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**The Constitutional Court of Romania
Curtea Constituțională a României**

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**NATIONAL REPORT PREPARED FOR THE XVIth CONGRESS
OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS
BY THE CONSTITUTIONAL COURT OF ROMANIA**

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ABSTRACT

The general idea that emerges from the case-law of the Constitutional Court of Romania is that of promotion of mutual respect, based on the understanding of the phenomenon of multiple constitutional systems existing in the European Union, which must coexist within and relate to the autonomous legal order that it entails.

In this complex context, the dialogue of the constitutional judge with the European judge serves to the development of common standards for the protection of fundamental rights or to the enrichment of the existing ones, with effects in the law making and enforcement at national level.

Upon citing earlier decisions of the Constitutional Court, we pointed out that reception of judgments of the European Court of Human Rights by those decisions has led even to the enrichment of the Basic Law, i.e. the 2003 revision took into account the conclusions therein.

As for the specific relationships determined by Romania's accession to the European Union, we believe that the national constitutional case-law has established certain concepts concerning: the relations between national law and the European Union law; the competence of the Constitutional Court; the competence of courts and that of the Court of Justice of the European Union within this relationship, inclusively as concerns the possibility to refer to the Court of Justice of the European Union with a preliminary question, the framework of the constitutional review of the rules for the transposition into national law of a regulation adopted at the level of the European Union and of the reference standards for the exercise of this review. Within these coordinates, the constitutional court is one of the main factors of the Europeanization process in the national legal system, in compliance with the national constitutional identity, conclusion confirmed by the numerous cases adjudicated by the Court on the obligations of national authorities from the perspective of Article 148 of the Constitution and on the fulfilment of these obligations.

The relevant aspects prove the effort for identification of a common language and common standards, particularly in the field of the protection of human rights. It is true that the plurality of sources in the matter – the national constitutions, the Charter of Fundamental Rights and Freedoms, the Convention for the Protection of Human Rights and Fundamental Freedoms, compulsory themselves - determines a risk of collision between the courts called to apply the rules contained therein. The standards for the protection of these rights tend, however, towards uniformity, also through the contribution of courts called upon to interpret those rules and that invoke each other's case-law. In addition, acceptance of the Charter or of

the Convention as systems or reference for the exercise of constitutional review - with the distinctions and peculiarities determined by the legal systems from which they originate - enhances the dialogue between courts, by means of preliminary references, as a way of solving such divergent approaches and of “constitutionalisation” at European level of the matter of fundamental rights and freedoms.

The Constitutional Court has not yet had the opportunity to adjudicate on the impact of European Union law or of decisions by the Court of Justice of the European Union cited in the jurisprudence of the European Court of Human Rights. On the other hand, we consider that case-law of national constitutional courts may tip the balance in favour of the Court in Strasbourg to the detriment of the Court in Luxembourg, given the longer and specific dialogue in the matter of protection of human rights. Likewise, national constitutional courts can support one of the two courts by developing their arguments in their own decisions.

In case of divergence between the case-law of the two European Courts, we consider that national constitutional courts should seek to ensure the most favourable legal regime for the citizens under their jurisdiction. In this evaluation, it should be kept in mind that, according to the Treaty of Lisbon, the European Union shall accede to the Convention for the Protection of Human Rights and Fundamental Freedoms and comply accordingly, through all its institutions, with the case-law of the Court in Strasbourg.

As concerns the foreign constitutional precedent, the Constitutional Court of Romania does not abound in references thereto, bearing in mind that the Romanian legal system belongs to the Romano-Germanic legal system. Therefore, citation of foreign constitutional precedent is analysed and integrated into decisions on a case-by-case basis and only when value judgments expressed in the decisions delivered by foreign constitutional courts correspond entirely to the situation brought before the Constitutional Court.

As it clear results from the answers to the questions in this questionnaire, foreign constitutional precedent was cited especially upon examination of issues relating to basic rights and freedoms. Of course, we cannot neglect the institutional aspect, namely the references to foreign jurisprudence on the issue of delegation of national competences in favour of the European Union. We believe that by appealing to foreign jurisprudence, the Constitutional Court of Romania has sought to strengthen the rationale of its decisions and to legitimise the solutions thus adopted.

Finally yet importantly, we note that these references have increased in quantity after 2010, which is, intrinsically, a sign of affiliation of Romania to the European legal values.

I. CONSTITUTIONAL COURTS BETWEEN NATIONAL AND EUROPEAN LAW¹

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1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?

