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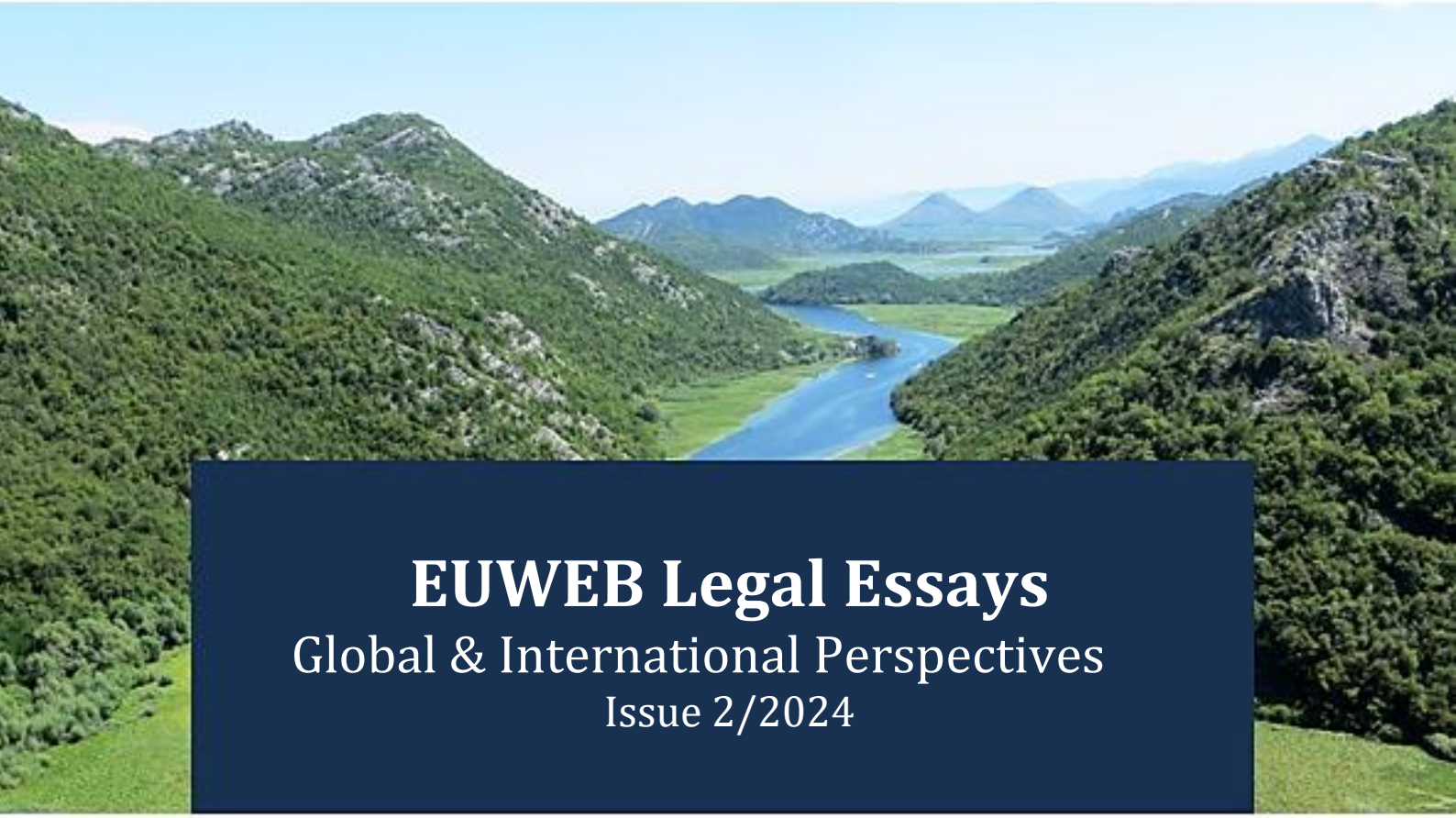

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THE CONCEPT OF *FAMILY* IN ROMANIAN LEGISLATION CONSTITUTIONAL PERSPECTIVE AND INFLUENCES ON THE CRIMINAL PROCEDURE

By Marieta Safta[*]

1. Introduction

More than three decades have passed since the adoption of Romania's democratic Constitution in 1991, providing an opportunity to reflect on the regulatory content of the Fundamental Law, which has undergone significant reconfiguration.

We consider both the 2003 revision of the Constitution and, most importantly, the shaping of the law through legal precedents set by the Constitutional Court of Romania (referred to as the CCR). This has often been influenced by the case law of the European Court of Human Rights (referred to as the ECHR) and, more recently, the Court of Justice of the European Union (referred to as the CJEU). The "living law" theory, often invoked by the CCR in its decisions, has expanded the boundaries of many constitutional concepts, with consequences in terms of the regulation of fundamental social relationships[1].

One concept that has changed significantly is that of *family.* We began by examining the concept of family and family relationships in accordance with the Constitution of Romania at a conference in early 2021[2]. In this current study, we will expand on the

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[1] See Decision No. 841 of 10 December 2015, published in the Official Gazette no. 110 of 12 February 2016, Decision No 276 of 10 May 2016, published in the Official Gazette no. 572 of 28 July 2016, paragraph 19; according to the CCR, "*Far from being just a doctrinal philosophy, the "living law concept*" theory (*diritto vivente*) is widely accepted and applied both at the level of the Constitutional Courts and at the level of the European Court of Human Rights. For example: Judgment of 7 July 1989, Application No. 14038/88, *Soering v. the United Kingdom* "*the Convention is a living instrument which must be interpreted in the light of present-day conditions*"; Judgment of 29 April 2002, Application No. 2346/02, *Pretty v. the United Kingdom* "*The Court shall have a dynamic and flexible approach regarding the interpretation of the Convention, which is a living instrument, any interpretation having to be in line with its fundamental objectives and the coherence of the system for the protection of human rights*" Decision No 356 of 25 June 2014, published in the Official Gazette no. 691 of 22 September 2014, paragraph 31.

