Jurnalul de Studii Juridice

Year XIII, No. 1-2, June, 2018, pp. 103-110

CONCEPTUAL REFERENDUM- SOCIO-LEGAL ASPECTS AND SOCIAL CONSEQUENCES

Iulian APOSTU

DOI: <https://doi.org/10.18662/jls/24>

Covered in:

CEEOL, CrossRef, CrossCheck, Index
Copernicus, Ideas RePeC, EconPapers,
Socionet

CONCEPTUAL REFERENDUM- SOCIO-LEGAL ASPECTS AND SOCIAL CONSEQUENCES

Iulian APOSTU¹

Abstract

The culture in which the individual is born and socialized will always impress upon him.

Analyzing the surface of social polemics about the "danger" of LGBT marriage, heterosexuality seems to be the main landmark of marital cohabitation, and minority alternatives seem to be a form of symbolic aggression that most feel sympathetic to accepting. Also, looking from the perspective of family protection actions through this ample national action, the referendum becomes more of an action to protect a simple concept of marriage than to protect the marital conjugal space, around which all fears about marriage are being developed (with all the "risks" of being "veiled" by same-sex couples claims). However, the legal modification of marriage only between man and woman does not protect conjugality from the "danger" of legalizing homosexual marital unions, nor from marriage-like rights such as adoption.

The study aims to analyze comparatively international laws on consensual union and marriage, insisting on socio-legal resources that express rights similar to marriage in the European space.

Keywords

Referendum, marriage, consensual union, homoparentality, adoption

Introduction

Current social views on conjugality require a series of structural changes that produce chain reactions in terms of gender attitudes, spouses' relationships, role distribution, functional structure, etc. Young couples have more to do with personal comfort and a personalized way of meeting conjugal needs, and less with an outside principle that guides relationships through pre-defined cultural patterns.

Thus, the evolution of the family from traditionality to postmodernity implies a double movement: a *privatization*, in the sense of a greater attention to the quality of interpersonal relations and a socialization of this group due to a larger intervention of the state. Marriage is no longer

¹ Ph. D. Scientific Researcher, Institute of Sociology of the Romanian Academy Associate Professor, Faculty of Sociology and Social Work, University of Bucharest.

attractive to the extent that it is perceived as a possible foreclosure in predetermined roles. Consequently, the consensual union appears to be a less rigid form, likely to be accepted according to individual demands (de Singly, 1993).

Roussel also notices a tendency of a double movement in conjugality: on the one hand, a kind of hesitation of couples from entering the institution, and on the other hand, a lethargy of the law which, in the spirit of the legislators, had to mitigate this reluctance towards a marriage with predefined legal rules. Today we are witnessing a dual deinstitutionalization, one in behavior, and another in the legislation itself (Louis Roussel, 1989, p. 126).

The relational strategies, their diversity and the way they are restructured, re-evaluated and functionally adapted provide the optimal framework for the diversity of cohabitation between two partners.

At a simple glance, cohabitation is structurally and functionally copying the classical family but, in its in-depth appreciation, it presents certain structural and functional manifestations that make it different: financial independence, level of personal autonomy, individualistic orientation, etc. Mutual limits generally established in the case of consensual unions, the temporary horizon and the uncertain future of the relationship can discourage these couples from increasing productivity, accumulating wealth, and having children (Pruna, 2005, p. 41).

Partners feel more to live for themselves than for the others, and the way of building the solidarity function is changed. The other becomes the personal fulfillment resource of the first one and its fulfillment becomes the resource of the other.

In particular, while partners are less happy together, they do not expect to remain together in the name of an outside principle, in the name of an institution or of a moral or societal principle (Singly, 1993, p. 86).

For Romanian society, the lethargy of Roussel's law was more noticeably observed after 2013, along with changes in the logic of patrimonial regimes or those of simplifying and diversifying divorce procedures.

The social aspects of the last couple of years in Romania regarding the life of the couple surprises an increase of the phenomenon of the consensual union, at least at the stated level. As a "confirmation," the 2002 Census has revealed that 86.2% of couples are married and 13.8% are in concubinage. However, the data obtained are imprecise, the census measuring only the declaration of cohabitation without legal forms, not the

one of a relationship alternative to marriage. So the people declared a concubinage for two distinct marital states: consensual union to marriage - as a premarital cohabitation state and a consensual union - a definitive alternative to marriage. Yet, although they were interpretable, statistical data became a technical resource to justify the reasons for legalizing the consensual union for all the projects proposed in the Parliament.

