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The Changing Status of Women as Others in the Romanian Constitution

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Abstract: This article investigates the extent to which the Romanian Constitution has provided for adequate means to enhance women's equal citizenship in its first twenty-five years of existence. Taking as its starting point Simone de Beauvoir's thought, encompassed in the idea that gender inequality is derived from defining women as 'the Others' or as totally opposite to men, the article shows that since its adoption in 1991, the Romanian Constitution began to depart from the stereotypical and antagonistic understanding of women and men's roles in society that Romania had inherited from its Socialist past. In 2003, when the Constitution was reviewed for Romania's EU and NATO accession, the requirement that *only* men should serve in the military was replaced with the guarantee of equal opportunities for men and women to occupy public, civil or military positions. Meanwhile, the Constitutional Court inched toward being an active actor in advancing gender equality. For example, in 2005 the Court held that allowing *only* women in the military, but not men in the same position, to take parental leave was unconstitutional and, in that same year, it gave women's reproductive rights a rather liberal interpretation. However, this article argues that the developments that have taken place have not been progressive enough. The Constitution still provides *only* for paid maternity leave, provides special working conditions *only* for women, does not explicitly mention the protection of reproductive autonomy, does not connect bodily rights with equality but with privacy, and lacks clarity on the admissibility of measures – such as gender quotas – to promote more women into the public sphere.

Keywords: women, gender equality, constitutional history, constitutional reform, Romania, socialist legacy, legal gender studies

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1 Introduction

This paper analyzes the gender equality guarantees of the Romanian Constitution ('RC') since its adoption in December 1991 until its twenty-fifth anniversary. By looking at gender equality guarantees, I aim to understand the extent to which the Romanian Constitution has enabled both men and women, but especially women – as they have been historically discriminated, excluded from the public sphere and isolated in the private sphere¹ – to become equal citizens.

To achieve this aim, the article will look at the constitutional text and the case law of the Romanian Constitutional Court ('RCC')². Since 1991, the Romanian Constitution was subject to a single successful review in 2003, when Romania was preparing to become a member state of the European Union ('EU') and of the North Atlantic Treaty Organization ('NATO'). The case law of the RCC on gender equality is sparse. This is probably connected to the fact that the women's movement in Romania has been rather weak and not necessarily involved in constitutional litigation or in the process of constitution-making.³ It must be mentioned though, that it was not just women's organizations that were left out of the constitutional debates of 1991 and of 2003. As Paul Blokker shows in his article 'Romanian Constitutionalism and Civic Engagement', that is part of the special issue on 'The Romanian Constitution at 25' published in the previous issue of the ICL Journal, it was civil society and citizens more generally that were left out, although at least during the 2003 review certain mechanisms of civil engagement existed. Nonetheless, even if the Constitution was written without input from the women's rights advocates and the women's movement has not been an actor before the Constitutional Court, the case law of the RCC did bring about a few changes with regard to women's equality.

On a methodological note, it is important to observe that the RCC is usually very brief in its reasons and rarely goes beyond formalistic legal arguments. I was able to locate around twenty decisions of the RCC relevant for gender equality. It is not uncommon that the gender issues in such decisions are explained in no more than a few paragraphs. More information about the cases could be found by examining the full case files in the archives of RCC, yet the RCC does not grant non-party access to such files.⁴ Due to these restrictions, the article will limit its

¹ See Carole Pateman, *The Sexual Contract* (Polity Press 1988).

² RCC started its activity in 1992.

³ See Mihaela Miroiu (ed), *Environmental and Feminist Movements in Romania (1990–2014)* [*Mișcări Feministe și Ecologiste în România (1990–2014)*] (Polirom 2015).

⁴ I made a request to obtain these files in November 2015, but the request was rejected on the above-mentioned ground.

scope to providing a general overview of these cases and placing them in the broader context of the legal evolution of gender equality guarantees in Romania. Given that legal studies on gender equality in Romania are scarce, bringing to the fore the main constitutional developments in this domain represents a useful contribution to the field.

Moreover, due to space and methodological constraints, the article does not aim to examine the effectiveness of gender equality legal norms in practice. It must be mentioned however, that Romania is one of the countries with the lowest levels of gender equality in the European Union.⁵ Since the fall of State Socialism in 1989, Romania has consistently been ranked among the countries with the poorest representation of women in politics,⁶ as one of the most conservative countries in the former Eastern Block in terms of attitudes regarding gender roles,⁷ and as one of the most conservative countries in the EU on the question of abortion.⁸ Yet, it is for sociologists and political scientists to further analyze and discuss the gap between the evolution of equality in law and the evolution of equality in practice. This article aims to facilitate the understanding of the situation as it stands in law.

Since the regulation of gender-related issues is strongly influenced by a country's historical, social and political background in which they operate, the article will undertake a 'law in context' analysis. Thus, throughout this article, I will emphasize in particular the connections between the status of gender relations under State Socialism and the constitutional order that was established after 1989. I will proceed as follows: first, I will briefly outline the theoretical foundations of the

5 See 'Gender Equality Index' (EIGE), <http://eige.europa.eu/content/gender-equality-index>, accessed 28 September 2017.

6 See for example 'Women in Parliaments: World Classification', Inter-Parliamentary Union, <http://www.ipu.org/wmn-e/classif.htm>.

7 For example, according to a report of Pew Research Center released in May 2017, 81% of Romanians agree with the statement that 'women have a responsibility to society to bear children', 65% agree with the statement that 'when jobs are scarce, men should have more rights to a job than women' and 72% agree with the statement that 'a wife must always obey her husband', see 'Religious Belief and National Belonging in Central and Eastern Europe' (Pew Research Center 2017) <http://www.pewforum.org/2017/05/10/religious-belief-and-national-belonging-in-central-and-eastern-europe/>, accessed 28 September 2017.

8 A 2011 study, commissioned by Soros Foundation Romania (Fundatia Soros România) underlined that only the population of Malta, Cyprus, Ireland, Poland (which are the only EU countries where abortion is illegal) and Italy (which is well known for its strong Catholic cultural tradition) have more conservative views on abortion than Romania. See a brief summary of the study here (in Romanian): http://www.fundatia.ro/sites/default/files/Analiza%20studiului_0.pdf, accessed 28 September 2017. See also 'Religious Belief and National Belonging in Central and Eastern Europe,' *Pew Research Center's Religion & Public Life Project* (n 7).

article borrowed from feminist theory; then I will give a short overview of gender relations under State Socialism; and lastly, I will tackle the changing status of women in Romania's post-Socialist constitutional order. I will limit myself to three separate domains to which the current text of the Romanian Constitution refers: women's political representation⁹; the domain of work/life balance, including measures such as parental leaves¹⁰ and the regulation of special working conditions for women¹¹ such as earlier retirement ages; and the domain of reproductive autonomy,¹² by looking specifically at the case of abortion.

2 Women as others – theoretical foundations

Many scholars have theorized on the legal protection of gender equality.¹³ Although in Central and Eastern Europe ('CEE') gender issues are increasingly being analyzed from different theoretical perspectives, one cannot speak of a feminist jurisprudence of the region. For example, the first monograph on gender and the law in a

9 Article 16 (3) of the Romanian Constitution, introduced during the 2003 constitutional review, reads as follows: 'Access to public, civil, or military positions or dignities may be granted, according to the law, to persons whose citizenship is Romanian and whose domicile is in Romania. The Romanian State shall guarantee equal opportunities for men and women to occupy such positions and dignities.' All English translations of the constitutional text are taken from the official translation available on the page of the Romanian Chamber of Deputies, http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=2#t2c1s0sba16, accessed 28 September 2017.

