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THE EFFECTS OF MARRIAGE ON THE MARRIED WOMAN'S POSSESSIONS AS STIPULATED BY THE 1864 CIVIL CODE

Irina APETREI[1]

Abstract

It is well-known that in human history the relations between women and men have not always been under the sign of equality.

Thus, during matriarch the mother established the rules within the family, while patriarchy has given man the prerogatives of the majority.

The rights that the man has had on the woman and children have evolved throughout history, according to the different stages of social development and implicitly to the rules of those historical periods.

This paper analyzes the married woman's incapacity in the regulation of the Romanian Civil Code of 1864[2]*, which has as primary source of inspiration the French Civil Code (Napoleon's Code) 1804.*

The Constitution of 1948[3] *brought important changes in family relationships, through the consecration of new principles, among which that of gender equality.*

Subsequently, the equality between women and men in all areas of social life has left its mark on the relations between spouses, so that the legislative changes to the Civil Code and afterwards to the Family Code of 1954 balanced the relationship between spouses.

The current Romanian Civil Code, which entered into force on October 1, 2011, reaffirms and strengthens the equality between spouses, both in terms of relations between them and of the exercise of parental authority.

Keywords

Married woman's incapacity; marriage approval; the Civil Code of 1864.

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2 The Civil Code of 1864 (or Cuza's Civil Code), published in Official Gazette no. 271 of December 4, 1864, entered into force on December 1, 1865, as amended and supplemented, repealed after the entry into force of the current Civil Code.

3 Published in the Official Gazette, Part I, no. 87 bis of April 23, 1948 and entered into force on the same date. It was implicitly repealed on September 24, 1952, after the entry into force of the Constitution of 1952.

1. Introductory arguments

As it is well-known that the understanding of the present is not complete without a thorough analysis of the past, at a time when many countries in the world adopt controversial legislation in matters of same-sex marriage and even of adoptions made by homosexual couples, we believe that a travel back in time regarding the legal relationship between spouses, as well as their relationships with their children would offer the possibility of assuming certain viewpoints based on historical considerations regarding certain bold regulations in the field of family relations.

While currently legal relations between spouses are under the sign of full equality, the history of these relations was marked by deep inequality between men and women both in terms of their relationships and in terms of their relationships with their children. In this respect, we considered it useful to carry out an analysis of the married woman's incapacity in the regulation of the Romanian Civil Code of 1864, and to point out the further development of property relations between spouses, reaching the current regulation of the Civil Code (Law no.287/2009).

According to the Civil Code of 1864 the wife was in a position of subordination to her husband, a relation consecrated by art.195, according to which "man is obliged to protect the woman and the woman to listen to the man."

Considering that the husband is the head of the family, man exercises parental power over children and under the same quality, his authority is exercised over his wife.

In the classical doctrine of civil law (Hamangiu,C., Rosetti-Bălănescu,I.,Băicoianu,Al.,(1996, p. 490) the *marital power* was regarded as an abstract legal concept, developed as a result of a long historical development. It is appreciated (Hamangiu, Rosetti-Bălănescu, ,Băicoianu,Al.,(1996, p. 490) that although there was no reason for the spouses not to be equal to each other during marriage, the historical evolution of these relations was of paramount importance for the purposes of acquiring a position of subordination of woman to man, on the one hand, and for the idea of the married woman's incapacity, on the other hand, due to the protective role of the man.

Also, it was considered (Hamangiu,C., Rosetti-Bălănescu,I.,Băicoianu, Al.,(1996, p. 490) that there was a practical

reason which required man to take a decision in the event of a conflict between him and his wife: if it had been found that spouses were in a position of full equality, it would have been assumed that the differences between them had to be resolved by a superior forum which could only be the court, but it was considered that the judicial intervention in resolving conflicts between spouses was deemed incompatible with the institution of marriage.

Such were interpreted the provisions of Article 195 of the Civil Code, under which the wife "had to obey" her husband.

2. Theory of the married woman's incapacity

The married woman's incapacity, as was established in the Civil Code of 1864, had its origins in the old French law, under which a married woman was "en puissance de mari" and her husband as "seigneur et maître de la communauté" had very extensive powers regarding the administration of common property. The French Civil Code of 1804, the main source of inspiration for the previous Romanian Civil Code, founded the theory of the married woman's incapacity on the woman's lack of experience and on her need for protection.

