

Brodeală, Elena (2025) *Gender Roles and the Family under Romania's Post-Socialist Constitution: Between Progress and Restraint*. International Journal of Constitutional Law, 23 (2). pp. 582-603. ISSN 1474-2640.

Downloaded from

<https://kar.kent.ac.uk/108987/> The University of Kent's Academic Repository KAR

The version of record is available from

<https://doi.org/10.1093/icon/moaf030>

This document version

Author's Accepted Manuscript

DOI for this version

Licence for this version

UNSPECIFIED

Additional information

Versions of research works

Versions of Record

If this version is the version of record, it is the same as the published version available on the publisher's web site. Cite as the published version.

Author Accepted Manuscripts

If this document is identified as the Author Accepted Manuscript it is the version after peer review but before type setting, copy editing or publisher branding. Cite as Surname, Initial. (Year) 'Title of article'. To be published in **Title of Journal**, Volume and issue numbers [peer-reviewed accepted version]. Available at: DOI or URL (Accessed: date).

Enquiries

If you have questions about this document contact ResearchSupport@kent.ac.uk. Please include the URL of the record in KAR. If you believe that your, or a third party's rights have been compromised through this document please see our [Take Down policy](https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies) (available from <https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies>).

Gender Roles and the Family under Romania's Post-Socialist Constitution: Between Progress and Restraint

Elena Brodeală^{*}

This article contributes to understanding the status of gender equality in Eastern European constitutions and societies. It focuses on Romania, revealing both progress and conservative setbacks. Specifically, the article provides a case study on the construction and evolution of gender roles within the family under the post-socialist Romanian Constitution. It shows that although state socialism aimed to promote gender equality, it left gender roles within the family mostly untouched. Gender roles within the family started being more fundamentally challenged – at least when it comes to legislation – only after the fall of the regime. The Constitutional Court of Romania played an important role in this process through its interpretation of the Constitution, acknowledging early on the socially constructed nature of gender roles and their impact on gender (in)equality in the family and beyond. An exception to this general trend comes from its recent case law on same-sex marriage. While the Court seems to be generally open to promoting equality between men and women, it shows restraint when questions of sexual orientation are at play. In this context, the article suggests that the recent conservative turn on constitutional questions of gender equality in Romania may be driven more by reticence to LGBT+ and intersectional equality than by concerns about equality between men and women per se.

^{*} Lecturer, Kent Law School, UK.

1. Introduction

The literature on gender relations in Central and Eastern Europe ('CEE') generally points to an overall regression in women's rights in the region brought about by the fall of socialism and subsequent developments.¹ Indeed, after 1989, women's political representation and labor force participation decreased in most of the region, while many countries saw serious attempts to re-traditionalize gender roles and return to the "natural" pre-communist order.² Although the transition period brought about a series of legal reforms in the field of gender equality, these were often imposed by the requirements of EU accession rather than a genuine commitment to gender equality.³ Consequently, many of these reforms remained merely words on paper and did not have the desired impact in practice.⁴ Moreover, in recent years, the region has seen the proliferation of conservative actors trying to reverse the often modest and fragile advancements made in gender equality and prevent progress on women's and LGBT+ rights.⁵ This article contributes to the existing literature by highlighting the variation and complexities of the status of gender equality in post-socialist states. It discusses original research from Romania, a jurisdiction that has received less attention in the comparative literature on gender relations in CEE. In particular, the article presents a case study on the construction of gender roles within the family under Romania's post-socialist Constitution. The article reveals significant and surprising progress in this area,⁶ although it also points to setbacks, particularly in matters related to same-sex marriage.

¹ See e.g. Suzanne LaFont, *One Step Forward, Two Steps Back: Women in the Post-Communist States*, 34(2) COMMUNIST POST-COMMUNIST STUD. 203 (2001); Ulf Brunnbauer, *From Equality without Democracy to Democracy without Equality? Women and Transition in Southeast Europe*, SOUTH-EAST EUR. REV. LABOUR SOC. AFF. 151 (2002).

² *Id.*

³ See e.g. Kristen Ghodsee, Lavinia Stan & Elaine Weiner, *Compliance without Commitment? The EU's Gender Equality Agenda in the Central and East European States*, 33 WOMENS STUD. INT. FORUM 1, 2 (2010).

⁴ *Id.* 1.

⁵ Ov Cristian Norocel & David Paternotte, *The Dis/Articulation of Anti-Gender Politics in Eastern Europe: Introduction*, 70 PROBL. POST-COMMUNISM 123 (2023). More specifically for the Romanian context, see Ov Cristian Norocel & Ionela Băluță, *Retrogressive Mobilization in the 2018 "Referendum for Family" in Romania*, 70 PROBL. POST-COMMUNISM 153 (2023); Oana Băluță, *What Is in a Name? Alternative Gender Knowledge and the Retrogressive Worlding of Radical Right Digital Media*, 24 FEM. MEDIA STUD. 1078 (2024).

⁶ Contrast with the way the family was debated and constructed in parliamentary debates, as discussed in Ionela Băluță & Claudiu Tufiș, *Preaching the "Traditional Family" in the Romanian Parliament: The Political Stakes and Meanings of a Hegemonic Narrative*, 38 EAST EUR. POLIT. SOC. 616 (2024).

The article focuses especially on the interpretation given to the Constitution in the case law of the Romanian Constitutional Court ('RCC', 'the Court') regarding gender and the family.⁷ It argues that the RCC has, at least partially, departed from the traditional way in which gender relations were constructed within the family during the country's socialist past, which is a significant finding given the developments in other parts of the region or gender equality areas. This finding is even more intriguing considering that, for most of the transition period, women were absent or seriously underrepresented on the RCC bench.⁸ Therefore, the article also contributes to the literature on gender in the judiciary and lays the foundation for further research on this topic.

To contextualize the analysis, Section 2 gives a brief overview of the situation of gender (in)equality within the family under Romanian state socialism. Section 3 then moves to discuss the evolution of gender roles within the family in the case law of the RCC. It will show that the Court decoupled reproduction from the traditional understanding of the family, opposed restrictions to women's equality in the labor market based on stereotypical ideas about women's role within the family, while firmly supporting the active role of men in childcare, and started partially departing from traditional ways of establishing parentage and defining parenthood. Despite this progress, the article shows that in its recent case law, the RCC continues to center family around heterosexual marriage, showing restraint in embracing developments taking place at the social and international levels. The article therefore suggests that the recent conservative turn on gender issues in Romania may not be the result of reluctance to advance women's rights or gender equality more broadly. Instead, similar to other CEE countries, it may be rooted in judicial restraint (and potentially social attitudes) in cases concerning sexual orientation.

⁷ Due to reasons of space and availability of sources, the case law that this article analyzes is not exhaustive.

⁸ For its first 12 years, the Court had no female judge. The first woman judge was appointed in 2004, with the second in 2010. Out of 44 judges who ever sat on the RCC bench, only 8 are women. Elena Brodeală, *Gender and Sexuality under Romania's 1991 Constitution: Between Marginalization and Public Participation*, NEW EUR. COLL. STEFAN ODOBLEJA PROGRAM YEARB. 9, 20 (2021). See also Silvia Șuteu, *Beyond Formal Conceptions of Judicial Leadership: Women on the Bench, Judicial Influence, and Judge Rapporteurs on the Romanian Constitutional Court*, in CONSTITUTIONAL HEROINES AND FEMINIST JUDICIAL LEADERSHIP (Erin Delaney & Rosalind Dixon eds.).

