

Evolution of Equality as a Constitutional Principle in Romania: European Union Membership Impacts and Current Challenges

ABSTRACT: *This study examines the evolution of equality as a constitutional principle in Romania, focusing on the transformative impact of European Union (EU) membership within the broader context of human rights regulations in Europe. It provides an overview of how equality has been understood within Romanian constitutional law, emphasising foundational principles and interpretations made by the Constitutional Court with the incorporation of European catalogues of human rights. From this perspective, the research highlights how the court has addressed complex issues such as gender equality, minority rights, and anti-discrimination protections in sensitive areas. These include political and social rights, education, and even review of the constitutional identity, all while balancing EU mandates with national legal traditions and social contexts. The aim is to evaluate the Constitutional Court's role in incorporating international standards in constitutional review and discuss the ongoing challenges of harmonising human rights protection standards within the EU.*

KEYWORDS: *equality, constitutional review, European Union, Constitutional Court of Romania, human rights*

1. Introduction

In ongoing debates about defining the European Union (EU) and its future, the issue of fundamental rights plays a crucial role in determining harmony or disharmony. This is evident from the various conflicts and tensions that have impacted the EU's evolution. Europe, albeit a relatively small region, is characterised by a multitude of

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fundamental rights “catalogues” and courts tasked with interpreting and adhering to them, often stimulating complex dialogues. Achieving a “single voice” in this context is one of the greatest challenges of coexistence and deeper integration, in the spirit of the founding Treaties. Thus, solutions identified in practice – especially by constitutional courts acting as guarantors of the highest-ranking laws – provide a valuable resource for analysing and shaping political and legislative actions.

Within fundamental rights, perhaps one of the most suggestive for such an analysis is the principle of equality, as it lies at the heart of constitutional and EU values. The Constitutional Court of Romania (CCR) has stated in this regard that equality is ‘a principle that underlies fundamental rights and freedoms’ (Decision No 465/2019, paragraph 32); it ‘characterizes fundamental rights and freedoms, while also serving as a guarantee for each individual’s fundamental rights’ (Decision No 80/2014, paragraph 136). Given this positioning in the structure of the Constitution, the evolution of the enshrinement, interpretation, and application of the principle of equality provides a comprehensive perspective on its development, bearing the EU’s context, illustrating how Romania’s accession to the EU has continuously shaped its constitutional landscape.

In this light, the current study examines the solutions identified by the CCR for harmonising standards that ensure and uphold the principle of equality. After briefly outlining the related complex legal landscape within the EU, the study delves deeper into the relevant jurisprudence of the CCR concerning the interpretation of the principle of equality. Some of the most relevant dimensions of the interpretation and application of the principle of equality are explored, in terms of establishing limits for the revision of the Romanian Constitution (the core of constitutional identity), political rights, and social rights, focusing on both aspects of gender equality and ongoing debates surrounding this issue. In terms of the impacts on the EU and current challenges, the main conclusion of the study highlights that achieving harmony within the EU’s complex framework of human rights is particularly challenging given sensitive issues shaped by legislative fragmentation, differing traditions, and varying social perceptions and experiences among Member States (MS). Consequently, the task of legislators in these delicate matters intricates. They must create regulations that reflect societal progress while considering the different interpretations from constitutional and quasi-constitutional courts across the EU. In the context of Romania, particularly regarding constitutional review, a significant challenge could be identifying and implementing a higher standard of human rights protection within the framework of various overlapping and binding human rights catalogues.

2.

Equality within the EU: a Complex Legal Landscape

2.1. Regulations of the Principle of Equality

2.1.1. Overlapping of a Multitude of Supranational Catalogues of Fundamental Rights

Considering its wide applicability, enduring significance, and impact at the European level, the primary document relevant to ensuring the principle of equality is the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights (ECHR)), adopted by the Council of Europe and enforced in 1953.¹ Article 14 explicitly prohibits discrimination in the enjoyment of the rights and freedoms outlined in the Convention. According to jurisprudence of the European Court of Human Rights (ECtHR), the principle of non-discrimination has a “fundamental” character and constitutes the basis of the Convention, together with the rule of law and the values of tolerance and social peace [S.A.S. vs France (MC), 2014, pct. 149; Străin and Others against Romania, 2005, pct. 59]. While the ECHR does not include a standalone equality provision applicable to all legal matters, it does allow for discrimination cases to be addressed alongside other rights violations. Additionally, this protection is supplemented by Article 1 of Protocol No. 12 to the Convention,² which prohibits discrimination in the exercise of any right provided by law in a more general way.

Considering the importance for the legal order of the EU, a highly relevant document is the Charter of Fundamental Rights (CFR), which became legally binding in 2009, being now part of the EU Treaties. Compared with the ECHR, the CFR provides a more contemporary and detailed perspective and guarantees for the principle of equality. Articles 20–26 specifically address equality and non-discrimination, with Article 21 explicitly prohibiting discrimination based on sex, race, colour, ethnic or social origin, and religion, among other factors. Furthermore, the CFR goes beyond merely prohibiting discrimination; it actively promotes equal treatment and opportunities. This is particularly evident in its provisions that focus on gender equality, as well as protections for children, older adults, and individuals with disabilities.