Some authors of the classical doctrine of Romanian civil law (Alexandresco, 1925, p. 737) even thought that the relations between spouses were so disproportionate, that man was hailed as an absolute ruler, and woman almost as a slave.

In fact, art. 950 of the Civil Code of 1864 listed the wife amongst those unable to contract. According to the 1864 legislature incapacity represented the general rule (Hamangiu, Rosetti-Bălănescu, Băicoianu, 1996, p. 494) of public policy regarding married women and their capacity – the exception, to the extent that the law contained a special provision. Article 1224 of the Civil Code allowed the conclusion of any marriage agreements between spouses, provided that it did not affect the rights of the husband as head of the family. The judicial practice of the time (Hamangiu,C.,Rosetti-Bălănescu,I., Băicoianu,Al.,1996, p. 494) ruled that husbands could partially derogate from the rules regarding the wife's incapacity within the restrictions of the law, but could never fully remove it. In this regard, they conceived the provisions of art.206 of the Civil Code according to which a general approval given to the wife by the husband would have been sanctioned by nullity.

The limits of the married woman's incapacity varied according to the matrimonial regime that spouses would chose. Thus, in case of the dotal[4]regime, incapacity was more extensive (the wife had the right to administer, use and dispose of the paraphernal property[5]), while in case of the matrimonial regime of separation of property the wife enjoyed greater freedom.

In fact, the married woman's incapacity produced two important effects: the need to obtain approval from the husband in order to conclude a valid legal document and, where appropriate, the relative nullity of the legal documents of the wife concluded without approval.

In matters of extrajudicial documents (concluded outside of the court), the wife needed the husband's approval regarding the documents of management of her own property (a lease or hire agreement), and also in order to sign legal documents with more important effects (concluding a loan agreement, suretyship transaction, etc.). As an exception to this rule, according to art.1265 of the Civil Code., the wife who has acquired the separation of goods by court no longer needs the husband's approval, as she was free to manage her own property.

Wife's incapacity was also applied to legal documents concluded by her with the husband or in this case the approval implied the participation of the husband in the preparation of documents, according to article 199.

Regarding trade relations, the wife needed her husband's consent to exercise a separate trade (art. 15 and 16 of the Commercial Code.). Once the wife obtained her husband's approval to this effect, she could stand alone in court and could assume obligations regarding her trade,

[4] The dotal regime was established within art.1233- 1293 of the Civil Code, being the only conventional regime that the spouses could adopt in the regulation of the Civil Code of the 1864, the common law matrimonial property regime is that of the separation of property. According art.1233 of the Civil Code, the dowry was the "wealth that is brought to man by or on behalf of the woman to help him support the tasks of marriage". The husband exercised alone the right of management and use over the dotal property, while the wife could dispose of the movable property from the dowry only with the husband's approval, the immovable property being inalienable and imprescriptible.

[5] Property that was created as dowry was called paraphernal property.

for which she could mortgage and alienate all her assets[6] without her husband's consent.

In matters of documents of disposal, a married woman could not alienate, mortgage or grant a dismantling of her real property (the establishment of a right of usufruct or servitude) or acquire for good and valuable consideration or free of charge, without her husband's participation in the conclusion of the document or without his written consent.

Thus, art.199 of the Civil Code forbade the married women to alienate her property free of charge by means of legal documents concluded between the living[7]. Regarding the legal documents of alienation of movable property for good and valuable consideration, the classical doctrine (Hamangiu, Rosetti-Bălănescu, Băicoianu, 1996) expressed the idea that the husband's approval was mandatory, with the exceptions[8] provided by law.

The same art.199 forbade the wife to acquire property without her husband's approval, without making any distinction between legal documents free of charge and legal documents for good and valuable consideration. Also, the wife could not get without the approval of her husband, any payment owed, regardless of the nature of such payment (capital or income). In this sense, for the validity of the receipt as proof of payment, spouse's signature was necessary.

However, to pursue a profession, the wife needed her husband's approval.

Regarding the judicial documents under art.197 of the Civil Code., "woman cannot sue without the husband's approval" (the rule was applicable irrespective of the matrimonial regime chosen by the spouses). Starting from the idea of the experience and protection of which the wife had to benefit from her husband in the classical legal literature it was appreciated that (Cantacuzino, 1998) if the wife had the procedural

[6] According to art.16 of the Commercial Code, the dotal property could be mortgaged or alienated by the merchant woman, only in cases and respecting the forms provided by the Civil Code.

[7] These provisions related to the paraphernal property (if the dotal regime is adopted) and not to dotal property, which were inalienable and to the wife's property, in case of the adoption of the regime of separation of property.

