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# GENDER AND SEXUALITY UNDER ROMANIA'S 1991 CONSTITUTION: BETWEEN MARGINALIZATION AND PUBLIC PARTICIPATION

## Abstract

This working paper aims to scrutinize the 1991 Constitution from the perspective of gender and sexuality. To contextualize the analysis, the paper first discusses the status of gender and sexuality in the previous constitutions of Romania. Then, the paper moves on to questions of gender and sexuality under Romania's current Constitution since its drafting in 1990 until July 2021, the time of writing. In particular, the paper looks at gender- and sexuality-related matters of constitution-making, constitution-drafting and constitutional adjudication in post-communist Romania. Overall, the paper argues that gender and sexuality have progressed from being marginal issues under Romania's Constitution to being the subject of serious contestation on the constitutional front, attracting important public attention and participation.

**Keywords:** Gender and the Law, Romanian Constitution, the Romanian Constitutional Court, Sexuality, LGBT+ Rights, Women's Rights, Gender Equality in Romania

## 1. Introduction

"Gender and Constitutionalism" has become an established field of study in many countries, particularly in the Anglo-Saxon world.<sup>1</sup> Scholars have scrutinized the manner in which constitutionalism promotes gender equality from different angles. They have looked into issues of constitution-making, asking whether women have participated in the writing of their countries' constitutions and whether and how women's interests have been included in constitutional texts.<sup>2</sup> Scholars have also analyzed the extent to which constitutional courts have promoted gender equality, or have interpreted constitutions in a gender-sensitive fashion.

For example, scholarship has looked at how constitutional courts have dealt with cases regarding reproductive rights, gender quotas, violence against women, pregnancy, parental leave, discrimination in custody cases and other situations of gender discrimination. In addition, scholars have analyzed the composition of constitutional courts looking at the extent to which women are present or occupy positions of leadership on constitutional benches, have their voices heard or promote women's interests in constitutional adjudication.<sup>3</sup> With the rise of third wave feminism, these inquiries undertook an intersectional perspective analyzing not only gender but also other axes of inequality such as race, ethnicity, class or sexuality.

The question of sexuality, for instance, has proved extremely important in understanding whether and how constitutions enhance men and women's equal citizenship. Sexuality not only touches on issues such as reproductive rights, including abortion and contraception, but is also related to family dynamics, in particular the distribution of gender roles in the private sphere. Hence, women's rights are intrinsically linked with LGBT+ issues. To give an example, the root of women's inequality is often perceived to lie in the attribution of different gender roles to women and men: women are expected to be wives, housekeepers and carers in the private sphere, while men are expected to take on the role of breadwinners and undertake work in the public sphere. This is why the "traditional family", based on the mentioned gender roles, was seen to be under threat when the topic of decriminalizing sexual relationships between individuals of the same sex and, later, the question of same-sex unions and marriage, came up. That groups attacking women's rights generally also oppose LGBT+ rights, and that studies on gender rights evaluate both women and LGBT+ matters, is therefore no coincidence.

Different studies on the topic of "Gender and Constitutionalism" started emerging quite recently in Romania as well. These studies looked at gender issues in the constitution and legislation of Romania,<sup>4</sup> at issues of women and constitution-making in the country,<sup>5</sup> as well as at the case law of the Constitutional Court of Romania ("CCR", "the Court").<sup>6</sup> Additionally, topics such as gender and sexuality that had not been issues of systematic or strategic contestation and debate on the constitutional front in Romania for a very long time after 1989, have begun to be intensely discussed from a constitutional point of view in recent years. For example, in 2015, a citizens' initiative was launched to review the Romanian Constitution and define marriage as between a man and a woman. The initiative gave rise

to intense debate spanning about three years. During this period, it passed two constitutional reviews by the Constitutional Court, a qualified majority vote of 2/3 in both chambers of Parliament and was put to a national referendum. The initiative was ultimately unsuccessful for not reaching the required participation quorum at the referendum. However, it sparked important discussions on whether the constitution should define marriage in gender neutral terms and whether or not it should offer protection to nontraditional families. Moreover, in 2015, the Constitutional Court had to decide on whether the non-recognition of same-sex marriages contracted abroad that could restrain freedom of movement within the European Union would be constitutional or not. This case was seriously debated at societal level in parallel with the initiative to review the constitution until a decision of the Constitutional Court was rendered in 2018.<sup>7</sup> Other debates on gender and sexuality have recently taken place before the Constitutional Court on the topic of sex education in schools,<sup>8</sup> and on banning gender studies and gender perspectives in education and research more broadly.<sup>9</sup> The latter in particular offered the Court the opportunity to decide on the meaning of “gender” under the Romanian Constitution, and its implications for women and LGBT+ rights.

This working paper aims to scrutinize the 1991 Constitution from the perspective of gender and sexuality. To contextualize the analysis, in Section 2, the paper first covers the status of gender and sexuality in the previous constitutions of Romania. Subsequently, in Section 3, the paper moves on to questions of gender and sexuality under Romania’s current Constitution from its drafting in 1990 until July 2021, the time of writing. This section first examines how women’s rights were framed in the 1991 Constitution, and the extent to which women have been active actors in constitution-making in post-communist Romania (Sub-section 3.1.). The section then moves on to discuss the gender equality case law of the Constitutional Court of Romania and briefly explores the question of women on the bench of the CCR (Sub-section 3.2.). Finally, Section 3 analyses the question of homosexuality and same-sex unions under the 1991 Constitution (Sub-section 3.3.). In Section 4, the paper draws the overall conclusions of the analysis.

## 2. Gender, Sexuality and Constitutionalism in Romania before 1989

Before 1989, six constitutions were adopted in Romania. Three of these constitutions have been adopted in 1866, 1923 and 1938 respectively, in which period Romania was ruled by the Hohenzollern-Sigmaringen dynasty. The other three constitutions were adopted in 1948, 1952 and 1965 respectively, during the communist regime.

From 1938 until 2001, homosexuality had been criminalized in Romania.<sup>10</sup> Unsurprisingly, therefore, none of the pre-1989 constitutions contained any protections for rainbow families. As regards women's rights, the situation of the first three constitutions during the rule of the Hohenzollern-Sigmaringens differed greatly from the situation of the communist constitutions. As to be expected, the latter were much more progressive in terms of women's rights than the former.

