The Institution of Marriage in Old Romanian Law

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Abstract: The institution of marriage is considered one the most important institutions of the family. In this thesis we propose to make a short presentation of this institution, its evolution in Romania, until the advent of the Civil Code and the imposition of civil status records, during the reign of Alexandru Ioan Cuza. The presentation of Roman legal regulations concerning marriage are intended to make the transition towards the existing institution of marriage in the Geto-Dacian space; there are many similarities between the two forms of regulation of this type of marriage. Until the advent of written standards, the marriage was concluded in accordance with the depositions of Country Rules. The form of concluding a marriage was the religious blessing, without an official written document. The emergence of Christianity has brought profound changes regarding the institution of marriage because the Christian church considered marriage as a Holy Communion where the religious moment coincided with the law. The written standards which will regulate the institution of marriage were inspired from the nomocoanons and collections of Roman-byzantine law, after some modification and adaptation to the internal relations and requirements.

Keywords: marriage, Roman law, medieval law, country rules, written standards

1. Marriage in Roman society

The institution of marriage is the most important of the institutions related to family. The regulation of the relations that appear between the spouses can be explained by the fact that family is grounded in marriage. The origin of the latter is inextricably linked with the appearance of family, while legally its origins are in the beginnings of law[1].

Roman law defined marriage as the union between man and woman that creates between them an indivisible bond or represents "the link between a man and a woman, a long-life union, a reciprocal participation in the divine and the human law[2]". In the Roman society, the family was monogamous, patrilocal and patrilinear, within a relationship that could be civil or of kinship. Civil marriage (*justae nuptiae*)

[1] Pricopie, Adrian,*Căsătoria în dreptul român*, Bucureşti, Editura Lumina Lex, 2000, p. 18.
[2] *Modestin*, lib. I, apud Anicuţa Popescu, *Instituţia căsătoriei şi condiţia juridică a femeii din Ţara Românească şi Moldova în secolul al XVII-lea*, în „Studii", an XXIII, nr. 1, 1970, p. 57; Doicescu, Raphael, *Despre căsătoria în dreptul roman şi român*, Bucureşti, Tipografia „Viitorul" Leon Grunberg, 1905, p. 13.

could bring the wife, who had to be no younger than 12[1], within the power of the husband (*cum manu*) who, in his turn, had to be no younger than 14[2]; however, the wife could retain a certain independence from the husband (*sine manu*). Marriage could be performed through religious ceremony, through purchase or through co-inhabiting for more than a year. Within the *cum manu* marriage, the wife became one of the husband's *agnates*[3] and consequently had to give up the domestic cult of the initial family. If in the case of the *cum manu* marriage, the husband held a genuine property right over his wife, in the case of the *sine manu* marriage the husband only held a right of possession[4].

In the case of the *cum manu* marriage, marriage could be terminated in the event of one of the spouses' death, through loss of liberty or citizenship of one of the spouses or through divorce. In the case of the *sine manu* marriage, marriage could be terminated through agreement of the spouses, thewre were, however, certain restrictions during the later years of the Empire under the influence of Christianity.

According to some legal experts' opinion, for the Romans, marriage was an entirely civil contract, which had no solemn character and was rather of a private nature. There was no law to regulate the marital ceremony, while the intervention of the authorities was not necessary in its formation.

2. Marriage in the Romanian Principalities in the mediaeval times

This brief presentation of Roman legal regulations related to marriage were meant to function as a passage towards the institution of marriage as it existed in the Geto-Dacian area, as there were a number of similarities between the two manners of regulating this type of institution. The family was monogamous, patrilinear and patrilocal. The woman held an inferior position in the Geto-Dacian society; she was, not, however, subject to humiliation[5]. There was a marital ceremony according to which the bride-groom purchased the bride from her parents for a symbolic price. The price varied according to the virtue and beauty of the bride; conversely, the men were purchased by the maidens[67]. The bride was supposed to have a dowry given to her by her parents. The wife took the name of the husband and she had to honour this name; she lived together with her husband and followed him everywhere. The

