Decision no. 534

of 18 July 2018
on the exception of unconstitutionality of the provisions of Article 277 (2) and (4) of the Civil Code

Published in the Official Gazette of Romania no. 842 of 03.10.2018

Valer Dorneanu	- President
Marian Enache	- Judge
Petre Lăzăroiu	- Judge
Mircea Ștefan Minea	- Judge
Daniel Marius Morar	- Judge
Mona-Maria Pivniceru	- Judge
Livia Doina Stanciu	- Judge
Simona-Maya Teodoroiu	- Judge
Mihaela Senia Costinescu	- Assistant-Magistrate-in-chief

1. Pending is the settlement of the exception of unconstitutionality of the provisions of Article 277 (2) and (4) of the Civil Code, exception raised by Relu Adrian Coman, Robert Clabourn Hamilton and Accept Association, in File no. 17.411/302/2015 of the Court of First Instance of Sector 5 Bucharest – Civil Division. The exception of unconstitutionality makes the object of the Constitutional Court File no. 78D/2016.

2. The debates took place in the public hearing of 5 July 2018, when the Court resumed its judgment on the suspended case by the Interlocutory Decision of 29 November 2016, by which it referred a number of preliminary questions to the Court of Justice of the European Union. In the debates participated the author of the exception of unconstitutionality, Relu Adrian Coman, in person and assisted by lawyer Raluca Iustina Ionescu, from Bucharest Bar Association, the authors Robert Clabourn Hamilton and Accept Association, represented by the same lawyer, the party National Council for the Fight against Discrimination, by President Csaba Ferenc Asztalos, as well as the representative of the Public Ministry, prosecutor Liviu Drăgănescu. The debates were registered in the Interlocutory Decision of 5 July 2018, date on which, needing time to deliberate, the Court postponed its decision for 18 July 2018, when it gave this decision.

THE COURT,

in the light of the facts and papers of the file, notes that:

3. By the interlocutory decision of 18 December 2015, given in the File no. 17.411/302/2015, the **Court of First Instance of Sector 5 Bucharest** - **Civil Division had referred the matter to the Constitutional Court, with the exception of the exception of unconstitutionality of the provisions of Article 277 paragraphs (2) and (4) of the Civil Code**. The exception was invoked by Relu Adrian Coman, Robert Clabourn Hamilton and Accept Association, plaintiffs in a case in which they ask, inter alia, to oblige the defendants, the General Inspectorate for Immigration and the Ministry of Internal Affairs, to immediately cease discrimination on the grounds of sexual orientation, in the application of the procedures concerning the right of free movement in the European Union, for Relu Adrian Coman and her husband, Robert Clabourn Hamilton.

4. **In the grounds of the exception of unconstitutionality,** its authors argue that the non-recognition of marriages between persons of the same sex, which is legally concluded abroad, is a violation of the right to an intimate, family and private life which has been legally recognised by the Belgian State. Their relocation to Romania cannot change the factual reality of their intimate and family life, nor the legal reality of their legal marriage in Belgium. Nevertheless the spouses cannot continue, on the territory of Romania, their family relation in equal terms with heterosexual individuals in similar situations, as plaintiff Robert Clauborn Hamilton is obliged, in agreement with the practice of the General Inspectorate for Immigration, to leave the Romanian territory as Article 277 of the Civil Code prohibits the recognition in Romania of marriages between persons of the same sex concluded

abroad. Therefore, according to the case-law of the European Court of Human Rights, the relations established within a same-sex couple are also intimate and family relations, as in the case of heterosexual couples, so there is no reasonable justification for differentiation by law, including in terms of the freedom of movement of the person. Therefore, the authors of the exception consider that the internal rules run counter the constitutional provisions which defend intimate, family and private life, and those which enshrine equality between citizens, and constitute a breach of Article 14 in conjunction with Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

5. The **Court of First Instance of Sector 5 Bucharest**, examining the invoked exception of unconstitutionality, in the light of the admissibility conditions laid down in Article 29 paragraphs (1) to (3) of Law no. 47/1992, notes that these are met. Thus, the plaintiffs allege the existence of a discriminatory treatment on the grounds of sexual orientation on the part of the defendants, and the latter justify the treatment in question precisely in accordance with the provisions of Article 277 paragraph (2) of the Civil Code, which prohibit in Romania the recognition of marriages between persons of the same sex, with the consequence of the refusal of the right of residence for family reunification provided in Directive 2004/38/EC to such persons. Regarding the validity of the exception of unconstitutionality, contrary to the provisions of Article 29 paragraph (4) of Law no. 47/1992, the court did not give an opinion.

6. Pursuant to Article 30 paragraph (1) of Law no. 47/1992, the decision instituting the proceedings was communicated to the Presidents of the two Chambers of the Parliament, the Government and the People's Advocate, in order to express their views on the exception of unconstitutionality.

7. The **Government** transmitted its point of view with Address no. 5/438/2016, registered at the Constitutional Court under no. 1.495 of 26 February 2016, expressing the view that the exception of unconstitutionality was unfounded. Thus, the rule in Article 277 paragraph (2) of the Civil Code constitutes, in the opinion of the Government, a form of exercise of national sovereignty, in accordance with the provisions of Article 2 paragraph (1) of the Constitution, through the legislative authority. The fact that a State does not recognise certain legal institutions or does not recognise certain rights or recognises them, under certain conditions, is the expression of the diversity of legal systems and of the different way in which national rules evolve, in line with social developments, with the moral values of the respective society, which entrusts the State with the protection of these values. In this context, it is for the State to decide how to give protection to certain social values. In the case of the institution of marriage, the Romanian State protects, primarily through recognition, the marriage between two persons of the opposite sex. The recognition of marriage is subject to legal conditions of substance and form, most of which being of public order, an expression of the importance which the State attaches to the conditions under which it protects this institution and its associated values. This cannot be deemed as a violation of the values safeguarded by Article 26 of the Constitution, just like it cannot be considered as a violation of the personal, family and private life the unfamiliarity with other institutions existing in other legislative systems or a marriage concluded in other conditions than those that, according to the Romanian law, are a matter of public order. On the contrary, as regards personal and private life, the most manifest form of respect is the lack of intrusion of the law, the legislator's reserve as concerns the regulation of this field of the social life. Or, the Romanian legislation does not set rules, does not impose or prohibit personal relations of the type of those invoked by the applicants. But, there is a completely different case when the legislator lacks interest, does not find the element of necessity justifying the regulation of this aspect of social life or does not want to grant protection – by acknowledging and setting the legal effects thereof – to certain forms of association or coexistence of certain natural persons. This option is the right of every social system to establish, according to its own contemporary "morality", through the governing mechanisms, through its representative bodies, the rules of social coexistence and their transformation into legal standards (public order). With regard to Article 277 (4) of the Civil Code, the Government considers that the authors of the exception do not justify, in any way, how the acknowledgement of the right of free movement on Romania's territory of the persons in a gay union acknowledged by other States would represent a form of violation of the right to personal and private life or a violation of the principle of equal rights.

8. **The People's Advocate** sent its viewpoint through Letter no. 2.124 of 20 April 2016, registered with the Constitutional Court under no. 3.358 of 25 April 2016, deeming the exception of unconstitutionality as inadmissible, because the pleas of unconstitutionality actually refer to the way in which the impugned provisions are interpreted and implemented by the competent authorities, which is not a matter of constitutionality. The claim of the authors of the exception that they are subject to discrimination as regards the exercise of the right to free movement because, on the one hand, Article 25 of the Constitution enshrines the right to free circulation, in the country and abroad, according to the law, and, on the other hand, Article 277 (4) of the Civil Code provides safeguards for the exercise

of the right to free movement, by stating that the legal provisions on free movement, on Romania's territory, of the citizens of the Members States of the European Union and European Economic Area remain applicable, in relation to Articles 8 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms cannot be held. Therefore, Article 277 of the Civil Code does not violate the right to free movement, given that paragraph (4) thereof expressly states the applicability of the legal provisions concerning the free movement on Romania's territory.

9. As concerns the fact that Article 26 of the Constitution was invoked, the People's Advocate underlines that Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms regulates the right of any person to have his/her private and family life respected. It results from the analysis of the legislation applicable in this case and from that of the case-law of the European Court of Human Rights that the concept of "private life" has received, over time, numerous meanings; its content varies both depending on the time of reference and on the States called to interpret the concept, which reflect a natural "diversity" of the opinions expressed, either by retaining the traditional aspects as essential (for example, the right to its image) or by including in the concept the modern aspects produced by social life, i.e. homosexuality, transgender and others. As concerns the evolution of this concept, the case-law of the European Court of Human Rights and the specialised literature held that sexual freedom relied on tolerance and social pluralism, so that it acknowledges the right of every person to a sexual life of his/her choosing, in accordance with his/her deep identity. Consequently, the homosexual acts performed in private circumstances, between adults that freely consent to these, cannot be subject to criminal repression. However, the protection of the right to private life is subject to limitations, which refer to the protection of the interests of other persons, which thus leads to the granting of a wide margin of appreciation to the States, which must ensure, through the legislation adopted, a fair balance between concurring interests. Beyond the absence of a European consensus in this field, we can see an evolution of the case-law of the European Court of Human Rights so as to legally acknowledge the sexual identity of homosexuals as concerns the exercise of the right to family life, safeguarded by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Judgment of 21 July 2015 in the case of *Oliari and Others v. Italy)*. But this evolution of the case-law must be correlated with § 2 Article 8 of the Convention, which includes the right to the respect of one's private and family life in the category of conditional rights, allowing for the intervention of a public authority as long as it is done in compliance with the Convention. Consequently, in this field, the States enjoy a wide margin of appreciation in fulfilling the obligations undertaken through this international instrument.

