

Marriage at a Crossroads in Romania

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ROMANIA IS AT A MARRIAGE CROSSROADS. On the one hand, Romania will hold a referendum in the spring of 2017 to constitutionally enshrine marriage as the union of one man and one woman. The petition for the referendum received the most support of any so far in Romania's history as a democracy, and it was unanimously approved by the Romanian Constitutional Court.

On the other hand, the same Romanian Constitutional Court has prompted a “European *Obergefell v. Hodges*” case, having referred preliminary questions to the Court of Justice of the European Union (CJEU) relating to the concept of “spouses” in European Union (EU) free movement legislation. If the CJEU interprets “spouses” as including same-sex partners, then all 28 Member States of the European Union would be obliged to recognize same-sex “marriages” contracted abroad, even if their domestic legislation as it currently stands does not allow them. In the long term, the decision of the CJEU would render the Romanian referendum moot as it may introduce same-sex “marriage” through the back door in all 28 EU Member States.

How could such diverging actions be possible?

Legal Overview

The areas of marriage and family are largely regulated by the Romanian Constitution and the Civil Code.

Article 48 (1) of the Romanian Constitution states: “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.”

The drafters’ intention to include “man and woman” in the definition of “spouses” is illustrated by the Civil Code, which was drafted after the Constitution and which speaks, in Article 258 (4), of “the man and the woman united through marriage.” Moreover, Article 259 (1) of the Civil Code states that marriage is “the freely consented union between one man and one woman.” In addition to defining what marriage *is*, the Civil Code also defines what marriage *is not*: Article 277 (1) of the Civil Code emphasizes that “marriage shall be prohibited between persons of the same sex.”

Furthermore, Article 277 (2) of the Civil Code states that Romania shall not recognize same-sex “marriages” contracted abroad (either by Romanian or foreign citizens). In accordance with Article 277 (3), the same is applicable to civil partnerships.

Article 277 (4) of the Civil Code emphasizes that the legal provisions for EU citizens, regarding the free movement of persons in the territory of Romania, are applicable.

These provisions should be seen in the light of international and European human rights conventions and related jurisprudence, which make clear that the competence to define and regulate marriage lies with Member States.

In the words of the European Court of Human Rights (ECtHR), “the question whether or not to allow same-sex marriage is left to regulation by the national law of the contracting state.”¹ Furthermore, States “enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition” of same-sex relationships, and its differences concerning the rights and obligations conferred by marriage.² The reason behind this is that “marriage has deep-rooted social and cultural connotations which may differ largely from one society to another.”³ The ECtHR has consistently held that the European Convention on Human

1. *Schalk and Kopf v. Austria* (Application no. 30141/04), June 24, 2010, para 61.

2. *Chapin and Charpentier v. France* (Application no. 40183/07), June 9, 2016, para 48.

3. *Schalk and Kopf v. Austria*, para 62.

Rights (ECHR) does not guarantee either a right to or a corresponding obligation on Member States to introduce same-sex “marriage.”⁴

The jurisprudence of the CJEU has also confirmed this.⁵ The EU constitutional framework means that such legislation *must* respect national competence in this area, and this is evident from the language permeating the relevant Directives and Regulations.⁶

A Tale of Two Developments

The citizens’ initiative to enshrine natural marriage in the Constitution of Romania was initiated by the Coalition for Family (Coalitia pentru Familie), an alliance of pro-family Romanian organizations, and was supported by a number of prominent public figures.⁷

The Coalition for Family filed a proposal for a constitutional amendment, seeking to replace the word “spouses” in the Constitution of Romania with “one man and one woman.” The initiative’s stated goal is to bring clarity and coherence to Romanian laws by fully aligning the constitutional regulation of marriage with the definition given by the Civil Code.

The wording of Article 48 (1), as proposed by the Coalition for Family, is: “A family is established through the free willed marriage between *one man* and *one woman*, and is based upon their equality and their right and duty to provide for the raising, the education and the training of children.”

The amendment, which was supported by three million citizens, was registered at the Romanian Senate on May 23, 2016. Subsequently, it was submitted for consideration to the Constitutional Court, which is

4. *Schalk and Kopf v. Austria*, paras 61-62, *Hämäläinen v. Finland* (Application no. 37359/09) July 16, 2014, *Chapin and Charpentier v. France*, para 39..

5. CJEU *Römer* case (C-147/08), para 38, *Maruko* case (C267/06), para 59, *Parris* case (C-443/15), para 59.

6. EU Directive on the Free Movement of Persons, para 6 of the recital, Article 3 (2); Council Directive 2003/86/EC of September 22, 2003 on the right to family reunification, para 10. Although the Directive on the right to family reunification does not apply to the *Coman* case (as it involves an EU citizen), it is relevant insofar as it reflects the EU approach to subsidiarity and national competence in matters concerning family and marriage.