Since the onset of this legalization process, the social polemics about legalizing the consensual union have become more and more obvious in public talks. With basis of argumentation, often stereotyped ("it is not a paper that keeps us together", "if I do not like it, I give up without any mediation of the lawyers", "why would the state regulate my obligations to my partner" etc.), the desire for a legal alternative emerged as a right to be gained for younger generations. Thus, on March 26, 2002, the first bill was proposed to the Parliament for the legalization of the consensual union that only concerned heterosexual partners. In his explanatory statement, the initiator specified that, in his civil aspect, the institution of marriage is a relatively recent date, the cohabitation being in return, both before and after marriage. The immediate effects of these legalizations could not be anticipated - LGBT community motivation to demand a partnership that does not limit legalization to heterosexuals only. Counterintelligent, the action directed primarily towards legalizing a marriage alternative for heterosexuals quickly became a common, anti-discriminatory law of a community claiming equity in rights, regardless of the sexual orientation of the partners. As a reaction, on 28 December 2004, as well as a subjective approach of a culture-built community to accept only heterosexuality, it was decided to terminate the legislative procedure by not complying with the provisions of art.63 paragraph 5 of the revised Constitution of Romania.

In 2010, Senator Viorel Arton proposed for the first time in Romania the legalization of civil partnership, making it clear that this type of legal cohabitation can be done by same-sex couples. Practically, it was for the first time in Romania when a draft law was proposed in line with international experiences that permitted, regardless of sexual orientation, the legalization of marital relationships in the alternative to marriage. The senator tried to offer a legislative variant compatible with the European one to offer the possibility of legalizing the marital relations between a Romanian partner and one of the international space. However, the harsh reactions of deputies and senators and, at the same time, the Church and the secular community, constituted an opposition that blocked the idea and possibility of legalization. In this context, the senator himself withdrew his proposal.

The last proposal to legalize the union was Senator Remus Cernea's in 2015 (L52 / 09.02.2015), this being the best project to legalize the consensual union. The project detailed the legal relationships between the partners, was in line with similar laws in the European space and targeted both homosexual and heterosexual partners. The project was rejected on December 9th, 2015.

None of the legislative proposals has been received with tolerance by deputies or senators. Cultural influences, as well as social reluctance for such a conjugal alternative, were subjective factors that influenced the decisions. Moreover, the social reactions have further stimulated the undesirability of such a legalization. For the Romanian space, the mentality of a marital alternative as a form of legal cohabitation is not regarded as a viable one. Legalizing the consensual union in Europe implied the existence of individualized marital attitudes in which the protection of personal patrimony becomes a precondition for all couples. For this reason, legislative initiatives for the legalization of a consensual union, perfectly adaptable to the Western conjugal space, still do not appear to be attributable to the Romanian conjugal space. However, the polemic framework associated with the referendum has created the structure of a minimum of tolerance, which is why, in the public speeches preceding the referendum, the leaders of the political parties have declared that there is a punctual concern to find a legal formula for the LGBT partnership.

Sens and countersens in referendum strategies

The context of the referendum was formed around a phobia that fueled the prompt reactions of a "traditional" community. Their reticence on homosexual partnership was the main resource to promote and stimulate the actions that led to the referendum.

In the same context, a consistent part of the elements in the public discourse had contradictory tendencies and goals: the misuse of the traditional family concept, legal confusion over family versus marriage, fears about adoption, the intrusion of religious communities into legal arguments about the consensual union, etc.

It should also be noted that Romania is among the least tolerant countries in accepting same-sex marriage. In 2003, EOS GALLUP Europe conducted an opinion poll in 30 European countries on its social agreement or disagreement regarding the legalization of homosexual marriage and the possibility of adoption for these couples. Among the countries with the highest degree of acceptability were Denmark - 82%, Luxembourg 71%, the Netherlands - 80%, Sweden 70%, Belgium 56%, and among the least

acceptable countries were Cyprus with 6%, Turkey with 16% and Romania with 17%. Concerning the degree of disagreement, the country with the highest share for non-acceptance of homosexual marriage was Turkey, with 79%, then Lithuania with 75% and Romania with 70%. Regarding the acceptability of adoption for same-sex couples, general statistics show that 42% of Europeans agree. Among the countries with the highest degree of disagreement are Malta, 86% and Romania 85% (SOURCE: EOS GALLUP Europe, 2003).

The use of these reticences has become the primary resource for mobilizing communities to organize and support the referendum. On this resource all the arguments concerning the social order were built: tradition, religion, adoption, marriage, etc.

From the conceptual point of view, the traditional family is not the "traditional family". The conceptual confusion is related to the imprecision of an association of heterosexual conjugal orientation with the image of a natural manifestation, which is majoritary in the common majority tradition, and not by a functional orientation of what the traditional family can be. Technically appreciated, the traditional family is an extended family type, with a hierarchy of gender and a conjugal role, with a type of community solidarity, with culturally imposed rules, etc.

The traditional family is an authoritarian or autocratic structure, chaired by the patron, including several generations living together, in a precise division and stratification of roles where the choice of partner is made by parents based on economic and social status, and subordination of obligations, and following traditions are major expectations (Mitrofan & Mitrofan, 1991, p. 144).

