Codruța Guzei-Mangu

The Beneficiaries of the Right to Marry under Romanian Law*

Abstract:
The issue of the beneficiaries of the right to marry under the Romanian legal framework on same-sex relationships and of those seeking to invoke in Romania the effects of a marriage entered into abroad is a modern day challenge in system that maintains the traditional notion that marriage is between a man and woman. In this paper we will present and analyse the Romanian legislation in relation to these issues, two decisions of the Romanian Constitutional Court ruled on this matter and the manner in which these decisions may influence a legislative development concerning same-sex marriages.
Keywords: right to marry, traditional marriage, same-sex marriage, right to private and family life, residence permit

I. Introduction

Romanian law maintains a traditional notion that marriage is between a man and woman. This is apparent in from a basic statutory requirement that a legally valid marriage under Romanian law is for the future spouses to be of different genders, i.e. male and female. In this paper we will address the legal framework of marriage in Romanian law from the perspective of the beneficiaries of the right to enter into a valid marriage. More specifically, the framework is viewed through the lens of two landmark decisions of the Romanian Constitutional Court on this matter: Constitutional Court Decision No. 534 of 2018 and Constitutional Court Decision No. 580 of 2016.

The analysis is structured in three parts. The first part presents the legal regime of marriage in relation to the substantive requirement of the gender difference between the future spouses. The second and third parts will be dedicated to the two decisions of the Constitutional Court and their relevance to the beneficiaries of the right to marry.

II. Different Genders: A Substantive Requirement for Marriage

Article 259 (1) of the Romanian Civil Code ("CC") defines marriage as "the freely consented union between a man and a woman, in accordance with the law." (Translation by author)

* *Codruța Guzei-Mangu*, Senior lecturer, Faculty of Law, West University of Timișoara, Romania; codruta.mangu@e-uvt.ro.

OER 4/2021, DOI: 10.5771/0030-6444-2021-4-453

https://doi.org/10.5771/0030-6444-2021-4-453
Generiert durch IP '172.22.53.54', am 18.08.2022, 21:33:01.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

It is readily apparent upon reading this legal definition that the Romanian legislator regulates the institution of marriage in its traditional form, with the condition of different genders being imperatively stipulated in the very definition of marriage itself. Article 259 (2) CC reiterates the importance of this condition in stating that "a man and a woman have the right to marry in order to found a family". At the same time, Article 258 (4) CC explains that in the Civil Code the term "spouses" means a man and a woman united by marriage. In the same sense, Article 277 CC expressly prohibits marriage between persons of the same sex or the equivalence of certain forms of cohabitation with marriage. Moreover, the same legal provision stipulates that marriages between persons of the same sex concluded or contracted abroad, either by Romanian citizens or by foreign citizens, are not recognised in Romania, and civil partnerships between persons of the opposite sex or of the same sex concluded or contracted abroad, either by Romanian citizens or by foreign citizens, are not recognised in Romania, the legal provisions on the freedom of movement on Romanian territory of citizens of the Member States of the European Union and the European Economic Area remaining applicable. It is therefore easy to see that Romanian law neither allows same-sex marriage nor the possibility of registering civil partnerships, both for different-sex couples and for same-sex couples.

Although this legislative approach is still justified on the basis of the margin of appreciation recognised to States in the matter of regulation regarding the beneficiaries of the right to enter into a marriage, it nonetheless becomes questionable in the context of the current case law of the European Court of Human Rights ("ECtHR") and its view on this subject.[1] We have in mind judgments such as *Schalk and Kopf v. Austria*,[2] *Valiantos and Others v. Greece*,[3] *Oliari and Others v. Italy*,[4] *Chapin and Charpentier v. France*,[5] and *Pajić v. Croatia*.[6] Thus, although the European Court of Human Rights does not in its case law require the signatory states to regulate the possibility of same-sex marriage, given that same-sex unions are not covered by Article 12 of the European Convention on Human Rights ("ECHR"), the Court nevertheless considers that it enjoys the protection of Article 8 and that of Article 14 ECHR, with regard to respect for family life and the prohibition of discrimination, which would require the signatory States to create a legal regime to protect the family life of same-sex couples and to give legal recognition to their relationship, the regulation of registered partnerships being a solution in this regard.[7]

