

DECISION 14 OF 1995: 13 MARCH 1995

ON THE LEGAL EQUALITY OF SAME SEX PARTNERSHIPS

The petitioner sought constitutional review of legal provisions concerning marriage and domestic partnership which discriminated against him on grounds of sexual orientation.

According to s. 10(1) of Act IV of 1952 on Marriage, Family and Guardianship, men and women of legal age may marry. Further art. 578/G of Act IV of 1959 on the Civil Code defines partners in the a domestic partnership as a woman and man living together in the same household who form an emotional and economic community outside of marriage.

The petitioner submitted that these two provisions infringed his constitutional rights to equality under Art. 66(1) and to be free from negative discrimination on the grounds of sex under Art. 70/A because (a) they made it impossible for persons of the same sex to marry; and (b) they failed to recognise that such a relationship could amount to a domestic partnership.

Held, giving the following ruling:

(1) The legal provisions did not violate Arts. 66(1) or 70/A. As regards the latter, the institution of marriage had special, express constitutional protection and was generally recognised as the union between a man and a woman. Men and women separately comprised homogenous groups of legal subjects which had to be treated the same in order to prevent negative discrimination. This requirement of equal regulation of the conditions of marriage between persons of different sexes excluded the legal possibility of marriage between persons of the same sex. Moreover, in respect of Art. 66(1), the regulation restricting marriage to the relationships of persons of the same sex in the law on family, prohibited men and women

equally from marriage with persons of their own sex. Taken together, the legal provisions did not discriminate on grounds of sex or otherwise.

(2) An enduring union of two persons, however, might realise such values that it could claim legal recognition on the basis of the equal personal dignity of the persons affected, irrespective of their sex. In respect of financial conditions and the benefits which were derived from this type of economic union, there was no constitutional justification which prevented the rules governing domestic partnerships from applying to an enduring union of persons of the same sex. Indeed, the regulation of partners in a domestic partnership and relatives was arbitrary, violating the right to human dignity in Art. 70/A since it excluded those of the same sex from among persons living in a common household and in an emotional and economic union (page 00, lines 00-00).

(3) The regulations on domestic partnerships and relatives could be rendered constitutional by expanding their scope to include same-sex relationships. This could be achieved not only by removing the restriction in the Civil Code, art. 578/G(1) that partners in a domestic partnership must involve only a man/woman relationship but also by providing the same legal standing with a separate legal institution for those of the same sex. Further, the legislature could also re-examine all rules applicable to partners in a domestic partnership and broaden them wherever the restriction to a heterosexual relationship did not have a foundation. In this way each rule would be rendered applicable to all persons living in such an intimate relationship (page 00, lines 00-00).

IN THE NAME OF THE REPUBLIC OF HUNGARY!

In the matter of the petition seeking an *ex post facto* examination of the unconstitutionality of a legal rule, the Constitutional Court has made the following

DECISION.

1. The Constitutional Court rejects the petition seeking a determination of unconstitutionality and annulment of s. 10(1) of Act IV of 1952 on Marriage, Family and Guardianship.

2. The Constitutional Court suspends its proceedings concerning the petition on Act IV of 1959 on the Civil Code, art. 578/G until 1 March 1996.

3. The Constitutional Court declares that it is unconstitutional for legal regulations to specify legal consequences only for those domestic partnerships currently defined in the Civil Code when these legal regulations determine the rights and responsibilities of persons who live together outside marriage in an emotional, sexual and economic community and who publicly uphold their relationship.

The Constitutional Court will publish this Decision in the *Hungarian Official Gazette*.

REASONING

I.

The petitioner requested the constitutional review of s. 10(1) of Act IV of 1952 on Marriage, Family and Guardianship, according to which "men and women of legal age may get married." The petitioner also proposed the review of Act IV of 1959 on the Civil Code, art. 578/G which, in the context of elaborating on the financial relations of those living in the same household, defines the notion of partners in a domestic partnership as "a woman and a man living together in the same household who form an emotional and economic community outside a marriage."

In the petitioner's opinion, the two legal provisions in question negatively discriminate on the basis of sex by making it impossible for persons of the same sex to get married and by not acknowledging their domestic partnership. In this way, according to the petitioner, the provisions in question violate both Art. 66(1) of the Constitution which declares the equality of men and women and Art. 70/A which prohibits negative discrimination according to any criterion -- including sex.

II.