10 Article 47 (2) of the Romanian Constitution reads as follows: 'Citizens have the right to [...] paid maternity leave'. There is no mention of gender neutral parental leaves or of paternity leaves in the text of the RC.

11 Article 41 (2) of the Romanian Constitution concerning Labor and Social Protection of Labor reads as follows: 'All employees have the right to measures of social protection. These concern [...] working conditions for women [...]'. I will not touch, for example, upon the provision on equal pay as it requires a wider discussion related to the situation of women under State Socialism or upon the provisions regarding 'the mother tongue'. On a brief discussion of the gender provisions in the RC see Corneliu-Liviu Popescu, 'Gender Non-discrimination in the Romanian Constitution' in Iulia Motoc (ed), *Women's Rights: From Universal to Regional in Human Rights: Essays in Honour of Justice Bhagwati* (Editura Universității din București 2009).

12 Article 26 (2) of the Romanian Constitution referring to personal and family privacy reads as follows: 'Any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals.' The masculine form is the one used in the official translation. In the Romanian original version, the noun 'person' (Rom 'persoana'), which in Romanian is a feminine noun, is used.

13 For an overview of different studies on gender equality from a legal perspective see the four volumes of Joanne Conaghan (ed), *Feminist Legal Studies* (Routledge 2008).

CEE country, namely in the Czechia, was only published in 2017.¹⁴ Its author, Barbara Havelková, borrows the theoretical foundations of her work from Western thinkers.¹⁵ This is not surprising. After the Second World War, the Communist Parties in CEE repudiated feminism as a 'bourgeois' notion and promised that establishing socialism would liberate women, which as Hilda Scott shows, never really happened in practice.¹⁶ Moreover, alternative voices to that of the Party were not accepted in the dictatorial regimes of CEE and a grassroots women's movement never had the opportunity to emerge. Therefore, the Second Wave feminism that developed in the West starting from the 1960s could not spread to CEE until the fall of State Socialism.

In the case of Romania, Mihaela Miroiu, one of the leading feminist scholars in the country, remembers how after 1989 'feminism had to be reinvented and rediscovered [...] the same way in which liberalism and democratic socialism had to be'.¹⁷ The collapse of Communism also represented the end of the intellectual isolationism practiced by communist leader Nicolae Ceaușescu. This made some Romanian scholars highly receptive and enthusiastic about those Second Wave feminist ideas imported into CEE mainly by American activists.¹⁸ Further, after 2007 when Romania became part of the EU, Third Wave feminism also emerged in Romania. This tried to emphasize the differences between women and promote the claims that certain women, like Roma women, could have had based on the particularities of their identity as women belonging to the Roma minority.¹⁹ Nonetheless, given the delay of Second Wave feminism in CEE, I agree with Havelková that more legal studies on the situation of women in the region should be done from a Second Wave feminist perspective, and especially from a radical feminist perspective.²⁰ As Havelková explains in her book on Czechia, it is not that intersectional claims for equality could not bring important improvements to the status of women in CEE, but that these

14 See Barbara Havelková, *Gender Equality in Law: Uncovering the Legacies of Czech State Socialism* (Hart Publishing 2017).

15 *ibid* 12–15.

16 See Hilda Scott, *Does Socialism Liberate Women? Experiences from Eastern Europe* (Beacon Press 1974). Scott uses mainly the example of Czechoslovakia in her analysis.

17 Mihaela Miroiu, 'On Women, Feminism and Democracy' in Lavinia Stan and Diane Vancea (eds), *Post-Communist Romania at Twenty-Five: Linking Past, Present, and Future* (Lexington Books 2015) 94.

18 *ibid*.

19 *ibid* 98–100. See also Andreea-Ioana Vlad, 'Women's Rights Activism in Romania after 2000. Studies on the Forms of Organization, Cooperation, Action and Influence' (*Școala Națională de Studii Administrative și Politice*) 104–114.

20 Havelková (n 14) 292–298.

claims cannot succeed without first shedding light on the gendered order of society, which is an objective of Second Wave, radical feminism.²¹

The major writings of the Second Wave feminists in the West were generally not accessible in Romania until the fall of State Socialism.²² For example, although a left-wing intellectual herself, and like Ceaușescu, a supporter of Mao-style Communism,²³ Simone de Beauvoir was known in Socialist Romania only as a writer and not as a philosopher.²⁴ Her book ‘The Second Sex’, a classic of feminist thought, was not translated into Romanian until 1998.²⁵ On the one hand, this is probably because de Beauvoir’s vision of gender relations was at odds with the anti-abortion legislation and other pro-natalist policies of the Romanian Communist Party.²⁶ On the other hand, it can also be related to what Janova and Sineau identify as de Beauvoir’s public expression of disappointment with the failure of the Eastern European Socialist States to truly emancipate women.²⁷

Miroiu sees de Beauvoir’s ‘The Second Sex’ as marking the beginning of Second Wave feminism in the West²⁸ and her ideas are often discussed by scholars writing about CEE. De Beauvoir’s thought, as I will show further on, also best describes the evolution of women’s status under the constitutional order of Romania. Apart from unveiling the fact that gender is a social construct through her famous phrase ‘one is not born a woman, but becomes one’,²⁹ de Beauvoir also emphasized that constructing gender in binary terms is the root of women’s inferiority in law and society. By using the Hegelian ‘Master and Slave’ metaphor, de Beauvoir developed the idea of women as ‘the Others’, or as

²¹ *ibid* 294.

²² Kristen Ghodsee, ‘On Feminism, Philosophy and Politics in Post-Communist Romania: An Interview with Mihaela Miroiu (Bucharest, 17 May 2010)’ (2011) 34 *Women’s Studies International Forum* 302, 303.

²³ Eric Leveél, ‘Simone de Beauvoir and Romania: A Distant Gaze (Circa 1965–1977)’ (2012) XIX *Colloquia. Journal of Central European History* 116, 117–118.

²⁴ Ghodsee (n 22) 303.

²⁵ Eric Leveél, ‘The Second Sex after Sixty Years. A Romanian Perspective’ (Al doilea sex după șaizeci de ani. O perspectivă românească), *Revista Verso*, 73 (2009): 13–14 cited in Leveél (n 23) 125, note 36.

²⁶ *ibid* 123.

²⁷ Mira Janova and Mariette Sineau, ‘Women’s Participation in Political Power in Europe’ (1992) 15 *Women’s Studies International Forum* 115, 115–116.

²⁸ Miroiu (n 17) 94, 104, note 27.

²⁹ See Simone de Beauvoir, *The Second Sex* (Knopf 1953) Part IV The Formative Years, XII Childhood.

defined in antagonistic terms to men and according to male standards.³⁰ In this way, she brought along a strong wave of criticism of traditional gender roles, according to which men occupy positions in the public sphere, as for example political and decision-making positions, and women are confined to the tasks related to the private sphere, meaning the tasks related to the domain of human reproduction such as childcare or household maintenance. Without claiming that de Beauvoir is the only one criticizing the traditional gender roles, her original idea of conceptualizing ‘women as others’ informs my inquiry on whether the Romanian Constitution in the last 25 years departed from seeing women’s roles in opposition to men’s roles.