[8] For example, the exception provided by art.1265 regarding the wife's capacity of separation of property regime that allowed the married women to dispose of her movable property, for the alienation of the immovable property the consent of her husband being required.

capacity of defendant or intervener, she needed marriage approval, regardless of the competent court or the stage of the dispute. Marriage approval had a special character, being valid only for the case concerned and not for other dispites. Where the wife filed a legal claim against her husband she needed his approval or, in case of refusal the consent of the court except in case of the divorce proceedings that would have been submitted by the wife.

But marriage approval was not necessary for the merchant wife who could stand alone in such a dispute, provided that the dispute may extend to the commercial activity of the woman.

3. Exceptions to the incapacity rule

The married woman's incapacity was smaller compared to the incapacity of others in the same category of incapable individuals (minors and the ones under court ban). Thus, the theory of the married woman's incapacity, analyzed above, knew exceptions arising from the express legal provisions or from rules relating to persons lacking legal capacity.

In matters of extrajudicial documents, first of all, the will, a legal document which by its nature took effect only after the death of the married woman, when the marriage was also terminated, was an exception to the theory of the married woman's incapacity. Therefore, it was considered that (Hamangiu, Rosetti-Bălănescu, Băicoianu, 1996, p. 500) "the powers of marital authority could be infringed by the provisions of the woman's independent and uncontrolled will". Being able to dispose by the will alone, the married woman could even cancel it, without the consent of her husband and cancel the donation made to him during marriage.

Secondly, legal documents relating to the exercise of parental authority, in cases where a husband could not exercise those powers (he was absent, he was under court ban, he served a sentence of imprisonment, he was in a state of mobilization or was deprived of parental rights) were also an exception to the rule incapacity. In these cases, the mother exercised parental authority alone, including in economic matters regarding the stewardship on minors because she acted in this case as the legal owner of their property, and not in her own name.

A third exception to the theory of the married woman's incapacity was represented by the legal documents of conservation, documents which did not harm the wife, but rather aimed to preserve or prevent the loss of her rights. In fact, in principle, these documents could be concluded by the people deprived of the legal capacity.

The fourth exception in question consists in the obligation of the wife to account with her goods for the damages generated by her offenses and quasi-offenses. Although the Civil Code of 1864 did not provide for such an obligation, it results from the application by analogy of the rule established by art. 1162 of the Civil Code regarding the minor, and also from the principle established by art.998 of the Civil Code, according to which any person who caused to another person any damage was required to repair it. In this matter, the case law of the time, applying art.1159 of the Civil Code by analogy, held that the mere statement of the woman that she was not married did not hold her liable, however, if she had used deceptive means to create the impression that she was not married, she was sanctioned with the impossibility of invoking the nullity of the legal act concluded, estimating that the most appropriate solution for the harm that could result from the cancellation of the document was to prevent her from requesting the nullity of the legal act in question[9].

The fifth exception to the wife's incapacity was represented by the unjust enrichment, a principle enshrined in art.1164 of the Civil Code, under which juveniles, those under court ban or married women who could pursue legal action for rescission against legal documents that they have concluded, did not refund the goods they received unless it was proved that they took advantage of what was given to them (in the sense that their property would have been increased).

A final exception in this matter was represented by business management. According to art.991 of the Civil Code, the woman, whose affairs were conducted by a third party *negotiorum gestor*, has to indemnify it for all useful and necessary expenses that it did.

In criminal causes the wife did not need approval, unless it was the injured party. While in civil matters the need of an approval was based on considerations to protect the wife's rights and to control the civil actions which she could exercise, in criminal cases public action was above the individual will. If the wife was called by the injured party in

[9] Ilfov Court, March 26, 1924, Pandectele Române, 1924.2. 203, note by A.Strelicescu.

civil court for damages or was itself a civil party then she needed her husband's approval (Alexandresco,1925).

4. Marriage approval and justice approval

For the validity of the legal documents signed by the wife, the husband could give her an express or implied approval.

