THE JUDICIAL INTERDICTION. SPECIAL REVIEW ON THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT

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Abstract

Prior to the entry into force of the new Codes, Civil and Civil Procedure, the institution of judicial interdiction was regulated in terms of substantive conditions and effects, by Title III, Chapter 2, Articles 142 - 151 of the Family Code, and the interdiction procedure was regulated in Chapter 3, first section, Articles 30 - 35 of Decree no. 32/1954 for the implementation of the Family Code and the Decree on natural and legal persons. Currently, the seat of the matter is, in terms of substantive conditions and effects in Book I, Title III, Chapter III, Articles 164 - 177 of the Civil Code, and in terms of procedural conditions in Book VI, Title II, Articles 936 - 943 of the Code of Civil Procedure, in essence the current legal provisions resuming the old regulation in the matter. In this study, we set out to analyze the substantive rules and procedure of judicial interdiction, as well as an examination of the jurisprudence of the Constitutional Court in the matter. From the short list of decisions of the Constitutional Court regarding the judicial interdiction, of particular interest is the recent Decision no. 601 of July 16, 2020 regarding the exception of unconstitutionality of the provisions of Article 164 paragraph (1) of the Civil Code, published in the Official Gazette of Romania no. 88 of January 27, 2021.

Keywords: *Civil Code; Code of Civil Procedure; the jurisprudence of the Constitutional Court; the judicial interdiction; human dignity.*

1. Introduction

As shown in a recent situation analysis[1], in the EU population, mental illness affects every fourth citizen and can lead to suicide; mental illness causes significant losses to economic, social, educational, and justice systems; there is still stigma, discrimination and disrespect for the human rights and dignity of people with mental illness and disability. According to the data provided by National Center for Statistics and Informatics in Public Health - National Institute of Public Health, in Romania, in 2019, 229,903 patients were registered by the family doctor with the diagnosis "Mental Illness", increasing compared to the previous year when 218,010 patients were recorded.

Thus, the recent jurisprudence of the Constitutional Court of Romania on the protection of the mentally ill by judicial interdiction is very important. Our study proposes an examination of the jurisprudence of the Court. Although the case law of the Court is not rich in this matter, Decision no. 601/2020, recently published, is of particular interest. We will also analyze the substantive rules and the procedure of placing under judicial interdiction, aspects for which we refer to the vast already existing legal literature[2].

2. Considerations regarding the judicial interdiction

In the literature, the judicial interdiction is defined as the measure of protection of the natural person lacking the necessary discernment to take care of his interests, due to the alienation or mental debility, which is ordered by the court and it consists in the deprivation of the one protected by the capacity to exercise and the institution of guardianship[3].

Prior to the entry into force of the new Codes, Civil and Civil Procedure, the institution of judicial interdiction was regulated in terms of substantive conditions and effects, by Title III, Chapter 2, Articles

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[1] The Ministry of Health, the National Institute of Public Health, the National Center for Health Assessment and Promotion, the Sibiu Regional Center for Public Health, "Sănătate mintală. Analiză de situație", 2021, http://insp.gov.ro/sites/cnepss/date-statistice-sanatatea-mintala/.

[2] To develop, see: Gheorghe Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil* (Bucharest: U.J. Publishing House, 2005), 387-93; Eugen Chelaru, *Drept civil. Persoanele* (Bucharest: C.H.Beck Publishing House, 2020), 178-84; Marian Nicolae (coordinator), Vasile Bîcu, George-Alexandru Ilie, and Radu Rizoiu, *Drept civil. Persoanele* (Bucharest: U.J. Publishing House, 2016), 239-51; Gabriel Boroi, Carla Alexandra Anghelescu, and Ioana Nicolae, *Fișe de drept civil. Partea generală. Persoanele. Familia. Drepturile reale principale*, 5th edition (Bucharest: Hamangiu Publishing House, 2020), 271-79; Flavius Antoniu Baias, Eugen Chelaru, Radu Constantinovici, and Ioan Macovei (coordinators), *Noul Cod civil. Comentariu pe articole Art. 1 - 2664* (Bucharest: C.H.Beck Publishing House, 2012), 155-63; Ioan Leș and Călina Jugastru (coordinators), *Tratat de drept procesual civil,* Vol. II (Bucharest: U.J. Publishing House, 2020), 255 - 63; Gheorghe Piperea, Cătălin Antonache, Petre Piperea, Alexandru Dimitriu, Irina Sorescu, Mirela Piperea, and Alexandru Rățoi, *Codul de procedură civilă. Comentarii și explicații* (Bucharest: C.H.Beck Publishing House, 2020), 1728-34; Andreea Tabacu, *Drept procesual civil. Legislație internă și internațională. Doctrină și jurisprudență* (Bucharest: U.J. Publishing House, 2019), 542-44; Gabriel Boroi and Mirela Stancu, *Drept procesual civil,* 5th edition (Bucharest: Hamangiu Publishing House, 2020), 962-67; Cezara Chirică, "Ocrotirea anumitor persoane fizice prin măsura punerii sub interdicție în lumina dispozițiilor noului Cod Civil și a Noului Cod de Procedură Civilă", *Dreptul*, no. 1(2012): 26-59; Maria Fodor, "Punerea sub interdicție în reglementarea noului Cod Civil și a Noului Cod de Procedură Civilă", *Dreptul*, no. 5(2013): 29-47.

[3] Chelaru, *Drept civil. Persoanele*, 179.

142 - 151 of the Family Code[4], and the interdiction procedure was regulated in Chapter 3, first section, Articles 30 - 35 of the Decree no. 32/1954 for the implementation of the Family Code and the Decree on natural and legal persons[5].

Currently, the seat of the matter is, in terms of substantive conditions and effects in Book I, Title III, Chapter III, Articles 164 - 177 of the Civil Code[6], and in terms of procedural conditions in Book VI, Title II, Articles 936 - 943 of the Code of Civil Procedure[7], in essence the current legal provisions resuming the old regulation in the matter, aspect criticized in the doctrine, where it was rightly referred to the regulations in the field of other legal systems that, "unfortunately, our legislator lost the chance to introduce a modern regulation in this field, which would correspond as well as possible to the needs of the various categories of vulnerable persons"[8].

