

FAMILY - CONSTITUTIONAL, LEGAL, SOCIAL AND HUMAN PERSPECTIVE

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Abstract

The idea of family represents a concept almost as old as law. The sense that we give to family is oscillating between legal definitions and social and human concepts. The year of 2018 brought to the attention of all a natural question: how can we define family from the constitutional, legal and human perspective? The organization of a referendum by the Romanian authorities in what concerns the redefinition of the family in the Constitution brought great controversies. By starting from this legal action (the referendum), we are trying to analyze, by means of it, what does this old, but at the same time new concept, mean: the family.

Keywords: family, referendum, legislative regulation, social impact, husband, wife, children

Introduction

The family is an institution with old roots, the family existed before the state, we cannot conceive mankind without the notion of family. Therefore, we wonder why this subject is so topical?

2018 brought this institution to the attention of Romanians, in an unexpected and surprising way.

A referendum was organized on October 6th and 7th, 2018 and the question to which the voters were called to answer was: 'Do you agree with the law on revising the Constitution of Romania in the form adopted by the Parliament?' It should be mention that the decision of the Legislative aimed the revision of art. 48 of the Constitution, meaning that the family is founded on the marriage between a man and a woman and not between spouses, as currently governed by the Constitution.

The new wording of art. 48 para. 1 of the Constitution should be reformulated: 'The family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children.'

Statistically speaking, 21.10% of the population voted in the referendum for the redefinition of the family in the Constitution, and from the total of votes, 91.56 were 'YES', 6.47% were 'NO', and the rest were null.

Out of the 18,279,011 voters, only 3,857,308 came in order to express their vote.

The referendum would have been valid if the turnout had been 30%, and 25% of the votes had been valid votes.

So, here is the real impact of this issue in Romania in 2018, according to actual data.

The scope of the referendum was that the constitutional text explicitly provided that family is the union between a man and a woman, by removing words 'between spouses', which could have led to confusions, by considering that spouses may also be persons of the same sex.

Notwithstanding, it should have not been disregarded that the Civil Code expressly provided, as we shall see below, on the definition of spouses as the man and the woman united by marriage.

However, due to the fact the Constitution is the fundamental law of the state, and Civil Code has organic law value, inferior to the Constitution as legal power, it was considered that the notions must be correlated, thus amending the constitutional text.

This is why the defenders of the traditional family opened Pandora' box.

However, the topic was not of interest for the Romanian population, which was clearly proved by the poor turnout, despite the propaganda made in religious media.

Without supporting any of the groups, the topic is worth analyzing.

We are in 2018, the year of the referendum, 21st century, when the society faces two realities that cannot be ignored: same-sex couples, whom other countries granted not only the freedom to marry, but also to have children and single-parent families, a growing phenomenon even in our country.

Faced with these realities, the following natural question arises: was the return to traditional formulas required or should we look to the future?

Family: parliamentary debates

First of all, we would like to present some of the opinions of the members of Parliament regarding the law on revising the Constitution.

Therefore, the senators had pro and con opinions in the debates on the Constitution revision initiative. Șerban Nicolae (PSD) argued that every child has the

right to grow up in a family consisting of a mother and a father, some liberals backed the project, and USR accused PSD of campaigning.

‘There is undoubtedly a religious dimension and a rational one. I have identified the religious dimension in what comes from the individuals’ understanding. Procreation can only be done by a man and woman. Three billion man without a woman cannot procreate. 4 billion women without a man cannot procreate. This is a natural law. I believe there is God and he has a creative role. There is a religious dimension. I believe we have the obligation to give a vote that respects what any human being understands by family and marriage. I believe life is the result of a natural process that cannot be questioned. I would like to say a few words about the rational dimension. I believe that every child has the right to grow up in a family consisting of a mother and a father. I do not believe that the first word of every child is by accident ‘mother’ – the person who he feels the most attached to’, Șerban Nicolae stated in the plenary of the Parliament. PSD Senator argued that current phrase of the Constitution, which stated the word ‘spouses’, emphasized the freely expressed consent, because marriages of post-war period were concluded of interests, by agreements, and that could not be called ‘family’.

