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Rule of law in Romania. Recent evolutions and challenges

Key words: rule of law, Constitutional Court, Court of Justice of the European Union, national constitutional identity, traditions

Summary. In addressing the issues underlying this study, we will refer to the rule of law as it results from the Constitution, the national doctrine, and case-law, to the dimension of this principle targeting the independence of the judiciary and national judges, the constitutional relationship between domestic and EU law, a framework for the limits of the intervention of the two levelled authorities, and to recent developments in the Court of Justice of the European Union-Constitutional Court of Romania relations, as it results from the relevant case-law of these courts. The conclusions highlight the importance of the rule of law as an integrating principle and as the foundation of the EU constitutional order and of constitutional loyalty as a possible “link” of the legal orders within the EU, still characterized by a significant degree of heterogeneity. From this perspective, we believe that it is necessary to be aware of the need for a consensus (in the light of the same principle) on concepts with a still vague content, such as “national constitutional identity” and “traditions” of Member States, sometimes used as a counterbalance with populist accents in the face of an alleged “attack” on the sovereignty of the Member States by the EU institutions.

Praworządność w Rumunii. Ostatnie zmiany i wyzwania

Słowa kluczowe: praworządność, Trybunał Konstytucyjny, Trybunał Sprawiedliwości Unii Europejskiej, narodowa tożsamość konstytucyjna, tradycje

Streszczenie. Podejmując problematykę leżącą u podstaw niniejszego opracowania, odniesiemy się do zasady praworządności wynikającej z Konstytucji, doktryny krajowej i orzecznictwa, do wymiaru tej zasady ukierunkowanego na niezależność sądownictwa i sędziów krajowych, konstytucyjnej relacji między prawem wewnętrznym a prawem unijnym, ram dla granic interwencji władz obu szczebli oraz do ostatnich zmian w relacjach Trybunał Sprawiedliwości Unii Europejskiej – Sąd Konstytucyjny Rumunii, wynikających z odpowiedniego orzecznictwa tych sądów. Wnioski podkreślają znaczenie rządów prawa jako zasady integrującej i jako fundamentu porządku konstytucyjnego UE oraz lojalności konstytucyjnej jako możliwego „łącznika” porządków prawnych w ramach UE, wciąż charakteryzujących się znacznym stopniem heterogeniczności. Z tej perspektywy, należy naszym zdaniem zdawać sobie sprawę z konieczności wypracowania konsensusu (w świetle tej samej zasady) w sprawie pojęć o wciąż nieostrej treści, takich jak „narodowa tożsamość konstytucyjna” i „tradycje” państw członkowskich, używanych niekiedy jako przeciwwaga o akcentach populistycznych w obliczu rzekomego „ataku” na suwerenność państw członkowskich ze strony instytucji unijnych

1. Introduction

The rule of law is indeed a value that the European Union was built on, and it must be recognized and upheld by all of its members. According to the first sentence of Article 2 of the Treaty on European Union (TEU), the European Union is „*found-
ed on the values of respect for human dignity, freedom, democracy, equality, the rule of
law and respect for human rights, including the rights of persons belonging to minori-
ties*”. The second sentence of this provision assumes that the Member States respect
and observe these values since they „*are common to the Member States in a society in
which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between
women and men prevail*”. This value is not only an ethical guideline but also a le-
gally binding norm that applies to legal issues under Union law. However, there
is no definition of this idea in the treaties. It is, therefore, necessary to define the
rule of law more precisely from the standpoint of Union law since it is not only
referred to in treaty law (Article 2 TEU) but is also acknowledged by the Union
court system as a constitutional principle that instructs other constitutional norms
and may rationalize review proceedings and sanctions against the Member States.
The 2014 Commission Framework to Strengthen the Rule of Law is based mostly
on case law from the Court of Justice of the European Union (CJUE).

The rule of law embodies not only strict formal standards but also material re-
quirements of justice related to the juridical shaping of decision-making process-
es that could be achieved. These aspects of the rule of law are inextricably linked
to fundamental rights, and they must ensure that any public power exerted within
the framework of Union law is done so in a non-arbitrary and lawful manner. To
this end, the rule of law in the Union can be viewed not just as a formal collec-
tion of objective rules, but also as a means of assuring the protection of individual
rights. From this perspective, recent case law developments at the EU level and
some tensions between the CJEU and national constitutional courts, including the
Romanian Constitutional Court (CCR), are a source of concern, requiring careful
analysis and appropriate measures, both legal and political.

2. The meaning of the principle of the rule of law

The Romanian Constitution¹ begins by defining and characterizing the Romanian
state, a framework in which the principle of the rule of law is expressly regulated

¹ Passed at the meeting of the Constituent Assembly of 21.11.1991 and entered into force fol-
lowing its approval by the national referendum of 8.12.1991, revised in 2003 by the adoption of the
Law for the revision of the Constitution of Romania, approved by the national referendum of 18-
19.10.2003, entered into force on 29.10.2003.

in Article 1 (3). The 2003 Revision of the Constitution added the express regulation, in the same article, of the principle of separation and balance of powers in the state, as well as of the principle of legality, as specific guarantees of the rule of law and democracy. In the recommendations of the Venice Commission, frequently invoked by the CCR², respectively in the *Rule of law checklist*, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)³, there is a list of the benchmarks of the rule of law concept. Thus, its hardcore comprises of:

- legality – including a transparent, controllable, and democratic process for the adoption of laws;
- legal certainty;
- prevention of abuse (misuse) of powers;
- access to justice before independent and impartial courts, including the possibility of reviewing the legality of administrative acts;
- respect for human rights;
- non-discrimination and equality before the law.

Harnessing these recommendations and in accordance with the international human rights treaties to which Romania is a party, the CCR defined **the concept of the rule of law**, revealing its richness of meanings and dimensions. Thus, according to the case law of the CCR, *“the essential feature of the rule of law is the supremacy of the Constitution and the observance of laws”*⁴, while *“the rule of law ensures the supremacy of the Constitution, the correlation of all laws and all normative acts with it”*⁵. According to the Court⁶, the requirements of the rule of law concern the major purposes of state activity, foreshadowed in what is commonly referred to as the rule of law, a phrase involving the subordination of the state to the rule of law, the provision of those means to censor political choices and, in this framework, to weigh the possible abusive, discretionary tendencies of the state structures. The rule of law ensures the supremacy of the Constitution, the correlation of laws and all normative acts with it, the existence of the regime of separation of public powers, which must act within the limits of the law, namely within the limits of a law expressing the general will. The rule of law thus enshrines several safeguards, including jurisdictional ones, to ensure that the rights and freedoms of citizens are

² See, for example, Decision of the Constitutional Court no. 153 of 6.05.2020, “Official Gazette of Romania”, Part I, no.489 of 10 June 2020.

³ Source: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e) [accessed: 20.04.2022].

⁴ Decision of the Constitutional Court no. 232 of 5.07.2001, “Official Gazette of Romania”, Part I, no. 727 of 15.11.2001.

⁵ Decision of the Constitutional Court no. 22 of 27.01.2004, “Official Gazette of Romania”, Part I, no. 233 of 17.03.2004.

⁶ See Decision of the Constitutional Court no. 70 of 18.04.2000, “Official Gazette of Romania”, Part I, no.334 of 19.07.2000.

respected through self-limitation by the state and the inclusion of public authorities in the coordinates of law⁷.

Article 1 (4) of the Constitution regulates **the principle of separation and balance of powers in the state** within the constitutional democracy, which presupposes, on the one hand, that none of the three powers can intervene in the activity of the other powers, and, on the other, it presupposes the control provided by law over the acts issued by each power⁸. Thus, just as the administration is not allowed to censor a court decision⁹ or the legislator is not allowed to censor a court decision¹⁰, neither are the courts allowed to establish/modify/supplement/repeal rules of primary regulation. Also, the courts are not allowed to carry out the constitutional review¹¹, disregard the decisions of the Constitutional Court,¹² or to verify the opportunity to issue legislative/administrative acts¹³.