Some of the most important changes in the way law conceptualized what is commonly known as ‘the gender binary’ occurred in the twentieth century. In Eastern Europe, these changes took place especially after State Socialism was instituted in the region. Since the design of the Romanian Constitution (and of the subsequent legislation) in the domain of gender equality was highly influenced by the situation of gender relations during State Socialism, in what follows, I find it necessary to give a brief overview of the regulation of gender related issues in pre-1989 Romania.

3 Women during state socialism

The rise of the Communist Party in 1946 granted Romanian women (and men) full political rights – at least on paper, since talking about political representation/political participation in a dictatorship seems to be a contradiction in terms.³¹ Furthermore, the 1948 Constitution – the first Communist

³⁰ In the introduction of ‘The Second Sex’ de Beauvoir specifically explained that woman ‘is defined and differentiated with reference to man and not he with reference to her; [...] He is the Subject, he is the Absolute – she is the Other’, *ibid*, Author’s Introduction. On the concept of otherness and an analysis of de Beauvoir’s thought on it see Lajos Brons, ‘Othering, an Analysis’ (2015) 6 *Transcience* 69.

³¹ Suffrage for women in local elections was achieved in 1929. Yet, it was only in 1938 during the authoritarian regime of King Charles II that women received equal voting rights with men for parliamentary elections. To vote however, women, just like men, had to fulfill certain conditions. Universal suffrage was achieved, for both men and women, in 1946, when Romania had its first Communist Government headed by Petru Groza. See Maria Nicoleta Turlic and Catalin Turlic, ‘The Struggle for Women’s Political Rights in Modern Romania. The Crystallization of Feminist Movement and the Constitutional Debates’ in Irma Sulkunen, Seija-Leena Nevala-Nurmi and Pirjo Markkola (eds), *Suffrage, Gender and Citizenship: International Perspectives on Parliamentary Reforms* (Cambridge Scholars 2009); Roxana Cheșchebec, ‘The

Constitution³² – unequivocally guaranteed full equality before the law regardless of sex,³³ the right to vote and to be elected in all the bodies of the State regardless of sex,³⁴ as well as full equality between men and women in all domains of public life and in the field of ‘private law’.³⁵ Moreover, State Socialism in Romania brought a massive process of industrialization; during that a significant part of the population was relocated from the countryside to cities. In the new ‘post-agricultural Romania’, women were supposed to work in factories alongside men. Additionally, women were seen as important comrades in promoting the politics of the Communist Party and, by consequence, they were also promoted in the arena of official politics.³⁶ In this context, Romania had the first female Foreign Minister of the modern world in 1947³⁷ and, later on, Elena Ceaușescu, the wife of the much-hated dictator Nicolae Ceaușescu, began to play a prominent role in politics.³⁸

Yet, not only that the policies meant to bring women into the public sphere were mandatory and not voluntary,³⁹ but they were never accompanied by

Achievement of Female Suffrage in Romania’ in Blanca Rodríguez-Ruiz and Ruth Rubio-Marín (eds), *The Struggle for Female Suffrage in Europe: Voting to Become Citizens* (Brill 2012).

32 Constitution of Romanian People’s Republic from 1948, published in the Official Gazette, no 87 bis from 13 April 1948 (Constituția Republicii Populare Române de la 1948, publicată în Monitorul Oficial, nr 87 bis din 13 aprilie 1948).

33 See Article 16 of the 1948 Constitution, *ibid.*

34 Article 18 of the 1948 Constitution, *ibid.*

35 Article 21 of the 1948 Constitution, *ibid.*

36 See Luciana Marioara Jinga, *Gender and Representation in Communist Romania: 1944–1989 (Gen și reprezentare în România comunistă: 1944–1989)* (Polirom 2015) 229–297.

37 Ana Pauker who served as Foreign Minister from 30 December 1947 to 9 July 1952, see Robert Levy, *Ana Pauker: The Rise and Fall of a Jewish Communist* (University of California Press 2001) 70.

38 See Mary Ellen Fischer, ‘Women in Romanian Politics: Elena Ceaușescu, Pronatalism, and the Promotion of Women’ in Sharon L Wolchik and Alfred G Meyer (eds), *Women, State, and Party in Eastern Europe* (Duke University Press 1985); Mary Ellen Fischer, *Nicolae Ceaușescu. A Study in Political Leadership* (Lynne Rienner Publishers 1989) 169–176.

39 For example, during State Socialism there was a law that incriminated the ‘lack of occupation’. In this sense, Article 7 of the 1972 Labor Code stated that: ‘Starting from the age of 16, every person who is fit for work but is not enrolled in any educational program, has the duty to perform until his/her retirement age any kind of work that is useful to society and that guarantees his/her means of living and spiritual development.’ (my translation) However, women, unlike men, were not liable under this law if they chose to be housewives only. Moreover, only women could take parental leave and most of the times, because of their ‘natural’ inclinations, they were the ones who got custody in case of a divorce. This happened in spite of the fact that children’s allowances were granted to fathers and in case of a divorce mothers needed an extra judicial decision to become the official holders of these allowances. See Vladimir Paști, *The Last Inequality. Gender Relations in Romania (Ultima Inegalitate. Relațiile de Gen în România)* (Polirom 2003) 103, 109–110.

policies meant to bring men into the private sphere and involve them in sharing the tasks of the household and childrearing.⁴⁰ This is how women in Romania, as in other CEE countries during State Socialism, had a double burden and had to work both in the public sphere of socialist production and in the private sphere of human reproduction.⁴¹

Promoting equality legislation was a more general characteristic of State Socialism in CEE. Yet, after 1965 when Nicolae Ceaușescu took power, the three domains that I have selected for analysis (ie women's political representation, reproductive autonomy and work/life balance) were regulated in a very peculiar manner in Romania. This is due to Ceaușescu's nationalistic version of Communism⁴² and his rebellious position during the Cold War, which allowed him not to follow the trends existent in other State Socialist countries. This is perhaps best illustrated by the fact that, while in 1974 Yugoslavia enshrined in its Constitution the respect for reproductive rights,⁴³ Romania had one of the toughest anti-abortion laws in European history.⁴⁴ Also, while countries like Hungary or Czechoslovakia introduced maternity

40 *ibid* 109–110.

41 Before State Socialism, Romanian society was generally a rural society, in which the labor division between men and women was more strictly separated, men being generally responsible for the work in the public sphere and women being generally responsible for the work done in the private sphere. Thus, in some sense, it could be argued that the division between the public and private and the role of men and women in these spheres were more clearly defined before State Socialism. For more on the labor division, lifestyles and (gender) beliefs in agricultural Romania, see Gail Kligman, *The Wedding of the Dead: Ritual, Poetics, and Popular Culture in Transylvania* (University of California Press 1988); For the problem of double burden under State Socialism see William Moskoﬀ, 'The Problem of the "Double Burden" in Romania' (1982) 23 *International Journal of Comparative Sociology* 79; See also Chris Corrin, *Superwomen and the Double Burden: Women's Experience of Change in Central and Eastern Europe and the Former Soviet Union* (Scarlet Press 1992).