In Europe, numerous other agreements, conventions, or declarations exist with either universal or regional significance that enshrine the principle of equality. The

1 The official, formal legal title of the treaty, while ECHR is its widely used form.

2 Council of Europe, 2000.

most prominent and universally relevant of these, is the Universal Declaration of Human Rights.³ Some of the international or regional instruments have not been ratified by all EU MS. An example in this regard is the Istanbul Convention (Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence), approved by the EU through Decisions (EU) 2023/1075 and (EU) 2023/1076.⁴ As long as not all EU MS have ratified the Istanbul Convention, they are bound only by the EU *acquis communautaire* that implements the convention. Any other aspects regulated by the Convention remain under the competence of MS. This legislative discrepancy creates a diverse landscape for the interpretation and application of the principle of equality within the EU.

2.1.2. National Catalogues of Human Rights: Constitutions of MS

Each Constitution of the EU MS contains a comprehensive list of fundamental rights, shaped by the unique socio-political and economic experiences of each country. In many EU States, constitutional courts serve as guardians of these fundamental laws and rights.

Thus, the Constitution of Romania, adopted in 1991 and revised in 2003,⁵ guarantees that all citizens are equal before the law, without discrimination based on race, nationality, ethnic origin, language, religion, sex, political opinion, property, or social status (Articles 4 and 16). During the revision of the Constitution in 2003, provisions were added to ensure equal opportunities for both women and men to access public, civil, or military positions, in line with relevant international standards. Other articles detail specific applications of the principle of equality. For example, Article 21 ensures free access to justice and the right to a fair trial. Article 44 guarantees equal protection of private property, regardless of ownership. Article 48 establishes equality between spouses in marriage. Additionally, Article 41 affirms the right to equal pay for women and men, along with the right to social protection, including paid maternity leave as stated in Article 47(2).

3 United Nations, 1948.

4 See Article 1 para. 2: 'the Union's accession to the Convention shall be without prejudice to the Member States' competence as regards the ratification of the Convention on matters falling within their national competences'.

5 Constitution of Romania.

2.1.3. Differences in Terms of the Incorporation of Supranational Catalogues

All EU MS are also members of the Council of Europe, meaning that they are subject to the system of key human rights catalogues, including the ECHR and CFR. However, the way these frameworks are received, interpreted, and applied within each country's legal system varies according to that State's constitutional provisions and practices of their national constitutional courts. Therefore, the international catalogues of human rights are assigned varying degrees of binding force in different jurisdictions.

In some countries, such as Luxembourg, these take precedence over national law, including the Constitution. In others, such as Croatia and the Czech Republic, they hold a weight similar to that of constitutional laws. In Belgium and Cyprus, international human rights frameworks have less weight than constitutional laws. Meanwhile, in Ireland and Austria, the significance of individual international treaties varies. In federal countries including Germany, international human rights treaties may have the same weight as federal legislation.⁶ In Romania, Article 20 of the Constitution requires that both the Constitution and domestic laws be interpreted in accordance with the international treaties to which Romania is a signatory. It also states that the most favourable provisions, whether they originate from the Constitution or from international agreements, shall take precedence. Furthermore, Article 148 of the Romanian Constitution establishes that the binding provisions of EU law have priority over any conflicting domestic laws.

Likewise, identifying common standards for applying the principle of equality across the EU is complicated by differences in legislation, culture, and traditions among MS. Variations in national laws and societal norms can influence how equality is understood and implemented, particularly in domains such as gender equality, religious expression, and migrant rights. Referring to the application of the Charter in this complex legal and cultural environment, the President of the European Court of Justice (ECJ) expressed the following opinion:

'In accordance with Article 52(4) of the Charter, "[i]n so far as [the latter] recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions." By referring to the constitutional traditions common to the Member States, the Charter does not seek to define the fundamental rights recognised thereby in accordance with the "smallest common denominator" of the Member States' constitutions, but to interpret the fundamental rights enshrined therein in a way that offers a high level of

6 Conference of European Constitutional Courts, 2021.

*protection; that is adapted to the nature of EU law; and that is in harmony with the national constitutional traditions’.*⁷

In the same context, addressing the question of whether Article 53 of the Charter must be interpreted as a codification of the Solange approach,⁸ the same aforementioned President stated:

*‘One should not read Article 53 of the Charter as a rule of conflict, but as a rule which seeks to strengthen the primacy of EU law by demanding from the ECJ that it states the reasons why it decided to follow (or depart from) the level of fundamental right protection provided for by the MS’ constitutions. Article 53 of the Charter thus mandates the ECJ to engage in a dialogue with the national constitutional courts or, as the case may be, with the national supreme courts. In accordance with such a reading, Article 53 of the Charter would be an expression of constitutional pluralism’.*⁹

The theory of “layers of protection”.¹⁰ advanced for a harmonious coexistence of catalogues of fundamental rights and the principle of subsidiarity¹¹ offers an orientation. However, the operation of these principle guidelines is conditioned by the dialogue and mutual observation of the jurisprudence developed in this complex framework.