7. For more information, see the website of the Coalition for Family, accessed February 9, 2017, <http://coalitiapentrufamilie.ro/>.

required to confirm its constitutionality.

Awaiting the decision of the Constitutional Court,⁸ advocates for same-sex “marriage” claimed that the citizens’ initiative was unconstitutional and undemocratic, that it constituted a “tyranny of the majority,” and that it illegitimately restricted fundamental rights, such as the right to marry and the right to private life. Although until this time such advocates had claimed not to be interested in advancing same-sex “marriage,” the press release of the twelfth Bucharest Pride Parade alleged that the right to family life was a universal human right, which was being infringed upon by the three million citizens who had signed the petition for a referendum.⁹ MozaiQ, an NGO recently established in Romania, publicly called upon the authorities to take steps towards the legalization of same-sex “marriages” and civil partnerships.¹⁰

On July 20, 2016, the Constitutional Court of Romania unanimously ruled that the citizens’ initiative was constitutional, but the reasoning of the decision followed only on October 14—a delay of over a month longer than the time prescribed by law.¹¹ Responding to the claim that the initiative might infringe upon the universal right to marry and restrict the right to marry on the part of same-sex couples, the reasoning, which is worth repeating at length, outlined:

[T]he Court concludes that [the proposal] does not remove, eliminate or annul the institution of marriage . . . replacing the phrase “between spouses” with “between a man and a woman” merely clarifies the

8. ADF International sent *amici curiae* briefs to the Constitutional Court of Romania in both the citizens’ initiative and in the *Coman* case. “Documente pentru dezbateri și inițiative publice,” Coaliția pentru Familie, accessed February 15, 2017, available at <http://coalitiapentrufamilie.ro/documente/>.

9. “Luni începe festivalul Bucharest Pride 2016, care se va încheia sâmbătă cu Marșul Diversității,” Hotnews, accessed February 10, 2017, available at <http://www.hotnews.ro/stiri-esential-21094440-luni-incepe-festivalul-bucharest-pride-2016-care-incheia-sambata-marsul-diversitatii.htm>.

10. Marin, “Asociația MozaiQ cere recunoașterea legală a căsătoriilor și parteneriatelor civile între persoane de același sex,” Elle Romania, accessed February 20, 2016, available at <http://www.elle.ro/lifestyle/asociația-mozaiq-cere-recunoașterea-legală-casatoriilor-si-parteneriatelor-civile-intre-persoane-de-acelasi-sex-482107/>.

11. According to Law 47/1992, Article 60 (1), the prescribed time frame is 30 days. The Constitutional Court offered no explanation for the delay in the reasoning.

exercise of the fundamental right to marriage by expressly stating that this is to be contracted between partners of different biological sexes. This was actually the original meaning of the text. In 1991, when the current Constitution was adopted, marriage was seen in Romania in its traditional meaning as the union of one man and one woman. This idea is also supported by the subsequent evolution of family law in Romania and by the systematic interpretations of the constitutional provisions. Thus, Article 48 of the Constitution defines the institution of marriage correlating it with child protection, both for children “outside” and “within” marriage. It is obvious, therefore, that the constitutional lawmaker based its conception of marriage on the biological component, which has undoubtedly been regarded as a union between a man and a woman, since only through such a union can children be born, whether within or outside of marriage . . .¹²

Despite this relatively uncontroversial reasoning, the unexpected and unexplained delay in the drafting of the reasoning made it impossible for the marriage referendum to be organized to coincide with the parliamentary elections in December 2016. This is because, in the Romanian legal system, a referendum prompted by a citizens’ initiative needs to go through a number of strenuous steps: after the initiative is approved by the Constitutional Court, it is examined by the Juridical Committees and Plenaries of both the Senate and the Chamber of Deputies, which need to approve it by a two-thirds majority. Had the Constitutional Court delivered its reasoning in the prescribed time frame, the referendum could have been held at the same time as the parliamentary elections, which would have likely ensured the turnout threshold of 30% was met.

In light of these delays, the expected date of the referendum is now April 2017, a date chosen by the Coalition for Family in concert with the three major political parties including both the socialists (PSD) and the liberals (PNL and ALDE).