42 See Katherine Verdery, *National Ideology under Socialism: Identity and Cultural Politics in Ceausescu's Romania* (Berkeley: University of California Press 1991).

43 Article 191 of the Federal Constitution of Yugoslavia of 21 February 1974 read as following: 'It is a human right to decide on the birth of children'.

44 This was part of a broader pro-natalist policy aimed to increase the demographic numbers. For more details on the anti-abortion law (Decree 770/1966) and the other pro-natalist policies see Gail Kligman, *The Politics of Duplicity: Controlling Reproduction in Ceausescu's Romania* (University of California Press 1998); Corina Doboș (ed), *The Pronatalist Politics of Ceausescu Regime (Politica pronatalistă a regimului Ceaușescu)*, vol I (Polirom 2010); Luciana Marioara Jinga and Florin S Soare (eds), *The Pronatalist Politics of Ceausescu Regime (Politica pronatalistă a regimului Ceaușescu)*, vol II (Polirom 2011).

leaves of up to four years,⁴⁵ the maternity leave endurance in Romania was only 112 days.⁴⁶ Furthermore, nowhere in CEE during State Socialism was the wife of a ruler perceived as having such an important impact on politics as the wife of Ceaușescu. Adding to this, after 1974, it was reported that Romania had one of the largest numbers of women in politics in the Eastern Block – ranging around 30%⁴⁷ – due to the affirmative measures promoted by the Communist party at Ceaușescu's demand.⁴⁸

The anti-abortion law deserves a separate discussion. This law was adopted in 1966 to counter the demographic crisis that was affecting the region and was part of a broader set of pro-natalist measures. Apart from criminalizing abortion on request, these included: making a divorce very difficult to obtain, granting 'heroine mother' honorary titles to women who had more than four children, making modern means of contraception unavailable, a lack of sexual education programs and promoting the image of women as mothers through the propaganda machinery of the Party.⁴⁹ Related to these pro-natalist policies, the regime also adopted different welfare measures that were to become extremely gendered. Among others, these included: (1) special measures meant to protect pregnant women (eg the interdiction of performing certain types of work including night work); (2) the 112-days of maternity leave; and (3) early retirement conditions for women with children.⁵⁰ As I will show in the next section of the article, the regulation of these measures highly influenced the drafting of the 1991 Romanian Constitution. Thus, it can be argued that the gender-related provisions of the Romanian Constitution are the product of their historical context, rather than part of a political agenda aimed at promoting a certain vision of gender relations.

45 For an overview of parental leaves in Hungary and Czechoslovakia during State Socialism and after see Steven Saxonberg, *Gendering Family Policies in Post-Communist Europe: A Historical-Institutional Analysis* (Palgrave Macmillan 2014).

46 For an overview of the parental benefits in Romania and CEE during State Socialism see Doboș, part II (n 44).

47 For the exact numbers see Inter-Parliamentary Union, Romania, Archive, http://www.ipu.org/parline-e/reports/2261_A.htm, accessed on 28 September 2017.

48 Jinga (n 36).

49 For a detailed overview over the abortion ban in Socialist Romania see Kligman (n 44).

50 My classification is based on the information offered in Chapter 3 'Protecting Women, Children and the Family', *ibid* and in Doboș (n 44) 223–264.

4 Gender (in)equality under Romania's post-Socialist Constitution: constitution-making, constitutional design and the case law of the Constitutional Court

Some of the influences of the regulation of gender relations during State Socialism can be clearly seen in the architecture of the new democratic Constitution, which was designed in 1991 mainly by men. At that time, only 4.9% of members of the Parliament that also stood as Constituent Assembly were women⁵¹ and none of them were members of the Commission for drafting the project of the Romanian Constitution.⁵² Under the right to 'intimate, familial and private life', the Constitution affirmed women's right to abortion under the following formulation: 'Any natural person has the right to freely dispose of herself/himself unless by this she/he causes an infringement upon the rights and freedoms of others, on public order or the standards of public morality'.⁵³ Article 38 of the Constitution referring to the social protection of labor guaranteed women not only equal pay with men for equal work, but also special working conditions. Additionally, Article 33 regarding the right to health guaranteed the protection of maternity and Article 43 regarding living standards guaranteed paid maternity benefits. Fatherhood rights were not mentioned at all in the 1991 Constitution, with the sole exception of Article 44 (1), which stated that 'the family is founded on the freely consented marriage of the spouses, their full equality, as well as *the right and duty of the parents to ensure the upbringing, education and instruction of their children*'.⁵⁴ Instead, men were mentioned in Chapter III regarding fundamental duties. According to Article 52 (2) – in force until the 2003 constitutional review – they, and not women, had a duty to defend the country and were obliged to serve in the national military forces.

Having provided the historical context of gender relations in Romania, in what follows, I examine how the status of women has changed either through the

51 'The Evolution of Women's Representation in the Parliament of Romania' (Department of Studies, Documentation and Monitoring of the Electoral Process, Electoral Permanent Authority 2013), http://www.roaep.ro/prezentare/wp-content/uploads/2013/04/women_Parliament.pdf.

52 See Resolution for approving the nominal composition of the Commission for drafting the project of the Romanian Constitution in Ortansa Stângă and Valentina Puiu, *The Genesis of the Romanian Constitution of 1991: The Works of the Constituent Assembly (Geneza Constituției României 1991: lucrările Adunării Constituante)* (Regia Autonomă 'Monitorul Oficial' 1998) 29.

53 Article 26 (2).

54 Emphasis added.

modification of the text of the Constitution in 2003, or through the interventions of the Romanian Constitutional Court. I will focus on the three areas present in the text of the RC, which are relevant from a feminist perspective when it comes to challenging the divide between the masculinized public sphere and the feminized private sphere: women's political representation, women's and men's role in the private sphere including the 'de-gendering' of parental leaves and of the different retirement conditions, and women's reproductive autonomy in the case of abortion.

4.1 Women and the public sphere: the case of political representation

As I have argued elsewhere in previous works,⁵⁵ although the fall of State Socialism gave women the chance to vote in free elections for the first time and the right to have a legal and safe abortion, it also led to a serious under-representation of women in politics. For example, Romania has never had a female President or Prime Minister and from 1990 until 2000, the representation of women in the national Parliament did not exceed 5%.⁵⁶ This seems to be connected to the so-called 'legacy of Elena Ceausescu', who, along with other women promoted by the regime, are said to have proven that the presence of women in politics is damaging. For this reason on the one hand, the affirmative action measures to promote women in politics adopted by the Communist Party were not taken over by the new democratic regime. The 1991 RC, on the other hand, did introduce reserved seats for the national minorities.⁵⁷ However, as Silvia Șuteu shows in her article 'The Multinational State that Wasn't: The Constitutional Definition of Romania as a National State', that is also part of the special issue on 'The Romanian Constitution at 25' of the ICL Journal, the RC reflects a constitutional nationalist project. Thus, the fact that the RC enshrined reserved seats for national minorities should not be read as making the RC more inclusive for national minorities than women. Instead, it should only show that affirmative action measures are not entirely foreign to the Romanian context.

With respect to the condition of women, it was only during the early 2000s, when Romania was preparing to become an EU and NATO member state, that women's political representation in the Parliament reached around 10%⁵⁸ and

55 See Elena Brodeală, 'Women and Politics: The Impact of the European Integration Process on Women's Political Representation in Romania' (2015) *Analyze – 8 Journal of Gender and Feminist Studies* 12–17.