2.2. Overlapping Jurisdiction Between the ECtHR and ECJ and Relations with National Courts

In addition to the existence of this complex normative framework, problems arise in the coherence of its interpretation, more so due to the overlapping jurisdiction between the ECtHR and ECJ. While the ECtHR has authority over States’ obligations under the ECHR, the ECJ maintains authority over interpreting the CFR within EU law. This dual system introduces complexity and can pose challenges for European citizens, who may find that their rights are interpreted differently depending on which

7 Lenaerts, 2011, pp. 79–106.

8 The judgments of the German Bundesverfassungsgericht of 29 May 1974, known as Solange I (2 BvL 52/71) and of 22 October 1986, known as Solange II (2 BvR 197/83); the judgment of the Italian Corte Costituzionale of 21 April 1989 (No. 232, Fragd, in Foro it., 1990, I, 1855); the declaration of the Spanish Tribunal Constitucional of 13 December 2004 (DTC 1/2004). See also ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, judgment of 30 June 2005, ECHR 2005-VI.

9 Lenaerts, 2011, pp. 79–106.

10 Polakiewicz, 2016.

11 Vila, 2017, pp. 393–413.

court has final authority in a given case. This dual framework has led to a situation known as “fragmentation” where differing interpretations can complicate enforcement and may undermine uniform standards of equality.¹² Some authors called these Courts ‘Two Senates of Europe’s Constitutional Jurisdiction’.¹³

‘The image of ‘two senates’ expresses the idea that the two courts bear a shared responsibility for the European legal space to which they each contribute in specific ways. The European Court of Justice’s role, as ‘first senate’, is best understood through its contribution to European political unity by fostering and controlling European public authority and ensuring its uniform effect in the European legal space. The European Court of Human Rights, which we consider Europe’s ‘second senate’, aims to entrench a set of basic norms – European human rights – in the European legal space’.

However, the opinion of the President of ECJ was as follows:

*‘from the fact that the Charter is now legally binding it does not follow that the EU has become a “human rights organisation” or that the ECJ has become “a second European Court on Human Rights” (the ECtHR). To this effect, the second paragraph of Article 6(1) TEU stresses that “[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.” A similar statement is also reproduced in Article 51(2) of the Charter. It requires that, in interpreting and applying the Charter, the ECJ respects the principle of conferral as set out in Article 5(2) TEU’.*¹⁴

The EU’s accession to the ECHR, as required by the Treaty of Lisbon, was intended to create greater coherence between the Convention and Charter, but the EU’s potential accession to the ECHR has yet to be realised. This complicated legal arrangement leads to further challenges in harmonising equality protections for MS.

These challenges were suggestively presented during the discussions within the Congress of Constitutional Courts focusing on catalogues of fundamental rights.¹⁵

12 Gerards, 2020.

13 von Bogdandy, Grabenwarter and Huber, 2023, pp. 383–418.

14 Lenaerts, 2011, pp. 79–106.

15 The XVIII Congress of the Conference of European Constitutional Courts (CECC) was held 24–25 February 2021.

*'Both national and international catalogues of human rights are identical in that they contain a similar list of rights (...). National catalogues have entrusted the protection of fundamental values and fundamental human rights (...) to constitutional courts or equivalent judicial bodies. If these bodies are empowered not only to abstractly review constitutionality but also to provide a posteriori protection of human rights and freedoms, they must also address the question of the source of human rights and freedoms and the normative definition of such a source. Thus, in addition to the application of their national catalogues of human rights (...) they must evaluate, respect and protect the fundamental rights contained in international legal documents. The contemporary approach to the material rule of law is characterized by an effort to eliminate contradictions and gaps in the system of protection of fundamental rights. (...) This brings the European constitutional and equivalent courts to the question of the relationship between national, supranational and international catalogues of human rights. Is there a hierarchy between them? Are they competitive or complementary? What legal system should the Constitutional Court apply first?'*¹⁶

However, as a general rule, European constitutional courts have embraced the interpretation of the principle of equality and non-discrimination developed over time by ECtHR,¹⁷ and, to a significant extent, also incorporate the jurisprudence of the ECJ where applicable, as it proves by the examination of reports of the courts in the same congress. According to some reports, national courts guarantee a comparable standard (e.g. Luxembourg, Slovenia, Slovakia); according to other reports, national courts follow the case law of the ECtHR (Croatia); and according to others, the ECtHR case law is not only followed but often cited in their countries (Romania, Austria, Czech Republic, Lithuania). For instance, the German Federal Constitutional Court has noted that the openness of the Constitution to international law creates a constitutional obligation for the Court to use international treaties, particularly human rights conventions, as interpretive guidelines for the Basic Law, especially concerning fundamental rights. This is particularly relevant for the ECHR, which receives heightened consideration due to its close links with the fundamental rights of the EU and the integration objective outlined in Article 23(1) of the German Basic Law (GG). According to the same report, the interpretation of the principle of equality for the most part corresponds to the approach of the ECJ (when it applies Article 20 of the CFR) and the ECtHR.¹⁸ Various nuances also exist, which differentiate the