All three constitutions of 1866, 1923 and 1938 denied women full equal rights, excluding them from succession to the throne<sup>11</sup> and enjoyment of full political rights. Until the 1923 Constitution, women were also denied equal civil rights to men.<sup>12</sup> With respect to political rights, after the adoption of the 1923 Constitution, *only* a few categories of women received the right to vote and to be elected and *only* in and to county and local councils.<sup>13</sup> Furthermore, the 1938 Constitution may have granted women the right to be elected into the Senate,<sup>14</sup> yet it once again *only* gave the right to vote to women who fulfilled certain stringent conditions.<sup>15</sup>

It was only with the coming into power of the communists and the adoption of the communist constitutions, that women in Romania received full political,<sup>16</sup> as well as other rights – at least on paper. In 1946, Romania's first Communist Government granted women equal voting rights.<sup>17</sup> In 1948, communist activist Ana Pauker became the first woman Minister of Foreign Affairs of Romania, and of the modern world. Article 18 of the 1948 Constitution also explicitly mentioned that all citizens – regardless of sex, among other criteria – had an equal right to vote in and be elected to State institutions. Furthermore, Article 21 of the 1948 Constitution granted women equal rights with men in the areas of state affairs and politics, in economy, society, culture, as well as in matters of private law. Article 21 also guaranteed women equal pay for equal work. To these, Article 83 of the 1952 Constitution added the protection of women's equal rights with men regarding "work, wage,



rest, social security and education.” In addition, Article 83 of the 1952 Constitution expressed the state’s full commitment to protect “the interests of mother and child”, to provide “aid to mothers with many children and single mothers, [and] paid leave for pregnant women,” as well as to arrange “maternity hospitals, nurseries and children’s homes.” Article 86 of the 1952 Constitution also granted the right to assembly in women’s organizations. Moreover, in addition to these gender equality provisions, the 1965 Constitution explicitly mentioned the principle of equality of rights (to be enjoyed without discrimination based on sex) in Article 17, mandated ordinary legislation to establish “special measures to protect women’s work” in Article 18, and included the President of the Women’s Council (i.e., a national women’s organization under the control of the Communist Party) as *de iure* member of the Council of Ministers (i.e., the Government of the time) through Article 80.

These generous constitutional guarantees were accompanied by different social changes in the status of women. Women were pushed to work shoulder to shoulder with men in the socialist field of production, thus having access to the public sphere. In addition, the communist regime adopted a quota system in the 1970s to ensure increased participation of women in politics and other leadership positions.<sup>18</sup> However, although these changes might be perceived to have been progressive in comparison to women’s situation in Western countries in the same period, the communist regime failed to fully emancipate women. Not only were women obliged to take paid employment outside the house, but they were also still expected to perform the tasks that were traditionally assigned to them in the private sphere, namely household chores and caretaking. In communist Romania, women, unlike men, had to perform double work, in the public sphere of communist production as well as in private sphere of human reproduction.<sup>19</sup> In addition, the promotion of women in communist politics was a matter of tokenism aiming to show communism’s commitment to women’s emancipation.<sup>20</sup> Like in other Eastern European countries, many women who entered politics did not have a real say. In this sense, mention should be made of the fact that the highest ranks of the Communist Party, where the power actually resided, were still dominated by men.<sup>21</sup> Arguably, Elena Ceaușescu was the exception to this rule. She managed to occupy some of the most important positions in the Communist Party and was perceived to rule the country together with President Nicolae Ceaușescu, her husband.<sup>22</sup> Yet Elena Ceaușescu was not perceived as a positive example by the people; on the contrary,

she was blamed for all the evils committed by her husband and the Communist Party. Consequently, the presence of women in politics began to be associated with the negative image of Elena Ceaușescu and other women who were promoted by the Communist Party. After 1989, this association led to the rejection of women from politics and arguably to a refusal to enter into politics by women themselves.<sup>23</sup>

The most drastic restriction of women's rights during Romanian communism was however related to the pro-natalist policies of Nicolae Ceaușescu, who was the president of Romania between 1965 and 1989. Among others, these policies included one of the harshest anti-abortion laws in the history of Europe (adopted in 1966),<sup>24</sup> a general lack of contraceptive means, forced gynecological checkups at the workplace disguised as regular medical checkups, as well as a curtailment of the conditions under which a divorce could be obtained.<sup>25</sup> This restriction of women's reproductive autonomy had devastating effects on not only women's equality and life plans, but also their health, liberty and even survival. Until 1989, when the anti-abortion law was repealed, an estimated 10,000 women died due to illegal abortions, 2,000 women were imprisoned and many others suffered serious health consequences for the same reason. This intrusion into the private life of women by the state remains a black page in Romanian history. Unsurprisingly, one of the first measures taken after the outbreak of the Romanian revolution was to legalize abortion on request,<sup>26</sup> and Ceaușescu's legacy of repressing women's reproductive rights has rendered any attempt to restrain abortion after 1989 unsuccessful.

### **3. Gender, Sexuality and Constitutionalism in Post-1989 Romania**

#### ***3.1. Women and the 1991 Constitution***

The current Romanian Constitution dates from 1991, having been drafted after the fall of communism in December 1989. Since then, several attempts to review the Constitution have been made, but only one of them was successful. The latter took place in 2003 when the review was needed to prepare Romania for EU and NATO accession. In a paper coauthored with Silvia Șuteu, we analyzed women's participation in and impact on the most important moments of constitution-drafting and change

after 1989.<sup>27</sup> Overall, we found that very few women participated in the processes of constitution-making in Romania until very recently, when constitutional review was triggered by a citizens' initiative originating in civil society. In addition, we concluded that women's interests and gender equality have rarely been a priority for constitution-makers. Just to give an example, when the current Romanian Constitution was drafted (between 1990-1991), a mere 4.9 percent of the Constitutional Assembly (i.e., the first democratically elected Parliament) were women and none have been part of the *Commission for Elaborating the Project of the Romanian Constitution*, the body that has *de facto* drafted most of the constitutional text.<sup>28</sup> In addition, we showed that the formulation of the gender provisions in the 1991 Constitution reflects a gender conservative mindset, this probably being the result of historical context.<sup>29</sup>

Annex I of this paper contains a list of the gender provisions of the 1991 Constitution, and any modification they underwent after the 2003 constitutional review. In a nutshell, Articles 4 and 16 of the 1991 Constitution guaranteed all citizens equality before the law. In Article 26(2), the Constitution further established the right to freely dispose of one's own body, which could cover issues such as abortion or sex change.<sup>30</sup> Along similar lines to communist laws, Article 33 referred to the protection of maternity,<sup>31</sup> Article 43 granted "citizens" the right to paid maternity leave,<sup>32</sup> while Article 38 protected women's right to special working conditions as well as the right to equal pay for equal work.<sup>33</sup> The protection of men in their capacity as fathers was not mentioned in the constitutional text, a sign that constitution-makers saw childcare as a woman's task. Moreover, Article 52 imposed mandatory military service on men, but not on women. This requirement was later abolished in the 2003 constitutional review. At that stage, a new paragraph was introduced in Article 16 to provide for equal opportunities to occupy "public, civil, or military positions or dignities" for women.

