

**Admitted exceptions of unconstitutionality regarding to the provisions of the
Romanian Civil Code:
The case law of the Romanian Constitutional Court***

I. Introduction

The new Civil Code of Romania (“Civil Code”), entered into force on 11 October 2011, (replacing the Civil Code of 1864) although, even before it entered into force, it had been seriously amended by Law no. 71/2011 on the implementation of the Civil Code, since then enjoys a relative stability.

Regarding the Civil Code or Law no. 71/2011 on the implementation of the Civil Code, relatively few exceptions of unconstitutionality² were raised, a total of 41, out of only two were admitted. These admission decisions are Decision no. 534 of 18 July 2018 (“Decision no. 534/2018”)³ regarding the exception of unconstitutionality of the provisions of art. 277 paragraph (2) and (4) of the Civil Code and Decision no. 601 of 16 July 2020 (“Decision no. 601/2019”)⁴ regarding the exception of unconstitutionality of the provisions of art. 164 paragraph (1) of the Civil Code.⁵

In this study I will analyze the two above-mentioned decisions of the Constitutional Court focusing on the fundamental rights invoked by the authors of the exceptions of unconstitutionality, which fundamental rights form the base of the decisions of the court,

¹ PhD student, Debrecen University, Géza Marton Doctoral School of Legal Studies; teaching assistant, Sapientia Hungarian University of Transilvania, Department of Law; attorney at law, member of the Bihor Bar Association (Romania).

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² According to the Romanian Constitution, there are two ways to review the conformity of legal provisions with the constitution by the Constitutional Court: i. the objection of unconstitutionality (a priori verification), adjudicating on the constitutionality of laws, before promulgation and ii. the exception of unconstitutionality (a posteriori verification), when the Court adjudicates unconstitutionality of laws and ordinances or any provision thereof, in force, raised before courts of law or courts of commercial arbitration, and on exceptions of unconstitutionality raised directly by the Advocate of the People (Ombudsman). The exception may be raised by the parties within the trial, ex officio, by the court of law or by the court of commercial arbitration, by the prosecutor, before the court of law, where he attends or directly by the Advocate of the People. Referral to the Constitutional Court is made by the court, through interlocutory order, or directly by the Advocate of the People. The subject matter of the exception of unconstitutionality must be a law or an ordinance or a provision of a law or of an ordinance (only legislative acts, not also the administrative acts), which is in force or produce legal effects after they came out of force, it is relevant in the settlement of the case in any phase of the trial and irrespective of the subject matter thereof and the legal provision was not already been declared unconstitutional by a previous decision of the Constitutional Court. See Article 146 d) of the Constitution and Articles 29-33 of Law no.47/1992 on the Organisation and Operation of the Constitutional Court, republished in the Official Journal of Romania, no.807 of 3 December 2010.

³ Published in the Official Journal of Romania (Monitorul Oficial) no. 842 of 03.10.2018

⁴ Published in the Official Journal of Romania no. 88 of 27.01.2021.

⁵ According to the Legislative Repertory of the Legislative Council, available at http://cdep.ro/pls/legis/legis_pck.frame (16.05.2021), the 2 admission decision regarding to the Civil Code is a very small number compared to the exceptions of unconstitutionality admitted regarding the other fundamental codes. For example, regarding the provisions of the Code of Civil Procedure (in force from February 15, 2013), 12 exceptions of unconstitutionality were admitted, regarding the Criminal Code (in force from February 1, 2014) 12 exceptions were allowed, and regarding the Code of Criminal Procedure (in force from February 1, 2014) 63 exceptions were admitted.

whether these decisions have importance in the European community and what the effects of these decisions are.

Regarding the fundamental rights and liberties, *Article 20* of the Constitution states that these shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party. Where any inconsistencies exist between the covenants and treaties and the domestic laws, the international regulations shall prevail, unless the Constitution or domestic laws comprise more favorable provisions. These provisions are in fact repeated in the Romanian Civil Code regarding the matters governed by the Code (Article 4 of the Civil Code).