In matters of extrajudicial documents the express approval should take the written form (*ad probationem*) excluding therefore the possibility to prove the approval by witnesses or presumptions, but being possible to prove it by means of the husband's confession, or by oath (Cantacuzino, 1998, p. 695). So, the husband's approval as a document under private signature was sufficient, even if the document that the wife had to conclude was a genuine one. Regarding extrajudicial documents, the law allowed a single tacit approval - which resulted from the husband's participation itself as party in the conclusion of the legal document, binding himself together with his wife or jointly with her. If the husband only assisted his wife in the conclusion of the document, without signing that document as a Contracting Party, in the judicial practice it was admitted that (High Court of Cassation, April 25, 1908, Bulletin of the High Court of Cassation, 1908) the tacit approval of the husband may result from acts such as: participation of the husband together with wife in the acquisition of an immovable property by public auction or the participation of the husband in the deliberations of the family council who gave the guardian the permission to put up for sale a property on which the wife was part owner in the form of severalty.

Regarding the judicial documents, the law does not impose any formal condition for the marriage approval, which means that the approval could be express or tacit. It was appreciated, however, that in judicial matters a tacit approval, resulting from the participation of the husband in the court together with his wife was sufficient. When the husband filed a claim against his wife to the court, it was presumed that the filing of the action signified the wife's approval for her participation in the court pleadings.

Besides the legal documents of administration and disposition, with significant effects on the married woman's property and for the valid conclusion of which she needed her husband's approval (for each legal document), the wife concluded a series of current legal documents (such as for instance, daily shopping) without the prior approval of her

husband and which were not disputed by anyone. Although in classical literature not all the authors (Colin & Capitant, 1920, p. 637), have agreed in terms of the legal nature of those rights granted in exceptional cases to the wife, most authors have concluded the fact that she acted as the agent of her husband, being tacitly empowered by him.

Both the doctrine (Hamangiu, Rosetti-Bălănescu, Băicoianu, 1996, p. 500) and jurisprudence have established that the limitations of the tacit mandate were not set by means of the presumed will of the husband, but were given by facts such as: the wealth of spouses, procurement utility, social position of spouses, etc..

This legal fiction of the tacit mandate only lasted where the spouses had a normal family life, but it could not work if the spouses were separated in fact.

As the husband was entitled to give his consent for the conclusion of valid legal documents by his wife, he could also revoke it. Withdrawal of marital approval was possible only if it was given before the conclusion of the legal document, the revocation of approval being unconceivable if the husband himself participated in the conclusion of the legal document concerned (in which case the approval was given concurrently with the conclusion of the document).

In exceptional circumstances, marital approval could be complemented by justice approval. These cases concerned the refusal of the husband to give his approval, the loss, the husband's incapacity (the husband was minor, placed under court ban or under judicial control) or his conviction for an offense classified as a crime.

5. The sanction of the lack of marital approval

Given that the aim of the marital approval was the completion of the wife's incapacity, if she concluded legal documents without the consent of her husband, those documents were sanctioned by nullity. While in the old French law this was considered an absolute nullity, the Romanian Civil Code of 1864 has turned it into a relative nullity, transforming the principle of marital authority, previously based on the woman's inferiority into a principle of defense of the interests of the family (Cantacuzino, 1998, p. 695).

According to art.207 of the Civil Code, they could invoke nullity: the married woman, her husband and the heirs of the married woman. It

was also found that women's creditors could exercise such action, as these were economic interests.

Following the admission of the action for annulment, the third party contractor was obliged to refund, instead the married woman was required to refund only within the limits of the benefit achieved.

In case of the legal actions that the wife promoted without approval, nullity could not be invoked without reforming the court judgment by ordinary and extraordinary means of appeal.

Since this is a relative nullity, it could be subsequently covered by confirmation or ratification by all persons who could invoke the nullity of non-approved legal acts: the wife, the husband and the wife's heirs.

Regarding the limitation period, the action for annulment was prescriptive within 10 years, a term that began from the dissolution of marriage (Article 1900, paragraph 2 of the Civil Code), during marriage the limitation being suspended as far as the wife is concerned. Regarding the husband, most authors believed that the limitation period did not operate, the period running from the date of conclusion of the legal document or from the date on which the husband took notice of the conclusion of that document.

6. Subsequent legislative evolution of the relationship between spouses

An important moment in the evolution of relations between spouses was the adoption of the Constitution of 1948, which included regulations on family relationships and which established the equality between spouses. Article 105 of the Constitution of 1948 expressly provided the revision of codes in order to correlate them with the constitutional provisions and stated that from the moment of its the entry into force all provisions of the Civil Code inimical to the principle of equality between spouses in terms of exercise of parental rights were repealed (Ionaşcu, 1950, p. 58). Also, the provisions restrictive to the woman on the protection of incapable individuals were repealed.