10. **The Presidents of the two Chambers of Parliament** did not sent their viewpoint with regard to the exception of unconstitutionality.

11. Several documents and memoirs were filed in this case, which had been sent, as *amicus curiae*, by several natural persons and civic associations.

THE COURT,

having examined the application, the viewpoints of the Government and of the People's Advocate, the report drafted by the Judge-Rapporteur, the Judgment of the Court of Justice of the European Union 5 June 2018 of (Grand Chamber) in the Case C-673/16, the arguments of the parties present at the sitting, the conclusions of the prosecutor, the impugned legal provisions examined against the Constitution, as well as Law no. 47/1992, held the following:

12. The application was legally lodged with the Constitutional Court being competent, under Article 146 (d) of the Constitution, as well as Article 1 (2) and Articles 2, 3, 10 and 29 of Law no. 47/1992, to settle this plea of unconstitutionality.

13. The subject matter of the application is Article 277 (2) and (4) of the Civil Code, republished in the Official Journal of Romania, Part I, no. 505 of 15 July 2011, which has the marginal title *Interdiction or equating of forms of living together with marriage*, worded as follows:

"*(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. […]*

(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."

14. The applicants alleged that the challenged legal provisions are in breach of the constitutional provisions enshrined in Article 4 – *Unity of the people and equality among citizens*, Article 16 – *Equality of rights* and Article 26 – *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*.

15. With regard to the procedure on referring the plea of unconstitutionality, the Court notes that by the complaint filed with the Court of First Instance of District 5 of Bucharest, the plaintiffs Relu Adrian Coman – a Romanian citizen and Robert Clabourn Hamilton – an American citizen against the defendants General Inspectorate for Immigration and Ministry of Internal Affairs, sought a decision finding the following: „1. The defendants have discriminated against the plaintiffs and other gay people in similar situations on grounds of sexual orientation, with respect to freedom of movement in the European Union. 2. Order the defendants 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 Relu Adrian Coman and his spouse, Robert Clabourn Hamilton; 3. Order the defendants, in a 30 day time-limit from the final judgment of the court, 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; 4. Order the defendants, 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 encompassing the following: public excuses expressed with respect to the plaintiffs, information targeting 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; reference shall be made to item 3 from above; 5. Order the defendants jointly to compensate the plaintiffs the equivalent of 5000 EUR, as civil redress for moral damages [for non-material damages] caused to the plaintiffs Relu Adrian Coman and his spouse Robert Clabourn Hamilton."

16. In their reasoning, the plaintiffs Relu Adrian Coman and his spouse Robert Clabourn Hamilton indicated that they married in Belgium, Brussels, on 5 November 2010. One of the options was to settle in Romania, which is why Relu Adrian Coman requested for their Belgium marriage certificate to be registered at the Romanian Embassy to Brussels. The answer that followed, according to the minutes of 20 September 2012, was that the request on registering the marriage "may not be answered in affirmative for the following reasons: the Civil Code of Romania provides the following in Article 277 (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.*" By its Letter no. G5-1/P1791, the Ministry of Foreign Affairs, Consular Department, relying *inter alia* on Article 277 of the Civil Code provided that "the decision made by the diplomat charged with consular responsibilities at the Romanian Embassy in Brussels is well-founded."

17. Further, Relu Adrian Coman filed a request for information with the General Inspectorate for Immigration on the procedure and conditions to be met in order for his spouse to be granted residency in Romania under the 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 amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. The General Inspectorate for Immigration responded with Letter no. 2447/180 of 11 January 2013, stating that "an extension of the right to temporary residence for the American citizen, under the conditions provided by the national laws on immigration in conjunction with other relevant normative acts in this field, ***cannot be granted on grounds of family reunion***." At the same time, it pointed out that "the American citizen may request an extension of the right of residence on the national territory for any other purpose, subject to the general and special conditions provided by the Government Emergency Ordinance no. 194/2002 on the status of aliens in Romania, republished, as subsequently amended and supplemented." The response also relied on the provisions of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, provisions of Article 62 of the Government Emergency Ordinance no. 194/2002 on the status of aliens in Romania, republished in the Official Journal of Romania, Part I, no. 421 of 5 June 2008, provisions on the extension of the right to temporary residence for purposes of family reunion, provisions of Article 41 (3) and (7) of the Law no. 119/1996 of civil status acts, republished in the Official Journal of Romania, Part I, no. 339 of 18 May 2012 on registering the civil status acts of the

Romanian citizens issued by the authorities of other states, and correspondingly the prohibition of registering certificates or extracts of civil status acts issued by the authorities of other states on the marriage of same-sex persons or on civil partnerships concluded or contracted abroad, either by Romanian citizens or by foreign citizens, as well as the provisions of Article 277 (2) of the Civil Code.

18. Challenging this refusal, on 28 October 2013, Relu Adrian Coman and Robert Robert Clabourn Hamilton filed a case, with the Association Accept, in the Court of First Instance, District 5, Bucureşti, against the General Inspectorate for Immigration and Ministry of Internal Affairs, alleging they were discriminated on account of sexual orientation and asking for a non-discriminatory enforcement of the conditions on the freedom of movement in the European Union for married same-sex couples, and claimed pecuniary [material] and moral damages. When filing the case, they made a plea of unconstitutionality of the text of the Civil Code which served as a basis for the refusal of the mentioned authorities, correspondingly Article 277 (2) of the Civil Code, as well as paragraph (4) of the same Article, which reads that the legal provisions on the freedom of movement in Romanian territory by citizens of the Member States of the European Union and the European Economic Area shall be applicable.

19. By a ruling referring the application to the Constitutional Court, the Court of First Instance noted, at page 4, the considerations of the General Inspectorate for Immigration in that "construing the notion of "spouse" provided by Article 2 (1) (3) (a) of the Emergency Ordinance no. 102/2005, (…) becomes possible only against the background of the internal legal order, that meaning Article 277 (1) and (2) of the Civil Code, providing that the Romanian State cannot recognise a marriage as the one in question. The provisions of Article 277 (4) of the Civil Code relied on by the plaintiffs do not address their situation in the fashion they understand and make a plea for it." This also clearly results from page 7 of the ruling referring the application to the Constitutional Court, concerning the considerations of the Ministry of Internal Affairs presented in the submissions to the case, in that "according to the responses of the previously mentioned authorities, their [plaintiffs'] marriage shall not be recognised, and an extension of the residence in Romania of R. A. Hamilton may not be granted based on the aim of family reunion." Also, page 9 reads as follows: "this case is related to how the Romanian authorities understand the violation of their obligations undertaken before the European Union on the free movement of persons in the European Union, by discriminating against EU citizens on grounds of sexual orientation," the discrimination being relied on Article 277 of the Civil Code, as also seen from the considerations made by the Court of First Instance at page 10 and further, referring to the case-files and the pleas.

20. As long as the acts of discrimination of the authorities sued, in their capacity as defendants, are based on the provisions of Article 277 of the Civil Code, it is evident that the provisions of this article are related to the cause of the judgment. According to the applicants before the Constitutional Court, striking down the alleged unconstitutional interpretation of the Article 277 (2) and (4) of the Civil Code, *i.e.* removing the legal basis underlying the refusal considered discriminatory, would lead to a correction of the erroneous practice of the competent authorities.

21. The Constitutional Court therefore finds that the non-recognition in Romania of same-sex marriages concluded abroad is criticised from the perspective of the Romanian authorities' refusal to grant the same-sex partner of a marriage concluded in a Member State of the European Union, the same legal status as regards to the right of residence in the territory of Romania, which is being granted to the partners of a marriage concluded between a man and a woman. The refusal is based on the mentioned laws. This framing of the critique is supported by the fact that the applicants also address, in addition to paragraph (2) of Article 277 of the Civil Code, which expressly prohibits the recognition of same-sex marriages, the provisions of paragraph (4) of the same Article 277 (1), (2) and (3) of the Civil Code regarding the free movement of citizens in the territory of Romania of the Member States of the European Union and the European Economic Area.

22. Subsequently, the Court finds that the provisions of Article 277 (2) and (4) of the Civil Code are related to the settlement of the case before the Court of First Instance, and accordingly it will examine the merits of the application with this subject matter.

23. Examining the application, the Court notes that this case only refers to the recognition of the effects of a legally concluded marriage between a citizen of the European Union and a third-country

national, with regard to the right to family life and the right to freedom of movement, in respect of the prohibition of discrimination on grounds of sexual orientation. At the same time, the Court notes the lack of certainty on the interpretation to be given to a number of notions used by the 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 amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC(2), in conjunction with the Charter of Fundamental Rights of the European Union and with the recent case-law of the Court of Justice of the European Union and the European Court of Human Rights, concerning the right to family life. Thus, Article 3 (1) of the Directive 2004/38 defines the beneficiaries thereof as "all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them." As a citizen of a non-EU country, Robert Clabourn Hamilton cannot therefore rely on the Directive, considering that the Court of Justice of the European Union held in Judgment of 12 March 2014, in case of *O. and B.* (C-456/12, EU:C:2014:135, paragraph 37), that "[i]t follows from a literal, systematic and teleological interpretation of Directive 2004/38 that it does not establish a derived right of residence for third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national."

24. On the other hand, in the same judgment, in paragraph 54, the European Court held that "[w]here, during the genuine residence of the Union citizen in the host Member State, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38, family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that the citizen's family life in the host Member State may continue on returning to the Member of State of which he is a national, through the grant of a derived right of residence to the family member who is a third-country national. 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 with his immediate family members which has been created or strengthened in the host Member State."

25. Furthermore, by the Judgment of 25 July 2008, in the case of *Metock and others* (C-127/08, EU:C:2008:449), the Court of Justice of the European Union decided that Article 3(1) of the Directive 2004/38 must be construed meaning that "a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State."