[2] M. SAFTA, *The concept of «Family» and family Relationship according to the Romanian Constitution*, in M. TĂBĂRAȘ, F. MAXIM, M. DINU (coord.), P*roceedings of the international conference of law, European studies and international relations. Family and family heritage. Challenges and national, European and international legislative perspectives*, Bucharest, 2021, pp. 66-77.

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previous analysis, referencing more recent interpretations from the CCR and ECHR, in an effort to identify the current constitutional framework of the family in Romania. This will cover its different dimensions and the resulting impact on the regulation of various legal aspects of family life.

2. Origins. Family and Marriage at the Time of the Adoption of the Romanian Constitution

The Constitution of Romania includes two main texts concerning the family and family life, contained in Title II, dedicated to fundamental rights, freedoms and duties. We are referring to Article 26 – *Personal and family privacy,* according to which "*(1) The public authorities shall respect and protect the intimate, family and private life. (2) 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*" and to Article 48 - *Family,* according to which "(*1) 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. (2) The terms for entering into marriage dissolution and nullity of marriage shall be established by law. Religious wedding may be celebrated only after the civil marriage. (3) Children born out of wedlock are equal before the law with those born in wedlock*".

As regards the regulatory content of these texts, the Constitutional Court made a distinction between *the concepts of "family life"* and *"marriage"*, considered by the constitutional judges as necessary given the marginal names of the reference constitutional texts. Thus, the Court held that Article 48 – *Family* "*enshrines and protects the right to marriage, and the family relationships resulting from marriage, distinct from the right to family life/respect for and protection of family life, with a wider legal content enshrined and protected by Article 26 of the Constitution, (...) The notion of family of family life is a complex one, including even factual family relationships, distinct from the family relationships resulting from marriage, the importance of which has made the framers to emphasize, distinctly, in Article 48, the protection of family relationships resulting from marriage and from the relationship between parents and children*"[3].

As for the meaning of the concepts used by the original framer, the Constitutional Court held, in the context of the analysis of an initiative for the revision of the Constitution, where it opted for an originalist interpretation, that "*by replacing the phrase 'between spouses' with the phrase 'between a man and a woman', only an explanation is made regarding the exercise of the fundamental right to marriage, in the sense of expressly establishing that it is concluded between partners of a different biological gender, which is actually the very original meaning of the text. In 1991, when the Constitution was adopted, marriage was viewed in Romania in its traditional sense of union between a man and a woman*"[4]. Moreover, according to the Court, the systematic interpretation of the constitutional standards of reference also leads to the same conclusion, as Article 48 of the Constitution defines the concept of marriage in connection with the protection of children, both "*out of wedlock*" and "*in wedlock*": "*it is therefore obvious the biological component that underpinned the framers' view of marriage, which*

[3] CC, Decision No. 580 of 20 July 2016, published in the Official Gazette of Romania, Part I, No. 857 of 27 October 2016.
[4] *Ibidem.*

was undoubtedly regarded as the union between a man and a woman, while only from such union, whether in marriage or outside, children can be born"[5].

We believe that, since there are no explicit references in the documents that were part of the adoption of the 1991 Constitution, in order to support the originalist interpretation of the concept of "marriage", the legislative context of that time must be considered. It's important to note that at that time, same-sex sexual relationships were considered criminal. It's clear that back then, marriage between people of the same sex wasn't even a topic of discussion. However, a few years later, a significant decision by the Constitutional Court signalled a fundamental change in approach, and pointed towards further developments in this area. A few years later, the noteworthy decision of the Constitutional Court marked a fundamental change in approach, envisaging further developments. Thus, by Decision No. 81 of 15 July 1994, the Court upheld, in part, the exception of unconstitutionality regarding Article 200 (1) of the Criminal Code, and found that the provisions of this paragraph are unconstitutional, insofar as they apply to sexual relationships between consenting adults of the same sex, which are not committed in public or do not cause a public scandal.

In the constitutional architecture, the provisions relating to family life and marriage correlate and are subject to the general principles that govern the constitutional framework in general and the matter of fundamental rights in particular[6]. As for the European reference framework, the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms included in Article 8 – *Right to respect for private and family life* and Article 12 - *Right to marry*, as well as those of the Charter of Fundamental Rights of the European Union contained in Article 7 – *Respect for private and family life* and Article 9 – *Right to marry and right to found a family*, applicable in national law according to the rules established by the constitutional provisions of Article 11- *International law and national law;* Article 20 – *International treaties on human rights;* Article 148 – *Integration into the European Union*[7].

3. Developments. "Family" and "marriage" nowadays

3.1. Brief General Considerations

[5] *Ibidem.*

[6] See M. SAFTA, *Constitutional law and political institutions*, volume I, *General theory of constitutional law. Rights and freedoms*, No. I, Bucharest, 2020.