16 Conference of European Constitutional Courts, 2021.

17 Hennette-Vauchez, 2023, pp. 199–218.

18 Conference of European Constitutional Courts, 2018.

practice of some constitutional courts, such as the Constitutional Court of Spain, whose case law provides that the prohibition of discrimination includes only the right to be treated equally in a comparable situation, but not the right to be treated differently in a different situation. The Spanish Constitutional Court has defined the right to equality (Article 14 CE) inspired by Article 14 of the ECHR and, now, Protocol No. 12 of 4 November 2000, as interpreted by the doctrine of the Court of Strasbourg. However, it has not accepted its criterion on one point: as summarised in CC Judgment 181/2000 of 29 June (point 11), ‘according to reiterated and constant doctrine of this Court, the right to equality of art. 14 of the Constitution does not enshrine a right to unequal treatment (CC Judgment STC 114/1995, 6 July, point 4), nor does it protect the lack of distinction between different assumptions, so there is ‘no subjective right to unequal normative treatment’ (CC Judgment STC 16/1994, 20 January, point 5), falling the so-called ‘discrimination through indifferentiation’ (CC Judgment STC 308/1994, 21 November, point 5) outside the scope of this constitutional precept. In brief, ‘the principle of equality cannot form the basis of a reproach of discrimination for indifferentiation’ (CC Judgment STC 164/1995, 13 November, point 7)’. Further, for example, the German Federal Constitutional Court has specified:

‘the principle of the Constitution’s openness to international law “does not require that the domestic legal order be schematically aligned in parallel to international law; Rather, the substantive values of international law [as they have been specified by the ECtHR] must be received in domestic law as comprehensively as possible, provided that this is both methodologically tenable and compatible with the requirements of the Basic Law’.

The Romanian Constitutional Court has demonstrated that its interpretation of the protection of fundamental rights, particularly regarding the principle of equality, can sometimes offer a higher standard than that provided by the ECHR. For instance, the CCR has declared the reduction of contributory pensions unconstitutional, highlighting its commitment to the superior protection standards in the Romanian Constitution. The Court notes that the protections afforded by the ECHR are minimal, allowing the Romanian Basic Law and CCR’s jurisprudence to provide ampler safeguards for fundamental rights, as stated in Article 20 (2) of the Constitution and Article 53 of the Convention.

3.

CCR and the Principle of Equality

3.1. Principle of Equality as a Limit of the Amendment of the Constitution

Before we explore examples of how the principle of equality is applied to specific fundamental rights, it is important to emphasise its role in defining the core of “constitutional identity” (see Decision No. 390/2021) in relation with human rights (the limits of constitutional revision). In this sense, Article 152 (2) of the Constitution states that ‘no revision can be made if it results in the suppression of the fundamental rights and freedoms of citizens or their guarantees’.

In its most recent decisions regarding initiatives to amend the Romanian Constitution, in 2019 (Nos. 464 and 465), the CCR highlighted relevant recitals about the application of the principle of equality in the context of constitutional revision. These decisions addressed initiatives with similar content that proposed limiting amnesty and pardon for acts of corruption. Beyond examining them in terms of the boundaries of constitutional revision – which is open to debate – attention is drawn to the distinctions made by the CCR in interpreting the limits of revision set forth in Article 152 (2) of the Constitution mentioned above. According to the CCR, its analysis:

*‘must be carried out in two stages when assessing the suppression of fundamental rights and freedoms or their guarantees within the meaning of art. 152 paragraph (2) of the Constitution, namely (1) the analysis of the revision initiative in relation to the general principles that guide the entire catalogue of fundamental rights and freedoms, principles that constitute their guiding guarantees, and (2) the analysis of the revision initiative in relation to an applicable fundamental right or freedom. The violation of the aforementioned general principles is decisive and can no longer proceed to the second stage of analysis, it being not necessary to identify the suppressed fundamental right or freedom because the violation of the principle of equality affects the individual himself, who is evaluated and placed, based on arbitrary criteria, in a position of inferiority’.*¹⁹

Referring to the principle of equality in the same context, the CCR noted that it has ‘a particular importance’ and ‘the analysis of the suppression of fundamental rights and freedoms must have as a premise the principle of equality, a principle that is at

19 Decision No. 465/2019, para. 34.

the basis of fundamental rights and freedoms'. (para. 32) This being the case, it follows that the way in which the CCR interprets the principle of equality, by incorporating the European and international catalogues of fundamental rights, constitutes a "filter" for the limits of revision of the Constitution, shaping these limits in correlation with the European framework for the protection of fundamental rights. The general interpretation of the same limits of revision should also be noted, in the sense that 'the constitutional protection of the citizen is upward, which implies that constitutional revisions must enhance the protection of fundamental rights and freedoms. According to the meaning of Article 152(2) of the Constitution, the safeguarding of these rights and freedoms can only have an upward/ascending direction'.²⁰