[1] Tomulescu, C. Şt., *Vârsta minimă cerută, în dreptul roman, pentru căsătoria fetelor*, în „Analele Universităţii Bucureşti. Ştiinţe Juridice", an XVIII, nr. 1, 1969, p. 133-135.
[2] Erbiceanu, Constantin, *Căsătoria în Biserica noastră naţională din timpurile vechi până în present*, Bucureşti, Tipo-litografia "Cărţilor bisericeşti", 1899, p. 18.
[3] Paternal relationship.
[4] Hanga, Vladimir, *Istoria generală a Statului şi Dreptului*, Bucureşti, 1958, apud Pricopie, Adrian, *op. cit*., p. 23.
[5] Cloşcă, Constantin, Asandului, Gabriel, *Istoria dreptului românesc*, Galaţi, Editura Fundaţiei Academice Danubius, 2002, p. 16.
[6] Amuza, Ion T., *Căsătoria şi divorţul în vechiul drept românesc*, Bucureşti, Editura Sylvi, 2001, p. 31.
[7] *Istoria dreptului românesc*, vol. I, Bucureşti, Editura Academiei, 1980, p. 77.

lineage was paternal, as it was in the Roman society. If the mother died, the children were entrusted to the care of the father[1].

The emergence of Christianity was to bring about profound changes regarding the institution of marriage in the area between the Carpathians, the Danube and the Black Sea. The Christian Church considered marriage a sacrament if the religious and the legal ceremonies coincided. The changes that were operated were more of an ethical nature – as the sacrament laid emphasis on the feeling of love between the spouses and on reducing the parents' absolute power over the children. The unequal status of the two spouses remained, while it was sanctioned by divine authority. The woman's inferior status was also due to the type of behaviour imposed on her in society by the Church[2].

Up to the moment when written documents were issued, marriage could also be contracted according to the unwritten Law of the Country. The form was "religious benediction", which lead to the belief that it was "written in Heavens". No written act was necessary for the marriage to be considered contracted. The ceremony was manifested especially in the procedure of match-making and the settling of the dowry. The youths were entitled to a dowry which represented an equivalent of the work done by them within the household. It was settled through the banns and public announcements during the wedding ceremony; to it other gifts were added from friends or other relatives with the aim of contributing to the founding of the new family. The dowry documents did not appear before the 17th century, when it started losing its traditional dimension; it was created for the future bride and would become a financial interest for the fortune-hunters. For this reason, the bride's parents took all sorts of legal measures for the preservation of its integrity, which represented the basis for the modern dowry system.

A typical impediment for marriage was the status of servitude of one of the spouses which, according to The Law of the Country, brought about the same status for the free spouse and the children resulting from such a marriage. Generally, the children could be legitimate, illegitimate (resulting from a relation outside marriage), adopted, step-children (from one of the spouses before the current marriage) to which blood brothers (fraternized) could be added.

Unlike the legal system of the Romanian countries outside the Carpathians, in Transylvania, family relationships (marriage, divorce, the status of dowry goods) were regulated according to canonical law. To contract a marriage, the parents' consent was compulsory; without it marriage could be contracted by elopement in a feigned abduction followed by the pay of a symbolic fee. The future wife's dowry was the duty of her parents or, after their demise, it passed on the brothers. Marriage could be annulled through repudiation, a case in which the dowry goods were left to the spouse who conformed to the marital obligations.

[1] Amuza, Ion T., *op. cit.*(1), p. 16-17.
[2] *Ibidem*, p. 34.

Up to the 17th century, in Ţara Românească (Wallachia) and Moldavia, written legal regulations regarding the institution of marriage were circulated through the collections *Matei Vlastares' Syntagma* (1335) and *Manuil Malaxos' Nomocanon* (1562 or 1563). The former collection would be used together with other colections of canons until the first Romanian prints[1]. At the same time, in our country *Matei Vlastares' Syntagma* lay at the basis of several later codes of laws. *Manuil Malaxos' Nomocanon* was in circulation in numerous copies[2] and was used until the creation of the codes of law named *Îndreptarea legii* and *Pravila aleasă*.