56 'The Evolution of Women's Representation in the Parliament of Romania' (n 51).

57 See Article 59 (2), currently Article 62 (2) of the RC.

58 'The Evolution of Women's Representation in the Parliament of Romania' (n 51).

legislative changes in this regard were adopted. In 2003, the Constitution was reviewed and a new paragraph was inserted into Article 16. It stated that the Romanian state guarantees men and women equal opportunities to occupy public, civil and military positions and dignities. Furthermore, another newly introduced article, Article 55, abolished the mandatory military service and offered all citizens the opportunity to enroll in the army, by replacing the word 'men' with 'citizens'.⁵⁹

From 2002 onwards, the possibility of implementing gender quotas in politics has been discussed and different legislative proposals have been sent to Parliament.⁶⁰ Yet, based on the example of other countries that have debated gender quotas,⁶¹ a question of constitutionality is left unanswered by the current constitutional text.⁶² Within the Romanian context, would quotas infringe the principle of equality, the indivisibility of the electorate, the right to vote and be elected or the autonomy of the political parties? Is the current constitutional text a strong enough tool to ensure women's equal participation in the public sphere? Based on the fact that the Romanian Constitution already provides for reserved seats for minorities, one might assume that gender quotas would pass a constitutionality test. Yet, given the patriarchal culture of the Romanian society and the negative memory of the quotas used by the Communist Party, this assumption cannot be taken for granted. In my opinion, only a constitutional amendment to clearly state the admissibility and the necessity of adopting measures such as gender quotas should ensure women's substantive equality in the domain of public representation.⁶³

59 See the parliamentary debates regarding the review of the Constitution in 2003 here: http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=3883&tot=1 accessed on 28 September 2017.

60 For some of these proposals see the annex of Mihai, Tudorina, 'The Political Representation of Romanian Women, in the Context of Europeanization (Reprezentarea politică a femeilor din România, în contextul europeanizării)' (Școala Națională de Studii Administrative și Politice 2016).

61 See the case of Italy or France. For other examples see Ruth Rubio-Marín, 'Women's Political Citizenship in New European Constitutionalism: Between Constitutional Amendment and Progressive Interpretation' in Helen Irving (ed), *Constitutions and Gender* (Edward Elgar Publishing 2017).

62 To my knowledge there is no relevant constitutional case law on the matter.

63 Currently (July 2017), two legislative proposals that aim to introduce a 30% gender quota for general and local elections are pending in the Parliament. For the first time since 1989, legislative gender quotas seem to have good chances to be adopted. It will be interesting to observe how their constitutionality will be discussed, if this will be the case. For more on these legislative proposals see PL-x no 275/2016 Legislative proposal to amend and complete Article 52 of the Law no 208/2015 on the election of the Senate and the Chamber of Deputies, as well as for the organization and functioning of the Permanent Electoral Authority (PL-x nr 275/2016 Proiect de Lege pentru modificarea și completarea art 52 din Legea nr 208/2015 privind alegerea Senatului și a Camerei Deputaților, precum și pentru organizarea și funcționarea Autorității

4.2 Women between the private and the public spheres: a discussion on parental leaves and the gender-differentiated retirement age

Parental leave is one of the ways of ensuring work/life balance and the participation of men and women in both the public and the private spheres. Parental leave was introduced in Romania in 1990.⁶⁴ This, however, was granted only to women. Further, in 1997, Romania adopted one of the most generous paid parental leaves in Europe (2 years with 85% payment). Due to the pressure of EU accession requirements, this was also granted to men. Nevertheless, according to the wording of the law the main holders of the right to parental leave were still women.⁶⁵

In 1999, paternal leave was also introduced in Romania.⁶⁶ Currently, this is of 5 days or 15 days if the father took an infant care course.⁶⁷ If the father is employed, the leave is paid and it equals his full salary. The law also states specifically that the paternal leave ‘has the purpose to ensure the real participation of the father in the care of the newborn’.⁶⁸ Although the intentions of the law-makers were in this case directed towards increased gender equality, the length of the leave, as well as the text of RC which refers only to maternity leave, in my opinion, still send a clear signal that fathers play just a marginal role in childcare and household tasks, or in other words, that men play just a marginal role in the private sphere.

Electorale Permanente) and PL-x no 329/2016 Legislative proposal to amend and complete Article 7 of Law no 115/2015 for the election of the local public administration authorities, amending the Local Public Administration Law no 215/2001 and amending and completing the Law no 393 / 2004 on the Statute Local elected representatives (PL-x nr 329/2016 Proiect de Lege privind modificarea și completarea art 7 din Legea nr 115/2015 pentru alegerea autorităților administrației publice locale, pentru modificarea Legii administrației publice locale nr 215/2001, precum și pentru modificarea și completarea Legii nr 393/2004 privind Statutul aleșilor locali).

64 See Decree no 31 on 18 January 1990 regarding the paid parental leave to care for children up to the age of one, published in the Official Gazette, Part I no 12 from 19 January 1990. The leave introduced by Decree 31 was of about nine months paid by 65% of women’s previous wage.

65 See Law no 120 from 9 July 1997 regarding the paid leave to care for children up to the age of two, published in the Official Gazette, Part I no 149 from 11 July 1997 (Legea nr 120 din 9 iulie 1997 privind concediul de îngrijire a copiilor în vârstă de până la 2 ani, publicată în Monitorul Oficial, Partea I nr 149 din 11 iulie 1997).

66 See Law no 210 of 31 December 1999 on paternity leave, published in Official Gazette no 654 of 31 December 1999 (Legea nr 210 din 31 decembrie 1999 privind concediul paternal, publicată în Monitorul Oficial nr 654 din 31 decembrie 1999).

67 See Articles 1 (2) and 4 of Law 210/1999.

68 Article 1 (1) *ibid.*

Furthermore, men in the military, unlike women holding the same position, did not have the right to take parental leave until 2005 following a case at the RCC.⁶⁹ The decision on parental leave concerned the case of Gabriel Hulea, who later filed a complaint at the European Court of Human Rights.⁷⁰ He challenged Article 15 of Law 80/1995 regarding the status of military personnel. This granted parental leave only to women in the military, but not to men in the same situation. Hulea argued that this provision breached the principle of equality enshrined in Article 16 (1) of the Constitution.⁷¹

The positions of the public authorities varied in this case. The Ombudsman thought that the provision under discussion was not discriminatory since the military profession, through its specificity, justified a gender distinction. The same position was adopted by the representative of the public prosecutor's office who believed that 'the principle of equality should not be equated to homogeneity, so that when situations are objectively different, as in this case, it is justifiable to apply a different legal treatment.'⁷² The Court, however, held that since the right to parental leave was generally granted to both men and women, the same principle should apply to employees in the military, and quite bravely dismissed the stereotypical vision of the military as a male-specific employer. By doing this, the RCC was also in line with the 2003 constitutional review which removed the requirement that only men had to serve in the military⁷³ and which stated that the State shall guarantee equal opportunities for men and women to occupy military positions.⁷⁴

69 See RCC, Decision 90/2005.

70 See *Hulea v Romania* App no 33411/05 (ECtHR, 2 October 2012).

71 Article 16 (1) reads as following: 'Citizens are equal before the law and public authorities, without any privilege or discrimination.'

