

THE POSSIBLE REVISION OF THE CONSTITUTION - A POTENTIAL SOURCE OF DISCRIMINATION?

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Abstract

Given that over 3 million Romanian citizens have requested the amendment of article 48 of the Constitution, i.e. the State should only agree with the marriage between a man and a woman, our study tries to make a brief overview of the positions taken by the European Court of Human Rights or other national courts in similar situations where such sensitive issues were debated, e.g. marriage between partners of the same sex or civil partnerships between such persons.

During our analysis we have strived to show the completely different positioning of the ECHR regarding marriages between the same sex - which it does not support - as well as civil partnerships - which they easily accepted, their motivation residing in the acceptance of various social and interrelated realities, in the idea that equal opportunities must be agreed on several levels, including the cases of same-sex partners who want to be able to buy common property, to achieve a joint bank loan or to inherit each other after a long period of cohabitation.

At the same time, we have also reviewed the position of the National Council for Combating Discrimination (NCCD) or other competent bodies campaigning in this new social and legislative context which led to vivid controversy, for tolerance and for the removal of discriminatory practices by referencing to the status of such couples already recognized by the Constitution of other European countries or by the provisions of art. 16 of the Romanian Constitution which speaks about the principle of non-discrimination between citizens, a principle we want to be real, applicable, and not one of declamatory nature only.

Key words - amendment, citizen, marriage, family, consultation

Introduction

In connection with major events related to the proposed amendment of art. 48 of the Romanian Constitution, at the end of 2016, the judges of the Constitutional Court postponed taking a decision until 29th of November 2016, on the plea of unconstitutionality in which a gay couple married in Belgium requires the recognition of their marriage in Romania too, postponing thus a possible disorder of the various factions of society who oppose, more or less motivated, such kind of marriages.

On the grounds of Decision No. 580 of 20.07.2016 of the Constitutional Court of Law concerning the citizens' initiative entitled *The law to amend the Romanian Constitution*, they analysed both the opinion of the Legislative Council no.1200 of November 6th, 2015 on the legislative initiative of the citizens entitled

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"The Law to amend the Romanian Constitution" and the Declaration establishing the Committee for promoting the citizens' legislative proposal on the revision of article 48, section (1) of the Romanian Constitution.

Basically, the goal of this initiative is the intention to amend the legal provision mentioned above which states in its current form, that *'families are created based on the consensual marriage between spouses, on their full equality and on the right and duty of parents to ensure the upbringing, education and schooling of children'*, the newly proposed text being no more than a confirmation of the provisions of art. 259 section (1) of the New Civic Code, which states: *'Marriage is the freely consented union between a man and a woman completed under the law.'*

I. Romanian perspective

Under the current Romanian constitutional provisions, marriage is the consensual act between spouses, which translates, in its conservative social meaning, as the union between a man and a woman. Other types of partnerships, for instance a civil partnership between two persons of the same sex, proves to be unacceptable to our society, because its ancestral religious, social and cultural grounds are in total opposition to this new form of union.

The new bill aims to amend the Article 48, section (1) of the Romanian Constitution. Thus, the *'family is created based on the consensual marriage between spouses, on their full equality and on the right and duty of parents to ensure the upbringing, education and schooling of children.'*, the new constitutional article aims to turn into *'the family is founded on the consensual marriage between a man and a woman, on their full equality and the right and duty of parents to ensure the upbringing, education and schooling of children'*. The 3 million people who voted the amendment of the constitutional text considered that the term *'spouses'* in its current wording is ambiguous and leaves room for interpretation, providing a legal loophole for the same-sex partners advocating for the official recognition of their relationship.

According to article 16 section 3 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on the 10th of December 1948, *'the family is the natural and fundamental element of society and is entitled to protection by society and by the State, the text of the statement itself describes, however, the legalization of marriage between a man and a woman, which derives from pt. 1 of art. 16'*. Beginning of full age, male and female, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They have equal rights to marry, during marriage and at its dissolution.

The same Statement also mentions, in art. 1 section 1 that *'All human beings are born free and equal in dignity and rights'* as confirmed by our constitutional text, art. 16, which declares all citizens of equal rights and opportunities, among which it is not accepted discrimination based on sex, religion, race. etc. This is the paragraph which lets us understand that this equality of opportunity should also apply to persons of the same sex whose rights to enter civil partnerships, to inherit

each other or to pay debts on behalf of the other, should be recognised just as in the case of an ordinary family.

