ASPECTS REGARDING SAME-SEX MARRIAGE

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Abstract

A great debate arose within the Romanian society following the possible claims of same-sex marriages being a forthcoming reality of our society. The quite recent Romanian law regarding this issue (The New Civil Code came into full effect on October 1 2011) expressly forbids same-sex marriages, while same-sex marriages concluded abroad, be it among Romanian or foreign citizens are not recognised as such. The Constitutional Court was invested with the trial of an unconstitutional exception regarding the law which forbids the recognition of a marriage license issued abroad for same-sex couples, but one year upon such investment, the sentence has not yet been delivered. Yet, it may be the case that following the exercise of fundamental rights, a marriage which was lawfully concludedis considered totally void if one of the partners has undergone sex reassignment surgery.

The question arising is: In lawful terms, is such marriage void or not? The research which is to be elaborated in this article aims at analysing the manner in which such valid marriage once performed is or can be influenced by the sex reassignment surgery of one of the partners, as expression of the right to have full control over one's body, according to one's personal values and sense of awareness.

Keywords: *marriage, sex reassignment surgery, husband, fundamental right, constitutional right, nullity of same-sex marriage.*

JEL Classification: [K 00, K 10, K36, K38]

1. Introduction

Same-sex relationships have been a social reality since the earliest days, though they have triggered different social responses, based on the level of social development, the historical context, etc.

Along time, such relationships have been either publicly condemned or tacitly approved, which means that society has either agreed or disagreed with such bonds. Same-sex relationships were quite spread in Ancient Rome, Greece or China, as well as in the Middle Ages. The situation of same gender relationships has not changed at the present days.

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The evolution of the human society, of the concept of man's fundamental rightsprovided individuals with the possibility of expressing their right to sexuality, without such preferences to be in any way considered abnormal, condemnable or law offending.

At present, there are states in Western Europe, the USA or Canada where the homosexual relationship is permitted and accepted, while in states such as Russia or Belarus, same-gender relationships are inculpatory according to criminal law.

This progression of events has stirrednew social and institutional realities. Same-sex marriage has divided the human society in two groups - one who has accepts the new approach and regulation of marriage, and theother whofiercely rejects it and who often expresses such disapproval by extreme responses[1].

There are sates where same-sex marriages are permitted, states where such marriages are forbidden by law or states which fail to take either side of the argument. Such states actually avoiddelivering a sentence against the regulation of such marriages, because this would come against international conventions they are a part of or they have adhered to, while the others do not regulate such marriages because they don't want to legislate sentences which would oppose the view of most of their citizens.

It is nevertheless obvious and under no circumstance debatable that people who are part of such relationships are in the situation where their civil rights, be they patrimonial or non-patrimonial rights, are not protected by the state they are a member of, thus leading to a legal relationship of discrimination compared to heterosexuals citizens.

This sort of hypocrisy leads to the appearance of a legal nonsense – that the state subject to the rule of the law warrantees the fundamental rights of man by means of various legal instruments (constitution and law), while at the same time being ignorant of the civil rights of people who are involved in same-sex relationships.

A simple example would be that of two individuals who are partners in a long same-sex relationship and who have acquired a certain amount of assets during their relationship.

Such assets will not be considered common assets, including all consequences hence deriving (common goods, a 50% share legally presumed for each of the two partners, partition by court, etc.), thesame manner such acquisition of assets is considered in the case of two individuals who are partners in a long term heterosexual relationship.

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[1] In France, the writer and historian Dominique Veneer, a right-wing politician, commited suicide in the Cathedral of Notre Dame de paris in sign of protest towards the legalisation of gay marriage.

At present, there are 20 worldwide states which have legalised the marriage between same-sex partners and one state where such legalisation is still partial. They are as follows:

a) In Africa there is just one state where same-sex marriages are legal: South Africa.
b) The North American states where same-sex marriage is legal are: Canada, Mexico (only partially) and The USA;
c) The South American states which have legalised same-sex relationships are: Argentina, Brazil, Columbia and Uruguay;
d) In Australia and Oceania, as well as in Africa, there is only one state where same-sex marriage have been legalised: New Zealand;
e) The European states which have legalised same-sex marriage are: Belgium, Denmark, Finland, France, Ireland, Iceland, Luxembourg, Norway, Portugal, The UK and Northern Ireland, Spain, Sweden and the Netherlands.