72 RCC, Decision 90/2005 (n 69). NB Until 2010 the decisions of the RCC did not contain numbered paragraphs. Therefore, I am unable to provide a more complete citation than the number and year of the decisions.

73 In the original text of the 1991 Constitution, Article 52 read as following: '(1) Citizens have the right and duty to defend Romania. (2) The military service is compulsory for all Romanian male citizens aged twenty, except for the cases provided by law [...].' After the 2003 constitutional review, Article 52 became Article 55 and read as following: '(1) Citizens have the right and duty to defend Romania. (2) The terms for doing the military service shall be set up in an organic law. [...].'

74 More precisely, the newly introduced paragraph 3 of Article 16 read as following: '(3) Access to public, civil, or military positions or dignities may be granted, according to the law, to persons whose citizenship is Romanian and whose domicile is in Romania. The Romanian State shall guarantee equal opportunities for men and women to occupy such positions and dignities.' For more on the increased assertiveness of the RCC during Romania's transition, see Bianca Guțan's contribution in this issue.

Through the decision in the Hulea case, parental leave was extended to men in all professions. As I will explain below, among others this also made the RCC state, five years later, that the traditional gender roles had changed and that a differentiated legal regime of genders, such as a differentiated pensioning age, was no longer justifiable.

The first case before the RCC challenging the different retirement age of men and women, inherited from Ceaușescu's pro-natalist times, dates from 1995.⁷⁵ Subsequent cases were brought to Court until 2011.⁷⁶ In 1995, the Constitutional Court of Romania decided that the different pensioning ages did not breach the principle of equality, since women were seen as being disadvantaged as compared to men (due to their household and childcare responsibilities, but also due to different legal measures that 'hamper(ed) women's career accession, like maternity and parental leaves or protective interdictions to work in certain conditions'⁷⁷). The public authorities that intervened in the case held very stereotypical views that clearly attributed household work to women. For example, the Government, based on Articles 6, 9 and 10 of the International Covenant on Economic, Social and Cultural Rights, argued that paid maternity leaves or (women's) leaves to care for a sick child, as well as the different pensioning ages for men and women, were special measures to 'protect' women in accordance with Romania's international commitments. Furthermore, based on the 1967 UN Declaration to Eliminate Discrimination Against Women, the Government argued that 'the measures taken for a woman's protection, *for reasons connected to her physical constitution* and her supplementary tasks that she has to fulfill throughout her life (birth, children rearing, household), cannot be seen as discriminatory'.⁷⁸ Further, in its intervention, the Ministry of Labor and Social Protection stated that the different pensioning ages for men and women were meant to compensate for the 'double' work of women, 'as workers and as housewives'.⁷⁹ Unlike the Government however, the Ministry mentioned that an equal pension age regardless of gender is a measure that should be adopted in the future, when 'the conditions for its realization will be created',⁸⁰ but did not say anything about what these conditions should be, or what role men should have in fulfilling them.

⁷⁵ RCC, Decision no 107/1995.

⁷⁶ See RCC, Decision no 107/1995, Decision no 27/1996, Decision no 888/2006, Decision no 191/2008, Decision no 1007/2008, Decision no 1237/2010, Decision no 287/2011.

⁷⁷ Decision no 107/1995 (n 75).

⁷⁸ *ibid.* Emphasis added.

⁷⁹ *ibid.*

⁸⁰ *ibid.*

The Romanian Society of Labor Law also intervened in the case. It stated that until a ‘serious biological and anthropological study on women in Romania’ existed, it could not be presumed that women ‘have an equal capacity for work with men of same age’, so the differentiated pensioning age as a measure of ‘positive discrimination’ should be upheld.⁸¹ The statement of the Romanian Society of Labor Law is problematic to the extent that it presumes that a differentiated labor regime is or should be grounded on the biological differences between men and women. Apart from these opinions, the Court also received comparative material for consideration: Decision no 1 from 28 January 1987 of the Federal Constitutional Tribunal of Germany, where it was held that the different social condition of women justified the differentiated pensioning age, and Decision no 12.568/1990 of the Austrian Constitutional Court, where it was decided that the legislator could and should proceed to equalize the differentiated pensioning age.

The reasoning of the RCC in this case is interesting. The Court started from the idea that ‘the principle of equality does not mean uniformity’ and that the principle of equality ‘underlines the existence of [...] the right to difference’, as a fundamental right.⁸² When ‘equality is not natural’, explained the Court, ‘imposing it means instituting a discrimination’.⁸³ The Court further explained that if the socio-professional conditions of men and women would have been equal in the material sense of the word, and not ‘only in the formal legal meaning of the term’, an equal pensioning age would have been constitutional.⁸⁴ Yet, by looking at the social condition of men and women, the Court concluded that men and women in Romanian society were not yet equal and thus found the differentiated pensioning age to be justified. Furthermore, the Court placed this measure within the broader legal context and concluded that the differentiated material conditions of men and women were mirrored in several other legal norms. Interestingly, the Court placed the legal inequality of women in the military domain in the same category as measures such as parental leaves only for women, or with measures meant to protect women at work. Whether the exclusion of women from the military is generally based on biological considerations, measures such as parental leaves or special working conditions, could be also seen, as the Court did, as measures to compensate for women’s unequal social conditions. Thus, the Court seems to have endorsed the idea of biological determinism rooted in women’s otherness.

81 *ibid.*

82 *ibid.*

83 *ibid.*

84 *ibid.*

It is possible that the evaluation of women's social situation corresponded to the material status of women in that period. Yet, in this case, treating women as a homogenous group and obliging *all* women to retire earlier is problematic. The Court was invited to declare the different pensioning age provision unconstitutional to the extent that it obliged *all* women to 'benefit' from a form of 'positive discrimination' against their will. The Court, nevertheless, dismissed the claim on the ground that the decision to change the mandatory character of legal norms belongs to Parliament and not to the Court, which cannot act as a 'positive legislator'. The Court also specifically underlined that the social condition of women was to change in time and saw this as 'a phenomenon that can be found in all European countries, and that is characteristic to the evolution of modern societies'.⁸⁵ Thus, it did not exclude equalizing the different pensioning age in the future.

In 2010, the Court finally held that equalizing the different pension age of men and women was constitutional.⁸⁶ A new law on the public system of pensions was under parliamentary debate at the time. Not least due to the European trends in the field, many voices supported equalizing the different pensioning ages for men and women. At the same time, other voices opposed such a reform. Probably the most vocal objector was the then-President Traian Băsescu, who stated that although he was a strong supporter of 'equality of opportunities and treatment between men and women', he could not disregard the social reality that women had to perform double work, both at home and on the labor market.⁸⁷ Nonetheless, in spite of such concerns, the draft law regarding the unitary system of pensions equalized the pensioning ages of men and women. Full pensioning equality should be reached by 2025. The draft law was sent by a group of MPs for an *a priori* constitutionality review to the RCC. The Court's decision noted that the supporters of the different pensioning ages for men and women argued for their position based on women's 'physiological particularities'.⁸⁸ The opinions of the public authorities intervening in this

85 *ibid.*

86 See Decision no 1237/2010.

87 See Alina Neagu, 'Traian Basescu: I Decided to Return the Pensions Law to the Parliament, with the Proposal to Change the Retirement Age for Women to 63 (Traian Basescu: am decis să retrimit Parlamentului Legea Pensiiilor, cu propunerea de modificare a vârstei de pensionare pentru femei la 63 de ani)' (7 October 2010) <http://www.hotnews.ro/stiri-esential-7901998-video-traian-basescu-decis-retrimit-parlamentului-legea-pensiiilor-propunerea-modificare-varstei-pensionare-pentru-femei-63-ani.htm>, accessed 28 September 2017.

