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**Disagreement of the Concept of Family.
From *Patria Potestas* to the Modern Family**

Tiberiu N. Chiriluşă¹

Abstract: This article is a socio-legal analysis of the current society being in a conflict of generations and ideas about the role of the family and its historical evolution from the rules of the Roman law to the new trends in the regulation of the matrimonial framework in accordance with the European law. Caught between tradition and secularism, the role of the family often becomes quite ungrateful, its space often being unable to satisfy people's desires, feelings and choices. If the family relationships no longer correspond to all these, because they restrict the freedom of the individual, then what else can we put instead, what is the alternative? Analyzing objectively, we notice a trend in reconfiguring the moral values with the help of legal norms as a justification in the great anti-structural movement. The analysis reveals three major *destructive* trends for the family, namely: that of responsibilities, that of delimitation and isolation of the family from the society and that of the alternatives proposed to replace the traditional family. We will therefore submit this institution of the family to a study focused on sociological, legal, spiritual but also moral landmarks as an alarm signal regarding the obsolescence of the concept of family and its utility.

Keywords: family; marriage; cohabitation; civil partnership; tradition; secularism

1. The Current Context of the Family Values

We live in an increasingly divided society in which every day spiritual and moral values have no longer consistency or are no longer found in our existence and their accelerated degradation pushes us like an invisible hand towards an existential disaster that we cannot perceive at its true destructive intensity, like the force of a hurricane sweeping everything in its path. The silence before the storm is always misleading, although we are aware of this fact we accept it with an almost assumed fear the destructive consequences of our acceptance, by paralyzing the senses without being able to act or have a reaction.

Our annulment as a historical, moral, spiritual identity and framing into a social pattern imposed with new drawn "values" and the obliteration from the millennial and existential values, which define the human being, helps to degrade and erode the social system that will collapse, also contaminating the basic cell of society which is the family.

If family relationships no longer correspond, because they restrict the freedom of the individual, then what do we place instead (Dogaru, Stănescu, & Soreată, 2009, p. 2)? That should be the question for us to find an answer nowadays. The sociological definitions of the notion of family focused on the relationships between its members, as well as on the sources of these relationships, noting their evolution along with the evolution of society as a whole (Mihăilescu, 2003, p. 236). If we carefully analyze this,

¹ PhD in progress, Faculty of Law, Bucharest Academy of Economic Studies, Romania, Adress: Piața Romană 6, Bucharest 010374, Corresponding author: chirilutatiberiu@yahoo.com.

we will notice that we do not find an answer but only other questions that arise such as: Do family relationships become a brake in the development of a social module that keeps pace with the technological revolution? Do these relationships restrict the evolution of the individual and his freedom?

The analysis of the family itself as well as of the family relations is closely related to the moral issues and the relation to them. Family sociology studies have highlighted a dynamic of changes that have taken place in the relationship between the traditional and the contemporary family as well as in its functions (biological, educational and economical) (Popescu, 2009, p. 34). The social unit, called the family, implies a widespread, even universal, institution, expressed over time in various concrete forms. If we examine the family from a diachronic perspective (on the vertical of history) we find that some of these forms have disappeared or diminished in weight, others have taken their place, or have been added to the existing ones. Every society has had and still has a certain family system, that is, a system of regulating the relationship between men and women and between them and their children¹. All the challenges that the family goes through in these times such as divorce, celibacy, cohabitation, same-sex couples, assisted reproduction are currently reflected in formulations such as „family crisis or drifting family”. It is increasingly being questioned whether the old moral precepts underlying ethical codes of conduct are still viable today. More and more voices claim that they would lead to a suffocation of moral individuality. Ethical codes of behavior are imposed from the outside as norms of living in a social context but also as a subordination of the individual to the system that leads to the obsolescence of his intimacy as a complex human individuality.

Since the eighth decade, the theme of the family crisis is resumed in the context of the accentuated dynamics of alternative lifestyles and the increase of family instability, of divorce. There are also authors who optimistically approach the family’s perspectives, emphasizing that time has shown that it has a special power to adapt to economic and social change, that it is a supple and resilient institution, with all the difficulties that accompany it, that it is the privileged place of those who forms it.

Society can be the place where the vulnerable can find help. Here we encounter two aspects: observance of the rules that represent everything and less discretion or an ethic of privacy where discretion is everything but observance of the rules is not mandatory. So the person who cannot rely on discretion is in dire need of rules.