The second initiative relating to marriage refers to the recognition of same-sex “marriages” contracted abroad. The two complainants are Mr. Clai Hamilton, an American citizen, and Mr. Relu Adrian Coman,

12. All the translations from Romanian to English used by this paper are the author’s.

a Romanian citizen. The two have been engaged in a long-term relationship, and in 2010 contracted a civil marriage in Belgium, where it is possible for two persons of the same sex to enter into a legally-recognized “marriage.” The two applicants have asked that the Romanian state recognize the “marriage” contracted in Belgium so that Mr. Hamilton may receive a permit to legally reside in Romania.

The complainants’ application relies on the assumption that the notion of “spouses,” under Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States (EU Directive on the Free Movement of Persons), as well as the Romanian Constitution, includes same-sex couples. According to this interpretation, the Civil Code provisions forbidding the recognition of same-sex “marriages” contracted abroad are unconstitutional and not in accordance with EU law.

This line of reasoning is in opposition to that of the Coalition. The Coalition seeks to strengthen marriage as the union of one man and one woman in the Constitution of Romania by explicitly aligning it with the Civil Code. Conversely, the *Coman* case relies on a presumed normative conflict and seeks to repeal the provisions of the Civil Code which forbid the recognition of same-sex “marriage.”

The proceedings began in 2013, and it took almost two years to determine which court was competent to hear the case. The lower tribunal in Bucharest, which was eventually deemed competent, referred the case to the Constitutional Court in December 2015 on the grounds of a presumed normative conflict between the Civil Code and the Constitution as interpreted in light of the EU Directive on the Free Movement of Persons.

Although the Constitutional Court initially announced that it would rule on both the citizens’ initiative and the *Coman* case on the same date (July 20, 2016),¹³ it unanimously approved the former and postponed the

13. The debates of July 20, 2016 before the Constitutional Court are partly available here: “Curtea Constituțională Dezbate Două Spețe Privind Familia,” PrivescEU, accessed February 9, 2017, available at <https://www.privesc.eu/arhiva/68181>. The National Council against Discrimination supported the same-sex couple. The Romanian Government recommended the Constitutional Court to dismiss the case.

latter. This was the first postponement in a series of three, in which the Constitutional Court was at pains to justify the delay in delivering a decision. To do so, the Constitutional Court either relied on the complexity of the case and the need to hear the applicants once again,¹⁴ or the exigency of considering a referral to the CJEU (a historical first).¹⁵ Not even on November 29, when the Court finally decided to submit preliminary questions to the CJEU,¹⁶ did the judges mention what their exact questions or issues were.

Although the preliminary questions are not yet publicly available,¹⁷ they most likely relate to the constitutionality of the Civil Code provision banning the recognition of marriages contracted abroad by same-sex couples, in conjunction with the legal provisions which state that freedom of movement is guaranteed to all EU citizens. This line of reasoning has already been clearly emphasized by ILGA Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association):

[R]estricting the notion of “spouse” to opposite-sex spouses amounts to discrimination on the grounds of sexual orientation; the prohibition of such discrimination is enshrined in the preamble to the Directive, which—even though not binding—the CJEU will take into account when interpreting the Directive.¹⁸

In accordance with Article 267 of the Treaty on the Functioning

14. Stoica, “CCR amână, pentru 29 noiembrie, dezbaterile pe sesizarea referitoare la recunoaşterea căsătoriilor dintre persoane de acelaşi sex,” Agerpres, accessed February 9, 2017, available at <http://www.agerpres.ro/justitie/2016/10/27/ccr-amana-pentru-29-noiembrie-dezbaterile-pe-sesizarea-referitoare-la-recunoasterea-casatoriilor-dintre-persoane-de-acelasi-sex-16-29-30>.

15. Up until now, the Romanian Constitutional Court had never submitted a referral to the CJEU.

16. In accordance with Article 267 TFEU, Member States’ national judges can make a reference when there are questions on the interpretation or validity of EU Law. National courts of the final resort with no judicial remedy are bound to make a reference to the CJEU for a preliminary ruling.

17. “Case-law of the Court of Justice,” InfoCuria, accessed February 9, 2017, available at <http://bit.ly/2ltUpll>

18. Piotr Bakowski *et al.*, “The rights of LGBTI people in the European Union,” 8, EPRS, accessed February 9, 2017, available at <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-557011-Rights-LGBTI-people-EU-FINAL.pdf>.

of the EU (TFEU), the decision of the CJEU is binding on all of the national courts of all Member States. This means that the interpretation of “spouses” in the EU Directive on the Free Movement of Persons (whether it ultimately strengthens or redefines marriage) will become mandatory across the EU from the moment that it is delivered by the CJEU. Following that, the Romanian Constitutional Court will ultimately need to rule on the constitutionality of the Civil Code provisions which were challenged in the *Coman* case, and will then refer the case back to the lower tribunal. Whatever the outcome of the *Coman* case may be at the national level in Romania, the greatest repercussions will be seen at the level of EU law.