In fact, the traditional family was conceptually confused with the heterosexual family. Subsequent shades about the "natural family" are also scientifically imprecise, as the natural family is not always a heterosexual family that can procreate, as has been pointed out to mark differences in same-sex partnership. In this context, as Maria Voinea appreciates, the natural family is formed also from heterosexual partners who can not have children for medical reasons. This type of family is known in the literature as struggling families (Voinea, 2005, p. 16).

Appreciating the religious perspective, Christian churches consider to be a sinful experience of all married partners who have not received religious blessing, so in religious logic, not the type of legal authentication of a marriage union is what matters to the religious community, but its own sanctification service, or blessing.

From the perspective of adoption, the issue of the referendum seems even more meaningless. As a general appreciation of the legalization of the consensual union in Europe, no draft legislation has allowed at first the adoption right or the assisted medical reproduction for same-sex couples. This legal impediment has been made since the first legalization of the homosexual concubinage in Europe - Denmark. The registered partnership generates the same rules as in the case of legal marriage, except for the right to adoption, the right of procreation and the rules of parental separation (Mécary, Leroy-Forgeot, 2000, p. 19). The same prohibitions have also appeared in the Swedish, Norwegian, Icelandic, French, German, etc. legislation.

The counter-sense of these prohibitions was that, although the law of concubinage did not permit adoption, the adoption law provided legal resources for anyone who wanted to adopt alone. Both in European and Romanian legislation, the adopter's definition is "the person who adopted or wishes to adopt, under the present law" (273/2004 updated by Law 57/2016). Thus, a homosexual partner adopts in its own name and then integrates the child into its own conjugal environment. Many controversies have been built on this topic in Europe because the legal strategy of homoparentality has taken the legislative authorities by surprise. The limitation of single adoption hits individual rights while, leaving the definition in the classical form, legally allowed homoparentality.

Moreover, some of the same sex partners have had heterosexual relationships until they understood their sexual orientation. Following cohabitation with their heterosexual partner, they had children. For this reason, building a legal framework to block homoparentality became even more difficult because any legal imperative could lead to the separation of the child from the natural parent. That is why, in all European countries, the phenomenon gradually gained tolerance, being subsequently accepted and quantified in the laws of many European countries.

Conclusions

The legalization of concubinage in the European countries was preceded by the same polemics we see in the Romanian space as well. In the social history of European cohabitation, the duration from the first legislative proposal to the actual legalization has been around 2 decades. All the while, the polemical talks between supporters and contestants embraced the form of emotional moments of momentary loss of their tone and impact with the exhaustion of arguments on both sides. Throughout Europe, the

history of legalizing the consensual union and later homosexual marriage had, as its starting point, the insistence of the LGBT community. In the case of Romania, such support was disseminated and the three legislative initiatives were rejected by the Chamber of Deputies and the Senate with a comfortable majority of votes based on arguments that show the synthesis and the reluctance to this type of legalization.

The very organization of the referendum to redefine the concept of marriage in the Romanian Constitution started from a mistaken assumption of failure, regardless of the outcome of the votes. Analyzing the effects of concubinage in European countries, it was found that consensual union seems more advantageous than marriage itself. Contracts of consensual union imply a number of contractual causes exposed by each partner. For any other litigation for which there are no contractual clauses, the courts judge on the basis of common law, that is, from the marriage-specific legislation. Thus, partners enjoy contractual rights and marriage law, where previously negotiated rights are not sufficient.

Also, involuntarily, all actions of the referendum have stimulated reactions accordingly, to organize a legal alternative for concubine partners, regardless of sexual orientation. The new demands of the LGBT community, the press statements of political leaders, and the sensible increase in social tolerance, the effect of banalizing pro or homosexual unions, are even more open to a new social and legal stage of the expression of marital life. Thus, in the spirit of the same idea, limiting same-sex marriage leaves the door open to the legalization of legal alternatives which, according to international law, require the construction of a legal framework in accordance with the international law, to enable partnerships between partners in different countries. All countries that have legalized the consensual union already have legislative provisions for adoption, patrimonial rights, tax and social assistance rights, etc.

References

- Mécary, C., & Leroy-Forgeot, F. (2000). *Le PACS*, Presses Universitaire de France, Paris.
- Mitrofan, N., & Mitrofan, I. (1991). *Familia de la A la Z: mic dicționar al vieții de familie*, București: Editura Științifică și Enciclopedică
- Prună, M. (2005). *Căsătorie versus coabitare. O analiză comparativă în Sociologie românească*, III, 3/2005, pp. 39 – 45.
- Roussel, L. (1989). *La famille incertaine*. Paris: Editions Odile Jacob
- Singly, F. (de). (1993). *Sociologie de la famille contemporaine*, Paris: Nathan

- Terré, F., Fenouillet, D., Lécuyer, H., & Reiss, L. (2002). *Le droit de la famille*. Presses Universitaires de France, Paris.
- Voinea, M. (2005). *Familia contemporană. Mică enciclopedie*. București: Editura Focus.