The judicial interdiction must be distinguished from the regulation dedicated to the protection of persons with mental disorders by Law no. 487/2002, republished, which provides for the rights of persons with mental disorders and the procedure of hospitalization in a psychiatric unit (voluntary hospitalization and involuntary hospitalization). In the sense of Law no. 487/2002, the person with mental disorders, covered by this normative act, is the person with mental imbalance or insufficiently developed mentally or dependent on psychoactive substances, whose manifestations fall within the diagnostic criteria in force in psychiatric practice. The person subject to the protection measures provided by Law no. 487/2002, republished, may or may not be judicial interdicted.

Thus, the protection measures provided by Law no. 487/2002, republished, applies to persons with mental disorders, have no influence on the exercise capacity of the protected person[9] and are decided administratively by the medical authority, the court having only the role of resolving any complaints made against the measures thus ordered.

Instead, the judicial interdiction can be instituted only by the court and produces two effects: *1)* the interdicted is totally deprived of capacity to exercise and *2)* the establishment of guardianship of the interdicted[10], which implies a legal regime of representation of the interdicted by the guardian, no just a simple assist.

Not every cause of lack of discernment[11], in regard to the care of one's own interests, can lead to interdiction, but only that which is due to mental alienation or mental debility[12]. It should be emphasized that in Romanian law, the measure of placing under judicial interdiction is not ordered for any mental illness, but only in the case of mental alienation and mental debility defined by Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code[13] as *"a mental illness or mental disability that determines a person's mental incompetence to act critically and predictively on the social-legal consequences that may arise from the exercise of civil rights and obligations"* (our emphasis).

In addition, we point out that under the rule of both current and old regulations, no other cause that could prevent a natural person from taking care of his interests, such as illness, old age or physical infirmity, can lead to judicial interdiction, in the situations enunciated previously to the respective person, a trustee may be appointed, under the conditions stipulated by Articles 178 - 185 of the Civil Code, if he gives his consent in this respect; or, according to Article 181 of the Civil Code, the establishment of the trusteeship does not affect the capacity of the person the trustee represents.

As a novelty, we point out the establishment by the provisions of Article 166 of the Civil Code, following the model of other modern legislation[14], of the so-called "dative guardianship" which allows the appointment of the guardian even by the beneficiary of the protection measure. Thus, Article 166 of the Civil Code provides: *"Any person who has full capacity to exercise may designate by unilateral act or mandate contract, concluded in authentic form, the person to be appointed guardian to take care of the person and his property in if it were interdicted. The provisions of Article 114 (3) to (5) shall apply accordingly"* (emphasis added).

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[4] Republished in the Official Gazette no. 13 of April 18, 1956.

[5] Published in the Bulletin Office no. 32 of January 31, 1954.

[6] Republished in the Official Gazette no. 505 of July 15, 2011.

[7] Republished under Article XIV of Law no. 138/2014 for the amendment and completion of Law no. 134/2010 on the Code of Civil Procedure, as well as for amending and supplementing related normative acts, published in the Official Gazette no. 753 of October 16, 2014, giving the texts a new number.

[8] Chirică, "Ocrotirea anumitor persoane fizice prin măsura punerii sub interdicție judecătorească în lumina dispozițiilor noului Cod Civil și a noului Cod de Procedură Civilă", 59.

[9] Article 68 paragraph (3) of Law no. 487/2002, republished, stipulates: *"Involuntary hospitalization is not a cause of restriction of the patient's legal capacity".*

[10] According to Article 170 of the Civil Code, *"By the decision to place under interdiction, the guardianship court immediately appoints a guardian for the protection of the one placed under judicial interdiction. The provisions of Articles 114 to 120 shall apply accordingly".* The guardianship of the interdicted person is assimilated to the guardianship of the minor who has not reached the age of 14, insofar as the law does not provide otherwise [Article 171 of the Civil Code].

[11] Article 5 letter k) of Law no. 487/2002, republished, defines the consent as a component of the psychic capacity, which refers to a certain deed and from which derives the possibility of the respective person to appreciate the content and the consequences of this deed. Discernment is a state of fact (status facti), as opposed to civil capacity which is a state of law (status iuris).

[12] Nicolae (coordinator), Bîcu, Ilie, and Rizoiu, *Drept civil. Persoanele,* 242.

[13] Published in the Official Gazette no. 409 of June 10, 2011.

[14] In this regard, the legislation of Quebec and France.

The request for interdiction of a person may be formulated by the persons mentioned by Article 111 of the Civil Code, respectively: persons close to the one under judicial interdiction, as well as the administrators and tenants of the house where the minor lives; the local community public service for the registration of persons, on the occasion of the registration of the death of a person, on the occasion of the opening of a succession procedure; the courts, on the occasion of the conviction to the criminal punishment of the prohibition of parental rights; local public administration bodies, protection institutions, as well as any other person.

As regards the competent court, according to Article 936 of the Code of Civil Procedure, the application for the judicial interdiction of a person is resolved by the court of guardianship in whose district he has his domicile.

From a material point of view, jurisdiction lies with the court in accordance with Article 94 (1) (a) of the Code of Civil Procedure.

The request for judicial interdiction shall include, in addition to the elements provided for by common law in Article 194 of the Code of Civil Procedure, the facts resulting from the alienation or mental debility of the person concerned, as well as the proposed evidence [Article 937 of the Code of Civil Procedure]; it is formulated in contradiction with the person in respect of whom the measure is requested.

The phases of the prohibition procedure that we will refer to below are: the non-contradictory phase and the contradictory phase.

Thus, after receiving the request, the president of the court will order the communication of copies of the request and of the documents attached to the one whose judicial interdiction was requested, as well as to the prosecutor, when the request was not submitted by him.

According to Article 938 paragraph (2) of the Code of Civil Procedure, the prosecutor will carry out the following steps: conducting investigations into the person whose interdiction is requested, including hearing the family members of the person concerned (social investigation, conducted by the mayor's office from the domicile of the data subject and the preparation of the corresponding report, at the request of the prosecutor)[15], will take the opinion of a commission of specialist doctors, and if the one whose placement under judicial interdiction is required is hospitalized in a health unit, takes its opinion.