To illustrate how the CCR approached the interpretation of the principle of equality, we have selected several relevant topics for highlighting the interaction between the fundamental rights catalogues in the EU, encompassing political and social rights and education, as well as sensitive and recent developments in domains such as gender identity and artificial intelligence (AI).²¹

3.2. Interpreting the Concept of Equality in Relation to Political Rights Amid Modern Challenges

3.2.1. Artificial Intelligence and Equality of Electoral Competitors

A recent and highly controversial ruling (No. 32/2024) of the CCR, by which it annulled the elections for the President of Romania, foregrounds the principle of equal opportunities for electoral competitors, a crucial aspect of the right to be elected, particularly in relation to the impact of AI interference. Thus, by stating that 'Equality of opportunities must be guaranteed to all candidates and parties and must stimulate the state to adopt an objective and impartial attitude towards them and to apply the same legislation in a fair manner to all' (para. 15), the CCR referred to the main aspects by which this objective is ensured, concerning the conduct of the State and electoral competitors.

Thus, approaching the 'electoral behaviour of competitors' and their use of social networks, new technologies, and AI to promote their candidatures, the CCR found that 'the significant exposure of a candidate led to a directly proportional reduction in the online media exposure of the other candidates in the electoral process', thus creating 'a clear inequality between the candidate who manipulated digital technologies and

20 Decision No. 80/2014, para. 65; Decision No. 465/2019, para. 29.

21 Tănăsescu, 1999.

the other candidates participating in the electoral process' (para. 16). In correlation with the exercise of equal conditions of the electoral campaign and considering the impact of AI, the CCR noted that:

'the use of digital technologies and artificial intelligence, both by candidates or electoral competitors, and by political parties, their supporters or sympathizers, must be transparent in order to guarantee the integrity and impartiality of the elections. Otherwise, voters are prevented from forming an opinion about the candidates and the electoral alternatives or may be misled regarding the identity and quality of the candidate or the voting procedures'.

Therefore, the use of such practices in an electoral process by electoral competitors, including political parties, 'entitles the competent public authorities, according to the law, to verify, ascertain and, where appropriate, sanction such conduct'.

From the perspective of reference to international standards, the way in which the CCR incorporated *soft law* in its binding argumentation is interesting, specifically points 18 and 21 of the Explanatory Report to the Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, adopted by the European Commission for Democracy through Law (Venice Commission), at its 52nd plenary session (Venice, 18–19 October 2002)]. This reference was used to support the argument concerning the possibility of the State to limit the expenses on the electoral advertising to guarantee equal opportunities.

3.2.2. Gender Equality and Electoral Competitors

The exercise of political rights is an important topic that highlights another challenging issue: the evolution in interpreting the principles of equality and non-discrimination, particularly the affirmation of equality between women and men.

In a recent decision (No. 341/2024), the CCR found constitutional provisions of Law No. 115/2015 on the election of local public administration authorities, according to which *'the lists of candidates for the election of local councils and county councils must be structured to ensure the representation of both genders, unless the list contains only one candidate'*; it is notable for its comprehensive approach to understand the evolution of equality between men and women. It provides a detailed examination of the mandatory and *soft law* instruments adopted, particularly within the Council of Europe and EU. According to the CCR:

'In the European context, the principle of equality between women and men has been incorporated into international legal instruments through a lengthy process of social, political, economic, and cultural evolution. This process is rooted in the recognition of various forms of discrimination against women perpetrated by men, which has led to a continuous societal commitment to affirming women's rights. These rights span civil rights – such as achieving full legal capacity at the same age as men regardless of marital status, the right to work and receive equal pay, the right to inheritance, freedom of movement, and the right to self-determination – as well as political rights, including the right to vote and the right to run for office.'

In reference to the relevant international and European documents – such as Article 1, point 3 of the Charter of the United Nations (1945); Article 14 of the ECHR (1950); and the International Covenant on Civil and Political Rights, adopted in 1966 and ratified by Romania in 1974 (Article 3) – as well as Additional Protocol No. 12 to the ECHR on the General Prohibition of Discrimination (Rome, 2000), along with other EU-level documents, the CCR has emphasised the following:

'The principle of gender equality has been strengthened, aiming to achieve genuine equality of opportunities and rights for both women and men, particularly in social and political activities. This goal includes the active involvement of women as decision-makers. Although demographic statistics show an equality or even a numerical predominance of the female population in Europe, women remain underrepresented in institutions and management bodies across all levels and sectors. It is acknowledged internationally that the absence of gender balance in the political sphere does not reflect the values of a true constitutional democracy, where the principle of equal rights is a fundamental value. Consequently, the promotion of equal rights between genders has become a major objective at the declaratory level. However, without mandatory, firm, and effective state measures, this goal remains theoretically declared but not effectively achieved. Several international legal documents have outlined work agendas and proposed specific methods, such as representativeness quotas or the "zipper" system (alternating male and female candidates) for achieving genuine women's representation in elected offices. Additionally, many instruments, including Recommendations and Resolutions adopted by the Council of Europe and the EU, have been developed to further this aim.'