The principle of the separation of powers in the state imposes a certain constitutional order, grafted on the activity of generating primary rules of the Parliament, the other branches of public power having the power to implement these rules; only the Constitutional Court is allowed to rule on their unconstitutionality and thus to remove them from the active world of the primary legislation. On the other hand, other public authorities may not supplement, amend, or repeal Parliament's legislative acts [except the Government, when acting as a delegated legislator], neither by administrative acts nor by court decisions¹⁴. Each of the public authorities must confine itself to the limits of its competence, and cannot exercise legislative powers. The constitutional order, as enshrined in the Basic Law, cannot be disregarded even by the public authorities that are invested in defending it; in such a situation, namely, when an authority, through concrete actions, opposes the

⁷ See Decision of the Constitutional Court no. 17 of 21.01.2015, "Official Gazette of Romania", Part I, no. 79 of 30.01.2015.

⁸ Decision of the Constitutional Court no. 1.221 of 12.11.2008, "Official Gazette of Romania", Part I, no. 804 of 2.12.2008, Decision of the Constitutional Court no. 63 of 8.02.2017, "Official Gazette of Romania", Part I, no. 145 of 27.02.2017, para. 87.

⁹ See Decision of the Constitutional Court no. 233 of 5.06.2003, "Official Gazette of Romania", Part I, no. 537 of 25.07.2003.

¹⁰ See Decision of the Constitutional Court no. 333 of 3.12.2002, "Official Gazette of Romania", Part I, no. 95 of 17.02.2003.

¹¹ Decision of the Constitutional Court no. 838 of 27.05.2009, "Official Gazette of Romania", Part I, no. 461 of 3.07.2009.

¹² Decision of the Constitutional Court no. 1.222 of 12.11.2008, "Official Gazette of Romania", Part I, no. 864 of 22.12.2008, Decision of the Constitutional Court no. 206 of 29.04.2013, "Official Gazette of Romania", Part I, no. 350 of 13.06.2013, and Decision of the Constitutional Court no. 454 of 4.07.2018, "Official Gazette of Romania", Part I, no. 836 of 1.10.2018.

¹³ Decision of the Constitutional Court no. 68 of 27.02.2017, "Official Gazette of Romania", Part I, no. 181 of 14.03.2017, and Decision of the Constitutional Court no. 757 of 23.11.2017, "Official Gazette of Romania", Part I, no. 33 of 15.01.2018.

¹⁴ See Decision of the Constitutional Court no. 838 of 27.05.2009, "Official Gazette of Romania", Part I, no. 641 of 3.07.2009.

legislative policy of the Parliament, its institutional positioning is generated outside the constitutional order, and its restoration can be achieved both through the courts and through the Constitutional Court¹⁵.

Regarding the **principle of legal certainty**, the Constitutional Court held that this is a fundamental dimension of the rule of law, as it is expressly enshrined in the provisions of Article 1 (3) of the Basic Law¹⁶. The lack of clarity, precision, and predictability of legal provisions has been associated, both in the case law of the CCR and in the one of the European Court of Human Rights (ECHR), with the need to ensure the certainty of legal relations. Thus, the CCR ruled¹⁷ that, although not expressly enshrined in the Constitution, the principle of legal certainty is inferred from the constitutional provisions of Article 1 (3), according to which Romania is a democratic and social state, governed by the rule of law, and that the existence of contradictory legislative solutions and the annulment of legal provisions through other provisions contained in the same normative act lead to the violation of the certainty of legal relations, due to the lack of clarity and predictability of the rule, a principle that constitutes a fundamental dimension of the rule of law, as enshrined in Article 1 (3) of the Constitution. In the same vein, it is the case-law of the ECHR, according to which the principle of legal certainty derives implicitly from the Convention for the Protection of Human Rights and Fundamental Freedoms and is one of the fundamental principles of the rule of law¹⁸.

By transposing both the ECHR and CJEU case law into the national legal order, compliance with the standards of clarity and predictability of the law has become a constitutional requirement. Thus, in its case law, the CCR has ruled that the legislature, namely the Parliament or the Government, as the case may be, must enact rules which comply with the features of clarity, accuracy, predictability, and predictability¹⁹. In this regard, the Court has found that, in principle, any normative act must meet certain qualitative requirements, including predictability

¹⁵ Decision of the Constitutional Court no. 685 of 7.11.2018, "Official Gazette of Romania", Part I, no. 1.021 of 29.11.2018.

¹⁶ Decision of the Constitutional Court no. 615 of 12.06.2012, "Official Gazette of Romania", Part I, no. 454 of 6.07.2012.

¹⁷ Decisions of the Constitutional Court no. 404 of 10.04.2008, no. 26 of 18.01.2012, no. 570 of 29.05.2012 and no. 615 of 12.06.2012.

¹⁸ Judgments of 2.10.2009, 10.10.2011 and 16.07.2013 in the cases of Iordanov and Others v. Bulgaria, para. 47, Nedjet Şahin and Perihan Şahin v. Turkey, para. 56, and Remuszko v. Poland, para. 92.

¹⁹ For example, Decision of the Constitutional Court no. 562 of 19.09.2017, "Official Gazette of Romania", Part I, no. 838 of 23.10.2017, Decision of the Constitutional Court no. 903 of 6 July 2010, "Official Gazette of Romania", Part I, no. 584 of 17.08.2010, Decision of the Constitutional Court no. 743 of 2.06.2011, "Official Gazette of Romania", Part I, no. 579 of 16.08.2011, and Decision of the Constitutional Court no. 1 of 11.01.2012, "Official Gazette of Romania", Part I, no. 53 of 23.01.2012.

ty, which presupposes that it must be clear and precise enough to be enforceable; thus, the wording of the normative act with sufficient precision allows the persons concerned - who may, if necessary, to seek the advice of a specialist - to foresee, to a reasonable extent, in the circumstances of the case, the consequences which may result from a particular act. Of course, it can be difficult to draft laws of total precision, and certain flexibility may even prove desirable, but it does not affect the predictability of the law²⁰. According to the case-law of the CCR and following the case-law of the ECHR, the predictability of the law presupposes that the citizen has sufficient and prior information on the legal norms applicable to a concrete situation and, about the requirement of predictability, the wording of laws is not absolutely precise given the generality of legal norms²¹. According to the same case law, the inaccuracy of legal terms may be covered by a constant interpretation by national courts²², and the person must be able to foresee, to a reasonable extent, in the specific circumstances of the case, the consequences of a particular act of conduct²³.

Extremely interesting, from this perspective, is the CCR's attempt to identify criteria for evaluating the quality of the law, and these were established by reference to the norms of legislative technique provided for in Romanian legislation. The Court considered that although they have no constitutional value, by regulating them the legislator imposed a series of mandatory criteria for the adoption of any normative act, the observance of which is necessary to ensure the systematization, the unification, and the coordination of legislation, as well as the appropriate content and legal form for every normative act. Thus, compliance with these rules contributes to ensuring legislation that respects the principle of legal certainty, having the necessary clarity and predictability²⁴.

The concept of the rule of law was developed by the Constitutional Court in close connection with **the principle of constitutional loyalty and loyal cooperation between state institutions**, most often invoked in resolving constitutional legal disputes between public authorities. When the Court analyses the loyal cooperation between public authorities, it must rule on the whole range of issues that

²⁰ See, in that sense, Decision of the Constitutional Court no. 903 of 6.07.2010, "Official Gazette of Romania", Part I, no. 584 of 17.08.2010, Decision of the Constitutional Court no. 743 of 2.06.2011, "Official Gazette of Romania", Part I, no. 579 of 16.08.2011, Decision of the Constitutional Court no. 1 of 11.01.2012, "Official Gazette of Romania", Part I, no. 53 of 23.01.2012, or Decision of the Constitutional Court no. 447 of 29.10.2013, "Official Gazette of Romania", Part I, no. 674 of 1.11.2013.

