ABOUT THE THEORY OR THE OPINION ON GENDER IDENTITY IN EDUCATION. THE RELEVANT CASE-LAW OF THE ROMANIAN CONSTITUTIONAL COURT

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Abstract

A legislative change of the National Education Law No 1/2011, passed by Parliament at the middle of 2020 brought to the attention of the public the notion of "gender identity". The provisions of Article 7 (1) (e) of Law No 1/2011, introduced by the Sole Article of the Law amending Article 7 of the National Education Law No 1/2011, prohibited, inside all teaching establishments and institutions and inside all facilities intended for vocational education and training, including inside those establishments that provide extracurricular education, any activity aimed at spreading the theory or opinion of gender identity, understood as the theory or opinion that gender is a concept different from biological sex and that the two are not always the same.

Keywords: *theory, opinion, gender identity, Constitution, case-law, education, Constitutional Court.*

1. Introduction

The impugned legislative amendment under review concerned a text in Title I - General provisions of the National Education Law No 1/2011, which included the concept, the principles governing the pre-university and university education system, as well as lifelong learning in Romania, the main purpose of education, general aspects regarding the funding of the education system, general competencies regarding the national strategies in the field of education, the organization of specific theological education, as well as general standards regarding the prohibition of activities likely to violate morality standards and of any activities that may endanger the physical or mental health and integrity of children and young people, respectively of teaching staff, auxiliary teaching staff and non-teaching staff, of political activities and religious proselytism, of psychological violence. The newly introduced text supplemented these rules, which underlied the organization and unfolding of the education process in Romania, with a general prohibition of any activity "*aimed at spreading the theory or opinion of gender identity*", the legislator understanding by this prohibited opinion/theory that "*gender is a concept different from biological sex and that the two are not always the same".*

According to the explanatory statement accompanying the legislative proposal, the established prohibition was motivated by the statement that "*in recent years, a new gender ideology has emerged. According to this, biological sex should not label persons as 'females' or 'males'; instead, each person can choose from among the dozens of gender types that (s)he prefers. Following the emergence of the gender ideology, the phenomenon of proselytism, based on both sex and gender, has become a real danger in the education system. Consequently, the legislative proposal supplements the list of prohibitions with the prohibitions of proselytism on the basis of sex and of proselytism on the basis of gender."*

The original wording of the proposed text, which referred to the prohibition of proselytism on the basis of sex and gender, according to the explanatory statement, was kept by the Chamber of Deputies, prohibiting "*e) proselytism on the basis of sex, as defined by Article 4 (d^2) of Law No 202/2002 on equal opportunities and equal treatment for women and men, as subsequently amended and supplemented; f) proselytism on the basis of gender, as defined by Article 4 (d^3) of Law No 202/2002 on equal opportunities and equal treatment for women and men, as subsequently amended and supplemented*." Within the Senate, as the decision-making Chamber, this wording was amended, the prohibition referring to gender identity and being regulated in point (e) of Article 7 (1) of Law No 1/2011, in the wording impugned by the author of the referral.

The President of Romania brought the issue to the attention of the Constitutional Court, who, in a remarkable decision[1], upheld the referral of unconstitutionality formulated by the President of Romania and found that the provisions of Article 7 (1) e), introduced by the sole Article of the Law amending Article 7 of the Law on national education No 1/2011, were unconstitutional.

The present paper aims at bringing to the fore the above-mentioned decision of the Constitutional Court.

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[1] Constitutional Court, "Decision of the Constitutional Court of Romania No 907 of December 16, 2020" (Official Gazette of Romania, Part I, No 68, January 21, 2021).

2. The decision of the Constitutional Court

2.1. The notions of "gender" and "gender identity"

By examining the terminology used by the legislator, the Court noted that, according to the Explanatory Dictionary of the Romanian Language, the word "spreading", when referring to ideas (theories/opinions as in this case), it has the meaning of "passing from one to another; becoming known to a wide group of people". Thus, it resulted that the impugned standards prohibited - inside all teaching establishments and institutions and inside all facilities intended for vocational education and training, including inside those establishments that provided extracurricular education - any activity aimed at spreading the theory or opinion according to which gender is a concept different from biological sex and that the two are not always the same.

Taking into account the notions contained in the wording of the impugned legislative amendment, the enshrined prohibition and its rationale, contained in the explanatory statement according to which, "*in recent years, a new gender ideology has emerged*", the Court then proceeded to an analysis of the national regulatory framework so as to identify whether and how the notions of "gender"/"gender identity", used by the legislator, are reflected at regulatory level.

Thus, by examining the constitutional provisions, it was found that the notions of "gender"/"gender identity" do not appear to be regulated as such. The Romanian Constitution uses the plural masculine form in several situations, such as: (the) citizens (Articles 4, 15, 16), voters (Article 81), candidates (Articles 37), or the singular masculine form - the citizen (Article 19). The Constitution refers to "women" and "men" (see Article 16), but it also uses neutral terms such as "person" (natural person - Article 26) or "persons" (natural and legal persons - Article 35), the meaning being a generic one, without gender connotation. Official positions do not have a feminine form, phrases such as "Senators" and "Deputies" being used (for example, in Article 90). The Constitution does not contain any distinction likely to establish affiliation to the female (or male) sex based on biological or other criteria. Article 16, read in conjunction with Article 4 of the Basic Law, enshrines formal equality, regardless of sex.