The CCR also invoked the relevant case law of the ECtHR regarding gender quotas and presence of women on the electoral candidate lists, as well as relevant case law of the ECJ.

Based on this extensive analysis, the CCR found that the criticised legal provision reflects, in an internal normative plan, a legal solution through which democratic states, in general, and EU MS, in particular, guarantee the principle of equal opportunities between women and men – an integral part of the universal principle of equality and non-discrimination. In this regard, the CCR emphasised the state's positive obligation to establish concrete legislative measures to achieve a more balanced representation of both sexes in political life and in political governing bodies, choosing, within its margin of appreciation, among the methods recommended or established at the international level: either the rule of gender parity on the lists of candidates for elections, or a certain percentage of women's representativeness in elected political bodies, or the solution of reserving a certain number of eligible seats for women candidates.

In summary, the CCR held that the elimination of gender stereotypes and social barriers that continue to perpetuate the underrepresentation of women in elected political positions depends on the adoption of a system of mandatory representation quotas or the parity system, and the legislative solution provided for in Article 7 (1) the final sentence of Law No. 115/2015 is currently the only guarantee for ensuring a balanced representation of women and men in political life, being in full agreement with the principle of equal rights and equal opportunities, both enshrined in Article 16 (1) and (3) of the Constitution.

3.3. Interpreting the Concept of Equality in Relation to Social Rights: Gender Equality and Retirement Age

A similar evolution, likely to illustrate the elimination of gender stereotypes, is provided by the regulation of the retirement age for women and men in legislation. The jurisprudence of the CCR, before and after accession to the EU, reflects not only societal changes, but also incorporation into the internal order of EU standards and objectives in the field of gender equality.

Thus, in 1995 (before the accession to the EU), the CCR noted (Decision No. 107) that:

‘due to the obligations related to children upbringing and education, especially during the early years, to the increased burdens on women around the household, to the lack of widely accessible social and economic means, during the current transition period, that could ease such burdens, as well

as to other aspects that hinder their professional advancement (maternity leaves, postnatal leaves, parental leaves to care for sick children, prohibitions aimed at preventing work under certain conditions, etc.), as well as due to other circumstances, women are in situations that disadvantage them compared to men”, which justified, from the perspective of the principle of equality, the establishment of different retirement ages’.

In 2010 (after the accession to the EU), the CCR found (Decision No. 1237/2010) that:

‘cultural traditions and social realities are still evolving towards ensuring real factual equality between the sexes, so that it cannot be concluded that, at present, the social conditions in Romania can be considered as supporting an absolute equality between men and women. However, important steps have been taken. An example in this regard is the extension of the right to parental leave for men as well, including for militaries, relevant in this regard being Decision No90 of 10 February 2005, published in the Official Gazette of Romania, Part I, No 245 of 24 March 2005. For these reasons, raising women’s retirement age to 65 was intended to take place over a period of 15 years, during which it is expected that, in Romania, the social conditions will change significantly’.

The Court noted, in the same context, ‘the normal changes that occur in society in terms of mentalities, culture, education and traditions’, stating that:

*‘the provision of an equal treatment between the sexes is increasingly necessary in the context of the European trend that requires States to comply with the standards of equal, non-discriminatory treatment between men and women’.*²²

The Romanian court also held the recitals of the ECJ against certain grounds, such as those regarding the role of women in the family, and stated that the imposition of different retirement ages cannot adequately compensate for the disadvantages and difficulties that women encounter in their professional careers due to their social status. Likewise, the concern for raising children should not be related only to women, but also to men, making the situation of the two sexes, in this instance, comparable. Consequently, the Court considered that a change in its perspective is required regarding the issue of equalising the retirement age between men and women and ‘the opposition to this solution would mean, at present, the very opposition of a social

22 To the same effect, see also Decision No. 387/2018.

current that has an international scope, to whose standards Romania is called to live up to'. The Court also mentioned that we should be aware about the discrepancies existing between the current social conditions in Romania and these standards; a reason why the solution adopted by the legislator through the Law on the Unitary Public Pension System for a gradual increase in the retirement age of women over 15 years is 'able to ensure the adequacy of this measure to the social reality and to give a constitutional nature of the legal norm'.

Beyond the issue, in itself, of pensions and the equalisation of the retirement age, we note the recitals that address the traditional social perception closely attached to the biological significance of sex – which seems to overwhelmingly underlie the solution delivered in 1995, respectively the recitals that highlight the social developments in the sense of moving away from gender stereotypes, as an effect of the change/acceptance of the change in the social roles of women and men under the influence of the factors highlighted by the Court in its reasoning.