Finally, when the question is the non-compliance with EU laws the CCR can apply a provision of the EU law in a constitutional review in accordance with the Article 148 (2) and (4) of the Constitution which states that the provisions of the founding treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

II. Decision no. 534 of 18 July 2018 of the Constitutional Court

II.1. Factual background

Mr. Coman, who holds Romanian and American citizenship, and Mr. Hamilton, an American citizen, lived together in United States of America from May 2005 to May 2009. Mr. Coman took up residence in Brussels (Belgium) in order to work at the European Parliament as a parliamentary assistant, while Mr. Hamilton continued to live in United States. They were married in Brussels in 2010. In March 2012, Mr. Coman ceased to work at the Parliament, but continued to live in Brussels, where he received unemployment benefits until January 2013. They wanted to settle down in Romania, which is why Mr. Coman requested for their Belgium marriage certificate to be registered at the Romanian Embassy to Brussels. This request was rejected, so in December 2012, Mr. Coman and Mr. Hamilton contacted the General Inspectorate for Immigration (Inspectoratul General pentru Imigrări) to request information on the procedure and conditions under which Mr. Hamilton, a non-EU national, in his capacity as member of Mr. Coman's family, could obtain the right to reside lawfully in Romania for more than three months. On 11 January 2013, in reply to that request, the Inspectorate informed Mr. Coman and Mr. Hamilton that only Mr. Hamilton had a right of residence for three months because, under the Civil Code, marriage between people of the same sex is not recognised, and that an extension of Mr. Hamilton's right of temporary residence in Romania could not be granted on grounds of family reunion.⁶

For this reason, on 28.10.2013 Mr. Coman, Mr. Hamilton and the ACCEPT Association, filed a case before the Court of First Instance, District 5, Bucharest (Judecătoria Sectorului 5 Bucureşti) against the General Inspectorate for Immigration and the Ministry of the Internal Affairs sought a decision finding that the applicants and other homosexuals are generally discriminated on the ground of sexual orientation as regards the exercise of the right of freedom of movement in the European Union. They requested the court to order the defendants to the following:

⁶ Judgement of 5 June 2018, C-673/16, Coman and others, paragraph 9-12; Judgement no. 6057 of 16 September 2019, Court of First Instance, District 5, Bucharest ("Judgement no. 6057/2019"). <http://rolii.ro/hotarari/5d842efae49009700f000033> (18.05.2021). This last decision is the judgement of the main proceeding.

-to immediately cease any discrimination on grounds of sexual orientation when applying the procedures pertaining to the freedom of movement in the European Union of the applicants
-to pass regulations that would provide for an equal, non-discriminatory enforcement of the conditions on exercising the freedom of movement in the European Union for married same-sex couples in a 30 day time-limit from the final judgment of the court
-in a 30 day time-limit from the final judgment of the court, to publish on their website and in a national newspaper a press-release through which they express their public apology and inform the European Union citizens moving or returning to Romania in line with the freedom of movement in the European Union that they themselves and their spouses enjoy the same rights, irrespective of whether they form a different or same-sex couple
-to compensate the applicant the equivalent of 5000 EUR for non-material damages.⁷

In that dispute, was raised an exception of unconstitutionality of Article 277 paragraph (2) and (4) of the Civil Code.

According to Article 277 paragraph (2) ” *Marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners shall not be recognised in Romania.*”, and according to paragraph (4) ” *The legal provisions relating to freedom of movement on Romanian territory by citizens of the Member States of the European Union and the European Economic Area shall be applicable.*”

The applicants argued that non-recognition, in connection with the exercise of the right of residence, marriages between persons of the same sex, which were legally concluded abroad, constitutes infringement of the constitutional provisions enshrined in *Article 4* on unity of the people and equality among citizens, *Article 16*, on equality of rights and *Article 26* on personal and family privacy. They also relied on the applicability of the following provisions of the European Convention on Human Rights and Fundamental Freedoms: *Article 8* – Right to respect for private and family life and *Article 14* – Prohibition of discrimination.⁸

The Constitutional Court suspended the trial by asking several preliminary questions to the European Court of Justice (“ECJ”) regarding the interpretation to be given to several terms employed in the relevant provisions of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, read in the light of the Charter of Fundamental Rights and of the recent case-law of this Court and of the European Court of Human Rights. The Romanian Constitutional Court had never referred to the ECJ for a preliminary ruling before this case.

II.2. The preliminary questions and the Judgement of European Court of Justice

The Constitutional Court referred the following questions to the Court for a preliminary ruling:

1. does the term “*spouse*” in Article 2 (2) (a) of Directive 2004/38 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. does Directive 2004/38, 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?

3. can the same-sex spouse, from a State which is not a Member State of the Union, of the Union citizen to whom he or she is lawfully married, in accordance with the law of a

⁷ Judgement no. 6057/2019.

⁸ Decision no. 534/2018, paragraph 13-14.

Member State other than the host State, be classified as “any other family member” or a “partner with whom the Union citizen has a long-term relationship, duly attested” with the corresponding obligation for the host Member State to facilitate entry and residence for that spouse, even if that State does not recognise marriages between persons of the same sex and provides no alternative form of legal recognition, such as registered partnership?