26. As with regard to the notion of "spouse" within the meaning of Article 2 point 2 letter (a) of the Directive 2004/38, the CJEU found that it is necessarily related to family life and is, accordingly, covered by the protection granted by Article 7 of the Charter of Fundamental Rights of the European Union. Under Article 52 (3) of the Charter, the meaning and scope of the rights corresponding to the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms shall be the same as those laid down by the said Convention. Accordingly, the rights guaranteed in Article 7 of the Charter correspond to those guaranteed by Article 8 of the ECHR. The former therefore have the same meaning and the same scope as the latter. In this context, the development of the case-law of the ECtHR concerning Article 8 of the ECHR is significant.[1]

Thus, whereas the European Court of Human Rights has constantly confirmed that the states are free to grant the possibility of concluding marriages to persons of the same sex (see, the Judgment of 9 June 2016 in case *Chapin and Charpentier v. France,* paragraphs 38, 29, 48 – Ed.), it considered that since 2010 it was "artificial to maintain the view that, in contrast to a different-sex couple, a same-

[1] Relevant aspects of this development are brought to light by the Advocate General Melchior Wathelet in the Conclusions presented on 11 January 2018 in Case C-673/16, paragraphs 62-65.

sex couple cannot enjoy “family life” for the purposes of Article 8 [of the ECHR]” (see, Judgment of 24 June 2010, in the case of *Schalk and Kopf v. Austria*, paragraph 94). Since then, this interpretation was confirmed repeatedly (Judgment of 7 November 2013 in the case of *Vallianatos and others v. Greece*, paragraph 73, Judgment of 23 February 2016 in the case of *Pajić v. Croatia*, paragraph 64, Judgment of 14 June 2016 in the case of *Aldeguer Tomás v. Spain*, paragraph 75, as well as Judgment of 20 June 2016 in the case of *Taddeucci and McCall v. Italy*, paragraph 58). The European Court of Human Rights has also confirmed that Article 8 of the Convention on Human Rights and Fundamental Freedoms require[s] of the states to fulfil their obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions (Judgment of 21 July 2015 in the case of *Oliari and others v. Italy*, paragraph 185). The applicability of this development in understanding family life on the right to reside of the third countries residents is certain. Therefore, although Article 8 of the Convention does not provide for a general obligation to accept the settling of spouses who are not nationals or to authorise family reunification in the territory of a contracting state, decisions taken by states on immigration may, in certain cases, constitute an interference in the exercise of the right to respect for private and public life, safeguarded by Article 8 of the Convention. This is especially the case when interested parties possess strong personal or family ties in the host country, which are liable to be seriously affected by the measure in question (Judgment of 30 June 2016 in the case of *Taddeucci and McCall v. Italy*, paragraph 56). Furthermore, according to the European Convention on Human Rights, although “protection of the traditional family may, in some circumstances, amount to a legitimate aim […] the Court considers that, regarding the matter in question here – granting a residence permit for family reasons to a homosexual foreign partner – it cannot amount to a “particularly convincing and weighty” reason capable of justifying, in the circumstances of the present case, discrimination on grounds of sexual orientation.” The European Court held that differences based solely – or decisively – on considerations of sexual orientation of the applicant are unacceptable under the Convention (Judgment of 23 February 2016 in the case of *Pajić v. Croatia*, paragraphs 59 and 84 or the Judgment of 30 June 2016 in the case of *Taddeucci and McCall v. Italy*, paragraph 89). In other words, under Article 8 in conjunction with Article 14 of the European Convention on Human Rights and Fundamental Freedoms, as it was interpreted in the case-law of the European Court of Human Rights, aiming at family reunification, a differentiated legal treatment of unmarried same-sex couples as compared to unmarried different-sex couples, grounded solely on sexual orientation, amounts to discrimination which is prohibited under the Convention. The Court considered that it is precisely the lack of any possibility for homosexual couples to enter into a form of legal recognition of their relationship (a situation similar to that from Romania) which placed the applicants in a different situation from that of unmarried heterosexual couples. Even supposing that at the relevant time the Convention did not require the Government to provide for the possibility of same-sex persons in a stable and committed relationship to enter into a civil union or registered partnership certifying their status and guaranteeing them certain essential rights, that does not in any way affect the finding that, unlike a heterosexual couple, the second applicant had no legal means in Italy of obtaining recognition of his status as “family member” of the first applicant and accordingly obtaining a residence permit for family reasons (paragraph 95 of the Judgment of 30 June 2016). According to the Court, the restrictive interpretation applied to the second applicant of the concept of “family member” did not duly take account of the personal situation of the applicants and, in particular, of their inability to obtain a legal form of recognition of their relationship (paragraph 96). In light of the foregoing, the Court considered that, at the material time, by deciding to treat homosexual couples – for the purposes of granting a residence permit for family reasons – in the same way as heterosexual couples who had not regularised their situation, the State infringed the applicants’ right not to be discriminated against on grounds of sexual orientation in the enjoyment of their rights under Article 8 of the Convention.

27. Therefore, following the comparative legal study on the legislation of European states, aiming at identifying the forms of legal protection of the fundamental right to intimate, family and private life of the persons forming homosexual couples, it results that thirteen Member States of the European Union have recognised the marriage between same-sex persons, as follows in chronological order: The Kingdom of the Netherlands, the Kingdom of Belgium, the Kingdom of Spain, the Kingdom of

Sweden, the Portuguese Republic, the Kingdom of Denmark, the French Republic, the United Kingdom (with the exception of Northern Ireland), the Grand Duchy of Luxembourg, Ireland, the Republic of Finland, the Federal Republic of Germany and the Republic of Malta and it will also become possible in Austria on 1 January 2019 the latest [by the Judgment of 4 December 2017 (G258-259/2017-9), the Constitutional Court of Austria repealed the provisions of the Civil Code limiting the right to marriage of homosexual couples and it held that, lacking an intervention of the legislator prior to this date, the marriage will be possible starting with 1 January 2019]. This legal recognition of same-sex marriage only reflects a general development of society on this issue. In addition to the thirteen Member States that granted legal recognition to same-sex marriage, nine other Member States recognise a registered partnership/civil partnership open to same-sex couples – a form of union whose name was chosen specifically to avoid confusion with marriage, but which is an alternative way of recognising personal relationships, with legal consequences similar to marriage, for example, in the matter of the sharing of property or inheritance rights, thereby rendering legal effectiveness to the principle of non-discrimination in accordance with international treaties on human rights. These are the Czech Republic, the Republic of Estonia, the Hellenic Republic, the Republic of Croatia, the Italian Republic and the Republic of Cyprus, Hungary, the Republic of Austria and the Republic of Slovenia.

28. The Court also notes that other states also authorise same-sex marriage, either legally, such as in Canada, New Zealand, South Africa, Argentina, Uruguay or Brazil, or by way of case-law: in Mexico (Supreme Court Judgment No. 155/2015 of 3 June 2015) in the United States (Supreme Court Judgment of 26 June 2015, "Obergefell et. al. Hodges, Director, Ohio Department of Health, et al. v. Hodges, Director, Ohio Department of Health et. al.", 576 U.S. (2015)] in Colombia (Judgment of the Constitutional Court SU-214/16 of 28 April 2016, Case T 4167863 AC) or Taiwan (Judgment of the Constitutional Court of China (Taiwan) of 24 May 2017, Interpretation No. 748 on the consolidated claims of Huei-Tai-12674 and Huei-Tai-12771].

29. The Court holds that to the detriment of the positive obligation deriving from Article 8 of the European Convention on Human Rights and Fundamental Freedoms and, implicitly, from Article 7 of the Charter of Fundamental Rights of the European Union, to ensure that the homosexual couples enjoy the possibility to be granted legal recognition and protection of their unions, in line with the case-law of the European Court of Human Rights (Judgment of 21 July 2015 in the case of *Oliari and others v. Italy*, paragraph 185), Romania does not grant any form of formal and legal recognition to couple relationships between same-sex persons (in the same situation are only five other Member States of the European Union: the Republic of Bulgaria, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland and the Slovak Republic).

30. In such legal and jurisprudential context, ***the Constitutional Court of Romania decided*** to stay the proceedings of the case with this plea of unconstitutionality of the provisions of the Romanian Civil Code and ***to ask for a preliminary ruling from the Court of Justice of the European Union***. Thus, by the ruling of 29 February 2016, the Constitutional Court submitted to the European Court the following preliminary questions:

(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?*

3) *If the answer to [the first question] is in the negative, 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 Member State other than the host State, be classified as "any other family member" within the meaning of Article 3(2)(a) of Directive 2004/38 or a "partner with whom the Union citizen has a durable relationship, duly attested", within the meaning of Article 3(2)(b) of that directive, 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) *If the answer to [the third question] is in the affirmative, do Articles 3(2) 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 Union citizen?"*

31. By the Judgment of 5 June 2018 in the case C-673/16, the Court of Justice of the European Union (the Grand Chamber) responded in affirmative to the first two questions. Thus, in respect to the first question, it held that, in a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7 paragraph (1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 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 amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21 paragraph (1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not provide for the marriage between persons of the same sex. Article 21 paragraph (1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

32. When delivering the Judgment, the Court of Justice of the European Union had regard to the term of 'spouse' used in Article 2 (2) (c) of the Directive 2004/38 as referring to a person joined to another person by the bonds of marriage and is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned. As regards the person who may be "a spouse," the Court found that in applying the mentioned directive, **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** (paragraph 36 of the Judgment).