3.4. Equality and Education in Schools

A significant decision regarding modern challenges and the application of international standards related to the principle of equality concerns the unconstitutionality of the proposal to amend the National Education Law with a legislative solution prohibiting, 'inside all teaching establishments and institutions and inside all facilities intended for vocational education and training, including inside those establishments that provide extracurricular education', any activity aimed at spreading the theory or opinion of gender identity, understood as the theory or opinion that gender is a concept different from biological sex and that the two are not always the same (see Decision No. 907/2020).

Given the numerous criticisms of unconstitutionality, the reasoning of the decision is complex. However, from the perspective of capitalising on the principle of equality, the most relevant are the recitals in which the CCR, with reference to the evolution of Romanian legislation and the European context in the matter, presents in detail the normative framework regarding gender equality. Indeed, also relevant are the recitals on ensuring equality in terms of access to education for Romanian young people in the European context.

Thus, with reference to the normative framework and its evolution, the CCR noted the consistency of Romanian legislation with international regulations in the matter, in which sense it referred both to the Civil Code and the special anti-discrimination

legislation: ‘Law No 202/2002²³ defines the notions of “sex” and “gender”, a distinction reinforced by the definition of “gender” in the Istanbul Convention, ratified in Romania by Law No 30/2016’ (para. 63). In relation to this normative evolution, the Court holds that the notion of “gender” has a broader scope than that of “sex”/sexuality in a strictly biological sense, ‘as it incorporates complex elements of a psychosocial nature’:

‘Thus, if the notion of “sex” is limited to the biological characteristics that mark the differences between men and women, the notion of “gender” refers to a set of psychological and sociocultural traits. The latter notion includes elements of the individual’s social identity, evolving in correlation with the evolution of society and the continuous reevaluation of the interpretation of the principle of equality and non-discrimination on the basis of sex. Gender identity also implies the customary social roles assigned and discrimination based on sex/gender. Awareness of the individual’s sexual affiliation thus appears as a component within gender identification, but biological factors are complemented by social ones, gender identity including the sexual one and adapting it to social demands. The Romanian state has legislatively enshrined this vision/approach, assuming obligations aimed, in essence, at combating gender stereotypes and effectively achieving the principle of equality and non-discrimination’ (para. 64).

The CCR referenced its own case law, which reflects the evolving social roles of women and men and the elimination of gender stereotypes, meaning the decisions regarding the retirement age for both genders, as discussed in the previous sections. It also cited the case law of the ECtHR, highlighting that issues related to gender and gender identity have been the subject of numerous cases. These cases include instances where women are victims of violence, matters related to employment and parental leave, age-related conditions for exercising the right to social benefits, national regulations concerning the choice of first names and the transmission of parents’ surnames to their children, as well as acts of homophobic violence.

The CCR also acknowledged advancements in gender equality within the EU. It noted that anti-discrimination protections based on sex are fundamental to the EU, with gender equality being both a core value (Article 2 of the Treaty on European Union) and an objective (Article 3 of the Treaty); further, it referenced the vital role of equality in the EU CFR, along with derivative legal instruments such as Directive 2006/54/EC of the European Parliament and Council, which focuses on implementing

23 Law No. 202 of 19 April 2002 on equal opportunities and treatment between women and men, Official Gazette No. 326 of 5 June 2013.

the principle of equal opportunities and treatment for men and women in employment, and Directive 2012/29/EU, which establishes minimum standards for the rights, support, and protection of crime victims, replacing Framework Decision 2001/220/JHA.

In summary, the Court notes that the normative developments at national, Council of Europe, and EU levels, reflected in the jurisprudence of the Constitutional Court, ECHR, and the ECJ, support and highlight the fact that gender identity/equality encompass more than just biological sex or differences. They aim to combat the gender stereotypes associated with the traditional roles of women and men in society. For nearly two decades, the Romanian State has embraced this perspective through specific legal norms, aligning itself with international standards. This commitment is evident in Article 20 of the Constitution, which prioritises the highest standards for the protection of fundamental rights (para. 76).

As concerns the application of the principle of equality of citizens before the law, in conjunction with the constitutional provision of Article 32 regarding ensuring access to education, and with those of Article 49 regarding the protection of children and young people, the recitals of the CCR that address young people in Romania as European citizens and their equal opportunities regarding access to education in the EU are noteworthy. According to the CCR, young people in Romania must know the ‘inherent evolutions of society’, to be able to form an opinion; acceptance/rejection of ‘theories or opinions circulated at a given time’ must be made in an “informed” manner (para. 85). Therefore, ‘education must be continuously connected to these evolutions, and not refuse, *de plano*, knowledge of them’. In the conditions in which ‘the issue of gender identity with its multiple dimensions has been present in the social and legal landscape for a long time’, the prohibition in the organised educational environment of any activity aimed at knowledge of this issue ‘appears almost anachronistic, likely to suppress access to information and, through this, access to education, targeting a psychosocial phenomenon recognized both in legislation and jurisprudence’ (para. 85).