[7] The treaties ratified by Parliament are part of the national law; they acquire in the national law the legal force and the position in the hierarchy of regulatory acts given by the act of ratification, with the corresponding consequences; the notion of "*international treaty*" has a broad meaning, including international documents regardless of their name (treaty, convention, protocol, charter, statute, memorandum, etc.); - the treaties on human rights to which Romania is a party constitute a distinct category: they are part of the "*block of constitutionality*", having constitutional interpretative value (in the sense that the constitutional provisions shall be interpreted and applied in accordance with the provisions of the international treaties on human rights to which Romania is a party) and priority of application in case of inconsistency with the national laws, except for the situation in which the Constitution or the national laws contain more favorable provisions; likewise, the founding treaties of the European Union, therefore including the Charter of Fundamental Rights of the European Union, as well as the other binding European regulations, also establish a category of international acts with a distinct legal regime, in the sense that they have priority over the contrary provisions of the national laws; they have a supra-legislative, but infra-constitutional position; see L.D. STANCIU, M. SAFTA, *Report – General part: catalogs of human rights and fundamental freedoms*, available at https://www.cecc2017-2020.org/fileadmin/Dokumenty/Pdf/Questionnaire/National_Reports/National/Romania_-_Questionnaire_XVIII_Congress_of_CECC.pdf,

The adoption of Title II of the current Constitution of Romania – *Fundamental rights, freedoms and duties of citizens* was based, as one of the fathers of the Constitution notes[8], on the idea of "*permanent development of the concept of rights, due to documents of 'indisputable moral, political and legal value', beginning with the Declaration of Independence of the United States and ending with the documents being adopted before our eyes*"[9]. The report of the Constitutional Commission "*suggests the theory of generations of rights which, in the end, aim at elevating the human being, through them man finds his freedom, inner peace, peace of mind, salvation and happiness*"[10].

The legal framework governing family relationships and marriage vividly reflects a significant shift away from traditional norms, showing remarkable development. These concepts have sparked extensive academic, political, and legislative discussions in recent years, driven by the substantial evolution of family structures and resulting regulatory changes[11]. Nowadays, families can be found in a variety of forms, including the purely biological, adoptive, foster or stepparent, where the definition of the notion of a parent has shifted from the purely biological meaning to that of the psychological bond between the child and the one who takes care of him. This development of the psychological component is also responsible for increasing the role and strengthening the rights of same-sex parents and family members in the broad sense[12]. The way in which family life is carried out has also changed, thus being noteworthy the impact of immigration and the fulfilment of family life in a variety of social, cultural and religious contexts, all of which need to be taken into consideration in the process of regulation and enforcement of the law in family proceedings. All these realities are reflected in the way in which first international and then national courts, including the CCR, proceeded to interpret the provisions that enshrine and protect the family.

3.2. The Relationship of a Same-Sex Couple Falls within the Scope of the Concept of "Family Life", as Does the Relationship Established in a Heterosexual Couple. EU Member States Are Free to Decide How to Regulate Same-Sex Marriages

The theory according to which the relationship of a same-sex couple falls within the scope of the concept of "*family life*" crystallized mainly in the case law of the ECtHR, being later taken up by the CJEU and the national constitutional courts. Thus, as regards these couples, initially the ECtHR ruled that the relationships between partners do not fall under the obligation to respect family life, but private life. However, due to the rapid change in the attitude of society in European states towards the same-sex couples, the Court reconsidered its approach, appreciating it as artificial to argue that, unlike couples made up of partners of different sexes, couples made up of partners of same-sex cannot enjoy a family life for the purposes provided by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. As a result, the Court decided that the relationships of cohabitating same-sex couples living in a stable *de facto* partnership fell within the notion of family life, as do the relationships of a heterosexual couple in the same situation[13]. We note as significant jurisprudential landmarks in this regard the

[8] Professor Antonie Iorgovan.
[9] A. IORGOVAN, *The Odyssey of the Drafting of the Constitution*, Târgu Mureș, 1998, p. 182.
[10] *Ibidem.*
[11] S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Oxford, Portland, Oregon, 2014, p.202 et seq.
[12] *Ibidem.*
[13] C. GRABENWARTER, *European Convention on Human Rights. A Commentary*, Munich, 2014, p. 184.

Judgments issued in the cases of *Mata Estevez v. Spain* (2001), *Karner v. Austria* (2003), *Kozak v. Poland* (2010), *Schalk and Kopf v. Austria* (2010), *Vallianatos and Others v. Greece* (2013). This development continued towards the enshrinement of the positive obligation of the State to provide a specific legal framework for the recognition and protection of the union that establishes the relationship between persons of the same sex. Thus, for example, in the Case of *Oliari and Others v. Italy*[14] (the ECtHR concluded that Italy had failed to fulfill its obligation to ensure that the applicants had available a specific legal framework providing for the recognition and protection of the union that establishes the relationship between people of the same sex. The ECHR based this conclusion on two conditions that it expressed cumulatively: The Italian Government has not demonstrated the existence of a public interest that prevails over the individual interest of the applicants and this aspect must be seen in the light of the decisions of the Italian courts that have ruled on the need to recognize unions between persons of the same sex, a necessity ignored by the legislature. Likewise, through the Judgment of 23 February 2016 delivered in the Case of *Pajic v. Croatia*[15], the European Court of Human Rights found a violation of Article 8 in conjunction with Article 14 of the Convention, holding that in order to obtain family reunification, discrimination between unmarried couples of the same sex and unmarried couples of a different sex, based only on sexual orientation, establishes a prohibited discrimination according to the Convention. By the Judgment of 30 June 2016 in the Case of *Taddeucci and McCall v. Italy*[16], the ECtHR determined that it was precisely the absence of the possibility for homosexual couples to have access to some form of legal recognition that placed the applicants in a different situation from that of an unmarried heterosexual couple. Thus, the Court noted that, worldwide, there is a "*significant tendency*" to treat same-sex partners as "*members of the family*" and to recognize their right to live together, and at the European level, a suitable consensus is emerging which, in immigration matters, there is a tendency for same-sex unions to be considered "*family life*".

