

CHALLENGES OF MODERN MARRIAGES - NON-PATRIMONIAL RIGHTS AND OBLIGATIONS OF SPOUSES

Nicoleta Roxana ȘERBĂNOIU*

Abstract

The evolution of contemporary private law is due to the recognition of the importance of human rights, knowing a real progress lately, which has led to the protection of the person's subjective civil rights. It is very important that, in addition to legal coercive values, society should accept the importance of subjective rights and respect them. In terms of family law, the personal obligations of spouses are important. In order to be effective, these rights must be applied carefully and it is necessary that they come to defend a person both physically and mentally. It is very important that, in addition to legal coercive values, society should accept the importance of civil subjective rights and respect them. Although at European level we can observe an exponential increase of the values protected due to European Convention on Human Rights and its implementation, in Romania the respect of the civil subjective rights remains at the discretion of individuals, force can not cover all the cases that may arise. Civil subjective rights and obligations, in terms of family law, are important, especially the personal obligations of spouses. Personal rights and obligations are inseparable from spouses and can not be alienated. They can not be the subject of the matrimonial agreement or of any other contracts. This provides an essential principle of family law - the equality of spouses in family – that is based on the Universal Declaration of Human Rights, the Convention on the Political Rights of Women, the Convention on the Elimination of All Forms of Discrimination against Women, Civil Code.

Keywords: non-patrimonial rights and obligations of spouses, cohabitation, fidelity, name.

1. Introduction

Over time, marriage has undergone significant changes due to legal regulation. Marriage, since the beginning of legal regulation, has been the union between man and woman.¹ The purpose of this union was, and continues to be, the founding of a family, the procreation and growth of children.

The family in the old Dacia was based on marriage. There are some documents that tell us that the husband had to pay a price for his wife so that when he wanted to marry, the husband had to pay a certain price to the woman's parents. The woman contributed to marriage by some material goods that constituted her dowry.²

In the sense of Roman law, the family was formed around the power given to the leader of the family, which could be absolute, having the power to decide the life of the persons under his power.³ The situation of the children (*filli or filiae familiae*), but also of the married woman was that of *alieni iuris*, who designate those who can not decide for them, these being under the power of a *pater familiae*. It is fair to say that the Roman family had a patriarchal character.⁴

During Augustus reign, Roman citizens were forced to observe a series of new rules on morality. During the same period of the Roman Empire, the natality rate had a downward trend, and Augustus's main goal was to maintain the birthrate, and thus issued rules to force the citizens of Rome to raise more children.⁵

Lex Julia maritandis ordinibus established the obligation of age difference. The age of legal consent for a marriage was 12 years for girls and 14 for boys.⁶

When we talk about marriage, men and women needed to respect the morality of a relationship and to consider marriage to each other sacred. These legal provisions applied to both men and women who were never married and to those who were divorced and wanted to remarry. The noble women married earlier. This aspect had in mind that an aristocratic woman had to be virgin at the time of her marriage.

As we have seen in previous lines, the basic principle was the morality of marriage and family life. Some of the rights and obligations that husbands had in ancient Rome have been preserved today, such as the principle of monogamy, which has been preserved in our current legislation.

The main purpose of marriage at that time was procreation, though current legislation no longer

* PhD student, Faculty of Law, "Lucian Blaga" University of Sibiu (e-mail: e-mail1@yahoo.com)

¹ Teodor Bodoașcă, *Dreptul familiei*, Ediția a III-a, rev., București, Ed. Universul Juridic, 2015, p. 91;

² Vl. Hanga, *Istoria dreptului românesc. Dreptul cutumiar*, Ed. „Chemarea”, Iași, 1993, p. 15; I. C. Drăgan, *Mileniul imperial al Daciei*, Ed. Științifică și Enciclopedică, București, 1986; I. C. Drăgan, *Noi tracii*, Ed. Scrisul românesc, Craiova, 1976.

³ Girard, *Texte de drept roman*, ref. Gaius, Ulpian, Regulae, Paris, 1937, p.4.

⁴ Vasile Val Popa, *Drept Privat Roman*, Ed. All Beck, București, 2004, p. 167

⁵ Richard I. Frank, *Legislația privind căsătoria și copiii în timpul lui Augustus*, Ed. California Studies in Classical Antiquity, Vol. 8, University of California Press, 1975, p. 44-45.