In the second half of the 16th century and in the 17th century these nomocanons were translated into Romanian[3] with the aim of strengthening the power of the state and of widening the enforcement of written law.

The codes of law of the 17th century as well as those of the previous centuries contained both lay and canonic regulations regarding marriage, regulations that had been taken from the Roman-Byzantine nomocanons and collections of law and used directly or indirectly, after some amount of transformation and adaptation to internal relations and necessities. Therefore, such regulations referred to the principle of monogamy, while its infringement was punished with the total nullity of marriage in terms of family law and with the punishment applied to the crimes of bigamy and biandry[4] in terms of criminal law. Penalized by the Christian Church and Byzantine law, the crimes of bigamy and biandry were considered serious crimes both for the woman who got married to two men and the man who committed the same deed, while the punishment was similar. As a rule, the punishment for those who committed this crime was „chastisement". The judge could also rule that the perpetrator should be sent to prison, carried around the town naked with the declared purpose of subjecting them to public contempt[5], and have his goods confiscated in favour of the Church. The punishemnt was more severe for those who married „two women of age"[6] or when both wives were gentry. In such cases, the capital punishment was enforced. The Orthodox Church considered that a bigamous person was a heretic and should be chastised with „terrible death". In order to escape punishment, the parties had to prove that they did not know that the first marriage had not been dissolved. Those who proved their good faith were not punished.

Mediaeval law stipulated free consent as the prime principle in contracting marriage. However, material interests actually made this principle impossible to put into practice. Therefore, the *Code of law of Govora* (*Pravila de la Govora*)

[1] Popovici, C., *Fîntînele şi codicii dreptului bisericesc ortodo*x, Bucureşti, 1866, p. 39; N. Milaş, *Dreptul bisericesc oriental,* Bucureşti, 1915, p. 161.
[2] Peretz, See I., *Curs de istoria dreptului român*, vol. II, partea I, Bucureşti, 1928, p. 371; Ştefan Berechet, *Legătura dintre dreptul bizantin şi românesc*, vol. I., partea I, Vaslui, 1937, p. 78-79.
[3] Panaitescu, P. P., *Începuturile scrisului în limba română*, în „Studii şi materiale de istorie medie", vol. IV, 1960, p. 180, 183.
[4] *Cartea românească de învăţătură*, Bucureşti, 1960, glava 15, *apud* Popescu, Anicuţa, *op. cit*., p. 60.
[5] *Ibidem.*

stipulated that the man who takes a woman against her will should be punished as one guilty of armed robbery according to the law[1]. *The Romanian book of teachings* and *Legal Regulations* (*Cartea românească de învăţătură* şi *Îndreptarea legii*) advised that rape or marriage against one's will should be punished with death and confiscation. If, however, the woman consented to abduction, the punishment was no longer so severe, and it was left for the judge to decide. The man who forced a woman into marriage was also punished. The freedom to consent on the choice of the future spouse existed in principle but not in fact. There were cases when the freedom to consent to marriage was exercised only within the class the future spouses belonged to[2] or to families with no fortune. Personal interests and the desire to ensure private property made this institution interesting not only to the parties, but also to the parents, masters or landowners and consequently such an act was no to be performed without their consent.

The parents' consent, required by the codes of law, was necessary since through marriage a new member was added to the family, whose material contribution interested the parties. Furthermore, through marriage a new person appeared who was entitled to a share of the property through inheritance. Although the codes of law did not stipulate that the parents' consent was essential in the case of the son's marriage, there was another possibility that the same result could be obtained in a different way – the right of the parents to disinherit the sons, which was not immaterial to the future spouses. Therefore, the parents' consent at the sons' marriage was a prerequisite so the latter they could inherit their parents. This stipulation was taken entirely from the Roman-Byzantine law.

As far as the relation between the spouses was concerned, feudal law enjoined the woman's state of inferiority towards her husband. As a way of protection for the husband's fortune, the wife could never dispose of or administrate the goods, only the husband having this prerogative.