Likewise, the CJEU which held that the interpretation of Article 7 of the Charter, whose content is similar to that of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, must be the same as the interpretation of Article 8 of the Convention (Case C-400/10, *JMcB v Le* of 2010[17] or C-673/16, *Coman*[18]: "*in this regard, as follows from the Explanations on the Charter of Fundamental Rights (OJ 2007, C 303, p. 17), in accordance with Article 52 (3) of the Charter, the rights guaranteed in Article 7 thereof have the same meaning and scope as those guaranteed in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. However, it emerges from the case law of the European Court of Human Rights that the relationship that a homosexual couple has is likely to fall within the scope of the notion of "private life" as well as the notion of "family life" just like that of a heterosexual couple who is in the same situation [European*

[14] European Court of Human Rights, Judgement of 21 July 2015, Applications Nos. 18766/11 and 36030/11, *Oliari and Others v. Italy*.
[15] European Court of Human Rights, Judgement of 23 February 2016, Appllication No. 68453/13, *Pajic v. Croatia*.
[16] European Court of Human Rights, Judgement of 20 June 2016, Application No. 5136/09, *Taddeucci and McCALL v.* Italy. See CEDO, *Taddeucci și McCall împotriva Italiei*, n. 51362/09, 30 June 2016, available [Online] at http://ier.gov.ro/wp-content/uploads/cedo/Rezumat-Taddeucci-%C8%99i-McCall-%C3%AEmpotriva-Italiei.pdf
[17] Court of Justice of the European Union, Judgement of 5 October 2010, Case C-400/10 PPU, *J. McB. V. L. E.*, ECLI:EU:C:2010:582.
[18] Court of Justice of the European Union, Judgement of 5 June 2018, Case C-673/16, *Relu Adrian Coman e a. V. Inspectoratul General pentru Imigrări e Ministerul Afacerilor Interne*, ECLI:EU:C:2018:385.

Court of Human Rights, 7 November 2013, Vallianatos and Others v. Greece, CE:ECHR:2013:1107JUD002938109, § 73, as well as European Court of Human Rights, 14 December 2017, Orlandi and Others v. Italy, CE:ECHR:2017:1214JUD002643112, § 143])" (par. 49 and 50).

The acceptance of this case law, with the consequent interpretation of the constitutional framework, was carried out by the CCR in a case in which the constitutionality of the prohibition in Romania of marriages between same-sex persons, as well as the recognition of marriages legally concluded between persons of the same sex, was challenged in other States regulated by Article 277 of the Civil Code, through the lens of freedom of movement and establishment in the European Union. At the request of a legally married homosexual couple in Belgium, who challenged Article 277 of the Civil Code seeking, basically, that their status be recognized in order to benefit from the right of residence on the territory of Romania as a family, the CC addressed the CJEU to clarify the applicability of the Directive invoked in the case.

In the case thus constituted, *Coman v. Romania*[19], the CJEU established that in a situation where a citizen of the Union has made use of his freedom of movement by moving and actually residing, in accordance with the conditions set out in Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 in a Member State other than the one of which (s)he is a national and on this occasion formed or consolidated a family life with a third-country national of the same sex to whom (s)he is related by marriage legally concluded in the host Member State, Article 21(1) TFEU must be interpreted in the sense that it precludes the competent authorities of the Member State of which the citizen of the Union holds a right of residence on the territory of that Member State to the said national, for the reason that the law of the said Member State does not provide for marriage between persons of the same sex. Likewise, Article 21(1) TFEU must be interpreted in the sense that, in circumstances such as those at issue in the main litigation, the national of a third country, of the same sex as the citizen of the Union, whose marriage with the latter was concluded in a Member State according to the law of this State, has a right of residence for a period of more than three months on the territory of the Member State whose citizenship the citizen of the Union holds. This derived right of residence cannot be subject to stricter conditions than those provided for in Article 7 of Directive 2004/38.

Starting from those ruled by the CJEU, the CCR applied, within the constitutional review, the norms of European law laid down in Article 21 (1) TFEU [Treaty on the Functioning of the European Union – A/N] and those of Article 7 (2) of Directive 2004/38/EC [of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States – A/N], considering that they have constitutional relevance, and found that the relationship that a same-sex couple has falls within the scope of the notion of "private life" as well as the notion of "*family life*", like the relationship established in a heterosexual couple, a fact that determines the incidence of the protection of the fundamental right to private and family life, guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 26 of the Constitution of Romania.

The CCR therefore finds that the provisions of Article 277 (2) of the Civil Code, according to which "*marriages between persons of the same sex concluded or contracted abroad by Romanian citizens or non-nationals are not recognised in Romania*" cannot

[19] *Ibidem*.

constitute the basis for the competent authorities of the Romanian State to refuse to grant the right of residence on the territory of Romania to the spouse of the same sex, who is a national of a Member State of the European Union to a Romanian national who is a national of a Member State of the European Union and/or of a third State, who is joined by a marriage lawfully concluded in a Member State of the European Union to a Romanian national who is resident in Romania, or a national of a Member State of the European Union, who is entitled to reside in Romania, on the ground that the Romanian national law does not provide for/recognises same-sex marriage. Thus, since the provisions of Article 277 (4) of the Civil Code state that "*The legal provisions on freedom of movement within the territory of Romania of nationals of Member States of the European Union and of the European Economic Area shall remain applicable*", the prohibition on the recognition of marriage does not apply where the citizen of a Member State of the European Union or of a non-member country, a person of the same sex, married to a Romanian national or national of a Member State of the European Union, under Article 21(1) TFEU and Article 7(2) of Directive 2004/38, applies for the grant of the right of residence for a period of more than three months on the territory of the Romanian State for the purposes of family reunification[20].