⁶ Vasile Val Popa, *Drept Privat Roman*, Ed. All Beck, București, 2004, p. 173. A se vedea și I.C. Cătuneanu, *Curs elementar de drept roman*, Ed. Cartea Românească, București, 1927, p. 150-151.

provides for an obligation in this respect, as Augustus had stated in the ancient Roman Empire, it still remains a right that spouses have today.

Lex Iulia de adulteriis provided a series of possible punishment for married women committing adultery. There is now a duty of loyalty, and the sanction for this violation of non-marital obligations of spouses is divorce.

2. The non-patrimonial rights and obligations of spouses in the context of the modern family

The rules of family law determine the pecuniary relations between its members and non-patrimonial also. The legislator wishes to establish a material solidarity between the members of the family. In the following, however, we will consider the non-patrimonial rights and obligations of family members and their consequences.

The legislator establishes certain rules regarding personal rights and obligations arising from family relationships, such as the regulation of marital relationships.

Values are important for family members, but especially for spouses. The laws must be in line with the collective ideals set by a society and the outcome. The functioning of the legal system is important, so the legislator had to regulate these values as predictable and desirable as possible.⁷

Decreasing sanctions clearly affects the non-marital relationship between spouses and is due to the principles of freedom and equality that have been promoted by both the legislator and the specialized doctrine. Most sanctions in previous legislation have disappeared, and criminal penalties have diminished, except for family abandonment, rape between spouses and domestic violence.

On the other hand, it is not wrong to suppress certain criminal sanctions that no longer apply to modern family law, but there are certain situations where they should be replaced by civil sanctions. We believe it is necessary to provide a legal framework that gives the spouses the opportunity to defend their rights and sanction the spouse who violates non-patrimonial obligations.

We believe it is time to give individuals a flexible right, more adapted to family transformations and modern needs. Thus, even if the legislator has lately made an act of withdrawal, non-interference in family relationships, this is not entirely wrong. With this desire not to interfere in the non-patrimonial relationship of the family and especially of the spouses, the legislator

leaves free the possibility of establishing the form of the non-patrimonial legal relationship that they want during the marriage.

The contemporary legislator makes recommendations and avoids editing coercive rules, leaving it to each family to choose the non-patrimonial relationship they want to have.

This freedom, however, must be achieved without hindering a member of the family without being able to hurt him and forcing him to do something he does not want. It is necessary to provide legal ground that gives the possibility of concluding contracts stipulating the will of the spouses. The clauses of a contract that stipulate the non-marital relationships of the spouses must be clearly stated, they must contain sanctions in case of non-exercise or guilty exercise, but, most importantly, must represent the will of each spouse.

The objective of the legislator, proposing different models of family relationship building, ensures freedom for everyone to choose what suits them best; "For every family, for every right," wrote the famous French author Jean Carbonnier.⁸

However, it should be emphasized that if the choice of the desired non-marital relationship model is free, compliance with legal obligations must be achieved by compelling individuals to respect the legal consequences of their contractual choice. For example, in the choice of marriage, people show the option of adhering to the legal rules governing spouses' relationships.⁹

This right of option on legal consequences is an indirect process that allows individuals to influence their constraint. When such persons find themselves in breach of legal rules, they should not be subject to inappropriate individualisation of the mandatory rule, but to the one resulting from the legal regime they have chosen.

For example, at the time of divorce, the spouses can agree on the sanction for the violation, and then present this conventional agreement to the court.¹⁰

Through these agreements, spouses could escape an individualization that they regard as wrong. The possibility of concluding these conventions is important if a certain interest is to be protected. Thus, the protection of the interests of spouses leads to the promotion of family interests, and the protection of social justice can be achieved through clauses that establish appropriate protection and be grounded on public order.¹¹

⁷ Y. Alpe, *Lexicon de Sociologie*, Dalloz, 2010; P. Morchain, *Psihologia valorilor sociale*, Dunod, 2009, p. 14.

⁸ J. Carbonnier, *Eseuri asupra legii*, Defrénois, ediția a 2-a, 1995, p. 181.

⁹ F. Dekeuwer-Defossez, "Divorțul și contractul", în D. Fenoillet, P. de Vareilles-Sommieres, *Contractualizarea familiei*, Economica, 2001, p. 67.

¹⁰ J. Hauser, P. Delmas Saint-Hilaire, *Voința și ordinea publică: un divorț intrat în domeniul contractual*, Revue Defrénois 2005, nr. 5, p. 357.

¹¹ J. Hauser, J. J. Lemouland, *Ordinea și morala publică*, Repertoriul Civil Dalloz 2013, spec. Art. 2, secțiunea 2.