We can notice from the above that none of the Asian, Central Europe or the Middle East countries have legalised same-sex marriage.

It is obvious that such legal operation, deeply transforming and ground-breaking at the same time is not admissible for the more traditional societies in the regions we have just listed above.

We also mentioned above that the assent to same-sex marriage depends greatly on the level of cultural development, the traditional customs and habits and why not on the religious beliefs of the citizens of such states.

At the same time, it is worthwhile noticing that it is not the religious cult which influences in one way or another the assent to such marriage, since in the states earlier mentioned people belong to different cults (Catholic in Poland, Hungary, the Czech Republic, Slovakia, Croatia; orthodox in Romania, Bulgaria, Serbia, Ukraine, Russia; Muslim in Albania, Bosnia Herzegovina – partially, and Turkey; Buddhist in China, Japan and Mongolia).

On the other hand, we cannot conclude that the countries where same-sex marriage was legalized are entirely Christian, just as none of the Christian – Orthodox countries has legalized same-sex marriages.

2. Homosexual, family, marriage. General notions

The terms of homosexual and homosexuality derive from same-sex relationships.

The homosexual individual has been defined to be „*the person who practices sexual intercourse with individuals of the same sex.*" (George Antoniu, Constantin Bulai, Gheirghe Chivulescu, 1976) and is condemned by society for breaking moral and ethical codes which regulate all social networking. Even if this definition dates from 1976, it is much closer to the truth than the definition we find in the Explanatory Dictionary of the Romanian Language edited under the guidance of the Romanian Academy in 2012 – „*A homosexual individual is that person which exhibits physical attraction for individuals of the same sex*.” (The Romanian Academy - The Institute of Linguistics „Iorgu Iordan Al-Rosetti”, 2012).

Until the official recognition by the state of same-sex relationships, these were incriminated by the criminal code enforced in Romania between 1968 and 2014, „*sexual relationships between individuals of the same sex performed publicly, be it that they have aroused a public response or not, are punishable by prison sentence from 1 to 5 years*” (1968).

Until 2000, the criminal legal principle considered that „*Sexual relationships between individuals of the same sex are abnormal acts for the satisfaction of the sexual instinct between either men or women. The practice of such sexual relationships whichcome against the laws of naturedefy the interest that society takes in the natural development of an individual's sexual life, with full respect for morality and decency*” (Octavian Loghin, Tudorel Tudor, 1999). Article 200 of the Romanian Criminal Code was rescinded on June 26th 2001 by Government Ordinance 89/2001.

This way of looking at and regulating relationships between same-sex individuals was greatly influenced by tradition, be it thetradition of either the layman or the Christian, and thus influenced the way in which the state regulated this kind of relationship, which from the point of view of its present regulation is tacitly accepted instead of being expressly accepted.

Suck type of relationship is tacitly accepted in Romania, because there is no express provision which recognizes relationships between same-sex individuals. The Romanian Constitution defends the right to intimacy, family life and private life, while the right of any individual to make use of one's own body freely is regulated by article 26.

The exercise of the right to make use of one's own body is conditioned by the respect for the rights and liberties of other members of the society and by the respect for the public order and good manners.

The content of article 26 of the Romanian Constitution is the one compiled in 1991, since in 2003 it underwent no modification. It can be hence ascertained that the constitutional law applicable to the right to private life and to the right to make use of one's own body freely was the same both when the disposition of the criminal law to incriminate relationships between individuals of the same-sex had effect and upon its abolition.

This constitutional provision, if regarded and interpreted individually, allows both theincrimination of the relationships between individuals of the same-sex and the freedom of choice for creating and maintaining such relationships. The right to private life was regarded in various manners, but not under the aspect of the free expression of sexuality, a right which according to the ECHR jurisprudence is associated to the right to private life and hence needs to be also warranted and not only protected by the state.

According to the European Court for the Human Rights, the homosexual population hold the right to having their home respected and to leading a private and family life.

This right to family gave rise to a whole series of interpretations, debate, actions and public manifestations meant to combat or support this idea, the majority of the citizens claiming to be against the idea of family as an institution composed of homosexual partners[2] and consideredthe concept as abnormal.

