle of marriage and family protection is regulated in the Romanian Constitution, which specifies in Art. 26, Subclause 1: “The Public authorities observe and protect intimate, familial and private life”, while in Art. 44, subclause 2 it mentions: “The contracting, dissolution and nullity conditions of a marriage are established by law.”

As well as this, this principle is consecrated by: Subclause 2 and 3 of the Art. 258 of the Civil Code. According to Subclause 2 “family has the right to be protected by the society and the state”. Subclause 3 stipulates that “The state has to support the contracting of marriage and the family development and consolidation, by means of economic and social measures.”

With a view to securing the stability of the family, the Civil Code rigorously regulates the conditions of content of form of the marriage, the spouses’ personal rights and duties, the spouses’ patrimonial rights and duties, marriage dissolution, etc.

References at the principle of family and marriage protection are also to be found in Art. 8 of the European Convention, which stipulates that: “Any person has the right that their private and family life, their domicile and their correspondence be respected”. (Point 1) No interference from any public authority is admitted in the exercise of this right, except for the situation when this interference is stipulated by the law and if it is a measure which, in a democratic society, is necessary for the national safety, the public safety and the country’s economic welfare, the preservation of order and crime prevention, the protection of health or morals, or the protection of other people’s rights and freedoms” (point 2).

According to the jurisprudence of the European Court the protection of family life refers to the protection of the actual family life, not the project of a family life; this is why Art. 8 of the European Convention, does not provide enough covering for the right to divorce. Thus, in the case *Johnston versus Ireland*, with respect to the plaintiffs’ complaint concerning the impossibility of getting married although they had been living together for more than 15 years, given the status of married person of one of the concubines and the inadmissibility of divorce in Irish law, the Court has decided that one cannot deduce from Art. 8 of the European Convention {(a general stipulation) a right that Art. 12 of the same Convention does not recognize (special stipulation)}, that is the right to get married (Bîrsan, 2006:853-854).

3. The principle of equal rights for children is dealt with in: Subclause 4 of Art. 44 of the Constitution which stipulates: „The children⁷ resulted out of wedlock are equal in front of the law to those resulted from wedlock, as well as to the adopted ones.”

According to Art. 446 of the Civil Code „The father has similar rights and obligations towards the child born by medically assisted reproduction with third donator and towards the child born by natural conception.”

According to Art. 448 of the Civil Code „, the child born out of wedlock, whose affiliation has been established according to the law has, towards each parent and their relatives, the same status as that of child resulted from wedlock.”

According to Art.471, Subclause 1 of the Civil Code “The adoptive parent has towards the adopted child the rights and duties parents have towards their natural child.”

We can notice that, regardless of the way they entered the respective family, children have equal rights.

4. The principle of observing and promoting first and foremost the child’s superior interest is consecrated in Art. 263, line 1-4 of the Civil Code. Paragraph 1 specifies: “All measure concerning the child, regardless of its author must be taken in the first and foremost interest of the child. Paragraph 2 specifies that: “To work out the applications referring to children, competent authorities have to provide all the necessary guidance so that the parties might use amiable conflict-solving methods.” Paragraph 3 specifies that: “The procedures referring to the parent-children relationship must guarantee that the parents’ wishes and interests concerning the children may be brought to the authorities’ knowledge and that the latter take these into account when making decisions.” Paragraph 4 mentions that: “The procedures referring to children must take a reasonable period of time, so that neither the child’s superior interests nor the family relationships are affected.”

5. The principle for the protection of the children and young people

According to Art. 49 Subclause 1 of the Constitution: „The children and the young people enjoy a special protection and assistance status in achieving their rights.” Paragraph 3 of the same article specifies that child exploitation, their use in activities that would damage their health and morals or that might endanger their life and moral development, is strictly forbidden. As well as this, according to Subclause 4 of the same article employment of minors under the age of 15 is also forbidden.

⁷ We mention that in conformity with subclause 5, Art. 263 „... the child is that person who has not turned 18 yet and has not acquired full exercise capacity, according to the law.”

The necessity of protecting the child is also stipulated in the law no. 272/2004 with reference to the protection and the promotion of the human rights but also in the Convention concerning the child's rights.

6. The principle of children's equality of rights.

Art. 48 Subclause 3 of the Constitution stipulates that "Children resulted out of wedlock are equal in front of the law to those resulted from wedlock".

Art. 63 of the family Code specifies: „the child born out of wedlock whose affiliation has been established by legitimation of the child or by court decision has towards his/her parent and their relatives, the same status as the legal status of a child resulted from wedlock.”

According to Art. 97 of the Family code "Both parents have the same rights and duties towards their minor children, regardless if they resulted from wedlock, out of wedlock or if they are adopted.”