Likewise, we emphasize here the distinction between the protection of family life and that of marriage, present both in the case law of the ECtHR, where, with regard to Article 12 of the Convention, the Court maintained its opinion that this article does not impose a positive obligation on States to offer couples made up of persons of the same sex as those in the situation of applicants for access to the institution of marriage, as well as in the case law of the CJEU where it is specified that "*it is certain that the civil status of persons, which includes the rules regarding marriage, is a matter that falls under the power of the Member States, and Union law shall be without prejudice to this power (see in this regard Judgment of 2 October 2003, Garcia Avello, C-148/02, EU:C:2003:539, paragraph 25, Judgment of 1 April 2008, Maruko, C-267/06, EU:C:2008:179, paragraph 59, and Judgment of 14 October 2008, Grunkin and Paul, C-353/06, EU:C:2008:559, paragraph 16). The Member States are thus free to provide or not provide for marriage for persons of the same sex (Judgment of 24 November 2016, Parris, C-443/15, EU:C:2016:897, paragraph 59)*"[21].

The issue of marriage itself and its definition is, moreover, a current issue in Romania, where the referendum for amending the Constitution in order to expressly establish marriage as a union between a man and a woman (and not between spouses) ended inconclusively, in the sense that the participation in the referendum did not allow the outline of a valid option[22]. In any case, the Constitution of Romania, like other European constitutions[23], defines marriage as being at the foundation of the family "[*the family* ***is based on marriage*** (...)]", so the two concepts *family* and *marriage* must be analyzed together, in the light of the same developments.

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[20] CCR., Decision No. 534/2018 published in the Official Gazette no. 186 of 3 October 2018.

[21] Court of Justice of the European Union, Judgment of the ECJ of 5 June 2018, *Relu Adrian Coman e a. contro Inspectoratul General pentru Imigrări e Ministerul Afacerilor Interne cit.*, paragraph 37.

[22] By Ruling No. 2 of 18 October 2018, published in Official Gazette No. 1012 of 29 November 2018, the CCR found that the national referendum for the revision of the Constitution of 6 and 7 October 2018 is not valid, since at least 30% of the number of people registered in the permanent electoral lists did not participate, in accordance with the provisions of Article 5 (2) of Law No. 3/2000 on the organization and conduct of the referendum, subsequently amended and supplemented.

[23] See T. BARZÓ, *Family Protection in Central European Countries,* in T. BARZÓ, B. LENKOVICS (eds.), *Family protection from a legal perspective- Analysis on certain Central European Countries*, Budapest, 2021, pp.287- 322

3.3 People Who Have Relationships Similar to Those Between Spouses or Have Had Relationships Similar to Those Between Spouses Fall under the Protection of the Right to "Family Life", Which Needs to be Protected

This interpretation of the concept of family life was carried out by the CC when it found the unconstitutionality of the legislative solution laid down in Article 117 (1) letter a) and letter b) of the Code of Criminal Procedure, which excludes from the right to refuse to be heard as a witness the persons who have established relationships similar to those between spouses[24].

The case referred to the judgment allowed, on the one hand, the presentation of a development regarding the legal meaning of the concept of "*family member*" and, on the other hand, the "correction" of a mismatch in the Romanian legislation in this regard. The Court found that, according to Article 177 (1) c) of the Criminal Code, *family member* means, *inter alia*, not only the spouse, but also the persons who have established relationships similar to those between spouses, in case they live together. The provision reveals two categories of persons that form the concept of "*family member*", namely the proper (formal) members of a family [Article 177 (1) a) and b) of the Criminal Code] and persons assimilated to them [Article 177 (1) c) of the Criminal Code]. According to the doctrine, the reason that leads the legislator to link various negative or positive effects of some legal-criminal institutions to the ascertainment of the family member status can be found, to an equal extent, in the hypotheses in which the existence of the relationship in question is legally and formally established in an official form (such as marriage), as well as when it is a factual situation, but involving the same effective daily dynamics.

The Court noted that the criminal law uses on numerous occasions the concept of "*family member*" defined in this way, integrating it either in the structure of general criminal norms, or of some special or criminal procedural ones that give expression to certain legal concepts presenting heterogeneous legal natures. The Court found a lack of correlation between the criminal procedural rules laid down in Article 117 (1) a) and b) of the Code of Criminal Procedure and those laid down in Article 119 of the Code of Criminal Procedure related to the legal definition of the "family member" enshrined in Article 177 of the Criminal Code, under the conditions in which the latter criminal rule must also be reflected in the criminal procedural law in force, considering that, according to Article 602 of the Criminal Code criminal procedure, "*Terms or phrases whose meaning is specifically explained in the Criminal Code have the same meaning in the Code of Criminal Procedure*". It follows that the Romanian criminal procedural legislation is among those that have regulated a right to refuse the hearing for certain categories of persons, but the Romanian legislator has not regulated this right in a clear, accessible and predictable manner. As a result, the Court found that the legislative solution laid down in Article 117 (1) a) and b) of the Code of Criminal Procedure, which excludes from the right to refuse to be heard as a witness the persons who have established relationships similar to those between spouses, if they cohabit or no longer cohabit with the suspect or defendant, is unconstitutional, as it affects the provisions of Article 16 (1) regarding the equality of citizens before the law in relation to Article 26 (1) regarding family life, of the Fundamental Law.