Concerning the requirement of different genders, a particular problem arises for beneficiaries of the right to marry in relation to the situation of persons who have undergone a gender reassignment operation on the basis of a final court decision. Following the gender reassignment by medical procedure, pursuant to Article 43 (i) of

1 *M. Avram*, Drept Civil. Familia (Civil Law. Family), Bucharest 2016, p. 39.
2 Application no. 30141/04.
3 Application nos 29381/09 and 32684/09.
4 Application nos 18766/11 and 36030/11.
5 Application no. 40183/07.
6 Application no. 68453/13.
7 *Avram*, fn. 1, p. 40; *C. Hageanu,*Dreptul Familiei si Actele de Stare Civilă (Family Law and Civil Status Acts), Bucharest 2017, p. 28–29.

https://doi.org/10.5771/0030-6444-2021-4-453
Generiert durch IP '172.22.53.54', am 18.08.2022, 21:33:01.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

Law no. 119/1996 regarding the civil status documents,[8] mention shall be made regarding the change of sex on the civil status documents, including on the birth certificate of the person in question. As the birth certificate provides proof of gender, the requirement of different genders will be satisfied even if the gender of one of the parties was subsequently changed via surgery, i.e. without such gender reassignment and subsequent change to the legal documents the parties would in fact be of the same sex.[9] From a legal perspective, there is no prohibition in this respect in Romanian law as long as the difference of gender is proven by civil status documents. Thus, as it results from the ECHR case law in *Christine Goodwin v. United Kingdom*,[10] gender not being determined solely on biological criteria present at birth, a person who has undergone a gender reassignment operation is entitled to marry a person of the sex opposite to the one acquired through medical intervention.

The circumstances become more complicated if the person who had their gender changed through surgery was already married at the time of the procedure. In such a situation, one possible solution would be that the spouse who did not consent to the gender reassignment surgery would have the possibility of dissolving the marriage by divorce on the grounds that the marriage could not continue because of the fault of the spouse who had changed their gender. If there is no disagreement between the spouses in this regard, the question arises whether the marriage was entered into is by analogy a same-sex marriage. The Civil code does not provide an express solution to this question, therefore, some authors[11] consider that the marriage lapses, applying general rules in the absence of an express regulation in the matter, and others[12] propose the option that the date of the change in civil status is analogous to the "death" of one of spouses and thus the marriage is terminated.[13]

It is clear that the provisions of Romanian law regarding the beneficiaries of the right to marry are still of a traditional nature, allowing the conclusion of a valid marriage only between persons of different sex and expressly prohibiting the possibility of a same-sex marriage. In view of this conservative approach, this aspect of the Romanian legal system appears to contradict the case law and the view of the European Court of Human Rights on this matter. Consequently, it may be considered that aligning the Romanian legislation with the ECtHR perspective will soon require legislative intervention to create a legal system for the protection of same-sex unions. We will be able to see the trends in this regard in the presentation of two extremely important and relevant judgments of the Romanian Constitutional Court on this issue.

8 Republished pursuant to Article V of Emergency Ordinance no. 80/2011 amending and supplementing Law no. 119/1996 on civil status acts, published in the Official Gazette of Romania, Part I, no. 694 of 30.9.2011, approved with amendments and additions by Law no. 61/2012, published in the Official Gazette of Romania, Part I, no. 257 of 18.4.2012.

9 *Avram*, fn. 1, p. 41–42.

10 Application no. 28957/95.

11 *A. Benabent*, Droit civil: La famille (Civil Law: The Family), 11th ed., Paris 2003, p. 33, referring to *caducité*.

12 *J. Fr. Renucci*, Tratat de Drept European al Drepturilor Omului (Treaty of European Law of Human Rights), Bucharest 2009, p. 235.