The family may be definedbased on several perspectives. Thus are:

a) Semantically, it is *„the basic social contract achieved through marriage and which binds the two wedded partners (parents) and their descendants (unmarried children)"*, (The Romanian Academy, The Institute of Linguistics „Iorgu Iordan-Al Rosetti", 2012).

b) Theologically[3], The Romanian Orthodox Church uses the term of "*Christian family*", which is "*a divine establishment, composed of parents and children who live their lives together in faith and love. Marriage is the foundation of the family. This tie was rightened by God when he created Man*" (1987).

c) Philosophically, "*the immediate substance of the spirit is determined by feeling, by love, and sothe feeling that is inherent to marriage is that each of the two partners finds their own self-consciousness in this unity, in order for each partner to act not asa distinct individual, but as a member of the family*" (Hegel 2015).

d) Judicially, "*The family is the biological, social and judicial entity formed of two individuals of different sexes – who are wedded by marriage (a family in the narrow sense), by parents and their children (the so called nuclear family) or by the members of the above defined family and other people they are connected with by means of other family bonds (family in the broad sense*)" (Mircea Costin, Mircea Muresan, Victor Ursa, 1980), or "*a group of people connected by a close relationship. For legal purpose a family is usually limited to relationships by blood, marriage, or adoption, although sometimes (e.g. for social security purposes) statute expressly includes other people, such as common-law"* (Martin, 1994)"

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[2] There even exists an initiative to modify the Romanian Constitution, in the sense that this should include a definition of the family as the relationship between a man and a woman.

[3] Romania's population is mainly Christian (orthodox - 72%, Greek Catholic - 7,90%, Roman Catholics - 6,83%, Reformed Calvin - 3,94%, Evangelical Lutheran - 2,21%, Unitarian - 0,38%, Armen Gregorian - 0,06%, Armen Catholic - 0,01%, Lipovan - 0,32%,

At the same time, there also exist various other definitions of marriage, based on the qualifications and academic preparation of the researchers who provided them.

Semantically, marriage is defined as "*the legal and freely consented union between a man and a woman in view of forming a family. Shared life of the wedded partners, conjugal life*" (The Romanian Academy, the Institute of Linguistics "Iorgu Iordan Al Rosetti", 2012);

a) Theologically, marriage is defined as "*the physical union between a man and a woman, one of the essential laws God has established for the human nature ever since Man was created.*" (Bria, 1994);

b) Philosophically, "*Marriage, as the immediate type of ethical relationship, contains first, the moment of physical life; and since marriage is a substantial tie, the life involved in it is life in its totality, i.e. as the actuality of the race and its life-process.*" (Hegel, 2015);

c) Judicially, marriage is defined as: "*The freely consented union between a man and a woman, concluded according to all legal provisions, in the purpose of forming a family*" (Filipescu, 1989). In the meanwhile, other authors have defined marriage as the "*judicial act concluded between a man and a woman who want to get married, by means of the expressed consent of the parties involved*" (Dan Lupascu, Cristiana Mihaela Craciunescu, 2011).

We don't share the perspective of the last definition, since this one defines marriage as the express willingness to form, modify or close a judicial rapport. Thus, if we were to include the definition of the judicial act within the definition of marriage, the latter could be defined as the display of willingness expressed by a man and a woman to get married, with the express consent of the parties involved therein. Otherwise put, marriage is a display of willingness.

The transsexual is the individual who according to his/her own beliefs is a representative of the opposite gender and who, upon following a set of treatments and surgical interventions, undergoes gender change.

3. The right to marriage is a fundamental right.

The right and the exercise of the right to marriage is a fundamental right of man which is protected by international treaties and conventions, be they universally or locally applicable.

The right to marriage is protected by the Universal Declaration regarding the Human Rights, adopted by the General Assembly of the United Nations on December 10th 1948.

Article 16 of this declaration ascertains the right of men and women to get married and form a family with no limitation based on race, nationality or religion. This is not an absolute right and it has to be exercised with full respect for the internal judicial regulations of each individual state concerned.

The European Convention of the human rights stipulates in article 12 that both men and women are entitled to get married once they have come of the legal age to do so and form a family according to national laws in effect. The text of article 12 of the European Convention regarding the Human Rights refers to the protection of two fundamental rights – the right to get married and the right to form a family. The exercise of these two rights can occur if the national laws regulating them are respected.