7. The principle of exercising the rights and of fulfilling their parental duties towards their children is regulated in several articles of the Civil Code.

The family is established according to Art. 258, Paragraph 1 of the Civil Code: "... also on the parents' right and duty to guarantee their children's upbringing and education.”

Art. 261 of the Civil Code, specifies "The parents are those who have, first of all, the duty to up-bring and educate their minor children.”

According to Art. 487 of the Civil Code, parents have the right and duty to raise their child, taking care of his/her health and his/her physical, emotional and intellectual development, of his/her education, knowledge and professional training, in conformity with their own beliefs, or with the child's needs and abilities; they have to give their child the guidance and the necessary advice for the appropriate exercising of the rights that the law grants to him/her.

Art. 488 Para 1 mentions that: „The parents have the duty of raising their child under circumstances that might guarantee his/her harmonious physical, emotional, spiritual, moral and social development.”

Therefore, the parents have to:

- a. to cooperate with the child and to respect his/her intimate and private life as well as his/her dignity;
- b. to present and let the child know about all the facts and acts that might affect him and take into account his/her opinion;
- c. to take all the necessary measures to protect and carry into effect the child's rights;
- d. to cooperate with the natural and legal persons that work in the field of child care, education and professional formation.

According to subclause 1 Art. 20 of the Civil Code the minor parent who is 14 has only the parental rights and duties that refer to the child.

8. The principle of equality between the spouses is dealt with in article 48, Para 1 of the Constitution and in various article in the Civil Code.

The equality between the spouses is nothing but a particular application of the principle of full equality between the man and the woman from all walks of life (Florian, 2008:10-11).

According to the stipulations of the Art. 258, Subclause 1 of the Civil Code, “The family is established on the marriage freely consented to by the spouses and on their equal status.....”

Art. 308 of the Civil Code, says that “The spouses decide by mutual agreement with reference to all the aspects of marriage”.

Art. 309 subclause 1 stipulates that: “The spouses owe respect, fidelity and moral support to each other.”

The principle of the equality between the spouses is also dealt with in various international papers.⁸ Thus, according to Art. 16, subclause 1 of the Universal declaration of the Human Rights “Starting with the legal age, the man and the woman regardless of their race, nationality or religion have the right to get married and build a family. They have equal rights when contracting the marriage, throughout the marriage and upon its dissolution”. The international Pact concerning the economic, social and cultural rights⁹ mentions, in Art. 3 that „The States that are parties in the Pact hereunder pledge themselves to guarantee the equal right that the man and the woman have to benefit of all the economic, social and cultural rights listed in the Pact hereunder.”

What has to be understood and admitted is that in the relationships between the spouses, their rights and duties, having the same content, are complementary and have one finale: the common interest (Florian, 2008:11).

9. The principle of granting mutual moral and material support between the family members is built on the affection, the friendship, the generosity and the trust they share.

However, the material side benefits of legal protection tools Thus, Art. 516, Subclause 1 of the Civil Code stipulates: „The maintenance obligation exists between the husband and the wife, the first degree relatives, between siblings, as well as between the other persons expressly mentioned by the law.”

As well as this, Art. 325, Subclause 1 of the Civil Code stipulates: “The spouses have to grant material support to each other.” Subclause 2 mentions that the spouses have to contribute, according to each one’s possibilities, to the

⁸ We would also like to mention the followig title: Pactul privind drepturile politice și civile (Art.23) (The pact concernng the civil and political rights); Protocole no. 7 at the European Convention (Art.5).

⁹ Adopted by the General Assembly of the UNO on 16 December, 1966, ratified by Romania by Decree no. 212 of 31 December, 1974.

expenditures of the household, if it has not been stipulated otherwise by matrimonial convention.

10. The principle of monogamy is dealt with in Art. 273 of the Civil Code that stipulates that “the contracting of a new marriage by the person who is already married is strictly forbidden”.

In full concordance with the cultural traditions of our society, the family legislation allows marriage only between those persons who, at the time of the contracting of marriage, do not have the status of a married person. In other words, each of the spouses has to be unmarried, divorced or widow(er). This is what we call *serial* monogamy, because it is not successive marriages that are banned, but a person’s concomitant engagement in several marriages (Florian, 2008:12).

The infringement of the principle of monogamy is sanctioned from a civil point of view with absolute nullity of the marriage according to Art. 293, of the Civil Code while from a criminal perspective this act refers to the bigamy offence and involves the punishment of detention.

However we cannot neglect the existence of polygamy under various forms; polygamy (the most famous form- allows a man to have several wives) and the polyandry (a woman’s marriage to several men- quite seldom found in Asian countries) in the Arab, African or Asian world.

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