2. Gender Relations and the Family under State Socialism

During most of the period before state socialism, the family in Romania was marked by serious inequalities between men and women.⁹ The communists' rise to power brought significant changes in gender equality. The first socialist Constitution of 1948 unequivocally guaranteed full equality between men and women in all spheres, including in the field of "private law".¹⁰ In addition, the Family Code of 1953 proclaimed full equality between men and women in most relevant family matters.¹¹

Although socialism improved the legal status of women in the family, it did not achieve full gender equality in practice. As Barbara Havelková explains, socialist regimes in CEE did not aim to undertake gender-sensitive measures and address inequality between men and women in the private sphere *per se*.¹² Rather, socialists believed that the key to women's emancipation lay in the abolition of private property and in bringing them into the labor force.¹³ In line with these ideas, the 1948 Constitution granted women full and equal rights in the "economic" sphere and provided for equal pay guarantees.¹⁴ In addition, the 1952 Constitution gave women equal rights as regards "work, salary, rest, [and] social insurance".¹⁵ These provisions were accompanied by a massive push for women to enter the workforce. At the same time, men were never encouraged to participate in childcare and household chores. Instead, childcare was transferred to the state, which committed itself "to organize maternities, crèches, and children's homes".¹⁶ Nevertheless, these

⁹ Luminița Dumănescu, *The Law of Marriage in Romania, 1890-2010*, in INTERMARRIAGE IN TRANSYLVANIA, 1895-2010 47, 48–50 (Ioan Bolovan & Luminița Dumănescu eds.); II ȘTEFANIA MIHĂILESCU, FROM THE HISTORY OF ROMANIAN FEMINISM: AN ANTHOLOGY OF TEXTS (1929-1948) [DIN ISTORIA FEMINISMULUI ROMÂNESC: ANTOLOGIE DE TEXTE (1929-1948)] 23 (2006); see also Maria Bucur, *The traditional family: ideology, myth, facts (Familia traditională: ideologie, mit, fapte)*, CONTRIBUTORS.RO (Sep. 30, 2018), <http://www.contributors.ro/cultura/familia-traditionala-ideologie-mit-fapte/>.

¹⁰ Art. 21 of the 1948 Communist Constitution. It is worth noting that in the absence of rule of law guarantees, constitutions in communist countries were merely words on paper. See JAN-ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY 118 (1996).

¹¹ Distinctions between men and women in family matters remained, for example, regarding the marriage age, which was 16 (or exceptionally 15) for women and 18 for men, Article 4 of the Family Code. See also Dumănescu, *supra* note 9 at 50–52.

¹² BARBARA HAVELKOVÁ, GENDER EQUALITY IN LAW: UNCOVERING THE LEGACIES OF CZECH STATE SOCIALISM 105–137 (2017).

¹³ Raluca Maria Popa, *The Socialist Project for Gender (In)Equality: A Critical Discussion*, J. STUDY RELIG. IDEOL. (2003).

¹⁴ Article 21. See also Article 19 granting all citizens the right to work.

¹⁵ Article 83.

¹⁶ *Id.*

proved insufficient, and women maintained their traditional caring and household roles within the family, while also working shoulder to shoulder with men in the field of production.¹⁷

The institutions of marriage and family, as well as the role of women as mothers, received special protection in the socialist period. Article 83 of the 1952 Constitution stated explicitly that “[t]he state protects marriage and family and defends the interests of the mother and child”. Then it added that “[t]he state provides support to mothers with many children and single mothers [and], paid leave for pregnant women”. Moreover, in 1966, after the coming to power of Nicolae Ceaușescu, the reproductive role of women was reinforced as a means of overcoming a demographic crisis faced by Romania at that time. Socialist leaders believed that this crisis was caused by the decadent morals of the time, as expressed by the legalization of abortion in 1957 and the leniency in obtaining a divorce.¹⁸ Accordingly, to reinvigorate socialist morality, the regime enforced some of the harshest anti-abortion legislation in the history of Europe and made divorce very difficult to obtain, while trying by all possible means to force families to have children.¹⁹ In this way, having children became a “patriotic duty” for both families and women.²⁰

Furthermore, the state did not involve men in the task of childrearing, even excluding them from existing parental leave (although they were entitled to receive child allowances).²¹ In addition, Romanian women received some of the shortest periods of parental leave in CEE at that time.²² In this context, for many women, motherhood (which they were expected to shoulder while also working outside the home) became a very heavy burden. Many chose to reject forced motherhood through recourse to illegal abortions. This had dramatic repercussions. It is estimated that from 1966 until 1989, the period when abortion was illegal in Romania, around 10,000 women died from illegal abortions, 2,000 spent time in prison, and many others faced serious health consequences.

¹⁷ William Moskoff, *The Problem of the “Double Burden” in Romania*, 23 INT. J. COMP. SOCIOl. 79 (1982).

¹⁸ See Raluca Maria Popa, *Female Bodies, Male Power. A Case Study on the Adoption of the Anti-Abortion Legislation in Communist Romania (1966)* [Corpuri Femeiești, Putere Bărbătească. Studiu de Caz Asupra Adoptării Reglementărilor Legislativ de Interzicere a Avortului În România Comunistă (1966)], in GENDER AND POWER. MONEY'S INFLUENCE ON THE ROMANIAN POLITICS (GEN ȘI PUTERE. PARTEA LEULUI ÎN POLITICA ROMÂNEASCĂ) 93, 107–110 (Oana Băluță ed., 2006).

¹⁹ See GAIL KLIGMAN, THE POLITICS OF DUPPLICITY: CONTROLLING REPRODUCTION IN CEAUȘESCU'S ROMANIA (1998).

²⁰ See e.g. Nicolae Ceaușescu, *The Role of Family in Romanian Society (Rolul familiei în societatea românească)* (Editura Politică, 1988), 19 in *Id.* at 71.

²¹ VLADIMIR PAȘTI, THE LAST INEQUALITY. GENDER RELATIONS IN ROMANIA (ULTIMA INEGALITATE. RELAȚIILE DE GEN ÎN ROMÂNIA) 109–110 (2003).

²² Namely 16 weeks of maternity leave. HENRY PHILIP DAVID & ROBERT J. MCINTYRE, REPRODUCTIVE BEHAVIOR: CENTRAL AND EASTERN EUROPEAN EXPERIENCE 193 (1981). See also J. Berent, *Causes of Fertility Decline in Eastern Europe and the Soviet Union: Part II. Economic and Social Factors*, 24 POPUL. STUD. 247, 286–290 (1970).

In summary, despite the ideological commitment of communists to equality, the family in socialist Romania remained deeply inegalitarian. The burden of reproduction, care, and household chores still fell on women's shoulders, even though women also had to perform paid labor outside the home. Furthermore, in line with "socialist morality" (and similar to the Christian-Orthodox tradition in Romania's pre-socialist society²³), the family was based on the concept of a monogamous, heterosexual, lifelong marriage. Therefore, it is not surprising that the criminalization of homosexuality was toughened during the socialist period.

Homosexuality was first criminalized in Romania in 1937, a decade before the establishment of state socialism, in the context of rising fascist ideologies. At the time, it was punishable only if it caused a "public scandal". After the Communist Party came to power, criminal sanctions for engaging in homosexual relations were increased and, in 1957, the "public scandal" condition was removed, making homosexuality a crime under all circumstances.²⁴ Following the collapse of the socialist regime, the requirement for homosexual acts to take place in "public" or cause a "public scandal" was reintroduced into Romanian legislation under pressure from European institutions, particularly the Council of Europe, and in response to a 1994 decision of the RCC.²⁵ In practice, however, since "public" and "public scandal" were loosely defined, convictions for homosexuality continued.²⁶ This was in breach of Romania's commitments under the European Convention on Human Rights ('ECHR'), which the country ratified in 1994 after joining the Council of Europe the previous year. In particular, in the 1981 case *Dudgeon v. United Kingdom* and subsequent cases, the European Court of Human Rights ('ECtHR') held that the criminalization of homosexuality constituted a violation of the Convention.²⁷ However, Romania has resisted the pressure of the Council of Europe to align its legislation with international standards.²⁸ It was not until 2002, that homosexuality was finally decriminalized to comply with the requirements of EU accession.²⁹ At the same time, after 1989 traditional gender roles within the family began to be explicitly or implicitly questioned, and

²³ Mary Ellen Fischer, *From Tradition and Ideology to Elections and Competition. The Changing Status of Women in Romanian Politics*, in WOMEN IN THE POLITICS OF POSTCOMMUNIST EASTERN EUROPE, 168–169 (1998).

²⁴ Discriminatory Romanian Legislation for LGBT – A Historical Overview (Legislatie romaneasca discriminatorie pentru LGBT – Iсторик), ACCEPT ROMANIA (2017), <https://web.archive.org/web/20170711090431/http://accept-romania.ro/lgbt-issues/legislatie/> (last visited Sep 25, 2024).

²⁵ Decision 81/1994. See also Appeal, Decision 136/1994. SCOTT LONG, *Public Scandals: Sexual Orientation and Criminal Law in Romania*, (1998), <http://www.refworld.org/docid/3ae6a7e70.html>.

²⁶ *Id.*

²⁷ Michael Jose Torra, *Gay Rights after the Iron Curtain*, 22 FLETCHER FORUM WORLD AFF. 73, 77 (1998).

²⁸ *Id.* at 79–80.

²⁹ See Emergency Ordinance no. 89/2001 which entered into force in 2002.

a number of cases on this matter reached the RCC, as this article discusses next.