The relationship between legal rules originating from domestic and international law and the harmonization thereof are regulated by the Constitution of Romania in: Article 11 – *International law and domestic law*, Article 20 – *International Human Rights Treaties* and Article 148 – *Integration into the European Union*.

The provisions of Article 11 of the Constitution read as follows:

Article 11: *”(1) The Romanian State pledges to fulfil as such and in good faith any obligations as may derive from the treaties to which it has become a party.*

(2) Once ratified by Parliament, subject to the law, treaties shall be part of domestic law.

(3) Where a treaty to which Romania is to become party comprises provisions contrary to the Constitution, ratification shall only be possible after a constitutional revision.”

The provisions of Article 20 of the Constitution read as follows:

¹ Upon drawing up this section, the following articles belonging to the same authors have been taken into account:

Forms of judicial dialogue between constitutional courts, in “Dreptul” magazine no.6/2013

Dialogue between the Constitutional Court of Romania and the European Court of Human Rights, in „Dreptul” magazine, no. 9/2013

Dialogue between the Constitutional Court of Romania and the Court of Justice of the European Union, forthcoming in the same journal, respectively, „Dreptul” magazine.

Achievement of basic rights through constitutional case-law, paper presented at the Annual Session of Scientific Communications of the Institute for Legal Research "Acad. Andrei Rădulescu" of the Romanian Academy, of 29 March 2013, with the topic "Continuity and discontinuity in Romanian law"

Article 20: “(1) *The constitutional provisions relative to the citizens' rights and freedoms shall be interpreted and applied in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party.*

(2) Where inconsistency exists between the covenants and treaties on fundamental human rights to which Romania is a party, and national law, the international regulations shall prevail except where the Constitution or domestic laws comprise more favourable provisions.”

The provisions of Article 148 of the Constitution, relevant from the viewpoint of the present analysis, read as follows:

Article 148: [...] “(2) *Following accession, provisions in the founding Treaties of the European Union, as well as other binding regulations under community law shall prevail over any contrary provisions of domestic law, while observing provisions in the accession instrument.*

(3) Provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to any instrument purporting a revision of the founding Treaties of the European Union.

(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that any obligations arising from the accession instrument and from provisions under paragraph (2) are put into effect [...]”.

From reading the three cited texts, we draw the following conclusions:

- treaties ratified by Parliament are part of national law; in the domestic law they have the legal force and position in the hierarchy of normative acts given by the instrument of ratification with the appropriate consequences; the notion of "international treaty" has a broad sense, this includes international acts regardless of their designation (treaty, convention, protocol, charter, statutes, memorandum, etc.);

- human rights treaties to which Romania is a party constitute a separate category: these are integrated in the "constitutional block", having constitutional interpretative value (in the meaning that the constitutional provisions need to be interpreted and applied in accordance with the provisions of the international treaties to which Romania is a party) and have priority of application in case of inconsistency with national laws, unless the Constitution or national laws comprise more favourable provisions;

- constituent treaties of the European Union (and other binding community regulations) represent also a category of international acts with a distinct legal status, meaning

that they take precedence over the contrary provisions of the national laws; they have a supralegislative but infraconstitutional position.

The provisions of Article 20 and Article 148 of the Constitution require courts to apply with precedence the provisions of international treaties ("*the covenants and other treaties to which Romania is a party*", respectively "*the founding Treaties of the European Union, as well as other binding regulations under community law*") if national laws contain contrary provisions (except for the situation envisaged by Article 20(2) final sentence of the Constitution, meant to assure a high protection of fundamental rights and freedoms).

As regards the competence of the Constitutional Court and the constitutional obligations it has to comply with in terms of European law, we distinguish between:

- European human rights treaties;
- constituent treaties of the European Union and other binding community regulations.

Concerning the first category mentioned, integration of "*the covenants and other treaties to which Romania is a party*" in the so-called "*constitutional block*", means that they constitute, by means of Article 20 of the Constitution, reference standards for the constitutional review. In time, the case-law of the Constitutional Court of Romania has invoked more often Article 20 of the Constitution, in particular by reference to the Convention for the Protection of Human Rights and Fundamental Freedoms and to its interpretation in the case-law of the European Court of Human Rights. The Constitutional Court of Romania has repeatedly held that "*following ratification by Romania of the Convention for the Protection of Human Rights and Fundamental Freedoms, through Law no.30 of 18 May 1994, this Convention became part of the national law, and therefore references to any of its texts is subject to the same regime as that applicable to references to the provisions of the Basic Law*"².