13 *Avram*, fn. 1, p. 43.

https://doi.org/10.5771/0030-6444-2021-4-453
Generiert durch IP '172.22.53.54', am 18.08.2022, 21:33:01.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

III. Beneficiaries of the Right to Marry by reference to Constitutional Court Decision No. 580/2016

By Decision No. 580/2016,[14] the Romanian Constitutional Court ruled on the citizens' initiative to reform Article 48 (1) of the Constitution,[15] which regulates and protects the right to marry: "The family is founded on the freely consented marriage between the spouses, on their equality and on the right and duty of parents to ensure the upbringing, education and training of their children." The proposed legislation sought to replace the term "spouses" with "man and woman". According to paragraph (3) of the explanatory memorandum, replacing the term "spouses" with "man and woman" removes any "ambiguity that the use of the term 'spouses' in Article 48 (1) of the Constitution might create in the definition of the concept of 'family' and with regard to the relationship between 'family' and the fundamental right of men and women to marry and found a family". Paragraph (4) explains further that only "men and women'" enjoy the right to marry and found a family, the right to found a family being a fundamental right "for men and women, which they enjoy not individually but together." In this context, another point in the reasoning of the legislative initiative concerns the positive influence that the traditional family, which has as one of its essential aims the perpetuation of mankind, has on the demographic development of a society and on the problem of the increasing rate of children born out of wedlock.

In the justification of the legislative proposal, its promoters make reference and base their request on the provisions of Article 16 (1) of the Universal Declaration of Human Rights and Article 12 ECHR, which use the expression "man and woman" to designate the beneficiaries of the right to marry. Furthermore, they take into account that Article 258 (4) CC expressly regulates the notion of "spouses" as the man and woman united by marriage and that Article 259 (1) CC describes marriage as the freely consented union between a man and a woman. Nonetheless, a change at constitutional level is nevertheless deemed necessary as the Civil Code is not fundamental, like the Constitution, but rather organic. There is thus the perceived risk that the right of men and women to marry may be subject to (legislative) changes or interpretations in response to pressure that is incompatible with the healthy and sustainable development of society. This could alter the institution of the family, seen as "the natural and fundamental element of society", as provided for in Article 16 of the Universal Declaration of Human Rights.

At the same time, the initiators of the reform proposal build their motivation on the right that the European provisions give to the Member States, notably the exclusive competence to regulate in the matter of legal institutions specific to family law, civil status and, in this case, the institution of marriage. In this regard, the initiators of the legislative proposal invoke the case law of the Court of Justice of the European

14 Published in the Official Gazette of Romania, Part I, No. 857 din 27.10.2016, available at https://www.ccr.ro/wp-content/uploads/2020/10/Decizie_580_2016.pdf.

15 According to Article 150 of the Romanian Constitution, the initiative to revise the Constitution "may be initiated by the President of Romania at the proposal of the Government, by at least a quarter of the number of deputies or senators, as well as by at least 500,000 citizens with the right to vote.".

https://doi.org/10.5771/0030-6444-2021-4-453
Generiert durch IP '172.22.53.54', am 18.08.2022, 21:33:01.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

Union ("CJEU") and refer to the judgment in *Tadao Maruko*, where the Court "marital status and the benefits deriving therefrom are matters which fall within the competence of the Member States and Community law does not affect that competence"[16] and the judgment in *Römer*[17] in which the Court has maintained the same view, reinforcing the fact that, in matters of marital status of persons, the competence lies with the Member States.

Pursuant to Article 7 of Law no. 189/1999 on the exercise of legislative initiative by citizens[18] the Romanian Constitutional Court has the role of conducting a constitutional review limited to verifying the constitutional character of the initiative by reporting its compliance with the limits on the reform of the Constitution pursuant to Article 152 of the Constitution,[19] and a control of the legality of the legislative initiative. The Constitutional Court is therefore limited within its decision on such initiative to carrying out a control of a technical nature, without having the competence to carry out a control of expediency.

Analysing the citizens' legislative initiative, the Constitutional Court found that it meets the conditions laid down in Articles 150 and 152 of the Constitution, thus having a constitutional character and in compliance with the requirements in terms of its legality. Next, the Court ordered the communication of the decision to the initiators of the reform, the President of the Senate and its publication in the Official Gazette of Romania, Part I.