3. Gender and the Family under the 1991 Constitution

Gender equality does not seem to have been a key priority for post-socialist constitution-makers in Romania.³⁰ Yet, the 1991 Romanian Constitution (RC) does contain provisions directly related to the construction of gender relations. Many of these, however, appear mostly to be a reflection of various laws that were in force during socialism and hence could be seen as a product of their historical context, rather than a result of a gender equality agenda.³¹ The 1991 Constitution contained less extensive equality guarantees than the constitutions of the socialist period, but it did proclaim equality before the law and prohibited discrimination based on sex (although not on sexual orientation).³² The family, according to the 1991 RC, was still centered on marriage, and while the Constitution proclaimed the full equality of spouses and the duty and right of parents “to ensure the upbringing, education and instruction of their children”,³³ it only guaranteed “paid maternity leave”,³⁴ without mentioning any measures regarding men’s involvement in childcare. Instead, until 2003, when the Constitution was revised, men had the constitutional duty to defend Romania, and thus to undertake mandatory military service.³⁵

What was new in the 1991 RC was the guarantee of the respect for private and family life, the right to control one’s own body and the right to bodily integrity,³⁶ under which the RCC adjudicated questions of reproductive autonomy and LGBT+ rights, which were strongly repressed during the previous regime. In addition, the 1991 Constitution required that constitutional rights and freedoms be interpreted in light of the Universal Declaration of Human Rights and other international treaties the country is party to,³⁷ including the European Convention of Human Rights. It also stated that in case of any inconsistencies between the relevant international treaties and national laws, “the international regulations shall take precedence, unless the Constitution or

³⁰ Elena Brodeală & Silvia Șuteu, *Women and Constitution-Making in Post-Communist Romania*, in WOMEN AS CONSTITUTION MAKERS: CASE STUDIES FROM THE NEW DEMOCRATIC, 138 (Helen Irving & Ruth Rubio-Marín eds., 2019).

³¹ *Id.* at 107–108.

³² Articles 4 and 16.

³³ Article 44 that after the 2003 constitutional review became Article 48.

³⁴ Article 43 (2) that after the 2003 constitutional review became Article 47.

³⁵ Article 52 of the 1991 RC.

³⁶ Articles 22 and 26.

³⁷ Article 20(1).

national laws comprise more favourable provisions".³⁸ Consequently, international human rights law – including its gender equality standards – sets a minimum level of protection for fundamental rights under the RC.³⁹ As discussed below, some of these new constitutional provisions allowed the RCC to distance itself from the socialist past on questions of reproductive autonomy and other gender and family matters by interpreting the Constitution in a progressive fashion, the most notable exception to this relating to the question of same-sex marriage.

3.1. Decoupling Reproduction from Gender and the Family

The protection of individual reproductive autonomy has the potential to decouple reproduction from gender and the family by disrupting traditional family structures. It challenges the historical relegation of women to the domestic sphere as mothers. It includes, among others, access to abortion and medically assisted reproduction ('MAR'), irrespective of marital status or gender. While the RC only addresses questions of reproductive rights indirectly, the RCC, in a 2005 decision, developed a number of principles that enhanced reproductive autonomy.⁴⁰ Before delving further into the RCC's reasoning in this decision, a brief overview of the legal and constitutional status of abortion after the fall of socialism is necessary.

Abortion on request was legalized in Romania just days after the outbreak of the Romanian Revolution in 1989, which marked the end of socialism in the country.⁴¹ This, together with the liberalization of other family law norms (e.g., regarding divorce), had the potential to give women control over their reproductive functions.⁴² However, the legalization of abortion in Romania was merely a reaction to the disastrous consequences of Ceaușescu's pronatalist policies, and did not arise from a concern for women's equality as such.⁴³ It was thus not accompanied by broader measures to ensure the effective realization of women's reproductive autonomy. For example, in the 1990s, contraception remained largely unavailable or unaffordable, and many women were

³⁸ Article 20 (2).

³⁹ Decision 562/2017, para. 31.

⁴⁰ Decision 418/2005.

⁴¹ See Article 8 of Decree-Law 1/27.12.1989.

⁴² Ana Gherghel, *Transformations de la régulation politique et juridique de la famille. La Roumanie dans la période communiste et post-communiste*, ENFANCES FAM. GÉNÉR. 1, 116 (2006).

⁴³ See more in Elena Brodeală, *A Socio-Legal Analysis of Abortion in Romania: From Inspiring 'The Handmaid's Tale' to Post-Dobbs Developments*, in ACCESSING ABORTION: COMPARATIVE PERSPECTIVES (Roseman Mindy & Rebouché Rachel eds., 2025).

reluctant to use it, due to a lack of education about its safety.⁴⁴ In this context, abortion remained the primary fertility control method in Romania, while still being practiced in unsafe conditions outside medical establishments.⁴⁵

This disregard for reproductive autonomy *per se* was also reflected in the text of the 1991 Constitution. A proposal made by a female MP to enshrine procreative freedom in the constitutional text was rejected.⁴⁶ Therefore, the Constitution did not contain any explicit reference to this, or reproductive rights more broadly, as some constitutions in the region did at that time.⁴⁷ It is not clear why this was the case, given the urgency with which abortion was decriminalized after the outbreak of the Romanian Revolution. It is likely that since abortion had already been legal for two years at that time, it was no longer high on the agenda, particularly given that the dominant Orthodox Church opposed legalizing it.⁴⁸ Yet, it is important to note that unlike other post-communist constitutional documents,⁴⁹ the RC did not mention the protection of unborn human life (in order to restrict abortion) either, although there was a proposal to do so when it was drafted.⁵⁰ Instead, the drafters of the RC seem to have opted for a “middle way”. More precisely, they arguably allowed for indirectly guaranteeing reproductive rights, including access to abortion, through the eventual interpretation of more general rights included in the Constitution. These include the right to private and family life, the right to control one’s own body, and the right to physical and mental integrity.⁵¹ Be that as it may, Ruth Rubio-Marín’s analysis of constitutions around the world has demonstrated that the presence or absence of explicit or implicit reproductive rights provisions in a constitutional text does not necessarily guarantee the right to abortion.⁵²

⁴⁴ Jane Perlez, *Romania’s Communist Legacy: “Abortion Culture,”* THE NEW YORK TIMES, Nov. 21, 1996, <http://www.nytimes.com/1996/11/21/world/romania-s-communist-legacy-abortion-culture.html> (last visited Aug 30, 2024)

⁴⁵ ABORTION AND CONTRACEPTION IN ROMANIA. A STRATEGIC ASSESSMENT OF POLICY, PROGRAMME AND RESEARCH ISSUES, 1–2 (2004), <http://whqlibdoc.who.int/publications/2004/9739953166.pdf>.

⁴⁶ Brodeală and Șuteu, *supra* note 30 at 106. The proposal, however, was not concerned with advancing women’s rights *per se*; rather, it was aimed at granting families (as opposed to individuals) the right to decide on their size.

⁴⁷ See Article 27 of the 1990 Serbian Constitution, Article 55 of the 1991 Slovenian Constitution and Article 41 of the 1991 North Macedonian Constitution.

⁴⁸ II IULIANA CONOVICI, ORTHODOXY IN POST-COMMUNIST ROMANIA: THE RECONSTRUCTION OF A PUBLIC IDENTITY (ORTODOXIA ÎN ROMÂNIA POSTCOMUNISTĂ: RECONSTRUCȚIA UNEI IDENTITĂȚI PUBLICE) 641 (2010).

⁴⁹ See Article 6 (2) of the 1991 Charter of Fundamental Rights and Basic Freedoms of Czech Republic or Article 15(1) of the 1993 Slovak Constitution.

⁵⁰ Elena Brodeală, *The Changing Status of Women as Others in the Romanian Constitution*, 11 VIENNA J. INT. CONST. LAW 541, 560–561 (2017).

⁵¹ Articles 22 and 26 of the 1991 Constitution.

⁵² RUTH RUBIO-MARÍN, GLOBAL GENDER CONSTITUTIONALISM AND WOMEN’S CITIZENSHIP: A STRUGGLE FOR TRANSFORMATIVE INCLUSION 232–234 (2022).

What seems to be more important is the jurisprudential interpretation of these provisions.⁵³ Therefore, it is key to look at the RCC's decision on reproductive matters.