‘For those who do not know, the current phrase taken from the Family Code emphasized the freely expressed consent. The freely agreed marriage, because in the post-war period, in the Romanian society, marriages were still contracted by agreements concluded between parents or in various other forms, and therefore, there was a need for a freely expressed consent, which did not mean marriage was the basis of the family. We are in the situation to discuss another aspect, now there is no question of free consent’, Șerban Nicolae added. USR Senator, Vlad Alexandrescu, declared in the plenary, during the debates on the revising of the Constitution for the definition of the family, that family and traditions do not matter for senators who support this modification, but they ‘are only campaigning by taking advantage of the Referendum’.

‘For USR it is clear that neither the family nor the traditions matter to you, but only the idea of campaigning by taking advantage of the referendum. (...) You have postponed it so many times and decided to vote it now, in order to distract people from the justice laws, from the Criminal Codes. (...) A vote against is not a vote against family. Does PSD really want a referendum on traditional values? What if we organize a referendum on traditional values? Let’s organize a referendum in order for those who are criminally convicted to stop holding public functions, for allocating 6% of the GDP for Education,

for removing plagiarism. Do you have the courage to ask Romanians what do they think about this? No, you want a useless referendum', USR Senator, Vlad Alexandrescu stated in the plenary.

ALDE Senator, Daniel Zamfir, said that such a draft law cannot be imposed on the senators and that they cannot be told how to vote. 'I strongly believe that this is not a draft law that any parliamentary group should discuss, more precisely to establish how to vote it. It is a draft law on which the senators must not be told how to vote. (...) ALDE has never influenced and will not influence the vote of any member of Parliament. Personally, I can say that I will vote as my conscience tells me'. PNL Senator, Nicoleta Pauliuc, announced she would vote in favor of adopting citizens' initiative, because 'this is a vote for keeping tradition', and PNL supports the stopping of demographic decline.

'I chose to vote today for supporting citizens' initiative. My vote is for keeping tradition. PNL wants to stop demographic decline, which can be achieved by two main ways, including supporting natality. It is not necessary to politicize the desire of over three million Romanians, Pauliuc said from the tribune of the Senate plenary. The leader of the UDMR Senate group, Cseke Atilla, said that there were things that had to be clarified during the debates, the amendment marking an equal sign between the notion of family and marriage.

'If you need a simple sentence on the proposed text, this is a text which is not perfect, but it is better than the current one. The UDMR Senate group analyzed the proposed text and all UDMR Senators agree with the definition of marriage provided that it is freely consented and contracted between a man and a woman. However, there are certain shortages; In some way, the term of family and marriage are put on an equal footing, which is wrong. They tried to induce the idea that if you are not married, you do not have a family. If a couple lives together and has children, is this not a family? It was on this occasion that these situations should be regulated by simple sentences at the constitutional level. Such things could be developed by organic laws. This did not happen, therefore, UDMR Senators will vote as their conscience tell them and they will say the following: We all agree with the contracting of the marriage between a man and a woman. Some will vote for and some will refrain from voting', the leader of UDMR Senate group, Cseke Atilla declared.

Therefore, here is the political dimension of this approach. Notwithstanding, this political dimension should have taken into account the legislative regulations that we

will analyze above and from the analysis of which can be concluded that, in fact, the approach remains only a political one.

Family: current legal regulation

In addition to the text of art. 48 of the Constitution, already quoted by us, the detailed regulation of the notion of family is found in the Civil Code.

Therefore, art. 258 provides as follows: 'Family. (1) The family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children.

(2) The family is entitled to protection granted by the society and the state.

(3) The state shall be bound to support, by economic and social measures, the conclusion of marriage, as well as the development and consolidation of family.

(4) For the purpose of this code, spouses shall mean the man and the woman united by marriage.

Family is the natural and fundamental group unit of the society. It is a form of social relations between people connected by marriage or kinship , a fundamental social institution found in all societies, even if its particular forms differ substantially from one place to another .

In legal terms, family represents the group of persons among whom there are rights and obligations that arise from marriage, kinship, and other relations assimilated to family relationships .

The sociological and legal notion of family usually concur, overlap, however, as we will show in this study, the phenomenon of single-parent families has increased, which has led to many approaches of the concept of 'family'.

Another example where the stricto sensu notion of family ceases occurs in case of the dissolution of marriage by divorce, when relationships between spouses, 'in sociologic terms, cease, because there is no longer a community of life and interests between them. However, certain rights and obligations, such as family relationships in a legal sense, continue to exist - for example, those relating to maintenance, right to name, common goods, unless they divided at the time of the dissolution of marriage."