33. Following preliminary observations in that the provisions on marriage is a matter that falls within the competence of Member States and EU law does not detract from that competence, recognising the right of the Member States to provide or not for marriage unions for same-sex persons, the Court of Justice of the European Union referred to its well-established case-law providing that Member States, must comply with EU law, in particular the Treaty provisions on the freedom conferred on all Union citizens to move and reside in the territory of the Member States (see, to that effect, judgments of 2 October 2003, *Garcia Avello*, C-148/02, EU:C:2003:539, paragraph 25; of 14 October 2008, *Grunkin and Paul*, C-353/06, EU:C:2008:559, paragraph 16; and of 2 June 2016,

Bogendorff von Wolffersdorff, C-438/14, EU:C:2016:401, paragraph 32). It thus concluded in paragraph 39 of the Judgment that "***[t]o allow Member States the freedom to grant or refuse entry into and residence in their territory by a third-country national*** whose marriage to a Union citizen was concluded in a Member State in accordance with the law of that state, according to whether or not national law allows marriage by persons of the same sex, would have the effect that the freedom of movement of Union citizens who have already made use of that freedom would vary from one Member State to another, depending on whether such provisions of national law exist. Such a ***situation would be at odds with the Court's case-law***, to the effect that, in the light of its context and objectives, the provisions of Directive 2004/38, applicable by analogy to the present case, may not be interpreted restrictively and, at all events, must not be deprived of their effectiveness (judgments of 25 July 2008, *Metock and Others*, C-127/08, EU:C:2008:449, paragraph 84, and of 18 December 2014, *McCarthy and Others*, C-202/13, EU:C:2014:2450, paragraph 32).

34. Therefore, "***the refusal by the authorities of a Member State to recognise, for the sole purpose of granting a derived right of residence to a third-country national, the marriage of that national to a Union citizen of the same sex***, concluded, during the period of their genuine residence in another Member State, in accordance with the law of that State, ***may interfere with the exercise of the right conferred on that citizen by Article 21(1) TFEU to move and reside freely in the territory of the Member States***. Indeed, 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." (paragraph 40 of the Judgment). Or, ***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***. It also follows from the case-law of the Court of Justice of the European Union that a measure is proportionate if, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective.

35. As regards public-interest considerations, the Court of Justice of the European Union took account of a number of Governments that have submitted observations to the Court in the case of *Coman and others* (C-673/16), emphasised the fundamental nature of the institution of marriage and a restriction of Article 21 TFEU would be is justified on grounds of public policy and national identity, as referred to in Article 4(2) TEU. The Court has repeatedly held that the concept of "public policy," as justification for a derogation from a fundamental freedom, must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the Union's institutions, this meaning that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. In this respect, the Court of Justice of the European Union held in paragraph 45 of the Judgment that ***the obligation for a Member State to recognise 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 falls within the competence of the Member States. It 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 Union's law. Accordingly, the Court concluded that "***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 concerned***" (paragraph 46 of the Judgment).

36. Stemming from the premise that the right to respect for private and family life, safeguarded by Article 7 of the Charter of Fundamental Rights, is a fundamental right with the same scope as that safeguarded by Article 8 of the European Convention on Human Rights and Fundamental Freedoms, having regard to the case-law of the European Court of Human Rights and Fundamental Freedoms pointing out that the relationships of a couple of same-sex persons fall within the notion of "private life," as well as within that of "family life," just as would the relationships of different-sex couples in the same

situation (Judgment of 7 November 2013 in the case of *Vallianatos and others v. Greece* or the Judgment of 14 December 2017 in the case of *Orlandi and others v. Italy*), the Court of Justice of the European Union decided that "Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex" (section 1 of the operative part of the Judgment).

37. As regards the second question referred by the Constitutional Court of Romania, the European Court held that "Article 21 (1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, **a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months**" (section 2 of the operative part of the Judgment). The Court pointed out that, as is apparent from Article 7(2) of Directive 2004/38, the right of residence provided for in this Article is to extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that the Union citizen satisfies the conditions referred to in points (a), (b) or (c) of paragraph (1) of the said Article.

38. Considering the holdings of the Court of Justice of the European Union, the Constitutional Court while applying a constitutional review of the provisions of Article 277 (2) and (4) of the Civil Code, it will also apply the provisions of the EU laws enshrined in Article 21 (1) TFEU and that of Article 7 (2) of the Directive 2004/38. Thus, according to its well-established case-law on the non-compliance with EU laws, by the Decision no. 668 of 18 May 2011, published in the Official Journal of Romania, Part I, no. 487 of 8 July 2011 and by the Decision no. 921 of 7 July 2011, published in the Official Journal of Romania, Part I, no. 673 of 21 September 2011, the Court held that "applying a provision of the EU law in a constitutional review, as a provision interposed between the EU law and the basic one, pursuant to Article 148 (2) and (4) of the Constitution of Romania, implies a cumulative conditionality: on the one hand, this provision has to be sufficiently clear, precise and unambiguous by itself or its meaning had been clearly defined by the Court of Justice of the European Union and, on the other hand, the provision has to 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. From such a hypothetical perspective, the reference of the Constitutional Court [for a preliminary ruling to the Court of Justice of the European Union – TN] is different from a mere application and interpretation of the law, a competence conferred upon courts of law and administrative authorities, it also being different from possible issues relating to the legislative policy advanced by the Parliament or by the Government, as the case may be."

39. In the light of the foregoing considerations of principle, the Court finds that the provisions of the EU legal order comprised by Article 21 (1) TFEU and Article 7 (2) of the Directive 2004/38, relied on within this constitutional review in connection with Article 148 (4) of the Constitution, have both a precise and unambiguous meaning, well-established in the case-law of the Court of Justice of the European Union, and constitutional relevance, as they provide for a fundamental right, *i.e.* the right to intimate, family and private life.

40. In this light, applying the considerations of the European Court on the EU laws, the Constitutional Court finds that ***the relation of a 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***, safeguarded 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. Enjoying the right to private and family life, same-sex couples, who form stable couples, have the right to express their personality within these relationships and to enjoy, in time and by the means prescribed by law, a legal and judicial recognition of appropriate rights and duties (see, to that effect, the Judgment of the Constitutional Court of Italy – *Ortinanza n. 4/2011*, published in the *Gazzetta Ufficiale* no. 2 of 12 January 2012).

41. Accordingly, the Court finds that the provisions of Article 277 (2) of the Civil Code, which read that "*Marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners shall not be recognised in Romania*" may not therefore serve as a ground for the competent authorities of the Romanian State to refuse to grant the right of residence in the territory of Romania to a same-sex spouse who is a national of a Member State of the European Union and/or of a third-country and who is joined by the bonds of marriage legally concluded in the territory of a Member State of the European Union, with a Romanian citizen having his/her domicile or residence in Romania, or a citizen of a Member State of the European Union who has the right to reside in Romania, on the ground that the Romanian internal law does not provide for/recognise marriages between persons of the same sex. Therefore, given that the provisions of Article 277 (4) of the Civil Code which read that "*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*", **precluding the recognition of marriages shall not be applicable in the situation where a citizen of a Member State of the European Union or of a third-country, who is a person of the same sex, married to a citizen of Romania or other Member State of the European Union**, and who pursuant to Article 21 (1) TFEU and Article 7 (2) of the Directive 2004/38 **is asking to be granted the right to reside, for more than three months in the territory of Romania on grounds of family reunion**.

42. The Court reiterates the considerations of the Court of Justice of the European Union, which held that whenever, ***during the genuine residence of a Union citizen in a Member State*** (in this case in the Kingdom of Belgium), other than that of which he is a national (in this case, Romania), pursuant to and in conformity with the conditions set out in Directive 2004/38, ***family life was created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by 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*** (*recte*, the United States of America).

43. For all the foregoing reasons, pursuant to Articles 146 letter d) and Article 147 (4) of the Constitution, as well as Articles 1–3, Article 11 (1) (A.d) and Article 29 of Law no. 47/1992, with a majority vote,

THE CONSTITUTIONAL COURT

In the name of the law
DECIDES

To uphold the plea of unconstitutionality and declares 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.

Final and generally binding.

The decision is to be communicated to the two Chambers of the Parliament, to the Government, to the Court of First Instance of District 5 of Bucharest – Civil Section and is to be published in the Official Journal of Romania, Part I.

Delivered in the public sitting of 18 July 2018.

DISSENTING OPINION

1. Contrary to the solution adopted – by a majority vote – through Decision no. 534 of 18 July 2018, we consider that the exception of unconstitutionality of the provisions of Article 277 (2) and (4) of the Civil Code should have been dismissed as inadmissible.

2. In fact, plaintiffs Relu Adrian Coman and Robert Clabourn Hamilton got "married" in

Brussels on 5 November 2010. R.A. Coman requested the transcription of their Belgian "marriage certificate" at the Romanian Embassy in Brussels. According to the report of 20 September 2012, the request for the registration of the marriage "cannot be answered favourably for the following reasons: the Romanian Civil Code states, in Article 277 (2), that: Marriages between persons of the same sex entered into or contracted abroad by Romanian nationals or by foreigners shall not be recognised in Romania". Through Letter no. G5-l/P1791, while also referring to the provisions of Article 277 of the Civil Code, the Ministry of Foreign Affairs – the Consular Department stated that "the decision of the diplomat with consular prerogatives within the Romanian Embassy in Brussels is well-founded".

3. Next, they addressed to the General Inspectorate for Immigration, with a request to be informed of the procedure and conditions for his "spouse" to be granted the right of residence in Romania under 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 amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. The response received included references to the provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, to the provisions of Article 62 – *The extension of the right of temporary residence for family reunification* of Government Emergency Ordinance no. 194/2002 on the legal status of aliens in Romania, republished in the Official Gazette of Romania, Part I, no. 421 of 5 June 2008, to the provisions of Article 41 (3) and (7) of Law no. 119/1996 on civil status documents, republished in the Official Gazette of Romania, Part I, no. 339 of 18 May 2012, on the registration/transcription of the civil status documents of Romanian nationals, prepared by foreign authorities, respectively the prohibition of the transcription/registration of civil status certificates or excerpts delivered by foreign authorities on same-sex marriages or civil partnerships entered into or contracted abroad, either by Romanian nationals or by foreign nationals, as well as to the provisions of Article 277 (2) of the Civil Code.