We notice that article 16 of the Universal Declaration for the Human Rights does not allude to the fact that the "*wedded partners*", or the "*specific person*", or "*the citizens*", or "*the man and the woman*" have the right to get married. Rather, the text of the above-mentioned article has the broader meaning of "*man and woman…have the right to get married and form a family*".

It is also established that the family is a natural and fundamental element of society which needs to be protected by the state. The European Convention regarding the Human Rights does not have a different approach from that of article 12, stipulating among others that "*the man and the woman have the right to get married*".

Nevertheless, both the legal principles and the jurisprudence of the European Court for Human Rights considered that the rightful holders of the right to marriage are the man and woman, since the text of the Convention does not consider the right of any person to marriage.

It is therefore inferred that such right to marriage was recognized only to persons of different sexes. By the jurisprudence of the Court, the warranty of the right to marriage refers to the marriage of partners of different sexes (a man and a woman).

In 2016,in the case of Chapin and Charpentier vs. France, the court consolidatedthis interpretation of article 12 from the European Convention for Human Rights in the sense that this article does not defend the right to marriage of couples of the same gender and that the matter of marriage of partners of the same gender is to be managed by each individual state, "*being subject to the national laws of contracting states…article 12…cannot be interpreted as imposing any obligations on the contracting states to provide couples of the same sex the right to marriage*". (The European Court for Human Rights, 2016).

4. Marriage in Romania. Judicial nature. Judicial perspectives.

Marriage is also regarded as a fundamental right of man, protected and warranted by International Conventions, the National Constitution and other various regulatory documents.

The Romanian Constitution does not regulate marriage, but article 48 of the Constitution, entitled "family" includes the following provisions:

(1) "*Family is based on the freely consented marriage of the two partners, on their equal rights and on the right and duty of parents to ensure the raising, education and didactics of their children*."

(2) "*The conditions for the dissolution and nullity of marriage are to be established by law*."

(3) "*By law, children who were not conceived during marriage have equal rights to those conceived during marriage.*"

Upon interpreting this constitutional text, we can identify that the civilian character of marriage lacks any religious conditioning. This is due to the evolution of marriage since the first half of the 19th century when it was marked by a strong religious character.

On the other hand, we notice that in the case of the constitutional text, as well as in the case of international treaties mentioned earlier, marriage is considered to be a contract concluded between the two partners, who may not necessarily be a man and a woman.

Being of different sexes was and still is considered to be an essential condition for the conclusion of marriage. Moreover, the old law said that "*Such condition is so obvious that the law (lawmaker) did not consider it necessary to make express provision regarding it.* (Filipescu, 1989)."

This lacunar analysis of the European Convention for Human Rights was solved by the jurisprudence of the European Court for Human Rights, as shown above, by the addition that the right to marriage refers to individuals of different sexes, with each specific state assuming the decision of approving or disapproving to gay marriages.

The regulatory national law for the conclusion of marriage is the Civil Code which regulates within the provisions of article 271the fact that marriage can be concluded only between a man and a woman, based on their express and willing consent.

The Romanian Civil Code is a relatively new Civil Code, which has come into effect on November 1st 2011, a moment when there were fierce social debates regarding relationships between individuals of the same sex, as well as gay marriage. Thus, it was felt that the legal text should expressly mention that marriage may be concluded between a man and a woman, while article 277, paragraph (1) forbids marriage between individuals of the same sex.

Romanian authors consider that marriage holds the following judicial traits:

- It is the union between a man and a woman;
- It is consensual and assented to freely;
- It is monogamous;

- It is secular or civilian;
- It is solemn;
- It is concluded on the equality of rights and the obligations of the wedded partners;
- Marriage is concluded with the purpose of forming a family.

Some of the authors believe that marriage is concluded for life, which is not quite valid assumption since the dissolution of marriage was regulated, be it with the assent of both partners or at the request of one of the two partners. This specific feature of marriage regulations is based on the religious perspective on marriage, namely that marriage was concluded by God for eternity.

Even if constitutionally speaking it is not forbidden to conclude marriage between individuals of the same sex, other legal dispositions establish the conditions that the individuals must fulfill in order for the marriage to be concluded.