Based on the control of expediency undertaken by the Parliament pursuant to Article 151 of the Constitution, the Parliament adopted the reform proposal. Pursuant to Article 146 (i) of the Constitution, a referendum was organised for the purposes of approving or rejecting the revision of the Constitution.[20] The referendum took place in October 2018, placing the fate of the legislative proposal in the hands of the citizens. Pursuant to Art. 4 of Law No. 3/2000 on the organisation and conduct of the referendum,[21] two conditions must be met for the referendum to be validly organised and its result to be validated: a turnout of at least 30% of the electorate and for the

16 Case C-267/06 *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* ECLI:EU:C:2008:179, para. 59.

17 Case C-147/08 *Jürgen Römer v. Freie und Hansestadt Hamburg* ECLI:EU:C:2011:286, para. 38.

18 Republished in the Official Gazette of Romania, Part I, no. 516 of 8.6.2004, with subsequent amendments.

19 According to Article 152 of the Constitution, "(1) The provisions of this present Constitution concerning the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, the integrity of the territory, the independence of the judiciary, political pluralism and the official language may not be subject to reform. (2) Nor may a reform be made if it results in the suppression of the fundamental rights and freedoms of citizens or their guarantees. (3) The Constitution may not be reformed during a state of siege or state of emergency or in time of war.".

20 *A. Verteș-Olteanu*, 12 Teme de Drept Constituțional (12 Topics of Constitutional Law), Bucharest 2019, p. 81.

21 Republished in the Official Gazette of Romania, Part I, no. 3 of 22.2.2000.

https://doi.org/10.5771/0030-6444-2021-4-453
Generiert durch IP '172.22.53.54', am 18.08.2022, 21:33:01.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

validly expressed options to represent at least 25% of the electorate.[22] At the polls, voter turnout was 21.10%. Valid votes for the answer "YES" represented 91.56% of the number of participants, valid votes for the answer "NO" represented 6.47% of the number of participants; 1.97% of votes were invalid. It can thus be easily observed that the proposed reform did not pass because the turnout was lower than the 30% required by law. From the analysis of the resulting percentages, we can indeed observe that over 90% of voters voted in favour of reforming the Constitution by replacing the term "spouses" with "man and woman". However, it is more notable to observe that the vast majority of the electorate decided not to participate in the referendum. Whereas such conduct may be interpreted as a negative vote on the issue, it is perhaps also as an expression of the mentality of the Romanian society in relation to the issue and the necessity to make a change at constitutional level.

The citizens' initiative to reform the Constitution thus did not bear fruit as it was not validated through the referendum procedure. Consequently, the reference to "spouses" in Article 48 (1) of the Constitution remain unchanged. However, this does not entail any change regarding the beneficiaries of the right to marry, marriage can still only be validly concluded between a man and a woman, given that this condition is expressly regulated in the Civil Code.

IV. Beneficiaries of the Right To Marry with reference to Constitutional Court Decision No. 534/2018

In Decision No. 534/2018[23] the Constitutional Court ruled on the challenge of constitutionality raised with regard to the provisions of Article 277 (2) and (4) CC, namely: "Marriages between persons of the same sex concluded or contracted abroad, either by Romanian citizens or by foreign citizens, are not recognized in Romania", and "[t]he legal provisions on the freedom of movement on the territory of Romania of citizens of the Member States of the European Union and the European Economic Area remain applicable".

The case concerned a homosexual couple who, after marrying in Belgium in November 2010, sought to settle in Romania. The request for the registration of the Belgian marriage certificate was rejected, citing Article 277 (2) CC regarding the non-recognition of same-sex marriages concluded abroad by Romanian or foreign citizens. A negative reply was also received from the General Department for Immigration which, in response to a request for information on the procedure and conditions under which one of the spouses (a US national) could obtain residence in Romania, referred to the prohibition of transcription or registration of civil status certificates or extracts issued by foreign authorities regarding marriage between persons of the same sex or civil partnerships concluded or contracted abroad.

22 For detail on the referendum for the reform of the Constitution, see *I. Muraru and E. S. Tănăsescu*, Constituția României. Comentariu pe Articole (Romanian Constitution. Commentary on Articles), 2nd ed., Bucharest 2019, p. 1355–1356.