4. does Directive 2004/38 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 Union citizen?⁹

Preliminary, the EJC stated that Directive 2004/38 does not confer a derived right of residence on third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national.¹⁰ Despite that the ECJ reminds that according to his case law, in certain cases, third-country nationals, family members of a Union citizen, who were not eligible, on the basis of Directive 2004/38, for a derived right of residence in the Member State of which that citizen is a national, could, nevertheless, be accorded such a right on the basis of Article 21(1) TFEU. Article 21(1) TFEU requires that that citizen’s family life in that Member State may continue when he returns to the Member State of which he is a national, through the grant of a derived right of residence to the third-country national family member concerned. If no such derived right of residence were granted, that Union citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he will be able to continue in his Member State of origin a family life which has been created or strengthened in the host Member State. In such situations the right of residence may be granted by analogous application by of the Directive 2004/38.¹¹

Regarding the *first question* the EJC firstly clarified that Directive 2004/38 specifically mentions the ‘*spouse*’ as ‘*family member*’ in Article 2(2) (a) of the directive¹², the term ‘*spouse*’ used in that provision refers to a person joined to another person by the bonds of marriage¹³, this term is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned.¹⁴ Moreover, the right to respect private and family life is guaranteed by the art. 7 of Charter is a fundamental right and it has the same meaning and the same scope as those guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the case-law of the European Court of Human Rights the relationship of a homosexual couple may fall within the notion of ‘*private life*’ and that of ‘*family life*’ in the same way as the relationship of a heterosexual couple in the same situation.¹⁵

The ECJ argues that Article 2(2)(a) of directive, applicable by analogy in the case, does not contain any reference to the legislation of the Member State to which that citizen intends to move or in which he intends to reside regarding the concept of ‘*spouse*’ within the meaning of the directive. In consequence, a Member State cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state.¹⁶

⁹ Coman and others, paragraph 17.

¹⁰ Coman and others, paragraph 20.

¹¹ Coman and others, paragraph 23-25.

¹² Coman and others, paragraph 33.

¹³ Coman and others, paragraph 34.

¹⁴ Coman and others, paragraph 35.

¹⁵ Coman and others, paragraph 48-50.

¹⁶ Coman and others, paragraph 36.

The ECJ admits that Member States are free to decide whether they allow or not marriage for persons of the same sex, but in exercising that competence they must comply with EU law, in particular the provisions on the freedom conferred on all Union citizens to move and reside in the territory of the Member States.¹⁷ Refusal by Member States to entry and reside in their territory for a third-country national whose marriage to a Union citizen was concluded in a Member State in accordance with the law of that state by the reason that national law does not allow marriage by people of the same sex, may interfere with the exercise of the right conferred to that citizen by Article 21(1) TFEU to move and reside freely in the territory of the Member States. The effect of such a refusal is that such a Union citizen may be denied the possibility of returning to the Member State of which he is a national together with his spouse.¹⁸

The ECJ finds the obligation for a Member State to recognise a marriage between persons of the same sex for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in Member States where the marriage between people of the same sex is not allowed, which is defined by national law and 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 recognise 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 recognise 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 concerned¹⁹, considerations submitted to the Court by the Latvian, Hungarian and Polish Government.

Regarding the *second question*, in the light of the previous conclusion, the ECJ concluded that host Member States must grant the right of residence in their territory for a period of longer than three months to the same-sex spouse of a citizen of the European Union, even if he or she is a third-country national, in accordance with Article 7(1) of Directive 2004/38 and Article 21(1) TFEU.²⁰ In the view of the answer given to the first and second questions, there was no need to answer the third and fourth questions.

This decision was mostly welcomed by the international²¹ and national²² community and has been referred as a breakthrough for the protection of same-sex couples. Deciding that the term ‘spouse’ in the Directive 2004/38 includes same-sex spouses, the Court obliged all Member States to recognise the personal status of same-sex marriage legal concluded in the Member States to exercise the right to the free movement.

Despite that, were noted some limitations of the decision:

- it speaks only about same-sex couples who have concluded their marriage in an EU Member State;²³

¹⁷ Coman and others, paragraph 37-38.

¹⁸ Coman and others, paragraph 40.

¹⁹ Coman and others, paragraph 45-46.

²⁰ Coman and others, paragraph 56.