Referring to European Union law, therefore the interpretation and application of the Article 148 of the Constitution, the case-law of the Constitutional Court of Romania has evolved to give rise to essentially the following conclusions: The Constitution is the only direct reference standard within the constitutional review; European standards can be used within constitutional review only as a rules interposed to the direct reference rule - which can only be the Constitution - , upon compliance with certain conditions (an objective condition, regarding the clarity of the rule, and a subjective one, relating to the margin of appreciation of the constitutional relevance of the European rule). To this effect, the Constitutional Court of

²Decision no.146/2000, published in the "Monitorul Oficial al României", Part I, no.566 of 15 November 2000

Romania held that *"an European legal norm within the constitutional review as replacing the reference one [A/N the Constitution of Romania] involves under Article 148(2) and (4) of the Constitution, a cumulative compliance: on the one hand, this rule must be sufficiently clear, precise and unambiguous in itself or its meaning must have been clearly, precisely and unequivocally established by the Court of Justice of the European Union, on the other hand, that the rule must be circumscribed to a certain level of constitutional relevance so as its legal content might support the possible infringement by the national law of the Constitution - the only direct reference standard in its review of constitutionality. In such a case the Constitutional Court approach is distinct from the simple application and interpretation of the law, jurisdiction belonging to courts and administrative authorities, or from any issues of legislative policy promoted by the Parliament or Government, as appropriate."* Constitutional relevance assessment lies with the Constitutional Court of Romania.

A special case is that of the Charter of Fundamental Rights of the European Union, on which the Constitutional Court established that, in principle, it is applicable within the constitutional review *"insofar it ensures, guarantees and develops the constitutional provisions in the matter of basic rights, in other words, to the extent that their level of protection is at least at the level of constitutional rules in the matter of human rights."*³ It is worth specifying that the constitutional basis for invoking the Charter lies in Article 148 of the Constitution, and not in Article 20, the Constitutional Court mentioning in this respect⁴ the following: *«as concerns the provisions of Article 41 of the Charter of Fundamental Rights of the European Union concerning the right to good administration, the Court notes, first, that they can be invoked in terms of Article 148 and not of Article 20 of the Constitution, as indicated by the author of the exception, because, according to Article 6 (1) of the Treaty on European Union (consolidated version), "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."*

In conclusion, Article 20 of the Constitution substantiates constitutional review in relation to European human rights treaties to which Romania is a party. In exercising this

³ Decision no.871 of 25 June 2010, published in the "Monitorul Oficial al României", Part I, no.433 of 28 June 2010

⁴ Decision no. 12 of 22 January 2013, published in the "Monitorul Oficial al României", Part I, no. 114 of 28 February 2013, to the same effect, Decision no. 967 of 20 November 2012, published in the "Monitorul Oficial al României", Part I, no. 853 of 18 December 2012

review, the Constitutional Court does not make a direct "comparison" between domestic law and the international treaty/convention, but an analysis mediated by the provisions of the Constitution interpreted in the light of the treaty.

On the grounds of Article 148 of the Constitution, the rules of the European Union law may be a reference tool for constitutional review, with the differentiations established by the constitutional text, within the limits and upon the appreciation of the Constitutional Court of Romania.

2. Are there any examples of references to international sources of law, such as:

- a) the European Convention on Human Rights,
- b) the Charter of Fundamental Rights of the European Union,
- c) other instruments of international law at European level,
- d) other instruments of international law at international level?

Given the constitutional texts cited above, and in particular the provisions of Article 20 of the Constitution, the following are frequently invoked before the Constitutional Court of Romania: The Convention for the Protection of Human Rights and Fundamental Freedoms, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights. There are also references and other sources of international law, as a rule, those bearing on human rights and fundamental freedoms, most often due to their invocation by the authors of referrals addressed to the Court, such as, for example: The Revised European Social Charter, adopted in Strasbourg on 3 May 1996⁵, the European Charter for Regional or Minority Languages⁶. In the past years, the Charter of Fundamental Rights of the European Union has been more often invoked. In addressing the issue of reference to sources of European law, we cannot forget the references to the case-law of the European Court of Human Rights, respectively the case-law of the Court of Justice of the European Union.

⁵ See, for example, Decision no.5 of 17 January 2013, published in the " Official Gazette of Romania ", Part I, no.109 of 25 February 2013

⁶ See, for example, Decision no.114 of 20 July 1999, published in the " Official Gazette of Romania ", Part I, no.370 of 3 August 1999

3. Are there any specific provisions of constitutional law imposing a legal obligation on the constitutional court to consider decisions by European courts of justice?