According to Fundamentation of the Govt. Decision project regarding the endorsement of the national strategy regarding the equal opportunities between women and men for the period 2014 - 2017 and of the General Action Plan for implementing the Strategy, 'equal opportunities in general and equal opportunities and treatment between women and men in particular is a complex social process, established in time and conditioned not only by objective factors - the economic ones being the most important - but also socio-cultural and subjective factors, among which traditions, customs and gender stereotypes are the most obvious'.

In Romania they adopted the republished Govt. Order no. 37/2000, regarding *the prevention and sanctioning all forms of discrimination*, which enshrined the right to personal dignity, it civil-sanctioned the concept of harassment by defining it as any behaviour based on race, nationality, ethnicity, language, religion, social affiliation, beliefs, gender, sexual orientation, belonging to a disfavoured category, age, disability, refugee or asylum status or any other criteria that could create an intimidating, hostile, degrading or offensive framework, but also the victimization, consisting of any adverse treatment, in reaction to a complaint or legal action regarding the infringement of the principle of equality and non-discrimination.

In March 2002, they passed the law no. 202/2002, amended by Law no. 229/2015, on equality between women and men which *defined and criminalized the direct and indirect discrimination*, harassment and sexual harassment, the discrimination on grounds of sex and multi-discrimination. Also, this law established the National Agency for Equal Opportunities for Men and Women (ANES) (Avram, Radu 2010), a specialized body belonging to central public administration, subordinated to the Ministry of Labour, Family and Equal Opportunities, which promotes "equal opportunities and treatment between men and women and ensures the active integration of gender perspective into all national policies and programs" (art. 24 section. 3).

II. European perspective

As regards the European directives on various types of discrimination one should note:

a) *the Directive for equal treatment* - 'This directive prohibits any discrimination based on sex in terms of access to employment, working conditions, chances of promotion, the actions concerning training and continuous development as well as labour contract. Thus, a general ban on working night shifts for women is illegal in the EU if there is no similar ban for men.' (Popescu 2007:73) or

b) *The Burden of Proof Directive regarding discrimination* - This directive defines the concept of indirect discrimination and supports removing the responsibility of the discriminated person to provide evidence. 'When persons who consider themselves wronged, because in their case one did not apply the directive for equal treatment, they argue before a court or other competent authority facts from which one infers that there has been direct or indirect discrimination, as it is the obligation of the defendant to prove that the principle of equal treatment' (Popescu 2007:73) was not infringed.

'Although the concept of human rights has imposed itself in the consciousness of humanity, individual protection continues to be a concept whose content is difficult to be grasped, considering that respect for cultural diversity is widely recognized as a prerogative belonging to human rights' (Berna 2015:191).

'The universality of human rights certifies the immutable absolute nature of human rights - giving the nature of preeminence to the latter, regardless of the context in which one invokes human rights, while cultural relativism has its starting point in the idea that every community enjoys a set of cultural norms which must be observed in order to maintain the identity of that respective community in its external relationships' (Berna 2015:192).

In this context of cultural diversity and diversity of opinions, *the National Strategy for equality between women and men for the period 2014 - 2017* has identified various actions in five main areas: *education, employment, equal participation in decision making, gender mainstreaming and gender violence*. For each area, it established key actions to boost progress in the respective area (Strategia națională în domeniul egalității de șanse între femei și bărbați, 2013), thus putting in question the equality of opportunity in several fundamental areas, specific to everyday life, meant to protect the person directly and thus its private life.

Regarding same-sex marriage, according to the latest statistics, it is legal in 18 countries of which 13 are in Europe. Here, several countries allow marriages between the same sex (e.g. Belgium, Denmark, Netherlands, Sweden, Norway and Spain) or some form of civil union (Austria, Germany, UK, Czech Republic, Switzerland etc.), countries such as Netherlands, allowing both marriages between the same-sex and adoptions of children since 2001, this being also accepted by Sweden since 2009 or Iceland since 2010.

According to MEDIAFAX, in the article about the law on the marriage between the same-sex persons (MEDIAFAX 2013), France, a country where the main religion is Christianity - a religion whose principles underlie the refusal to accept such unions in Romania - has begun to legalize such marriages since May 2013. It is also known that in England and Wales, laws authorizing the marriage between persons of the same sex were adopted in July 2013, followed by Scotland in February 2014.