An article that was subject of debate was Article 44(1) (which became Article 48 at the 2003 constitutional review). This article stipulated equality between spouses, stating that "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." When this article was drafted, one of the few women-members of the Constituent Assembly unsuccessfully proposed to modify its wording so to "add that, apart from being based on the full equality of the spouses, the family is also based on the right to decide

freely on its size.”<sup>34</sup> This was meant to guarantee reproductive rights, so as to avoid the adoption of any pro-natalist policy similar to Ceaușescu’s. Furthermore, as is shown in sub-section 3.3., this article was subject to other review proposals, including a citizens’ initiative that (unsuccessfully) aimed to change its text to replace the term “spouses” with the syntagm “a man and a woman” so as to prevent the legalization of same-sex marriage, and ensure that “gender stereotypes are constitutionally enshrined.”<sup>35</sup>

This latter citizens’ initiative to review the Constitution was launched in 2015, and was particularly important for women’s participation in constitution-making. As mentioned, in the preceding constitutional moments, not many women had been present or visible.<sup>36</sup> This changed when it was citizens initiating the constitutional review. Over the three years during which the citizens’ initiative was under examination, women and women’s groups from both sides of the debate – supporting or opposing the proposal to define marriage in heterosexual terms – have been highly involved in the campaign around amending the Romanian Constitution.<sup>37</sup> As I and Silvia Șuteu have explained, this may have had to do with the fact that women are better represented in civil society (civil society being at the core of launching and campaigning for and against the citizen’s initiative).<sup>38</sup>

Even if the 2015 citizens’ initiative was meant to hinder gender equality, it remains crucial from the perspective of women’s involvement in constitution-making. Not only were women active actors in the process of constitutional review, but women’s groups also built alliances among themselves as well as with LGBT+ and other human rights groups to counter attacks on gender equality, learning about the Constitution and its potential to restrict or advance women’s rights.<sup>39</sup> This may explain why women’s groups and their allies have been extremely quick and effective in engaging with constitutional actors, including the Constitutional Court, in 2020 when a ban on gender education and research was under consideration, as further explained in the next section of the paper. This might have also prepared women’s groups to further consider the Constitution and the Constitutional Court as avenues to promote their interests.

### ***3.2. Women, Gender and the CCR***

The Romanian Constitutional Court was established by the 1991 Constitution and became operational in 1992. The Court was meant to

act as “the guarantor for the supremacy of the Constitution.”<sup>40</sup> It has an important function in interpreting the fundamental rights laid down in the Constitution, including rights touching upon gender issues. In this sense, the Court can scrutinize the compatibility of laws and bills with the Constitution. However, it is important to mention that the Constitutional Court neither stands as an appeal court nor can it decide on the outcome of a case. Moreover, individuals have no direct access to the Constitutional Court.

There are two ways in which the Court could come to decide on the constitutionality of a bill or a law. On one hand, the Court could check the constitutionality of a bill after its adoption by Parliament, but before its promulgation by the President. This is the so called abstract or *a priori* review, or in Romanian “objection of constitutionality” (Ro. “obiecție de neconstituționalitate”).<sup>41</sup> This could be requested “by the President of Romania, one of the presidents of the two Chambers [of Parliament], the Government, the High Court of Cassation and Justice, the Advocate of the People, a number of at least 50 deputies or at least 25 senators, [...] [and could be initiated] *ex officio*, on initiatives to revise the Constitution.”<sup>42</sup> On the other hand, a request to verify the constitutionality of a piece of legislation could be made during a trial, that is, after its adoption. This is known as concrete or *a posteriori* review, or in Romanian “referral of constitutionality” (Ro. “excepție de neconstituționalitate”). In this case, the request could be referred to the CCR *ex officio* by the court before which the trial is pending, by one of the parties to the trial or by the prosecutor.<sup>43</sup> The Ombudsman, an institution specialized in protecting fundamental rights in Romania, is the only institution to date that can ask the Court to check the constitutionality of a legal norm after its entering into force. However, as Bianca Selejan-Guțan shows, the Ombudsman has rarely used this power and, to the best of the author’s knowledge, never in a case on gender or sexuality.<sup>44</sup>

Since it started functioning until today, the CCR has adjudicated on a series of important matters related to gender and women’s rights. For example, the CCR has looked at the issue of abortion in the context of surrogacy and assisted reproduction; the question of extending parental leave to men in the military; the matter of equalizing the pensioning age for men and women; the possibility of a mother to challenge the legal presumption of paternity; the discrimination of fathers with regard to custody claims; the unconstitutionality of the more lenient penal sanctions for women; the unconstitutionality of granting full legal capacity to married

women under the age of 18, but not to married men of the same age; pregnancy discrimination; violence against women and other topics. Annex II of this working paper contains a list of all the relevant gender and sexuality cases of the CCR that I could identify. The list does not claim to be exhaustive due to the difficulty of researching in the database of the CCR which does not allow to sort decisions according to their subject-matter or the article of the Constitution that was invoked in the case.<sup>45</sup>

Looking holistically at the cases adjudicated by the CCR it cannot be claimed that the Court has developed a comprehensive or far reaching doctrine on gender equality.<sup>46</sup> However, the Court has developed a few important principles in this area. For example, on a number of occasions, the Court has held that affirmative action is permissible under the Romanian Constitution.<sup>47</sup> Accordingly, it would not be a stretch to say that possible measures, such as gender quotas in politics, would be constitutional in the Romanian context. In addition, the Court has previously established that sex and gender are different concepts and that gender roles and stereotypes lie at the foundation of gender discrimination. This is extremely important given that the notion of gender as a social construct is currently strongly contested in Central and Eastern Europe. For example, in 2018, the Constitutional Court of Bulgaria (“CCB”) has declared the ratification of the *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* – also known as the Istanbul Convention – unconstitutional due to its definition of “gender” as being a social construct differing from biological sex.<sup>48</sup> More precisely, the CCB maintained that:

The [Bulgarian] Constitution and the whole of Bulgarian legislation is based on a binary understanding of the existence of the human species ... The social dimension of sex is unambiguously perceived in interaction with the biological one (Art 47(2) Bulgarian Constitution [on special protection to mothers]). In that constitutional provision, the biological sex of “a woman” is connected with her social role—“mother,” “giving birth,” and “obstetric care.” In short, the term “sex” is used by the constitution-maker as a unity of the biologically determined and the socially constructed.<sup>49</sup>

In other words, the CCB endorsed gender essentialism assigning certain roles to men and women by virtue of their biological sex (for example the roles of mothers and caretakers to women). The CCR has dealt with the question of the difference between biological sex and gender in cases

related to the different pensioning age for men and women, and in a case on granting parental leave to men in the military.<sup>50</sup> Yet CCR's most elaborate analysis on this topic was performed in Decision 907/2020 declaring a bill meant to ban gender education and research in Romania unconstitutional.<sup>51</sup> In Decision 907/2020, the CCR stated clearly 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. Thus, while the concept of "sex" refers to the biological characteristics which mark the differences between men and women, the concept of "gender" refers to a set of psychological and sociocultural traits. The latter incorporates elements of one's social identity, which change according to the evolution of society and the continuous reassessment of the interpretation of the principle of sex equality and non-discrimination... The Romanian State has enshrined this vision/approach in its legislation undertaking essentially to combat gender stereotypes and enforce in an effective manner the principle of equality and non-discrimination.<sup>52</sup>

The CCR reached the aforementioned conclusion on the definition of "gender" not only by looking at the national regulation of transsexuality, homosexuality and equality between men and women and its previous case-law, but also at applicable European norms.<sup>53</sup> This is in line with the Court's approach in other gender equality cases where the CCR has also had recourse to European standards on gender equality. In this context, developments at the European level (particularly at the EU and Council of Europe/European Court of Human Rights level) will likely play a key role in the manner in which gender equality will be further conceptualized by the CCR.