²¹ van den Brink, Martijn: Is the Reasoning in „Coman“ as Good as the Result?. <https://verfassungsblog.de/is-the-reasoning-in-coman-as-good-as-the-result/>(16.06.2021)

²² Botău, Diana: Curtea Constituțională a României și dreptul Uniunii Europene: o anxietate a influenței? In Noua Revista a Drepturilor Omului, 2020/3. pp. 9–28;

²³ Tryfonidou, Alina: The EU Top Court Rules that Married Same-Sex Couples Can Move Freely Between EU Member States as “Spouses”: Case C-673/16, Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne. p. 219. In Feminist Legal Studies no. 27, 2019, pp. 211-221.

- it does not provide an answer to the question of whether the term “spouse” includes a same-sex spouse when used in the context of the Family Reunification Rights Directive;²⁴
- the case only applies in cross-border situations and, thus, cannot help married, same-sex couples who are in a purely internal situation;²⁵
- the judgement only applies to those who can be considered “spouses”, but does not extend the same right of residence to registered same-sex partners;²⁶
- reasoning is confined to the context of free movement rights and not to protections against discrimination more broadly.²⁷

II. 3. The decision of the Constitutional Court

The Constitutional Court held that a provision of the EU law can be applied in a constitutional review when the subject matter of the review is the non-compliance with EU laws and when this provision of the EU law is sufficiently *clear, precise* and *unambiguous* by itself or its meaning had been clearly defined by the Court of Justice of the European Union. On the other hand, the provision must be circumscribed to a certain level of *constitutional relevance*, for its normative content to support the alleged violation by the national law of the Constitution – the sole direct provision of reference within a constitutional review.²⁸ The Constitutional Court found that Article 21 (1) TFEU and Article 7 (2) of the Directive 2004/38 fulfills these conditions.

Applying the considerations of the *Coman and others* Judgement the Constitutional Court also declared that the relationship of homosexual couples falls within the notion of ‘private life’ and that of ‘family life’ in the same way as the relationship of a heterosexual couple in the same situation, which makes applicable the protection of the fundamental right to private and family life, conferred by *Article 7* of the EU Charter of Fundamental Rights, *Article 8* of the European Convention on Human Rights and Fundamental Freedoms and by *Article 26* of the Constitution of Romania.²⁹

For this reason with a majority vote upheld the plea of unconstitutionality and *declared constitutional the provisions of Article 277 (2) and (4) of the Civil Code, to the extent that they permit the granting of the right to reside in the territory of the Romanian state, under the conditions provided by the EU law, to spouses – citizens of the Member States of the European Union and/or citizens of third-counties – of same-sex marriages, concluded or contracted in a Member State of the European Union.*

Contrary to the solution adopted, three judges of the Constitutional Court wrote two *dissenting opinions*, considering that the exception of unconstitutionality of the provisions of Article 277 (2) and (4) of the Civil Code should have been dismissed as *inadmissible*.

Mona-Maria Pivniceru considered that the exception of unconstitutionality should have had a different subject-matter – Article 46 (17) of Government Emergency Ordinance no. 194/2002 – and it should have been raised within a different procedural framework: the applicant was supposed to address the General Inspectorate for Immigration in order to

²⁴ Ibid.

²⁵ Tryfonidou: p. 220. For example: if Mr. Coman had moved from Romania to the United States, married Mr. Hamilton in the United States, and returned directly to Romania, the situation would be considered purely internal.

²⁶ Tan, Daron: Adrian Coman v. Romania: A Small Victory with Wasted Potential. <https://ohrh.law.ox.ac.uk/adrian-coman-v-romania-a-small-victory-with-wasted-potential/>(16.06.2021).

²⁷ Ibid.

²⁸ Decision no. 534/2018, paragraph 38.

²⁹ Decision no. 534/2018, paragraph 40.

receive the right of residence and, in the event of a negative decision thereof, to challenge the document delivered before the competent court, i.e. the county court.³⁰ On the other hand, she argued that after the delivery of the Judgment of 5 June 2018 by the Court of Justice of the European Union, the matter became one of interpretation and implementation of the European law and no longer a matter of constitutionality.³¹

Mircea Ștefan Minea and Petre Lăzăroiu considered that the exception of unconstitutionality had to be dismissed as inadmissible, as these were not inextricably linked to the settlement of the dispute between the applicants and the General Inspectorate for Immigration. They recognize that both the provisions of the TFEU and the judgment of the ECJ must be observed and implemented unconditionally, but it is up to the courts to duly and directly apply the provisions above, courts that are entitled to implement the provisions of the TFEU as interpreted by the ECJ.³²