4. Considering these aspects, through the application initiating the proceedings filed with the Court of First Instance of District 5 Bucharest, plaintiffs Relu Adrian Coman and Robert Clabourn Hamilton, against defendants the General Inspectorate for Immigration and the Ministry of Internal Affairs, requested the court to adjudicate on the following:

"1. That the defendants had discriminated the plaintiffs, and other persons in the same situation, on grounds of sexual orientation, with regard to the exercise of the right of free movement within the European Union;

2. That the defendants be ordered to immediately stop the discrimination on grounds of sexual orientation in accordance with the procedures referring to the right of free movement within the European Union against Relu Adrian Coman and his spouse, Robert Clabourn Hamilton;

3. That the defendants be ordered to adopt, within 30 days from the date on which the court's ruling becomes final, a regulation ordering the equal, non-discriminatory application of the conditions for the exercise of the right of free movement within the European Union with regard to married same-sex couples;

4. That the defendants be ordered to publish, within 30 days from the date on which the court's ruling becomes final, on their own Website and in a journal of national circulation, a press release containing the following: to publicly apologise to the plaintiffs, to inform that European citizens moving to or coming back to Romania, under the freedom of movement of people within the European Union, enjoy the same rights for themselves and their families, regardless of the fact that they belong to same-sex or different-sex couples; to inform about the content of the regulation in point 5;

5. That the defendants be also ordered to pay the RON equivalent of the sum of 5,000 Euro, representing civil redress for the moral damage caused to plaintiffs Relu Adrian Coman and to his spouse Robert Clabourn Hamilton."

5. Consequently, it can be noted that this action was filed following, on the one hand, the refusal to register the marriage in the Romanian civil status registers at Romania's diplomatic mission in Belgium and, on the other hand, the notification of the regulatory provisions with regard to a request for information. It should be noted that the dispute generated by the refusal to enter a civil status document in the Romanian civil status registers refers to the application of the provisions of Book II of the Civil Code, so that, according to Article 265 of the Civil Code, the competence to settle this dispute belongs **to the court of competent jurisdiction,** respectively the court of first instance [Article 94 (1) (a) of the Civil Procedure Code]. On the other hand, "the dispute" caused by the discontent of the plaintiff(s) with the national regulatory framework existing in Romania on the right of residence is not, in reality, a reason, because the matter obviously exceeds the competence of the judiciary. Therefore, considering the two types of applications filed, only the first one gave rise to proceedings regulated as such by the Civil Code.

6. But, **the two plaintiffs chose a different way,** original in itself, but lacking any legal effectiveness, i.e. the ascertaining of the fact that the General Inspectorate for Immigration and the Ministry of Internal Affairs discriminated them. Or, the General Inspectorate for Immigration only communicated them the applicable legal framework. Consequently, the object of the "discrimination proceedings" could only be represented by the way in which the response was worded, by the discrimination that they were subject to through the response filed. However, instead of challenging this aspect, the plaintiffs lodged these proceedings claiming that the two national legal subjects had discriminated them by informing them about an allegedly discriminatory legislation. The lodging of discrimination proceedings against a public authority on the grounds that the latter answered a petition by indicating the applicable legal texts lacks all logical reasoning. Considering things in this manner means that the discrimination proceedings do not concern the conduct of the State authority answering a petition, but the content of the legal texts communicated. Thus, a petition filed under Law no. 544/2001 regarding the free access to information of public interest becomes an opportunity to file discrimination proceedings for any piece of information communicated. In reality, the discrimination proceedings were regulated by the legislator through Government Ordinance no. 137/2000, as a procedural remedy in order to bring before the courts of law the verification of the alleged discrimination that the person is subject to. Or, through the response filed, it is impossible to conclude, under any circumstance, that the respective persons were discriminated. Hence, **the plaintiffs have distorted and altered the subject-matter of such proceedings** by officially suing two State authorities, on grounds that the legislation they communicated – while answering the petitions received – was discriminatory. Therefore, it is found that, in themselves, the discrimination proceedings filed are inadmissible, as the plaintiffs had not put into question the discriminatory nature of the way in which the answer was worded. Consequently, they do not deem themselves aggrieved by the way in which the authorities have worded their answer, but by the existing regulatory framework.

7. It should be noted that they based the petition filed with the General Inspectorate for Immigration on the provisions of Directive 2004/38/EC, and the national authorities had correctly implemented the provisions thereof to the specific case of the parties, by providing them accurate information. So, we ask ourselves, were the plaintiffs in this case not supposed to follow a different procedural way instead of following a procedural path that could not represent an effective remedy for the recognition of their "marriage" or right of residence?

8. **Should the procedural path that needed to be taken not be the challenge before the**

competent court – the court of first instance – of the refusal of the Ministry of Foreign Affairs to register "the marriage certificate" in the civil status registers? In this case, an exception of unconstitutionality concerning Article 277 (2) of the Civil Code and Article 41 (7) of Law no. 119/1996 on civil status documents[1] could have been raised, in which case the Constitutional Court was supposed to adjudicate on their merits, given that the requirements of admissibility set by Article 29 (1) to (3) of Law no. 47/1992 were met. Moreover, in these proceedings, from the point of view of substantive law, the only applicable legal texts were the ones indicated, because they prohibited the registration of the "marriage" in the Romanian civil status registers, being the right of the plaintiffs to challenge their constitutionality through such proceedings.

9. **Or were they supposed to address the General Inspectorate for Immigration in order to 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? Because it results from the proceedings filed that, in fact, it was not the registration of the "marriage certificate" that was pursued, but the granting of the right of residence for the "spouse". In this case, the exception of unconstitutionality of the provisions of Article 46 (17)[2] of Government Emergency Ordinance no. 194/2002 could have been raised; through the obligation to file the marriage certificate delivered or transcribed by the Romanian authorities, this text of law indicates the fact that its scope did not cover foreign nationals legally "married" abroad. As the legislative omission indicated was constitutionally relevant[3] from the perspective of Article 26 of the Constitution, it could have represented the subject-matter of the exception of unconstitutionality and it would have been examined, on its merits, by the Constitutional Court. In this case, if the unconstitutionality of the abovementioned text had been found, we would not have witnessed a recognition of the "marriages" entered into abroad by persons of the same sex, but the legal possibility granted to the same-sex person, who contracted such a "marriage" abroad with a Romanian national, to have the right of residence in Romania.**

10. **We deem that, according to the elements of the case, the plaintiffs should have followed the procedural path indicated in point 9 of this dissenting opinion in order to ascertain the unconstitutionality of the legal text requesting the plaintiffs to file a series of documents available only to married different-sex persons. But, it seems that such proceedings, accompanied by the abovementioned exception of unconstitutionality, were not sufficiently challenging and, so, discrimination proceedings were filed – accompanied by an exception of unconstitutionality concerning the prohibition to recognise same-sex marriages – whose settlement, even favourable to the plaintiffs, does not lead to the granting of any right of residence, considering the way in which it was worded (with regard to the claims of the proceedings, see point 4 of this dissenting**

---

[1] According to this text of law: "The transcription/registration of civil status certificates or excerpts delivered by foreign authorities and concerning marriages between same-sex persons or civil partnerships concluded or contracted abroad, either by Romanian nationals or by foreign nationals, shall be prohibited."

[2] According to this text of law, "The visa application filed by the persons referred to in paragraph 16 (a) to (e) shall be accompanied by the marriage certificate delivered by the Romanian authorities or transcribed under the law or, where appropriate, by the proof of kinship or of partnership". We mention that Article 46 (16) (a) of the same emergency ordinance states that "A visa application for family reunification can also be filed by the following categories of persons: a) aliens married with Romanian nationals".

[3] On the constitutional relevance of the legislative omission, see also Decision no. 503 of 20 April 2010, published in the Official Gazette of Romania, Part I, no. 353 of 28 May 2010, Decision no. 107 of 27 February 2014, published in the Official Gazette of Romania, Part I, no. 318 of 30 April 2014, Decision no. 308 of 12 May 2016, published in the Official Gazette of Romania, Part I, no. 585 of 2 August 2016, para. 41, or Decision no. 392 of 6 June 2017, published in the Official Gazette of Romania, Part I, no. 504 of 30 June 2017, para. 55, by which the Court stated that "legislative omission and inaccuracy lead to a violation of the allegedly violated fundamental right".

opinion).

11. In conclusion, **the plaintiffs used a third procedural remedy, which, however, was essentially wrong**, as the discrimination proceedings were not a procedural remedy applicable to their situation. Or, the constitutional court cannot be vested with the review of the unconstitutionality of a regulatory act within a procedural framework especially created for this purpose (see Decision no. 460 of 16 September 2014, published in the Official Gazette of Romania, Part I, no. 738 of 9 October 2014, or Decision no. 137 of 1 February 2011, published in the Official Gazette of Romania, Part I, no. 320 of 10 May 2011). To this same effect, the Court of Justice of the European Communities (currently, the Court of Justice of the European Union), in its Judgment of 11 March 1980, delivered in the Case of *Foglia v. Novello,* admitted that it was not competent to rule when obliged by the expedient of arrangements to give rulings "that would jeopardize the whole system of legal remedies available to private individuals to enable them to protect themselves".

