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## The Right to Marriage according to the Provisions of the Main Legal Instruments of the UN and EU

**Abstract:** Both in the Universal Declaration of Human Rights (Art. 16) and in the European Convention on Human Rights (Art. 12), the right to marriage is perceived and defined as a fundamental human right, as it was in fact enounced both by *jus divinum* and by *jus naturale*.

Among other things, from the texts of the legal instruments, of prime importance to the nations of the world, one can note that a marriage can be concluded only between a man and a woman, and only if the following indispensable conditions are met, namely: a) the marriageable age laid down in the national law; b) the mutual consent of the future spouses; c) that the race, nationality or religion of the future spouses are not taken into account. Therefore, a valid marriage is concluded only by the persons of different sex (man and woman), and not by the people of any sex, as the Treaty of Nice (2000) stipulated.

In the article, we also highlighted the fact that the right of a man and a woman to have a family is ontologically bound with the marriage. This reality proves in fact, once more, that the marriage and the family were and remain “two main institutions of the mankind.”

**Keywords:** the legal instruments, right to marry, the family, the fundamental human rights

## Introduction

The right to the marriage, one of the fundamental human rights,<sup>1</sup> was stipulated in both *jus divinum* (divine law) (according to Gen. I, 27—28; Mt. XIX, 3—6; Jn. 2: 1—10), and *jus naturale* (natural law).<sup>2</sup> In addition, this right has been emphasized since Antiquity, also by *jus consuetudinarius* (customary law) and *jus gentium* (law of nations), as confirmed by *jus romanum*,<sup>3</sup> which expressly refers to both the right to marriage and to found a family.

According to the provisions of classical Roman law (1st—3rd century AD), only the person who fulfils the conditions stipulated by the law (age, parental consent, impediments to marriage, etc.) may conclude a “lawful marriage (*iustae nuptiae*)” (Gaius, *Institutiones*, lb. I, 55).<sup>4</sup>

The new Roman law, known as the Byzantine law, provided also that the “Roman citizens [*cives romanum*] are joined together in lawful wedlock [...] they are united according to law [*secundum praecepta legum*],”<sup>5</sup> that is, if they meet the conditions set out therein (e.g., the legal age, the *consensus patres* (‘parental consent’), lack of impediments to marriage,

<sup>1</sup> See, N. V. DURĂ: “Drepturile și libertățile omului în gândirea juridică europeană. De la *Justiniani Institutiones* la *Tratatul instituind o Constituție pentru Europa* [Human rights and freedoms in European legal thinking. From *Justiniani Institutiones* to *The Treaty Establishing a Constitution for Europe*].” *Analele Universității Ovidius. Seria: Drept și Științe Administrative* 1 (2006), pp. 129—151; N. V. DURĂ: “The Fundamental Rights and Liberties of Man in the EU Law.” *Dionysiana* IV, 1 (2010), pp. 431—464; N. V. DURĂ, C. MITITELU: “The human fundamental rights and liberties in the Text of some Declarations of the Council of Europe.” In: *Exploration, Education and Progress in the Third Millennium*, I, 5. Bucharest 2015, pp. 7—22; N. V. DURĂ, C. MITITELU: “Human rights and their universality. From the rights of the ‘individual’ and of the ‘citizen’ to ‘human’ rights.” In: *Exploration, Education and Progress in the Third Millennium*, I, 4. Galați 2012, pp. 103—127.

<sup>2</sup> N. V. DURĂ: “Loi morale, naturelle, source du Droit naturel et de la Morale chrétienne.” In: *La morale au crible des religions*. Ed. M. Th. URVOY. Paris 2013, pp. 213—233; N. V. DURĂ: “Law and Morals. Prolegomena (I).” *Acta Universitatis Danubius. Juridica* 2 (2011), pp. 158—173; N. V. DURĂ: “Law and Morals. Prolegomena (II).” *Acta Universitatis Danubius. Juridica* 3 (2011), pp. 72—84.

<sup>3</sup> N. V. DURĂ: “The Right and its Nature in the Perception of the Roman Jurisprudence and of the Great Religions of the Antiquity.” In: *Rethinking Social Action. Core Values*. Eds. A. SANDU et al. Bologna 2015, pp. 517—524; N. V. DURĂ, P. KROCZEK, C. MITITELU: *Marriage from the Roman Catholic and Orthodox points of view*. Kraków 2017, pp. 117—125.

<sup>4</sup> *The Institutes of Gaius*, <https://thelatinlibrary.com/law/gaius1.html> [accessed 19.09.2022].