2. The Family between Tradition, Morality, Christianity and Obsolescence

The institution of *Pater familias* in the Roman Law is perhaps the most eloquent reality in which the rules prevail and according to them the entire existence of the family that carries on its life following its natural course. „The family in the proper sense is made up of a set of people, who are under the power of one” as Ulpian shows us². The unlimited power of the head of the family can be easily explained if we make an x-ray of the material life that governed Roman society at that time. *Patria potestas* was perpetual, whatever the age and political position in the state (consul, praetor) of the descendants, they remained in the power of the *pater* (Molcuț, 2011, p. 97).

The family seems to be an important institution in all societies. Therefore, it is not surprising that the modern or Roman societies with sophisticated legal systems have elaborated rules about those families. They regulate, for example, the eligibility for marriage or the transfer of the assets by inheritance. But

¹ <https://sociogrii.files.wordpress.com/2014/06/curs-sem-ii-sociologia-familiei.pdf>.

² Ulpian (Gnaeus Domitius Annianus Ulpianus, cca.170-223 d.Hr.) one of the great jurists of ancient Rome, left behind important works such as, *Ad Sabinum*, *Ad edictum*, *De officio proconsulis libri* și *Domitii Ulpiani fragmenta*, for further information see Tony Honore, *Ulpian, Pioneer of Human Rights*, Oxford University Press, 2002.

the general resemblance can be misleading. While the importance of „family” may be universal, the ideals and even the definition of this term can differ considerably. The expression the *Roman family*, for example, usually means „household” or even „slaves of the household” (Molcuț, 2011, p. 95). Latin does not have a word that clearly refers to what we call the (nuclear) family today. As a result, the form of the Roman family law may be surprisingly different from the modern versions. However, compared to other social structures, an important characteristic of the Roman family was the constancy of its way of organization, as well as the fact that it managed to keep many of its original characters.

Today, watching in the past, we tend to criticize without looking at the natural evolution based on the transformation of the gentile society and the transition to the empire. However, the dynamics of things show us that all the norms of living have been the solid basis of the functional family but also of the ever-changing legal norms that have governed its existence over time.

On the other hand, the law is a conglomeration of rules and principles that have the role of impregnating a high social and moral conduct in the mind and conscience of the public. Thus the family is the central pillar of society and the basis for the development of any nation.

From a legal point of view, the family is a group of people between whom a set of rights and obligations has been established, regulated by legal norms on how to conclude marriage, establishing paternity, rights and obligations of the spouses, relations between parents and children, how inheritance is transferred etc. The subject of law in family legal relations is always the natural person, the individual who has the quality of a family member, regardless of the sociological or legal meaning of this notion (Avram, 2016, p. 9).

Analyzing objectively, we notice a trend in reconfiguring the moral values with the help of the legal norms as a justification in the great anti-structural movement. Concepts such as reciprocity and duty are intended to be replaced by new contractualist theories that lead to egocentrism and anti-human social structures. Thus, the moral precepts will be subordinated to the law, intervening a universalization and leading to the leveling of the individual consciences.

A natural question that arises is whether these theories influence young people’s decision not to marry and to remain comfortable in a cohabiting relationship. There may be family relationships in the sociological sense, without being regulated by the family law such as cohabitation or free union (Avram, 2016, p. 9). Perhaps the theories only state a reality of today regarding the non-assumption of obligations resulting from the reciprocity of the marriage contract. Responsibility is assumed when it comes naturally from the feelings of the partners based on strong feelings that go beyond the obligation of the required legal framework. Can we talk about a new social order based on free will? It may be difficult to understand what a society in which moral behavior is, triggered by the mere presence of the other, without representing an authority devoid of legal power. Failure to fulfill obligations would not be sanctioned because there is no authority but in theory it would not be the case as the condition predominated as „source of all obligations”.

Regarding the tradition and modernity in the Christian family, viewed and approached from the perspective of human existence, the family is a real source of life. The family is the only one that permanently renews the world, bringing with its children who will later become the ones who will in turn start other families (Gomboș, 2016, p. 121).

In Christianity, the relationship between spouses is based precisely on this moral law, which is based only on shared love without being constrained by any provision regulated by the legal norms. Thus, in the Family Law, there is very little talk of mutual love between spouses, as the first condition of their

union through marriage. We have regulated certain conditions of form and substance at the end of the marriage, but neither speaks of the mutual love of the two who will form one body.