Law No 287/2009 - The Civil Code, republished in the Official Gazette of Romania, Part I, No 505 of 15 July 2011, which contains the rules that represent the general law governing the patrimonial and non-patrimonial relationships between persons, as subjects of civil law, states in Article 30 - *Equality before the civil law* that "*Race, colour, nationality, ethnic origin, language, religion, age, sex or sexual orientation, opinion, personal beliefs, political affiliation, affiliation to a trade union, to a social category or to a disadvantaged category, wealth, social origin, level of education, as well as any other similar situation have no influence on civil capacity."* The Civil Code makes no reference to the situation of transgender people, but the Romanian legislation regulates the legal effects of sex change by Article 4 (2) (l) of Government Ordinance No 41/2003 regarding the acquisition and administrative change of the names of natural persons, according to which "(*2) The requests for name changes are deemed justified in the following cases: l) when a person was approved to have a sex change through a final and irrevocable court decision and requests to bear an appropriate first name by presenting a medical-legal document indicating her/his sex."*

Law No 202/2002 on equal opportunities and equal treatment for women and men, republished in the Official Gazette of Romania, Part I, No 326 of 5 June 2013, distinguishes between the notions of "sex" and "gender" through the provisions of Article 4 (d^2) and (d^3), introduced by Article I (3) of Law No 229/2015, published in the Official Gazette of Romania, Part I, No 749 of 7 October 2015, worded as follows:

„d^2) sex shall mean the set of biological andphysiological traits by which women and men are defined;

d^3) gender shall mean the set of roles, behaviours, traits and activities that society deems appropriate for women and for men, respectively. "

The definition of the notion of "*gender*" also appears in the Council of Europe Convention on preventing and combating violence against women and domestic violence, adopted in Istanbul on 11 May 2011, ratified by Law No 30/2016, published in the Official Gazette of Romania, Part I, No 224 of 25 March 2016. Thus, according to Article 3 (c) of the Convention, "*For the purpose of this Convention: (...) c) 'gender' shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men;* Article 12 of the Convention sets a series of general obligations, among which, in point 1: "*Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.*" Based on this view, States' obligations are shaped, including that of promoting the social and cultural changes and of eradicating prejudices and other practices based on discrimination between men and women and on "gender stereotypes".

Considering all the above, in the Court's view, it appeared that, since 2003, the national regulatory system has been regulating State's administrative obligations for those situations in which a person proceeds to a sex change. This equaled, implicitly, to the legal acceptance of the perception of sex not as a simple biological "given", but as an element of identity and, respectively, of social identification. Undoubtedly, for a person who chooses such a change, biological sex does not correspond to the sexual identity perceived by the respective person, as the two are not always the

same, contrary to the idea advanced by the prohibition enshrined in the impugned text of law.

This view was also reflected by the provisions of Law No 287/2009 - The Civil Code, which take into account, through the concept of "sexual orientation", elements of sexual identity, as perceived by the individual, and not only the biological features that define sex. The recognition, by law, of differences in sexual orientation and of sex changes equals, implicitly, to the acceptance, by the legislator, of the idea that biological sex is not perceived as gender by all individuals equally and that gender identity is different from biological sex.

The social component of sex/sexuality and the view/distinction between biological/psychological, contrary to socially imposed stereotypes, were clearly outlined at legislative level, in 2015, by the amendment of Law No 202/2002 on equal opportunities and equal treatment for women and men. Thus, Law No 202/2002 defines the notions of "sex" and "gender", distinction strengthened by the definition of "gender" in the Istanbul Convention, ratified a year later through Law No 30/2016.

In relation to this regulatory evolution, the Court noted that the notion of "gender" has a wider scope than that of "sex"/sexuality in the strictly biological sense, as it incorporates complex elements of a psychosocial nature. Thus, while the notion of "sex" is limited to the biological features that mark the differences between men and women, the notion of "gender" refers to a set of psychological and sociocultural traits. This latter notion includes elements of social identity of the individual, which evolve together with society and with the continuous re-evaluation of the interpretation of the principle of equality and non-discrimination on the basis of sex. Gender identity also involved customarily assigned social roles and discrimination based on sex/gender. Thus, becoming aware of one's sex appears as a component in gender identification, but biological factors are supplemented by social ones, gender identity including sexual identity and adapting it to social demands. The Romanian State has legislated this view/approach, undertaking obligations aimed, in essence, at combating gender stereotypes and at the effective realization of the principle of equality and non-discrimination.

In line with this regulatory evolution, the case-law of the Constitutional Court reflects the changes that have taken place over time regarding the social roles attached to women and men and the removal of gender stereotypes. A conclusive example in this regard is represented by the cases concerning the retirement age for women and men or those related to the regulation of parental leave.