The RCC's only decision on reproductive rights regards the constitutionality of a legislative proposal that was initially aimed at restricting abortion through dissuasive counselling and was later extended to create a legal framework for MAR, a procedure that started being practiced in Romania a few years after 1989. The decision was taken after the President of Romania asked the Court to assess the constitutionality of this legislative proposal. While in the final formulation of the proposal, the dissuasive framing of pre-abortion counselling was toned down, the President argued that the new phrasing was unclear, and still left space for unduly restricting woman's access to abortion. In addition, the President challenged the constitutionality of other provisions, including the requirement that women willing to become surrogates must have their husbands' consent to carry out or terminate a pregnancy for third parties (i.e., the intended parents), and the fact that the legislative proposal granted access to MAR only to couples, but not to single (i.e. unpartnered) individuals.

Despite a number of shortcomings, the RCC's decision favors individual autonomy in reproductive matters. As regards the requirement of counseling before having an abortion, the Court ruled that if such a practice was dissuasive, in the sense of trying to deter women from having an abortion, this would contravene Article 22 of the Constitution on the right to life, to physical, and mental integrity. In the case at hand, it found that abortion counseling, as it was provided for by the legislative proposal, was purely informational and hence permitted under the Constitution.⁵⁴ Although this may appear to favor women's reproductive autonomy – and arguably protects them from the threats to their life, physical and mental integrity posed by illegal abortions – a closer look at the content of the counseling requirement shows that the Court might have not have fully understood or did not want to engage with the way in which such counseling could become a barrier to accessing abortion.

For example, while the counseling, as provided for by the legislative proposal, aimed to give information about the “risks” of abortion or related anesthesia, it was also supposed to warn women about its “possible complications and sequelae”.⁵⁵ In practice, this could have been deeply problematic. Informing patients about the risks of a medical procedure is standard practice.

⁵³ *Id.* at 234.

⁵⁴ Decision 418/2005, para. 3 (a).

⁵⁵ Article 7(4) and (5) (c) and (d) of Legislative Proposal regarding reproductive health and assisted human reproduction https://www.cdep.ro/proiecte/2003/200/10/7/cd217_03-1.pdf, accessed on 27 September 2024.

However, also informing them about its “possible complications and sequelae” appears to assume, as anti-choice groups do, that the medical procedure of abortion is harmful. In practice, pre-abortion counseling that offers false information on the “complications and sequelae” of this procedure is a well-known method of anti-choice groups to deter women from terminating their pregnancy. Such false information includes claims that abortion causes sterility, breast cancer, or a so-called “post-abortion syndrome” that manifests through psychological symptoms.

The fact that the wording of the legislative proposal left space for such practices shows that the provisions did not meet the “quality of law” requirement in terms of clarity, precision, and predictability that a law should meet when it could encroach on fundamental rights. This requirement existed in the ECtHR case law at that time,⁵⁶ which, according to the Constitution, should be a benchmark for the interpretation of fundamental rights in Romania.⁵⁷ Interestingly, the RCC itself noted the “deficient wording” in a relevant section of the legislative proposal, but it chose to declare pre-abortion counseling constitutional, provided it was purely informational. This, I suggest, should not be seen as a way to leave space for restrictions on reproductive autonomy. While one could argue that the Court did not give due diligence to the social reality of pre-abortion counselling, it must be mentioned that for a long time (including when this decision was rendered), the Court considered that remedying poor legal drafting was a competence of Parliament and did not raise questions of constitutionality as such.⁵⁸ It is only in 2014 that the Court, inspired by the ECtHR, began considering issues of “quality of law” as a ground for unconstitutionality in relation to all fundamental rights.⁵⁹ In theory, this development would mean that a provision that is unclear about the purely informational nature of pre-abortion counseling should normally be declared unconstitutional today. This is particularly important given that pre-abortion counselling is one of the main ways in which conservative groups in Romania try to further restrict access to this medical procedure.⁶⁰

That the Court favors reproductive freedom can be also inferred from its reasoning on related issues it has ruled on. For example, the Court strongly rejected any kind of spousal consent in the decision of a woman to engage in surrogacy and carry or terminate a pregnancy, if the

⁵⁶ Bianca Selejan-Gutan, *La qualité de la loi comme standard de constitutionnalité – brèves réflexions (The quality of law as a standard of constitutionality - brief reflections)*, ROMANIAN J. COMP. LAW 112, 112–115 (2020).

⁵⁷ Article 20 of the Constitution.

⁵⁸ Part 5 of Decision 418/2005.

⁵⁹ Between 2009 – 2011, the RCC would apply such a standard only as regards Articles 21 and 23(5) of the Constitution (free access to justice and individual freedom as regards the principle *nulla poena sine lege*). Selejan-Gutan, *supra* note 56 at 115–116.

⁶⁰ The ‘Pregnancy Crisis’ Franchise: From the USA to Romania (Franciza „criza de sarcină”. Din SUA în România), Scena 9, accessed 6 September 2024, <https://www.scena9.ro/article/franciza-criza-de-sarcina-din-sua-in-romania>.

intended parents requested she do so. The Court found that a requirement for spousal consent breaches the right to one's own body. Hence, although not explicitly mentioned, the overall spirit of the Court's decision was to protect women's reproductive autonomy, independent of concerns related to the family, or broader societal questions. This was also reflected in the holding that the right to access MAR is an individual right that cannot be made conditional on the consent of a partner "of opposite sex". In this sense, the Court decoupled reproduction from the family, protecting reproductive autonomy as an individual right, at least for heterosexual people.⁶¹

It must be noted, however, that in practice the situation of reproductive rights in Romania is not equally positive. For example, recent NGO reports highlight the existence of significant barriers to accessing abortion,⁶² while anti-choice groups are actively working toward further restrictions.⁶³ In the current context of rising anti-gender movements and opposition to sexual and reproductive rights, it is possible that the RCC may be called upon to rule on these issues once again. Article 1(3) of the RC requires that fundamental rights be interpreted "in the spirit of ... the ideals of the Revolution of December 1989". Reproductive freedom clearly represents one of these ideals, with abortion having been legalized by the first decree adopted by the leaders of the Romanian Revolution. The RCC would therefore have a strong foundation to adopt a liberal interpretation, although in the absence of an explicit reproductive rights provision in the constitutional text, it could also follow regressive international developments, like in the United States, where in June 2022 the Supreme Court overturned the right to abortion in the landmark case *Dobbs v. Jackson Women's Health Organization*.

3.2. Redefining Care and Breadwinning Roles in the Family

Feminists have long argued that achieving gender equality also requires redefining gender roles within the family as to encompass caregiving and breadwinning responsibilities for both men and

⁶¹ The legislative proposal at hand restricted access to MAR to couples only to exclude gays and lesbians from this procedure. The RCC might have used the syntagm "of opposite sex" to support the initial intention of the lawmakers. See the explanation of Mr Mircea Ifrim, head of the Parliamentary Commission for Health and Family in the parliamentary debate of 02.03.2004 and 21.02.2005:

https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=3870 (recording starting at 2h29 and min. 40). See also the parliamentary debate of 21.02.2005:

https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=3870 (recoding starting at min. 37), accessed on 28 September 2024.

⁶² See e.g. REPORT ON ACCESS TO SAFE ABORTION: PROBLEMS AND SOLUTIONS FOR GUARANTEED ACCESS TO ABORTION IN ROMANIA, 14 (2024), https://moasele.ro/wp-content/uploads/2024/04/EN_AMI-Report-on-access-to-safe-abortion.pdf (last visited Aug 5, 2024).

⁶³ Brodeală, *supra* note 43.

women. In this field as well, it is not the text of the RC that explicitly supports changing gender roles within the family, but the interpretation given by the RCC to certain constitutional provisions, and particularly to the principle of equality.⁶⁴ While the RC guarantees paid maternity leave and declares that the family “is founded on … the right and duty of the parents to ensure the upbringing, education and instruction of their children”, it remains silent about paternal leave or the exact distribution of gender roles in childcare.⁶⁵ It is the Constitutional Court that has embraced the changing nature of gender roles in a number of its decisions, and pointed out that according to the RC, both men and women should be able to participate in breadwinning and childcare on an equal footing. A series of these decisions concern questions related to the unequal retirement age of men and women. One decision addresses parental leave for men, while another touches on the question of caregiving time for men with small children. All these topics are related, as the different retirement ages for men and women, along with the exclusion of men from parental leave and time with children, stem from the idea that the caring role in the family (and society) is performed by women. Thus, legally it should be women benefiting from different pension benefits, parental leave, and time with their children.