Where appropriate, the President of the Court shall also order the appointment of a trustee, the appointment procedure being regulated by Article 178 - 187 of the Civil Code. If the defendant's state of health prevents his personal presentation, the appointment of the trustee is mandatory for representation in court.

Article 939 of the Code of Civil Procedure provides that, once the opinion of the board of specialists or the health unit has been submitted, the court may find that it is necessary to observe the mental state of the defendant for a longer period. If the observation cannot be made otherwise, the court may order the temporary hospitalization, for a period of maximum 6 weeks, in a specialized unit.

After receiving the result of the prosecutor's investigations, the opinion of the commission of medical specialists and, where appropriate, of the health unit, the court sets a deadline for judging the request, ordering the summoning of the parties.

Concerning the hearing of the person whose judicial interdiction is requested, Article 940 paragraph (2) of the Code of Civil Procedure provides that at trial, the court is obliged to hear him, asking him questions to ascertain the mental state of the defendant. It should be noted that the hearing will take place in court, and if this is not possible, he will be heard at the place where he is.

According to Article 940 paragraph (3) of the Code of Civil Procedure, the participation of the prosecutor in the trial is mandatory.

As regards remedies, we specify that the sentence pronounced in question can be appealed exclusively within 30 days from the communication, as it results from the provisions of Article 94 point 1 letter a) of the Code of Civil Procedure, corroborated with Article 483 paragraph (2) of the same Code.

As a novelty, we show that the provisions of Article 941 of the Code of Civil Procedure have modernized the advertising system to achieve the opposability to third parties of the measure, in order to increase the sphere of the institutions receiving the communication of the operative part of the final decision in a certified copy compared to the previous regulation, Article 144 paragraph (2) of the Family Code according to which: *"After it has become final, the decision will be communicated without delay by the court that issued it the one placed under interdiction was registered, to be transcribed in the register specifically intended"* (our emphasis). The institutions listed in the current regulation are the following: the local community public service for the registration of persons with whom the birth of a person under judicial interdiction is registered, in order to make a mention on the birth certificate; the competent health service, so that it establishes on the person placed under judicial interdiction, according to the law, a permanent supervision; the competent real estate cadastre and advertising office, for notation in the land book, when applicable; trade register, if the person placed under judicial interdiction is a professional. It must be said that after the judgment of interdiction becomes final, its communication will be made by the court that pronounced it, i.e. either the first instance or the appellate court.

For the purposes of Article 941 paragraph (3) of the Code of Civil Procedure, if the request for judicial

[15] Piperea, Antonache, Piperea, Dimitriu, Sorescu, Piperea and Rățoi, Codul de procedură civilă. Comentarii și explicații, 1731.

interdiction has been rejected, the trusteeship established during the trial shall cease by right.

If the cases that caused the judicial interdiction have ceased, the court will decide to lift it, the applicable rules of procedure being the same as those of the interdiction[16]. It should be noted that the request for lifting the interdiction is made by the interdicted person, the guardian and the persons provided for in Article 111 of the Civil Code.

According to Article 943 paragraph (2) of the Code of Civil Procedure, the lifting of the judicial interdiction is mentioned on the decision to put under interdiction. However, the termination of the guardian's right of representation may not be opposed to a third party until the date of completion of the publicity formalities provided for in the Code of Civil Procedure, unless the third party has experienced the lifting of the interdiction in another way. In other words, the right of the guardian to represent the person under interdiction shall cease only from the date on which the appropriate registration on the birth certificate of the person under interdiction is made, as regards the third party who did not know the lifting of the interdiction, of noting the lifting of the interdiction in the land book or of the corresponding mention in the trade register, if the person under judicial interdiction is a professional[17].

3. The jurisprudence of the Constitutional Court regarding the judicial interdiction

Regarding the old regulation in the matter of judicial interdiction, the court of constitutional contentious ruled by Decision no. 226/2003[18]. In the motivation of the decision to reject the exception of unconstitutionality of the provisions of Articles 30 - 35 of Decree no. 32/1954 for the implementation of the Family Code and the Decree on natural persons and the provisions of Articles 43 - 45 of the Code of Civil Procedure, the Court held that the measure of interdiction of a natural person is provided in the situation where, as following an extensive and complex legal investigation, the court seized is convinced that the person lacks the necessary discernment to take care of his own interests. The Court also stated that by the effect of judicial interdiction, it is completely deprived of the capacity to exercise, being assimilated to the minor until the age of 14, having the possibility to capitalize on his capacity to use exclusively by his representation at the conclusion of legal acts, by the guardian. The court of constitutional contention has shown that this measure does not constitute a sanction, but has an obvious purpose of protection of both the natural person who is thus sheltered from the harmful consequences of their own acts, consequences which, due to lack of discernment do not - could foresee, as well as the society, as a whole, the rules of which could be seriously disrupted by maintaining the full exercise of the rights of such a person. Next, it was pointed out that, in view of the particularly drastic consequences of the interdiction - the lack of capacity to exercise and the imposition of guardianship of the interdicted person -, the legislator has established a procedure that offers sufficient guarantees to prevent and annihilate possible abuses in this matter, so that only the court has the power to decide to put the person under interdiction. Thus, as the Court stated, the procedure of judicial interdiction it can be initiated by any interested person and comprises two phases, the non-contradictory phase, in which the necessary investigations are carried out to establish the factual situation and the contradictory phase, which takes the form of an ordinary civil process, based on evidence administered by the court. By the same decision, the Court found that the legal texts deduced from the review of constitutionality only express the requirements of guaranteeing the fundamental rights and freedoms of the person and consequently do not contradict the provisions of Article 16 paragraph (1), Article 21 paragraph (1) and (2), Article 26 paragraph (1) and (2) and Article 30 paragraph (1) of the Constitution invoked in the motivation of the exception of unconstitutionality.