²¹ Judgment of 26.04.1979 in *Sunday Times v. United Kingdom*, para. 49.

²² Judgment of 4.05.2000 in *Rotaru v. Romania*, para. 56-62.

²³ Judgment of 25.01.2017, in *Sissanis v. Romania*.

²⁴ Decision of the Constitutional Court no. 26 of 18.01.2012, "Official Gazette of Romania", Part I, no. 116 of 15.02.2012, and Decision of the Constitutional Court no. 445 of 16.09.2014, "Official Gazette of Romania", Part I, no. 790 of 30.10.2014.

this relationship entails, and not only about certain parts of it²⁵. Thus, the meaning of constitutional loyalty is not limited to specific and/or particular issues, viewed exclusively from the perspective of one of the authorities in constitutional relations that require loyal cooperation, but to a coherent and exhaustive analysis of the existing constitutional relations between public authorities.

Thus, the CCR noted that the first component of the rule of law is the implementation of the explicit and formal provisions of the law and the Constitution. In other words, in terms of loyal collaboration between state institutions/authorities, the first significance of the concept is the observance of the positive law norms, in force in a certain period, which expressly or implicitly regulate competences, prerogatives, attributions, obligations or duties of state institutions/authorities²⁶. Moreover, the observance of the rule of law is not limited to this component, but involves, on the part of public authorities, constitutional behaviours and practices, which have their origin in the constitutional normative order, regarded as a set of principles that underpin the social, political, legal relations of society. In other words, this constitutional normative order has a broader meaning than the positive norms enacted by the legislator, instituting the constitutional culture specific to a national community. Therefore, loyal collaboration presupposes, beyond the respect for the law, the mutual respect of the state authorities/institutions, as an expression of certain assimilated, assumed, and promoted constitutional values, to ensure the balance between the state powers. Constitutional loyalty can therefore be characterized as a value-principle intrinsic to the Fundamental law, while loyal collaboration between state authorities/institutions has a defining role in the implementation of the Constitution.

In the same manner, the Venice Commission noted that “the respect for a Constitution cannot be limited to the literal execution of its operational provisions. The very nature of a Constitution is that, in addition to guaranteeing human rights, it provides a framework for the state institutions, and sets out their powers and their obligations. The purpose of these provisions is to enable smooth functioning of the institutions based on their loyal co-operation. The Head of State, Parliament, Government, and the Judiciary, all serve the common purpose of furthering the interests of the country as a whole, not the narrow interests of a single institution or the political party having nominated the officeholder. Even if an institution is in a situation of power, when it can influence other state institutions, it has to do so with the interest of the State as a whole in mind, including,

²⁵ Decision of the Constitutional Court no. 240 of 3.06.2020, “Official Gazette of Romania”, Part I, no. 504 of 12.06.2020.

²⁶ Decision of the Constitutional Court no. 611 of 3.10.2017, “Official Gazette of Romania”, Part I, no. 877 of 7.11.2017.

as a consequence, the interests of the other institutions and those of the parliamentary minority”²⁷.

The institutional conduct that is limited to loyal collaboration, therefore, has an *extra legem* component, based on constitutional practices, whose primary purpose is the proper functioning of state authorities, good administration of public interests, and respect for the fundamental rights and freedoms of citizens. The secondary purpose is to avoid inter-institutional conflicts and to remove blockages in the exercise of their legal prerogatives. The tools that contribute to achieving these goals and that demonstrate loyal behaviour towards constitutional values are institutional dialogue and the establishment of mutually accepted practices. These instruments must be the basis for resolving “together”, “by agreement of the parties” and not “against”, “to the detriment” of one or the other, of any disputes arising in the relations between the authorities, caused by confusing, equivocal factual or legal situations. By virtue of the principle of loyal cooperation between authorities, it is, therefore, necessary for each of them to exercise due and increased diligence in the legal institutional dialogue, to avoid, as far as possible, the incitement of legal conflicts of a constitutional nature.

The notion of loyal collaboration cannot have a stable, concrete, quantifiable content, but, on the contrary, it is a dynamic one, variable from one case to another, depending on the actors involved, but also from one era to another, depending on the evolution of the legislative framework governing interinstitutional relations or the existence of good practices/customs governing these relations. However, what can be established peremptorily is that the loyalty of state institutions/authorities must always be manifested towards constitutional principles and values, while inter-institutional relations must be governed by dialogue, balance, and mutual respect.

Given these considerations, the Constitutional Court noted that the role of contributing to shaping the principle of loyal cooperation and mutual respect is mainly played by the institutions/authorities put in a position to cooperate. They have the task of outlining/structuring the possible forms that loyal conduct can take, in relation to the legal competencies of each of the collaborating institutions/authorities and in relation to the values and constitutional principles incident to that collaboration. Collaboration must be made in the forms provided by law, and

²⁷ Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, Adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15.12.2012); [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)026-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)026-e) [accessed: 20.04.2022].

where the law is silent, public authorities must identify and establish, in good faith, those forms of collaboration that value the constitutional normative order and do not prejudice either the constitutional principles under which they function and relate, neither the fundamental rights nor freedoms of the citizens in whose service they carry out their activity. Good faith must therefore be shown to find solutions that overcome possible institutional blockages and that ensure the efficient functioning of each individual authority, according to the powers conferred by law. If the identification of these good practices is difficult to achieve and the resolution of inter-institutional disputes fails, public authorities have the opportunity to resort to constitutional mediation instruments, respectively to the procedure for resolving constitutional disputes, provided by Article 146 e) of the Constitution, which aims precisely to restore the constitutional normative order, by interpreting the incident norms of the fundamental Law and establishing the concrete landmarks of loyal conduct towards constitutional values and principles²⁸.

Of course, the rule of law would remain a purely theoretical notion if it did not benefit from judicial guarantees to ensure that public authorities are included in the coordinates of the law, guarantees including **the state's liability** for acts of disobedience to the law²⁹. As such, "the compulsory *erga omnes* character of the decisions of the Constitutional Court, which establishes the unconstitutionality of a law or an ordinance, implies the existence of legal liability in case of non-compliance with these decisions. In this respect, there is equivalence with the situation in which a law adopted by the Parliament or an ordinance issued by the Government is not observed. Or, in more general terms, it is a question of identifying legal liability when one of the state authorities refuses to implement the measures established, within the limits of the powers conferred by the Constitution, by another state authority. In such a situation, the identification of the legal liability derives from the imperative character of the provisions of Article 1 (3) of the Constitution (...). Otherwise, one of the state powers would remove this fundamental constitutional principle, which is inadmissible. Also, in light of the provisions of Articles 11 and 20 of the Constitution, the legal liability for non-compliance with a decision of the Constitutional Court may consist, insofar as the conditions provided by the Convention for the Protection of Human Rights and Fundamental Freedoms are fulfilled, in the judgment of the European Court of Human Rights against the Romanian state"³⁰.

²⁸ Decision of the Constitutional Court no. 611 of 3.10.2017, cited above.

²⁹ I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole* [Romanian Constitution. Article comments], 2nd ed., C.H. Beck, Bucharest 2019, p. 10.

³⁰ Decision of the Constitutional Court no. 169 of 2.11.1999, "Official Gazette of Romania", Part I, no. 151 of 12.04.2000.

As far as the EU is concerned, the concept of the rule of law is not defined by the Treaties. The European Commission has compiled a list of the basic principles of the rule of law as set out in the case-law of the Court of Justice of the European Union, which were included in the 2014 Rule of Law Framework³¹: legality, prohibition of misuse of powers, legal certainty, independent and impartial courts, effective judicial review, including respect for fundamental rights, judicial protection, separation of powers, equality before the law. However, these principles, although inspired by the recommendations of the Venice Commission and presented as a common denominator of the European Union, must take into account the constitutional legal systems of the Member States as to the meaning they give to the rule of law. And in the joint effort to standardize the interpretation of the rule of law, a key role is played by the judiciary, whose independence is vital to achieving loyal cooperation in the EU.