The CCR noted, from this perspective, the generality of the wording in the law regarding a notion ‘which, through the multitude of legal, sociological, psychological meanings, can encompass a variety of fields of study and research that thus become prohibited to the recipients of the educational act only because, in one way or another, they can be interpreted as calling into question aspects of gender identity’ (para. 86). Even if, according to the explanatory memorandum, the intention of the initiators was to prohibit “proselytism”, that is, to prohibit acts of persuading young people to embrace a certain idea/theory, the final form of the law – criticised by the author of the notification – prohibits any activity of expression/knowledge of opinions different from the one imposed by the legislator. The absolute character, formulated in general terms, is considered by the CCR to be incompatible with the organisation

of education in a democratic state and with the protection of children and young people, as regulated by Articles 32 and 49 of the Constitution: ‘concealing/denying/repressing an opinion does not cause it to disappear, nor can it “protect” the individual from allegedly harmful effects that the state would like to prevent with regard to the education of children and young people’ (para. 87).

The CCR also considers the violation of equality by corroborating with the provisions of Article 32 of the Constitution on the right to education and Article 49 on the protection of children and young people. According to the CCR, ‘the place that the principle of equality occupies in the set of constitutional provisions gives it a particular importance’; ‘the principle of equality characterizes the fundamental rights and freedoms, being, at the same time, a guarantee of each fundamental right in particular’; ‘equality is closely correlated with the set of fundamental rights and freedoms, so that the analysis of the suppression of fundamental rights and freedoms must have as a premise the principle of equality, a principle that is at the basis of fundamental rights and freedoms’; ‘since the principle of equality relates to the essence and function of human dignity, it follows that equality is a characteristic and intrinsic element of human dignity’ (Decision No. 464/2019). In light of the principle of equality thus defined, in correlation with the right to education and protection of children and young people, they must be ensured, without any discrimination, the possibility of knowing and studying theories, ideas, and concepts in accordance with the developments of society, without constraints that would censor their freedom of thought and expression. The prohibition of access to education and the imposition of the state’s opinion in the sense shown,

‘do not serve the conscious assumption of a system of values necessary for personal fulfillment and development, constituting, at the same time, a genuine violation of equal opportunities, as long as young people in Romania, citizens of the EU, are prohibited in the country from knowing/expressing opinions/studying a certain sphere of problems and theories’.

The reasoning and conclusion support our opinion, as seen in a comment on the IACL Blog, according to which:

*‘this decision is not about LGBT+ rights or specific individuals, but instead it speaks to everyone about the importance of equality and freedom. It is inconceivable to confine future generations to dogmatic beliefs. Education spaces should always be a place for free thought, research, and expression. The Constitutional Court’s timely judgment reaffirms this’.*²⁴

24 Safta, 2023.

4. Conclusions

The principle of equality serves as a cornerstone of human rights protection in the EU and acts as a unifying element that promotes consistent interpretations of fundamental rights. It acts as a harmonising force both vertically – by integrating interpretations from the ECHR and ECJ – and horizontally through cross-fertilisation, bringing together various legislations, standards, and traditions.

However, its implementation is complicated by overlapping jurisdictions, national differences, and evolving social challenges. Thus, the principle of equality is a dynamic standard that adapts to the diverse needs of the population, aiming to ensure equal rights and protections for all individuals within its jurisdictions. The examples provided illustrate how the harmonisation of standards has progressed over time, integrating various principles in response to social developments.

There are still areas where achieving this harmony is challenging, particularly regarding sensitive issues shaped by legislative fragmentation and differing traditions, social perceptions, and experiences of the MS. These include interpretations of concepts such as family life, gender identity, and same-sex marriage. Consequently, the legislator's task in these delicate matters becomes complex. They must enact regulations that reflect societal evolution while also considering the varying interpretations from constitutional and quasi-constitutional courts across the EU, which can sometimes be in competition with one another.

Returning, from this perspective, to the idea of evolutionary interpretation of the Constitution that invites the reasoning of the CCR regarding the upward orientation of fundamental rights (similar to the “living tree” doctrine),²⁵ we recall the emphasis in the legal literature on ensuring a balance between two seemingly contradictory goals, predictability and flexibility, because “allowing the Constitution to evolve is not a simple task”. In the complex system of the legal order of the EU, this difficulty is multiplied exponentially as far as the evolutionary interpretation of the Constitution must consider the harmonisation of law at the level of the EU, the various powers that belong to the EU and MS and, correspondingly, to their authorities, of the constitutional identity of the States and the EU itself.

This being the case, we consider that the “upward orientation” of the protection of fundamental rights in general and the principle of equality in particular offers a very wide margin of appreciation to the constitutional courts, which comes with the corresponding burden of responsibility, of the fair consideration and balancing of a complex of oft-volatile factors, especially in matters sensitive to public perception.

25 Howes, 2022, pp. 32–51; Huscroft, 2006, pp. 3–23.

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The risk of imbalance manifests itself directly in the legislative action, which can then be judicially censured at the international (through ECHR decisions) or supranational (through CJEU decisions) level or politically at both levels.

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