<sup>5</sup> *The Institutes of Justinian*, [https://www.gutenberg.org/files/5983/5983-h/5983-h.htm#link2H\\_4\\_0011](https://www.gutenberg.org/files/5983/5983-h/5983-h.htm#link2H_4_0011) [accessed 10.09.2022].

kinship, etc.). In this regard, the jurists of Emperor Justinian (527—565) stipulated that this is how it must be done, provided that they have “the consent of the parents in whose power they respectively are,”<sup>6</sup> from which stems the necessity that this consent of the parents be “given before the marriage takes place”<sup>7</sup> as it “is recognised no less by natural reason than by law” (Justiniani, *Institutiones*, lb. I, X).<sup>8</sup>

It was therefore also a question of *jus naturale*, that is, of that *naturalis ratio*, which — according to Gaius (*Institutiones*, lb. I, 1) — was the basis of *jus gentium* (law of nations), the forerunner of the international law of our days. Hence, therefore, the need that the right to marriage, stipulated in the main legal instruments of the UN and EU, has to be perceived and defined from the perspective of its evolutionary, conceptual and institutional process, that is, as it was stipulated by *jus divinum*, *jus naturale*, *jus romanum* and *jus Ecclesiae*, that is, by the law of the Church.<sup>9</sup>

## 1. The Universal Declaration of Human Rights — the main source and reference regarding the right to marry for other main international legal instruments

In the Universal Declaration of Human Rights<sup>10</sup> — adopted by the UN in 1948 — it was stated that, “men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family” (Art. 16 para. 1), and, at the same time, it was specified that the respective “marriage shall be entered into only with the free and full consent of the intending spouses” (Art. 16 para. 2).<sup>11</sup>

As can be seen, two indispensable conditions were laid down for the conclusion of a marriage, namely the legal age of the husband and wife

<sup>6</sup> Ibidem.

<sup>7</sup> Ibidem.

<sup>8</sup> Ibidem.

<sup>9</sup> N. V. DURĂ, C. MITITELU: *Legislația canonică și instituțiile juridico-canonică europene, din primul mileniu* [Canon law and canonical legal institutions in Europe in the first millennium]. București 2014, pp. 93—124; N. V. DURĂ: “Thinking of Some Fathers of the Ecumenical Church on the Law.” *Christian Researches* VI (2011), pp. 230—245.

<sup>10</sup> On December 10, 1948, the UN General Assembly adopted and proclaimed the Universal Declaration of Human Rights, apud <https://legislatie.just.ro/Public/DetaliuDocumentAfis/22751> [accessed 22.08.2022].

<sup>11</sup> Universal Declaration of Human Rights [hereinafter: UDHR], <https://www.un.org/en/about-us/universal-declaration-of-human-rights> [accessed 1.08.2022].

and the free consent of the future spouses. In addition to this, any restrictions based on race, nationality or religion were strictly prohibited.<sup>12</sup>

The provisions of principle stated in the Universal Declaration of Human Rights,<sup>13</sup> according to which “everyone has the right to a nationality” (Art. 15, para. 1) and “no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality” (Art. 15, para. 2),<sup>14</sup> was also reiterated in the Convention on the Nationality of Married Women<sup>15</sup> adopted by the United Nations General Assembly on 20 January 1957, which entered into force on 11 August 1958.

The same Convention on the Nationality of Married Women stipulated that “neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife” (Art. 1).<sup>16</sup>

Moreover, the contracting states agreed that “neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national” (Art. 2).<sup>17</sup> Therefore, no one can be deprived — arbitrarily — of their citizenship, nor of its change during the marriage.

On 7 November 1962, the representatives of the Member States of the United Nations signed a “Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,”<sup>18</sup> that entered into force on 9 December 1964.

<sup>12</sup> See more in N. V. DURĂ: “‘Rights’, ‘Freedoms’ and ‘Principles’ Set Out in the Charter of Fundamental Rights of the EU.” *Journal of Danubius Studies and Research* VI, 2 (2016), pp. 166—175; N. V. DURĂ: “The Right to the Guarantee and Ensurance of Religious Freedom from ‘The Statute for Religious Freedom’ of 1786 to the ‘Declarations’ Issued during the UN Session of 2019.” *Bulletin of the Georgian National Academy of Sciences* 1 (2021), pp. 117—127; N. V. DURĂ: “The Legal Status of ‘Migrants’ according to the European Union Legislation.” *Ecumeny and Law* 9/2 (2021), pp. 105—123.