In its proceedings, the Constitutional Court began with the idea that both in our culture and in our law, the institution of marriage is traditionally the union of a man and a woman. This union typically is aimed at giving birth to common children and bringing them up in the family in addition to being the framework for the mutual taking of care and assistance of the partners. The ability to procreate and give birth to children is neither the defining element nor the condition of the notion of marriage, but the idea that marriage requires the partners to be of different sexes is a condition that derives from the original and typical designation of marriage. The institution of marriage is constitutionally protected by the State also with respect to the fact that it promotes the establishment of families with

common children. This is the reason why Art. 15 of the Constitution refers to the two subjects of protection together: "The Hungarian Republic protects the institutions of marriage and family."

From the wording of the most important international human rights documents, it can also be derived that the family is conceived of as the union of a man and a woman: the right to get married is defined as the right of men and the right of women, while in relation to other rights, the subjects of law are "persons" without any such differentiation (art. 16 of the Universal Declaration of Human Rights 1948; art. 23 of the International Convention on Civil and Political Rights 1966; and art. 12 of the European Convention on Human Rights 1950). The European Court of Human Rights has re-enforced this interpretation (see *Rees*, ECtHR, Judgment of 17 October 1986, Series A, no. 106, p. 19).

In recent decades in our culture, homosexuality has been decriminalized, and a movement has been started to protest against negative discrimination with respect to homosexuals. In addition, changes can be observed in the traditional family model, especially in terms of the durability of marriages. All these are not reasons for the law to diverge from the legal concept of marriage which has been preserved in traditions to this day, which is also common in today's laws and which, in addition, is in harmony with the notion of marriage according to public opinion and in everyday language. Today's constitutions -- among them the Hungarian with the interconnected nature of its provisions on marriage and the family -- consider marriage between man and woman a value and protects it (Arts. 15, 67 and 70/J of the Hungarian Constitution).

The State can offer different legal options for traditional and currently exceptional communities, through which it acknowledges and integrates such communities into different social relations. In doing this, the State does not have to follow the self-interpretation of the communities but it can maintain and support traditional institutions, as well as create new

legal forms for acknowledging new phenomena and with this it can, at the same time, extend the boundaries of "normality" for public opinion. In determining the concept of marriage, the same requirements apply as, for instance, in the case of determining the concept of "church:" *cf.* Constitutional Court in *Dec. 4 of 1993 (II.12) AB* (MK 1993/15 at 705); and *Dec. 8 of 1993 (II.27) AB* (MK 1993/29). In the creation of these legal institutions, the right of the affected person is not that the same institutions be available to everybody; instead, the constitutional requirement is that those affected are handled as equals and as persons of equal human dignity -- that is, their points of view are evaluated with like circumspection, attention, impartiality and fairness (*Dec.9 of 1990 (IV.25) AB*: MK 1990/36 at 770-771; *Dec. 21 of 1990 (X.4) AB*: MK 1990/98 at 2082). Equality between man and woman has a meaning if we acknowledge the natural difference between man and woman, and equality is realized with respect to this.

The Constitutional Court declares that since the institution of marriage has a special and explicit protection in the Constitution and since, according to the generally acknowledged legal notion, marriage is the union of a man and a woman, men and women separately make up homogeneous groups of legal subjects that have to be treated as the same in order to prevent negative discrimination -- as is standard in the practice of the Constitutional Court. The Constitution only poses the requirement of equal regulation of the conditions of marriage between persons of different sexes, which excludes the legal possibility of marriage between persons of the same sex. On the basis of the above, the Constitutional Court has arrived at the conclusion that the contested provision pertaining to marriage does not discriminate either in terms of sex or in terms of other conditions, and thus it does not violate Art. 70/A of the Constitution.

The contested provision cannot be related to Art. 66(1) of the Constitution, since the provision has no reference to the equality of men and women. The provision restricting

marriage to the relationships of persons of the same sex in the law on family rights, prohibits men and women equally from marriage with persons of their own sex. On this basis, the Constitutional Court rejects the determination of unconstitutionality and the request for nullification of the claimed provision of the law on family rights.

III

An enduring union of two persons may realize such values that it can claim legal acknowledgement on the basis of the equal personal dignity of the persons affected, irrespective of the sex of those living together. Equal treatment always has to be interpreted with respect to the social relations that are subjects of the legal regulation -- with special respect to whether children have been born in this union, or whether there have been previous or subsequent marriages, or whether the law evaluates the close personal relationship itself. Especially with respect to financial conditions and benefits that derive from the economic union, with respect to official incompatibility, and with respect to the exemptions and restrictions of criminal law, there is no constitutional foundation to justify that these provisions about domestic partnership should not also apply to an enduring union of persons of the same sex. On the contrary: a constitutional reason is required if the provision would legitimately discriminate on the grounds of sex between those living in such a union.