12. By choosing to lodge such proceedings, the plaintiffs ignored the fact that these could only have as subject-matter the authority's mode of operation/conduct and not the communication of an allegedly discriminatory national legislation. Therefore, the proceedings before the court of law are inadmissible and so, according to the case-law of the Constitutional Court, the exception of unconstitutionality is also inadmissible. Thus, if an exception of unconstitutionality is raised "as part of proceedings *ab initio* inadmissible, it is also inadmissible, given that it is precisely the legal provisions determining such a solution in the case in which the exception was raised that are not challenged, and this because, regardless of the solution delivered by the Constitutional Court concerning the exception of unconstitutionality raised in a case *ab initio* inadmissible, its decision shall not produce any effect with regard to such a case (see Decision no. 171 of 8 February 2011, published in the Official Gazette of Romania, Part I, no. 242 of 7 April 2011, Decision no. 203 of 6 March 2012, published in the Official Gazette of Romania, Part I, no. 324 of 14 May 2012, Decision no. 94 of 27 February 2014, published in the Official Gazette of Romania, Part I, no. 279 of 16 April 2014, or Decision no. 320 of 9 May 2017, published in the Official Gazette of Romania, Part I, no. 555 of 13 July 2017, para. 26).

13. Moreover, it is found that the proceedings lodged were based on Article 253 of the Civil Code [means of defence of non-property rights], on Article 2 (1), (2), (4) and (5), Article 10 (h), Article 15, Article 27, Article 28 of Government Ordinance no. 137/2000, on Article 2 (1) (3) (a) and subsequent of Government Emergency Ordinance no. 102/2005 on the free movement on the territory of Romania of citizens of the European Union and the European Economic Area and of the Swiss Confederation, on Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, on Article 8, Article 14 of the Convention for the protection of Human Rights and Fundamental Freedoms and on Protocol no. 14 to the Convention. **Or, on the one hand, all these provisions do not apply to the claims of the plaintiffs and, on the other hand, even in application of the provisions of the Convention on private life, the claims of the plaintiffs to obtain the right of long residence cannot be exercised through such proceedings.**

14. **By invoking Article 253 of the Civil Code, the idea of affecting a non-property right is brought into discussion; or, insofar as the Romanian legislation does not recognise same-sex "marriages" entered into abroad, within the scope of jurisdiction of the Romanian State, the person does not hold a non-property right. It is a legal fact, and not a legal act.**

15. **With regard to the indicated legal grounds from Government Ordinance no. 137/2000, we have shown that, in fact, as concerns the situation of the plaintiffs, these had no applicability to their case because the plaintiffs had not challenged the way in**

which the General Inspectorate for Immigration made the communication, but the communicated legal texts, which did not even apply to them. Or, when lodging discrimination proceedings, the person should invoke concrete facts/acts of the respective authority, which put him/her in a position of inferiority, contrary to the law or international documents in the field.

16. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and the national transposition document, i.e. Government Emergency Ordinance no. 102/2005, also invoked in support of the proceedings, do not apply to this case. We have warned about this aspect in our dissenting opinion to the interlocutory order of 29 November 2016, delivered by the Constitutional Court, referring to the Court of Justice of the European Union[4], **which we reproduce below**:

1. Contrary to the solution adopted, by a majority vote, through the interlocutory order of 29 November 2016, delivered by the Constitutional Court, referring to the Court of Justice of the European Union, we consider that, in this case, the referral filed by the authors of the exception of unconstitutionality had to be dismissed as groundless, for non-compliance with the requirements set, to this effect, by the provisions of Article 267 of the Treaty on the Functioning of the European Union, as developed in the settled case-law of the Court.

2. First, we note that the case-law of the Court of Justice of the European Union (hereinafter "the CJEU") on the conditions for referring to it; to this effect, through the Judgment of 6 October 1982, delivered in Case C-283/81 *SRL CILFIT and Lanificio di Gavardo Spa v. Ministry of Health*, the Court stated that "The third paragraph of Article 177 (become Article 267 — sn.) of the EEC Treaty is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, **where a question of Community law is raised before it**, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that **the question raised is irrelevant** or that **the Community provision in question has already been interpreted by the Court** or that **the correct application of Community law is so obvious as to leave no scope for any reasonable doubt**. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community".

3. The national court against whose decisions there is no longer any judicial remedy under law must make a reference to the Court for a preliminary ruling when it has the slightest doubt as regards the interpretation or correct application of EU law (Judgment of 28 July 2016, delivered in Case C-379/15 *Association France Nature Environnement*, para. 51]. The

---

[4] The four questions referred to the Court of Justice of the European Union for a preliminary ruling were the following:

'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?

3) If the answer to [the first question] is in the negative, 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 Member State other than the host State, be classified as "any other family member" within the meaning of Article 3 (2) (a) of Directive 2004/38 or a "partner with whom the Union citizen has a durable relationship, duly attested", within the meaning of Article 3 (2) (b) of that directive, 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) If the answer to [the third question] is in the affirmative, do Articles 3 (2) 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 Union citizen?'

national court or tribunal has sole responsibility for determining whether the correct application of EU law is so obvious as to leave no scope for any reasonable doubt and for deciding, as a result, to refrain from referring to the Court a question concerning the interpretation of EU law which has been raised before it (Judgment of 9 September 2015, delivered in Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others*, para. 40].

4. In the context of the cooperation between the Court and the national courts, it is solely for the national court before which a dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both **the need for a preliminary ruling** to enable it to deliver judgment and **the relevance of the questions** which it submits to the Court (e.g.: Judgment of 23 April 2009, delivered in the Cases C-261/07 and C-299/07 *VTB-AB NV*, respectively *Galatea BVBA*, para. 32, or Judgment of 22 September 2016, delivered in the Case C-110/15 *Microsoft Mobile Sales International Oy*, para. 18).

5. Considering the abovementioned case-law, it was for the Constitutional Court to determine whether or not the questions in the referral to the Court of Justice of the European Union were relevant and necessary to the case *a quo* so as to establish whether or not the decision of the CJEU would lead to the finding of the constitutionality or unconstitutionality of Article 277 (4) of the Civil Code, respectively whether or not the scope *ratione materiae* of Directive 2004/38/EC applied to the case of the Romanian national "married" to a same-sex American national, in Belgium, with regard to the latter's right of residence in Romania.

6. In this context, with regard to the ***relevance of the questions addressed to the CJEU***, we consider that, regardless of the ruling of the CJEU, it does not influence in any way the constitutionality of Article 277 (4) of the Civil Code, according to which "*The legal provisions concerning the freedom of movement of the citizens of the Member States of the European Union and the European Economic Area on Romania's territory remain applicable*". The national standard is precisely a concretisation of the obligations incumbent upon Romania under the founding treaties and the accession treaty to comply with the binding acts of the European Union. The wording of Article 277 (4) of the Civil Code, whether or not it was enshrined from a regulatory point of view, is not likely to deny or limit the scope of the European Union's binding acts. This standard resembles rather to an explanatory standard and, regardless of the decision of the CJEU, it shall continue to exist in the Romanian substantive law. The ascertaining of its constitutionality or unconstitutionality under reservation of interpretation is a false problem, because, in the event of a potential problem related to the non-observance of the European Union's binding acts, **it would concern a different regulation**, **i.e. the national regulatory acts *concerning the freedom of movement on Romania's territory of the citizens of the Member States of the European Union and the European Economic Area***; or, the impugned text does not regulate such conditions, but only indicates the fact that the national regulations including the substantive/formal requirements concerning the *freedom of movement on Romania's territory of the citizens of the Member States of the European Union and the European Economic Area* continue to apply. It would be completely debatable and contrary to Article 146 (d) of the Constitution and to Article 29 (1) of Law no. 47/1992 on the organisation and operation of the Constitutional Court that the constitutional court should find the unconstitutionality (pure and simple, under reservation of interpretation) of **other regulatory acts brought before it** on the grounds that these do not transpose or irregularly transpose the provisions of an European Union's binding act. The Court shall adjudicate within the limits of its referral, therefore, only with regard to the legal texts with which it was referred, in its turn, by the court of law, i.e. the Court of First Instance of District 5 Bucharest.

7. Therefore, the problem brought before the CJEU is irrelevant for the constitutional dispute. If the constitutional court had been referred to with an exception of

unconstitutionality concerning the provisions of the regulatory acts indicated by Article 277 (4) of the Civil Code, the condition of relevance in this case would have been met.

8. ***As concerns the need to refer to the CJEU****,* we reckon that the constitutional court should have considered recital no. 11 of the Directive, according to which "The fundamental and personal right of residence **in another Member State** is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures", as well as Article 3 (1) of the Directive, according to which it "shall apply to all Union citizens who move to or reside in a Member State **other than that of which they are a national**, and to their family members as defined in point 2 of Article 2 who accompany or join them".

9. The "marriage" of the Romanian national abroad, more exactly on the territory of a Member State of the European Union was and is possible, among others, under the freedom of movement enshrined by the Treaty on the Functioning of the European Union and the abovementioned Directive. Obtaining a right of entry/residence in a Member State by the Romanian national is the premise of entering into such a "marriage", as the directive regulates the right of all citizens of the Union moving to or residing in a Member State, **other than that of which they are a national. The entry and residence of the Romanian national on the territory of the State of which he is a national does not fall within the scope of the Directive, but of the domestic law of the respective State**.

10. According to recital no. 9 of the Directive, "Union citizens should have the right of residence **in the host Member State** for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice". It results that, since the "host Member State" is the Member State to which a citizen of the Union moves in order to exercise his freedom of movement and right of residence, the Directive does not concern the case of the Romanian national with regard to his entry and residence in Romania, but in another Member State of the European Union.

