

SHORT COMPARATIVE CONSIDERATIONS REGARDING BIGAMY in FRENCH AND ROMANIAN CRIMINAL CODES

Ion Cristinel RUJAN¹

ABSTRACT: *FRENCH CRIMINAL LAW HAS ALWAYS BEEN A SOURCE OF INSPIRATION FOR THEORISTS AND PRACTITIONERS OF LAW IN ROMANIA, SO THAT THIS SUCCINCT ANALYSIS OF CERTAIN CRIMES RELATING TO FAMILY LIFE IN THE FRENCH CRIMINAL CODE REPRESENTS AN ELEMENT OF REFERENCE TO SIMILAR OR SEMBLABLE PROVISIONS IN THE ROMANIAN CRIMINAL CODE. IN THIS ARTICLE ARE OUTLINED SOME SPECIFIC TRAITS OF THE OFFENCE OF BIGAMY AS LAID DOWN IN THE FRENCH AND ROMANIAN CRIMINAL CODES.*

KEYWORDS: FAMILY, MARRIAGE, DIVORCE, CRIME, BIGAMY, PUNISHMENT.

1. INTRODUCTION

The French Criminal Code establishes the crimes against minors in chapter VI of the part which includes the offences against persons.

Some French authors criticize the way in which was structured the book II of the French Criminal Code, since it contains two categories of offences whose social purpose is not the same. It is noted that, although the family is made up of individuals and in terms of criminality there is need of a demonstration of the specificity of family by criminal protection of the family institution, we must distinguish between offences relating to family integration, which fall into this category of offences, and offences against the persons who form a family and which are protected under the criminal law on the basis of humanity and, their familial attachment.

The family is a social institution, consisting of persons, which must be considered a separate legal entity and protected against acts that its members would commit against it. In France it is proved the fact that the largest number of delinquents against the family institution are members of this family.

Another division of criminal offences against the family is given by the actual prejudice which affects his family. From this perspective we point out two categories: first- that of offences against the family context, which is considering whether family attachment

¹Lecturer PhD., Department of Juridical Sciences, Faculty of International Relations, Law and Administrative Sciences, "Constantin Brâncuși" University of Târgu-Jiu.

or family rights it provides to its members; the second-that of the offences that affect family cohesion and involves violations by its members of the obligations that it creates.

2. THE OFFENCE OF BIGAMY IN THE FRENCH CRIMINAL CODE

The first in the series of offences against the family, aimed at prejudices against the family connection is bigamy.

According to the article.433.20 of the French Criminal Code bigamy is the deed of a married persons to contract another marriage, before the dissolution of the previous one.

There is a first prerequisite for the existence of the offence of bigamy, namely the existence of a marriage, validly concluded. The validity of the conclusion of the first marriage is the legal foundation for the second marriage to become bigamy. The person accused of bigamy may invoke the nullity of the first marriage to escape criminal liability.

Evaluation of the validity of marriage must take into account, in the case of foreigners, private international law. So, the person who got married in the country or in accordance with applicable legal norms according to the principle of territoriality, cannot invoke the nullity of marriage in France. In the same respect, the French legislation incidental to the field does not distinguish between absolute nullity or relative nullity of marriage.

It is also worth mentioning is the case of the Muslim to whom religion and legislation in the country allow him polygamy, but who may not require the French State acceptance of multiple marriage, because this issue is contrary to public order.

With regard to the material competence of the courts in the case of bigamy it is noted that the Court referred to the settlement of the offence of bigamy will postpone judgment until a civil court will pronounce final sentence on the validity of the first marriage.

French legal doctrine criticizes the existence of this "injurious exception" of civil nature to settlement in cases of bigamy because it basically requires the existence of a prerequisite of civil nature, on determination of the offence.

Another requirement of the law is the persistence of the first marriage, because the second marriage can't be bigamy if the first marriage is already cancelled.

In the event of the death of the first spouse there is is no longer a problem in analyzing the bigamy in the saense of its lack of bigamy, as this offence does not exist when, in the absence of the first husband, he has been declared missing by a court, declaring that has the effects of a death.