In a comprehensive definition, family is the social community by means of which spouses and their children build a life together, by being united by their biological, economic, psychological, spiritual relationships .

How can we start a family? We go back to the traditional concepts, in connection with the legal ones.

‘The first principle enshrined in para. (1) is the principle of freely consented marriage. The principle is enshrined both internationally, in art. 16 of the Universal Declaration of Human Rights , art. 12 of the European Convention on Human Rights and Fundamental Freedoms , and nationally, not only in para. (1) of the regulation, but also in the Constitution, which, in art. 48 para. (1) provides that family is founded on the freely consented marriage of the spouses and in art. 259 para. (1) NCC, which provides that family is based on the freely consented marriage between man and woman.

Stricto sensu, this principle of constitutional value means that the concordant will of the future spouses is the only subjective, relevant and indispensable factor for the conclusion of the marriage. The agreement or opposition of the parties or of other persons do not have legal connotations. The freely accepted consent of marriage means that there are no privileges or discrimination of social, racial, ethnic, religious nature in the exercise of the fundamental right of any person to marry and to found a family.

The second principle enshrined by para. (1), is the principle of equality of rights between man and woman. Equality between man and woman is enshrined both in terms of patrimonial and personal relationships between spouses, and between parents and children.

The equality of woman with man in different activities is provided by certain international acts. Therefore, according to art. 16 para. (1) of the Universal Declaration of Human Rights “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution”. Furthermore, according to art. 3 of the International Covenant on Economic, Social and Cultural Rights : ‘the States Parties to the present Covenant undertake to ensure the equal right of men and women to enjoyment of all economic, social and cultural rights set forth in the present Covenant’.

Once the marriage is concluded, the spouses have equal rights and duties, both in what concerns the relations between them and their relations with their minor children; together they must ensure their raising and education’ . In the relationship between spouses, the rights and duties of each, having the same content, are complementary and have only one purpose: the common interest .

Equality between man and woman does not exclude the right of women to a protection regime, as do young people, when social reasons impose such measures .

The third principle enshrined by para. (2), is the principle of family protection. The family is protected not only by the state but also by society in general, the right to protection being constitutionally enshrined by art. 26 para. (1). Furthermore, art. 8 of the European Convention regulates the right to respect for private and family life. The respect for private and family life entails the obligation of the authorities to protect family life and, at the same time, the obligation to refrain from any arbitrary interference in it. In the light of the European Court case law, the protection of family life concerns the existent family life, formed after the conclusion of the marriage, and not the family life which is at the planning stage .

In connection with the right to family protection, para. (3) of the regulation establishes the obligation of the state to support the conclusion, development and consolidation of marriage. The support can be materialized by means of various economic and social measures. One example would be state allowance for family support. This is another controversial topic, are these allowances sufficient resources or at least a real point of financial support? These allowances should help children, at least in order to ensure a minimal support of the educational process, but the amounts provided are insignificant.

'Law no. 217/2003 for preventing and combating domestic violence was also adopted in order to protect and support family, to develop and strengthen family solidarity, based on friendship, affection and moral and material support of family members, which is a national interest goal.

The principle of marriage and family protection is provided by various international instruments: The Universal Declaration of Human Rights provides in art. 16 that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the state'; The International Covenant on Economic, Social and Cultural Rights provides in art. 10 para. (1) that 'the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children'; The International Covenant on Economic, Social and Cultural Rights provides in art. 23 para. (1) that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State';

the European Convention on Human Rights establishes in art. 8 the right to respect for private and family life.'

Furthermore, for the purpose of this study, we have to take into account the provisions of Art. 259. of the Civil Code: Marriage. (1) Marriage is the freely consented union between a man and a woman, concluded under the law.

(2) The man and the woman have the right to marry in order to found a family.

(3) The religious celebration of marriage can only be performed after the conclusion of the civil marriage.

(4) The conditions for the termination and the nullity of the marriage are set out in this Code.

(5) The marriage ceases by the death of one of the spouses or if the court declares the death of one of the spouses.

(6) Marriage can be terminated by divorce, under the terms of the law.

'Paragraph (1) of this regulation defines marriage as the union between two persons of different sex, founded on their free consent, under the fulfillment of substantive and formal terms required by the law' .