Regarding ECHR's position against marriages between persons of the same sex, *the Decision in the case of Hämäläinen vs. Finland*-Request no. 37359/09, judged

on the 13th of November, 2012- stated that, currently ' *the European Convention on Human Rights cannot be interpreted as imposing an obligation on the member States to allow marriages between persons of the same sex*' (section 49) and given that, at that time, only ten (10) countries of the European Council were granting homosexuals the right to marry, so it concluded that '*one cannot say that there is a European consensus on the permissibility of marriages between persons of the same sex*' (section 74), both vindications based on the provisions of art. 12 of the Convention, which '*confers the fundamental right of a man and woman to marry and form a family.*'

Regarding civil partnerships, the Strasbourg Court in the case of *Oliari and Others vs. Italy* (Request no. 18766/11 și 36030/11, judged in the 21st of July, 2015) Section Two of the European Court of Human Rights (ECHR), decided unanimously that 'the right to private and family life was violated, in this case about the legalization of civil partnerships / marriage between persons of the same sex in Italy'. Thus, the Second Section imposed a positive obligation arising from the Convention to institute civil partnership (section 164 and 185) i.e. the Court ascertained that 'the Italian Government has exceeded the margin of appreciation and failed to fulfill its positive obligation to ensure that the applicants are provided a specific legal framework designed to ensure the recognition and protection of unions between persons of the same sex '(section 185). In fact, this case refers to three Italian homosexuals' couples who wanted to get married or to be part of a civil partnership in Italy, but they were turned down by the authorities.

Once again, ECHR, in *the Case of Schalk and Kopf vs. Austria*- Request no.30141/04, judged on the 24th of June, 2010- adopted on the 24th of June 2010, stated that stable couples of the same sex can enjoy '*the right to family life*' in the same way as the couples of opposite sex on the grounds that '*it is considered that it is artificial to continue to believe that a homosexual couple, unlike a heterosexual couple, would not enjoy a "family life" within the meaning of Article 8. Consequently, the relationship the applicants have, a homosexual couple which cohabits de facto in a stable way emphasizes the notion of "family life" in the same way as for a heterosexual couple in the same situation.*'

The same violation of the right to family life and of art. 8 of the Convention was invoked by the petitioners in the case for which the Romanian Constitutional Court was currently vested for a resolution. The petitioners are also supported in this case by the National Council for Combating Discrimination (CNCD), the President of this structure stating that '*the current legislation (editor's note - of Romania) limits the right to human dignity, intimacy and family life of sexual minorities because banning marriages between persons of the same sex and the failure to recognize such marriages, or civil partnerships, places them outside society*' (Digi24, 2016). The file was opened following a lawsuit initiated by the Romanian citizen R.A.C. and by the American R.C.H. who were married in Brussels in 2010. The exception of unconstitutionality was raised by a homosexual couple, consisting of a Romanian and an American at the Court of Sector 5, after the General Inspectorate of the

Romanian Immigration refused to grant the American the right to be a resident. The Court of Sector 5 admitted the exception of unconstitutionality and sent it to the Constitutional Court.

Conclusions

Coming back to our analysis on a possible inequality of opportunity after a possible revision of the Constitution, we note that, supported also by the legal doctrine, 'indeed the complexity of the principle of equal rights, its scope and practical application led to the identification, also in the jurisprudence of Constitutional Court, of a *right to be different* as an expression of citizens' equality before the law, which is incompatible with uniformity' (Muraru, Constantinescu in Muraru, Tănăsescu 2008 :151).

To the concept of equal opportunities, in the doctrine we also noticed the idea that '*the legislator will have to identify the most suitable legal formula precisely because this text must not remain a mere declaration*' (Muraru in Muraru, Tănăsescu 2008: 153), which also encourages the positioning of a part of the Romanian members of the Parliament or of the citizens in accepting the civil partnerships which enables the two members of the couple to inherit each other or to actually live with his husband of Romanian nationality.

Of course, equality of opportunity should not be treated and interpreted as in anything and anytime is worth allowing. If the balance tilts towards unaccepting a segment of the population that understands, wants to live and cohabits '*this way*' we risk, however, to place ourselves only theoretically among tolerant societies, societies which show poor, discretionary understanding towards the equality of opportunity, which also implicitly means a deviation from the text of art. 16 of the Constitution.

As of now, we look forward to the decision of the Constitutional Court regarding marriages between persons of the same sex, and we mention in the end of this article, that it is precisely our EU membership which gives us the right to see the things surrounding us from new perspectives, including culturally and socially. Moreover, we have the obligation to tolerate the policy of the other Member States which, in time, agreed to eliminate the discrimination against those of a different sexual orientation, showing thus that we are part of a new, modern, open world, detached from the old restrictive and religious dogmas which dominated our concepts about privacy and family for centuries.

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