Bigamia also exists if, in the case of starting the action for dissolution of marriage, the Court has given a final decision in this regard, until the moment of the second marriage conclusion.

A sensitive issue of private international law that arises is that of effectiveness and applicability in France of certain modes of separation allowed abroad, such as, for example the repudiation. As a principle it has been accepted the possibility of invoking separation modes formally practised in the country of origin, where they produced effects, with the exception of exotic methods of separation, invoked for the first time in France, only in order to evade prosecution.

The second marriage is the act by which the offence is consumed, with the nature of an instant offence. Proof of marriage is made in accordance with the rules of civil law, and the transcription of the marriage, which is nothing but a means of advertising, does not affect its validity, when it is done.

At the same time, it is necessary for the existence of bigamy and the validity of the second marriage, although the propensity for autonomy of criminal law leads to penalties even if the act of marriage is illegal.

Under the subjective aspect, for the existence of bigamy, it is necessary to commit the offence intentionally, otherwise, will not be legally responsible the person who thought

unmarried when the second marriage ended. The legal text does not provide for the punishment of the offence in the form of attempt.

Regarding the legal participation arose the issue of complicity to the offence of bigamy. Although initially it was considered in French doctrine that can be considered an accomplice to bigamy the civil officer who concluded this marriage, knowing the existence of the previous one, however, was imperative the opinion that it is impossible for a third party to be involved in acts of bigamy. In this respect, the French jurisprudence concluded that it is not necessary for committing an offence to exist an accomplice.

Bigamy punishment consists of one-year prison sentence and a fine of 45,000 euros, which may be extended to additional punishment.

3. THE OFFENCE OF BIGAMY IN THE ROMANIAN CRIMINAL CODE

In order to be able to analyze the act of the person who meets the requirements laid down by law for the purpose of retention as bigamy offence, we must emphasize several civil law institutions which have an incidence on the matter, namely: family, marriage, divorce.

The family is a form of social relations between people connected among by marriage or kinship, and has three principal functions: perpetuating the human species, economical and educational². According to the article. 258 par.(1) of the Civil Code, "the family is founded on the freely consented marriage between spouses, on their equality, and on the right and duty of parents to ensure raising and the education of their children".

The family, based on marriage between two persons of the opposite sex, is irrelevant only from legal perspective, representing a sentimental, a psychological and moral union, which is created between its members. The Union of two persons of the opposite sex in marriage is one of the seven "*Sacraments*" of the Orthodox Church, which consists in communion of love feelings expressed by the two in light of love being poured out from God, love being essentially a gift, and wedded love, involving spouses in mutual knowledge, makes them become "*one flesh*" (Genesis 2: 24).

In the legal sense, according to art. 259 of the Civil Code "Marriage is the Union of free consent between a man and a woman drawn in compliance with the law". According to the legal text the man and the woman have the legal right to marry in order to start a family, so that a marriage drawn with another purpose is an illegal marriage. An essential element for the validity of the marriage is covered by art. 271 of the Civil Code and consists of personal and free consent expression of those who conclude the marriage.

The civil code contains provisions relating to bigamy, in the sense that, in article 273 it stipulates that "it is prohibited to conclude a new marriage by the person who is married." With respect to this prohibition, there are two legal sanctions applicable in cases of non-conformity, i.e. the one of civil law, which entails the absolute nullity of marriage, according to art. 293 of Civil Code and one of criminal law, which consists in the application of a punishment for committing of the offence of bigamy.

In order to avoid the application of such penalties first it is necessary the dissolution of marriage, i.e. staying the final judgment of divorce, and then the conclusion of another marriage. In other words, to be able to conclude a marriage, a person must be unmarried, that is not to be completed another marriage before or to have her marriage declared null or cancelled or terminated by death, with the judicial declaration of death or divorce³.

The offence of bigamy belongs to the category of crimes against the family, is stipulated in the article. 376 of the Romanian Criminal Code and requires completion of a

² I. Filipescu, *Treatise on family law*, (Bucharest: E. ALL Publishing House, 1993), 1-5..