In Romania, as in other countries, different retirement ages for men and women were intended to compensate for women’s role in childcare and household tasks. However, this negatively affected women’s pensions, and left gender roles untouched. Starting from the early 1990s, the early retirement age for women has been contested by both women wanting to work longer and men wanting to retire earlier, and by a group of parliamentarians in a request for an abstract review of legislation under parliamentary debate.⁶⁶ The first RCC decision on this topic was handed down in 1995. At that time, the Court concluded that it was too early to equalize retirement ages. Since women still bore most of the childcare and household responsibilities, they argued, it would have been unfair for them to retire at the same age as men, who mostly performed breadwinning roles.⁶⁷ The applicant appealed this decision. While the Constitutional Court maintained its holding on appeal, it made an important distinction between discrimination based on sex, and discrimination based on the social status of women as a result of their sex.⁶⁸ The Court

⁶⁴ Enshrined in Article 16(1) of the RC.

⁶⁵ For an overview of the different types of childcare leave existent in postsocialist Romania and their gender implications see Anca Dohotariu, *Parental Leave Provision in Romania between Inherited Tendencies and Legislative Adjustments*, 5 SYMPOSION 41 (2018).

⁶⁶ See Decision 107/1995; Decision 27/1996; Decision 888/2006; Decision 191/2008; Decision 1007/2008; Decision 1237/2010; Decision 287/2011; Decision 387/2018; Decision 112/2021.

⁶⁷ Decision 107/1995.

⁶⁸ Decision 27/1996.

emphasized that had the differentiated retirement age would have been unconstitutional were it motivated solely by biological sex, and not by social disadvantages related to one's sex.⁶⁹ Although the Court did not explicitly use the term “gender” in its ruling, its distinction between biological sex and the social condition associated with it is fundamental to understanding the socially constructed nature of gender roles.

As a result of this distinction, the RCC declared fifteen years later that since “cultural traditions and social realities” were evolving toward *de facto* equality between men and women, a gradual equalization of the retirement age would be permissible under the RC, if the legislature opted for it.⁷⁰ To support its holding, the Court referred to a broader European trend toward the equalization of the retirement age for men and women. It also based its reasoning on the Court of Justice of the European Union (‘CJEU’)’s finding⁷¹ that different retirement ages for men and women are not fit “to compensate for the disadvantages and difficulties that women face in their professional careers due to their social status”,⁷² and that childcare should be regarded not only as a woman’s, but also as a man’s, responsibility. The RCC also noted that the Romanian legal system embraced the changing gender roles of men by, for example, opening up parental leave to them too.

Interestingly, the Romanian legislature ultimately chose not to equalize the retirement ages on the ground that women and men’s social realities were different, with women continuing to bear the responsibility of both formal employment and domestic duties.⁷³ In follow-up cases, the Court upheld the constitutionality of this measure, considering that the legislature was better placed to evaluate gender relations in practice. Yet, the Court held that it was impermissible to oblige *all* women to retire earlier than men if they would rather continue working. In this sense, it found it unconstitutional to terminate a woman’s work contract before reaching the pension age for men, unless she agreed to retire at the age set for women.⁷⁴ It can thus be concluded that in retirement age cases, the Court has taken a strong stance against gender roles, although it has accepted that differential treatment to correct factual inequalities is permissible as a temporary measure, until gender roles are equalized.

⁶⁹ *Id.*

⁷⁰ Decision 1237/2010, part. 2.6.

⁷¹ In the cases Case C-46/07, Commission v. Italy, Case C-559/07, Commission v. Greece.

⁷² Decision 1237/2010, part 2.6.

⁷³ Transcript of the debate in the Chamber of Deputies of PL-x 323/2010/17.10.2010 from 6 December 2010, <https://www.cdep.ro/pls/steno/steno2015.stenograma?ids=6926&idm=10> (last visited Sep 7, 2010).

⁷⁴ Decision 387/2018; Decision 112/2021.

The same explicit stance against traditional gender roles within the family was also taken by the Court in cases brought by men complaining that they were excluded from caring for their children. A first decision, from 2005, concerned excluding men in the military from parental leave, which at that time was available only to women. The Court found that such a difference in treatment was unjustified, but did not provide much detail on why this was the case.⁷⁵ Rather, to legitimize its ruling, the Court referred to ECtHR case law that emphasized the importance of gender equality for the member states of the Council of Europe, including Romania. Interestingly, at that time the ECtHR had not required member states to grant paid parental leave to men, leaving this decision to national authorities.⁷⁶ The RCC therefore went a step beyond what was required by the ECtHR.⁷⁷

Significantly, in 2019, the RCC further overrode the reasoning of the ECtHR in a case against Romania regarding men's role in childcare.⁷⁸ This case dealt with a provision of the Code of Criminal Procedure that granted only convicted women (and not men) a stay of execution of their sentence if they had a child under one year of age.⁷⁹ A similar case had been decided by the ECtHR just two years before the RCC handed down its ruling.⁸⁰ The ECtHR found that although men's caretaking capacities were comparable to those of women, granting a stay of execution only to women with children under one year old was justified, among other reasons, by the "specialties" that supposedly existed *only* between a mother and her child.⁸¹ Furthermore, the ECtHR found this to be a protective measure for pregnant women and mothers in the prison environment.⁸² This reasoning provoked a strong dissenting opinion from two of the male judges. In a similar

⁷⁵ Decision 90/2005.

⁷⁶ In the 1998 case *Petrovic v. Austria*, the ECtHR stated that the decision of granting men a parental leave allowance fell within the margin of appreciation of states, whereas the provision declared unconstitutional by the RCC granted *paid* parental leave only to women. *Petrovic v. Austria*, Application no. 20458/92, March 27, 1998, paras. 42-43. Developments in the case law of the ECtHR took place only in 2009 in *Weller v. Hungary*, App. no. 44399/05, 31 March 2009 and later on in *Konstantin Markin v. Russia*, App. no. 30078/06, March 22, 2012.

⁷⁷ The ECtHR endorsed this reasoning only in the 2012 case *Konstantin Markin v. Russia*, *supra* note 75. It must be noted that although the RCC found that excluding men in the military from parental leave was unconstitutional, the lower courts still denied the applicant the right to parental leave on the ground that he had not duly contributed to the social security fund. He therefore took his case to the ECtHR, which found a violation of his private life due to the failure of the national authorities to consider unpaid parental leave. *Hulea v. Romania*, App. No. 33411/05, October 2, 2012. See more about the case in Elena Brodeală, *Gender Discrimination in Romania through the Case Law of the ECtHR: Searching for the Roots of the Systemic Failure to Protect Women's Rights in Romania*, in ANTI-DISCRIMINATION LAW IN CIVIL LAW JURISDICTIONS 214, 219–222 (Barbara Havelková & Mathias Möschel eds., 2019).

⁷⁸ Decision 535/2019.

⁷⁹ See more about the stay of execution under Romanian law in Alina-Marilena Tucă, "Stay of Execution of Sentence - Theoretical and Practical Approach," *Challenges of the Knowledge Society*, 2021, 128–37.

⁸⁰ *Alexandru Enache v Romania*, App. no. 16986/12, March 3, 2017.

⁸¹ *Id.*, para. 76.

⁸² *Id.*, paras. 71, 77.

case, a majority of mostly male judges on the bench of the RCC also decided to distance themselves from the judgment of the ECtHR, and found that denying convicted men a stay of execution when they had a child under the age of one constituted discrimination based on sex.⁸³

The RCC explicitly engaged with the ECtHR's reasoning to justify why, unlike the Strasbourg Court, it deemed the provision in question to be discriminatory against men. In particular, the RCC highlighted that men also play a key role in children's lives very early on.⁸⁴ This had been acknowledged by Romanian lawmakers through the opening of parental leave to men.⁸⁵ The RCC further held that it is in the best interests of a child to grant men a stay of execution of their sentence, not least because mothers might not always be able or willing to provide childcare.⁸⁶ In addition, the RCC stated – very boldly – that granting men a stay of execution to care for their children cannot lower or affect the protection of mothers and motherhood.⁸⁷ The RCC also noted that a domestic law provision used by the Strasbourg Court in its judgment to support its finding of non-discrimination⁸⁸ was no longer in force. This provision had allowed any person – including men – to request a stay of execution of only three months if their imprisonment had grave consequences for his/her family.⁸⁹ Interestingly, two of the three women on the bench of the RCC disagreed with the majority and would have followed the ECtHR's reasoning.⁹⁰ Despite not being unanimous, this decision stands out as one of the clearest expressions of the Court's opposition to conventional gender roles within the family, rendering the RCC even more progressive in this area than the Strasbourg Court. Of course, one could not ignore that the cases analyzed in this section involve either issues of formal equality or complaints brought by men, which courts in other jurisdictions like the US or the UK have generally reviewed more favorably.⁹¹ Yet, as we will see below, these matters do not seem to impact RCC holdings in the same way.