Several provisions in Hungarian law recognise domestic partnerships, and apply in part the legal provisions referring to marriage partners; but primarily they apply those provisions so as also to include relatives. The sole legal definition of domestic partnership can be found in art. 578/G(1) of the Civil Code. According to this definition, "the partners in a domestic partnership are a man and a woman living together in a common household and in an emotional and economic community, outside a marriage." It is a fact that a domestic

partnership typically exists between men and women and this is also what public opinion understands by this notion. But the legal recognition of a domestic partnership has an incomparably shorter history than that of marriage. Judicial practice began to recognise domestic partnerships in the 1950s and such partnerships were incorporated into the important legal rules, though, only between 1961 and 1977. The cohabitation of persons of the same sex, which in all respects is very similar to the cohabitation of partners in a domestic partnership -- involving a common household, as well as an emotional, economic and sexual relationship, and taking on all aspects of the relationship against third persons -- gives rise today, even if not to the same extent, the necessity for legal recognition just as it did in the fifties for those in a domestic partnership. The difference is that in a constitutional state, the problem also arises from the point of view of fundamental rights, and the Constitutional Court has the opportunity to fulfill its task of minority protection. The Constitution specially protects marriage and not domestic partnership. In the latter case, the question of the partners' sex emerges as a question of negative discrimination.

From the point of view of determining possible discrimination -- which is in opposition to the principle of equal dignity (Art. 70/A of the Constitution) -- it is decisive that the legal regulation of partners in a domestic partnership refers to the partners alone only in the most rare cases; it usually encompasses a certain circle of (close) relatives depending on the subject of the regulation. The Constitutional Court examined the current legal provisions in force which define rights or responsibilities with respect to the partner in a domestic partnership, and found that usually it is not relevant that the relationship is between persons of different sexes. When the law regulates domestic partnership at the same level with relatives, the cause of the provision is generally irrefutably supposed on the basis of the formal family law relations, or in the absence of formal relations -- like in the case of engaged couples or partners in a domestic partnership -- on the basis of the currently existing

emotional and/or economic relationship. The sex of partners and relatives can be significant if the provision is in respect of a common child or -- more rarely -- if it concerns a marriage with another person. If these exceptional cases do not apply, however, the regulation of partners in a domestic partnership and relatives is arbitrary. It thus violates human dignity, which conflicts with Art. 70/A of the Constitution if those who are of the same sex are excluded from among persons living in a common household and in an emotional and economic union. What is more, the provisions in question fulfill their task completely if they expand to cover these relationships as well. The rules of incompatibility (from officials in economic chambers and cooperative societies, through bodies of the local governments, to courts) are incomplete if they do not apply to persons of the same sex who live together according to the criteria of a domestic partnership. The principles on account of which one can refuse to give evidence or neglect to report a crime can be invoked in the case of persons in an intimate relationship irrespective of their sex. The benefits (social and social security) that can be given only on the basis of a domestic partnership cannot depend only on the sex of the two people living together.

The legislature has several options with respect to providing for all those who live in a relationship comparable to a domestic partnership, an equal legal standing in those legal relations where there is no constitutional reason for discrimination on the grounds of sex among those living in an intimate relationship. In order to achieve these aims, not only could it remove from art. 578/G(1) of the Civil Code the restriction on the concept that partners in a domestic partnership must involve only a relationship of a man and a woman, but it could also provide the same legal standing with a separate legal institution for those of the same sex. (An institution of this kind was the one accepted in Denmark in 1989 for homosexuals, called a "registered partnership.") Instead of these general solutions, the legislature could also re-examine all provisions applying to partners in a domestic partnership, and expand them

wherever the restriction to a heterosexual relationship has no foundation, and make each provision apply to all persons living in such an intimate relationship. The legal notion, currently in force, of partners in a domestic partnership is defined by the Civil Code. The unconstitutionality of this cannot be determined on its own but it depends on whether the distribution of rights and duties among those who are in the same situation is done in a manner that respects the right to equal human dignity -- that is, permitting equal treatment of persons and evaluating their points of view with like circumspection, attention, impartiality and fairness. The legislature can create a situation that is in harmony with the Constitution, while leaving untouched the legal notion of domestic partnership that is currently in effect. Thus the Constitutional Court did not decide on the constitutionality and the annulment of the definition in art. 578/G(1) of the Civil Code, but instead suspended its proceedings until 1 March 1996. If the legislature does not change the unconstitutional situation before this deadline, the Constitutional Court in the framework of the available subsequent norm control can create a situation that is harmonious with the Constitution through the constitutional review of the Civil Code's notion of domestic partnership or through expanding the review to all provisions dealing with domestic partnership. The Constitutional Court followed a similar proceeding in its Decision, *Dec. 15 of 1993 (III.12) AB (MK 1993/29)*.