Article 938 paragraph (2) of the Code of Civil Procedure provides: "The prosecutor, directly or through the police, will carry out the necessary investigations, will get the approval of a commission of medical specialists, and if the one whose judicial interdiction is required is hospitalized in a health unit, he will also get its approval". By Decision no. 736/2017[19] to be summarized, the Constitutional Court rejected the exception of unconstitutionality and found that the provisions of Article 938 paragraph (2) of the Code of Civil Procedure are constitutional in relation to the criticisms made.

In order to decide thus, the Court first noted that Article 938 of the Code of Civil Procedure with the marginal name *"Preliminary Measures"* rules on the obligation to communicate the request of the person whose interdiction is requested, as well as to the prosecutor [paragraph (1)]; conducting preliminary investigations by the prosecutor directly or through the police [paragraph (2)]; the appointment of a special trustee [paragraph (3)]; and are part of the special procedure for placing under judicial interdiction regulated by Article 936 - 943 of the Code of Civil Procedure.

Distinct from the reference made to those retained by the Court in the Decision no. 226/2003, it was shown that in the interdiction procedure, the prosecutor has an important role, given that he can initiate any civil action, whenever necessary to defend the rights and legitimate interests of minors, of persons under

[16] Article 943 paragraph (1) of the Code of Civil Procedure.
[17] In this sense, Boroi and Stancu, Drept procesual civil, 967.
[18] Published in the Official Gazette no. 458 of June 27, 2003.
[19] Published in the Official Gazette no. 326 of April 13, 2018.

interdiction and of the missing, as well as in other cases expressly provided by law[20], and the measures established by Article 938 paragraph (2) of the Code of Civil Procedure are a necessary guarantee for the observance of the rights of the person whose interdiction is requested. The Court further stated that the President of the Court is obliged to take measures to ensure that the application for interdiction and the attached documents are communicated to the person concerned and to the prosecutor, and the prosecutor is obliged to carry out the necessary investigations to verify the situations are invoked in the request for interdiction, obligations that fall within the non-contradictory phase of the procedure, in which the investigations necessary to establish the factual situation are carried out.

In the reasoning of the decision, it was also noted that prior to the trial, the prosecutor must conduct the necessary investigations, obtain the opinion of a board of specialists and, where appropriate, the opinion of the health unit, if the person is hospitalized and concluded that this does not contravene to constitutional provisions that were invoked by the author of the exception of unconstitutionality. In the Court's view, the legislative solution criticized is a natural one in the context in which at this stage of the proceedings the substance of the dispute is not settled, but only the necessary measures are taken for the proper administration of the act of justice. The Court explained that the documents drawn up and obtained by the prosecutor are to be communicated by him to the court in order to fix the first trial term, under the conditions of Article 940 of the Code of Civil Procedure. The Constitutional Court has ruled that the establishment of a pretrial stage is not contrary to the principle of free access to justice, as long as the acts and measures ordered by the prosecutor are to be subject to the control of the court.

Next, the Court explained that the criticized legal provisions represent procedural norms, the regulation of which is the exclusive competence of the legislator, who may establish, in view of special situations, special rules of procedure, according to Article 126 paragraph (2) of the Constitution. Thus, the legislator can assign certain competencies to the prosecutor in the civil process, even if the attributions of the Public Ministry are exercised, mainly, in the criminal judicial activity.

Also, regarding the phrase *"necessary research*", from the content of Article 938 paragraph (2) of the Code of Civil Procedure, criticized for the lack of predictability, the Court argued that the text does not make an express determination of them, but obviously refers to the checks carried out in relation to the person whose interdiction is resolved, with regarding the facts presented in the request for interdiction and the proposed evidence, and the prosecutor will assess concretely on the investigative activities that need to be carried out and concluded that the legal provisions criticized are accurate and predictable. Continuing the argument, regarding the criticism according to which the text of the law gives the possibility to the representative of the Public Ministry to delegate the competence to the police, it was noted that this is not a relationship of subordination of police to the prosecutor, because according to Article 2 of Law no. 218/2002 on the organization and functioning of the Romanian police[21], the activity of the Romanian Police constitutes a specialized public service and is performed in the interest of the person, of the community, as well as in support of state institutions, exclusively on the basis of and in law enforcement. In addition, the Constitutional Court has also shown that the purpose of the prosecutor's action is not to obtain for a party the satisfaction of a claim, but, as a representative of the general interests of society, defends the rule of law, the rights and freedoms of citizens, fulfilling a constitutional role enshrined in Article 131 of the Constitution.

By the same decision, the Court ruled that it could not be detained either the alleged contradiction of the provisions criticized with Article 126 paragraph (1) of the Constitution because the placing under interdiction is carried out by the court, which, based on the evidence administered, will decide the admission or rejection of the application.

Recently, by Decision no. 795/2020[22], the Court found the unconstitutionality of the provisions of Article 299 paragraph (3) of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code[23] according to which: "*(3) Until the date of entry into force of the regulation provided in para. (1), the attributions of the guardianship court regarding the exercise of guardianship regarding the assets of the minor or the judicial interdicted person, as the case may be, regarding the supervision of the way the guardian administers his assets belong to the guardianship authority*"(our emphasis). The legal provisions that were the object of the exception of unconstitutionality refer to Article 229 paragraph (1) of the same normative act, according to which: *"(1) The organization, functioning and attributions of the guardianship and family court are established by the law on judicial organization"* (our emphasis).

With regard to the exception with the analysis of which it was invested, the court of constitutional contentious recalled that according to Article 158 - 160 of the Family Code of 1953, repealed by Article 230 letter m) of Law no. 71/2011, the attributions of guardianship authority belong to the executive and disposition bodies of the local, communal, city, municipal or sector councils of the municipality of Bucharest, which is competent, among others, in the

[20] Article 92 paragraph (1) of the Code of Civil Procedure.
[21] Republished in the Official Gazette no. 307 of April 25, 2014.
[22] Published in the Official Gazette no. 1299 of December 28, 2020.
[23] Published in the Official Gazette no. 409 of June 10, 2011.

exercise of the guardianship of the person placed under interdiction.