In this context, the Court held, *inter alia*, that "*the person who is in a relationship similar to those between the spouses with the suspect/defendant— without being formalised — does not enjoy the right to refuse to be a witness although from a moral,*

[24] CCR, Decision No. 562/2017 published in the Official Gazette No. 837 of 23 October 2017.

emotional and moral point of view, there is no relevant difference between legally married partners and those involved in a consensual union, and the latter's hearing in the case of their partner creates the same possible couple problems or the same reasonable doubt as to the sincerity of the declaration, as is the case of the legitimate spouse's declaration"[25].

The CC based the interpretation of the constitutional framework of reference on the ECHR case law on the matter, noting, inter alia, that "*the Strasbourg Court ruled on the right to refuse the hearing in the case of the long-standing companion, by the Judgment of 3 April 2012 in Case of Van der Heijden v. the Netherlands. In the case, according to the claims of the parties, the European court held that the concept of* 'family life'*, defended by Article 8 of the Convention, is not confined solely to families based on marriage and may encompass other de facto relationships. When deciding whether a relationship can be said to amount to* 'family life'*, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means*"[26].

Based on the reasoning stated in the recitals, the CC concluded that "*The right to* 'family life' *in the case of persons who are having or had similar relationships as those between spouses with the suspect or the accused person needs to be protected in criminal matters in a similar way to lawfully established couples, given the identity of the purpose of the regulation of the impugned criminal procedure rule in the said cases. At the same time, the Court held that, in so far as they will not be obliged to give statements as witnesses in criminal proceedings, persons who have relationships similar to those between spouses with the suspect or the accused person have, however, the right to give such statements, by waiving their right, thereby being ensured also the public interest to effectively exercise criminal action*"[27].

3.4 Persons Who Have Established Relationships Similar to Those Between Parents and Children Fall under the Protection of the Right to "Family Life", Which Needs to be Protected

This interpretation of the concept of family life was given by the CCR when it upheld the exception of unconstitutionality and found that the legislative solution contained in Article 117 (1) (a) of the Criminal Procedure Code, which excludes from the right to refuse to be heard as a witness person who have established relationships similar to those between parents and children, if they live with the suspect or defendant, is unconstitutional[28].

Essentially, the Court found that the arguments retained in Decision No. 562 of 19 September 2017 are applicable *mutatis mutandis* also with regard to persons who have established relationships similar to those between parents and children, if they live together.

The Court found, in this respect, that, in the mentioned hypothesis, the provisions of Article 117 (1) (a) of the Criminal Procedure Code do not comply with the constitutional requirements regarding the quality of the law, being contrary to the provisions of Article 1 (5) of the Constitution from the perspective of the lack of correlation with the provisions

[25] CCR, Decision No. 562/2017, published in the Official Gazette No. 837 of 23 October 2017.
[26] *Ibidem*, paragraph 24.
[27] *Ibidem*, paragraph 37.
[28] CCR, Decision No. 175/2022, published in the Official Gazette No. 450 of 5 May 2022.

of Article 119 of the Criminal Procedure Code related to the legal definition of "*family member*" regulated in Article 177 (1) of the Criminal Code, according to which a family member means: "*c) persons who have established relations similar to those between spouses or between parents and children, if they live together*". At the same time, the Court found that the legislative solution contained in Article 117 (1) (a) of the Criminal Procedure Code, which excludes from the right to refuse to be heard as a witness person who have established relationships similar to those between parents and children, if they live with the suspect or the accused, is unconstitutional, as it violates the provisions of Article 16 (1) regarding the equality of citizens before the law related to Article 26 (1) regarding family life from the Fundamental Law. The distinction of legal treatment between the categories of persons listed in the criticized criminal procedural norm, on the one hand, and persons who have established relationships similar to those between parents and children, if they live with the suspect or defendant, on the other hand, from the perspective of regulating the right to refuse to testify as a witness in the criminal trial is discriminatory, not being objectively and reasonably justified. Thus, in the case of people who have established relationships similar to those between parents and children, if they live with the suspect or defendant, on the one hand, the rule does not maintain a reasonable ratio of proportionality between the means used and the intended purpose, and, on the other hand, the rule ignores the reason for establishing the right to refuse the hearing, that of protecting the feelings of affection, the close relationships that the formal members of a family and persons assimilated to them can have with the suspect or defendant and the avoidance of the moral dilemma faced by these people.

3.5. The Concept of Family and Gender Equality

In approaching the concept of family, we consider that we must take into account, equally, the regulatory content of the concept, but also *the change in perception in terms of the social roles attached to women and men*. Likewise, in this respect, the development of society is revealed in the legislation, as well as in the case law of the constitutional courts, as can be seen in a recent decision of the CC which sanctioned the legislator's disregard of this development[29].

A legislative initiative initially aimed at prohibiting proselytism based on sex and gender criteria was modified through parliamentary amendments, resulting in a law that completely prohibits any activity of expression/knowledge in the educational and professional training environment of the idea/theory that gender identity is different from biological sex. Referred to by the President of Romania, in an *a priori* review, regarding this legislative solution, contained in a law amending the National Education Law No. 1/2011, the CCR upheld the objection of unconstitutionality and found unconstitutional the legislative solution prohibiting the conduct, in establishments, education establishments, and all areas devoted to education and training, including establishments providing out-of-school education, of activities aimed at spreading theory of opinion of gender identity, understood as meaning that gender is a concept different from biological sex and that the two are not always the same[30].