<sup>13</sup> See N. V. DURĂ: “The Universal Declaration of Human Rights.” In: *10th Edition of International Conference The European Integration — Realities and Perspectives*. Galati 2015, pp. 240—247.

<sup>14</sup> UDHR.

<sup>15</sup> Romania acceded to this Convention by Decree no. 339, published in *Official Gazette of Romania*, part I, no. 20 of September 22, 1960.

<sup>16</sup> Convention on the Nationality of Married Women, [https://treaties.un.org/doc/Treaties/1958/08/19580811%2001-34%20AM/Ch\\_XVI\\_2p.pdf](https://treaties.un.org/doc/Treaties/1958/08/19580811%2001-34%20AM/Ch_XVI_2p.pdf) [accessed 19.08.2022].

<sup>17</sup> Ibidem.

<sup>18</sup> The Convention adopted by the United Nations General Assembly on November 7, 1962 (New York) entered into force on December 9, 1964. Romania signed the Convention on December 27, 1963, and ratified it on December 15, 1992 by Law no. 116, published in *Official Gazette of Romania*, part I, no. 330 of December 24, 1992.

From the Preamble to this UN Convention, it can be seen that its authors reiterated the provisions of principle stated in the United Nations Charter on “human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion”<sup>19</sup> and reproduced *ad-litteram* the text on the right to marry, that is, the text of Article 16 of the Universal Declaration of Human Rights.

The same authors of the UN Convention also recalled the fact that, in “Resolution no. 843 (IX) of 17 December 1954, certain customs, ancient laws and practices relating to marriage and the family were inconsistent with the principles set forth in the Charter of the United Nations and in the Universal Declaration of Human Rights” (Preamble).<sup>20</sup>

Moreover, the UN Convention of 9 December 1964 stipulated the obligation of “all States” to take “all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, inter alia, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty” (Preamble).<sup>21</sup>

Article 1 (para. 1) of the UN Convention (1964) affirms the basic principle of marriage, namely the free consent of the future spouses, which must be expressed “in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law,”<sup>22</sup> that is, of the national law. And, according to Article 2 of the Convention, the UN member states were required to set a “minimum age for marriage,” such that “no marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.”<sup>23</sup>

The Convention on the Elimination of All Forms of Discrimination against Women<sup>24</sup> — adopted by the UN General Assembly by Resolution 34/180 of 18 December 1979, which entered into force on 3 September 1981 — also stipulated the obligation of the States Parties to ensure the

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For the Romanian text of the Convention, see: *Main International Instruments on Human Rights to which Romania is a party*, vol. I. 6th edn. Bucharest 2003, pp. 334—337.

<sup>19</sup> Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, <https://www.ohchr.org/sites/default/files/convention.pdf> [accessed 12.09.2022].

<sup>20</sup> *Ibidem*.

<sup>21</sup> *Ibidem*.

<sup>22</sup> *Ibidem*.

<sup>23</sup> *Ibidem*.

<sup>24</sup> Romania signed the Convention on November 26, 1981 by Decree no. 342, published in *Official Gazette of Romania*, part I, no. 94 of November 28, 1981. The Romanian text of the Convention is published in: *Main International Instruments on Human Rights to which Romania is a party*, vol. I..., pp. 338—352.

“recognition [...] on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field” (Art. 1).<sup>25</sup>

The same Convention stipulated that “States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband” (Art. 9 para. 1).<sup>26</sup>

The same States Parties agreed to “grant women equal rights with men with respect to the nationality of their children” (Art. 9 para. 2).<sup>27</sup> Hence, the finding that in the text of this Convention adopted by the UN Assembly we find provisions that guarantee that a woman can also marry a foreigner, without being forced to take the nationality of her husband or becoming stateless if her husband changes his nationality during the marriage.

In fact, the provisions of principle set out in the Universal Declaration of Human Rights were reaffirmed in the text of the main international legal instruments, as for example, in some of the Conventions adopted by the UN, namely the Convention on Consent to Marriage, Minimum Age for Marriage and the Registration of Marriages, the Convention on the Nationality of Married Women and the Convention on the Elimination of All Forms of Discrimination against Women, and in the text of European Union legislation and, first and foremost, in the European Convention on Human Rights, which entered into force in 1950.

## 2. The provisions on marriage of the European Convention on Human Rights and its Protocols

The drafters of the European Convention on Human Rights<sup>28</sup> stipulated and guaranteed the “right to marry” (Art. 12),<sup>29</sup> hence the assertion that — for our days — this Convention remains “the first important

<sup>25</sup> Convention on the Elimination of All Forms of Discrimination against Women, <https://www.ohchr.org/sites/default/files/cedaw.pdf> [accessed 28.09.2022].