As the Constitutional Court recalled, Article 107 of the Civil Code of 2009, with the marginal name *"Court of guardianship"*, established the jurisdiction of a specialized court, the court of guardianship and family, with regard to the resolution of claims and proceedings in the matter of protection of the natural person.

The Court further held that the transitional rule criticized extends the powers of the guardianship authority to supervise the manner in which the guardian administers the assets of the interdicted person regulated by the Family Code, from the date of entry into force of the Civil Code, respectively 1 October 2011, until in force of the norms regarding the organization, functioning and attributions of the guardianship and family court, by the corresponding modification of Law no. 304/2004 regarding the judicial organization[24], normative act that at the date of pronouncing the Decision no. 795/2020 had not been completed in this regard.

The Constitutional Court specified that the transitional norm criticized temporarily assigns the attributions established by the Civil Code in charge of the guardianship court to an administrative body subordinated to the local public authority, respectively the guardianship authority, thus ensuring, for a determined period, the correlation between the old and the new regulation, respectively the Civil Code of 2009 and, respectively, the Family Code. Therefore, - the Court explained - during the criticized transitional norm, there is an ultra-activation of the legal provisions contained in the Family Code regarding the attributions of the guardianship authority regarding the control of the exercise of guardianship. Thus, in the absence of express regulation by law of the organization and functioning of a special court, replacing the guardianship authority, with regard to the latter's powers of control, guidance and decision relating to guardianship, the settlement of requests for interdiction, requests for the lifting of the interdiction measure, the requests for the replacement of the guardian, as well as the establishment of other protection measures were the competence of the sections or, as the case may be, at the control of the guardianship, respectively the inventory of the goods of the person placed under interdiction[25], the receipt of the annual report of the guardian, checks related to the administration of income and property, the report of psycho social investigation provided by Article 396 and the following of the Civil Code, necessary in the case of establishing the relations between the divorced parents and their minor children, except for the investigation provided by Article 508 paragraph (2) of the Civil Code, necessary in the case of the procedure of revocation of parental rights, which is resolved by the guardianship court, on the date of the decision by specialized panels for minors and family at the request of public administration authorities with responsibilities in child protection.

Continuing its argument, the Court noted that until the establishment of the guardianship court, the authorities and institutions with responsibilities in the field of protection of the rights of the child and the individual continue to exercise the powers provided by the regulations in force at the time of entry into force of the Civil Code, except for those given exclusively in the jurisdiction of the guardianship court, on that date panels or specialized sections for minors and family which does not agree with the purpose of the new regulation on the protection of natural persons established by the New Civil Code, which established a court specialized in fulfilling important duties in the field of personal protection, as well as decisions or solving problems related to the life of the natural person, such as those related to the capacity of the natural person[26], marriage[27], rights and property obligations of spouses[28], divorce, filiation, parental authority, maintenance obligation, co-ownership sharing, liberality capacity or the nullity of the contract concluded by a minor.

The Constitutional Court insisted that, given the increased role of the guardian in the measures of protection of the natural person, assigned to him by the provisions of Title III with the marginal name "*Protection of the natural person"* of the Civil Code of 2009, the legislator considered that it is necessary to replace the control attributions of the guardianship authority as an administrative institution, subordinated to the local public authority, with those of a specialized court, respectively the guardianship court. The Court also drew attention to the fact that given the importance of quickly identifying optimal solutions to the specific problems of a person for whom the judicial interdiction is resolved, the legislator expressly provided in Article 107 paragraph (2) of the Civil Code, the speedy settlement of claims for the jurisdiction of the guardianship court, in accordance with the constitutional principle of the right to a fair trial, conducted in an optimal and predictable time.

In the Court's view, the above issues were not compatible with the fact that the transitional situation persisted from the date of entry into force of the Civil Code, the lack of intervention of the legislator in the sense of regulation, by the law on judicial organization likely to contravene Article 1 paragraph (5) of the Constitution regarding the principle of legality, in its component regarding the quality of the law, as well as Article 124 of the Constitution on the administration of

[24] Republished in the Official Gazette no. 827 of September 13, 2005.
[25] Inventory subject to court approval.
[26] Article 40, 41, 44, 46 and Article 92 of the Civil Code.
[27] Article 272 and 274 of the Civil Code.
[28] Article 315, 316, 318, 322, 337, 368, 388 of the Civil Code.

justice, as it does not ensure a good administration of justice, by the lack of correlation with the substantive legal norms established in the Civil Code, thus perpetuating a transitional situation.

The Court noted that the lack of intervention of the legislator in establishing the rules on the organization of the court of guardianship, from the date of entry into force of the Civil Code was likely to distort the purpose of the law, namely to grant a court the powers exercised until the date of entry into force of an administrative authority, respectively the guardianship authority, considering the increased role of the tutor in the administration of the interdicted person's property, a role that requires effective control by a court that benefits from guarantees of impartiality and independence.

The Court also stated that given that the legislator expressly regulated the speedy settlement of requests for protection of the individual, in case of guardianship, with the consequence of failure to exercise civil rights, as well as the minority, lack of regulation of organization and functioning of the court of tutorship lacks efficiency the purpose of the legislator to involve the court in making decisions or solving problems related to the natural person, in all cases where the intervention of the court of guardianship is necessary.

In addition, the Court emphasized that maintaining sine die in the active fund of a transitional rule, contradicts the purpose of such a rule, to ensure, for a certain period, the correlation of two successive regulations, which is likely to violate the quality requirements of the law, guarantee of the principle of legality, by lack of predictability of regulation.

The Court also noted that, under the transitional rule criticized, an administrative body, subordinated to the local public authority or the guardianship authority, rules on the exercise of guardianship over the assets of the judicial interdicted person or, as the case may be, over the supervision the way in which the guardian administers his assets, without the interested party being able to contest the decision of the administrative body before the court, which contradicts Article 21 paragraph (1) of the Constitution on free access to justice.

By Decision no. 795/2020, the Court held that, pending the organization by law on the judicial organization of the court of guardianship, its special attributions regarding the exercise of guardianship over the property of the minor or the interdicted person or, as the case may be, regarding the supervision of which the guardian administers his property, are fulfilled by the courts, sections or, as the case may be, specialized panels for minors and family.