Basic conditions for the conclusion of marriage

In order for a marriage to be validly concluded, there is a set of formal or substantive conditions that need to be fulfilled.

a) The formal conditions have to do with the solemn character of marriage and with the quality of the person who officiates the marriage (marriage officer, ambassador, consul, ship or aircraft commander, etc.)

b) The formal conditions which need to be fulfilled by the partners to be wedded, for the full validity of marriage concluded, are:

- The two need be at least 18 years of age (legal marriage age). There are exceptions from this condition, in the sense that a person who is only 16 years of age can get married for serious reasons, based on a medical certificate and the assent of the parents or the legal tutor and the assent of the family court.
- Neither of the two partners should be married;
- The two partners need to be of different sexes;
- The two partners should want to get married at their free volition and without any coercion or undue influence whatsoever.
- The two partners would be in no way related to each other, up to forth degree relatives included.
- The two partners should not be in any tutor legal relationship.

Who can get married?

Taking notice of the imposed conditions for the validity of marriage, we can hence deduce that any person who fulfils the national legal conditions in effect can get married.

It is difficult to say that anybody can get married, regardless of sex, since marriage can be concluded only between partners of different sexes. Nevertheless, it is obvious that at the moment when the marriage is concluded, the two partners need to be of different sexes.

As can be noticed, there is no express injunction that individuals with different sexual orientations cannot get married. Thus, homosexual individuals can conclude a valid marriage provided that their partner is of a different sex.

In this case, it is obvious there would be a great problem, since debate might arise concerning the right to the free expression of sexuality and why not, to the validity of such marriage.

a) Sexuality and the expression of sexuality is a fundamental right which is ascertained and warranted both by the international conventions and treaties and by the constitutional regime.

b) As mentioned earlier, such right is circumscribed to the right to a private life, which in Romania is constitutionally warranted by means of disposition 26 to which international conventions and treaties are added. The provisions of treaties and conventions have priority to internal regulations, if there are any contradictions of terms between these.

The ways in which such internal regulations are interpreted are especially interesting, since de facto, they are international treaties, which according to constitutional dispositions become internal judicial norms, while on the other side the European rights should be effective in all states. According to article 20, paragraph 1 of the Romanian Constitution:

"The Constitutional Dispositions regarding the rights and freedom of citizens will be interpreted and applied according to The Universal Declaration of The Human Rights, including all other accords and treaties Romania is a part of", while according to article 20, paragraph 2 "*If there are any disparities between accords and treaties that Romania is part ofregarding the fundamental rights of man and the internal regulations, the international regulations are of priority, with the exception of the case when the Constitution or the internal laws include less favourable dispositions.*"

Consequently, in the specific situations which were restrictively enunciated within the constitutional text enunciated above, the judicial regulation issued from international treaties and accords regarding the human rights and fundamental freedom, and in the case when such treaties or accords include more favourable provisions, such treaties or accords shall be considered internal judicial regulations to which the above interpretation regulations are to be applied.

Article 48, paragraph 2 of the Romanian Constitution requires that "*Upon the (EU) admission, the provision of constitutive treaties of the European Union, as well as other binding community regulations have priority over all* *otherwise contrary dispositions expressed by internal laws, as long as the provisions of the admission act are respected.*"We can notice in this text how the European judicial norms are considered to be internal norms.

The European Court for the Human Rights acknowledged the rights of individuals of homosexual or lesbian orientation to express their sexual orientation and lead a life according to it, this Convention seeking to protect a form of expressions "*which is essentially private to the human personality and character*" (ECHR, 1981). Such right to a private life is partially incompatible with the right to marriage, since this latter cannot be exercised by homosexuals and lesbians.

c) A marriage concluded between persons with homosexual or lesbian sexual orientation, is valid as long as the other partner is of a different sex.

As shown before, existing judicial regulations (article 27 of the Civil Code) expressly forbid marriage between persons of the same sex.

By means of a contrary interpretation of this text, marriage concluded between persons of a different gender is allowed and article 273 of the Civil Code stipulates that "*marriage is to be concluded between a man and a woman*" without being conditioned by the sexual orientation of the partner.

This aspect apparently leads to the conclusion that marriage concluded between persons with either homosexual or lesbian orientation is valid if the other partner is of a different sex.