3. What minimum requirements follow from the European rule of law principle and its respective counterpart in national constitutional systems for judicial independence, the filling of judgeships, the transfer of judges against their will, and the „statutory judge”?

In Romania, the main textual sources in this matter are represented by the Constitution and the organic laws. To the textual sources are added the “praetorian” sources that are the case-law of the Constitutional Court in interpreting the constitutional texts of reference.

Thus, the current Constitution of Romania dedicates a specific chapter to the regulation of the “Judicial authority” (Chapter VI, under Title III). It comprises three sections: Section I on “Courts of law”, Section II on “The Public ministry” and Section III on “The Superior Council of Magistracy”. Therefore, the Constitution distinguishes between the *judiciary*, represented by the courts of law, and the *judicial authority* that includes, together with the courts, other two public authorities, namely the Public Ministry and the Superior Council of Magistracy (*CSM*). The constitutional provisions are developed in a series of organic laws³², respectively Law no. 303/2004 on the status of judges and prosecutors³³, Law no. 304/2004 on the judicial organization,³⁴ and Law no. 317/2004 regarding the Superior Council

³¹ COM(2014) 158 final, 19.03.2014.

³² Prior to the legal framework in force, the matter was regulated by Law no. 92/1992 for the judicial organization, “Official Gazette” no. 197 of 13.08.2002, republished, with subsequent amendments and supplements, in the “Official Gazette” no. 259 of 30.09.1997.

³³ Republished in the “Official Gazette of Romania”, Part I, no. 826 of 13.09.2005.

³⁴ Republished in the “Official Gazette of Romania”, Part I, no. 827 of 13.09.2005.

of Magistracy, republished, as subsequently amended and supplemented³⁵. The fundamental principles according to which judiciary is carried out, in accordance with the constitutional and legal framework mentioned, are the following: the independence of the judge and his obedience only to the law, the principle of legality, the free access to justice, the achievement of justice equally for all, the observance of the right to defense, the observance of presumption of innocence, publicity of court hearings, use of official language and native language in court. The judge benefits from the full independence given by the exercise - only by him - of the judiciary. The constitutional norms comprise the guarantees of the independence of judges, including the conditions of recruitment, immovability, promotion, and sanctioning of judges.

The Constitutional Court has ruled, in principle, that **the independence of the judge** means that, in his activity, the judge is subject only to the law, which means that in the resolution of disputes he cannot receive orders, instructions, indications, suggestions on the solution to be pronounced. The framer has established the independence of the judge to defend him from the influence of the political authorities and, in particular, of the executive power³⁶. According to the Court, “both the independence of the judiciary - **the institutional component** (...) and the independence of the judge - **the individual component** implies the existence of numerous aspects, such as: the lack of interference of the other powers in the judicial activity, the fact that no body other than the courts can decide on their specific competences provided by law, the existence of a procedure provided by law regarding the appeals of the judgments, the existence of sufficient funds for the conduct and administration of the judicial activity, the procedure of appointment and promotion as magistrates and, possibly, the period for which they are appointed, adequate working conditions, the existence of a sufficient number of magistrates of the respective court in order to avoid excessive workload and to allow the completion of the processes within a reasonable time, remuneration commensurate with the nature of the activity, impartial assignation of cases, the possibility of forming associations whose main object is to protect the independence and interests of the magistrates, etc.”³⁷. Moreover, “the institution of objection of the judge is justified by the imperative of ensuring an impartial judgment, in which the parties are protected from the possible bias of the judge. Consequently, the objection can only be individual and not collective, nor can it lead, in our legal system, to prevention of all the judges of a court from judging the proceedings with

³⁵ Republished in the “Official Gazette of Romania”, Part I, no. 628 of 1.09.2012.

³⁶ Decision of the Constitutional Court no.2 of 11 January 2012, published in the “Official Gazette of Romania”, Part I, no. 131 of 23.02.2012.

³⁷ Decision of the Constitutional Court no. 873 of 25.06.2010, “Official Gazette of Romania”, Part I, no. 433 of 28.06.2010.

which they have been invested under the law. Therefore, a request for an objection is inadmissible if it does not concern the judges who are part of the panel of the case to which the case has been assigned for settlement, as well as in the situation where the request is directed against the same judge for the same reason of incompatibility as the one previously invoked³⁸.

At the same time, the Court emphasized that “the independence of the judiciary has both an objective component, as an indispensable feature of the judiciary, and a subjective component concerning the person’s right to have his or her rights and freedoms established by an independent judge. Without independent judges, rights and freedoms cannot be respected fairly and legally. Therefore, the independence of the judiciary is not an end in itself. This is not a personal privilege of judges, but it is justified by the need to allow judges to fulfil their role of protectors of the rights and freedoms of citizens”³⁹.

The **immovability** was defined by the CCR as “that state of law which, in guaranteeing the independence of the judges, protects them from the risk of being dismissed, removed or demoted from office without legitimate grounds or moved to other courts, by delegation, secondment or even by promotion, without their consent. The principle of immovability applies both to the duration of the position of judge and to the term of office, which cannot be either reduced or prolonged without the consent of the judge”⁴⁰. Thus, for example, the Court has found, in *a priori* review, that they are unconstitutional, in violation of the principle of immovability of judges, the provisions according to which at the date of entry into force of the criticized law, their term of office ceases if on that date their duration exceeded 3 years from the appointment (as a result of the introduction of the 3-year term of the office in a management position, under the conditions in which the law in force provided for a 5-year term). In another case⁴¹, concerning the interpretation of the same constitutional principle, the Court ruled that the sanction of professional demotion is not contrary to the immovability of the judge. The limits of immovability must always be related to the conduct of the judge, this principle being applied in full when he exercises his powers within the limits and according to the law.

³⁸ Decision of the Constitutional Court no. 574 of 29.09.2015, “Official Gazette of Romania”, Part I, no. 827 of 5.11.2015.

³⁹ Decision of the Constitutional Court no. 629 of 4.11.2014, “Official Gazette of Romania”, Part I, no. 88 of 2.02.2015.

⁴⁰ Decision of the Constitutional Court no. 375 of 6.07.2005, “Official Gazette of Romania”, Part I, no. 591 of 8.07.2005.

⁴¹ Decision of the Constitutional Court no. 45 of 30.01.2018, “Official Gazette of Romania”, Part I, no. 199 of 5.03.2018.

4. The relationship between European and Romanian law and the jurisdictional limits of EU institutions

In the Romanian Constitution, the relations with the EU are regulated in a separate article, Article 148 - *Integration into the European Union*, which was introduced in the revision of the Constitution, in 2003⁴². By Article 148 (2), as a result of the accession, “the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act”. The following paragraphs of Article 148 provide for the duties of public authorities resulting from the act of accession, respectively of the Parliament, the President of Romania, the Government, and the judicial authorities, to fulfil the duties resulting from the act of accession and those mentioned in paragraph (2), quoted above.

The Constitution, therefore, provides the basis for the relationships of the legal norms in the two systems and the premise of their coherence, which is guaranteed by Article 148 (2), which gives priority to EU founding treaties and other binding European regulations contrary to domestic law. It is noted that the constituent legislator used the notion of “priority”, and, concerning this way of drafting the constitutional norms of reference, the CCR has built a case law that substantiates the relations between the national and European legal order centered on the **idea of unconditional supremacy of the Constitution** and, inherent to this approach, the jurisdictional limits of the EU institutions.

Ruling on the initiative to revise the Constitution in 2003, the Court noted that the “accession to the European Union, once achieved, entails a series of consequences that would not occur without proper constitutional regulation. The first of these consequences requires the integration into the national law of the *acquis Communautaire*, as well as the determination of the relationship between the community normative acts and the internal law. The solution proposed by the authors of the revision initiative envisages the implementation of community law in the national and the establishment of the rule of priority application of Community law over the contrary provisions of national law, in compliance with the provisions of the Act of Accession. The consequence of the accession stems from the fact that **the Member States of the European Union have agreed to place the *acquis Communautaire* - the founding treaties of the European Union and the regula-**

⁴² The sole revision of the Romanian Constitution adapted in 1991.

tions derived from them - in an intermediate position between the Constitution and other laws when it comes to binding European regulations”⁴³.