We signal the recent publication of Decision no. 601/2020[29], an extremely important decision in this matter since the Constitutional Court admitted the exception of unconstitutionality and found that the provisions of Article 164 paragraph (1) of the Civil Code are unconstitutional, which we will refer to below.

The object of the exception of unconstitutionality was represented by the provisions of Article 164 paragraph (1) of the Civil Code with the following content: *"(1) The person who does not have the necessary discernment to take care of his interests due to alienation or mental weakness, will be placed under interdiction"* (our emphasis).

We note that prior to the settlement of the case, at the deadlines of November 21, 2019 and January 21, 2020, the request was submitted to the Court of Justice of the European Union with a preliminary question under Article 267 of the Treaty on the Functioning of the European Union, respectively Article 412 paragraph (1) point 7 of the Code of Civil Procedure in conjunction with Article 3 paragraph (2) and Article 14 of Law no. 47/1992 on the organization and functioning of the Constitutional Court and the suspension of the trial of the national case, having as object the following three questions:

"1. It is the automatic revocation of the right to vote in elections to the European Parliament of a person suffering from a mental disorder, as a result of his being interdicted on the grounds that *"he does not have the necessary discernment to take care of his interests"* compatible with Article 39 paragraph 2 of the Charter of Fundamental Rights of the European Union, taking into account Article 12 of the Convention on the Rights of Persons with Disabilities?

It is the automatic forfeiture of the right to employ a person suffering from a mental illness, as a result of being interdicted on the grounds that "he does not have the necessary discernment to take care of his interests" a form of direct discrimination prohibited by Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment with regard to employment and occupation, having regard to Article 12 of the Convention on the Rights of Persons with Disabilities?

In case of a negative answer to question no. 2, is the automatic revocation of the right to employment of a person suffering from a mental illness, as an effect of being interdicted on the grounds that "he does not have the necessary discernment to take care of his interests" a form of indirect discrimination prohibited by Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment with regard to employment and occupation, having regard to Article 12 of the Convention on the Rights of Persons with Disabilities? "

Referring to the case law of the Court of Justice of the European Union which it used in its argument, the Constitutional Court held that the application to the Court of Justice of the European Union is unnecessary, as the questions referred are irrelevant and nor the relevance in question, so that it rejected the claim as unfounded.

[29] Published in the Official Gazette no. 88 of January 27, 2021.

The Court noted that the analyzed regulation establishes *a substitute regime*, so that the rights and obligations of the person placed under judicial interdiction will be exercised by a legal representative, regardless of the degree of impairment of the discernment of the person concerned, to the detriment of *a support regime* characterized by a support mechanism to be granted by the State according to the degree of impairment of the discernment. Next, the Constitutional Court analyzed whether the unconditional option for such a substitute regime complies with Article 50 of the Constitution and Article 12 of the Convention on the Rights of Persons with Disabilities.

Regarding Article 50 of the Constitution, the Constitutional Court stated that it enshrines the right of persons with disabilities to enjoy special protection, meaning that the state must ensure the implementation of a national policy of equal opportunities, prevention and treatment of disability, in order to ensure the effective participation of people with disabilities in community life. It was stated that this constitutional norm imposes on the legislator the positive obligation to regulate adequate measures so that persons with disabilities can exercise their fundamental rights, freedoms and duties, obligation of support and backing to come to their aid[30].

With regard to the Convention on the Rights of Persons with Disabilities[31], the Court noted that it aims to promote, protect and ensure the full and equal exercise of all fundamental human rights and freedoms by all persons with disabilities[32] and seeks to respect inalienable dignity and autonomy, including the freedom to make one's own choices and the person's independence[33].

Next, the Court referred to Article 12 of the Convention with the marginal name *"Equal recognition before the law"* as interpreted by the Committee on the Rights of Persons with Disabilities in General Comment no. 1/2014[34]. Thus, the Court recalled that Article 12 paragraph (2) of the Convention states that all persons with disabilities have the right to full legal capacity and that legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights and acquires a special significance for persons with disabilities when they must make fundamental decisions about their health, education and work. The Court also noted that Article 12 point (2) of the Convention recognizes that persons with disabilities enjoy legal capacity on an equal footing with other persons in all areas of life, and that legal capacity and mental capacity are distinct concepts. The Court also mentioned that pursuant to Article 12 point 3 of the Convention, the state has the obligation to take all appropriate measures to ensure the access of persons with disabilities to the support they would need in the exercise of their legal capacity. In addition, the Court noted that according to Article 12 point 4 of the Convention it is possible to apply protection measures to persons with disabilities, adapted to their particular situation, measures that will be proportionate to the degree to which they affect the rights and interests of the person and will be adapted to his situation and will respect the rights, the will and preferences of the person. The Court pointed out that in terms of the duration for which a protection measure is instituted and its periodic review, the Convention provides in Article 12 point 4 that a protection measure is applied for the shortest possible duration and is subject to review by a competent authority. Therefore, - the Court concluded - the Convention provides for certain safeguards which must accompany the measures of protection instituted against persons with disabilities.

Regarding the provision of guarantees that must accompany the protection measures, the Court also referred to the Recommendation no. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults[35]. We note that although the recommendations are not binding, they seek to approximate the laws of the Member States and are a means of directing[36]. As such, the Court referred to Principles 3 and 6 of Recommendation no. R (99) 4 of the Committee of Ministers of the Council of Europe which states that national legislation should, as far as possible, recognize that there may be different degrees of incapacity and that the incapacity may vary over time and, if necessary, a measure of protection, it must be proportionate to the degree of capacity of the data subject and adapted to his or her individual circumstances and needs. At the same time, the Court pointed out that Principle 14 point 1 of the Recommendation no. R (99) 4 of the Committee of Ministers of the Council of Europe provides for a

[30] See, in this respect, see also Decision no. 138 of March 13, 2019, published in the Official Gazette no. 375 of May 14, 2019, paragraph 60; Decision no. 681 of November 13, 2014, published in the Official Gazette no. 889 of December 8, 2014, paragraph 21.