Another prerequisite for the marriage to be performed was that neither of the future spouses should be bound by a marriage that had not yet been annulled. *Matei Vlastares' Syntagma* enjoined that the man who had two wives at the same time should be punished by clubbing, while his second wife and the children[3] he had by her should be driven away. The codes of law of the 17th century, inspired by the Byzantince imperial canons and regulations punished the breach of monogamy by absolute nullity of the marriage; thus, if bigamy was committed, not only the person who contracted a second marriage before the initial one was annulled was to be punished, but also of the priests who performed such a marriage.

Religious canons and codes of law allowed the widowed husband to remary a

[1] *Pravila de la Govora*, glava 32, *apud* Anicuţa Popescu, *op. cit*., p. 61.
[2] Ionaşcu, Tr., Christian, I., Eliescu, M., *Căsătoria în dreptul R.P.R.*, Bucureşti, Editura Academiei, 1964, p. 115.
[3] Pascu, Ştefan, Hanga, Vladimir, *Crestomaţie pentru studiul istoriei şi dreptului R.P.R.*, vol. 2, Bucureşti, Editura de Stat pentru Literatură Economică şi Juridică, 1958, p. 629.

second and a third time if he performed penance. A fourth marriage was considered by the codes as „outside the law" and hence forbidden. The man who broke this interdiction would be laid under the ban of the Church „until total separation should be performed...and he would repent."[1]

3. Conclusions

In the mediaeval codes of law, marriage was regulated according to the Byzantine law which in turn retained many elements from the Roman law. It did not have a solemn character and there was no civil institution to perform it or to issue a written civil act to certify the marriage between the spouses.

During the Middle Ages marriage was contracted only in front of religious authorities, in respect of the basic condition imposed by the religious codes of law, by the Byzantine laws, the codes of law in force and the customs.

The old regulations contain a number of principles that to this day lie at the basis of the institution of marriage: the principle of monogamy and of free consent. Old Romanian law retained, however, the woman's inferior status, as she was considered incapable and less intelligent than the man[2].

As for the absolute impediments, the codes of law enjoined certain basic conditions: the consent of the parties and of the parents. Also, if there had been a previous marriage, this had to be annulled; a fourth marriage was not permitted. The breach of any of these conditions affected the marriage through absolute nullity. From among the relative impediments that prevented marriage between two persons, the old code of laws included: age, unbroken betrothal of previous marriage, non-observance of the one year mourning period, of relationship, of guardianship, of difference in terms of religion.

Regarding the effects of marriage, old Romanian law enjoined both reciprocal and unilateral obligations; some of the reciprocal obligations were: fidelity, the care of parents for their children and of the children for their parents. The unilateral obligations were those that applied to spouses individually. Most of them applied to both spouses, while others applied only to one of them. Some of the wife's obligations were: the obligation to obey her husband, the obligation to cohabit with her husband and to follow him, the obligation to wait for the husband who had gone to war, had been taken prisoner or even that who left the marital residence and lived elsewhere with another woman. The husband had obligations such as: to assist his wife and provide medical care if she was taken ill and to support his wife.

In the old Romanian customary law, marriage affected patrimonial relations. Such effects were grounded in the principle of inequality between sexes, as the codes and custom bestowed on the husband more rights than on the woman. Hence,

[1] *Pravila aleasă a lui Eustratie Logofătuldin1632,apud* Popescu, Anicuța, *op. cit.*, p. 64.
[2] *Cartea românească de învățătură*, glava 41, *apud* Amuza, Ion T., *op.cit.* (1), p. 45.

the entire mediaeval matrimonial system bestowed on the husband the right to administrate the entire income during the marriage period.

In the old Romanian customary law, marriage was subject to the interests resulting from the existence of private property; consequently, the consent of both parties to marriage was often not a genuine one since the parents had the right to disinherit their sons if they married without parental consent.

Old Romanian customary law would govern the institution of marriage until the dawns of modern age. Certain features would be still retained in the codes belonging to the Phanariot age and the age of the Regulations. The Civil Code of 1865 would become the modern legal norm to govern the institution of marriage up to the middle of the 20th century.

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