It is important to note that a significant number of *amicus curiae* briefs were sent to the Court to support its analysis in Decision 907/2020. Remarkably, out of the twelve amicus briefs sent to the Court, eight came from organizations and individuals interested in promoting gender and sexual equality in Romania. These organizations and individuals possibly learned about the value of engaging with the Constitutional Court from the previous debates on the review of the Romanian Constitution to define marriage in heterosexual terms. This "participatory turn" on gender matters before the CCR could be seen as a positive development in Romania that has the potential to bring about a more in-depth conversation on gender and the constitution in the country.

An explanation for the progressive holding of the CCR in Decision 907/2020 might have to do with the composition of the bench. At the time when Decision 907/2020 was rendered, three of the nine judges sitting on the bench were women, amounting to 30 percent.<sup>54</sup> One of them, Judge Simina Tănăsescu, is a reputable scholar who has worked extensively on equality in Romanian Law,<sup>55</sup> and is also the co-author of one of the few studies on gender equality under the Romanian Constitution.<sup>56</sup> Further research into the impact of female judges on the decisions of the CCR would be interesting. To the author's knowledge, no such research exists yet. In addition, no research has been done to explain the overall underrepresentation, and the experiences of the few women on the bench of the CCR, despite the importance of such research.

For the first 12 years of its existence, the Court had no woman on the bench. It is only in 2004 that the Court got its first female judge, namely Ms Aspazia Cojocaru. The second woman to be nominated as a constitutional judge was Ms. Iulia Anotnella Motoc, in 2010. Altogether, out of the 32 judges who have previously sat on the bench of the CCR, only 3 have been women, which is barely three percent. Moreover, the Court has never had a female president.<sup>57</sup>

The underrepresentation of women on the CCR bench might seem puzzling given the overall feminization of the judiciary in Romania. Romania is one of the countries with most female judges in Europe, women making up a majority of judges, including on the bench of the High Court of Cassation and Justice and as presidents of courts.<sup>58</sup> The reason for the underrepresentation of women on the bench of the Constitutional Court might be related to the nomination procedure of the judges. While regular judges in Romania are selected based on a competitive examination, constitutional judges are nominated through a political process by the two chambers of Parliament and the Romanian President. Given the political influence in the selection of constitutional judges, the underrepresentation of women on the bench of the Constitutional Court might have to do with the equally serious underrepresentation of women in Romanian politics.<sup>59</sup> Yet further research is needed to duly grasp this matter.

### ***3.3. Sexuality and the 1991 Constitution***

After 1989, Romania upheld the communist Criminal Code adopted in 1968, and many of its provisions. Among these was Article 200 that criminalized homosexuality and the act of "inciting or encouraging"



a person to practice homosexuality.<sup>60</sup> As a result, LGBT+ groups were illegal in Romania until 2001 (when Article 200 was repealed) and not much activism could take place on LGBT+ rights. However, in the 1990s, international human rights organizations began to put constant pressure on Romania to decriminalize homosexuality. For example, the Council of Europe (“CoE”) repeatedly insisted that homosexuality should be decriminalized as Romania had become one of its member states in 1993 and Article 200 was seen at odds with the requirements of the European Convention on Human Rights (“ECHR”), which is the CoE’s cornerstone document.<sup>61</sup>

Based on the requirements imposed on Romania under the ECHR, in 1994, the CCR declared Article 200 unconstitutional to the extent that it criminalized sexual relationships between consenting adults that took place in private and did not cause public scandal.<sup>62</sup> Yet as Scott Long reported, the definitions of “public” and “public scandal” were so broad that they could not make an important difference in practice.<sup>63</sup> It was only in 2001 that Romania decriminalized homosexuality under pressure of the EU accession.

Given that the 1991 Constitution was drafted at a time when homosexuality was criminalized in Romania, constitution-makers did not have LGBT+ rights in mind. However, some of the provisions of the Constitution are extremely relevant for LGBT+ individuals and same-sex couples. Article 4 refers to the principle of equality and then enumerates some grounds on which citizens should not be discriminated against. The Constitution does not refer to “sexual orientation” as a ground of discrimination, such protection existing only in the regular legislation.<sup>64</sup> An attempt to include “sexual orientation” in the constitutional text was made in 2013 when the Constitution was under review. Nonetheless the parliamentary committee in charge of preparing a draft for the review of the Constitution rejected the proposal despite protests from civil society.<sup>65</sup> Moreover, the process of constitutional review has failed at that time.

Another relevant article of the Romanian Constitution for LGBT+ persons is Article 26 on “personal and family privacy.” In 1994, the CCR interpreted this Article in light of the ECHR so as to hold that criminalizing homosexuality when this does not cause “public scandal” is unconstitutional as explained above. Twenty-four years later, the CCR also interpreted Article 26 in view of the case law of the European Court of Human Rights and the Court of Justice of the European Union (“CJEU”) so to protect the private and family life of same-sex couples.<sup>66</sup> This happened

in the context of the *Coman* case that concerned granting residence rights to same-sex spouses of EU citizens willing to move to Romania by exercising their right to free movement within the EU. Adjudicated by the CCR between 2015 and 2018, the *Coman* case is the most important strategic litigation case on gender and sexuality that has ever reached the CCR, giving rise to important debates on LGBT+ rights in society. In addition, in this case the CCR also sent a preliminary question to the CJEU for the first time in its history.

Article 48 of the Constitution referring to “family” is another important provision for same-sex couples. Its first paragraph reads as follows: “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.”<sup>67</sup> Article 48(1) is formulated in gender neutral terms, which in some interpretations leaves room for the legalization of same-sex marriage. Consequently, conservative actors in Romania have attempted to review Article 48(1) several times so as to replace the term “spouses” with “a man and a woman” and prevent any future legalization of same-sex marriage. None of these attempts have been successful. However, conservative actors did manage to include the definition of marriage as between a man and a woman in the text of the 2009 Civil Code.<sup>68</sup>

A first attempt to review Article 48 of the Constitution was made in 2006 when a group of conservative actors initiated a citizens’ initiative towards this end. For a citizens’ initiative to be successful, it has to gather the signatures of “at least 500,000 [Romanian] citizens’ with the right to vote,”<sup>69</sup> and these citizens “must belong to at least half the number of the counties in the country, and in each of the respective counties or in the Municipality of Bucharest at least 20,000 signatures must be recorded in support of this initiative.”<sup>70</sup> The CCR has to ensure that these conditions are met<sup>71</sup> and check “the constitutional character of the legislative proposal that is the object of the initiative.”<sup>72</sup> Any proposal of constitutional review that would result “in the suppression of the citizens’ fundamental rights and freedoms, or of the safeguards thereof,”<sup>73</sup> will be declared to be unconstitutional by the CCR.