11. The case-law of the CJEU is very clear with regard to the scope of Article 3 of the Directive, meaning that "In so far as a Union citizen is not covered by the concept of 'beneficiary' for the purposes of Article 3 (1) of Directive 2004/38, **their family member is not covered by that concept either, given that the rights conferred by that directive on the family members of a beneficiary of that directive are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family**" [see Judgment of 5 May 2011, delivered in Case C-434/09 *McCarthy*, para. 42, Judgment of 15 November 2011, delivered in Case C-256/11 *Dereci and Others*, para. 55, Judgment of 8 May 2013, delivered in Case C-87/12 *Ymeraga and Others*, para. 31, or Judgment of 13 September 2016, delivered in Case C-304/14 *Secretary of State for the Home Department*, para. 22]. Thus, in the case before the Constitutional Court, even if we accept that the spouse of the Romanian national is "a family member", he cannot be covered by the Directive given that **the Romanian national is not covered by the Directive either**, considering that he does not exercise his freedom of movement/right of residence within the meaning of the Directive (see, to this effect, the legal ground for adopting the Directive, respectively Articles 12, 18, 40, 44 and 52 of the Treaty establishing the European Community, which became Articles 18, 21, 46, 50 and 59 in the Treaty on the Functioning of the European Union), **but just moved back to the Member State of the European Union to which he is a national: Romania.**

12. "It is not all third-country nationals who derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are a 'family member' within the meaning of Article 2 (2) of that directive of a Union citizen who has exercised his right of

freedom of movement **by becoming established in a Member State other than the Member State of which he is a national**" (Judgment of 16 July 2015, delivered in Case C-218/14 *Singh*, para. 51, or Judgment of 8 November 2012, delivered in Case C-40/11 *Yoshikazu Iida*, para. 51). Furthermore, this reason is expressly highlighted and marked as such by the CJEU, which, in a subsequent decision, added: "that principle being **established by the Court's settled case-law**" (Judgment of 30 June 2016, delivered in Case C-115/15 *Secretary of State for the Home Department*, para. 41).

13. There are very special situations in which, "despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence **exceptionally** cannot, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, **that citizen would be obliged in practice to leave the territory of the European Union altogether**, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status" (Judgment of 8 November 2012, delivered in Case C-40/11 *Yoshikazu Iida*, para. 71, and subsequent, or Judgment of 13 September 2016, delivered in Case C-165/14 *Alfredo Rendón Marín*, para. 74). Or, the third-country national cannot be forced to leave the territory of the State in which the "marriage" was entered into, i.e. Belgium, as long as the citizen of the European Union exercises his freedom of movement, thus remaining under the scope of the Directive.

14. Obiter dictum, as concerns the family members of the Romanian national, we note that, according to Article 2 (2) (b) of the Directive, "family member" means: "the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State **treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State**". Or, in this case, there are no reasons for the interpreter of the standard to depart from this vision as concerns precisely the spouse.

15. Furthermore, it is also held that "in accordance with Article 51 (1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. Under Article 51 (2) of the Charter, it does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called on to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it" (Judgment of 8 November 2014, delivered in Case C-40/11 *Yoshikazu Iida*, para. 78). Or, as indicated above, **this is a purely domestic situation** to which the Directive does not apply. A contrary approach of the case-law would be tantamount to a severe breach of the prerogatives of the Member State and to a violation of the settled case-law of the CJEU.

16. Also, we note that the referral of the Court of Justice of the European Union and the staying of the proceedings before the Constitutional Court were done "under Article 3 (2) and Article 14 of Law no. 47/1992"; or, correctly, the legal ground could only be Article 267 of the Treaty on the Functioning of the European Union, respectively Article 412 (1) (7) of the Civil Procedure Code, read in conjunction with Article 3 (2) and Article 14 of Law no. 47/1992.

17. For the grounds above, we consider that, given the lack of relevance of the preliminary question for this case, as well as the fact that the provisions of the Directive are clear both as concerns their regulatory content and from the perspective of the settled case-law of the Court of Justice of the European Union [we are, thus, dealing with a clear act within the meaning of the case-law of the CJEU], the referral to the Court, filed by the authors of the exception of unconstitutionality should have been dismissed as groundless, as the problems raised fell in

the category of the exceptions resulting from the case of *CILFIT*.

17. **Consequently, ever since 29 November 2016, we have considered that the Directive invoked did not apply to this case.** This point of view was also confirmed by the Court of Justice of the European Union, which, in para. 21 of the Judgment of 5 June 2018, indicated, *expressis verbis*, the following: "**It follows that Directive 2004/38, which the national court has asked the Court of Justice to interpret, cannot confer a derived right of residence on Mr Hamilton**".

18. Therefore, through the abovementioned decision, the Court of Justice of the European Union indicates, in para. 22, that: "Nonetheless, as the Court has repeatedly held, **even if, formally, the referring court has limited its questions to the interpretation of the provisions of Directive 2004/38, that does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it**, whether or not the referring court has specifically referred to them in the wording of its questions (see, to that effect, judgments of 10 May 2017, Chavez-Vilchez and Others, C-133/15, EU:C:2017:354, paragraph 48, and of 14 November 2017, Lounes, C-165/16, EU:C:2017:862, paragraph 28 and the case-law cited)".

19. It results that the European court held that the abovementioned Directive did not apply to this case, its field of regulation being different from the situation in this case. Hence, by observing the data in this case, the Court of Justice **provided all the elements of interpretation of the EU law which may be of assistance in adjudicating in the case pending before it and interpreted Article 21 (1) of the Treaty on the Functioning of the European Union in that it "must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex".**

20. In this context, it is found that neither the application initiating proceedings nor the exception of unconstitutionality include the legal ground indicated in the judgment of the Court of Justice of the European Union. Therefore, it was only by interpreting Article 26 of the Constitution, and not by referring to the invoked Directive, but to Article 21 (1) of the Treaty on the Functioning of the European Union, that the constitutional court managed to adjudicate in the sense of upholding the exception. Thus, it is found that after being referred to, the Court amended the standard of reference in the exception of unconstitutionality. It does not result from the grounds of the exception of unconstitutionality, as worded, that the provisions of Article 21 of the Treaty are invoked, so that the review of Article 26 of the Constitution should be carried out according to it, but, following the judgment of the Court of Justice of the European Union, the Constitutional Court *ex propriu motu* changes the standard of reference and, consequently, does not consider private life from the perspective of the Directive, but from that of the Treaty. Thus, the exception of unconstitutionality was upheld based on a component of Article 26 of the Constitution, which had not been invoked in the exception of unconstitutionality. Or, the Court, in its case-law, stated that it could not replace the party with regard to the invoking of the ground of unconstitutionality, because an **ex officio** review was inadmissible considering that the review based on exceptions of unconstitutionality could only be carried out upon referral; moreover, the procedural framework specific to the exception of unconstitutionality results from the interlocutory order referring to the Court and from **the written grounds of the author**, which **could not be supplemented, before the Constitutional Court, with new elements that had not been debated by the parties before the court of law** (Decision no. 1.313 of 4 October 2011, published in the Official Gazette of Romania, Part I, no. 12 of 6 January 2012). Therefore, **the**

Court exceeded the limits of its prerogatives, by modifying the structure of the exception of unconstitutionality, as invoked.

21. Consequently, the court of law *a quo* must also change the legal ground of the proceedings, so that Article 8 of the Convention referred to the wording of Article 21 (1) of the Treaty [not invoked], and not to the provisions of the Directive. **But, paradoxically, even by upholding the proceedings, the ruling thus delivered is not likely to lead to the granting of the right of residence**. This is why the plaintiffs should have followed the procedural path set by law, i.e. to file an application with the General Inspectorate for Immigration to be granted a long-stay visa, to challenge the decision of the General Inspectorate for Immigration dismissing the application and to file an exception of unconstitutionality of the provisions of Article 46 (17) of Government Emergency Ordinance no. 194/2002.

22. ***Per absurdum***, even by accepting that the procedural path chosen was the correct one, the exception of unconstitutionality is found to be inadmissible from another point of view as well, i.e. that Article 277 (2) of the Civil Code did not apply to the case under Article 29 (1) of Law no. 47/1992, and that Article 277 (4) of the Civil Code raised problems of interpretation and implementation with regard to the European law that it refers to.

23. To this effect, it is noted that the Decision of the Constitutional Court no. 534 of 18 July 2018 stated that the provisions of Article 277 (2) and (4) of the Civil Code were constitutional "to the extent that they granted the right of residence on 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 third-country nationals – of same-sex marriages, entered into or contracted in a Member State of the European Union". Thus, in fact, same-sex marriages concluded abroad are recognised with limited effects, precisely by including Article 277 (2) in the abovementioned operative part. Or, in order to grant the right of residence, as requested in the application initiating proceedings, **there was no need for an implicit recognition of the marriage thus concluded**, which could remain a state of affairs within the domestic order, to which the legislator associated the possibility of obtaining the right of residence. It is found that Article 277 (2) of the Civil Code is not directly related to the right of residence, but expresses **a public order requirement**, whose setting falls within the margin of appreciation of the State and which falls within the exclusive competence of the legislator. Therefore, **Article 277 (2) of the Civil Code is not intrinsically linked to Article 21 (1) of the Treaty**, which states only with regard to the freedom of movement within the European Union, without ordering, in any way, the removal of the requirements set by the State when defining marriage.

24. Para. 45 of the Judgment of the Court of Justice of the European Union refers to "the obligation for a Member State to recognise 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 […]. 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". By examining this recital of the judgement, it is found that it does not order the Member State to recognise such marriages, but only the right of residence; thus, the phrase "*the obligation to recognise such marriages*" in the final part of the abovementioned recital does not enshrine or orders the State to recognise such a marriage and, subsequently, to grant, based on this recognition, only the right of residence, but it orders the State to recognise the right of residence derived from an extraneous legal fact, even if this legal fact cannot be turned into a nationally recognised legal act. So, this is how this recital must be interpreted;

any other interpretation would distort the abovementioned recital and would create a true antinomy between the grounds in the judgment of the Court of Justice of the European Union, because it would imply that it is accepted that the Member States are free to decide whether or not to allow marriage for persons of the same sex (para. 37), but, at the same time, the State must recognise a same-sex marriage concluded in another Member State in accordance with the law of that State (para. 45). Consequently, we deem that it is the right of any Member State to regulate the legal mechanisms necessary for ensuring the right of residence of same-sex persons having concluded marriage in another Member State, in accordance with the law of that State, which cannot be forced in any way to recognise such marriages under the abovementioned judgement.