3. The importance of adopting appropriate legal solutions

From a legal point of view, besides imperative rules, there have always been rules that depend on the will of the person. In general, the contractual clauses are negotiated by the parties, representing their unwarranted will. The contract even concluded between spouses, under the scope of establishing their extra-patrimonial relationship, must have the power of law between the two, both during the marriage and in the event of a divorce. Thus, the simple behavioral act that seems appropriate for the spouses needs to be well-defined by a legal framework, which results in a structured set of rights and obligations bound by a contract.

In family law, there are some examples of legal prevention that relate to the defense of the rights and obligations of spouses. Our current law seems to encourage marriage, as it gives the spouses certain advantages that are not offered to people living in concubinage. Here we mainly refer to those legal provisions that bring an advantage over the non-patrimonial relationship of spouses. An eloquent example of this is the name of the spouse, since only spouses can use a common name or can wear during marriage and the name of the other, according to art. 282 Civil Code. In case of death, spouses can inherit the other's property without any legal formality prior to the date of death. Also, only a surviving spouse can claim a survivor's pension. It should also be noted that only marriage allows the foreign spouse to obtain a residence permit, having an entitlement to the right of her husband.

Besides the advantages mentioned, the law also provides coercive techniques such as punishment. Legal sanctions are the legislator's orientation to straightening individual behavior by punishment when preventive activity reaches certain limits and becomes ineffective. In such situations, spouses must comply with a certain pattern of behavior, and a penalty is also required to ensure compliance with this obligation.¹²

We have an eloquent example of this, namely, the moral damage that may be suffered by the wife during marriage due to the husband's abusive behavior.¹³ After a marriage that lasted for thirty years, the wife decides to seek divorce. Together with the divorce, the wife also seeks to cover the moral prejudice suffered by her husband's abusive behavior.¹⁴ We consider this claim to be well founded and to be moral, in so far as it can be proved. Although moral damage is evident, in most cases the Romanian courts have agreed to reject such requests.

In a recent ruling¹⁵ by the European Court of Human Rights, the widow of an employee exposed to asbestos at work has asked the employer for damages for the moral damage caused by her husband's death. In parallel to this action, the children of the deceased continued the civil liability action commenced by their father before his death. None of these actions had a positive result, as the national courts claimed that the action was prescribed due to a period of ten years after the last exposure to pathogens. The widow and children have appealed to the European Court of Human Rights, alleging violation of the rights guaranteed by Article 6 § 1 of the Convention. In its judgment, the Court emphasized that the right of access to a court is not an absolute right and that the States have a margin of discretion in setting the time limits for action, and that these delays must be compatible with the requirements of Art. 6§1 and must not affect the very substance of this right, but it is not the case when those periods of time could deprive a person because the damage occurs after the expiry of these time limits.

From the point of view of non-patrimonial rights and obligations of spouses, we are confronted lately with certain problems in respecting the religion of the other husband. US states allow insertion of certain clauses in this sense if there are some reasons for that husband to have a certain religion. In recent years, some couples have included social life clauses relating to the use of social media networks, stipulating provisions for use in their prenuptial agreements that may be used in the context of marriage.¹⁶

We recall, in this respect, the recitals of the criminal decision no. 564/2017 of the Iași Court of Appeal,¹⁷ which condemned a man for accessing multiple emails and internet banking accounts without the prior consent of his wife. He has taken several actions in the criminal resolution by opening and reading conversations and monitoring his wife's bank accounts. The husband claimed in his defense that he had the initial permission of his wife, so that since she had her consent, she was presumed until her express withdrawal or change of account password, which the court did not agree with. The Court of Appeal of Iași recalled by the recitals no. 564/2017, that the acts committed constitute the constitutive elements of the offenses of illegal access to a computer system, provided in art. 360 par. (1) and (2), violation of the correspondence secret, provided in art. 302 par. (1) and unauthorized transfer of computer data, provided in art. 364 of the Criminal Code.

¹² C. Chainais, D. Fenoillet, "Legea contemporană a sancțiunilor, între tehnică și politică: prezentarea și concluziile cercetării colective", în C. Chainais, D. Fenoillet, *Sancțiunile în dreptul contemporan*, vol. 1, Dalloz, 2012, p. XXII.

¹³ E. Mulon, *Daunele interese în materia divorțului*, Gazette Palais, 2014, nr. 21, p. 6 și urm.

¹⁴ Curtea de Casație Franța, secția I civilă, 1 iulie 2009, nr. 08-17825, *Dreptul familiei*, 2009.