Citizens’ initiatives that pass an initial constitutional check by the CCR have to be adopted by both chambers of Parliament (the Senate and the Chamber of Deputies) with a qualified majority (i.e., two thirds of the members of each chamber).<sup>74</sup> If adopted, they have to pass another constitutional review by the CCR.<sup>75</sup> On the reconfirmation of its

constitutionality, the proposal has to be put to a referendum to be finally adopted.<sup>76</sup>

The citizens' initiative in 2006 proposed to include the following phrase in the text of Article 48: "In Romania, polygamy is prohibited and marriage is allowed only between a man and a woman."<sup>77</sup> However, the proposal failed to gather the required number of signatures and was declared unconstitutional by the CCR.<sup>78</sup>

An attempt to define marriage as between a man and a woman in the constitutional text was again made in 2013 when the Constitution was under review to address a series of previous constitutional crises. At that time, the two chambers of Parliament established a Commission for the Review of the Romanian Constitution. Not only did civil society propose to include "sexual orientation" as ground of discrimination in the Constitution (as explained above), but a proposal was also made to define marriage as between a man and a woman in the text of Article 48(1), and to add two paragraphs to Article 48 formulated as follows: "3) Family represents the natural and fundamental element of society and has the right to protection from society and the state; 4) Every child has the right to a mother and a father."<sup>79</sup> Despite these debates on the topic of LGBT+ rights and the definition of marriage, the overall attempt to review the Constitution was unsuccessful at that time. In this context, groups promoting "the traditional family" continued their efforts and in 2015 managed to launch the first successful citizens' initiative to review the Constitution in Romanian history.

At that time, an alliance of conservative actors called "the Coalition for Family" succeeded in gathering (with the help of the Orthodox Church) over 2,500,000 signatures from all over Romania in support of amending Article 48. The initiative was validated by the Constitutional Court<sup>80</sup> and passed a 2/3 vote in Parliament. Nevertheless, the initiative ultimately failed to meet the 30 percent participation quorum at the referendum that should have been the last stage in the procedure before the adoption of the amendment. This constitutional moment has been extremely important as LGBT+ and other human rights groups achieved visibility in the public sphere and managed to put forward their agenda for public discussion. They have also built knowledge on the constitutional mechanisms that could threaten but also promote LGBT+ rights. In what way these groups will utilize the experience and know-how that they have gained in this period, remains to be seen.

#### 4. Conclusion

This working paper has analyzed the way in which gender and sexuality have been framed and debated under the 1991 Constitution. The paper showed that Romania had included strong protections of gender equality in its communist constitutions, but that these did not necessarily lead to achieving gender equality on the ground. The Communist regime was never concerned with changing women's role in the family and the private sphere more broadly. This lack of concern of communists for dismantling gender roles in the family could also be inferred from their repression of non-traditional families and the criminalization of homosexuality. The 1991 Constitution did not address this matter either, instead treating women as mothers and omitting to offer protection to men in their quality of fathers.

The paper has also shown that, until very recently, women have not been present in the constitution-making processes in Romania and that gender and sexuality have not been areas of great contestation before the Constitutional Court. This changed in 2015 when the amendment of the constitution was triggered by a citizens' initiative led by civil society, where women are generally better represented. In parallel, the CCR also became the center of debates on gender and sexuality as demonstrated by the *Coman* case on granting residence rights to same-sex couples, as well as by the case on banning gender education and research. The *Coman* case is certainly the most important strategic litigation case on gender and sexuality in Romania to date. It gave rise to important debates in the legal community as well as society. In addition, the attempt to ban gender education and research mobilized gender equality supporters who have promptly intervened before the Romanian President and the Constitutional Court to counter the proposed bill.

These recent developments could be characterized as a "participatory turn" on issues of gender and sexuality in Romanian constitutionalism. They mark the beginning of an era where the Romanian Constitution is seen as an important battleground for gender (in)equality and in which relevant civil society actors as well as society at large are becoming more seriously involved in constitutional debates on gender and sexuality. This represents a departure from the period when these topics were seen as marginal – if not inexistent – on the constitutional front and in which the Constitution was not necessarily perceived as a vehicle for promoting gender and sexual equality. To what extent this "participatory turn" will bring about future improvements in the legal status of women, men and LGBT+ individuals, remains to be seen.

**Annex I. Provisions of the 1991 Romanian Constitution Relevant for Gender and Sexuality (as of 15 July 2021)<sup>81</sup>**

Provisions of the 1991 Constitution	Provisions after the 2003 review
<p style="text-align: center;"><b>Article 4</b></p> <p>(2) Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of [...] sex [...]</p>	<p style="text-align: center;">Idem</p>
<p style="text-align: center;"><b>Article 16</b></p> <p>(1) Citizens are equal before the law and public authorities, without any privilege or discrimination.</p> <p>(2) No one is above the law.</p> <p>(3) Access to a public office or dignity, civil or military, is granted to persons whose citizenship is only and exclusively Romanian, and whose domicile is in Romania.</p>	<p>Review: (3) Access to public, civil, or military positions or dignities may be granted, according to the law, to persons whose citizenship is Romanian and whose domicile is in Romania. The Romanian State shall guarantee equal opportunities for men and women to occupy such positions and dignities.</p>
<p style="text-align: center;"><b>Article 26</b></p> <p>(1) The public authorities shall respect and protect the intimate, family and private life.</p> <p>(2) Any natural person has the right to freely dispose of herself/himself unless by this she/he causes an infringement upon the rights and freedoms of others, on public order or the standards of public morality<sup>82</sup></p>	<p style="text-align: center;">Idem</p>

<p style="text-align: center;"><b>Article 33</b></p> <p>(1) The right to the protection of health is guaranteed.</p> <p>(2) The State shall be bound to take measures to ensure public hygiene and health.</p> <p>(3) The organization of the medical care and social security system in case of sickness, accidents, maternity and recovery [...] shall be established according to the law.</p>	<p>Becomes Article 34</p>
<p style="text-align: center;"><b>Article 38</b></p> <p>(2) All employees have the right to social protection of labour. The protecting measures concern [...] working conditions for women [...]</p> <p>(4) On equal work with men, women shall get equal wages.</p>	<p>Becomes Article 41</p>
<p style="text-align: center;"><b>Article 43</b></p> <p>(2) Citizens have the right to [...] paid maternity leave [...].</p>	<p>Becomes Article 47</p>
<p style="text-align: center;"><b>Article 44</b></p> <p>(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.</p>	<p>Becomes Article 48</p>

<p style="text-align: center;"><b>Article 52</b></p> <p>(1) Citizens have the right and duty to defend Romania.</p> <p>(2) The military service is compulsory for all Romanian male citizens aged twenty, except for the cases provided by law. [...]</p>	<p>Becomes Article 55 and reads only:</p> <p>(1) Citizens have the right and duty to defend Romania.</p> <p>(2) The terms for doing the military service shall be set up in an organic law.* [...]</p> <p>* The requirement that only men had to serve in the military was removed</p>
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**Annex II. Case-law of the Romanian Constitutional Court on Gender and Sexuality (from the moment it started functioning in 1992 until 15 July 2021)**

<b>Decision</b>	<b>Main issue</b>
<b>Decision 81/1994, Appeal Decision 136/1994</b>	Decriminalization homosexuality in private, in case it would not cause "public scandal"
<b>Decision 74/1996 Decision 483/2007</b>	Upholding the illegality of prostitution/pimping
<b>Decision 107/1995 Decision 27/1996 Decision 888/2006 Decision 191/2008 Decision 1007/2008 Decision 1237/2010 Decision 287/2011 Decision 387/2018</b>	On the (un)equal pensioning age of men and women
<b>Decision 349/2001 Decision 8/2004</b>	The possibility of mothers and other interested persons to challenge the legal presumption of paternity
<b>Decision 453/2003</b>	Discrimination between the father of a child born within wedlock and the father of the child born out of wedlock in challenging the legal presumption of paternity
<b>Decision 90/2005</b>	Extending parental leave to men in the military
<b>Decision 217/2005</b>	The unconstitutionality of granting women under 18 full legal capacity if married, but not to men in the same situation
<b>Decision 418/2005</b>	Assisted reproduction/Abortion