In the Civil Code art. 309 para. (1) the obligation of respect, fidelity and mutual moral support is provided. The current regulations make express reference in terms of fidelity, the characteristics of marriage support this obligation, which is deduced, and positively regulated, the explanation being that it is a moral obligation of spouses that belongs to their own conscience. The obligation of fidelity presupposes on the one hand the observance of the obligations imposed by the marriage status, and on the other hand, it imposes the non-maintenance of the extramarital intimate relations. The violation of this obligation may constitute a valid ground for divorce. Preserving and defending these moral values is a duty of the family in the face of the dangers of a secularized world, keeping intact the properties of marriage, unity and indissolubility, and its sacramental character.

Caring for the loved one, in the real family, does not demand reward and there is no duty only one-sided responsibility towards the other. It is not instituted by the fear of the law either, because the law begins beyond the moral responsibility. That is why responsibility is freedom, it is spontaneous and so, the constraints do not take place.

Speaking of the legal obligation, we notice that it intervenes where the family responsibility and discretion have disappeared as principles. The law, its role to regulate the case intervenes in the resolution of the case. Where distrust arises, the law must prevail. The human nature is capable of contrary feelings such as love and hate, which give rise to contradictory feelings and states that give rise to conflict situations, which shows us that the legal regulation is necessary to the same extent as the morality is necessary. The rules of law are based on the rules of the morality and thus, the legal norms are in fact, rules of the morality.

However, the rule of law intervenes in the regulation of intra-family relations, provided that this is an extension of a moral rule. Their role is to strengthen the family life in a time of changing ideology, dominated by technology, in which the moral values become obsolete.

The Civil Code specifies that the family is based on the institution of marriage, practically resuming the provisions of art. 48 para. 1 of the Romanian Constitution. Unlike the Constitution, which does not specify what is meant by the notion of spouses, the Civil Code is more restrictive and states that the spouses are understood to be the man and woman united by civil marriage.

According to art. 16 point 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 have equal rights in the marriage, during the marriage and in its dissolution”¹.

The Romanian society is following the same evolutionary trends as the western countries. A slower pace has followed, due to the specific history, but overall, and especially when we talk about the challenges in the family area, it is part of the same logic of development as the western states. Increasing the age of marriage, reducing the number of children, the large number of divorces but also consensual couples, the diversity of family models, conflicts in couples a.s.o, these are apparently new situations for Romania but also an opportunity for the scientists to study, know, understand and develop strategies to mitigate their possible negative effects, without limiting the freedom of the individual (Morandau, 2015, p. 88). Cohesion and family unity are affected, with a tendency towards the individual adaptation to

¹ The Universal Declaration of Human Rights was adopted on 10 December 1948 by Resolution 217 A of the Third Session of the General Assembly of the United Nations.
https://ro.wikipedia.org/wiki/Declara%C8%9Bia_Universal%C4%83_a_Drepturilor_Omului.

different systems. The traditional family that supported the comfort, safety and perpetuation of the transgenerational pillar is transformed into the modern family that supports and promotes individuality, a certain social and cultural status and a certain social and financial status.

A new challenge is for the families of the same-sex couples as well as their right to adopt or have children in a different setting than the traditional one. The legal and political debates on allowing same-sex marriage tend to focus on two major issues that can be seen even in the first attempts to obtain the legal recognition of the same-sex marriage. These two themes argue about the inherent and traditional relationship between marriage and procreation versus arguments about the extent to which opposition to the legal recognition of the same-sex relationships is rooted in irrational animosity and discrimination against the same-sex couples.

At the same time, many same-sex couples adopt children or use reproductive technologies such as the artificial insemination and surrogacy.

These legal and political debates over the last decade on the legality of the same-sex marriage have also taken into account their behavior as parents, and the sociologists have been asked to study and weigh the issue. They conclude that the same-sex couples are as good as parents as their counterparts of the opposite sex. Any difference in the well-being of children raised in the same-sex and different-sex families can be explained not by the gender composition of the parents, but by the fact that children raised by the same-sex couples experienced, on average, more family instability, as most children raised by the same-sex couples were born to parents of the opposite sex.

As more and more same-sex couples marry, new research hypotheses are being considered that may help to understand how marriage and parenting affect the child's well-being.

Substantial evidences show that the institution of marriage promotes stability in couples and families. The stability and the financial and social benefits that come with it, contribute to better results for the children raised by married parents. The married couples tend to be the most prosperous type of family unit, and economic prosperity undoubtedly has certain benefits for the children.

The widespread acceptance of the same-sex marriage comes at a time when many of them are looking to become parents as a couple through adoption and reproductive technologies. Will marriage have a stabilizing effect on the same-sex couples and their families that we have seen in different-sex couples? Evidence suggests that it could, since lesbians and gay men have a strong desire to be married and have views on the purpose of marriage that are similar to those of the general population. The impact on the children remains to be studied as well as their evolution in society as successors of the inherited family values.