The idea of the supremacy of the Constitution was strengthened a decade later when Romania joined the EU⁴⁴. Thus, on another occasion for a revision of the Constitution, in 2014⁴⁵, it was proposed to amend the hierarchy of legal norms, established by the current Article 148 (2) of the Constitution. The CCR found the proposed amendment unconstitutional, noting that “the current text of the Constitution provides that the provisions of the founding treaties of the European Union, as well as other binding Community regulations, take precedence over the contrary provisions of national law, in accordance with the provisions of the Act of Accession.”, meaning that it referred to the hierarchy of norms established by the aforementioned Decision no. 148 of 16 April 2003, where the Court made a distinction between the Constitution and the other laws. Emphasizing that “constitutional provisions are not declaratory in nature, but constitute binding constitutional rules, without which the existence of the rule of law cannot be conceived, as provided for in Article 1 (3) of the Constitution”, the Court held that that “establishing that the law of the European Union is applied without any circumstance within the national legal order, not distinguishing between the Constitution and the other internal laws, it is equivalent to placing the Fundamental Law in a secondary plan compared to the legal order of the European Union”⁴⁶. The CCR stressed that the Fundamental law of the state - the Constitution is the expression of the will of the people, which means that it cannot lose its binding force only by the existence of a discrepancy between its provisions and the European ones. The Court concluded that **accession to the European Union cannot affect the supremacy of the Constitution over the entire legal order**.

For a better understanding of the 2014 ruling of the Court, it should be noted that, with regard to the review of the initiatives to revise the Constitution, the **CCR rules on the observance of the express limits of revision, as established by Article 152 of the Romanian Constitution**. About the proposed amendment on the hierarchy of rules in relation to EU law, the CCR considered that it restricts

⁴³ Decision of the Constitutional Court no. 148 of 16.04.2003, “Official Gazette of Romania”, Part I, no. 317 of 12.05.2003.

⁴⁴ Romania’s accession to the EU took place in 2007.

⁴⁵ Which was not completed, however, being abandoned, perhaps even in view of the numerous elements of unconstitutionality and drafting imperfections, found both by CCR, in Decision of the Constitutional Court no. 80 of 16.02.2014, “Official Gazette of Romania”, Part I, no. 246 of 7.04.2014, and by the Venice Commission, which was asked for its opinion on the proposed amendment to the Constitution; see Opinion on the Draft Law on the Review of the Constitution of Romania, adopted by the Venice Commission at its 98th Plenary Session, (Venice, 21-22.03.2014); [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)010-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)010-e) [accessed: 18.04.2022].

⁴⁶ Decision of the Constitutional Court no. 80 of 16.02.2014, cited above.

fundamental rights, namely the right of the citizen to seek constitutional justice. The Court considered that “accepting the new wording proposed in Article 148 (2) would be tantamount to creating the necessary prerequisites for the limitation of the jurisdiction of the Constitutional Court, in the sense that only normative acts that are adopted in areas not subject to the transfer of powers to the European Union could also be subject to constitutional review, while the normative acts that regulate, from a material point of view, in shared areas would be subject exclusively to the legal order of the European Union, excluding the constitutional review on them. Or, regardless of the field in which the normative acts regulate, they must respect the supremacy of the Romanian Constitution, according to Article 1 (5)”. As a result, **the Court found that such an amendment would constitute a restriction on the right of citizens to apply to constitutional justice for the defence of constitutional values, rules, and principles, i.e. the abolition of a guarantee of those values, rules, and principles, which also include the sphere of fundamental rights and freedoms, which is why, by a unanimous vote, it found that the amendment to the provisions of Article 148 (2) is unconstitutional**, as it violates the limits of the revision provided by Article 152 (2) of the Constitution⁴⁷.

Thus, nowadays, the relations between national and EU law and, from this perspective, the jurisdictional limits of the EU institutions are established in domestic law by reference to Article 148 of the Constitution in the wording of the 2003 revision of the Constitution and the CCR interpretation, which invokes consistently, in its case law, **the principle of the supremacy of the Constitution and the role of the Constitutional Court as guarantor of this supremacy**.

Within all constitutional provisions, those of Article 148 must be supported by the other norms that “connect” the Romanian legal system to the international one, namely **art.11- International law and domestic law**, located in Title I - *General principles*. From the analysis of these provisions, it results that in the internal system it is forbidden [at least theoretically] to enter norms contrary to the Constitution, as long as, according to Article 11 (3), “*if a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution*” and, according to Article 147 (3) the final sentence of the Constitution, “*the treaty or international agreement found to be unconstitutional cannot be ratified*”. Correlatively, the Constitution establishes by Article 147 b) the power of the Constitutional Court to rule on the constitutionality of international treaties before their ratification. We mention that, although the constitutional framework allows this, the CCR has not been notified, like other European constitutional courts, to rule on Romania’s accession to the EU. As a result, according to the rules established by Article 11 of the Constitution, the

⁴⁷ *Ibidem*.

European treaties to which Romania has become a party enjoy the presumption of constitutionality, being subsidiary to the duty imposed by Article 11 (1) cited above, generally known as the *pacta sunt servanda* principle. If there is a collision of a treaty with the Constitution itself, including one in the range of the relations at the EU level, we must return to the general rules established by Article 11, in the sense of calling into question the very revision of the Constitution.

To have a complete picture of the relationship between the constitutional norms and the jurisdictional competencies in this context in Romania, including with reference to the norms of EU law, we must also mention **Article 20 of the Constitution - International Treaties on Human Rights**, which has the following wording: *“(1) Constitutional provisions concerning the citizens’ rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions”*. This constitutional text determines the integration of “covenants and treaties on fundamental human rights, to which Romania is a party” in the so-called “constitutionality bloc”, so that they create, through Article 20 of the Constitution, the reference norms for the constitutional review.

As a result, regarding the competence of the CCR obligations and the constitutional duties under European law, we distinguish as it regards: the European Treaties on Human Rights and the Constitutive Treaties of the European Union, as well as other binding Community regulations.

As regards the first category, the case-law of the CCR frequently refers in particular to the Convention for the Protection of Human Rights and Fundamental Freedoms and its interpretation in the case-law of the European Court of Human Rights. Regarding the European Union law, hence the way of interpretation and application of the provisions of Article 148 of the Constitution, in the case-law of the CCR, has gradually emerged a true “doctrine”, which can be summarized as follows: the Constitution is the only direct rule of reference in constitutional review; a rule of European law may be used in constitutional review as a rule of direct reference - which can only be the Constitution - subject to certain conditions (an objective condition, concerning the clarity of the rule, and a subjective one, which concerns the margin of appreciation of the constitutional relevance of the rule of European law). In this sense, the CCR noted that “the use of a norm of European law in the constitutionality review as a norm interposed to the rule of reference implies, based on Article 148 (2) and (4) of the Romanian Constitution, a cumulative conditionality: on the one hand, this rule must be sufficiently clear, precise

and unequivocal in itself or its meaning must have been clearly, precisely and unequivocally established by the CJEU, and on the other hand, the rule must be of a certain level of constitutional relevance so that its normative content supports the possible violation by the national law of the Constitution – the only direct reference norm within the constitutional review. In such a case, the CCR's approach is distinct from the simple application and interpretation of the law, which belongs to courts and administrative authorities, or from any matter relating to legislative policy promoted by Parliament or the Government, as the case may be⁴⁸. The assessment of constitutional relevance rests exclusively with the CCR.