3.3 Parenthood and Gender Equality

⁸³ Decision 535/2019, para. 22.

⁸⁴ *Id.*, para. 35.

⁸⁵ *Id.*, para. 34.

⁸⁶ *Id.*, paras. 33, 35.

⁸⁷ *Id.*, para. 39.

⁸⁸ *Alexandru Enache v. Romania*, *supra* note 80, para. 74.

⁸⁹ Decision 535/2019, para. 36.

⁹⁰ See the separate opinion of Justices Livia-Doina Stanciu and Elena-Simina Tănasescu.

⁹¹ HAVELKOVÁ, *supra* note 12 at 223–224.

Although the Family Code, enacted under socialist rule, was supposed to promote gender equality, it also contained provisions that were later found by the RCC to be discriminatory.⁹² Article 54(2), for instance, granted the right to contest the paternity of a child born out of wedlock exclusively to the mother's husband, who was presumed to be the father. This rule sought to ensure marital stability and placed all decision-making power regarding the filiation of a child in the hands of the husband, even when his wishes did not align with the genetic reality or the desires of the mother, child, and genetic father. The husband in this sense retained some of the prerogatives of being "the head of the family".

The first case contesting Article 54(2) of the Family Code was brought in 1995 by a genetic father looking to establish his paternity. The Court rejected his claim, reasoning that declaring this provision unconstitutional "would favor destabilizing families and marriages, would promote an unacceptable climate of immorality and instability in society and would harm children's interests".⁹³ A similar case was brought before the Court again in 2001, this time by the legal mother and the child.⁹⁴ In this case, the Court declared the provision granting the right to contest paternity only to the presumed father, but not to the mother and the child, unconstitutional.⁹⁵ It based its reasoning on relevant case law of the ECtHR,⁹⁶ and the principles of non-discrimination and equality between spouses, as well as on the need to give legal recognition to the genetic reality. The decision contained the strong dissent of two male judges who argued that "biology should be subordinated to institutional arrangements",⁹⁷ and that the provision should have been found constitutional to promote family stability and good morals.⁹⁸ This statement shows that the dissenters were well aware of the role of social constructs – or "legal fictions"⁹⁹ – in shaping family relations.

While the 2001 decision opened the way to contest paternity for the mother and child, the genetic father still did not have this prerogative. This was again contested before the RCC, but without success. In a 2009 decision, the Court found that it could not act as a "positive legislator"

⁹² The socialist Family Code adopted in 1953 was in force until 2011 when the so-called "New Civil Code" entered into force.

⁹³ Decision 78/1995.

⁹⁴ Decision 349/2001.

⁹⁵ The applicants in this case also contested the presumption of paternity as being unconstitutional. The Court rejected this claim, stating that the presumed father is in a different situation to other men who are not married to the mother and that this legal presumption has the aim of upholding public order and good morals.

⁹⁶ More precisely the case *Kroon and Others v. the Netherlands*, App. no. 18535/91, October 27, 1994.

⁹⁷ Dissenting opinion of Petre Ninosu and Lucian Stangu, Decision 349/2001.

⁹⁸ *Id.*

⁹⁹ *Id.*

to amend the legislation and extend the right to contest paternity to the biological father or any other interested party.¹⁰⁰ Such a holding is questionable, given that the Court had already ruled that the mother and child should have standing to contest paternity, particularly in the interest of establishing genetic reality.

Moreover, while the mother and child did gain standing to contest the paternity of the presumed father as a result of the RCC's decision in 2001, further discrepancies emerged regarding the deadlines for contesting paternity. More precisely, Article 55(1) of the Family Code provided for a 6-month deadline for the presumed father to contest paternity from the moment he became aware of the child's birth, but it imposed no such deadlines on the mother or the child. When confronted with the question of the constitutionality of this provision, the RCC regarded it again as a legislative omission that needed to be addressed by lawmakers, rather than an issue for constitutional review.¹⁰¹ In addition, another distinction existed between the presumed father, who could only contest paternity within 6 months of learning of the child's birth, and genetic fathers, who acknowledged a child born outside of marriage and who could contest paternity at any time.¹⁰² The Court did not find this distinction discriminatory, reasoning that fathers of children born within marriage and those of children born outside marriage were in different legal positions—one being married to the child's mother, while the other not. In practice, this situation had two conflicting implications. On the one hand, the 6-month deadline for the presumed father reinforced marital stability by giving him only a limited window to challenge paternity. On the other hand, this stability was not absolute, as both the mother and child retained the ability to challenge the presumed paternity at any time, in pursuit of establishing the “genetic truth”. Furthermore, it is not clear why the father of a child born within marriage should have been treated differently to the father of a child born outside marriage.

In 2007, a new deadline of three years to contest the paternity of the presumed father was introduced for *all* subjects entitled to take such legal action. The presumed father was given three years to contest his paternity from the moment he found out about the birth and the mother and

¹⁰⁰ Decision 1573/2009.

¹⁰¹ See Decisions 453/2003, 390/2005, 538/2005, 646/2006, 589/2007 and 806/2007. On similar situations see also Decisions 776/2008, 1060/2009, 582/2010, 1033/2010, 1328/2010. For cases regarding children born outside marriage see Decisions 1554/2010 and 697/2016. The RCC also found that spouses have equal rights in matters related to child custody after divorce. However, Tănăsescu and Băluță point out that in these cases, the Court could not balance the rights and obligations of both men and women in a perfectly equal manner, as the institution of joint custody did not exist at that time in Romania, being introduced only in 2011. See Decisions 82/2003, 327/2004, 168/2006, 411/2006, 974/2007, 1023/2007, 1638/2010 discussed in Elena-Simina Tănăsescu & Ionela Băluță, *Romania (Roumanie)*, 34 ANNU. INT. JUSTICE CONST. 391, 404 (2019).

¹⁰² Article 58(1) of the Family Code.

child were allowed three years from the birth itself.¹⁰³ Yet, this new law did not apply retroactively to children born before the enactment of the new deadline, which was found to be constitutional by the RCC.¹⁰⁴

A similar situation arose following the entry into force of Romania's New Civil Code in October 2011. The Code has finally granted genetic fathers the right to contest paternity on an equal footing with the child, mother, and her husband. Yet, according to Article 47 of Law 71/2011, this provision applied exclusively to fathers of children born after the Civil Code entered into force. In the case of children born before, genetic fathers did not have standing to challenge presumed paternity, as the relevant provision of the old Family Code¹⁰⁵ remained in effect. Article 47 of Law 71/2011 was contested before the RCC. The Court, however, found the provision constitutional, stating that it respects both the principles of non-retroactivity and non-discrimination.¹⁰⁶ This holding was maintained in subsequent case law, in which the Court also clarified – without bringing any explicit arguments – that, in its view, the situation of the biological father was different to that of the mother and child, whose exclusion from contesting paternity was deemed unconstitutional in 2001.¹⁰⁷ In sum, while the RCC began to depart indirectly from traditional gender roles in matters of parentage involving heterosexual couples, progress has been uneven. The powers of the husband and the concept of marriage stability still at times trumping the rights of the genetic father. As it will be discussed below, the Court is even less willing to completely break the gender binary in marriage questions when same-sex couples are involved.

3.4. (Not) Breaking the Binary? Same-Sex Marriage and the Redefinition of Family

The legal recognition of same-sex relations has the potential to challenge the traditional gender roles historically assigned to spouses within marriage and implies a reconceptualization of this institution. More precisely, same-sex marriage centers the essence of marriage on affection and reciprocal support, rather than on the differentiated gender roles of the spouses. In addition to strengthening LGBT+ rights, this could also have a positive impact on gender equality. As a result, resistance to same-sex marriage stems both from opposition to same-sex relations and from a desire to preserve traditional gender roles within the family.

¹⁰³ Article 2 of Law 288/2007.

¹⁰⁴ Decision 755/2008. See also Decision 1345/2008.

¹⁰⁵ Article 54(2).

¹⁰⁶ Decisions 847/2015.

¹⁰⁷ Decision 583/2016, para. 21.