The1952 Constitution[10] stated equality between men and women in all areas of economic, political and cultural life and gave the opportunity of family law to establish as a distinct branch of law, through the adoption

[10] Entered into force on September 24, 1952, published in the Official Bulletin, no. 1 from September 27, 1952 and repealed by the entry into force of the 1965 Constitution.

of the Family Code. The 1965 Constitution[11] and the one from 1991[12] reiterated the principle of equality between spouses.

Family Code was speaking about the equality between women and men in the wording of Article 1, paragraph 4, art.25 and art.97 paragraph 1. The texts enshrined the equality of spouses, both in terms of their personal relationships and in terms of their economic relations and the equal exercise by parents of their personal and property rights in relation to the minor children. Under the Family Code, the woman who married at the age of 16, and under certain conditions even at the age of 15, gained full legal capacity of exercise in order to have equal rights with her husband (who could marry starting from 18 years old). By Law no. 288/2007 Law amending and supplementing the Family Code they eliminated discrimination on grounds of sex at the conclusion of marriage, increasing the minimum age for the conclusion of marriage for women to 16 years old and also by allowing both women and men[13] to conclude their marriage at that age (under certain conditions)[14], when both spouses acquired by marriage full legal capacity. The current Civil Code reiterates almost identically the previous regulation regarding the marriage of the minor (regardless of sex) exceptionally from 16 years old[15] and the acquirement in this way of the full legal capacity [(Article 39 paragraph (1)].

Also, the current Civil Code expressly stipulates in art.258 paragraph (1) that "Family is based on marriage between the spouses, on

[11] Entered into force on August 21, 1965, published in the Official Bulletin, no.1 from August 21, 1965 and repealed by the entry into force of the 1991 Constitution.

[12] In its original form, the current Constitution of Romania was adopted in the Meeting of the Constituent Assembly on November 21, 1991, published in Official Gazette Part I, no. 233 from November 21, 1991 and entered into force on December 8, 1991. It was amended and completed by the Law revising the Constitution of Romania no. 429/2003 and republished in the Official Gazette Part I, no. 767 of October 29, 2003.

[13] This decrease of the marriage age for men is contrary to the recommendation of the Committee for Children's Rights, which found that the equalization of the legal age of marriage must be done by raising the age of marriage for women and not by lowering the age for men.

[14] According to Article 4 paragraph (2) of Law no. 288/2007, "For good reasons, the minor who turned sixteen can marry under a medical opinion, with the consent of his parents or, where applicable, of the guardian, and with the approval of the General Directorate of Social Assistance and Child Protection in whose jurisdiction the minor has its domicile. "

[15] In regulating the current Civil Code the approval of the General Directorate of Social Assistance and Child Protection is replaced with the approval of the guardianship court.

their full equality ...". However, the new provisions of the Civil Code which establish the freedom of choice of the matrimonial regime, the freedom of the married spouses under the community of goods regime to conclude themselves documents of conservation, management and acquisition of joint assets, joint exercise of parental authority (including the divorce as a rule) and so on, come only in support of strengthening the principle of equality between spouses and their equality in relations with underage children.

Conclusions

Human history has been marked by the legal inequality between spouses, an expression of the inequality between men and women in all areas of social life and based on man's superiority from an economic point of view.

Taking over this legislative concept of the French Civil Code of 1804 the Civil Code of 1864 established the principle of the married woman's incapacity, the husband being the one who compensated for the marital approval the legal inexperience of the wife and checked the appropriateness of the legal documents signed by her. In special circumstances, as we have shown, marriage approval was replaced by court approval.

Slowly but surely, the subsequent regulations have replaced the principle of married woman's incapacity as a result of gender equality in general, the internal regulations reflecting the documents adopted internationally in the field[16].

The analysis of these regulations from a historical perspective gives us a deeper understanding of the current legislation in this matter, of the appreciation of its superiority in terms of relations between spouses under the sign of full equality. Also, we want this historical approach to be an opportunity of reflection for the legislators, who will have to adopt appropriate, substantiated rules, and historical arguments,

[16]Woman's equality with men in different areas is established in article 16 paragraph 1 of the Universal Declaration of Human Rights, in Article 3 of the International Covenant on Civil and Political Rights, in article 23 paragraph 4 of the International Covenant on economic, social and cultural rights, in art.l and II of the Convention on the political rights of women and other international conventions regarding the fight against discrimination.

in respect to the challenges to which we will be subjected as a result of the inevitable transformations of the contemporary society.

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