¹⁵ CEDO, 11 martie 2014, *Howald Moor și alții contra Elveției*, nr. 52067/10 și 41072/11, 2014.

¹⁶ Laura Effron, *Te iubesc, esti perfect, dar ai grijă cum folosești Facebook-ul: Acordurile prenuptiale privind rețelele de socializare*, articol pentru ABC News, 3 iunie 2014.

¹⁷ Decizia penală nr. 564/2017 a Curții de Apel Iași.

In the same sense, we have the criminal sentence no. 183 / 26.11.2018 by the Alba Tribunal¹⁸, the defendant was convicted of illegally accessing a Facebook account of “jealousy.” This was confirmed by the Criminal Decision no. 92 of 5 February 2019, the Alba Iulia Court of Appeal dismissed the defendant's appeal and the court held that the defendant had committed a violation of privacy, and his motivation regarding jealousy did not attenuate but, on the contrary, amplified the deed. The court shows that the defendant has attempted to intimate a person, which is a serious deed, because he treated the other person as his own, his property, considering himself entitled to use his privacy, to know who she is talking to and what she is talking about.

We consider these examples to be eloquent in highlighting the need to restore values in terms of the life of the modern family, but especially with respect to the non-marital relationship of spouses.¹⁹

A person injured in a right of his own may request the court to defend his rights through a defensive action.²⁰ Depending on the situation or the moment of the action, it can be materialized in a request:

- prevention, when there is a real possibility of a violation.
- cessation, when the breach of non-patrimonial rights and obligations has occurred and persists at the date of the action.
- to find out when the touch has ceased.

If there are facts imputable to the offender, the injured party may request compensation for the damage caused. Remedies may only be made by the holder of the non-patrimonial right or obligation infringed.²¹

The claim for reparation of the damage by the actions regarding the protection of the extra patrimonial rights and obligations of the spouses can be formulated according to the provisions of art. 253 par. 4 of the Civil Code, and actions for reparation of the damage may be in reparation of the patrimonial damage suffered or in the repair of the moral damage.

The action for reparation of the patrimonial damage involves covering the damage caused by a diminution of the patrimony of the rightholder, which

must be proved. As regards the extra-patrimonial rights and obligations of spouses, this action may be brought in order to recover the damage caused by one of the spouses when it disregards a non-patrimonial right of its spouse. An example of this is the sale of the family home by one of the spouses, with the disregard of the right of the other spouse or of their children.

In order to determine the reparation of the moral damage caused, it is important to determine its nature and extent. The severity of the damage suffered, which may materialize in a suffering, due to a physical or mental injury, must be assessed. The injured person must prove the facts and the circumstances in which they happened.

4. Conclusions

We conclude that prevention and sanctions are coercive techniques that the legislator is relying on to impose certain behaviors and to limit actions that could cause harm.

We can, however, consider that the legislator no longer wants an absolute involvement in the rights and obligations of the spouses, so we notice a tendency to withdraw the constraint. This wish of the legislator not to interfere in the extra-patrimonial relationships of spouses results in the impossibility of applying any legal sanction in the case of a spouse's violation of the rights and obligations of the other spouse.

Under the influence of the new values of equality and freedom, indirect techniques of behavioral orientation are in decline. In couple relationships, for example, rules that seek to benefit married couples and disadvantage unmarried couples have gradually disappeared.

However, we must bear in mind that while the work of prevention tends to be reduced to the non-patrimonial right of the family due to the influence of freedom and equality, we must not conclude that it disappears. This also applies to the sanctions applicable to spouses.

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¹⁸ Sentința penală nr. 183/26.11.2018 pronunțată de Tribunalul Alba, confirmată prin Decizia penală nr. 92 din 5 februarie 2019, Curtea de Apel Alba Iulia.

¹⁹ B. Beignier, *Drepturile și libertățile fundamentale*, coord. R. Cabrillac, M.A. Frison Roche, T. Revet, Dalloz Paris, 12eme ed., 2006, p. 139

²⁰ Marian Nicolae (coordonator), Vasile Bîcu, George – Alexandru Ilie, Radu Rizoiu, *Drept civil. Persoanele*, Ed. Universul Juridic, București, 2016, p. 68-69

²¹ Gheorghe Beleiu, *Drept civil român: introducere în dreptul civil, subiectele dreptului civil*, ediția a V-a, Casa de presă și editură Șansa S.R.L., București, 1998, p. 88

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