We note a distinct situation regarding the Charter of Fundamental Rights of the European Union, because, even if it is a treaty on fundamental rights, it is applicable in the Romanian legal system through the rules established by Article 148 of the Constitution for EU law, and not the rules of Article 20 for the international treaties on human rights (which allow inclusively the priority over the Constitution of the norms from the treaties in the matter of human rights to which Romania is a party, insofar as they would be more favorable). Thus, about the Charter, the CCR has stated that it is, in principle, applicable in constitutional review “insofar as it ensures, guarantees and develops the constitutional provisions on fundamental rights, in other words, insofar as their level of protection it is at least at the level of constitutional norms in the field of human rights”.

However, the direct application of the provisions of Articles 20 and 148 of the Constitution is made not only by the CCR within the constitutional review but also by the courts from the traditional justice system in Romania, in their ruled cases. The latter have the duty to apply, as a matter of priority, the provisions of international treaties (*“covenants and treaties on fundamental human rights, to which Romania is a party”*), respectively *“the founding treaties of the European Union, as well as other binding EU regulations”*), if the domestic laws contain provisions contrary to the Article 20 (2) final sentence of the Constitution, which is intended to ensure high protection of the rights and fundamental freedoms. In this way, the national judge is to some extent also a European judge, contributing to legal integration at the EU level.

In practice, given this way of allocating jurisdiction, the identification of a judicial coherence within the “triangle” formed by national courts, the Constitutional Court, the CJEU, in which the ECHR also interferes (if we consider the fundamental rights) is not always straightforward. Although the CCR's case law, as

⁴⁸ See, for example, Decision of the Constitutional Court no. 668 of 18.05.2011, “Official Gazette of Romania”, Part I, no. 487 of 8.07.2011, Decision of the Constitutional Court no. 921 of 7.07.2011, “Official Gazette of Romania”, Part I, no. 673 of 21.09.2011, Decision of the Constitutional Court no. 64 of 14.02.2018, “Official Gazette of Romania”, Part I, no. 336 of 26.04.2018.

established shortly after Romania's accession to the EU (on a historical scale, of course), clarified some boundaries between the jurisdiction of the Constitutional Court and that of the courts in applying EU law in the sense detailed above, they are not entirely consolidated.

However, according to the significant case-law cited above⁴⁹ in the sense that, from the perspective of Article 148 of the Constitution, the courts have the power to determine whether there is a contradiction between national law and EU law, giving due priority to EU law⁵⁰ (a framework in which, to reach a fair and legal conclusion, *ex officio* or at the request of a party, they may refer to the CJEU for a preliminary ruling in the sense of Article 267 TFEU⁵¹), recently, by a decision

⁴⁹ See M. Safta, *Case law of the Constitutional Court [18–22 November 2019]. Relations between national, international and European law in the context of constitutional review (I). Interpretation of art. 20 of the Constitution – International human rights treaties. Interpretation of art. 148 of the Constitution – Integration into the European Union. Cumulative conditions regarding the use of a norm of European law in the constitutionality control as a norm interposed to the reference one*, <https://www.juridice.ro/662254/nota-de-jurisprudenta-a-curtii-constitutionale-18-noiembrie-22-noiembrie-2019.html> [accessed: 17.04.2022].

⁵⁰ Also see Decision of the Constitutional Court no. 490 of 25.06.2020, “Official Gazette of Romania”, Part I, no. 968 of 21.10.2020, para.19: „Regarding this aspect, namely whether the delegated legislator affected by emergency ordinance the harmonized provisions, the Court also noted that the courts, together with the Court of Justice of the European Union, are the only ones able to analyse and ascertain the inconsistency between domestic law aimed at transposing a directive and European Union law” (referring to Decision of the Constitutional Court no. 137 of 25.02.2010, “Official Gazette of Romania”, Part I, no. 182 of 22.03.2010 and marking, accordingly, the consistency of the interpretation given by CCR art.148 of the Constitution up to that moment).

⁵¹ For example, Decision of the Constitutional Court no. 137 of 25.02.2010, “Official Gazette of Romania”, Part I, no. 182 of 22.03.2010: “By Decision of the Constitutional Court no. 1.596 of 26 November 2009, published in the Official Gazette of Romania, Part I, no. 37 of 18 January 2010, the Constitutional Court ruled that it is not within its competence “to examine the conformity of a provision of national law with the text of the Treaty establishing the European Community (now the Treaty on the Functioning of the European Union) in the light of Article 148 of the Constitution . Such competence, namely to determine whether there is a conflict between national law and the EC Treaty, belongs to the court, which, in order to reach a correct and legal conclusion, *ex officio* or at the request of the party, may refer a preliminary question within the meaning of art. 234 of the Treaty establishing the European Community before the Court of Justice of the European Communities. In the event that the Constitutional Court considers itself competent to rule on the compliance of the domestic law with the European law, this might lead to a possible conflict of jurisdiction between the two courts, which is inadmissible at this level”. The Court also notes in the same decision that the author of the exception of unconstitutionality admits that “the court is forced to find that the provisions of Ordinance no. 50/2008 are regulations that are contrary to European law and cannot be maintained as applicable and concluded that all these issues converge to show that the task of prioritizing the application of mandatory Community regulations in relation to the provisions of national law belongs to the national court. It is a matter of law enforcement, not a constitutionality one”. The Court notes that “in the relationship between Community and national law (with the exception of Constitution), one can speak only of the priority of application of the former over the other, a matter which falls within the competence of the courts”. See Decision of the Constitutional Court no.21 of 18 January 2018, published in the Official Gazette of Romania, Part I, no. 175 of February 23, 2018.

adopted by a majority of votes, the CCR raised the issue of legal uncertainty⁵² in connection with that mechanism. The limits of the jurisdiction of the CJEU and the CCR appear even more “vague” from the perspective marked by the dispute between “supremacy” (supported by the CJEU) versus “priority” (supported by the CCR) when applying EU law. As recent case law has shown, both at the national and supranational level, tensions persist, and judicial coherence in the EU is still a difficult goal to achieve. However, this coherence is needed to uphold the rule of law in the EU and, in particular, the rights and freedoms of citizens.

5. Tensions in the dialogue between constitutional courts and ECJ

Apparently, these tensions would be solved – to the benefit of the rights of citizens and the rule of law in the EU, through the dialogue of judges and the harmonization of case law in existing mechanisms, such as the referral for a preliminary question. But, although at various times and forms of discussions, both academics and practitioners use the formula “dialogue of judges”, especially when referring to courts located on several levels, it seems that sometimes we rather see a “monologue”. We cannot talk about dialogue as a formal harmonization mechanism unless there is a “bridge” open for communication or existing “bridges”, such as preliminary references to the CJEU, are not used.

About national developments in this respect, in particular the CCR-CJEU relations, several steps can be identified, in line with the attitude and openness to this type of vertical dialogue.

Regarding the pre-accession period and immediately after the accession, we consider very indicative the features presented in the Report of the CCR at the 16th Congress of the Conference of the European Constitutional Courts⁵³, hosted by the Constitutional Court of Austria in 2014, whose theme was the relations between courts (*Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives*). The CCR report begins by emphasizing the “general concept that emerges from the case-law of the Romanian Constitutional Court”, namely that of “promoting mutual respect, based on the understanding of the phenomenon of a plurality of constitutional systems, which must coexist and relate within and in

⁵² Para. 86 of the Decision of the Constitutional Court no.390 of 8.06.2021, “Official Gazette of Romania”, Part I, no. 612 of 22.06.2021: “or, insofar as some courts do not apply ex officio national provisions that they consider contrary European law, while others apply the same national rules, considering them in line with European law, the standard of predictability of the norm would be severely affected, which would lead to serious legal uncertainty and, implicitly, to a violation of the rule of law”.