II.4. The effects of the decision

The decision of Romanian Constitutional Court is a so called “*interpretative decision*” in which the court declares the unconstitutionality of legal provision, but in a certain interpretation of the text. In this way, the text is “saved”, in the sense that, it can still be applied in the obligatory interpretation established by the Constitutional Court, respectively with elimination of the interpretation that were found unconstitutional. Such type of decisions also exists in the practice of constitutional courts of Germany, Italy, France.³³ When the Constitutional Court has ruled that only a certain interpretation of a text is in accordance with the Constitution, maintain the presumption of constitutionality of the text in that interpretation, both the courts and the administrative bodies must comply with the decision of the Court and to apply it as such.³⁴

This decision of the Constitutional Court has historical relevance in Romanian law in, at least, two aspects. First, this was the first occasion when the Constitutional Court referred to the ECJ for preliminary ruling. It reflects the fact that the Court have familiarized with the particularities of application of European law and have contributed to overcoming barricaded interpretations of the principle of classical constitutionalism. Second, this step could bring Romania a little closer to the portrait of a Member State of the European Union³⁵. Romania is one of those Member States that does not grant any form of formal and legal recognition to couple relationships between same-sex persons.³⁶ Thus, it seems that, at the moment, Romania would not grant more rights to the LGBT community than strictly required by the ECJ.³⁷

³⁰ Decision no. 534/2018, dissenting opinion of judge Mona-Maria Pivniceru, paragraph 9.

³¹ Decision no. 534/2018, dissenting opinion of judge Mona-Maria Pivniceru, paragraph 29.

³² Decision no. 534/2018, dissenting opinion of judges Mircea Ștefan Minea and Petre Lăzăroiu, paragraph 3-5.

³³ Safta, Marietta: Drept constituțional și instituții politice, Vol. I. Teoria generală a dreptului constituțional. Drepturi și libertăți, Ed. a 4-a, Editura Hamangiu, București, 2018, p. 114.

³⁴ Decision no. 536 of 28 April 2011, published Official Journal of Romania, no. 482 of 7 July 2011.

³⁵ See Botău: p. 27.

³⁶ Does not grant any form of formal and legal recognition to couple relationships between same-sex persons the following Member States: Bulgaria, Latvia, Lithuania, Poland, and Slovakia. We mention that thirteen Member States of the European Union have recognised the marriage between same-sex persons (Netherlands, Belgium, Spain, Sweden, Portugal, Denmark, France, Luxembourg, Ireland, Finland, Germany, Malta and Austria), thirteen Member States granted legal recognition to same-sex marriage and nine other Member States recognise a registered partnership/civil partnership open to same-sex couples (Czech Republic, Estonia, Greece, Croatia, Italy, Cyprus, Hungary, Austria and Slovenia). See Decision no. 534/2018, paragraph 27 and 29.

³⁷ Brodeala, Elena: Paying Lip Service to the CJEU: The Unsurprising Decision of the Constitutional Court of Romania in the Coman Case. <https://ohrh.law.ox.ac.uk/paying-lip-service-to-the-cjeu-the-unsurprising-decision->

It is important to note that by this decision the Constitutional Court did not overwrite the term of marriage provided in the Civil Code. It just stated that same-sex marriages legally concluded in the Member States should be recognized only to exercise the right of free movement. In Romania, marriage will still mean” *a freely consented union between a man and a woman*” (Article 259 of the Civil Code) and the general prohibition of Article 277 (2) of the Civil Code regarding the recognition of marriages between same-sex persons remains valid. Given the failed referendum³⁸ (the turnout was only 21.1%, below the required voter turnout threshold of 30%) on 6 and 7 October 2018 regarding the definition of the family in the Constitution (Article 48 of the Constitution states: ”*The family is founded on the freely consented marriage of the spouses, their full equality, as well as on the right and duty of the parents to ensure the upbringing, education and instruction of their children.*”), where the 93,4 % of voters (3.531.732) said that same-sex marriage must be prohibited, it is hard to believe that the Romanian society is ready for a change in this regard.

III. Decision no. 601 of 16 July 2020

III.1. Factual and legal background

In this decision of the Constitutional Court, it is not presented in detail the factual background of the case. All we know is that it has raised an exception of unconstitutionality of Article 164 (1) of the Civil Code regarding to adjudication of incapacity in a case of Buzău County Court – 1st Civil Section, that have object an appeal against a civil judgment admitting the adjudication of incapacity of Mr Alexandru Ștefan Francisc Nabosny.³⁹

The *Art. 164 (1)* of the Civil Code stated as it follows: “(1) *The person who does not have the necessary capacity of judgement to look after her/his own interests, due to insanity or mental retardation, will be adjudicated as incapacitated.*”

The institution of adjudication of incapacity is regulated, in terms of substantive conditions, by the Civil Code (Articles 164 to 167), and in terms of procedural conditions, by the Civil Procedure Code (Articles 936 to 943).