<sup>26</sup> Ibidem.

<sup>27</sup> Ibidem.

<sup>28</sup> See C. MITITELU: “The European Convention on Human Rights.” In: *10th Edition of International Conference The European Integration — Realities and Perspectives*. Galați 2015, pp. 243—252.

<sup>29</sup> European Convention on Human Rights, [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) [accessed 17.09.2022].

international document to enshrine this freedom,”<sup>30</sup> that is “the right of a man and a woman to marry after they reached the marriageable age required by the law.”<sup>31</sup>

However, we should not ignore the fact that the provisions of this Article (12) of the European Convention on Human Rights are based on the provisions of Article 16 of the Universal Declaration of Human Rights.

It should also be noted that, subsequently, in the “jurisprudence of the bodies of the Convention” reference is made to “two distinct rights regulated by Art. 12: the right to marry and the right to found a family.”<sup>32</sup>

In Article 12, the authors of the European Convention on Human Rights stated that “man and woman [...] have the right to marry”<sup>33</sup> starting from “marriageable age,”<sup>34</sup> that is, with the matrimonial age established by the “national law,” as confirmed, *expressis verbis*, by the very text of Article 12 of this EU Convention, which states that “the exercise of this right,”<sup>35</sup> that is, the right to marriage, must be done “according to the national laws” (Art. 12).<sup>36</sup>

According to the Article 12 of the European Convention on Human Rights, “men and women of full age [...] have the right to marry” (Art. 16, para. 1).<sup>37</sup>

Although the Article 12 of the European Convention does not refer to the equal rights of the spouses in the conclusion, on the duration and in the dissolution of a marriage, however, the provision of principle stated in the text of the Universal Declaration “has found its consecration, in the Convention’s system, in the provisions of art. 5 of Protocol no. 7 to the Convention, concluded in 1984.”<sup>38</sup>

Indeed, in Article 5 of Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>39</sup> of 22 November

<sup>30</sup> R. CHIRIȚĂ: *Convenția Europeană a Drepturilor Omului. Comentarii și explicații* [The European Convention on Human Rights. Comments and explanations]. 2nd edn. București 2008, p. 584.

<sup>31</sup> Ibidem.

<sup>32</sup> C. BÎRSAN: *Convenția europeană a drepturilor omului. Comentariu pe articole* [European Convention on Human Rights. Comments on articles]. 2nd edn. București 2010, p. 906.

<sup>33</sup> European Convention on Human Rights...

<sup>34</sup> Ibidem.

<sup>35</sup> Ibidem.

<sup>36</sup> Ibidem.

<sup>37</sup> UDHR.

<sup>38</sup> C. BÎRSAN: *Convenția europeană...*, p. 905.

<sup>39</sup> Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, apud [https://www.echr.coe.int/Documents/Library\\_Collection\\_P7postP11\\_ETS117E\\_ENG.pdf](https://www.echr.coe.int/Documents/Library_Collection_P7postP11_ETS117E_ENG.pdf) [accessed 12.09.2022].

1984, express reference is made to the “equality between spouses,” stating that “spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution” (Art. 5).<sup>40</sup>

Therefore, we have to retain that, according to the provisions of this Article — of Protocol no. 7<sup>41</sup> to the European Convention on Human Rights — “spouses enjoy equal rights and responsibilities in civil matters, between themselves and in their relations with their children during their marriage.”<sup>42</sup>

Referring to this legal principle of equality between the spouses in “civil rights and responsibilities,” Professor Corneliu Bîrsan considered that “the jurisprudence of the bodies of the Convention regarding the application of art. 5 of Protocol no. 7 is almost negligible”<sup>43</sup>; as an alternative, “the European system of human rights protection enshrines a true subjective right in terms of the equality in civil rights and responsibilities of the spouses.”<sup>44</sup>

The same magistrate of the European Court also noted the fact that, regarding the equality in rights and responsibilities, of a civil nature, and also the “dissolution” of the marriage — to which Article 5 of Protocol no. 7 expressly refers — this “cannot be understood in the sense that it would imply any specific obligation on the part of the State, in the Convention area, regarding divorce; as the Court ruled, neither the Convention nor its Additional Protocols recognize the right to divorce. Obviously, states are free to regulate divorce, its conditions and effects,”<sup>45</sup> and “contracting states” may “adopt such regulations as they deem necessary in the best interests of the children.”<sup>46</sup>

With regard to the dissolution of marriage via divorce — pursuant to Article 12 of the Convention — the European Court also “showed that the ordinary meaning of the terms ‘the right to marry’ used in the text refers only to the conclusion of the marriage, not to its dissolution.”<sup>47</sup>

In 1994, “Council of Europe’s Member States” considered that it was necessary and urgent to strengthen the “efficiency of its protection of

<sup>40</sup> Ibidem.