In the recitals of the decision, the Court held, *inter alia*, that the notions of 'gender'/"*gender identity*' do not appear regulated as such in the Constitution of

[29] Juridice.ro – M. SAFTA, *Constitutional updates*, in *Relevant case law of the Constitutional Court of Romania. International events. Publications*, 2021, available [Online] on https://www.juridice.ro/715033/ , from which a fragment was taken.
[30] *Ibidem*; CCR, Decision No. 907/2020, published in the Official Gazette No. 68 of 21 January 2021.

Romania, but they were regulated in the infra-constitutional legislation, in accordance with the international treaties in the matter to which Romania became a party. Thus, Law No 202/2002 on equal opportunities and treatment between women and men[31], "*however, distinguishes between the notions of 'sex' and 'gender' through the provisions of Article 4 d2) and d3), introduced by Article I (3) of Law No 229/2015[32], which shall be read as follows:* '*d2)* ***by sex*** *we refer to the set of biological and physiological traits that define women and men; d3)* ***by gender*** *we refer to the set of roles, behaviors, traits and activities that society considers appropriate equally for women and for men"*". Likewise, the definition of the notion of 'gender' appears in the Council of Europe Convention on preventing and combating violence against women and domestic violence, adopted in Istanbul on 11 May 2011, ratified by Law No 30/2016[33]. Thus, according to Article 3 c) of the Convention, "*For the purpose of this Convention: (...) c) 'gender' shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men*". Article 12 of the Convention establishes a series of general obligations, among which, in point 1 "*Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men*". The CCR held that in relation to this view, States' obligations are established, including that of promoting social and cultural changes and eradicating prejudices and other practices based on discrimination between men and women and on "*gender stereotypes*".

Likewise, in the same decision, the CCR found that, "*since 2003, the national regulatory system regulated the State's administrative obligations for situations in which a person proceeds to his/her gender reassignment. This involves, implicitly, the acceptance from a legal/juridical point of view of perceiving sex not as a simple biological 'data', but as an element of identity and, namely, of social identification. Undoubtedly, for a person who proceeds to such a reassignment, the biological sex does not correspond to the sexual identity perceived by him/her, the two are not always the same which contravenes to the idea spread by the prohibition enshrined in the impugned legal text. This concept is also enshrined in the provisions of Law No 287/2009 - Civil Code, which take into consideration, through the concept of 'sexual orientation', elements of sexual identity, as perceived by the individual, and not exclusively the biological characters that define sex. The recognition by law of the differences in sexual orientation and gender reassignment involves, implicitly, the recognition by the legislator of the fact that biological sex is not perceived equally as gender by all individuals and that gender identity is different from biological sex*".

Further, starting from these conceptual premises, the CCR revealed the development of the perception in Romania in terms of the social roles attached to women and men, with consequences also regarding the concept of family and family relationships, revealed in its case law. The Court specifically referred to the issue determined by the regulation of different retirement ages for women and men, where the evolution is perhaps the most suggestive. Thus, in 1995, the Court held that "*due to the imperatives related to raising and educating children, especially in the first years, the increased responsibilities of women in the household, the lack of widely accessible social and economic methods, in the current transitional period, which would exempt from these obligations, as well as from other aspects that hinder their professional development (maternity leave, postnatal*

[31] Republished in the Official Gazette No. 326 of 5 June 2013.
[32] Published in the Official Gazette No. 749 of 7 October 2015.
[33] Published in the Official Gazette No. 224 of 25 March 2016.

leave, leave to take care of a sick child, protective prohibitions to work under certain conditions, etc.), as well as other circumstances, women are in situations that put them at a disadvantage compared to men", which justifies, through the principle of equality, the establishment of different retirement ages[34]. However, in 2010, regarding the same issue, the constitutional court found that "*the cultural traditions and social realities are still in the stage of development towards ensuring a real factual equality between the sexes, so it cannot be concluded that, at present, the social conditions in Romania can be considered as supporting absolute equality between men and women. Nevertheless, important steps have been taken. An example is the extension of the right to parental leave to men as well, including in the military field, relevant in this regard being Decision No 90 of 10 February 2005, published in the Official Gazette of Romania, Part I, no. 245 of 24 March 2005. For these reasons, the increase of the women's retirement age to 65 years was foreseen to be achieved during a period of 15 years, meanwhile being expected that, in Romania, social conditions will undergo significant changes*".[35] In the same context, the Court observed "*the natural changes that appear in society in terms of mentalities, culture, education and with regard to traditions", noting that "the provision of equal treatment between the sexes appears increasingly necessary in the context of the European trend that imposes States to comply with the standards of equal, non-discriminatory treatment between men and women*"[36].

The Court emphasized the recitals that address the traditional social perception, closely attached to the biological meaning of sex - which seems to overwhelmingly guide the solution pronounced in 1995, namely the recitals that emphasize the social developments in the sense of moving away from gender stereotypes, as an effect of change/acceptance the changing social roles of women and men, with reference also to the case law of the ECtHR on gender equality which encompasses a variety of legal aspects. Additionally, it mentions the case law of both the European Court of Human Rights and the Court of Cassation in relation to parental leave and parental leave allowances. Noting that «Romania's legislation prohibits discrimination on grounds of sexual orientation, contains legislative solutions for situations concerning gender reassignment, the distinction between the notions of 'sex' and 'gender', thus clear provisions and in line with Romania's obligations as a party to international treaties related to the area of 'gender identity', as well as the connection of the national regulatory system, through Article 20 of the Constitution, to the international one in the matter of human rights and the evolutionary interpretation given by international courts, the CCR concluded that "*the legal prohibition of the expression and knowledge in educational establishments of the theory of gender identity other than as identity between gender and biological sex is tantamount to promoting mutually exclusive regulatory solutions, which are likely to create a confusing and contradictory legislative framework, contrary to the quality requirements of the law imposed by Article 1 (3) and (5) of the Constitution*"[37]. "*Such a regulatory solution seems contrary to the legal logic and devoid of any reasonable grounds*"[38]. (paragraph 100).