If the notion of spouses is interpreted by the CJEU to include same-sex couples, then all Member States of the EU may be required to recognize same-sex “marriages” contracted abroad. This would erode national competence in the area of marriage and family and would be the first step in regulating same-sex “marriage”: once cross-border recognition is allowed, there is no logical stopping point.

How Did the Two Separate Developments Come About?

If the law is clear on the definition of marriage, subsidiarity, domestic competence, and limits to EU power, how is it possible that the same Constitutional Court unanimously upheld the initiative to strengthen marriage in the Constitution of Romania, and yet had doubts regarding the concept of “spouses” in the EU Directive on the Free Movement of Persons which undoubtedly impacts the concept of “spouses” domestically?

A couple of reasons can be derived from the public statements triggered by these two initiatives. On the one hand, the understanding of marriage as the union of one man and one woman in the Romanian legal order is clear. This has been explicitly stated by the judges of the Constitutional Court in the reasoning in the citizens’ initiative decision. It has also been supported by the largest expression of democratic will, outside of an actual election, in the history of Romania.

At the same time, one should not overlook the hostile political and media environment within which the citizens’ initiative found itself. Although the mainstream media and politicians did not initially engage

with the issue, it became more and more difficult to ignore. Even with the scarce opportunities to publicize—the Coalition’s website, social media, and a number of conservative platforms—the citizens’ initiative, or “the longest letter to ever be addressed to Parliament,”¹⁹ could not be overlooked. When the issue became a topic for political debate, however, the public reactions on the part of politicians were negative on the whole. Statements made from the upper echelons of the political establishment opposed, criticized, or misrepresented the citizens’ initiative. When asked about the Coalition for Family, the President of Romania said that he belonged to an ethnic and religious minority and that “it is wrong to listen to and follow the path of *religious fanaticism*” as opposed to openness and tolerance toward one another.²⁰ Less than a month later, when he was given the opportunity to clarify his position on the initiative, the President said that he stood by his words. He also mentioned that it was important to be “mindful” of initiatives to change the Constitution on the topic of family. “Social peace can be obtained only through compromise . . . between society and the church and between the different groups in society.” He also said that, in his opinion, “although the topic was raised with many signatures, around three million, and has important supporters, it is not a topic which has penetrated Romanian society and statements made by politicians have not managed to significantly move voters.”²¹

Ms. Raluca Prună, Minister of Justice, speaking at a symposium on November 1, 2016 dedicated to tolerance and anti-discrimination, referred to “extremist movements . . . promoting traditional values in an extreme way . . . attempts to legitimise, by way of attachment to

19. Apostol and Marinescu, “Coaliția pentru familie a depus la Parlament cele 3 milioane de semnături pentru revizuirea Constituției,” Active News, accessed February 8, 2017, available at <http://www.activenews.ro/stiri-social/Coalitia-pentru-familie-a-depus-la-Parlament-cele-3-MILIOANE-de-semnaturi-pentru-revizuirea-Constitutiei-Reprezentam-trei-milioane-de-romani-care-doresc-ca-familia-sa-fie-formata-dintre-un-barbat-si-o-femeie-133439>.

20. Ionescu, “Klaus Iohannis se declară împotriva fanatismului religios,” Adevărul, accessed February 9, 2017, available at <http://www.digi24.ro/stiri/actualitate/social/patriarhia-ii-raspunde-lui-klaus-iohannis-pe-tema-fanatismului-religios-592474> (emphasis added).

21. Peia, “A fi tolerant nu înseamnă a fi tăntălău,” Agerpres, accessed February 8, 2017, available at <https://www.agerpres.ro/politica/2016/11/09/iohannis-a-fi-tolerant-nu-inseamna-a-fi-tantalau-22-45-26>.

traditional values, what is in fact the rejection of somebody else's fundamental rights—for instance, the right to marry for all.”²²

At the same event, Cristian Pârvulescu, the dean of the Department of Political Science at the National School of Political and Administrative Studies in Bucharest, said: “Three million people signed a petition to change the Constitution in a restrictive way . . . and our political class, with its famous courage, immediately gave way to the pressure of the mob.”²³

The three million supporters of the Coalition were labelled as “three million stupid people” by one of the largest print newspapers in Romania.²⁴ The media advanced the idea that Romanians had been tricked into signing the petition, that they did so without knowing what they were really signing, and that the Church had “used” its powers to suppress minority opinion.