<sup>41</sup> Protocol no. 7 was concluded in November 22, 1984 and entered into force on November 1, 1988. Romania ratified Protocol no. 7 by Law no. 30 of May 18, 1994, published in the *Official Gazette of Romania*, part I, no. 135 of 31 May 1994.

<sup>42</sup> C. BÎRSAN: *Convenția europeană...*, p. 1868.

<sup>43</sup> Ibidem.

<sup>44</sup> Ibidem.

<sup>45</sup> Ibidem, p. 1870.

<sup>46</sup> Ibidem.

<sup>47</sup> Ibidem, pp. 910—911.



human rights and fundamental freedoms [...], established by the Convention (for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950)” (The *Preamble* to Protocol No. 11, Strasbourg on 11 May 1994).<sup>48</sup>

However, strengthening the effectiveness of the defence of fundamental human rights and freedoms — including, at the forefront, the right to marry — can only be achieved by affirming and applying the provisions of principle set out in the text of the European Convention (1950),<sup>49</sup> which was and is — for the Member States of the European Union — the Constitutional Charter of Human Rights and Freedoms, but in which, unfortunately, this right to marriage is often perceived and defined only in terms of *pro domo* interpretations, generated by some ideological, philosophical, sexual guidelines, etc.

With regard to the holders of “the right to marry” — who, according to Article 12 of the Convention, can only be a “man” and a “woman” — it was also noted that “unlike the other rights and freedoms guaranteed by the Convention,” regarding whose texts state that they belong to “any person,” Article 12 uses the wording according to which upon reaching the legal age of marriage “the man and the woman” have the right to marry; the text does not state that “any person” has the right to marry. The difference is fundamental: it reflects the concept that the right to marry is recognized for the people who have “a different biological sex.”<sup>50</sup>

In 2010, the same magistrate of the European Court found that, in its case law, the Court considered only the “traditional marriage,” that is, “between two persons of different biological sex,”<sup>51</sup> and therefore not of the same sex.<sup>52</sup>

The “right to marry,” stipulated in Article 12 of the European Convention on Human Rights, had also been enshrined in the “classical legal systems,”<sup>53</sup> in which this right was also recognized as having a “contractual or institutional character,”<sup>54</sup> but, “curiously,” this character — also

<sup>48</sup> Published in the *Official Gazette of Romania*, no. 147 of 13 July 1995.

<sup>49</sup> See C. MITITELU: “Provisions of Principle with European Constitutional Value on the ‘Person’s’ Right to Freedom and Security.” *Journal of Danubius Studies and Research* VI, 2 (2016), pp. 158—165; M. MARIN: “Human Rights Between Abuse And Non-Discrimination.” *Managementul Intercultural* XVI, 2 (2014), pp. 209—213.

<sup>50</sup> C. BÎRSAN: *Convenția europeană...*, p. 907.

<sup>51</sup> *Ibidem*.

<sup>52</sup> See more in C. MITITELU: “About the Right to Same-Sex Marriage. Some Considerations and Interpretations from the Constitutional Law Perspective.” *Logos Universal-ity Mentality Education Novelty: Law* 7/2 (2019), pp. 80—88.

<sup>53</sup> J.-L. CHARRIER, A. CHIRIAC: *Code de la Convention européenne des droits de l’homme*. Paris 2008, p. 449.

<sup>54</sup> Protocol no. 7. In: *Principalele Instrumente internaționale privind Drepturile Omului* [The main international human rights instruments], vol. II. București 2003, p. 84.

stipulated in Protocol 7 to the European Convention on Human Rights — has disappeared “from the modern Constitutions, so that it does not today have a constitutional protection other than in exceptional cases.”<sup>55</sup>

Although in Article 12 of the European Convention “the notions of marriage and family are distinct,”<sup>56</sup> it is *expressis verbis* stated that “there cannot be a family without marriage,”<sup>57</sup> hence the fact that both legal institutions enjoy the same legal protection. However, some European jurists have noted that the Treaty of Nice (7 December 2000) “protects rights that are not covered by the Convention,”<sup>58</sup> that is, the European Convention on Human Rights (Rome, 1950), including the “right to marry” between people of the same sex.