<b>Decision 390/2005</b> <b>Decision 538/2005</b> <b>Decision 646/2006</b> <b>Decision 589/2007</b> <b>Decision 806/2007</b>	Discrimination between the mother and father of a child born during marriage as regards the prescription of the action of contesting the recognition of paternity or the action of denying paternity respectively
<b>Judgement 6/2007</b>	The formal requirements of a citizen's initiative to review Article 48 of the Constitution so as to prohibit polygamy and define marriage as between a man and a woman
<b>Decision 82/2003</b> <b>Decision 168/2006</b> <b>Decision 411/2006</b> <b>Decision 974/2007</b> <b>Decision 1023/2007</b>	The rights and obligations of former spouses and parents as regards children
<b>Decision 1197/2007</b>	The surname one could bear after divorce
<b>Decision 530/2008</b>	Changing the acts of civil status in case of sex reassignment
<b>Decision 782/2009</b>	Equal access to public positions
<b>Decision 1638/2010</b>	The discrimination of fathers regarding custody claims
<b>Decision 423/2007</b> <b>Decision 997/2011</b>	The unconstitutionality of the more lenient penal sanctions for women
<b>Decision 80/2014</b>	The review of the Constitution – the Court refers to the proposal to exclude the definition of “morals and public order” from the text of Article 26 of the Romanian Constitution on the right to personal and family privacy, including the right to one's own body under which the protection of abortion falls
<b>Decision 556/2015</b>	Equal pay for equal work

<b>Decision 580/2016</b> <b>Decision 539/2018</b>	Review of Article 48 of the Constitution on Family, defining marriage as between a man and a woman
<b>Decision 264/2017</b>	Violence in the home, incompatibility of the national legislation with the Istanbul Convention
<b>Decision 534/2018</b>	On the recognition of same-sex marriages contracted abroad (the <i>Coman</i> case)
<b>Decision 1/2020</b>	Pregnancy discrimination
<b>Decision 644/2020</b>	Sex education in schools
<b>Decision 907/2020</b>	Banning gender perspectives in education and research

## NOTES

- <sup>1</sup> That is not to say that works on this topic in other languages do not exist. For example, in 2018, a special edition of a French journal published a series of reports on gender and constitutionalism in 21 countries, including Romania. See *Annuaire International de Justice Constitutionnelle*, 34-2018, 2019. Égalité, genre et constitution - Populisme et démocratie, [https://www.persee.fr/issue/aijc\\_0995-3817\\_2019\\_num\\_34\\_2018](https://www.persee.fr/issue/aijc_0995-3817_2019_num_34_2018) (accessed 1 May 2021).
- <sup>2</sup> See e.g. Ruth Rubio-Marín, “Women and Participatory Constitutionalism” (2020) 18 *International Journal of Constitutional Law* 233; Ruth Rubio-Marín and Helen Irving, *Women as Constitution-Makers: Case Studies from the New Democratic Era* (Cambridge University Press 2019); Nanako Tamaru and Marie O’Reilly, “How Women Influence Constitution Making After Conflict and Unrest” [2018] *Inclusivesecurity.org*; Mukabi Kabira, *Time for Harvest: Women and Constitution Making in Kenya* (University of Nairobi Press 2012); Brigitte Mabandla, “Women in South Africa and the Constitution-Making Process”, *Women’s Rights Human Rights* (Routledge 1995); Martha I Morgan and Monica Maria Alzate Buitrago, “Constitution-Making in a Time of Cholera: Women and the 1991 Colombian Constitution” (1992) 4 *Yale Journal of Law and Feminism* 353.
- <sup>3</sup> Helen Irving (ed), *Constitutions and Gender* (Edward Elgar Publishing 2017); Beverley Baines, Daphne Barak-Erez and Tsvi Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press 2012); Catharine A MacKinnon, “Gender in Constitutions”, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012); Susan Hoffman Williams (ed), *Constituting Equality: Gender Equality and Comparative Constitutional Law* (Cambridge University Press 2009); Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge University Press 2008); Beverley Baines and Ruth Rubio-Marín (eds), *The Gender of Constitutional Jurisprudence* (Cambridge University Press 2004).
- <sup>4</sup> Elena-Simina Tănăsescu and Ionela Băluță, “Romania (Roumanie)” (2019) 34 *Annuaire international de justice constitutionnelle* 391.
- <sup>5</sup> Elena Brodeală and Silvia Șuteu, “Women and Constitution-Making in Post-Communist Romania” in Helen Irving and Ruth Rubio-Marín (eds), *Women as Constitution Makers: Case Studies from the New Democratic* (Cambridge University Press 2019).
- <sup>6</sup> Elena Brodeală, “The Changing Status of Women as Others in the Romanian Constitution” (2017) 11 *Vienna Journal on International Constitutional Law* 541.
- <sup>7</sup> CCR Decision 534/2018.
- <sup>8</sup> CCR Decision 644/2020.
- <sup>9</sup> CCR Decision 907/2020.

- <sup>10</sup> Homosexuality had been criminalized in Romania under the authoritarian dictatorship of King Carol II (see Article 431 of Romania's second Penal Code of 1936). The criminalization was maintained during the communist regime through Article 200 of the 1968 Penal Code that was finally repealed in 2001 under pressure of EU accession. On Article 431 of the 1936 Penal Code, see Scott Long, "Public Scandals: Sexual Orientation and Criminal Law in Romania" (Human Rights Watch 1998) 6–16 <http://www.refworld.org/docid/3ae6a7e70.html>. On the decriminalization of homosexuality in Romania, see Carl Franklin Stychin, "Ch. 6 "We Want to Join Europe, Not Sodom": Sexuality and European Union Accession in Romania", *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Hart Publishing 2003); Voichita Nachescu, "Hierarchies of Difference: National Identity, Gay and Lesbian Rights and the Church in Postcommunist Romania" in Aleksandar Štulhofer and Theo Sandfort (eds), *Sexuality and Gender in Postcommunist Eastern Europe and Russia* (Haworth Press 2005); Sînziana Cârstocea, "Romania-From Closet to Liberation. Elements for a Socio-Political History of Homosexual Claims in a Post-Communist Society (La Roumanie-Du Placard à La Libération. Éléments Pour Une Histoire Socio-Politique Des Revendications Homosexuelles Dans Une Société Postcommuniste)" (Université Libre de Bruxelles 2010); Marius Mite, "Documentary: The Incrimination and Deincrimination of Homosexuality. Article 200 of the Romanian Criminal Code. (Documentar. Incriminarea Și Deincriminarea Homosexualității. Articolul 200 Din Codul Penal Românesc)" [2016] *Noua Revistă de Drepturile Omului* 51.
- <sup>11</sup> See Article 82 of the 1866 Constitution, Article 77 of the 1923 Constitution and Article 34 of the 1938 Constitution.
- <sup>12</sup> Article 6 of the 1923 Constitution explicitly stated that "women's civil rights are to be established on the basis of full equality between the sexes."
- <sup>13</sup> See Article 108 of the 1923 Constitution and Article 375 of Law 167/1929.
- <sup>14</sup> See Articles 61 and 63 of the 1938 Constitution.
- <sup>15</sup> See Articles 61 and 62 of the 1938 Constitution.
- <sup>16</sup> For more on the constitutional protection of women's electoral rights in Romania, see Doina Bordeianu, "The Constitutional Evolution of Women's Electoral Rights in Romania (Evoluția Constituțională a Drepturilor Electorale Ale Femeilor în România)" [2010] *Sfera Politicii (The Sphere of Politics)* 53.
- <sup>17</sup> Luciana Marioara Jinga, *Gender and Representation in Communist Romania: 1944-1989 (Gen și Reprezentare în România Comunistă: 1944-1989)* (Polirom 2015) 208. On the achievement of women's suffrage in Romania, see Roxana Cheșchebec, "The Achievement of Female Suffrage in Romania" in Blanca Rodríguez-Ruiz and Ruth Rubio-Marín (eds), *The Struggle for Female Suffrage in Europe: Voting to Become Citizens* (Brill 2012).
- <sup>18</sup> See Mary Ellen Fischer, "Women in Romanian Politics: Elena Ceaușescu, Pronatalism, and the Promotion of Women" in Sharon L Wolchik and Alfred