The definition of the marriage reveals its characteristics: a) marriage is the union between a man and a woman; the union is established by the consent of the persons who join in marriage and, once achieved, it is governed by the legal regulations; b) marriage is freely consented, meaning that both spouses express their consent freely, based on mutual affection between them; c) marriage is monogamous, this feature naturally deriving from the foundation of marriage, namely mutual affection of spouses; the exclusive nature of love entails monogamy; a person can only be married with one person of opposite sex at a time; the legislation in force punishes bigamy; d) marriage is concluded under the terms of the law; we consider it has a solemn nature, because it is concluded in a certain place, before a state authority, at a date established in advance; e) marriage has a civil nature, its conclusion and registration being of the exclusive competence of state authority; f) marriage is concluded for lifetime; the relationship of marriage is meant to last a lifetime; g) marriage is based on full equality between man and woman; this equality is manifested both in the relationship between spouses and towards children; the equality between man and woman goes beyond the sphere of family relationships, thus existing in all areas of social life; h) marriage is concluded for the purpose of starting a family; marriage is the basis of the family; when we deal with a

marriage completed for a purpose other than the foundation of a family, we are in the presence of a fictitious marriage, which is null and void .

‘The right to marry entails the freedom of choice between celibacy and marriage’ .

The right to start a family includes in its content the right to have children, so to procreate (including by using artificial fertilization techniques, given the progress in the field of the medically assisted procreation) and the right to adopt children .

‘The scope of marriage is stated by paragraph (2) of the analyzed wording, namely the founding of a family. Any marriage contracted for any other purpose than that of founding a family is a fictitious marriage, null and void. It does not matter if both spouses or only one of them pursue a purpose other than that of starting a family, such as, for example, getting privileges (for example, the marriage contracted by a graduate of the theological institute to obtain a parish).

Paragraph (3) establishes the obligation of civil marriage and the optional nature of religious marriage, which can only be celebrated after the conclusion of civil marriage, the wording being taken over from the provisions of art. 48 para. (2) of the Constitution.

Marriage has a perpetual nature, it is contracted for lifetime and can cease in case of the death of one of the spouses (either physically found or declared by the court) or the dissolution of marriage can be performed by divorce. Marriage cannot be affected by any term or condition.

The right to marry is regulated by art.16 of the Universal Declaration of Human Rights, according to which: ‘1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. 2. Marriage shall be entered into only with the free and full consent of the intending spouses. 3 The family is the natural and fundamental group unit of society and is entitled to protection by society and the State’. This right is also regulated by the International Covenant on Civil and Political Rights, as well as by art. 12 of the European Convention on Human Rights and Fundamental Freedoms, according to which ‘men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right” .

Although art. 12 of the European Convention is entitled ‘Right to marry’, its wording seems like providing two different rights: the right to marry and the right to found a family. Such an interpretation occurred from the use of conjugation "and" in the

final part of conventional regulation, which uses the phrase "exercising this right", referring to the founding of a family .

In terms of the law applicable to marriage in private international law relations, we distinguish between substantive and formal conditions required for the valid contracting of marriage. The substantive conditions are governed by the national law of each of the future spouses at the time of the marriage, according to art. 2586 NCC. Therefore, if a marriage is contracted abroad between Romanian citizens, the Romanian law shall be applicable; if a marriage is contracted in our country between foreign citizens, their national law shall be applicable; if a marriage is contracted abroad between a foreign citizen and a Romanian citizen, each of the future spouses shall be subject, in what concerns marriage, to his/her national law; if a marriage is contracted in our country between a Romanian citizen and a foreign citizen, the national law of each of the spouses shall be applicable; if the national law of the foreign citizen is aware of an impediment to marriage which, according to the Romanian law, is incompatible with the freedom to contract a marriage, this impediment shall not apply, provided that one of the spouses is a Romanian citizen and the marriage is contracted on the territory of our country; if a marriage is concluded abroad between a Romanian citizen and a stateless person (person without citizenship), the law of the country of domicile shall apply for the latter, and, in the lack of it, the law of the country of residence, while the Romanian citizen shall be subject to Romanian law; if a marriage is concluded in our country between a Romanian citizen and a stateless person, the Romanian law shall apply for the latter if he/she has domicile in Romania, and the Romanian citizen shall be subject to the Romanian law; if a marriage is concluded in our country between two stateless persons, each of them shall be subject to the law of the country of domicile or residence, and if the domicile or residence of the stateless persons is in Romania, the Romanian law shall be applicable . 'The formal conditions shall be governed by the law of the state on the territory of which the marriage is celebrated. In case the marriage is concluded abroad by a Romanian citizen, in front of the diplomatic or consular agent of Romania in the respective state, the marriage shall be subject to the formalities provided by the Romanian law.'