Indeed, the text of Article 12 of the European Convention makes express reference only to the right to marry “recognized exclusively to men and women,”<sup>59</sup> without any specification as to the “sex of the holders,”<sup>60</sup> who can exercise their “right to marry” (Article 9, Treaty of Nice).<sup>61</sup>

It should also be noted that Article 12 of the European Convention on Human Rights, “does not recognize the right of persons of the same sex to marry,”<sup>62</sup> and that, initially, in its decisions, the European Court “refused to recognize the right of transgender people to marry, after a sex change operation, a person of the same biological sex on the grounds that the purpose of the provision (Article 12) is to protect marriage as a foundation of the family.”<sup>63</sup>

But, later on, the Court ordered the European Union States to remove this prohibition, although that “Article 12 is strictly applicable to the traditional family of one woman and one man,”<sup>64</sup> and that, consequently, “it is contrary to the purpose of this provision to allow a marriage to continue, when husbands change their sex.”<sup>65</sup>

In their Commentary on Article 8 of the European Convention, the Romanian jurists also acknowledge that the authors of the Convention

<sup>55</sup> Ibidem.

<sup>56</sup> J.-L. CHARRIER, A. CHIRIAC: *Code de la Convention européenne...*, p. 450.

<sup>57</sup> Ibidem.

<sup>58</sup> Ibidem, p. 15.

<sup>59</sup> Ibidem.

<sup>60</sup> Ibidem.

<sup>61</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL> [accessed 7.09.2022].

<sup>62</sup> R. CHIRIȚĂ: *Convenția Europeană...*, p. 585.

<sup>63</sup> Ibidem, pp. 585—586.

<sup>64</sup> Ibidem, p. 587.

<sup>65</sup> Ibidem.

considered that, in addition “to the right to privacy and family life,”<sup>66</sup> which is indeed expressly provided in Article 8,<sup>67</sup> the Article 12 stipulated and guaranteed the “right to marry” only between a man and a woman.

As it is known, Article 8 of the European Convention on Human Rights is in fact “the first in a series of four texts of the Convention which protect rights that mean social respect due to the individual,”<sup>68</sup> and implicitly stipulates the right of the children “to a family life.”<sup>69</sup> Consequently, we might say that, implicitly, Article 8 of the Convention also stipulated and guaranteed the right to marry.

In fact, some constitutionalists from the European Union also wanted to specify the fact that from the analysis of the notion of family, “the provisions of Article 12 of the Convention, enshrining the right to marry, cannot be ignored,”<sup>70</sup> hence the fact that the European Court also conveys great importance not only to the “right to found a family” (according to Art. 8), but also to the right of the “man” and “woman” to marry (according to Art. 12), without which, in fact, there can be no basic cell of human society, the family, but also our descendants, that is, children,<sup>71</sup> resulting from the act of marriage, whose “protection” received from the European Court “a special importance.”<sup>72</sup>

The magistrates of the European Court also found that “Article 12 of the Convention does not contain provisions on the limits of the right to marry and to found a family; however, since the text stipulates that this right is exercised in accordance with the provisions of national law, this means that, implicitly, the same provisions also set the limits of its enforcement, which, in this matter, usually means the need to meet certain conditions of substance and form for the marriage.”<sup>73</sup>

The same magistrates of the European Court state that, although “in the official text of the Convention, the title of art. 12 is stated as regulat-

<sup>66</sup> C. BÎRSAN: *Convenția europeană...*, p. 596.

<sup>67</sup> According to Article 8 of the European Convention: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

<sup>68</sup> C. BÎRSAN: *Convenția europeană...*, p. 596.

<sup>69</sup> *Ibidem*, p. 661.

<sup>70</sup> *Ibidem*, p. 645.

<sup>71</sup> See N. V. DURĂ: “Provisions of International Law on the Parents’ Right to Provide their Children with a Religious Education.” In: *The fundamentals of our spirituality*. Batumi 2018, pp. 240—248; C. MITITELU: “The Children’s Rights. Regulations and Rules of International Law.” *Ecumeny and Law* 3 (2015), pp. 151—169; N. V. DURĂ, T. PETRESCU: “Children’s Rights. Provisions of Certain International Conventions.” *Ecumeny and Law* 3 (2015), pp. 127—149.

<sup>72</sup> C. BÎRSAN: *Convenția europeană...*, p. 660.