- G Meyer (eds), *Women, State, and Party in Eastern Europe* (Duke University Press 1985) 125–129; Jinga (n 17) 217–221.
- 19 See William Moskoff, “The Problem of the ‘Double Burden’ in Romania”, *International Journal of Comparative Sociology*, 23.1–2 (1982), 79–88. The problem of the double burden was not characteristic only of communist Romania, but was widespread in the entire communist space in Eastern Europe. See Chris Corrin, *Superwomen and the Double Burden: Women’s Experience of Change in Central and Eastern Europe and the Former Soviet Union* (Scarlet Press, 1992).
- 20 Fischer (n 18) 131.
- 21 Mira Janova and Mariette Sineau, “Women’s Participation in Political Power in Europe” (1992) 15 *Women’s Studies International Forum* 115, 117, 122.
- 22 For more on the role of Elena Ceaușescu in communist Romania, see Cristina Liana Olteanu, “The Cult of Elena Ceaușescu in the 1980s (Cultul Elenei Ceaușescu în Anii ’80)” in Alin Ciupala (ed), *About Women and Their History in Romania (Despre Femei și Istoria lor în România)* (Editura Universitatii din Bucuresti 2004); Jill Massino, “Women’s Anonymity in the Aesthetics of Ceaușescu’s Romania (Anonimatul Femeii în Estetica României Ceaușiste)” in Alin Ciupala (ed), *About Women and Their History in Romania (Despre Femei și Istoria lor în România)* (Editura Universitatii din Bucuresti 2004) 151–156; Vasile Vese, “The Condition of Women in Romania during the Communist Period” in Ann Katherine Isaacs (ed), *Political Systems and Definitions of Gender Roles* (Edizioni Plus: Università di Pisa 2001) 269–272; Catherine Lovatt, “The Legacy of Elena Ceaușescu” (1999) 1 *Central Europe Review* [http://www.ce-review.org/99/3/women\\_lovatt3.html](http://www.ce-review.org/99/3/women_lovatt3.html) (accessed 2 June 2021); Fischer (n 18).
- 23 For more on this topic, see also Brodeală and Șuteu (n 5) 87–89; 96–98.
- 24 Decree 770/1966.
- 25 For more on Ceaușescu’s pronatalist policy, see Gail Kligman, *The Politics of Duplicity: Controlling Reproduction in Ceausescu’s Romania* (University of California Press 1998).
- 26 See Decree 1/1989.
- 27 Brodeală and Șuteu (n 5).
- 28 ibid 102–104.
- 29 ibid 105–108.
- 30 The article reads as follows: “Any natural person has the right to freely dispose of herself/himself unless by this she/he causes an infringement upon the rights and freedoms of others, on public order or the standards of public morality.” Official translation from the website of the Romanian Presidency <https://www.presidency.ro/en/the-constitution-of-romania> (accessed 7 July 2021). The official translation only uses the masculine pronouns; the feminine is the author’s addition.
- 31 Article 33 became Article 34 after the 2003 constitutional review.

- 32 Article 43 became Article 46 after the 2003 constitutional review.
- 33 Article 38 became Article 41 after the 2003 constitutional review.
- 34 Brodeală and Șuteu (n 5) 106.
- 35 “Gheorghiu (Civic Platform Together): Gender Ideology has Become a State Policy in Romania [Gheorghiu (Platforma Civică Împreună): Ideologia de gen a devenit în România politică de stat]” *AGERPRES* (3 September 2018) <http://www.agerpres.ro/social/2018/09/03/gheorghiu-platforma-civica-impreuna-ideologia-de-gen-a-devenit-in-romania-politica-de-stat--169742>.
- 36 Brodeală and Șuteu (n 5) 94–126.
- 37 *ibid* 129–130, 134–138.
- 38 *ibid* 137.
- 39 *ibid* 138.
- 40 Article 142 of the Constitution.
- 41 Bianca Selejan-Guțan, *The Constitution of Romania: A Contextual Analysis* (Hart Publishing 2016) 172.
- 42 According to Article 146(a) of the Constitution.
- 43 Selejan-Guțan (n 41) 173.
- 44 *ibid* 174.
- 45 Moreover, no summaries of decisions are provided. As a result, the search process is extremely time-consuming unless the researcher knows the exact decision to look for. The Case Law Database of Court can be accessed here: <https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx> (in Romanian only).
- 46 The fact that one cannot speak about a comprehensive doctrine on gender equality of the CCR might be explained by different factors. Firstly, it might be explained by the drafting style of the CCR that is often characterized by formalism and brevity. For example, it is not uncommon that the gender-relevant issues in CCR’s decisions are analyzed in just one or a few paragraphs. In addition, “law and society” or teleological arguments appear rarely, if ever in the CCR case-law and oftentimes the reasoning of the Court in gender equality cases remains underdeveloped. This makes the analysis of the case law beyond a black-letter inquiry rather difficult. Another factor might have to do with the fact that many of the cases that reached the Court were not the product of strategic litigation or an attempt to bring about a conversation on gender equality in Romania through litigation. To the best of my knowledge most of the cases I found (with some exceptions) did not receive much public attention and were not subject of serious debate in society. Hence one could argue that no actors had been present to pressure the Court to be more detailed in its reasoning on the matter of gender equality as has lately been the case as regards the issue of banning gender education and research (see Decision 907/2020). N.B. Strategic litigation does not have a serious or long tradition in Romania or in Eastern Europe more generally. See e.g. James Goldston, “Public Interest Litigation in Central and Eastern