Article 44 of the 1991 RC declared that “[t]he family is founded on the freely consented marriage of the *spouses*, [and] their full equality [...] ”.¹⁰⁸ This article was thus formulated in gender-neutral terms, and can be interpreted as referring also to spouses of the same sex. When the Constitution was written, however, same-sex marriage was not a matter of discussion, due to the criminal ban on sexual relations between persons of the same sex.¹⁰⁹ It is likely that this formulation in Article 44 was instead a transposition at the constitutional level of a similar provision from the 1954 Family Code that was adopted in the socialist period to improve the status of women in the family.¹¹⁰

The gender-neutral formulation of Article 44 (later Article 48)¹¹¹ of the Constitution has been contested by conservative groups on several occasions.¹¹² Although same-sex marriage was not seriously debated at the societal level during Romania’s transition to democracy, these groups aimed to preventively define marriage in the Constitution as being between a man and a woman, and to block any future legalization of same-sex marriage, in view of the evolution taking place in other countries.¹¹³ The most important attempt took place in 2015, when an alliance of conservative organizations called “The Coalition for Family” gathered the necessary number of signatures to launch a citizens’ initiative to review the Constitution, and define marriage as being between a man and a woman.¹¹⁴ The initiative passed a qualified majority vote in the Parliament and two constitutional reviews by the RCC, but was invalidated at the last step before its adoption, through a national referendum that did not meet the 30% quorum for participation.¹¹⁵ Nonetheless, it left behind two decisions of the Constitutional Court that will have an important impact on the definition of family in the future.¹¹⁶ One of them, namely Decision 580/2016, is particularly relevant for this article.

¹⁰⁸ Emphasis added.

¹⁰⁹ In 1994, the Constitutional Court declared the criminalization of sexual relations between persons of the same-sex unconstitutional when these took place in private and did not create “public scandal”. See Decision 81/1994, Appeal Decision 136/1994. While some scholars call this decision “revolutionary”, its limitations are obvious and convictions for homosexual relations continued even after the RCC’s decision. Marieta Safta, *The Concept of “Family” and Family Relationships According to the Romanian Constitution*, CONFERINȚA INTERNAȚIONALĂ DREPT STUD. EUR. ȘI RELAȚII INTERNAȚIONALE 66, 68 (2021); LONG, *supra* note 25.

¹¹⁰ See Article 1 of the 1953 Family Code and LUCIANA MARIOARA JINGA, GENDER AND REPRESENTATION IN COMMUNIST ROMANIA: 1944-1989 (GEN ȘI REPREZENTARE ÎN ROMÂNIA COMUNISTĂ: 1944-1989) 214–215 (2015).

¹¹¹ After the 2003 constitutional review.

¹¹² Brodeală, *supra* note 8 at 22–23.

¹¹³ *Id.* See the memorandum of the constitutional amendment: <http://www.cdep.ro/proiecte/2017/100/20/7/em34.pdf>.

¹¹⁴ *Id.* at 23.

¹¹⁵ *Id.*

¹¹⁶ Decision 580/2016 and Decision 539/2018. For a detailed analysis of these two decisions see Elena Brodeală, *Legal and Constitutional Developments in the Field of Gender Equality in Post-Communist Romania : An Analysis in the Framework of the Public/Private Divide* (2019) (unpublished PhD thesis, European Univ. Inst.), available at <https://cadmus.eui.eu/handle/1814/63206>, last visited March 8, 2025.

In Decision 580/2016, the RCC reviewed the procedural requirements of the citizens' initiative and considered whether it would breach the eternity clause of the Constitution. The eternity clause prohibits, among others, any revision that would result in "the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof".¹¹⁷ Decision 580/2016 was highly criticized due to its poor reasoning.¹¹⁸ Indeed, in this decision, the RCC dedicated only one paragraph to the question of whether the initiative breaches the eternity clause, concluding that the proposed amendment did "not suppress citizens' fundamental rights" but "only ...[made] a clarification regarding the exercise of the fundamental right to marriage, in the sense of explicitly stating that this can be concluded only between partners of different biological sexes".¹¹⁹

Furthermore, the Court adopted an originalist interpretation and concluded that Article 48 was included in the Constitution with the aim of guaranteeing the right to marry only to opposite-sex couples. The Court reasoned that the text of Article 48 linked the institution of marriage with the protection of children (within and outside marriage). It therefore deemed it "self-evident" that marriage, as defined by Article 48, had a "biological component", being related to procreation, and held that marriage should be open only to heterosexual couples, as only they can conceive children.¹²⁰ The Court therefore endorsed the definition of family proposed by the initiators of the constitutional review.¹²¹

Decision 580/2016 contradicts the aforementioned case law on reproductive rights in which the Court explicitly stated that the right to reproduce belongs to an individual alone and not to a couple, and that this right cannot be made dependent on the will of a partner.¹²² Moreover, the Court's originalist interpretation does not offer a comprehensive and accurate account of the situation at that time, given that Article 48 seems to have been inspired by the 1954 Family Code, which aimed to equalize gender relations within the family, rather than prevent same-sex marriage (which was probably not a topic of discussion at the time).¹²³ In this context, the proposed constitutional review could have been deemed unconstitutional for contravening equality between

¹¹⁷ Article 152 of the RC.

¹¹⁸ See Vlad Perju, *The Lack of Professionalism of the Constitutional Court: On the Positive Opinion Regarding the Initiative to Modify the Definition of Marriage in the Romanian Constitution (Neprofesionalismul Curtii Constituionale: Despre Avizul Pozitiv Dat Initiativei de Modificare a Definitiei Casatoriei in Constitutia Romaniei)*, CONTRIBUTORS.RO (2016), <http://www.contributors.ro/cultura/neprofesionalismul-curtii-constitutionale-despre-avizul-pozitiv-dat-initiativei-de-modificare-a-definitiei-casatoriei-in-constitutia-romaniei/> (last visited Jun 30, 2024).

¹¹⁹ Para. 42. Decision 580/2016.

¹²⁰ Decision 580/2016, para. 42.

¹²¹ See the memorandum of the constitutional amendment: <http://www.cdep.ro/proiecte/2017/100/20/7/em34.pdf>.

¹²² Decision 418/2005.

¹²³ See also Elena Simina Tănasescu, *De l'initiative Populaire Au Référendum Constitutionnel En Roumanie*, 9 ROMANIAN J. COMP. LAW 97, 107 (2018).

spouses, and their freedom to choose the roles they want to fulfill within marriage. Furthermore, holding that marriage should be open only to those able to procreate seems to imply that heterosexual couples who cannot or do not want to have children cannot marry. This is not the case. It is also unclear why the Court ignored the fact that same-sex couples are able to have children too, particularly using assisted reproductive technologies. Finally, Article 48(3) states that “[c]hildren born out of wedlock are equal before the law with those born in wedlock”. Hence a holistic interpretation of Article 48 suggests that procreation within or outside the confines of marriage should receive the same level of legal protection, rendering it unnecessary to link marriage to reproduction.

The remaining question therefore relates to the Court’s reticence to move beyond the gender binary in relation to marriage. As discussed above, in other cases related to the equality of men and women, the Court has directly or indirectly endorsed the notion that achieving gender equality requires changing gender roles. The Court has been less open to granting full equality to same sex couples. During the period when the initiative to revise the Constitution was discussed, the Court was confronted with a case regarding the recognition of same-sex marriages conducted abroad for the purpose of residence rights, in the context of the free movement of persons in the EU.¹²⁴ In this case, the Court held that individuals in a same-sex couple have a right to the protection of their private and family life and the right to the recognition of their marriage abroad for the purpose of residence rights, although not the right to marriage.¹²⁵ Yet this holding seems to have been mostly based on Romania’s obligations under the ECHR¹²⁶ and a response to the preliminary questions it sent to the CJEU, rather than to a commitment to LGBT+ equality as such.¹²⁷

It is possible that in these kinds of cases, the RCC has been responsive to the overall social context in Romania and therefore may have acted with caution. Romania was the last country in the EU to decriminalize homosexuality in 2001, and it did so only to meet the requirements of EU accession. Furthermore, the decriminalization of homosexuality, as well as the recognition of same-sex relations, has attracted strong opposition from the Romanian Orthodox Church (to which most of Romanians belong). Unlike the question of abortion, the legalization of which is partially safeguarded by its dramatic history during state socialism, same-sex relations have not gained

¹²⁴ The so-called *Coman* case, Decision no.534/2018.

¹²⁵ Decision 534/2018, para. 41 and 42.

¹²⁶ *Id.*, para. 29.