Thus, in 1995, the Court noted that "due to the imperatives related to children upbringing and education, especially during the early years, to the increased burdens on women around the household, to the lack of widely accessible social and economic means, during the current transition period, that could ease such burdens, as well as to other aspects that hinder their professional advancement (maternity leaves, postnatal leaves, parental leaves to care for sick children, prohibitions aimed at preventing work under certain conditions, etc.), as well as due to other circumstances, women are in situations that disadvantage them compared to men", which justified, from the perspective of the principle of equality, the establishment of different retirement ages[2].

But, in 2010, on this same subject, the Constitutional Court found that "cultural traditions and social realities are still evolving towards ensuring real factual equality between the sexes, so that it cannot be concluded that, at present, the social conditions in Romania can be considered as supporting an absolute equality between men and women. However, important steps have been taken. An example in this regard is the extension of the right to parental leave for men as well, including for militaries[3]. For these reasons, raising women's retirement age to 65 was intended to take place over a period of 15 years, during which it is expected that, in Romania, the social conditions will change significantly"[4]. The Court noted, in the same context, "the normal changes that occur in society in terms of mentalities, culture, education and traditions", stating that "the provision of an equal treatment between the sexes is increasingly necessary in the context of the European trend that requires States to comply with the standards of equal, non-discriminatory treatment between men and women"[5].

Thus, were noted the recitals that address the traditional social perception, closely attached to the biological significance of sex - which seemed to overwhelmingly underlie the solution delivered in 1995, respectively the recitals that highlight the social developments in the sense of moving away from gender stereotypes, as an effect of the change/the acceptance of the change in the social roles of women and men under the influence of the factors highlighted by the Court in its reasoning.

The issue of gender/gender identity had also been the subject-matter of numerous cases before the European Court of Human Rights (*ECHR*), even if, similar to the Romanian Constitution, the Convention for the Protection of Human Rights and Fundamental

[2] Constitutional Court, "Decision of the Constitutional Court of Romania No 107 of November 1, 1995" (Official Gazette of Romania, Part I, No 85, April 26, 1996).

[3] Constitutional Court, "Decision of the Constitutional Court of Romania No 90 of February 10, 2005" (Official Gazette of Romania, Part I, No 245, March 24, 2005).

[4] Constitutional Court, "Decision of the Constitutional Court of Romania No 1237 of October 6, 2010" (Official Gazette of Romania, Part I, No 785, November 24, 2010).

[5] Constitutional Court, "Decision of the Constitutional Court of Romania No 387 of June 5, 2018" (Official Gazette of Romania, Part I, No 642, July 24, 2018).

Freedoms does not expressly regulate these notions. However, the lack of express rules to this effect did not prevent the ECHR from ruling on the above-mentioned concepts, from ascertaining social developments in this respect, resulting in the duly imposition of States' obligations, in particular with regard to the principle of equality and respect for the right to privacy (which also includes in its scope the gender identity of a person).

Thus, the ECHR stated that gender equality was a major goal in the member States of the Council of Europe, noting, for example, in its Judgment of 22 March 2012, delivered in the Case of *Konstantin Markin v. Russia*, point 127, that "the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention. (...). In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex. (...)."

The case-law on gender equality of the ECtHR covers a variety of legal aspects, such as cases where women are victims of violence (see, for example, the judgment of 28 May 2013 in the Case of *Eremia v. Republic of Moldova*, in which the ECtHR held that the failure by the authorities to comply with their duty to protect the applicants reflected the fact that they did not assess the seriousness of acts of violence against women, and the failure by the authorities to take into account the issue of violence against women constitutes discriminatory treatment on grounds of sex, in breach of Article 14 read in conjunction with Article 3 of the European Convention on Human Rights), employment and parental leave (see, for example, Case of *Konstantin Markin v. Russia*, cited above, where the ECtHR found that men were in a similar situation to that of women as regards parental leave), age conditions in relation to the exercise of the right to social benefits (see, for example, the judgment of 17 February 2011 in the Case of *Andrle v. Czech Republic*, where the applicant complained that, unlike the situation of women, there was no lowering of the retirement age for men who had raised children, and the Czech Government argued that this difference in treatment was due to the situation in the old communist system, where women with children had an obligation to work full-time, as well as to take care of children and care for the households, the measure being designed to compensate women for that dual burden), national provisions on the choice of first name and the transfer of the parents' surname to their children (see, for example, the judgment of 7 January 2014 in the Case of *Cusan and Fazzo v. Italy*, where the ECtHR found that a rule which does not allow a married couple to give their children the surname of their mother is discriminatory against women), homophobic violence (see, for example, the judgment of 12 April 2016 in the Case of *M.C. and A.C. v. Romania*, where the ECtHR found that the authorities had not taken into account possible discriminatory grounds when investigating a homophobic attack).