The civil partnerships were introduced in 2005 to provide legal recognition and protection to the same-sex couples. Since then, the law has been further developed to allow the same-sex marriages. This created an unusual situation in which the same-sex couples could choose to marry or have a civil partnership, but the opposite-sex couples were limited to marriage only.

There are a variety of reasons why couples choose not to marry, for example, those who have previously married may have personal or religious beliefs because they do not repeat the process, while others oppose to the patriarchal or religious associations of a marriage, as well as to the traditional wedding ceremonies.

The civil partnership¹ is by no means a form of marriage but only of cohabitation. While civil partnerships do not come with the same traditional and religious connotations, the rights and obligations are almost identical to those of marriage. It extends not only to the financial provision available for separation, but also to the rules of inheritance and tax rights available.

The couples who live together but have not married or are not based on a civil partnership do not have special rights. There is no right to share property or to request continued financial assistance through maintenance, even if a party has given up work to take care of the children.

Cohabitation² as an institution is not regulated, although the cohabitants are often misled by certain legal provisions that seem to apply to them, without knowing that the legislator has not granted legal recognition to this type of relationship. This way of life is a modern form that different couples are adopting more and more. However, as it was mentioned before, in the absence of the legal regulatory framework, such a relationship is based on certain rights but also obligations in relation to the nature of the certain legal situation in which it would be. We cannot speak of rights assimilated to those arising from a marital relationship. Within a marriage, there are several legal advantages that partners can have and that are not found in the cohabitation, but the obligations come bundled in this union of interests such as the marital relationship. The union of interests as it is drawn in marriage by the chosen matrimonial regime, together with the other legal provisions, does not exist between the concubines.

Returning to the attention of some with its regulation in the Civil Code, the engagement seemed the easiest way to gain certain benefits for those in a cohabitation, but it can not be assimilated to the state of cohabitation because it is a promise to enter into a marriage and is subject to the legal provisions, „for the conclusion of the engagement it is necessary to meet the substantive conditions for the conclusion of the marriage”³.

Cohabitation, from what we can deduce is a permissive relationship without restrictions that may involve partners of the same sex or different sex, does not involve legal constraints and it is not regulated and the concubines assume this status as a voluntary act. Beyond the moral precepts that change, however, from age to age, cohabitation is a state of fact (but not law) that has always existed.

The Civil Code defines marriage as “the freely consented union between a man and a woman, concluded in accordance with the law, in order to establish a family”. We notice, therefore, that the purpose is to start a family and the legislator is not interested in the purpose in which two people want to live together for the rest of the days in cohabitation.

Romania is currently one of the five member states of the European Union that does not approve partnerships or civil unions of any kind (neither between persons of the opposite sex, nor between persons of the same sex): “Civil partnerships between persons of the opposite sex or of the same sex concluded or contracted abroad either by Romanian citizens or by foreign citizens are not recognized in Romania”.

The debate over the same-sex marriage and gay and lesbian adoption rights as well as the civil partnerships or cohabitation revolves around many competing sets of assumptions with political, religious ideas and axes that cannot be fully resolved or even addressed in this article.

¹ A domestic partnership is a legal relationship between two people who live together and share a common domestic life, but are not married (to each other or to anyone else).

https://en.wikipedia.org/wiki/Domestic_partnership

² CONCUBINATION, concubinage, s. n. Cohabitation of a man with a woman without fulfilling the legal forms of marriage; illegitimate marriage.

³ Civil code, art.266

3. Conclusions

There are three major destructive trends for the family, namely: the one regarding responsibilities, the one of the delimitation and isolation of the family from the society and the one of the alternatives proposed to replace the family (Gomboş, 2016, p. 123).

The family in the new trends of the society is no longer considered the fundamental institution for the survival and reproduction of the individual. Decreasing the importance and the role of the family leads to its delimitation and isolation from the society. The works of sociology, psychology, psychopedagogy, analysis that observe and note the current trends in the evolution of the family, consider it as the place of some simple connections and private interests. The finality of the actions within the family are no longer absolutely necessary for the society in its structural-institutional form.

Marriage is a long-term contract that allows and encourages parents to make long-term investments in their children. The various benefits of marriage extend far beyond the material income, taking into account the emotional side, so in general, we would expect that the children from married couples to have benefits, even after socioeconomic status is accounted for in regressions. Marriage is the real union between two beings of the opposite sex: a woman and a man. No other dimensions can be invented that can replace these parts. To invent unmarked forms of a union ends in a crisis.

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