¹²⁷ See a detailed account of this decision in Brodeală, *supra* note 116 at 240–247.

acceptance in Romanian society. A majority of Romanians still disapprove of the legal recognition of same-sex relationships, and demonstrate homophobic attitudes.¹²⁸

In this context, having little chance of success at the domestic level, same-sex couples seeking legal recognition have taken their fight to the international level through complaints before the ECtHR. A key case is *Buhuceanu and Others v. Romania*.¹²⁹ In this case, the Romanian government argued that, although the Romanian state is fully committed to fight LGBT+ discrimination and homophobia, it could not legally recognize same-sex relations, due to the low acceptance of such relationships in Romanian society.¹³⁰ It also contended that such recognition should be left to follow its “due democratic path” in the national Parliament,¹³¹ suggesting that courts should not intervene in this area. The ECtHR disagreed, and in a judgment delivered in May 2023, it found Romania in violation of Article 8 of the ECHR for not granting any form of legal recognition to same-sex couples. If implemented, this judgment should result in Romania permitting civil partnerships and, arguably, paving the way for the social acceptance of same-sex couples and non-traditional families. According to Article 20 of the RC and as affirmed by the RCC, the Court must interpret fundamental rights in line with the ECtHR’s case law, except when it can provide a higher standard of protection.¹³² Therefore, the *Buhuceanu* judgment might support the RCC in taking a more resolute approach to questions of same-sex marriage in the future. Given that the RCC has already stated that the family life of same-sex couples falls under the protection of Article 26 of the RC and that they should “benefit, in time” from legal recognition,¹³³ this could be a likely outcome.

4. Concluding Remarks

This article examined the evolution of gender roles within the family under Romania’s post-socialist Constitution. It showed that on matters touching on equality between men and women,

¹²⁸ According to the European Commission’s 2019 Eurobarometer on Discrimination, just 29% of Romanians have a favorable perception of same-sex relationships and agree with same-sex marriage. See <https://europa.eu/eurobarometer/surveys/detail/2251> p. 23 in the summary of the findings. Accessed on 8 March 2025.

¹²⁹ *Buhuceanu and Others v. Romania*, App. nos. 20081/19 and 20 others, May 23, 2023, para. 83.

¹³⁰ *Id.*, para. 15.

¹³¹ *Id.*, para. 48.

¹³² Decision 562/2017, para. 31. In this decision, the Court found that limiting the right to refuse to testify in a criminal trial to (former) spouses, while excluding individuals in similar relationships, was discriminatory. Although the ruling does not explicitly mention it, this should also extend to same-sex partners who cannot legally marry in Romania.

¹³³ Decision no.534/2018, paras. 41.

such as reproductive autonomy, distribution of care, and breadwinning roles within the family, as well as questions related to parenthood, the RCC has generally interpreted the Constitution in a rather forward-looking fashion, in a break from the country's socialist past. Yet one area in which the Court has reaffirmed the traditional understanding of family is same-sex marriage. While the RCC ruled in 1994 that criminalizing same-sex relations in the private sphere was unconstitutional, in more recent decisions it has resisted including same-sex couples within the definition of the "family based on marriage", despite recognizing their right to the protection of private and family life. The departure of the Court from the traditional understanding of gender roles and the family in this sphere was thus only partial.

This latter finding of the article suggests that the recent conservative constitutional turn on gender and family questions in Romania might not necessarily be the result of reluctance to advance women's rights or equality between men and women more broadly, but could instead originate from restraint on questions of sexual orientation. This would be in line with trends in other countries in CEE, where constitutional amendments and/or referenda are used to prevent progress on LGBT+ equality while gender equality instruments have often been contested for trans- or homophobic reasons, and not necessarily due to their potential to improve women's social status. For example, in some CEE states, the ratification of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (known as the Istanbul Convention) has been challenged on the ground that its definition of gender as a social construct, and the obligation it imposes on states to fight gender stereotypes, would encourage homosexuality and "transgenderism", thereby destroying the traditional family.¹³⁴

Given this conservative trend in CEE and its success in countries like Bulgaria, Poland, and Hungary, one might wonder whether it will gain traction in the Romanian context and lead to a regression in the constitutional progress made on questions of gender and the family. Said differently, one might ask whether the conservative decisions of the RCC on same-sex marriage could be the beginning of a regressive trend in the constitutional protection of gender equality within the family. This is especially relevant considering that, in February 2024, a new citizens' initiative was launched in Romania to amend the constitution and define marriage exclusively as

¹³⁴ See e.g. Ivo Gruev, *Constitutionalising Gender: Deterrence Instead of Equality*, INT. J. CONST. LAW (forthcoming). See also Josipa Šarić, *The Istanbul Convention in Croatia: Challenges and Opportunities in Tackling Violence against Women and Domestic Violence*, in VIOLENCE AGAINST WOMEN UNDER EUROPEAN HUMAN RIGHTS LAW: FROM SUPRANATIONAL STANDARDS TO NATIONAL REALITIES 161, 168–172 (Elena Brodeală, Ivana Jelić, & Silvia řuteu eds., 2024).

a union between a man and a woman.¹³⁵ The answer to this question is not easy. Yet, recent developments seem to suggest this might not be the case. As discussed above, the recent case law of the ECtHR requiring Romania to grant legal recognition to same-sex couples might encourage the RCC to adopt more progressive holdings in the future. Further, in a recent decision, the RCC went “against the tide” of “gender backsliding” in CEE, resisting an important attack on gender questions in Romania.¹³⁶ The decision concerned the constitutionality of a bill aiming to ban gender perspectives in research and education.¹³⁷ Before finding the bill unconstitutional, the Court noted that “the concept of ‘gender’ has a wider scope than that of ‘sex’/sexuality in a strict biological sense, since it incorporates complex elements of a psychosocial nature”.¹³⁸ The Court then emphasized that “[t]he Romanian State has enshrined this vision [that gender is a social construct]… in its legislation undertaking essentially to combat gender stereotypes and enforce in an effective manner the principle of equality and non-discrimination”.¹³⁹ It is noteworthy that to reach its conclusion, the Court considered not only legislation on equality between men and women but also domestic provisions prohibiting discrimination on sexual orientation and allowing individuals to change their sex.¹⁴⁰ Furthermore, the RCC relied on Articles 3 c) and 12 of the Istanbul Convention regarding the definition of gender as a social construct and the obligation of states to fight gender stereotypes,¹⁴¹ departing in this way from the regional trend of contesting this document due to these provisions. This, together with its previous case law supporting the changing nature of gender roles within the family, makes the Court well equipped to resist further attacks on gender equality. Therefore, the Romanian example shows that “gender backsliding”, or

¹³⁵ The initiators however have failed to gather the necessary number of signatures needed for its validity. Laura Popa, “*The Patriarchy did not Give its Blessing.*” *Dan Puric, Piperea, and Other Romanian Extremists Failed to Gather Signatures for the Constitutional Redefinition of the Family and for Cash Payments.* („Patriarhia nu a dat binecuvântare”. *Dan Puric, Piperea și alții extremiti români n-au reușit să strângă semnături pentru redefinirea constituțională a familiei și plata cash*), Oct. 8, 2024, <https://pressone.ro/patriarhia-nu-a-dat-binecuvantare-dan-puric-piperea-si-alti-extremisti-romani-n-au-reusit-sa-stranga-semnaturi-pentru-redefinirea-constititionala-a-familiei-si-plata-cash> (last visited Dec 29, 2024).

¹³⁶ Georgiana Epure & Elena Brodeală, *Going Against the Tide: The Romanian Constitutional Court Rejects a Ban on Gender Studies*, INT’L J. CONST. L. BLOG (Mar. 21, 2021), <http://www.iconnectblog.com/2021/03/going-against-the-tide-the-romanian-constitutional-court-rejects-a-ban-on-gender-studies/> (last visited May 25, 2023).

¹³⁷ For a detailed analysis see Elena Brodeală & Georgiana Epure, *Nature versus Nurture: ‘Sex’ and ‘Gender’ before the Romanian Constitutional Court: A Critical Analysis of Decision 907/2020 on the Unconstitutionality of Banning Gender Perspectives in Education and Research*, 17 EUR. CONST. LAW REV. 724 (2021).

¹³⁸ Decision 907/2020, para. 64. Author’s translation.

¹³⁹ *Id.*

¹⁴⁰ *Id.*, paras. 58, 59.

¹⁴¹ *Id.*, para. 60.

the resistance to acknowledging that gender is a social construct, is not necessarily a characteristic of the entire CEE region.¹⁴²

¹⁴² Contrast to the argument made in Barbara Havelková, *The Struggle for Social Constructivism in Postsocialist Central and Eastern Europe*, 18 INT. J. CONST. LAW 434 (2020).