Another field of gender identity, which was very significant as regards developments both at the level of case-law and national legislation, concerned the situation of transgender people. The case-law of the ECtHR to this effect has developed from the Court's statements in the sense that it was aware "of the seriousness of the problems affecting transgender people and of their suffering" and the recommendation as to "constant consideration of appropriate measures, having regard in particular to developments in science and society" (point 47 of the judgment of 17 October 1986 in the Case of *Christine Goodwin Rees v. United Kingdom*), to finding a violation of Article 8 (right to respect for private and family life) of the Convention in a case concerning the recognition of transgender people (see judgment of 25 March 1992 in the Case of *B. v. France*) where, observing that several official acts revealed in France "a discrepancy between the legal gender and the apparent gender of a transgender person" (Article 59 of the judgment), which also appeared in the acts relating to social security contributions and in the salary slip, the ECtHR held that the refusal to amend the register of civil status in her regard had placed the applicant "in a daily situation which was inconsistent with her private life".

These considerations were reiterated in subsequent cases, such as the judgment of 30 July 1998 in the Case of *Sheffield and Horsham v. the United Kingdom*, where the Court reaffirmed that "the area must be kept under constant review by the Contracting States" (point 60 of the judgment), in the context of "extended acceptance of the phenomenon and recognition by society of the problems that transsgender people may encounter", in its judgment of 11 July 2002 in the Case of *Christine Goodwin v. the United Kingdom* (Grand Chamber), where the Court ruled that Article 8 of the Convention Convention had been violated, retaining a clear and continuous international trend towards greater social acceptance of transgender people and the legal recognition of the new sexual identity of transgender people who have undergone surgery. In its judgment of 12 June 2003 in the Sase of *Van Kuck v. Germany*, the ECtHR held, inter alia, that sexual identity is one of the most intimate aspects of aperson's private life, in its judgment of 10 March 2015 in the Case of *Y.Y. v. Turkey*, it reiterated in particular that the possibility for transgender people to fully enjoy the right to personal development and physical and moral integrity cannot be regarded as a controversial issue, and in the judgment of 11 October 2018 in the Case of *S.V. v. Italy*, the ECtHR found that there had been an infringement of Article 8 of the Convention by relying in particular on the inflexibility of the judicial process for recognising the sexual identity of transgender people then in force, which placed the applicant — whose physical and social identity had long been that of a female — for an

unreasonable period of time in an abnormal situation, leading to feelings of vulnerability, indignity and anxiety. Similarly, it is also possible to mention the judgment of 17 January 2019 in the Case of *X against the former Yugoslav Republic of Macedonia*, in which the ECtHR found that the circumstances of the case revealed legislative gaps and serious deficiencies in the recognition of his identity which, first, leave the applicant in a situation of uncertainty as to his private life and, second, have long-term negative consequences on his mental health.

Also under European Union (EU) law, the promotion of gender equality and the fight against discrimination on grounds of gender are issues developed at both legislative and case-law level. Thus, according to the EU Treaties, protection against discrimination on grounds of gender has been and remained a fundamental function of the European Union and gender equality is a "fundamental value" (Article 2 TEU) and an "aim" (Article 3 TEU) of the Union. The degree of acceptance of the social and economic importance of equal treatment was strengthened by the central position it received in the Charter of Fundamental Rights of the European Union.

To the same effect, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) establishes in the second recital that "*equality between men and women is a fundamental principle of Community law under Article 2 and Article 3(2) of the Treaty and the case-law of the Court of Justice. Those Treaty provisions proclaim equality between men and women as a «task» and an «aim» of the Community and impose a positive obligation to promote it in all its activities".* According to recital 3 of that directive, "*The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person."* Another relevant example is Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, which protects lesbian, gay, bisexual, transgender and intersex (LGBTI) persons from hate crimes. This includes the criteria of sexual orientation, gender identity and gender expression in the recognition of victims' rights, helping to ensure that victims affected by a crime due to prejudice or discrimination receive adequate information, support and protection.

The Court concluded that regulatory developments at national, Council of Europe, EU level, as reflected in the case-law of the Constitutional Court, the ECtHR, the Court of Justice of the European Union (CJEU), support and highlight the fact that gender identity/gender equality is more than biological sex/differences thus combating gender stereotypes attached to the traditional approach to women's and men's roles in society. The Romanian State has, for almost two decades, undertaken that approach by express rules, Romania being connected to international developments in this area by the provisions of Article 20 of the Constitution, which set the priority for the highest standards of protection of fundamental rights.

This was essentially the national and European context in which the law containing the criticised rule has recently been adopted, a rule which establish that, in all teaching facilities, it is forbidden to spread the idea/theory that gender identity is a concept different from biological sex. In other words, gender stereotypes appear to be established by law (in the premises where the teaching process takes place), opinions to the contrary being penalised. The legislative solution with that content is considered to be contrary to the constitutional rules relied on in the statement of reasons for the referral, to be analysed in the order in which they are mentioned in the referral.