A person can be adjudicated as incapacitated when the following conditions are met:⁴⁰

- the person has no longer the necessary capacity of judgement to look after her/his own interests;
- the lack of necessary capacity is due to insanity or mental retardation;⁴¹
- must be a legally designed medical diagnosis of a mental illness or a mental disability leading to a lack of capacity of judgment required to care for one’s own interests.

[of-the-constitutional-court-of-romania-in-the-coman-case/](#) (16.06.2021).

³⁸ The referendum was started by a legislative initiative of the citizens. According to the art. 74 of the Constitution a legislative initiative shall lie a number of at least 100.000 citizens entitled to vote. The citizens who exercise their right to legislative initiative must belong to at least one quarter of the country’s counties, while, in each of those counties or the Municipality of Bucharest, at least 5.000 signatures should be registered in support of such initiative. In the end, the legislative initiative was sign by 3 million citizens. The initiative's promoters sought to amend the gender-neutral language of the Constitution with an explicit reference to marriage as a union between a man and a woman. Had the initiative passed, it would have made same-sex marriage always unconstitutional in the country.

³⁹ Decision no. 601/2020, paragraph 3.

⁴⁰ Adults and minors with limited exercise capacity. See Article 164 (2) of the Civil Code.

⁴¹ Article 211 of Law No 71/2011 for the implementation of Law No 287/2009 on the Civil Code defines insanity or mental retardation as: ”*mental illness or mental disability that determines the mental incapacity of a person to act in a critical and predictive manner regarding the social and legal consequences that may arise from the exercise of her/his civil rights and obligations*”.

The regulation under consideration establishes a *substitute regime*, so that a person's rights and obligations that have been adjudicated as incapacitated will be exercised by a legal representative, regardless of the degree of capacity of judgment of the person concerned, to the detriment of a *support regime* characterized by a support mechanism which the State should grant depending on the degree of impairment of the capacity of judgment.⁴²

The author of the exception of unconstitutionality considered that these legal provisions violate the constitutional provisions of *Article 1 (5)* in its component regarding the quality of the law, of *Article 16 (1)* on equal rights, of *Article 20* regarding the international treaties on human rights, of *Article 21* on free access to justice, of *Article 23* on individual freedom, of *Article 26* on personal, family and private life, of *Article 37* on the right to be elected, of *Article 41* on labour and social protection of labour, of *Article 44* on the right to private property, of *Article 48* regarding the family, of *Article 50* regarding the protection of disabled people, *Article 8* on the right to respect private life and of *Article 14* on the prohibition of discrimination in the *Convention for the Protection of Human Rights and Fundamental Freedoms*, of *Article 12* on equal recognition before the law in the Convention on the Rights of Persons with Disabilities adopted in New York by the General Assembly of the United Nations on 13 December 2006, ratified by Law No 221/2010⁴³, of *Article 39 of Charter of Fundamental Rights of the European Union* on the right to vote and to stand as a candidate at elections to the European Parliament and the *Article 2 of Council Directive 2000/78/EC* on establishing a general framework for equal treatment in employment and occupation.⁴⁴

In motivating the exception of unconstitutionality, the author argued, in essence, that the institution of adjudication of incapacity operates a dichotomous distinction between people with capacity of judgement and those without this capacity, implicitly rejecting the possibility that capacity of judgement of an adult could be partially abolished/diminished. Thus, the criticized legal provision does not allow the individualization of the measure according to the real needs of the person. It was also pointed out that the legal regime of adjudication of incapacity does not contain any measures to support the person in the decision-making process.⁴⁵ He also criticized the Article 164 paragraph (1) of the Civil Code in terms of clarity of the rule, showing in this sense that the phrases “*look after*” and “*interests*” in its content are not defined and it is not clear what the line from which the lack of discernment is missing.⁴⁶

III.2. Request to refer to the Court of Justice of the European Union with a preliminary question

During the hearings a request was formulated to refer to the Court of Justice of the European Union with a preliminary question with the following questions:

“1. *Is the automatic deprivation of the right to vote in the elections to the European Parliament of a person suffering from a mental illness, following her/his adjudication as incapacitated on the grounds that “(s)he does not have the necessary capacity of judgement to look after her/his own interests”, compliant with Article 39 (2) of the Charter of Fundamental Rights of the European Union, having regard to Article 12 of the Convention on the Rights of Persons with Disabilities?”*

⁴² Decision no. 601/2020, paragraph 30.