<sup>73</sup> *Ibidem*, pp. 903—904.

ing the ‘right to marry,’ in fact, its careful reading leads to the conclusion that the respective article proclaims two closely related rights: the right to marriage and the right to a family.”<sup>74</sup>

Indeed, the members of the Commission — who drafted Article 12 of the European Convention — considered “the sole right to marriage and the foundation of a family,”<sup>75</sup> while “the jurisprudence of the Convention’s bodies [...] assessed the recognition of two distinctly regulated rights of Article 12.”<sup>76</sup>

There is no reference — even an allusive one — in the text of the European Convention to the dissolution of a marriage by divorce. Regarding this reality, a magistrate of the European Court wanted to specify that, in the “usual sense of the terms, the “right to marriage” used by the text,”<sup>77</sup> that is, by the text of Article 12 of the Convention, “considers only the conclusion of the marriage, not its dissolution”<sup>78</sup> and that, through divorce, “the very substance of the right to marriage, guaranteed by Art. 12 of the Convention”<sup>79</sup> is affected.

Moreover, the European Court also “considered that this interpretation is in full accordance with the object and purpose of art. 12,”<sup>80</sup> which it “has its origin” in “article 16 of the Universal Declaration of Human Rights.”<sup>81</sup>

Indeed, Article 16 of this Declaration stipulates that “of full age [...], men and women, [...], without any limitation, [...] have the right to marry and to found a family,” and that “they (our note: the spouses) are entitled to equal rights as to marriage, during marriage and at its dissolution” (Art. 16, para. 1).<sup>82</sup>

Here, then, lies the motivation for which some magistrates of the European Court also wanted to specify that it was not “the intention of the authors of the Convention to include in art. 12 any mention of the dissolution of a marriage by divorce,”<sup>83</sup> but that it must be borne in mind that, “indeed, the Convention is a living instrument,”<sup>84</sup> which can “be interpreted in the light of new realities; ... this did not mean — their Lords conclude — that by an evolutionary interpretation the existence of

<sup>74</sup> Ibidem, p. 906.

<sup>75</sup> Ibidem.

<sup>76</sup> Ibidem.

<sup>77</sup> Ibidem, p. 910.

<sup>78</sup> Ibidem, pp. 910—911.

<sup>79</sup> Ibidem, p. 911.

<sup>80</sup> Ibidem.

<sup>81</sup> Ibidem.

<sup>82</sup> UDHR.

<sup>83</sup> C. BÎRSAN: *Convenția europeană...*, p. 911.

<sup>84</sup> Ibidem.

a right which was not inscribed from the beginning in its texts could be omitted, all the more so as the omission was deliberate.”<sup>85</sup>

“Protocol no. 11”<sup>86</sup> to the European Convention on Human Rights, which entered into force on 1 November 1998, stipulated that, “men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”<sup>87</sup>

The Article 12 of the European Convention, suggestively entitled *Right to marry*, has therefore found legal consistency through Protocol no. 11,<sup>88</sup> which confirms the fact that, in the text of Article 12 of the Convention, it refers only to the “right to marry,” not to the “right to divorce,” that is, the right to dissolve a legally concluded marriage.

That Article 12 of the European Convention on Human Rights included “only the right of some persons to marry and to found a family, without having a negative correlation, namely the right to dissolve a marriage and a family by divorce,”<sup>89</sup> is also attested by the jurisprudence of the European Court, in which it was specified that “art. 12 was introduced in the Convention in order to guaranteed the establishment of the conjugal relations, without taking into account their dissolution.”<sup>90</sup>

In fact, Article 12 of the Convention “does not guarantee the rights of the spouses during the marriage; their equality with respect to marital rights and duties being covered by the provisions of art. 5 of Protocol no. 7 to the Convention.”<sup>91</sup>

Certainly, it has to be also underlined and retained the fact the right to a family, a *sine qua non* condition of family life, is ontologically linked to the right to marriage, and that both rights have been stated explicitly both by the Universal Declaration of Human Rights and some of the international Conventions adopted by the Member States of the United Nations, and by European Convention on Human Rights and its Protocols. And, finally, it has to be mentioned and retained the fact that Article 12 of the European Convention “enshrines the right to marriage, but nothing is stipulated regarding a possible right to divorce,”<sup>92</sup> underling thus the character of the indissolubility of the marriage.

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<sup>85</sup> Ibidem.

<sup>86</sup> A text published in *Tratate ale Consiliului European. Texte esențiale* [Council of Europe Treaties. Essential texts]. Bucharest 2002, pp. 29—45.

<sup>87</sup> Ibidem, p. 35.