2.2. Submissions related to the infringement of Article 29 of the Constitution on freedom of conscience

According to the author of the referral, the prohibition, applicable to the teaching staff and to pupils and students, inside all teaching facilities, of activities aimed at spreading theories or opinions on gender identity, understood as the theory or opinion that gender is a concept different from biological sex and that the two are not always the same, was *eo ipso* a problem likely to lead to violations of the freedom of conscience, as long as those provisions generated obligations in the sense of teaching/attending courses/classes on a certain theory/opinion with a result/purpose contrary to the beliefs of each individual.

The Court found that those claims were well founded. Freedom of conscience essentially presupposes that the person has the opportunity to have and publicly express his or her views of the surrounding world. Such views are developed under the influence of a multitude of factors during the life of the individual, a framework in which the education system plays an essential role. This is also the meaning of the provisions under Article 4 of Law No 1/2011 on national education, according to which "*the main purpose of education and training of children, young people and adults is to develop competences, understood as a multifunctional and transferable set of knowledge, skills and abilities, necessary for: (a) the personal fulfilment and development, by achieving their own goals in life, in accordance with the interests and aspirations of everyone and the desire to learn throughout their lives; (b) social integration and active citizen participation in society; (c) employment and participation in the functioning and development of a*

sustainable economy; (d) forming a vision of life, based on humanistic and scientific values, national and universal culture and fostering intercultural dialogue; (e) education in a spirit of dignity, tolerance and respect for human rights and fundamental freedoms; (f) nurturing sensitivity to human issues, moral-civic values and respect for nature and the natural, social and cultural environment." These principles, which may be subsumed to the freedom of conscience, are incompatible with the imposition by law a "truncated" knowledge of reality as a prerequisite for shaping the conception of the surrounding world. These views of life cannot be "prescribed" or imposed by the State by asserting certam ideas as absolute truths and by prohibiting, de plano, any attempt to learn about any other opinion/theory existing on the same topic, especially when such opinions/theories are promoted/supported from a scientific and legal point of view, marking the societal evolutions at a certain point in time.

The drafting of Article 29 (1) of the Constitution highlights the complex area of freedom of conscience, which includes *„freedom of thought"*, *"freedom of opinion"* and *"freedom of religious beliefs"*. They *"shall not be restricted in any form whatsoever"* and no one shall be *"compelled to embrace an opinion or religion contrary to his own convictions"*. However, the contested law prohibits any activity of knowledge/expression in the organised educational environment of theories/opinions relating to gender identity other than that established by the State. This is tantamount to forcing both young people and teachers to adopt and express - on the teaching premises - only the view promoted and recognised by the State by law, according to which gender is identical to biological sex, a constraint incompatible *de plano* with the freedom of conscience as defined by that constitutional text.

Thus, with reference to Article 29 (2) of the Constitution, according to which the State guarantees freedom of conscience, and taking into account the content of that freedom, it follows that, in order to meet constitutional requirements, the education system must be open to ideas, values, opinions and encourage their free expression and criticism. In organising educational activities, the State must ensure that these freedoms are respected by ensuring that pupils/students can take part in the study of particular subjects, theories or opinions, be able to know, think to, understand, analyse certain concepts and theories and express themselves freely in relation thereto, regardless of their complexity or controversial nature. In other words, the State — through the education system, must support the formation of views of the surrounding world, rather than impose them, by preventing any possibility to learn/discuss information on a particular topic/subject.

Moreover, as stated in the referral, freedom of conscience must be examined "in particular in relation to the human dignity guaranteed by Article 1 (3) of the Basic Law, which dominates the entire system of values as its ultimate value" (the author of the referral refered to the reasoning part contained in Decision No 669 of 12 November 2014, published in the Offîcial Gazette of Romania, Part I, No 59 of 23 January 2015). The prominent position of human dignity in the constitutional system of values was reinforced by the considerations underlying the decisions by which the Constitutional Court ruled on initiatives for revision of the Constitution, such as Decision No 465 of 18 July 2019, published in the Official Gazette of Romania, Part I, No 645 of 5 August 2019, in which the Court held that "the fundamental rights and freedoms of citizens and their guarantees cannot be regarded as a diffuse set of elements unrelated one to the other, but form a coherent and uniform system of values, based on human dignity. In addition to the fact that the fundamental rights and freedoms described as such in the Constitution are based on human dignity (Decision No 1109 of 8 September 2009), human dignity being a supreme value of the Romanian State, it is not only proclamative in nature and is not deprived of legislative content, but, on the contrary, has normative value and can be classified as a fundamental right with a distinct content calling into question the human nature and condition of the individual. To that effect, the Constituțional Court itself held that disregarding the subjective principles characterising human beings is contrary to human dignity by expressly referring to the object-subject formula used by the German Federal Constitutional Court when analysing the concept of human dignity[6]. In that decision, the Court emphasised that a particular regulatory framework must not disqualify the person and place them on the second level in relation to the State's intention to keep an electronic health record and/or to centralise various medical data." (paragraph 47). The ECtHR has held in the same sense that of the very essence of the Convention for the Protection of Human Rights and Fundamental Freedoms is the respect for human dignity and human freedom (judgment of 29 April 2002, Case of *Pretty v. the United Kingdom*, paragraph 65). Any violation of human dignity affects the essence of the Convention (judgment of 2 July 2019 in the Case of *R.S. v. Hungary*, paragraph 34) (paragraph 48). Similarly, the Court noted that the Court of Justice of the European Union had also held that the EU legal order, unequivocally, endeavours to ensure respect for human dignity as a general principle of law (judgment of 14 October 2004 in Case C-36/02, Omega Spielhallen-und Automatenaufstellungs-GmbH, paragraph 34).