[31] Adopted in New York by the General Assembly of the United Nations on 13 December 2006, opened for signature on 30 March 2007 and signed by Romania on 26 September 2007. Romania has ratified the Convention by Law no. 221/2010 published in the Official Gazette no. 792 of November 26, 2010.

[32] Article 1 of the Convention. By persons with disabilities, the text of the Convention means those persons who have lasting physical, mental, intellectual or sensory deficiencies, deficiencies which, in interaction with various barriers, may impede the full and effective participation of persons in society on an equal footing with others.

[33] Article 3 letter a) of the Convention.

[34] Available at: http://www.crj.ro/wp-content/uploads/2018/01/CRPD-Comentariu-General-art-12-RO.pdf. The purpose of the General Comment no. 1/2014 is to explore the general obligations deriving from the various components of Article 12 of the Convention on the Rights of Persons with Disabilities.

[35] Adopted by the Committe of Ministers on 23 February 1999 at the 660th meeting of the Ministers' Deputies.

[36] In this regard, Anamaria Groza, *Uniunea Europeană. Drept instituțional* (Bucharest: C.H.Beck Publishing House, 2008), 359.

limited duration of the protection measure and the establishment of a periodic review of it.

In view of the foregoing, in the recitals of the decision in paragraph 34, the Court held that, in order to respect the rights of persons with disabilities, any protection measure must be proportionate to the degree of capacity, be adapted to the person's life, be only if other measures cannot provide sufficient protection, take into account the will of the person, apply for the shortest period of time and be reviewed periodically.

Considering this normative framework and taking into account the fact that by regulating a special regime for the protection of persons with disabilities, the premise of respecting all their rights is created, the court of constitutional contention mentioned that in the conception of Article 12 of the Convention on the Rights of Persons with Disabilities, as this article has been interpreted by General Comment no. 1/2014, the legal capacity of the person is not confused with his mental capacity, being distinct concepts, and the perceived or real limitations in mental capacity should not be used as a justification for rejecting legal capacity.

The Court also noted that, "The Civil Code operates with absolute values in the sense that any potential impairment of mental capacity, regardless of its degree, may lead to a lack of capacity to exercise. (...) Thus, any partial / total, permanent / temporary limitation of mental capacity may inexorably lead to loss of capacity to exercise and limitation of civilian capacity, without the possibility of such a situation being avoided by necessary support measures" (our emphasis). As such, the Court found that "there is a paradigmatic mismatch between the Convention on the Rights of Persons with Disabilities and the Civil Code on protection measures to be taken in respect of persons with disabilities, the former falling within the scope of support measures and operating with intermediate values, while the latter placing itself in a regime of substitution and absolute values, refusing intermediate solutions adapted to the particular situation of each person"[37] (our emphasis).

Given that a person's lack of capacity to exercise and his exercise through a guardian is a particularly serious consequence of placing a person under judicial interdiction, the Court further examined whether the protection measure regulated by the legal provisions criticized are accompanied by sufficient guarantees, as provided for in the Convention on the Rights of Persons with Disabilities, which ensure the exercise of their legal capacity and, as a consequence, respect for the dignity of the person.

Thus, the Court observed that from the way of regulating the measure of placing under judicial interdiction by Article 164 paragraph (1) of the Civil Code does not show that it concerns the total lack of discernment of the person in relation to the multitude of interests he can manifest in different areas of life. Or, as the Constitutional Court rightly noted, although the person in question may manifest a conscious will in a certain field, by placing him under judicial interdiction he loses his capacity to exercise. It was criticized by the Constitutional Court that although the Convention on the Rights of Persons with Disabilities stipulates that a protection measure is established taking into account the existence of different degrees of capacity, Romanian legislation provides for restricted capacity to exercise only in respect of a minor aged 14 to 18[38], no and the restricted capacity of the adult who, as a result of being placed under judicial interdiction, will be completely deprived of it, the legal acts will be concluded, on his behalf, by a legal representative[39].

The Constitutional Court held that the effects of the restriction of capacity to exercise of a person more than necessary may place him, in terms of freedom of action in areas where he manifests a conscious will, in a situation of inequality with respect to other persons who are not under a protective measure, being free to exercise their rights and to exercise their freedoms, with consequences for the principle of equality. Given that there are different degrees of disability, and a person may have to a greater or lesser extent the discernment affected, but not completely abolished, in the Court's view, until a measure is ordered to restrict the person's capacity to exercise must be taken into account the imposition of alternative and less restrictive measures than the placing under judicial interdiction. Consequently, the Court said, in the absence of such alternative measures, it is for the legislature to identify and regulate mechanisms capable of providing the necessary support in making decisions based on the will and preference of those persons. In other words, the Court noted that as assumed by the ratification of the Convention on the Rights of Persons with Disabilities, the Romanian state must provide support in exercising legal capacity, through mechanisms based on the premise of respecting the rights, will and preferences of persons with disabilities and, only to the extent that the support thus provided proves to be ineffective should it regulate protection measures adapted to the particular situation of the persons. With these arguments, the Court concluded that *"a protection measure such as judicial interdiction should be regulated only as a last resort, as it is of extreme gravity involving the loss of civil rights as a whole and must be carefully considered each time, including whether other measures have proved ineffective in supporting the person's legal capacity. Therefore, the state must not give up its positive obligation resulting from the provisions of Article 50 of the Constitution and must provide all the necessary support to avoid such an extreme measure"*[40] (emphasis added).

[37] Decision of the Constitutional Court no. 601/2020, paragraphs 35 - 36.
[38] Articles 38 and 41 of the Civil Code.
[39] Article 43 paragraph (2) of the Civil Code.
[40] Decision of the Constitutional Court no. 601/2020, paragraph 39.