⁵³ See <https://www.vfgh.gv.at/cms/vfgh-kongress/en/index.html> [access: 18.04.2022].

relation to the autonomous legal order that this entails. In this complex context, the dialogue of the constitutional judge with the European one serves to develop common standards for the protection of fundamental rights or to enrich the existing ones, with effects in terms of the activity of legislation and law enforcement at a national level⁵⁴. It is also stated that “the constitutional court is one of the main factors in the process of Europeanization of the national legal system, all the while respecting the national constitutional identity, a conclusion proved by the numerous cases in which the Court ruled on the duties of national authorities from the perspective of Article 148 of the Constitution and how to fulfil these obligations. The presented aspects demonstrate the effort to identify common language and standards, especially in the field of human rights protection. It is true that the plurality of sources in this matter - the national constitutions, the Charter of Fundamental Rights of the European Union, the Convention for the Protection of Human Rights and Fundamental Freedoms, all binding in nature, give rise to a risk of collision between the courts called upon to apply them. However, the standards for the protection of these rights tend to be unvarying, including through the contribution of the courts called upon to interpret the rules in question and which invoke each other’s case-law. In addition, the acceptance of the Charter or the Convention as a reference system for exercising constitutional review - with the distinctions and particularities determined by the legal systems from which they arise - enhances the dialogue between courts, by way of preliminary references, thus solving such divergent approaches and “constitutionalizing” fundamental rights and freedoms at European level⁵⁵.”

Both the introduction and the case law presented in the Report reveal the pro-European attitude of the CCR, and later was open the dialogue by way of preliminary reference, in Case C-673/16, *Coman v. Romania*. This is the first (and the only, so far) preliminary reference to the CJEU that the CCR has made. The case raised a sensitive issue, namely the recognition of same-sex marriage. The file in which this referral was made had as object the exception of unconstitutionality of the provisions of Article 277 (2) and (4) of the Civil Code, having the marginal name *Prohibition or equivalence of some forms of cohabitation with marriage*. The exception was raised in the context of the refusal of the Romanian authorities to grant a right of residence as a family member to the same-sex husband (American citizen) of a Romanian citizen, a refusal based on the rules of the mentioned Civil Code. By Judgment of 5 June 2018 in Case C-673/16, the CJEU (Grand Chamber) ruled, in essence, that in the event that a citizen of the EU exercised his freedom of movement and is actually residing in accordance with the conditions laid down

⁵⁴ See KF+LB-Roumanie-MS (vfigh.gv.at) [access: 17.04.2022].

⁵⁵ *Ibidem*.

in Article 7 (1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 in a Member State other than the one of which he is a national and, on this occasion, established or has strengthened a family life with a third-country national of the same sex, to which he is bound by a legal marriage concluded in the host Member State, Article 21 (1) TFEU must be interpreted as meaning that it opposes that the competent authorities of the Member State of which the Union citizen is a national refuse to grant a right of residence in the territory of that Member State to that national, on the ground that the law of that Member State does not provide for marriages of people of the same sex. Article 21 (1) TFEU must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to the latter was concluded in a Member State under the law of that State, shall have a right of residence for more than three months in the territory of the Member State of which he is a citizen of the Union. That derived right of residence may not be subject to more stringent conditions than those laid down in Article 7 of Directive 2004/38.

The CCR applied in its constitutional review the provisions of Article 277 (2) and (4) of the Civil Code, the rules of European law contained in Article 21 (1) TFEU and those of Article 7 (2) of Directive 2004/38, in the interpretation of the CJEU, admitted the exception of unconstitutionality and found that the provisions of Article 277 (2) and (4) of the Civil Code are constitutional insofar as they allow the granting of the right of residence on the territory of the Romanian state, under the conditions laid down by European law, to spouses - nationals of Member States of the European Union and/or nationals of third countries - from same-sex marriages concluded or contracted in a Member State of the European Union⁵⁶.

Following this moment of opening the dialogue by way of preliminary reference, the developments in the Romanian public and legal space, amid changes to the laws of justice, have enhanced a topic of great resonance and, in turn, sensitive, concerning justice in general and the independence of justice in particular. In this context, the debates on the place and role of the Cooperation and Verification Mechanism established on the occasion of Romania's accession to the EU and, implicitly, the limits of competence of the European institutions were reactivated⁵⁷. A neuralgic point of all the debates, notifications, and contestations, was the establishment of a structure called the Section for the Investigation of Crimes in Justice (SIIJ). This regulation (in fact the amendment of the laws of justice) was repeatedly

⁵⁶ Decision of the Constitutional Court no. 534 of 18.07.2018, "Official Gazette of Romania", Part I, no. 842 of 3.10.2018.

⁵⁷ Commission Decision of 13.12.2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (Official Journal of the European Union L 354, 14.12.2006, p. 56).

notified to the CCR, opinions have been requested from the Venice Commission, recommendations have been expressed by the European Commission under the Cooperation and Verification Mechanism⁵⁸, and by GRECO⁵⁹ within its competence. Also, the courts notified the CJEU which ruled on several judgments fiercely debated in Romania, assigning them diametrically opposed meanings depending on the interest of demonstrating one or another point of view. The main points of these judgements and the reaction of the CCR are presented in what follows.

Thus, by the judgment of 18 May 2021, handed down by the CJEU following preliminary references made by Romanian courts, the European court ruled, *inter alia* (para. 7 of the operative part) that “*The principle of the primacy of EU law must be interpreted as precluding legislation of a Member State having constitutional status, as interpreted by the constitutional court of that Member State, according to which a lower court is not permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU*”. CJEU reiterated in its judgment the principle of the supremacy of Union law, which “*establishes the pre-eminence of EU law over the law of the Member States. That principle therefore requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States (judgment of 6 October 2020, La Quadrature du Net and Others, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 214 and the case-law cited)*” (para. 244). According to the CJEU, “*by virtue of the principle of the primacy of EU law, a Member State’s reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law*” (para. 245). As such, “*any national court, hearing a case within its jurisdiction, has, as a body of a Member State, more specifically the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it [judgments of 24 June 2019, Popławski, C-573/17, EU:C:2019:530, paragraph 61, and of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 161]*” (para. 248). In the recitals of the judgement, CJEU also noted that “*article 2 and the second subparagraph of Article 19(1) TEU and Decision 2006/928 must be interpreted as precluding national legislation providing for the creation of a specialised section of the Public Prosecutor’s Office with exclusive competence to conduct investigations into offences committed by*

⁵⁸ See https://ec.europa.eu/info/files/progress-report-romania-com-2021-370-final_ro [access: 18.04.2022].

⁵⁹ See <https://rm.coe.int/decision-87th-greco-plenary-meeting-strasbourg-kudo-online-22-25-march/1680a1ea78> [access: 18.04.2022].

judges and prosecutors, where the creation of such a section is not justified by objective and verifiable requirements relating to the sound administration of justice, and is not accompanied by specific guarantees such as, first, to prevent any risk of that section being used as an instrument of political control over the activity of those judges and prosecutors likely to undermine their independence and, secondly, to ensure that that exclusive competence may be exercised in respect of those judges and prosecutors in full compliance with the requirements arising from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union” (para.5 of the operative part). Also, CJEU remarked that “where it is proved that the second subparagraph of Article 19(1) TEU or Decision 2006/928 has been infringed, the principle of the primacy of EU law will require the referring court to disapply the provisions at issue, whether they are of a legislative or constitutional origin [see, to that effect, judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, paragraph 150 and the case-law cited]”. (para. 251)