³ O. Loghin, T. Toader, *Romanian Criminal Law. Special part.*, (Bucharest: Publishing house and media Chance, 2001), 592.

new marriage by a married person. It is an offence of bigamy the act of an unmarried person who concludes a marriage with a person he knows to be married. Given the limits of the punishments for the two variants of committing the crime, we can find that the act committed under the conditions laid down in paragraph 1. (2) constitutes a mitigating variant.

A) Legal and material object .

The crime of bigamy has as special legal object the relations of social cohabitation, family-related social relationships that ensure the monogamous nature of marriage and abiding for the legal norms governing the conclusion of marriage. At the same time the legal object of the offence consists in the respect for the moral precepts related to of the foundation of a family by marriage. The offence of bigamy has no material object, as criminal activity concerns the conclusion of the civil status act.

B) Subjects of the offence.

The active subject of the crime of bigamy may be only a married person . It is obvious that those who participate in the bigamy marriage must be two persons of the opposite sex. In a situation in which offenders are both married, they commit the crime of bigamy as coauthors, and where one of the subjects is married and one unmarried, they are legally responsible differently: the first , as the author of the variant type, and the second as the author of the attenuated Variant. In this respect, it is noted that paragraph 2 of article 376 provides only a mitigation of punishment for the case in which one of the subjects of the offence is unmarried.

Some authors consider that the person who does not meet the conditions required by the text of article. 376 to be liable criminally as an author, i.e. he is not married and does not have at the same time the quality of spouse in the second marriage, commites the deed as an accomplice. In such a case is the one who holds a public office and has the legal competence to conclude a marriage or a civil servant appointed by him for that purpose, if the marriage is concluded knowing that one of two people married.

a) passive subject of the offence of bigamy is the spouse of the married perpetrator , and if the deed is also committed under the conditions laid down in article 376. Par.(2), then we are dealing with a multiple passive subject made up of the spouses of the two active subjects.

C) Objective Side.

The material element of the objective side is achieved exclusively through an action, namely through the conclusion of a new marriage by the person who is married.

For the existence of the offence it is necessary that the conclusion of the marriage act should be validly concluded, subject to all the conditions of legality and solemnity⁴.

Bigamy subsists as a criminal offence, even if in the first marriage there is no family life there or the spouses are forcibly separated in fact for a long time⁵.

In the specialized literature there is some controversy regarding the offences in respect of the lying declaration made on the occasion of drawing up documents for the conclusion of marriage, in which case the perpetrator or perpetrators do not reveal the existence of an impediment to marriage, that is, hide or conceal the existence of a marriage contracted validly previously. In this respect, the issue that arises is whether the offence of false declarations is absorbed in the content of the offence of bigamy, being a condition of its completion or we are in a situation of real crimes⁶.

In the criminal doctrine majority of opinion is geared to considering perjury statement as a separate offence, so that it will retain and punish both offences.

⁴ O. Predescu, A. Hărăstășanu, *Criminal law. Special part*, (Bucharest: The legal universe Publishing House, 2012), 456.

⁵ C.S.J, Decision No. 78\1999, in the Journal Law No. 5/2000, 51.

⁶ Toader, *Romanian Criminal Law. Special part*, 593.

Assuming that a person enters into a second marriage, and later requests dissolution through divorce of first marriage, after completing a third marriage, he does not commit two offences of bigamy because the last act (marriage) is based on a marriage (the second), which is struck by a declaration of nullity.

Amendments made in the new Criminal Code to bigamy exclude the possibility, provided for in paragraph 1. (3) of the Treaty. 303 of the Criminal Code, according to which the offence circumscribed to bigamy is not punishable, if either the first or the second marriage was declared void for a reason other than bigamy⁷

D) Subjective Side.

The offence of bigamy is committed intentionally, directly or indirectly. The perpetrator realizes that he concludes a new marriage, although he is married, he wants to conclude a new marriage and stipulates that this generates a danger for social living relationships within the family, a result he wants or accepts.

In respect of the participant, who is an unmarried person, it is necessary, in order to be criminally liable, to know that the other person is married. If the participant does not know the circumstance that the person with whom he is marrying is already married, he is not criminally liable⁸.

