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EUROPEAN COURT OF JUSTICE DECISION IN *COMAN CASE* AND ITS IMPLICATIONS IN THE SAME-SEX SPOUSES MATTER

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Abstract: *Romania is still showing a strong resistance towards the spectacular changes in the way the family is currently regulated by the legal systems of other EU Member States. Under such conditions, through this study we are concerned about the issue of the recognition, by the Romanian State, of a marriage validly concluded abroad, between a Union citizen and his spouse of the same sex, who is a third country national. Our analysis starts from the principles developed by the European Union Court of Justice, in Coman case, a decision that brought back into the debate issues such as the right to family life and the right to freedom of movement, viewed from the perspective of the discrimination prohibition on grounds of sexual orientation.*

Key words: *same-sex spouses, family member, right of residence, freedom of movement*

1. Introduction

The recognition, from a legal standpoint, of same-sex relations is even today a sensitive subject, to which the Member States of the European Union position themselves differently, with a greater degree of acceptance in the Member States of Western and Northern Europe, respectively, a high resistance in the Member States of Central and Eastern Europe, differences which can be explained not only in terms of geographical location, but also social cultural values, and different religious characteristics and social democratic trends (Kovačić Markić, 2020, p.1322).

In this debate framework, the doctrine (Kovačić Markić, 2020, p.1321) signalled the need for the European Union and, more generally, for the European system of human rights protection, to identify proper legal responses, thereby providing a clear legal standard for the protection of same-sex couples.

Therefore, this study has also emerged in the context of current concerns at the level of the European Union (Motion for an European Parliament resolution on LGBTIQ rights

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in the EU) on the removal of the problems faced by "rainbow families" and their children in the European space, considering that they are deprived of their rights on the grounds of sexual orientation, and that the Member States and the European Commission are invited to contribute to the removal of obstacles faced by such persons when exercising their fundamental right to free movement within the EU. This motion for a resolution even insists on a common approach for the recognition of same-sex marriages and partnerships, with Member States being invited to adopt legislative measures to ensure full respect for the right to private and family life without discrimination.

Whereas the preamble to this motion for a resolution refers to principles of interpretation developed in the case law of the Court of Justice of the European Union, including the case of *Relu Adrian Coman and Others v. the General Inspectorate for Immigration - Ministry of Internal Affairs* (case C-673/16, Coman, EU:C:218:385), we find it appropriate to submit to our examination the implications of this decision, as they result from the consultation of specialized literature.

The choice of this case is not accidental, as we can use it as a benchmark for the legal problems that arise in the case of an application for recognition, on the territory of our country, of a same-sex marriage concluded in another Member State. Mainly, as we will have the opportunity to show, the *Coman case* provides answers in circumstances such as those of recognition of same-sex marriage for immigration purposes, thus playing a significant role in the application of the principle of free movement of persons and the prohibition of discrimination on grounds of sexual orientation.

Before referring to this case, we find it useful to set out the domestic legislative framework, which has been subject to compliance check with our fundamental law, that led the Constitutional Court of Romania to address, in an inter-institutional dialogue, the Court of Luxembourg, to clarify, in essence, the term "spouse" found within Directive 2004/38 (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77–123).

2. The principle of prohibition or equivalence of some forms of cohabitation with marriage, provided by art. 277 of the Romanian civil code

Article 277 of the Romanian Civil Code has the following normative content:

"(1) Marriage between persons of the same sex shall be prohibited.

(2) Marriages between persons of the same sex concluded or contracted abroad, either by Romanian citizens or by foreign citizens shall not be recognized in Romania.

(3) Civil partnerships between persons of the opposite sex or of the same sex concluded or contracted abroad, either by Romanian citizens or by foreign citizens shall not be recognized in Romania.

(4) The legal provisions regarding the free movement on the Romanian territory of the citizens of the Member States of the European Union and of the European Economic Area shall remain applicable".

It is therefore found that the Romanian legislator wanted to enshrine sexual differentiation as a constitutive element for the valid conclusion of a marriage, namely

an impediment, a negative condition, with the rank of public order, which is also imposed on foreigners, even if according to their national law marriage is allowed under such conditions (Hageanu, 2018, p.149).

The legislator's choice could be justified within the so-called margin of appreciation that is granted to each Member State in matters of civil status. Therefore, its role is based, on the one hand, on the provisions of Article 9 of the Charter of Fundamental Rights of the European Union, according to which the right to marry and the right to found a family are guaranteed in accordance with national laws governing the exercise of these rights.

On the other hand, recognition of this margin of appreciation also derives from the case-law of the European Court of Human Rights, which has established that "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society" (ECHR, Judgment, 24 June, 2010, final 22.11.2010, *Case of Schalk and Kopf v. Austria*,par. 62).

At the same time, the argument of striking a fair balance between competing interests must also be considered, in which sense we find suggestive the conclusions of the Strasbourg Court in the *X. and the Others v. Austria case* (ECHR, Judgment, 19 February, 2013, par.151), according to which striking a balance between the protection of the family, in the traditional sense of the term, and the rights of sexual minorities under the Convention is, by its nature, a difficult and delicate exercise, which may require States to reconcile competing views and interests perceived by the parties concerned as fundamentally antagonistic.

The Romanian doctrine (Nicolescu, 2020, p.69) has signalled the fact that the cited article from the Romanian Civil Code is not safe from criticism, being considered excessive, in contradiction with the spirit of the European system of human rights protection.

The solution proposed in our specialized literature (Nicolescu, 2020, p.70), concerns the recourse to the theory of the attenuated effect of public order in private international law, following the model of those states that, although not authorizing same-sex marriage, nevertheless admit that such a marriage could produce partial effects, ensuring, as far as possible, a continuity of the family status legally acquired abroad.