Even if the three million had intentionally, in an informed manner, supported marriage, they still were not to be considered a democratic voice. ACCEPT, the organization representing the complainants in the *Coman* case, claimed that the citizens' initiative represented “hate speech,” and that the three million signatures were an expression of “hatred.”²⁵

Under the argument that such “hate speech” is conducive to violence and should therefore be banned, Iustina Ionescu, the lawyer of the applicants in the *Coman* case, opposed the idea of a referendum organized at the same time as the parliamentary elections, calling it a “social danger”: “Homophobic sentiments, that are pervasive in our society, will be raised to the level of political and electoral discourse. The electoral campaign will be turned away by these messages and the LGBT persons will be

22. Florea, “Din 2002 avem 16 persoane trimise în judecată pentru rasism și xenofobie; e foarte puțin,” Agerpres, accessed February 8, 2017, available at <http://www.agerpres.ro/justitie/2016/11/01/raluca-pruna-din-2002-avem-16-persoane-trimise-in-judecata-pentru-rasism-si-xenofobie-e-foarte-putin-16-14-26>.

23. *Ibid.*

24. Iaru, “Trei milioane de proști,” Adevărul, accessed February 9, 2017, available at http://adevarul.ro/news/societate/trei-milioane-prosti-1_574461a25ab6550cb83fca10/index.html.

25. “Three million Romanians are mobilized by hatred against LGBT people,” ACCEPT, accessed February 9, 2017, available at <http://www.acceptromania.ro/blog/2016/05/23/trei-milioane-de-romani-mobilizati-de-ura-fata-de-persoane-lgbt>.

made the scapegoat for all Romanians' problems."²⁶

When asked what the best response would be to "the religious right" support of natural family, the couple's lawyer replied to simply block the referendum, as it does not bring anything new to the legal regulation of marriage and the ban on same-sex "marriage." At the same time, the very case that Iustina Ionescu is litigating seeks to introduce same-sex "marriage" through the back door by using the freedom of movement argument against the national competence of Member States to regulate marriage and family. By so doing, marriage would ultimately be redefined.

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In this context, under the pressure of political statements and the media, the judges might have wanted to be "on the safe side" with respect to the ruling. Upholding the citizens' initiative was respectful of the Romanian and European legal order and of the unprecedented democratic expression. A different outcome would have contradicted Article 2 of the Constitution of Romania, which states that "national sovereignty appertains to the Romanian people, who express it through . . . referendum."

On the one hand, referring preliminary questions to the CJEU might have been seen as a way to respond to the statements coming from the highest levels of the political establishment and to the media portrayals of the citizens' initiative. Given that the Constitutional Court had already, rather uncommonly, delayed the decision several times, it might have considered the CJEU referral as the only means to further delay a decision on what was perceived to be a very controversial issue.

On the other hand, suspending the case for at least one year would allow sufficient time for the citizens' initiative to go through the required steps in the Romanian Parliament. It would also allow the judges, if they wished, to clarify once and for all the dispute over what marriage is. This is a historic moment: it is a challenge, but also an opportunity.

If the applicants' case is accepted, however, it would undermine domestic legislation and, implicitly, EU and ECHR jurisprudence and

26. Paletta, "ILGA meets . . . Adrian Coman and Clai Hamilton," ILGA, accessed February 8, 2017, available at <http://ilga.org/ilga-meets-adrian-coman-clai-hamilton-romania>.

legislation, which highlight the competence of Member States in this field.

The marriage crossroads that Romania is at is in some ways very simple. It entails either a strengthening of marriage as the union of one man and one woman in the Constitution of Romania (the initiative of the Coalition for Family), or a weakening and erosion of this institution by recognizing same-sex “marriages” contracted abroad (the *Coman* case).

While it may be simple, there is still much at stake. Marriage is the fundamental building block of all human civilization—the smallest and most essential group unit of our society.

Finally, the decision will have enduring implications because the *Coman* case has the potential to undermine the democratic process by validating institutions which the direct democratic process does not support. Not only is this relevant to Romania, but also to Europe as a whole. The *Coman* case has the potential to redefine marriage across the continent. This would erode national competence in the area of marriage and family, and would be the first step towards legislating for same-sex “marriages” on a pan-European scale.

It is unfortunate that the Constitutional Court devolved the same question to two decision matters. Ultimately, since it was not a question for the CJEU, it would have been better for the Constitutional Court to await the outcome of the referendum.

Since it has now gone to the CJEU, it is not clear what the path ahead looks like. What is clear, however, is that, in trying to avoid ruling on a controversial issue, the Constitutional Court has set up a very rocky road ahead.

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