E) Consumption.

The offence of attempted bigamy is not punishable by law, and the consumption of the offence takes place at the time of the conclusion of the new marriage. The offence of bigamy is not susceptible of realization in continuing form, whereas, although the illegal marriage is extended in time after the actual act of marriage, the action by which the offence is carried out does not require an extension in time.

F) Penalty.

The offence of bigamy is sanctioned with alternative imprisonment or fine punishments for both variants of committing. Thus, in the form stipulated by article. 376. (1) Criminal Code, the deed is punished with imprisonment from 3 months to 2 years or by a fine. According to the article. 376. (2) Criminal Code. the penalty is reduced to its limits from one month to one year or a fine. The justification for the existence of a mitigating variant is given by the fact that the unmarried person who participates in the conclusion of a new marriage, although affects social relations regarding social co-existence based on morality and respect, do not harm the rights of other persons and family relations, as is the case of the married perpetrator.

4. CONCLUSIONS

In both the French Criminal Code and the Romanian Criminal Code this crime finds its place, although in the future we believe that this will decrease the frequency of committing and, thus, it will gradually disappear from the criminally incriminating context. This effect will be generated by the magnitude that information technology and communication will have, in the sense that anyone will be able to instantly check the database of civil status if a person is married or not and thus prevents the commission of the offence of bigamy.

In other words, the family must be further protected from criminal perspective and acts of bigamy must be penalised, in order to prevent a moral destructuring of society and endangering even the perpetuating of the human species.

⁷ paragraph. (3) of the article 303 of the previous Criminal Code: "(3) the Acts referred to in this article shall not impose sanctions if the first or the second marriage is declared void for other reason than bigamy.

⁸ E. G. Simionescu, The stages of intentional crimes. Theoretical and practical aspects, Annals of the „Constantin Brâncuși” University of Târgu Jiu, Juridical Sciences Series, Issue 4/2012

Strictly criminally, we realize first of all that the provisions of the French Criminal Code are similar to those of the Romanian Criminal Code, but that the punishment for bigamy in the French Criminal Code is a fixed one-year imprisonment and a fine of 45,000 euros.

As compared to the old Criminal Code, in the new Romanian Criminal Code the limits of the sentences are lower. Thus, in the former regulation, in the version of the bigamy type, the penalty was imprisonment from 1 to 5 years and does not provide for a fine alternative punishment, and in mitigated variant punishment was also imprisonment from 6 months to 3 years. In the new Romanian Criminal Code for the offence provided for in art. 376. (1) the punishment shall be imprisonment from 3 months to 2 years or a fine, and for paragraph (2) the punishment is imprisonment from one month to one year or a fine.

Also in the new Criminal Code the offender is no longer exempted from criminal liability if the first or second marriage is declared invalid for reasons other than bigamy.

For the future *lege ferenda* will require the Romanian legislator to adopt the French model of fixed pecuniary penalties for committing the offence of bigamy.

REFERENCES

1. **G. Antoniu, C. Duvac, D.I. Lamasanu, I. Pascu, C. Sima, T. Toader, I. Vasiu**, Preliminary explanations of the new penal code, The legal universe Publishing House, Bucharest, 2013;
2. **V. Dobrinou, N. Neagu**, Criminal law. Special part, The legal universe Publishing House, Bucharest, 2011;
3. **A. Gh. Gavrilesu**, Parental rights and duties, The legal universe Publishing House, Bucharest, 2011;
4. **I. Filipescu**, Treatise on family law, ALL Publishing House, Bucharest, 1993;
5. **O. Loghin, T. Toader**, *Romanian Criminal Law. Special part.*, Publishing house and media Chance, Bucharest, 2001;
6. **Gh. Nistoreanu, Al. Boro**i, Criminal law. Special part, ALL Publishing House, Bucharest, 2002;
7. **O. Predescu, A. Harastasanu**, Criminal law. Special part, The legal universe Publishing House, Bucharest, 2012;
8. **E.G. Simionescu**, Criminal Executive Law, Academica Brancusi Publishing House, Targu-Jiu, 2008