Furthermore, as it has just been pointed out, the validity and even the actuality, respectively the appropriateness of Art. 277 of the Romanian Civil Code is called into question by recent decisions of European courts.

Namely, the references, by way of example, are to the Decision of the European Court of Human Rights in the case of *Oliari and Others. v. Italy* (Applications Nos. 18766/11 and 36030/11 ECLI: CE: ECHR: 2015: 0721JUD001876611), respectively to the judgment of the Court of Justice of the European Union in the Coman case (Case C-673/16, Coman, EU:C:218:385).

3. *Coman case* and its implications in understanding the significance of the "spouse" term, within the context of other fundamental rights recognized at the European level

The *Coman case* was generated by a factual situation that serves as an example of circumstance, within which an international couple made of same-gender persons, who concluded validly a marriage/registered partnership, in an European Union member state, puts up with a series of negative consequences related to the so-called law conflict in terms of location and time, under the hypothesis that it wants to settle down on the territory of another State Member that does not recognize the effects specific to such an union.

In the case at hand, Mr. Coman, having Romanian&American citizenship and Mr. Hamilton, American citizen, married in Bruxelles, in the year 2010, made a request to the Romanian authorities, so that Mr. Hamilton, as member of the Coman family, would benefit of the right to live in Romania for a period of more than three months. The Romanian authorities answered that, being the case of same-gender persons, their marriage cannot be recognised, according to the Civil Code and on the other hand, the extension of the temporary residence right in Romania for Mr. Hamilton cannot be given by way of family reunification. In light of this rejection, the couple brought a civil action, that was pending at a Romanian court, by which they requested on one hand, the acknowledgement of a discrimination based on sexual orientation, in regard to the exercise of the freedom of movement within the Union, and on the other hand, the coercion of the General Inspectorate for Immigrations to put an end to this discrimination and to pay them non-pecuniary damages. In this civil file, the solicitors invoked the exception regarding the unconstitutionality of the art. 277 from the Civil Code, by ascertaining that this text represents a breach of the Romanian Constitution provisions, that protect the right to sexual, family and private life as well as of the provisions referring to the rights equality principle. The Romanian Constitutional Court, that had the competency to solve this exception, suspended the cause and addressed the European Union Court of Justice 4 preliminary questions, the first 2 being of concern:

1) "Does the term "spouse" in Article 2(2)(a) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, include the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State?

2) If the answer [to the first question] is in the affirmative, do Articles 3(1) and 7([2]) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, require the host Member State to grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a citizen of the European Union?"

The first observation that needs to be made is that, although the case generated polemics among the civil society regarding the notion of marriage, the object of the cause was not the legalization of the marriages between same-gender persons, but only the recognition of the residence right for the spouse having the same-gender as the

Romanian citizen (Irinescu, 2018, p.187).

Basically, by the given answer, the European Court of Justice pointed out the fact that the meaning of the term "spouse", from the Directive 2004/38 is neuter from the gender point of view, by recognising, therefore, the freedom of movement rights for the married same-gender couples as for the married heterosexual couples, no matter of the manner in which each EU member-state frames the family in its own legislation - Dimitry Kochenov and Uladzislau Belavusau (2019, p.1). Therefore, it was concluded that a EU state-member cannot set its national legislation as the basis for the refusal to recognise on its territory a marriage concluded between same-gender persons in other state-member, in accordance to the legislation of that state, when it comes to giving the right of residence on its national territory - Dimitry Kochenov and Uladzislau Belavusau (2019, p.5-6). Within this sense, it was invoked a well-specified jurisprudence, according to which the European legal order must be observed, in regard to the freedoms given in the European space, without being permitted the restrictive interpretation of the provisions from the Directive 2004/38, a fact that could give them a lack of efficiency - Dimitry Kochenov and Uladzislau Belavusau (2019, p.6).

For that matter, the Court proceeded to an evaluation of the possible legal justifications for which such a restrictive measure would be in force in Romania, showing in the par. 41 that „it is established case-law that a restriction on the right to freedom of movement for persons, which, as in the main proceedings, is independent of the nationality of the persons concerned, may be justified if it is based on objective public-interest considerations and if it is proportionate to a legitimate objective pursued by national law.". Therefore, at par. 45, 46, the Court concluded the following: "The Court finds, in that regard, that the obligation for a Member State to recognize a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, which is defined by national law and, as indicated in paragraph 37 above, falls within the competence of the Member States. Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognize such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law. Accordingly, an obligation to recognize such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned".

As consequence, our Constitutional Court gave a decision from the perspective of granting the residence right on the Romanian territory, without approaching the troublesome issue of not recognizing the other personal and patrimonial effects driven by the marriages concluded validly in another state-member (Nicolescu, 2018, retrieved from www.sintact.ro).

Anyway, it was noticed that (Hageanu, 2018, p.152), for the issue of the movement freedom rights, there were already enough legal arguments, as well as in our national legislation (for ex., art. 277 par. 4 Civil Code), reason for which the preliminary reference

would not have been necessary, the explanation being that, our Constitutional Court wanted a consecration at the supranational level, of all these matters, in order to impose itself with a higher legal force.

4. Concluding Remarks

The legal issue under the current analysis is assigned to a subject matter with a continuous evolution, without an established consensus, for the moment. It prefigures new dimensions in terms of the legal protection and recognition of the unions made of same-gender persons, being useful to follow, next, the extension of the protection to other effects specific and connected to the family life, such as: raising children, inheritance, receiving the survivor's pension, effects of the matrimonial regimes.

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