As a conclusion of the aforementioned, 'for the purpose of the New Civil Code, the term 'spouses' designates the man and the woman united by marriage. Therefore, only

persons of different sex, married, can have the capacity of spouses, not those who cohabit together, without being united by marriage.'

According to art. 5 para. (2) of Law no. 17/2001, the provisions of the New Civil Code are also applicable to the future effects of legal situations born prior to its entry into force derived from marriage, parentage, adoption and legal obligation of maintenance, if such legal situations subsist after its entry into force.'

This is why, in relation to the entire applicable legislation, we consider that the initiation of a referendum whereby terms 'man' and 'woman' explicitly appear in the Constitution, as persons entitled to found a family, was totally inappropriate.

The legislation already covers this topic, such approach being useless. Eventually, the action entailed only organizational costs, with no ending.

The population showed no interest in this topic, the approach being already imprinted in human patterns. A part of the population appreciates religious concepts and does not conceive another pattern of family than the traditional one: woman/man. In what concerns this part of the population, the approach could have meant at most a support granted to the church, the main promotor of this topic.

However, as already argued, the legislation covers more than satisfactorily the classic concept.

A second tendency that we have to consider is the European one. In many countries of the European Union, not to mention countries outside the European Union, marriage between same-sex persons is allowed.

In Romania, such an approach would entail not only the modification of the Constitution, but the modification of the entire related legislation, where family is regulated. The approach would be a great one and only at that point in time fervent discussions would occur between the groups of supporters.

Taking into account the current national mentality, we do not believe that the population is ready for such an approach. This is why, it is not included on the agenda of any political party and it is not a real subject of discussions.

The third approach should analyze single-parent families, a topic that we have already mentioned in this study.

What is single-parent family?

Single-parent family (monoparental family) is that type of family where children live only with one of the parents. This can happen as a consequence of the divorce,

separation of parents, death of one of the parents, the adoption of a minor child by an adult or following the decision of a woman to give birth to a child without being married and without living with a man.

In Romania, as in many other countries of the world, in most single-parent families, the position of single-parent is held by the woman. When family becomes a single-parent one following divorce or separation of parents, the connections between the child and the parent with whom he does not live permanently tend to be interrupted in a very large number of cases.

The single-parent family is a type of family consisting of a parent and his/her child or children; group of persons in kinship relationship, resulted from direct parentage or adoption. It is often approached as a deviation from the nuclear family, made up of husband, wife, and their minor children.

Marriage is no longer the only way to legally found a family, but only the first element of a causal conglomerate: marriage followed by divorce, separation or death. The single-parent family can also be a consequence of undertaking the liability of children born outside marriage.

In this background, we should not lose sight of the share that these families start to have and the impact of such a type of family on society.

Conclusions

This study emerged from a simple question: did the referendum organized in 2018 represent a must for the society?

By analyzing the arguments presented herein, the answer takes a clear shape. The referendum was not necessary from any point of view: in legal terms, the institution of family is extremely well regulated so that additional notes are not required. Currently, it is obvious that in Romania, family and marriage can only be concluded between a man and a woman. The constitutional wording, even if it does not define the term of 'spouses', it is construed together with the other applicable regulations, respectively articles of the Civil Code, which we have broadly commented.

From a sociological point of view, the approach appears as useless. The pattern of the notion of family is very well established in the conscience of the Romanian people, so that any change in regulating marriage between persons of the same sex would lead to extensive debates, supported only by a minority.

That is why the population showed no interest in this approach, which would have no purpose.

Therefore, after long and controversial parliamentary, political and mass-media debates, after organizing a referendum and after centralizing the results, the debated issues remain in their nature core, as the lawmaker established them.

Despite this, certain realities which currently take shape in the society have also been debated.

Above all, family represents the love of the people towards those they choose to be together with and, later, towards their children. Perhaps this is the most important aspect that neither politicians nor the lawmaker should lose sight of.

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