- Europe: Roots, Prospects, and Challenges” (2006) 28 *Human Rights Quarterly* 492; Edwin Rekosh, “Who Defines the Public Interest - Public Interest Law Strategies in Central and Eastern Europe” (2005) 2 *Sur - International Journal of Human Rights* 167.
- 47 See for example CCR Decision 27/1996.
- 48 See more on this topic in Ruzha Smilova, “The Ideological Turn in Bulgarian Constitutional Discourse. The Rise Against ‘Genders’” in András Sajó and Renáta Uitz (eds), *Critical Essays on Human Rights Criticism* (Eleven International Publishing 2020).
- 49 Quote and translation taken from Barbara Havelková, “The Struggle for Social Constructivism in Postsocialist Central and Eastern Europe” (2020) 18 *International Journal of Constitutional Law* 434, 438.
- 50 See the cases in Annex II and Brodeală (n 6) 554–559.
- 51 More precisely, the bill aimed to amend Article 7 of the National Education Law banning “activities aimed at spreading gender identity theory or opinion” in any kind of educational setting. The “gender identity theory or opinion” was defined as “the theory or opinion according to which gender is a concept that is different from the biological sex and that the two are not always the same.” For a more detailed commentary of this decision, see Elena Brodeală and Georgiana Epure, “Nature v. 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”, (2021) 17 *European Constitutional Law Review* 724.
- 52 Paragraph 64. Translation from *ibid* 733 – 734.
- 53 Paras. 69 – 76.
- 54 See the CCR website: <https://www.ccr.ro/judecatori/> (accessed 2 July 2021).
- 55 See e.g. Elena Simina Tănăsescu, *The Principle of Equality in Romanian Law (Principiul Egalității în Dreptul Românesc)* (All Beck 1999).
- 56 See Tănăsescu and Băluță (n 4).
- 57 Based on the data available on the website of the CCR: <https://www.ccr.ro/fostii-judecatori/> (accessed 2 July 2021).
- 58 See Yvonne Galligan and others, “Mapping the Representation of Women and Men in Legal Professions Across the EU” (Policy Department for Citizen’s Rights and Constitutional Affairs, EU 2017) 102–114.
- 59 For example, from 1989 until 2020, the representation of women in the Romanian Parliament did not exceed 19 percent. See Tănăsescu and Băluță (n 4) 408. Currently (July 2021), the representation of women in the Romanian Parliament is only 17 percent.
- 60 Article 200 read as follows:
- (1) *The sexual relations between persons of the same sex shall be punished with imprisonment from 1 to 7 years.*
  - (2) *The act in paragraph 1 committed against a minor, on a person unable to defend himself/herself or to express his/her consent, or*

*through coercion, shall be punished with imprisonment from 2 to 7 years.*

*(3) If the act in paragraph 2 results in serious bodily injury or health problems, the punishment is imprisonment from 3 to 10 years, and if it results in the death or suicide of the victim, the penalty is imprisonment from 7 to 15 years.*

*(4) Inciting or encouraging a person to practice the act referred to in paragraph 1 shall be punished with imprisonment from 1 to 5 years.*

My translation.

61 Michael Jose Torra, “Gay Rights after the Iron Curtain” (1998) 22 *Fletcher Forum of World Affairs* 73, 79–80.

62 CCR Decision 81/1994 and Decision 136/1994.

63 Long (n 10).

64 See Government Ordinance 137/2000 Regarding the Prevention and Sanctioning of all Forms of Discrimination.

65 See the open letter by various civil society organizations, “Sexual Orientation Should Remain a Protected Ground in the Romanian Constitution!” (13 June 2013) <https://accept-romania.ro/sexual-orientation-should-remain-a-protected-ground-in-the-romanian-constitution/> (accessed 11 July 2021).

66 See CCR Decision 534/2018, paragraph 41.

67 Official translation.

68 More precisely, Article 258 of the 2009 Civil Code on “family” reads: “(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. ... (4) Within the meaning of this Code, spouses should be a man and a woman united by marriage.” Moreover, Article 259 referring to marriage reads as follows: “(1) Marriage is the freely consented union between a man and a woman, concluded according to the law. (2) Men and women have the right to marry with the aim of starting a family. [...]”. My translation.

69 Article 150(1) of the Constitution.

70 Article 150 (2) of the Constitution.

71 Article 7 (1) c of Law 189/1999 regarding the Exercise of the Legislative Initiative by Citizens.

72 Article 7 (1) a of Law 189/1999.

73 Article 152 (2) of Constitution. Official translation.

74 Article 151(1) of the Constitution.

75 Article 7 (5) of Law 189/1999. According to Article 146 a), the Constitutional Court shall adjudicate *ex officio* on the constitutionality of initiatives to revise the Constitution.

76 More precisely, Article 150 (3) of the Constitution requires that the referendum should take place “within 30 days of the date of passing the



draft or proposal of revision.” To be valid, at least 30 percent of the citizens subscribed on the permanent electoral lists should vote in the referendum. See Article 5(2) of Law 3/2000 on referendum.

77 See Legislative Proposal no. 782 of 2 June 2006 regarding the constitutional review, published in the Official Gazette no. 536 of 21 June 2006 (Proiect de lege nr. 782 din 2 iunie 2006, publicat în Monitorul Oficial nr. 536 din 21 iunie 2006), <http://legislatie.just.ro/Public/DetaliiDocument/72851> (accessed 10 July 2021). My translation.

78 CCR Judgement 6/2007, <https://idrept.ro/EmbedView.aspx?EmbedId=70b28861-85b3-4e21-811e-5fa787c88eec> (accessed 11 July 2021).

79 The proposal was made by the Alliance of Romania’s Families (Alianța Familiilor din România), the group that was involved in the 2006 citizen’s initiative with the same scope. For more details, see <http://www.variantacojocar.ro/ConstitutiaPoporului/propuneri/propunere-Alianta-Familiilor-din-Romania.pdf> (accessed 11 July 2021).

80 The core of the CCR’s reasoning is encapsulated in one of the paragraphs of the first out of the two decisions that it delivered on the initiative:

“Examining the modification of Article 48(1) proposed by the initiators of the revision, the Court concludes that this cannot remove, eliminate or annul the institution of marriage . . . . Replacing the phrase “between spouses” with “between a man and a woman” only offers a clarification on the exercise of the fundamental right to marriage, in the sense of expressly stating that this can be concluded only between partners of different biological sexes, this being the original meaning of the [constitutional] text. In 1991, when the Constitution was adopted, marriage in Romania was regarded in its traditional understanding of a union between one man and one woman. This idea is supported by the subsequent evolution of family law in Romania, as well as by the systematic interpretation of the relevant constitutional norms. More precisely, Article 48 of the Constitution defines the institution of marriage in relation to protecting children, born within and out of wedlock. The biological component of marriage therefore obviously underpins the vision of the constituent assembly, being without a doubt that this regarded marriage as the union between a man and a woman, insofar as only through such a union, within or outside the confines of marriage, children can be born” (Paragraph 42, Decision 580/2016). My translation.

81 All the translations are the official translations of the Constitution available on the website of Romanian Presidency <https://www.presidency.ro/en/the-constitution-of-romania> (accessed 7 July 2021).

82 The official translation only uses the masculine pronouns here. The feminine is the author’s addition.