88 Part I, para 2.6. RCC, Decision no 1237/2010 (n 86).

case did not contain any references to gender roles, but the Government stated that the different pensioning ages did not pose a problem of constitutionality, but one of ‘opportunity’ (Romanian *oportunitate*) and it should be decided by the legislator.⁸⁹

The Court showed that since 1995 the issue of different pensioning ages had been contested by both men, dissatisfied that they had to work longer, and women, dissatisfied that they had to retire early. It then observed that gender relations and the status of women had evolved and that equalizing the pensioning age was no longer discriminatory, in the conditions in which the equalization should have been reached within 15 years. Among the arguments that the Court used in its decision were the facts that Romania had to comply with new emerging ‘European standards’ and that welfare benefits, like parental leaves, were at that time also available to men.⁹⁰ What was novel in this decision was that changing men’s gender roles seems to have been seen as part of the solution for achieving gender equality. The Court expressly mentioned that it was not appropriate to correct women’s material inequality by using a differentiated legal treatment. It then stated that childrearing should not be seen just as a woman’s task, but also as a man’s task and that the State had an obligation to ensure women’s equality to men on the labor market. In this way, the Court seems to have moved closer to disestablishing the traditional gender order that constructs femininity in opposition to masculinity.⁹¹ However, in an article written by Asztalos Ferenc Csaba, the president of the National Council for Combating Discrimination (ie Romania’s Equality Body), the Court was criticized for still obliging *all* women to retire earlier until 2025 when the gender-dependent pensioning age will be equalized.⁹² The author rightly noted that retiring earlier should have been women’s option according to how they assessed their social condition.

4.3 Women’s reproductive autonomy: the issue of abortion

Developments have also taken place regarding women’s reproductive autonomy, but not always to the advantage of women. After 1989, in the young pluralistic

⁸⁹ Part I, para 2.8. *ibid.*

⁹⁰ See RCC, Decision no 90/2005 in *Hulea Case* (n 69).

⁹¹ See Part II on the reasoning of the Court, para 2.6. *Decision 1237/2010* (n 86).

⁹² See Csaba Ferenc Asztalos, ‘The Gender-Dependent Age of Retirement in Romania – a Source of Discrimination (Limita de vârstă de pensionare diferită pe criteriul de sex în România – cauză de discriminare)’ [2012] *The New Review of Human Rights* 13.

Romanian society, different traditional values started to re-emerge and various pro-life voices began to appear. After the adoption of the Decree that decriminalized abortion in 1989,⁹³ a legislative proposal advanced in 1997 attempted to re-criminalize abortions and the use of contraception.⁹⁴ While it ultimately failed, it was not the last of such initiatives. In 2004, an attempt to limit the right to abortion was challenged by the President of Romania in front of the Constitutional Court⁹⁵ and later on, in 2012, a legislative proposal that aimed to introduce mandatory dissuasive counseling in cases of abortion⁹⁶ gave way to important debates in the Romanian public sphere. Yet, as I will explain below, both the RCC and the constitutional text favor women's reproductive autonomy.

Even from the drafting of the 1991 democratic Constitution, the right to life, presently guaranteed in Article 22 (1),⁹⁷ was not meant to include a fetus' the right to life. Such a proposal had been made during the debates of the Constituent Assembly, yet it was rejected without much debate.⁹⁸ The proponent was Ioan Alexandru, a member of Parliament and one of the revivers of the pre-communist, conservative Christian Democratic National Peasants' Party. He was well known for his illegal preaching of the Bible in Bucharest's attics during the Communist regime. He believed that the communists were to blame for their materialistic understanding of social problems. Instead, as he underlined during the debates of the 1990 Constituent Assembly, he was absolutely convinced that Romania's problems were caused by a moral and spiritual crisis⁹⁹ and not by economic reasons. A clear sign of Romania's spiritual decadence, in his view, was the rate of

93 Decree no 1 from 26 December 1989 regarding the abolishing of certain laws, decrees and other normative acts, published in the Official Gazette no 4 from 27 December 1989 (Decret-Lege nr 1 din 26 decembrie 1989 privind abrogarea unor legi, decrete și alte acte normative, publicat în Monitorul Oficial nr 4 din 27 decembrie 1989).

94 Legislative proposal no L646/1997 regarding the abortion ban (Propunere legislativă nr L646/1997 pentru interzicerea avortului).

95 RCC, Decision no 418/2005.

96 Legislative proposal no 348/2012 on the establishment, operation and organization of counseling offices in case of pregnancy crisis (Propunere legislativă nr 348/2012 privind înființarea, funcționarea și organizarea cabinetelor de consiliere pentru criza de sarcină). Such a proposal also existed in 2004 and was more drastic than in 2012, see http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=3870, accessed 28 September 2017.

97 This reads as follows: 'The right to life, as well as the right to physical and mental integrity of person are guaranteed'.

98 Stângă and Puiu (n 52) 241, 297.

99 *ibid* 237.

abortions performed after the abolition of Decree 770 in 1989, which became one of the highest in Europe.¹⁰⁰ For this reason, he argued that abortion should have been re-criminalized and that the fetus should have been granted constitutional protection. In order to convince the Assembly, his discourse was built to promote the idea that granting constitutional protection to the life of the fetus from the moment of conception would re-establish Romania's religious and 'Western-like' development, which had been put on hold by the Communist regime. More precisely, he stated:

(In Ch 2, Thesis 1 of the draft of the Romanian Constitution) we (the Constituent Assembly) are proudly and honorably stating that '[...] the right to life is absolute and inviolable'. [...] But when does life begin, my brothers? I was recently in Oslo at a world congress where these issues were very seriously addressed. I was in Switzerland, I was in America, (where) I saw the representative of (pro-life Movement¹⁰¹ in) the United States led by Bush, (and) half million people gathering beside the White House protesting and asking 'When does human life begin?'. Does it begin, as the Romans said, in their mothers' wombs? I am sorry I did not bring along a film to show you how the criminal scissors of the doctor gets into a few weeks old baby [...]. I am quoting a big prophet of the Jewish people – Jeremiah, Ch XX, XXI: 'The most devastating thing on earth is when your mother's womb becomes your grave'. [...] This is horrible! This is why I propose, beloved brothers, the following [...] (re-formulation of the provision under debate): 'The human right to be born and to live is absolute and inviolable'. [...] 'Human life starts with conception'.¹⁰²

The reason for which the proposal of Ioan Alexandru was rejected should have been the disastrous consequences of Ceaușescu's pro-natalist policies of which 'the fathers of the Constitution' were probably very aware of. Nevertheless, even if they did not have any constitutional echo, Alexandru's convictions, with the support of American pro-life activists (and funding), formed the groundwork for the pro-life movement in Romania. In this way, in 1990, Ioan Alexandru became the founder of the first *Pro Vita* office in Romania.¹⁰³

100 See 'Abortion and Contraception in Romania. A Strategic Assessment of Policy, Programme and Research Issues.' (World Health Organization 2004) 15 <<http://whqlibdoc.who.int/publications/2004/9739953166.pdf>>, accessed 28 September 2017.