Would such marriage be absolutely void?

The nullity of marriage represents the civilian sanction which intervenes following a breach of the formal or substantive requirements concerning the conclusion of marriage. Such nullity is absolute or relative, virtual or express.

The absolute nullity intervenes when a set of formal requirements for marriage has been breached, that is:

- One of the partners in marriage is not yet of the legal age for marriage;
- One of the two partners was already married;
- The two partners are somehow related, 4th degree relatives included;
- One of the partners is mentally incompetent;
- The marriage is concluded between the legal tutor and the one under his/ her tutorship;
- The marriage concluded is fictive.

Relative nullity intervenes when the consent of either of the two partners is viced by: errors regarding the physical identity of the other partner, mourning or violence.

Hence, there is only one reason which could affect marriage concluded between two partners of homosexual or lesbian orientations: the fictive marriage (absolute nullity) or other reasons of relative nullity.

A marriage is considered to be fictive if the reason for its conclusion was different from that of forming a family, or otherwise put, the marriage was concluded just in form, without the consent of the partners being genuine or without it expressing the authentic will.

Such aspect of marriage is difficult to establish, even if the two partners concluding marriage are of different sexes but of homosexual or lesbian orientation. It cannot be presumed that the conclusion of such marriage was simulated or that the given consent of the partners is merely formal.

At the same time, such marriage cannot be characterised as being simulated since simulation requires the existence of a public act and of a secret act, while in this case marriage is not a secret act.

Nevertheless, there can be great debate in what regards the relationship between the two partners, while their relationship can be characterized as being specific to a marriage relationship or not. These relationships between the partners are specific and can be identical to those between heterosexual couples, with the exception of sexual intercourse and the sexual orientation, which may be either homosexual or lesbian.

At the same time, sexual intercourse between the two partners is a form of expression of the fundamental right to life, which makes it impossible for a tertiary party to judge such matter in an either negative or positive manner. The state cannot object by invoking the clause of nullity of such marriage, because this would represent a forbidden intrusion in the private life of the individual.

Based on laws in effect on this topic, marriage cannot be considered void based on the sexual orientation of one or both partners, be it that nullity might be considered absolute or relative, since such reason does not make the case for absolute nullity of marriage.

By taking the reasoning further, we can consider that such marriage falls under absolute nullity only if one of the two partners was led into error in what regards the sexual orientation of their partner, while absolute nullity refers to an error regarding the person they have wedded and not the their sexual orientation.

Thus, we notice that even from the standpoint of the reasons leading to absolute or relative nullity, the regulations of marriage do not cover all situations that members of a society might encounter during their interaction and that overall, our mentality is old and does not take into accountthe present ever changing social reality.

a) Transsexuals are individuals who are entitled to be wedded by marriage. They are individuals who have undergone a series of surgical interventions which led to a change of sex.

b) The scientific evolution has transformed the sex reassignment surgery, achieved by means of a series of medical, hormonal and psychological treatment, into common reality.

Such individuals can be wedded by marriage with individuals of the opposite sex, according to applicable regulations.

Consequently, as long as there is no sort of permissive or prohibitive provision in this regard, a person who has undergone sex reassignment surgery has the right to get married, with full respect of all legal provision, which means with a person of the opposite sex, namely the sex the transsexual had before undergoing sex reassignment surgery.

Romanian applicable law does not provide any conditions which should be fulfilled by a person who undergoes sex reassignment surgery, but there are states where regulations provides some conditions which need to be fulfilled for issuing a permit for sex reassignment surgeries.

There is only one study of comparative law achieved by the Ministry of Justice France which is available at http://www.justice.gouv.fr/art_pix/1_ tableau_transsexualisme.pdf and which presents the conditions which need to be fulfilled in order for a person to be able to change his/her status in states such as Germany, Belgium, the United States of America, the Netherlands, Poland, the United Kingdom and Northern Ireland, the Czech Republic, Sweden and Switzerland.

Such conditions are almost identical and they require that the person to be married should be at least 18 years of age (to have already come of age) and be submitted to a psychiatric or medical examination which should establish the irreversible character of the feeling that one belongs to the opposite gender and of the decision of undergoing specific hormonal treatments and the surgical intervention.