Continuing its reasoning, the Court noted that neither in terms of the duration for which the protection measure is imposed nor in terms of its regular review, the legal provision does not correspond to the international standards according to which a protection measure applies for the shortest period of time and shall be subject to regular review by a competent authority. The Court recalled that according to Article 177 paragraph (1) of the Civil Code, the interdiction and, implicitly, the guardianship, lasts until the cessation of the causes that caused them. According to the Court, this legal provision is a guarantee of substantial law, but stressed that in order for it not to be illusory, the legislator must guarantee its disposition over certain periods of time and to enable the assessment of the cessation of cases that led to the establishment measure. With regard to other legal systems, the Court has ruled that these time-limits must be characterized by the fact that they are short, predetermined, easily identifiable, flexible and without an excessive duration, allowing for a periodic review of measures in a mode efficient and consistent.

At the same time, the Court held that according to Article 940 paragraph (1) letter b) of the Code of Civil Procedure, the obligation of the court to communicate the decision of interdiction to the competent health service was regulated, so that it establishes a permanent supervision over the one placed under judicial interdiction, according to the law. Therefore, as the Court rightly pointed out, a person may be placed under judicial interdiction for an indefinite period of time, and permanent supervision of the health service does not necessarily imply a regular reassessment of the person's capacity, which is not unequivocally apparent from the national regulations. Therefore, it has been shown that the mental retardation can vary over time, the judicial interdiction for an indefinite period and without a periodic reassessment of the person's capacity affects the rights and interests of people who, in certain periods, may be aware and coordinate their actions. On these issues, the Court concluded that the measure to protect the person with a mental disability must be individualized in relation to the degree of disability.

Referring to the relevant jurisprudence of the ECHR, the Constitutional Court noted that the protection measure consisting in placing under judicial interdiction, which has the consequences of depriving the person of the capacity to exercise and establish the guardianship, is not accompanied by the specified guarantees. In the recitals of the decision, in paragraph 44, the Court stated that in the absence of these guarantees *"the deprivation of the person's capacity to exercise leads to the impairment of one of the supreme values of the Romanian people, namely the human dignity provided by Article 1 paragraph (3) of the Constitution, which, according to the jurisprudence of the Constitutional Court, represents the source of fundamental rights and freedoms, as well as their guarantees"*[41] (our emphasis). At the same time, it was noted that *"the free development of the human personality is affected, which is closely related to human dignity, both in terms of its active side - expressed in the form of freedom of action - and its passive side expressed in the form of respect for the personal sphere of the individual and the underlying requirements"*[42] (our emphasis).

The Constitutional Court held in paragraph 46 of the Decision that the measure of judicial interdiction "is not accompanied by sufficient guarantees to ensure respect for fundamental human rights and freedoms. It does not take into account the fact that there may be different degrees of incapacity or the diversity of a person's interests, is not available for a specified period of time and is not subject to regular review. Any protection measure must be proportionate to the degree of capacity, be adapted to the person's life, be applied for the shortest period of time, be reviewed periodically and take into account the will and preferences of persons with disabilities. Also, when regulating a protection measure, the legislator must take into account the fact that there may be different degrees of disability, and mental deficiency may vary over time. Lack of legal capacity or discernment can take various forms, for example, total / partial or reversible / irreversible, a situation that requires the establishment of protection measures appropriate to reality and which, however, are not found in the regulation of the measure of judicial interdiction. Therefore, different degrees of disability need to be attached appropriate degrees of protection, the legislator in regulating legal measures must identify proportionate measures. An incapacity must not lead to the loss of all civil rights, but must be analyzed in each case" (our emphasis).

In conclusion, the Court ruled in paragraph 47 of the Decision that "in the absence of the establishment of safeguards to accompany the measure of protection of judicial interdiction, touches are brought to the constitutional provisions of Article 1 paragraph (3), of Article 16 paragraph (1) and of Article 50, as interpreted according to Article 20 paragraph (1), and in the light of Article 12 of the Convention on the Rights of Persons with Disabilities" (emphasis added).

The Court also emphasized that it is up to the National Authority for the Rights of Persons with Disabilities, Children and Adoptions to make regulatory proposals in this area, with Parliament or, as the case may be, the Government having the obligation to adopt regulations in accordance with the

[41] See, in this sense, Decision no. 1109 of September 8, 2009, published in the Official Gazette no. 678 of October 9, 2009. For developments on this topic, see Izabela Bratiloveanu, "Considerations about human dignity in the jurisprudence of the Constitutional Court," in *Proceedings of the International Conference European Union's History, Culture and Citizenship*, 12th edition (Bucharest: C.H. Beck Publishing House, 2019), 482-99.

[42] See, in this sense, Decision no. 465 of July 18, 2019 published in the Official Gazette no. 645 of October 5, 2019, paragraphs 31, 44, 45.

Constitution and the Convention on the Rights of Persons with Disabilities.

4. Conclusions

In connection with the effects of the decisions of the Constitutional Court, we specify that according to Article 147 paragraph (4) of the Constitution, from the date of their publication in the Official Gazette, the decisions of the Court are generally binding and have power only for the future, and regarding the provisions of the laws and ordinances in force found to be unconstitutional, paragraph (1) of the same article stipulates that *"its legal effects shall cease 45 days after the publication of the decision of the Constitutional Court if, during this period, the Parliament or the Government, as the case may be, do not agree the unconstitutional provisions with the provisions of the Constitution. During this period, the provisions found to be unconstitutional are suspended by law"*. As noted in the doctrine, the decision to establish unconstitutionality applies directly in pending cases, pending before the courts[43]. Finally, we emphasize that gradually, in the European countries, the systems of adult protection have been modernized, personalized measures have been introduced, and the possibility has been established to allow everyone to organize in advance the consequences of a mental impairment, therefore comparative law can provide valuable benchmarks for future regulation in this area.

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[43] In this regard, see Benke Károly and Mihaela Senia Costinescu. *Controlul de constituționalitate în România. Excepția de neconstituționalitate* (Bucharest: Hamangiu Publishing House, 2020), 244. For the effects of the decisions of the Constitutional Court, see also Tudorel Toader and Marieta Safta, *Curs de contencios constituțional* (Bucharest: Hamangiu Publishing House, 2017), 309-44, Bianca Selejan-Guțan, *Excepția de neconstituționalitate* (Bucharest: C.H. Beck Publishing House, 2010), 237 - 64.