However, a legal constraint, in the sense of prohibiting the teaching staff and the pupils and students, inside all teaching facilities, from conducting any activity aimed at "spreading" - that is, actually, any act of communicating/learning about opinions on gender identity contrary to the one imposed by the

[6] Constitutional Court, "Decision of the Constitutional Court of Romania No 498 of July 17, 2018" (Official Gazette of Romania, Part I, No 650, July 26, 2018), par.52.

State, a theory that can contradict opinions, beliefs or maybe even the gender identity that a person perceives, is contrary to human dignity itself. Applying *mutatis mutandis* the case-law cited above, the Constitutional Court held that, by the legislative framework created with regard to the organisation of education, the State must not disregard the individual, with all the complexity inherent to that concept, and place the individual in a secondary position in relation to the possible intention of the State to impose a particular idea. In other words - with reference to the present case - the intention of the State, through its authorities, to promote at some point a conception of the concepts of "sex" and "gender", must not be transformed into an act imposing and penalising the actions for knowledge/bringing to knowledge of existing opinions on this subject, that is to say, an act which represents a constraint of the freedom of conscience, as an inherent dimension of human dignity.

2.3. Submissions as to the infringement of the constitutional provisions of Article 16 (1) relating to the principle of equality of citizens before the law, in conjunction with the provisions of Article 32 on ensuring access to education and the protection of children and young persons

The author of the referral took the view that, by imposing a condition in the sense described above, the law subject to review by the Constitutional Court is such as to exclude from the scope of beneficiaries of the right to education those who wish to study the theory/opinion of gender identity other than as it is subjectively set out by the legislator. Making access to education conditional by imposing constraints on the expression of a theory/opinion expressly provided for by law, both for beneficiaries and education providers, constitutes, according to the author of the referral, an interference which does not respect the principle of proportionality between the measures taken and the public interest safeguarded.

The Court found that those claims were also well founded. Thus, ensuring the right to education and, from that point of view, guaranteeing it at constitutional level by the provisions of Article 32 were actions aimed at the education of children, young people and people so that they can form part of society, which implies an awareness of the developments inherent in society and an informed acceptance/rejection of theories or opinions conveyed at a given time. As a result, education must be continuously linked to these developments and not *de plano* deny the knowledge of them.

The issue of gender identity with its many dimensions has long been present in the social and legal landscape - even though the initiators of that legislation use vague terms, referring to "recent years" and without indicating where and how the "theory" whose prohibition they propose has emerged and developed. The developments of legislation and case-law in Romania, of the rules adopted at the level of the Council of Europe and the EU and of the case-law developed by the ECHR and the CJEU demonstrate that the distinction between sex and gender and its much wider and more complex scope are recognised in the instruments mentioned for several decades. In this context, the prohibition in the organised educational environment of any activity aimed at knowing this issue appeared almost anachronistic, such as to suppress access to information and, thereby, access to education, aiming at a psycho-social phenomenon recognised both in legislation and case-law. This is all the more so as the prohibition is formulated in general terms and on a concept which, through the multitude of legal, sociological, psychological meanings, can emulate a variety of fields of study and research that thus become forbidden to the recipients of the educational act only because, in one way or another, they can be interpreted to question aspects of gender identity.

According to the explanatory statement, the intention of the initiators was to prohibit "proselytism", i.e. to prohibit acts of persuading young people to embrace a certain idea/theory. With regard to this wording of the text of law, considerations may have been eventually made in the light of the conditions for restricting the exercise of certain rights and freedoms. However, the final form of the law - criticised by the author of the referral - prohibits any activity of expression/knowledge of opinions different from that imposed by the legislator. Such an absolute prohibition is incompatible with the organisation of education in a democratic state and also with the protection of children and young people, as regulated by Articles 32 and 49 of the Constitution. The concealment / denial / repression of an opinion does not lead to its disappearance, nor can "protect" the individual from the alleged harmful effects that the state would like to prevent in relation to the education of children and young people.