⁴³ Published in the Official Journal of Romania, no. 792 of 26 November 2010.

⁴⁴ Decision no. 601/2020, paragraph 26.

⁴⁵ Decision no. 601/2020, paragraph 3.

⁴⁶ Decision no. 601/2020, paragraph 4.

2. *Is the automatic deprivation of the right to be employed of a person suffering from a mental illness, following her/his adjudication as incapacitated on the grounds that “(s)he does not have the necessary capacity of judgement to look after her/his own interests”, a form of direct discrimination prohibited by Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, having regard to Article 12 of the Convention on the Rights of Persons with disabilities?*

3. *In the event of a negative answer to Question No 2, is the automatic deprivation of the right to be employed of a person suffering from a mental illness, following her/his adjudication as incapacitated on the grounds that “(s)he does not have the necessary capacity of judgement to look after her/his own interests”, a form of indirect discrimination prohibited by Article 2 of of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, having regard to Article 12 of the Convention on the Rights of Persons with Disabilities?”⁴⁷*

The CCR noted that the exception of unconstitutionality of the provisions of Article 164 (1) of the Civil Code refers to the institution of adjudication of incapacity, in itself, without being raised in a dispute concerning employment or the right to vote. Given that there is no dispute related to employment or the elections to the European Parliament, which could possibly lead to a joined jurisdiction of the European Union and the Member States, the CCR considered that the regulation in principle of the institution of adjudication of incapacity falls within the jurisdiction of the national State. Because the preliminary questions are unnecessary, irrelevant and useless in the case, the Constitutional Court rejected as unfounded the request.⁴⁸

III.3. The decision of the Constitutional Court

The Constitutional Court, by unanimous vote, *upheld the exception of unconstitutionality and found that the provisions of Article 164 (1) of the Civil Code are unconstitutional.*

They held that the constitutional provisions of Article 1 (3) on human dignity, *Article 16* on equal rights and *Article 50* regarding the protection of disabled people have been violated, as interpreted in accordance with Article 20 of the Constitution and Article 12 of the Convention on the Rights of Persons with Disabilities.

The CCR held in essence, that the order of adjudication of incapacity laid down in Article 164 (1) of the Civil Code is not accompanied by sufficient guarantees to ensure respect for fundamental human rights and freedoms. It does not take into account the fact that there may be varying degrees of incapacity and the diversity of an individual interests. Furthermore, it is not ordered for a specified period of time and is not subject to regular review. Therefore, the CCR noted that any protective measure must be proportionate to the degree of capacity, be adapted to the person’s life, be applied for the shortest period of time, be reviewed periodically and taken into account the will and preferences of disabled people.⁴⁹

Also, when regulating a protection measure, the legislator must take account of the fact that there may be different degrees of incapacity and the mental deficiency may vary over time. The lack of mental capacity or discernment may take various forms, for example, *total/partial* or *reversible/irreversible*, which requires the introduction of protective measures

⁴⁷ Decision no. 601/2020, paragraph 18.

⁴⁸ Decision no. 601/2020, paragraph 23-24.

⁴⁹ Decision no. 601/2020, paragraph 32.

appropriate to reality and which, however, are not found in the regulation of the measure of adjudication of incapacity.⁵⁰

Therefore, appropriate levels of protection must be attached to the different degrees of disability, and the legislator needs to identify appropriate solutions while regulating the legal measures. An incapacity must not lead to the loss of the exercise of all civil rights, but must be examined in each case.⁵¹

The CCR noted that every person must be free to act in order to develop his/her personality, the state, by virtue of its social character, having the obligation to regulate a normative framework that ensures respect for the individual, full expression of the personality of citizens, their rights and freedoms, equal opportunities, resulting in respect for human dignity.⁵²

At the end of the decision the CCR recommends to the National Authority for the Rights of Persons with Disabilities, Children and Adoption⁵³ to make proposals for regulation in this area to the Parliament or the Government.

III.4. The effects of the decision

Regarding the effects of the decisions of the Constitutional Court, we note that according to the provisions of art. 147 paragraph (1) and (3) of the Constitution, the normative act declared unconstitutional ceases to have legal effect within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, has failed to bring the unconstitutional provisions into line with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended *de jure*. The decision of the Constitutional Court applies *only for the future* (legal relations born after the publication of the decision, as well as in pending cases) according to Article 147 paragraph (4) of the Constitution which states that from the date of publication the decisions are generally binding and take effect only for the future.