23 Official Gazette of Romania, Part I, No. 842 of 3.10.2018, available at https://www.lege-online.ro/lr-DECIZIE-534%20-2018-(205439)-(1).html.

https://doi.org/10.5771/0030-6444-2021-4-453
Generiert durch IP '172.22.53.54', am 18.08.2022, 21:33:01.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

The applicants argue that the refusal to recognise same-sex marriages legally concluded abroad violates the right to intimate, family and private life, and to discrimination on the grounds of sexual orientation. The applicants state that they formed an intimate and family life, in compliance with Belgian law, thus enjoying its recognition. Furthermore, they state that the fact that they have moved to Romania cannot change, on the one hand, the factual reality of their intimate and family life, and, on the other hand, the legal reality of their marriage, validly concluded in Belgium. Furthermore, the General Department for Immigration requires the applicant, *Robert Clabourn Hamilton*, to leave the territory of Romania, invoking in that regard the provisions of Article 277 CC concerning the non-recognition in Romania of same-sex marriages concluded abroad. Consequently, the two spouses cannot continue their family relationship on Romanian territory on equal terms with heterosexual persons in similar situations. They argue that there is no reasonable justification for creating a different legal regime for family and intimate relationships between persons of the same sex, including from the point of view of the freedom of movement of persons, since the case law of the European Court of Human Rights has stated that relationships established in a same-sex couple are also intimate and family relationships, like those of heterosexual couples. As a result of this situation, the applicants claim that the normative provisions stipulated in the Civil Code contradict the constitutional provisions protecting private, family and intimate life and with those enshrining equality between citizens, thus causing a violation of Article 14, in conjunction with Article 8 ECHR. The applicants also claim that this discriminatory treatment violates their rights guaranteed by Articles 4, 16 and 26 of the Romanian Constitution, namely those relating to the unity of the people and equality between citizens, the equality of rights for citizens and the right to private, family and private life. Thus, the applicants claim that the existence of such discriminatory treatment on the basis of sexual orientation is due precisely to the provisions of Article 277 (2) CC, which prohibits in Romania the recognition of marriages between persons of the same sex. This has the effect of denying those persons the rights deriving from EU Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[24]

In examining the constitutionality challenge, the Constitutional Court first examines the provisions of Directive 2004/38/EC in conjunction with those of the Charter of Fundamental Rights of the European Union and the recent CJEU and ECtHR case law concerning the right to family life. In that regard, the Constitutional Court refers to the decision in *O* in which the CJEU states that on a "literal, systematic and teleological interpretation of Directive 2004/38 that it does not establish a derived right of residence for third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national.".[25] On the other hand, the Constitutional Court points out that the CJEU held in its judgment that "where, during the genuine residence of the Union citizen in the host Member State, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38,

24 OJ L 158/77.

25 Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B.* ECLI:EU:C:2014:135, para. 37.

https://doi.org/10.5771/0030-6444-2021-4-453
Generiert durch IP '172.22.53.54', am 18.08.2022, 21:33:01.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that the citizen's family life in the host Member State may continue on returning to the Member of State of which he is a national, through the grant of a derived right of residence to the family member who is a third-country national."[26]

At the same time, the Constitutional Court points out that by the CJEU judgment in *Metock and Others*, the CJEU ruled that Article 3 (1) of Directive 2004/38 must be interpreted so that "a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State."[27]

The Constitutional Court further states that the CJEU has held that the concept of "spouse"' within the meaning of Article 2 (2) (a) of Directive 2004/38 is necessarily linked to family life and, consequently, to the protection conferred by Article 7 of the Charter of Fundamental Rights of the European Union and, pursuant to Article 52 (3) of the Charter, by Article 8 ECHR, the rights guaranteed by Article 7 of the Charter corresponding to those guaranteed by Article 8 ECHR. As a result, the Constitutional Court refers to the European Court of Human Rights ruling on the legal regime of same-sex marriages and points out that, in the view of the ECtHR, the possibility of the signatory States to allow same-sex marriage is consistently confirmed,[28] and that it is "artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8 [ECHR].".[29] The European Court of Human Rights has also confirmed that Article 8 ECHR requires States to provide same-sex couples with the opportunity to obtain legal recognition and legal protection of their couple.[30] The Constitutional Court relies on the ECtHR's view to show that the influence of the developments in the understanding of family life on the right of residence of non-EU nationals is clear and that even if Article 8 ECHR includes a general obligation to accept the settlement of non-EU national spouses or to authorise family reunification on the territory of a signatory State, the decisions which States may adopt in immigration matters may, in certain circumstances, result in interference with the exercise of the right to respect for private and family life protected by Article 8 ECHR. Therefore, by relying on other ECtHR judgments of the ECtHR,[31] the Constitutional Court points out that, in the view of the European Court, the different legal treatment of unmarried same-sex couples compared to unmarried different-sex couples, based solely on sexual orientation, constitutes discrimination prohibited under the ECHR. Although the protection of the traditional family may – under certain circumstances – constitute a legitimate purpose, neverthel-