The criticised regulation also violates the principle of equality, invoked by the author of the referral, being in conjunction with the provisions of Article 32 of the Constitution on the right to education and of Article 49 on the protection of children and young people. According to the case-law of the Constitutional Court, "the place that the principle of equality occupies in all constitutional provisions confers particular importance on it"; "the principle of equality characterises fundamental rights and freedoms, while being a guarantee of each fundamental right"; "equality is closely correlated with all fundamental rights and freedoms, so that the analysis of the suppression of fundamental rights and freedoms must be based on the principle of equality, principle which underlines fundamental rights and freedoms"; "as the principle of equality is related to the essence and function of human dignity, it follows that equality is a characterising and intrinsic element of human

dignity."[7] In the light of the principle of equality thus defined, in conjunction with the right to education and the protection of children and young people, they must have, without any discrimination, the possibility to know and to study theories, ideas, concepts in accordance with societal developments, without any constraints to censor their freedom of thought and expression. The educational ideal promoted in Romania is represented by "*the free, integral and harmonious development of human individuality", "the formation of autonomous personality", "the assumption of a system of values that are necessary for personal fulfilment and development"* [Article 3 (2) of Law No 1/2011], and the mission assumed by the legislator in terms of education is, among others, to *"train, through education, the mental infrastructure of the Romanian society, in agreement with the new requirements, derived from the status of Romania as member of the European Union and from the functioning in the context of globalization, and to sustainably generate a national highly competitive human resource, capable of efficiently operating in the current and future society".* [Article 2 (2) of Law No 1/2011]. The prohibition of the access to education and the obligation for the state to express its opinion in this regard do not serve the conscious assumption of a system of values necessary for personal fulfilment and development, being at the same time a genuine violation of equal opportunities, as long as young people in Romania, citizens of the European Union, are forbidden in their country to know/express opinions/study a certain sphere of problems and theories. The issue of gender identity is present not only in theoretical debates, but also in legislations and in a rich case-law at European level, and the prohibition on information about it appears as an unjustified violation of the equal access to education of young people in Romania.

2.4. Submissions regarding the violation of the provisions of Article 30 (1) and (2) of the Constitution on freedom of expression and prohibition of censorship

The author of the referral stated that the criticised rules equate with the establishment of a censorship of opinions/theories in theoretical research on gender identity. This is the imposition of a certain result, of a distorted knowledge regarding the matter of gender identity, and, according to Article 30 (2) of the Constitution, censorship of any kind is prohibited. Moreover, the criticised rule, by the way it will be applied, will result in the prohibition, by law, of an academic theory and will equate with the pre-establishment of the result of scientific research in the matter, with the aim of falling within the established legal limits, in contradiction with the rules of the framework law on education.

With reference to these claims, the Court recalled its statements that "the freedom of consciousness inevitably implies the freedom of expression, which makes possible to externalise, by any means, the thoughts, opinions, religious beliefs or spiritual creations of any kind."[8]. Regarding the content of the ideas, of the opinions that can be expressed at some point, the ECHR stated, referring to the interpretation of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, that the freedom of expression constitutes one of the foundations of a democratic society and one of the basic conditions for its progress and for the fulfilment of each individual (Judgment of 25 October 2018 in Case *E.S. vs. Austria*). "The freedom of expression enshrined in Article 10 shall be valid, subject to paragraph (2), not only for the 'information' or 'ideas' received in favour or regarded as harmless or indifferent, but also for those which catch, shock or worry" [see, inter alia, Judgment of 7 December 1976, in Case *Handyside v United Kingdom*, paragraph (49), and Judgment of 23 September 1994, in Case *Jersild v Denmark*, paragraph (37)].

Under Article 30 (1) of the Constitution, freedom of expression is inviolable, however, "according to Article 30 (6) and (7) of the Constitution, it shall not be prejudicial to the dignity, honour, privacy of a person and to the right to one's own image, being prohibited by law any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism or public violence, as well as any obscene conduct contrary to morality. The limits of the freedom of expression are entirely consistent with the concept of freedom, which is not and cannot be understood as an absolute right. The legal-philosophical conceptions promoted by democratic societies admit that one person's freedom ends where another person's freedom begins. (...) An identical limitation shall also be laid down in Article 10 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which "*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, for the protection of the reputation or rights of others (...)",* as well as in Article 19 (3) of the International Covenant on Civil and Political Rights, which establishes that the exercise of freedom of expression carries with it special duties and responsibilities and may therefore be subject to certain restrictions, but these shall only be such as provided by law, taking into account the rights or reputation of

[7] Constitutional Court, "Decision of the Constitutional Court of Romania No 464 of July 18, 2019" (Official Gazette of Romania, Part I, No 646, August 5, 2019).

[8] Constitutional Court, "Decision of the Constitutional Court of Romania No 485 of May 6, 2008" (Official Gazette of Romania, Part I, No 431, July 9, 2008).

others. Being a restrictive rule capable of circumscribing the framework within which freedom of expression can be exercised, the listing made by Article 30 (6) and (7) is a strict and limiting one"[9].

The Court observed that the prohibition of access to knowledge of an opinion and expression in this regard only because it does not agree with that of the state on an issue - in this case gender identity - arises from that perspective as a clear violation of the freedom of expression in a democratic society and cannot be classified within any of the limits enshrined in the constitutional text of reference. However, "as the limits imposed on the freedom of expression are themselves of constitutional rank, the determination of the content of this freedom is of strict interpretation, no other limit being admitted except in breach of the letter and spirit of Article 30 of the Constitution."[10].