The Romanian legislator has not adopted within the 45 days a legislation regarding to adjudication of incapacity, which means that starting from 13 March 2021 adjudication of incapacity in Romania hasn't got any legal basis. As a result, the requests having as object adjudication of incapacity, pending before the courts, either were rejected⁵⁴ or they were successively postponed⁵⁵.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Decision no. 601/2020, paragraph 32.

⁵³ A specialized body of the central public administration, with legal personality, subordinated to the Ministry of Labour and Social Protection, designated to fulfil the obligations laid down in the Convention on the Rights of Persons with Disabilities.

⁵⁴ Filote-Iovu, Ioana-Anamaria: Scurte considerații cu privire la Decizia nr. 601 din 16 iulie 2020 referitoare la excepția de neconstituționalitate a dispozițiilor art. 164 alin. (1) din Codul civil. https://www.juridice.ro/715038/scurte-consideratii-cu-privire-la-decizia-nr-601-din-16-iulie-2020-referitoare-la-exceptia-de-neconstituionalitate-a-dispozitiilor-art-164-alin-1-din-codul-civil.html#_ftnref31 (16.06.2021). For case law see Judgement no. 2165 of 2 April 2021, Târgu Jiu District Court. <http://rolii.ro/hotarari/6078eec6e490092819000069> (16.06.2021); Judgement no. 592/2021 of 16 April 2021, Aleșd District Court. <http://rolii.ro/hotarari/60a72158e49009c41a000065> (16.06.2021); Judgement no. 2017 of 17 March 2021. <http://rolii.ro/hotarari/60ac5c2de49009a41d000082> (16.06.2021).

⁵⁵ Drepturile unor persoane cu probleme psihice, blocate în instanță de Curtea Constituțională. Unele nu pot primi nici pensie. Ce spun avocații. <https://focuspress.ro/drepturile-unor-persoane-cu-probleme-psihice-blocate-in-instanta-de-curtea-constitucionala-unele-nu-pot-primi-nici-pensie-ce-spun-avocatii/> (16.06.2021).

We mention that only on 9th March 2021 the Ministry of Justice put in public debate the draft normative act having as object the conformity with the above-analyzed decision⁵⁶, which means that the necessary legislative framework is far, known the time needed for the Government to adopt such a modification. The main problem is, the legislative situation we are in is seriously damaging to the person who has the affected capacity, as long as he can no longer take care of his interests. The goods as well as the health of the people are endangered, which is why it is necessary to urgently amend the legal provisions and adapt them in the sense indicated by the CCR.⁵⁷ We know, this is not an easy task, because it is necessary to completely rethink the measures for the protection of individuals and which also must be in accordance with the other provisions of the Civil Code. We think it is also essential the effective participation of civil society and protection organizations⁵⁸ in the public debates of the project, as they know best the problems of people who have a lack of mental capacity or discernment.

IV. Conclusion

Although the Constitutional Court did not have to often review the constitutionality of the provisions of the Civil Code, the issues raised were about essential problems of the institutions concerned, with serious effects on the application of legal provisions.

The Decision no. 534/2018 is the first time when the Constitutional Court referred to the ECJ for a preliminary ruling, which marks the beginning of the dialogue between the two courts regarding the non-compliance with EU laws. However, there is also a possibility of interpretation that the Constitutional Court shifted the responsibility to the ECJ to decide in a very sensitive question, given the general refuse of the same-sex marriages and partnerships by the Romanian society. Even if the decision does not overwrite the definition of marriage, it was necessary for reasons of equality and free movement of people within the EU. The decision no. 601/2020 was also a necessity, the Constitutional Court practically forcing the legislator to respect a treaty that was ratified many years ago.

⁵⁶ Propuneri preliminare de reglementare având ca obiect conformarea cu Decizia Curții Constituționale nr. 601/2020. <http://www.just.ro/propuneri-preliminare-de-reglementare-avand-ca-obiect-conformarea-cu-decizia-curtii-constitucionale/> (16.06.2021).

⁵⁷ See also Popescu, Ruxandra: Punerea sub interdicție - o problemă de punere în aplicare a dispozițiilor legale. https://www.hotnews.ro/stiri-specialisti_stoica_si_asociatii-24688513-punerea-sub-interdictie-problema-punere-aplicare-dispozitiilor-legale.htm (16.06.2021).

⁵⁸ Such as National Authority for the Rights of Persons with Disabilities, Children and Adoption ("Autoritatea Națională pentru Drepturile Persoanelor cu Dizabilități Copii și Adopții"), non-governmental organizations.