The only country where it is imposed that the person should not be married is Germany, while other earlier mentioned states do not provide such conditions within the framework of applicable sets of laws. Romania is one of these countries.

From the judicial point of view, such marriages are validly concluded and do not raise any sort of judicial matter if concluded after the sex reassignment surgery.

The transsexual can undergo sex reassignment surgery based on an administrative authorization issued by the state for both the treatment and the surgical intervention.

It happens quite often that the costs of such medical treatment and surgical interventions are borne by the state, so that the transsexual is recognized by the state and can make use of the entire complex of rights and civil libertieswarranted and protected by means of various judicial tools and mechanisms. One of these rights is the right to a name that the transsexual will change with the administrative authorities.

The change of name is performed by administrative authorities; it is regulated by Ordinance 41/ 2003 and can be claimed only on solid grounds. Such solid grounds are enunciated by article 4 of Ordinance 41/2003. None of the enunciated reasons refers to any sex reassignment surgery, while the closest reason enunciated is that provided in article 4 paragraph (2) "*when the name of the person is specific to the opposite gender*".

This solid reason is not always sufficient for approving to the demand of a transsexual to change his/ her name. Existing national regulations are not comprehensive enough for ensuring the respect for the fundamental rights of these individuals, while even the jurisprudence of the European Court for Human Rights is not very coherent in what regards this aspect.

States are obliged to respect the sexual identity of the person and they cannot issue any prohibitive laws regarding the transsexual's possibility to get married, so that such individuals can get married anytime with a person of a different gender.

There is no other interpretation to the text of law as long as the European Court for Human Rights acknowledged the identity of the transsexual; it means that states for which the jurisprudence of the court is compulsory cannot hold any contrary position to the matter.

Any contrary interpretation might make it possible for a transsexual and a person of the same gender to get married, after the latter has underwent sex reassignment surgery. On the whole, this equals marriage in between two partners of the same gender.

As long as the national regulations of many states within the European space, such as Germany, do not provide the condition that the person undergoing sex reassignment surgery is not married, it means that the sex reassignment surgery can occur if the person is married as well.

After sex reassignment surgery of such individual, there will arise a matter of validity of the marriage. The marriage is validly concluded at least until a transsexual modifies his data regarding his status (name, gender), a moment when the new documents become opposable.

As of the moment when information of status is changed, marriage can be characterized as being concluded between partners of the same gender, which is expressly forbidden by law, following that in this case a sanction of absolute nullity is applied to the marriage.

If at the moment the marriage is concluded, none of the future partners is aware of the possible sex reassignment surgery of the other partner, the marriage was concluded in the purpose of forming a family and it has fulfilled all formal and substantive conditions, so that it is considered to be a validly concluded marriage.

If at least one of the future partners in marriage knows at the moment the marriage is being concluded that his/ her future husband/ wife was about to undergo sex reassignment surgery, the specific marriage falls under absolute nullity for *evasion of the law.*

The acknowledgement of absolute nullity is retroactive – ex tunc -. Consequently, marriage will be considered to have never been concluded. This retroactive effect has its exceptions which regard the situation of children resulted from a void marriage in the situation of a putative marriage.

In the case of the situation analysed, we can infer that the reason for absolute nullity did not exist when the marriage was concluded and occurred at a subsequent moment, after one of the partners changed his sexual identity by means of sex reassignment surgery, and when the same concluded marriage could be characterized as valid and forbidden by law (void), which seems to be a judicial nonsense.

According to the intended law, we strongly believe that the judicial regulations do not agree with existing social realities and the scientific evolution, even if such arising situations require judicial regulation.

The state has the positive obligation to exercise one of its fundamental obligations, that is to provide a judicial framework which supports all type of human relationships existing in nowadays society, without ignoring any social group, regardless of their sexual orientation. The state cannot and should not ignore the right to expression of individuals who have other sexual orientation than the majority, or their desire and need to form a family, regardless of the fact that such needs or desires might stir the disapproval of the majority.

The sexual and family relationships of such individuals need to be regulated in view of both gaining the respect and warranty of fundamental rights of these sexual minorities who are to become family minorities.

A new judicial concept will have to hence emerge, which if included in the legal principles and the jurisprudence, will define and support family minorities.

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