<sup>88</sup> Ibidem, p. 35, n. 1.

<sup>89</sup> R. CHIRIȚĂ: *Convenția Europeană...*, p. 587.

<sup>90</sup> Ibidem.

<sup>91</sup> Ibidem.

<sup>92</sup> Ibidem, p. 453.

## In lieu of conclusions

As the texts of the main international and European Union instruments proved, the right to marriage and the right to a family were expressly stated by the United Nations — through the Universal Declaration of Human Rights, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, the Convention on the Nationality of Married Women and the Convention on the Elimination of All Forms of Discrimination against Women — as well as by the European Union, in particular through the European Convention on Human Rights and its Protocols.

Since the provisions of principle laid down in the text of the main UN and EU instruments,<sup>93</sup> that is the Universal Declaration of Human Rights and the European Convention on Human Rights, including on marriage, have the force of *jus cogens*, the states of the world have therefore the obligation to state them *expressis verbis* in the text of their legislation, and especially in their fundamental laws, that is, in their Constitutions.

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<sup>93</sup> On the importance of their provisions of principle, see more in N. V. DURĂ: “General Principles of European Union Legislation Regarding the Legal Protection of Human Rights.” *Journal of Danubius Studies and Research* III, 2 (2013), pp. 7—14; N. V. DURĂ: “Despre caracterul prioritar al normelor dreptului internațional, privind drepturile și libertățile fundamentale ale omului, în raport cu cele ale dreptului național [On the priority character of the norms of international law, regarding the fundamental human rights and freedoms, in relation to those of the national law].” *National Law Review* 7—9 (2018), pp. 54—58.

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CĂTĂLINA MITITELU, BOGDAN MOISE

## Droit au mariage selon les dispositions des principaux instruments juridiques de l'ONU et de l'UE

### Résumé

Dans la Déclaration universelle des droits de l'homme (article 16) et la Convention européenne des droits de l'homme (article 12), le droit au mariage est considéré et défini comme un droit humain fondamental, puisqu'il est inscrit dans le *ius divinum* et le *ius naturale*.

Entre autres, sur la base des textes des instruments juridiques d'importance primordiale pour les peuples du monde, on peut remarquer que le mariage ne peut être conclu qu'entre un homme et une femme, et seulement si les conditions nécessaires suivantes sont remplies, à savoir : a) l'âge nubile tel qu'il est défini par la loi nationale ; b) le consentement mutuel des futurs époux ; c) la race, la nationalité ou la religion des futurs époux ne sont pas prises en compte. Par conséquent, un mariage valide n'est conclu que par des personnes de sexe différent (homme et femme) et non par des personnes de n'importe quel sexe, comme le prévoit le traité de Nice (2000).

Dans cet article, nous avons également souligné le fait que le droit d'un homme et d'une femme de fonder une famille est ontologiquement lié au mariage. Cette réalité prouve une fois de plus, que le mariage et la famille ont été et restent « les deux principales institutions de l'humanité ».

**Mots-clés :** instruments juridiques, droit au mariage, famille, droits humains fondamentaux

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## Il diritto di sposarsi secondo le disposizioni dei principali strumenti giuridici dell'ONU e dell'UE

### Sommario

Sia nella Dichiarazione universale dei diritti dell'uomo (articolo 16) che nella Convenzione europea dei diritti dell'uomo (articolo 12), il diritto di sposarsi è visto e definito come un diritto umano fondamentale, come sancito sia dallo *ius divinum* che dallo *ius naturale*.

Sulla base, tra l'altro, dei testi di strumenti giuridici di primaria importanza per i popoli del mondo, si può constatare che il matrimonio può essere concluso solo tra un uomo e una donna, e solo se sono soddisfatte le seguenti condizioni necessarie, vale a dire: a) l'età per contrarre matrimonio stabilita dalla legislazione nazionale; b) mutuo consenso dei futuri sposi; c) non si tiene conto della razza, della nazionalità o della religione dei futuri coniugi. Pertanto, un matrimonio valido è contratto solo da persone di sesso diverso (un uomo e una donna), e non da persone dell'uno o dell'altro sesso, come previsto dal Trattato di Nizza (2000).

Nell'articolo abbiamo anche sottolineato il fatto che il diritto dell'uomo e della donna di fondare una famiglia è ontologicamente legato al matrimonio. Questa realtà dimostra ancora una volta che matrimonio e famiglia erano e restano "le due principali istituzioni dell'umanità".

**Parole chiave:** strumenti giuridici, diritto di sposarsi, famiglia, diritti umani fondamentali