25. Therefore, Article 277 (2) of the Civil Code does not apply to the settlement of the case, from the perspective of the plaintiffs' claims, so that the exception of unconstitutionality concerning it should had been dismissed as inadmissible. Furthermore, from this perspective, the entire exception of unconstitutionality was inadmissible, as it was up to the competent court of law to apply Article 277 (4) of the Civil Code, according to which "*The legal provisions concerning the freedom of movement of the citizens of the Member States of the European Union and the European Economic Area on Romania's territory remain applicable*", in accordance with Article 21 (1) of the Treaty. To this effect, it is noted that, in fact, Article 277 (4) of the Civil Code is a referring standard[5], which, in itself, does not include any specific regulatory provision, but only a reference precisely to Article 21 in the Treaty, so that, in principle, it was up to the competent court of law to apply this piece of European law in the case *a quo.*

26. Moreover, the decision delivered interferes in an unlawful manner with the Decision of the Constitutional Court no. 580 of 20 July 2016, published in the Official Gazette of Romania, Part I, no. 857 of 27 October 2016, by which the Court indicated that the will of the original framers was to establish the constitutionality of an initiative for the revision of the Constitution, according to which **marriage** could be concluded between a man and a woman; or, through this decision, the Court accepts that a marriage concluded abroad between persons of the same sex **shall be recognised in Romania as a marriage**, but with "limited effects", which is contrary to Article 48 and to Article 147 (4) of the Constitution.

27. Consequently, following this decision of the Constitutional Court and considering the way in which its operative part is worded, the national authorities shall be bound to transcribe the marriage certificate obtained abroad, and the transcribed certificate shall be used exclusively for being granted a right of residence. **Or, we consider that, for the mere granting of a right of residence, there was no need to deliver an interpretative decision regarding Article 277 (2) and (4) of the Civil Code.**

28. We restate the fact that the legal texts based on which this decision was delivered cannot be deemed unconstitutional. **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**, as previously indicated. Or, by not complying with these two essential aspects, a decision of admission was delivered referring to a series of legal texts that were not applicable to the

[5] Concerning the standards of reference, through Decision no. 82 of 20 September 1995, published in the Official Gazette of Romania, Part I, no. 58 of 19 March 1996, or through Decision no. 405 of 15 June 2016, published in the Official Gazette of Romania, Part I, no. 517 of 8 July 2016, para. 87, the Court stated that referring from one text of law to the other, within the same regulatory act or in a different regulatory act, was often used for achieving the optimal use of the resources. In order to avoid repetition on every occasion, the legislator can refer to a different legal provision, expressly setting certain regulatory provisions. The effect of the referring provision consists in the ideal inclusion of the provisions referred to within the referring standard. This leads to an achievement of the ideal content of the referring standard with the provisions of the other text. Without such a process, the legislator would have obviously included this text in the written form of the referring text.

settlement of the plaintiffs' claims.

29. Considering all the above, we deem that, in this case, **the exception of unconstitutionality of the provisions of Article 277 (2) and (4) of the Civil Code should have been dismissed as inadmissible, on the one hand, under Article 29 (1) of Law no. 47/1992, as it did not apply to the settlement of the case, and, on the other hand, under Article 2 (1) of Law no. 47/1992, read in conjunction with Article 126 (1) of the Constitution, because, 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.**

Judge,
Prof. dr. **Mona-Maria Pivniceru**

DISSENTING OPINION

Contrary to the solution of admission adopted, by a majority vote, through Decision no. 534 of 18 July 2018, we consider that the exception of unconstitutionality in this case-file should have been dismissed as inadmissible, for the reasons below.

1. The dispute subject to settlement by the court of law had as legal base Government Emergency Ordinance no. 102/2005[1] and Government Emergency Ordinance no. 194/2002[2], regulations that prohibit natural persons outside the European Union, the European Economic Area and the citizens of the Swiss Confederation from residing in our country for more than three months. Within this dispute between the plaintiffs and the General Inspectorate for Immigrations, the authors of the exception invoked the unconstitutionality of the provisions of Article 277 (2) and (4) of the Civil Code, claiming that, because of these legal standards – prohibiting same-sex marriages from being concluded in Romania and, respectively, not recognising the marriages concluded abroad between such persons – a third-country national (USA), who the Romanian national married in a Member State of the European Union, cannot be granted the right of residence.

2. The Constitutional Court, by a majority vote, adopted the decision to address to the Court of Justice of the European Union (*CJEU*) four questions for a preliminary ruling. By answering the first two questions, the CJEU stated that **State authorities should ensure the implementation of the provisions of Article 21** (on the freedom of movement of individuals in the European Union) **of the Treaty on the Functioning of the European Union**, by interpreting it as follows: (1) *"In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence […] in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State,* ***Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not***

[1] Government Emergency Ordinance no. 102/2005 on the free movement on the territory of Romania of citizens of the European Union and the European Economic Area and of the Swiss Confederation, republished in the Official Gazette of Romania, Part I, no. 774 of 2 November 2011, is the regulation that transposes Directive 2004/38/EC in the domestic legislation.

[2] Government Emergency Ordinance no. 194/2002 on the regime of aliens in Romania was republished in the Official Gazette of Romania, Part I, no. 421 of 5 June 2008.

recognise marriage between persons of the same sex." (s.n.). (2) *"**Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months.** That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38."*

3. It is **indisputable** that **both the provisions of the TFEU and the judgment of the CJEU must be observed and implemented unconditionally, but it is up to the court of law to duly and directly apply the provisions above,** court that – by being a public State authority (according to Section 1 of Chapter VI of Title III of the Constitution) – **is perfectly entitled to implement the provisions of the TFEU** as interpreted by the Court of Justice of the European Union, all the more so as the **judgment of the CJEU orders "State authorities" to implement the provisions of Article 21 (1) TFEU in the interpretation indicated, and the direct application of the provisions of the TFEU to this case, instead of the opposite domestic provisions, is the exclusive prerogative of the court of law and not of the Constitutional Court.** Thus, after reading the judgment of the CJEU delivered in the case pending before the Constitutional Court, **the court of law shall retain as a legal fact[3] the marriage concluded by the plaintiffs in a Member State of the European Union** and, consequently, it ca order – in this case – the application of the provisions of Article 21 TFEU, so as to order the General Inspectorate for Immigration to grant the right of residence in Romania, for more than three months, to a third-country national, married to a Romanian national. The prerogative of the court of law to order the direct application of the provisions of the TFEU to a dispute based on domestic legal standards expressly results from the constitutional provisions of Article 11 (1) and (2)[4], as well as from those of Article 148 (2) and (4)[5].

4. Thus, the observance of the European law and of the case-law of the CJEU can and must be ensured through the direct application, by the court of law, of the provisions of Article 21 TFEU to this case, without affecting the provisions of Article 277 of the Civil Code, which are not likely to prevent a court of law from directly applying a European regulation, if the domestic legal provision is contrary thereto[6]. Moreover, the provisions of Article 277 (2) and (4) of the Civil Code are not directly related to the subject-matter of the dispute in which the exception of unconstitutionality was raised (see point 1 of this dissenting opinion).

5. In conclusion, we note that – in this case – the fact of making the constitutionality of the provisions of Article 277 of the Civil Code conditional upon the granting of the right of residence to a third-country national (even married, in a different State, to a Romanian national) is not only senseless, but also damaging, because the judgment of the CJEU orders only the implementation of the provisions of Article 21 TFEU as interpreted for this case, i.e. the granting of a right of residence in Romania to a third-country national for more than three

---

[3] Legal facts are situations that, according to the law, generate, modify or terminate legal relationships and, as such, generate, modify or terminate subjective rights or obligations (see: M. N. Costin, C. M. Costin, Dicționar de drept civil de la A la Z, Hamangiu Publishing House, Bucharest, 2007, pp. 456—457; M. Mureșan, Dicționar de drept civil, Cordial Lex Publishing House Cluj-Napoca, 2009, pp. 320—321).

[4] According to Article 11 of the Constitution: "(1) The Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties to which it is a party. (2) Once ratified by Parliament according to the law, the treaties are part of the domestic law."

[5] According to Article 148 of the Basic Law: "(2) Following accession, the provisions of the Founding Treaties of the European Union, as well the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession document. [...] (4) The Parliament, the President of Romania, the Government and the judicial authority shall guarantee that the obligations resulting from the accession instrument and the provisions of paragraph (2) are put into effect."

[6] In this case, the opposite domestic legal provision is the one in Government Emergency Ordinance no. 102/2005, cit. supra.

months, which suggests that the violation of the provisions of Article 277 of the Civil Code (limitation/mitigation of the effects of the respective legal provisions) is void. Besides, it does not result from the judgment of the CJEU that the provisions of Article 277 of the Civil Code requested any type of constitutional interpretation in order to apply Article 21 TFEU to the dispute subject to settlement. In other words, we deem that the judgment of the CJEU in this case is revealing/significant as indicated above and it supports/strengthens our opinion that the exception of unconstitutionality of the abovementioned provisions of the Civil Code **had to be dismissed as inadmissible**, as these were not inextricably linked to the settlement of the dispute between the plaintiffs and the General Inspectorate for Immigration.

Judges,

Mircea Ștefan Minea
Petre Lăzăroiu