26 Ibid. para. 54.
27 Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* ECLI:EU:C:2014:135.
28 *Chapin and Charpentier,* fn. 5, paras 38, 39 and 48.
29 *Schalk and Kopf,* fn. 2, para. 94.
30 *Oliari and Others*, fn. 4, para. 185.
31 *Pajić*, fn. 6, paras 59 and 84; *Taddeucci and McCall v. Italy*, application no. 51362/09, para. 89.

https://doi.org/10.5771/0030-6444-2021-4-453
Generiert durch IP '172.22.53.54', am 18.08.2022, 21:33:01.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

ess, by reference to the consequences which it entails, it is not sufficiently strong and convincing to justify the discrimination on grounds of sexual orientation.

Further, the Constitutional Court notes that, although it is clear from the case law of the European Court of Human Rights that States are under a positive obligation to provide same-sex couples with the possibility of obtaining legal recognition and legal protection of their relationship, Romania has not taken steps in this regard.

In light of this framework, the Constitutional Court of Romania acted prudently and decided to suspend the case and request the CJEU to give a preliminary ruling on some issues of interest for the case:[32] "Does the term "spouse" in Article 2(2)(a) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, include the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State?" and (2) "If the answer [to the first question] is in the affirmative, do Articles 3(1) and 7([2]) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, require the host Member State to grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a citizen of the European Union?" The Constitutional Court also submitted two further questions, however these are not at issue here as they were settled by the CJEU's answer to the two questions above.

The CJEU gave an affirmative answer to the first two questions, thereby stating Article 21 (1) TFEU must be interpreted "as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38." In order to answer in this way, the CJEU specified that by the notion of "spouse" provided by Article 2 (2) (a) of Directive 2004/38, refers to a person related to another person by marriage and is a gender-neutral notion and is therefore likely to include the same-sex spouse of the EU citizen concerned. The CJEU also pointed out that a refusal by the authorities of a Member State to recognise the marriage of a non-EU national to an EU citizen of the same sex, in order to grant a secondary right of residence to a non-EU national, is liable to impede the exercise of that citizen's right to move and reside freely within the territory of the Member States (Article 21 (1) TFEU). Restrictions may be imposed only if they are based on objective considerations of general interest and are proportionate to the legitimate objective pursued by national law, which, as the CJEU pointed out, is not the case in relation to the situation of same-sex marriage, since "an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned".[33]

32 Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* ECLI:EU:C:2018:835.

33 Ibid. para. 46.

https://doi.org/10.5771/0030-6444-2021-4-453
Generiert durch IP '172.22.53.54', am 18.08.2022, 21:33:01.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

By requesting preliminary clarifications from CJEU, the Constitutional Court has proceeded in this manner not only as a matter of prudent conduct but also in order to give legal weight to the judgment it will deliver on the constitutionality challenge. It did so knowing that the subject covered by the constitutionality challenge is as important as it is sensitive from both a legal and social perspective.

In the light of the CJEU's decision, the Constitutional Court decided to use the rules of EU law set out in Article 21 (1) TFEU and Article 7 (2) of Directive 2004/38, in compliance with the provision laid down in the two decisions of the Constitutional Court concerning the use of a rule of EU law in the review of constitutionality, as an interposed rule to the reference rule.[34] Thus, from the point of view of the requirements laid down in the two decisions of the Constitutional Court, it considers that the rules of EU law contained in Article 21 (1) TFEU and Article 7 (2) of Directive 2004/38 have both a precise and unequivocal meaning, clearly established by the CJEU, and constitutional relevance, since they concern a fundamental right, namely the right to private, family and private life.[35]

Consequently, taking into account the view of the European Courts on the interpretation of European provisions, the Constitutional Court states that the relationship of a same-sex couple falls under the notions of private life and family life, as well as the relationship between a couple of different sexes, and, as a result, enjoys the protection of the rights and guarantees offered by Article 7 of the Charter of Fundamental Rights of the European Union, of Article 8 ECHR and of Article 26 of the Romanian Constitution.