The CCR, by Decision no.390 of 8 June 2021⁶⁰, regarding the exception of unconstitutionality of the provisions of art.88¹-88⁹ of Law no.304/2004 on judicial organization, as well as of the Government Emergency Ordinance no.90/2018 on some measures for the operationalization of the Section for investigating criminal offences within the judiciary (SIIJ), with a majority of votes, **reiterated its case law on the constitutionality of the regulation establishing the SIIJ**, the relations between the national and European legal order, **as well as the principle of the supremacy of the Constitution, and not of EU law**. At the same time, referring to the Judgment of 18 May 2021, delivered by the CJEU in case C-355/19, the CCR considered that “*cannot be considered as an element which could lead to a reversal of the case-law in terms of the impact of Decision 2006/928/EC [n.a. regarding the establishment of MCV] in the constitutional review and, implicitly, of the violation of Article.148 of the Constitution*” (previously ascertained by several decisions referred to in the recitals of Decision no.390/2021). As a result, the CCR rejected, as unfounded, the exception of unconstitutionality of the provisions of art.88¹ paragraph (1) - (5), of art.88²-88⁷, of art.88⁸ paragraph (1) letter a) -c) and e) and paragraph (2), as well as of art.88⁹ of Law no.304/2004 (referring to SIIJ). Moreover, the CCR noted in the recitals of the ruling that “**the application of point 7 of the operative part of the judgment [of the CJEU]**, according to which a court “shall be empowered to leave of its own motion a national provision which falls within the scope of Decision 2006/928 and which it considers, in the light of a judgment of the Court, to be contrary to that decision or Article 19 (1), second subparagraph, TEU” **has no basis in the Romanian Constitution**, since, as previously mentioned, Article 148 of the Constitution enshrines the priority of applying European law

⁶⁰ Published in the “Official Gazette of Romania”, Part I, no. 612 of 22.06.2021.

to the contrary provisions of domestic law. Or, the MCV reports, drawn up on the basis of Decision 2006/928, by their content and effects, as established by the CJEU judgment of 18 May 2021, do not constitute rules of European law which the court should apply as a matter of priority, thus removing the national norm. Therefore, **the national judge cannot be put in a position to decide on the priority application of recommendations to the detriment of national law, as MCV reports do not regulate, so they are not likely to conflict with domestic law. This conclusion is all the more necessary in the event that the national legislation has been declared in accordance with the Constitution by the national constitutional court in the light of the provisions of Article 148 of the Constitution**".

Continuing this tense "saga", at the end of 2021, by the Judgment (Grand Chamber) of 21 December 2021 in Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, in response to preliminary rulings also made by the Romanian courts, the CJEU ruled, *inter alia*, that "*the principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court of Justice, that that case-law is contrary to the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision 2006/928*"⁶¹.

The recitals of the judgment mention decisions of the CCR indicated by Romanian courts in their applications, which showed that "*the case-law of the Curtea Constituțională (Constitutional Court) established in the decisions at issue in the main proceedings, in relation to which they have doubts as to the compatibility of that case-law with EU law, is, in accordance with Article 147(4) of the Romanian Constitution, binding and must be observed by the national courts, failing which a disciplinary penalty may be imposed on their members pursuant to Article 99(§) of Law No 303/2004. In those circumstances, the referring courts are seeking to ascertain whether the principle of primacy of EU law precludes such national rules or such a national practice and allows a national court to disapply case-law of that kind, without that court's members bearing a risk of incurring a disciplinary penalty*"⁶². In answering the question on this issue, CJEU ruled, in the same judgment, that "*Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision 2006/928 are to be interpreted as not precluding national rules or a national practice under which the decisions of the national constitution-*

⁶¹ See <https://curia.europa.eu/juris/document/document.jsf?jsessionid=9B42CB84E0909B1682AB0DF529E41110?text=&docid=251504&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=7313870> [access: 18.04.2022].

⁶² *Ibidem*, par. 244.

al court are binding on the ordinary courts, provided that the national law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive, as required by those provisions. However, those provisions of the EU Treaty and that decision are to be interpreted as precluding national rules under which any failure to comply with the decisions of the national constitutional court by national judges of the ordinary courts can trigger their disciplinary liability”.

This practice is reinforced by the judgment of the Court (Grand Chamber) of 22 February 2022, in Case C-430/21, where CJEU ruled that “*The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law*”⁶³.

Without entering into controversies and categorical assessments, we believe that the issue raised by this case law regarding the relations between courts and especially the constitutional ones in the EU is not a minor one, requiring clarification and coordination both in the horizontal relations between the constitutional courts and the courts, as well as vertically, in relations between national courts and the CJEU. **As we have shown on other occasions, conflicts of case law must be avoided, because there are no winners, only losers, and we are considering here, above all, the issue of the realization of fundamental rights and freedoms and the rule of law**⁶⁴.

6. Conclusions

The subject matter is very broad, so that the present study points only out a few elements regarding the definition of the rule of law and, in this context, the relationship between the legal systems and the courts and constitutional courts in the EU.

However, these benchmarks highlight the insufficient delimitation of the powers that have been shifted by the national states to the European institutions from the powers that remain in the competence of the states, as well as the existence of different arbitrators making decisions to resolve legal disputes. In turn, these arbitrators do not always coordinate to identify ways to resolve potential conflicts.

⁶³ See <https://curia.europa.eu/juris/document/document.jsf?text=&docid=2543848&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=7317283> [access: 18.04.2022].

⁶⁴ M. Safta, *Curțile constituționale au un rol de “translator”*, interview, <https://www.juridice.ro/494896/marieta-safta-curtile-constitutionale-au-un-rol-de-translatori.html> [access: 19.04.2022].

As judiciously observed in the recent Romanian legal literature, with reference to the mentioned tensions, “in the absence of a supreme arbitrator, in addition to the ordinary legal conflicts, *i.e.* those subject to trial by various arbitrators, legal conflicts arise even between arbitrators. It is the main vulnerability of the EU institutional system, which generates frustrations for both sovereigns and Europeanists: some fear the alleged abandonment of sovereignty, others fear the excesses of arbitrary sovereignty”⁶⁵. Or, as Koen Lenaerts, the President of the CJEU, remarked in a statement⁶⁶, referring to the EU’s own constitutional identity, that it is wrong to reduce the development of this “functional constitution” and the constitutional law of Member States to simple competition, “in fact, the reality is that they have the vocation to coexist and to develop in a harmonious manner”, starting even from the common values referred to in Article 2 TEU and which constitute “the backbone of a Union based on democracy, justice and law”⁶⁷.

From this perspective, the recent Rule of Law Mechanism is able to promote this principle as an integrative and uniform value of the irregularity, amid loyal cooperation between all authorities involved.

However, as we showed in the introduction, this integration would also involve **the identification of a coherent doctrine of national constitutional identity**, invoked – more or less happily, more or less argued, by some constitutional courts when placing a “shield” in front of the European construction. In any case, the assertion of the jurisdiction of the constitutional courts to protect the national constitutional identity does not mean and should not lead *to the* idea of a conflict of jurisdictions, but should appear as a *last resort* when the hardcore of Member States’ values would be affected.

Likewise, the Rule of Law Mechanism should pay special attention to the “bridges” of dialogue between courts, such as the referral mechanism. Even if qualified as a keystone of European integration, the reference for a preliminary ruling does not resolve all conflicts and sometimes creates conflicts if the courts at both levels position themselves in an overly authoritarian manner. Nor should be neglected the “accumulation” of rules established by case law, which should be codified in order to ensure compliance with the principle of legal certainty as a fundamental dimension of the rule of law.

We agree, from this perspective, with the idea expressed in the doctrine, which supports the need for a stricter codification, especially of the normative-operational

⁶⁵ V. Stoica, *Dialogul necesar între CCR și CJUE, in Dilema veche*, <https://dilemaveche.ro/sectiune/tilc-show/articol/dialogul-necesar-dintre-ccr-si-cjue> [access: 18.04.2022].

⁶⁶ Constituțiile naționale și dreptul Uniunii Europene – interacțiuni la intersecția pluralismului constituțional cu adeziunea la valori comune, *Revista de drept Comunitar* no. 2/2019.

⁶⁷ K. Lenaerts, The European Union as a Union of Democracies, Justice and Rights, in *International Comparative Jurisprudence*, nr.2, 2017, pp.132-136,

content of the principles of the rule of law, regarding which, as noted, there is no unitary approach within EU Member States⁶⁸.

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⁶⁸ O. Mader, *Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law*, "Hague Journal on the Rule of Law" 2019, no. 11, pp. 133-170, <https://doi.org/10.1007/s40803-018-00083-x>.

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