The Court also noted that a specific expression of the freedom of expression in higher education units is, according to law, the academic freedom [Article 123 (1) of Law No 1/2011]. This involves the free expression of academic opinions, without restrictions of ideological, political or religious nature. At the same time, academic freedom requires objectivity in knowledge and appropriate scientific training, the universities having the freedom to impose certain scientific and ethical standards. In higher education institutions it is prohibited to jeopardise in any form the right to free expression of scientific opinions and the freedom of research is ensured in terms of determining the themes, choosing the methods, processes and capitalising on results, according to the law [Articles 123 (5) and (6) of Law No 1/2011]. However, the prohibition of free expression in relation to gender theory clearly determines the prohibition of any research initiative in this field, the criticised rule imposing, independently of any free debate or research, a dogmatic, truncated education, compelling for the free expression of teachers and beneficiaries of the educational act, ignoring their right to opinion.

2.5. Submissions regarding the violation of the provisions of Article 1 (3) and (5) of the Constitution on the rule of law and the respect for the Constitution and laws, as well as Article 20 (2) on the priority of international regulations in the field of fundamental human rights

It was argued, in essence, that the normative act does not comply with the legal requirements regarding its integration into the entire legislation and its correlation with the international treaties to which Romania is a party, that it contains provisions which are inconsistent with the regulations of Articles 6 and 14 of the Istanbul Convention and also contravenes the solution established by the constituent legislator in Article 20 (2) of the Fundamental Law. With regard to the existence of contradictory legislative solutions, the Constitutional Court held, by Decision No. 1 of 10 January 2014, that it breaches the principle of legal certainty, principle which constitutes a fundamental dimension of the rule of law, as expressly enshrined by the provisions of Article 1 (3) of the Fundamental Law. Taking into account the case-law of the constitutional court in the matter, binding according to Article 147 (4) of the Constitution, it was appreciated that the criticised law is contrary to the provisions of Article 1 (3) and (5) of the Constitution referring to the rule of law and the respect for the Constitution and laws.

The Court found that those criticisms were well founded. The Romanian legislation prohibits discrimination on grounds of sexual orientation, contains legislative solutions for situations aiming at sex change, the distinction between the concepts of "sex" and "gender", therefore clear provisions, in line with the obligations assumed by Romania as a signatory party to international treaties relating to the field of "gender identity". Similarly, the internal normative system is connected, through Article 20 of the Constitution, to the international regulatory framework on human rights and to the evolutionary interpretation given by international courts such as the ECHR, enshrining the priority of the highest standards on fundamental rights. Through Article 148 of the Constitution, mandatory European rules have priority if they are contrary to the domestic ones. In this context, the prohibition by law of the expression and knowledge in educational institutions of the issue of gender identity other than as identity between gender and biological sex equates to the promotion of normative solutions that are mutually exclusive, capable of creating a confusing and contradictory regulatory framework, contrary to the requirements of law quality law imposed by Article 1 (3) and (5) of the Constitution.

The establishment of different legal solutions for the same normative situation represents a contradiction of the legislator's conception, which cannot be accepted as it generates a lack of coherence, clarity and predictability of the legal rule, making the recipients of the law unable to adapt their conduct. It would be inferred from the corroboration of the incidental rules in this area that a pupil/student/teacher/a person must comply exactly with legislation that promotes gender identity distinct from sex as biologically given and does not commit any discrimination because he/she is liable to be sanctioned, but, at the same time, in educational areas to support the contrary to this legislation because - again - he/she is liable to be sanctioned, this time because he/she does not agree with gender-specificity, meaning he/she does not agree to discrimination in a

[9] Constitutional Court, "Decision of the Constitutional Court of Romania No 649 of October 24, 2018" (Official Gazette of Romania, Part I, No 1045, December 10, 2018); Constitutional Court, "Decision of the Constitutional Court of Romania No 629 of November 4, 2014" (Official Gazette of Romania, Part I, No 932, December 21, 2014).

[10] Constitutional Court, "Decision of the Constitutional Court of Romania No 629 of November 4, 2014", par.48; Constitutional Court, "Decision of the Constitutional Court of Romania No 650 of October 25, 2018" (Official Gazette of Romania, Part I, No 97, February 7, 2019).

broad sense. The obligation to comply with the law imposed by Article 1 (5) of the Constitution thus obtain a derisory nature, the person being objectively unable to comply with it. Whereas, according to other regulations in force, the State does not discriminate against persons with other sexual orientation, administratively recognises the change of sex, distinguishes between sex and gender and respects the obligations imposed by the ECHR in matters of equality and non- discrimination with its multitude of facets. Such a normative solution appears to be contrary to legal logic and lacking any reasonable reasoning.

4.Conclusions

Romania's accession to the E.U., in 2007, meant the acceptance of multiple changes. Little by little, European values were inserted in legislation and subsequently, in everyday life. The evolution of E.U. and ECtHR case-law were also reflected in the case-law of ordinary courts and of the Romanian Constitutional Court. The decision of the latter regarding the theory or the opinion on gender identity in education is another example of the adaptations undergoing in Romanian legislation.

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