101 Probably. The text in Romanian is not very clear about what representative Alexandru is talking about.

102 Stângă and Puiu (n 52) 236.

103 See the official site of 'Pro Vita București' <<http://provitabucuresti.ro/ce-inseamna-provita/istoric-provita>>, accessed 28 September 2017. See also Barbara Butta, *Colonizing the Discourse on Abortion and Sexuality: Pro-Life Activities in Transition Romania* (Central European University 2004).

The final version of the 1991 Romanian Constitution included the right to dispose of one's body.¹⁰⁴ When it comes to the protection of children guaranteed by Article 49 (1) of the Constitution, there is a consensus in the Romanian constitutional doctrine that this does not cover the product of conception.¹⁰⁵ The RCC, which began its activity in June 1992, has been confronted with questions related to reproductive rights only once in 2004/2005. As will be explained below, the Court adopted a rather liberal view of reproductive rights.

The 2005 decision was taken after the President of Romania sent a legislative proposal on reproductive health and assisted reproduction to the RCC for an *a priori* control of constitutionality. Among others, the President challenged the requirement of dissuasive counseling¹⁰⁶ in case a pregnant woman wanted to have an abortion, the requirement that surrogates needed their husbands' consent to carry or terminate a pregnancy (when commissioning parents required so), and the fact that the law discriminated between single individuals and couples, and allowed only the former to have access to assisted reproduction.

In rendering its decision the Court examined the legislation with regard to more aspects than it was initially asked to;¹⁰⁷ however, it did not seem to express any concern about balancing woman's reproductive autonomy and the fetus's right to life. On the contrary, the Court seems to have taken for granted that the issues should be analyzed from the point of view of the woman's reproductive autonomy. Except for using the idiom 'conceived child', which was probably an unintentional editing error, the Court did not consider in any way the status or the right to life of the fetus. This, I argue, should be connected to the legacy of Ceaușescu's anti-abortion legislation. As it can be inferred from the declarations of Theodor Stolojan (center-right wing oriented politician and prime-minister of Romania in the period when the Constitution was under debate) in a meeting organized by Open Society Foundations, Romania's history of repressing women's reproductive autonomy is the factor that makes pro-abortion attitudes deeply embedded in

104 Article 26 (2) which reads as follows: 'Any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals.'

105 Article 49 (1): 'Children and young people shall enjoy special protection and assistance in the pursuit of their rights.'

106 Ie counselling that aims to convince the pregnant woman not to have an abortion.

107 See for example the position of the Court with regard to the constitutionality of surrogacy at para 3 b (RCC, Decision no 418/2005 [n 95]).

Romania's political culture, regardless of whether they are discussed by women or men.¹⁰⁸

In summary, in Decision 418/2005, the RCC held that: (1) as long as it is dissuasive and not purely informational, pre-abortion counseling is unconstitutional; (2) according to Romania's Constitution, the decision to become pregnant or aborting belongs exclusively to women; and (3) the decision to become parents (using assisted reproduction) belongs to *individuals* alone and cannot be made conditional upon the will of a partner (of 'opposite sex'). Based on this position of the RCC, one can conclude that the post-Socialist constitutional framework of Romania favors women's autonomy.

Yet, when it comes to reproductive rights, the Constitution speaks about privacy rights and not women's equality. The protection of privacy rights is generally achieved through State non-intervention which, in my view, leaves out, for example, the obligation of the State to provide for effective access to abortion through public funding, sexual education, and family-planning programs, or the State's obligation to avoid abuses resulting from assisted reproduction techniques like surrogacy.¹⁰⁹ Thus, a reformulation of the current constitutional text, or even a specific mentioning of the protection of reproductive rights at the next review of the Romanian Constitution is necessary.

5 Conclusion

As this article has shown, in spite of the theoretical commitment of State Socialism to equality, Romania inherited an inegalitarian gender regime from its Socialist past. The laws and policies of State Socialism highly influenced the drafting of the Romanian Constitution in 1991. By looking at the text of the 1991 RC, one can observe a continuity of certain measures in existence before 1989, but also a rejection of such measures. Similar to the Socialist laws, the 1991 RC provided for maternity leave, but made no mention of gender neutral parental leave to be taken by any of the parents, or of paternity leave. It also provided for special working conditions for women, and until the 2003 constitutional revision, it stated that only men could enroll in the national army. On the other hand, due to Ceaușescu's

108 See 'Stolojan about LGBT Rights, Abortion and Equal Opportunities between Men and Women' (Stolojan despre drepturile LGBT, avort și egalitate de șanse între femei și bărbați) <<http://www.feminism-romania.ro/presa/editoriale/1194-2014-04-29-13-01-16.html>>, accessed 28 September 2017.

109 See Elena Brodeală, 'The Legal Status of Assisted Human Reproduction in Romania. A Brief Discussion on Surrogacy' (2016) *Romanian Journal of Comparative Law* 56.

disastrous pro-natalist policy, the Constitution protected women's choice to have an abortion under the right to personal and family privacy.

At the same time, likely due to linking women's political representation to the negative image of Elena Ceaușescu, the Constitution did not carry over the informal affirmative action measures used by the Communist Party to promote women in leadership positions. It is just in 2003, in the context of EU and NATO accession, that a new paragraph was inserted in Article 16 of the RC guaranteeing women equal opportunities to occupy public functions and dignities. Moreover, in 2005, the RCC extended parental leave to all men, including those in the military, and in 2010 took active steps towards equalizing the different pensioning ages for men and women, another remnant of Ceaușescu's pro-natalist policy. The RCC has also reaffirmed women's reproductive autonomy in a decision concerning assisted human reproduction. In this way, the Romanian Constitution has begun to distance itself from treating women as others, in the sense of being the opposite of men, and has moved towards achieving gender equality.

Yet, I have argued in this article that changes in the text of the Romanian Constitution are required if true gender equality is to be achieved. If maternity leave is guaranteed under the Constitution, so should be paternity leave. Equality on the labor market and achieving life/work balance for employees requires either excluding from the constitutional text the guarantee for special working conditions only for women, or extending it to both men and women. At the same time, to emphasize that the Constitution protects women's reproductive autonomy and full equality with men in all domains, reproductive rights should be specifically mentioned. Privacy rights, I have argued, do not offer full protection for women's reproductive autonomy. They do not necessarily imply that the State also has positive obligations, such as providing for sexual education, family planning, funding for contraception or abortion and so on. Moreover, I have argued that the text of the Constitution should be clarified so as to specifically mention that gender quotas are required to increase women's representation in the public sphere. Such a re-drafting of the Romanian Constitution should grant men and women equal opportunities to participate in both the public and the private spheres and transform the RC to what is known as a 'gender-sensitive constitution'.¹¹⁰

110 For what a 'gender-sensitive Constitution' should entail see Silvia Șuteu and Ibrahim Draji, 'ABC for a Gender Sensitive Constitution. Handbook for Engendering Constitution-Making' (Euromed Feminist Initiative IFE-EFI 2016).