For these reasons the Constitutional Court held that the provisions of Article 277 (2) CC may not be used as a legal basis for refusing to grant the right of residence in Romania to a spouse who is a national of an EU Member State or of a non-EU country, who is a person of the same sex and who has been legally married in another EU Member State, with a Romanian national who resides in Romania, or with a national of an EU Member State who has the right of residence in Romania, on the ground that Romanian national law does not provide for or recognise same-sex marriage.

Based on the arguments set out above, the Constitutional Court accepted the constitutionality challenge and held that the provisions of Article 277 (2) and (4) CC are constitutional only if they allow the right of residence on the territory of the Romanian state, under the conditions stipulated by European law, to spouses (citizens of EU Member States and/or citizens of non-EU countries) from same-sex marriages concluded or contracted in an EU Member State. The way in which the Constitutional Court ruled takes the form of a partial admission of unconstitutionality or one with reservation of interpretation,[36] namely that the text of the law in question remains in force,

34 Decision No. 668 of 18.5.2011, published in the Official Gazette of Romania, Part I, no. 487 of 8.7.2011, and Decision No. 921 of 7.7.2011, published in the Official Gazette of Romania, Part I, no. 673 of 21.9.2011.

35 Decision No. 534/2018, fn. 23, para. 40.

36 For details on the specifics of this type of Constitutional Court decisions, see *M. Criste, A. Verteș-Olteanu*, Judicial Review of Constitutionality and Politics in Romania, a Relationship of Mutual Conditioning, Revista Română de Drept Comparat 2|2017 p. 207 et seq., 302, https://www.ceeol.com/search/article-detail?id=678998, 22.10.2021.

https://doi.org/10.5771/0030-6444-2021-4-453
Generiert durch IP '172.22.53.54', am 18.08.2022, 21:33:01.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

but only as long as it is interpreted in the sense that the Constitutional Court has indicated in the present decision.

V. Conclusions

By presenting the decisions of the Constitutional Court in relation to the general legal framework regarding the beneficiaries of the right to enter into a valid marriage in Romania, we have strived to present the current state of affairs in relation to this issue and the emerging trends on the level of national case law in order for these national (and European) judicial solutions, together with the social perspectives, to generate a new legal framework regarding the beneficiaries of the right to marry in Romania.

We believe that the two decisions of the Constitutional Court are extremely evocative in order to describe the steps that Romanian courts are taking towards a legislative evolution in the recognition of the rights of same-sex couples in relation to the institution of marriage in Romania, as well as the views and mentality of Romanian society in relation to this issue. While the decision of the Constitutional Court on the citizens' legislative initiative was purely technical in nature as the Court was restricted to verifying compliance with the limits imposed by the Constitution rather than controlling the content, the Romanian electorate ultimately played an essential role in relation to the fate of the legislative initiative. By not showing up at the polls they leave room for the interpretation that their conduct reflects a negative vote on the issue subject to referendum, thus neutralising the potential effects of the legislative initiative and giving a glimpse of the social mentality on this matter. In its second decision, the Constitutional Court took into account the case law and European recommendations on the subject in order to deliver an extremely well reflected and balanced decision. This decision is likely to fall within the limits marked by the legal framework, yet by acknowledging a right of residence in an EU Member State, offers a form of protection and recognition of the rights of those who are in a same-sex relationship.

In our opinion, these steps taken by the Romanian judiciary regarding the evolution and the legislative amendment in relation to the subject under analysis are essential in what we believe that, in the future, will need to materialise in a legislative change that will provide a legal framework for the protection and recognition of the effects of same-sex relationships. We believe that this is a necessary measure in order to align the Romanian legal system with the view of the European courts and that of most of the EU Member States on the prerogatives of same-sex persons in relation to the institution of marriage or, at least, to that of other legal forms or constructions assimilated to it.

https://doi.org/10.5771/0030-6444-2021-4-453
Generiert durch IP '172.22.53.54', am 18.08.2022, 21:33:01.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.