[34] CCR, Decision No. 107/1995, published in the Official Gazette No. 85 of 26 April 1996.
[35] CCR, Decision No. 1.237/ 2010, published in the Official Gazette Mo. 785 of 24 November 2010.
[36] In the same regard, see also the CCR, Decision No. 387 of 5 June 2018, published in the Official Gazette No. 642 of 24 July 2018.
[37] *Ibidem*, paragraph 99.
[38] *Ibidem*, paragraph 100. For a commentary, see G. EPURE, E. BRODEALĂ, *Going Against the Tide: The Romanian Constitutional Court Rejects a Ban on Gender Studies*, in *International Journal of Constitutional Law*, 2021, availabe at: http://www.iconnectblog.com/2021/03/going-against-the-tide-the-romanian-constitutional-court-rejects-a-ban-on-gender-studies/.

Furthermore, the change in the traditional understanding of the roles of women and men in society is also evident in the finding by the CCR of the unconstitutionality of the legislative solution that prohibits a convicted man with a child younger than 12 months from obtaining a stay of execution of a prison sentence or life imprisonment. With regard to this legislative solution, the CCR considered that it violates the equality of citizens before the law and public authorities, without privileges and without discrimination, and the obligation to respect and protect intimate, family and private life by public authorities[39]. The Court has held that, from the perspective of the right to care of the child,– a fundamental component of the right to respect for family life enshrined in the provisions of Article 26 (1) of the Constitution –, a convicted man who has a child younger than 12 months of age is in a situation similar to that of a convicted woman who has a child of the same age and the difference in treatment between the two categories of convicted person has no objective and reasonable justification. Likewise, this case contains established references to the case law of the ECtHR – see the Judgment of 27 March 1998, pronounced in the Case of *Petrovic v. Austria, § 36* or the Judgment of 3 October 2017, in the case of *Alexandru Enache v. Romania*.

4. Final Reflections

The topic at hand is quite comprehensive and requires an interdisciplinary approach on national, international, and supranational levels, involving legislation and case law. The studies in the matter, also giving expression in other European States to the concern for this fundamental topic, establish the legislative developments in the social context, revealing the concern for a crisis of marriage and family, and, in this light, the need to adopt the most appropriate strategies to respond to the observed phenomenon[40] or putting the related issue in the paradigm of the question: marriage and family, symptoms of a development or a crisis?[41]

In this presentation, we have only discussed a few benchmarks that we believe are relevant for the interpretation of the constitutional concept of family and family life in Romania, especially in relation to gender equality. The dialogue between the CCR, ECHR, and CJEU is crucial for these developments, as well as how the interpretation of constitutional concepts through this dialogue will be reflected in Romanian legislation. The recent legislative initiative to amend the National Education Law, which contradicted the existing regulatory framework in Romania, stands out as an isolated phenomenon in this context. It highlights the role of constitutional review in addressing violations of the fundamental law. Furthermore, the continuous improvement of fundamental rights protection as mandated by Article 20 of the Constitution, along with the mentioned developments, underscores the need to consider revising the Constitution in terms of fundamental rights. This requires a careful examination of how the new perspective on the family will influence any future amendments to the Fundamental Law[42].

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[39] CCR, Decision No 535/2019, published in the Official Gazette no. 1026 of 20 December 2019

[40] B. LENKOVICS, *The protection of Family*, in T. BARZÓ, B. LENKOVICS (eds.), *op.cit.*, pp. 9-37

[41] M. ANDRZEJEWSKI, *Legal Protection of the family: essential Polish provisions*, in T. BARZÓ, B. LENKOVICS (eds.), *op.cit*, pp. 151-191.

[42] It is worth following the development under this aspect, especially since a new citizens' initiative promoted in 2023 had as its object the amendment of Article 48 (1) of the Constitution - *Family*, in the sense of replacing the phrase "*between spouses*" with the phrase "*between a man and a woman*" with regard to the conclusion of marriage (see Official Gazette no. 94 of 1 February 2024**)** The proposal has to go through the procedural steps provided by Law No. 189/1999 on the exercise of the legislative initiative by citizens, and Articles 150-152 of the Constitution.

ABSTACT

Over the past three decades, international and European developments have greatly influenced the interpretation of the Romanian Constitution. One concept that has evolved significantly is the notion of family. This study examines recent rulings from the Constitutional Court of Romania and the European Court of Human Rights to understand how the concept of family is currently defined in the constitution. It explores various legal aspects of family life and anticipates future developments, particularly in terms of gender equality.

KEYWORDS

Family life, criminal trial, witness, gender equality, marriage.

IL CONCETTO DI FAMIGLIA NELLA LEGISLAZIONE ROMENA PROSPETTIVA COSTITUZIONALE E INFLUENZE SULLA PROCEDURA PENALE

ABSTRACT

Negli ultimi tre decenni, gli sviluppi internazionali ed europei hanno influenzato notevolmente l'interpretazione della Costituzione rumena. Un concetto che si è evoluto in modo significativo è quello di famiglia. Questo studio esamina le recenti sentenze della Corte Costituzionale della Romania e della Corte Europea dei Diritti Umani per capire come il concetto di famiglia sia attualmente definito nella Costituzione. Esplora vari aspetti legali della vita familiare e anticipa gli sviluppi futuri, in particolare in termini di uguaglianza di genere.

KEYWORDS

Famiglia, procedimento penale, testimonianze, uguaglianza di genere, matrimonio.