In light of the distinction made in section 1, we will refer to the European Court of Human Rights, respectively, to the Court of Justice of the European Union.

a) the European Court of Human Rights

The relations between the European Court of Human Rights and the constitutional courts, in a broad sense, are understood as an expression of cooperation on many levels, operating on the basis of systemic concepts such as: unity, difference and diversity, homogeneity and pluralism, separation, interaction and involvement⁷. This view⁸, which has the merit of avoiding simplistic approaches such superiority / subordination and juxtaposition, in favour of autonomy, respect and the ability to act jointly⁹, was expressed also by the European Court of Human Rights. Thus, during the XIIth Congress of the Conference of European Constitutional Courts, the President of the European Court of Human Rights has revealed the role of this Court as actor in the field of European constitutional justice, as well as the fact it that works in partnership with national constitutional courts, as a quasi-constitutional court. According to the statements made, what is not in doubt is that the issues which it is called upon to decide are constitutional issues in so far as they concern the fundamental rights of European citizens These issues are settled at national level, by constitutional courts and national courts. From this perspective, the control exercised by the European Court of Human Rights is a fail-safe device designed to catch the ones that get away from the rigorous scrutiny of the national constitutional bodies.¹⁰ From this perspective, the constitutional court, and in general, the national judge, appears to be the first charged with the task of achieving the protection of fundamental rights and freedoms and, in terms of reference to the European standards concerning these rights, a main "actor" in the process of legislative harmonization and integration of these standards at national level.

⁷A . Voßkuhle, *The protection of human rights within the european cooperation of Courts*, presented during the meeting of the Venice Commission, 9 March 2013, Venice, Italy, p.4, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU\(2013\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2013)001-e)

⁸A . Voßkuhle, idem

⁹A . Voßkuhle, idem

¹⁰L.Wildhaber, *The place of the European Court of Human Rights in the European Constitutional landscape*, <http://www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf>

This role is supported and facilitated by the existence of legal mechanisms for interconnection between the national level and the international level of protection of human rights, designed for an efficient protection thereof. In Romania, what customizes the dialogue between the Constitutional Court of Romania and the European Court of Human Rights is the substantiation of the cooperation mechanism at the constitutional level, by regulating the correlation between national and international legislation in the matter of human rights. The correlation is ensured by the provisions Article 20 of the Constitution, quoted above, which establish the supralegislative position of international human rights treaties and their constitutional interpretative value.

Applying Article 20 of the Constitution, the Constitutional Court of Romania established the binding nature of both the Convention for the Protection of Human Rights and Fundamental Freedoms and of its text interpretation by the European Court of Human Rights. The Court held in this respect that *"as long as Romania was not a member of the Council of Europe and had not acceded to the European Convention of Human Rights, the interpretation of Article 8 of the Convention, through the relevant decisions of the European Court of Human Rights in Strasbourg, had no relevance to the Romanian legislation and case-law, however, once Romania became a member of the Council of Europe and acceded to the European Convention of Human Rights (Law no. 30/1994, published in Official Gazette of Romania, Part I, no. 135 of 31 May 1994) the approach was fundamentally different. This change is imposed by the Constitution of Romania itself, which in Article 20 (1) specifies that its provisions on human rights and freedoms of citizens shall be construed and enforced in accordance with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party, and the European Convention of Human Rights, since 31 May 1994, has become such a treaty. Furthermore, Article 20 (2) of the Constitution enshrines the principle of precedence of international regulations: "Where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence".¹¹*

As a result, constitutional review of domestic laws was often made in light of the constitutional provisions of Article 11 and Article 20 in relation to the interpretation of texts of the Convention and of the case-law of the European Court of Human Rights. Thus, for example, the Constitutional Court found that *"Article 20 (1) of the Constitution requires the interpretation of Article 21 on free access to justice of the Basic Law through the meaning*

¹¹ Decision no.81/1994, published in the " Official Gazette of Romania ", Part I, no. 14 of 25 January 1995

given to that right by the European Court of Human Rights in its case law [...] If we'd reach a different conclusion, the justice seeker would be deprived of the protection conferred by the Convention for the Protection of Human Rights and Fundamental Freedoms, and his/her right of free access to justice provided by Article 21 of the Basic Law would be infringed upon. As a direct consequence, Romania would be in the situation of a Party to the Convention that does not fulfil the obligations undertaken in terms of international public law and domestic law, contrary to the provisions of Article 11 (1) and (2) and Article 20 (1) of the Constitution .”¹²

Thus, in light of the provisions of Article 20 of the Constitution, the European Court is more than a dialogue partner, its case law provides a mandatory reference framework for the Constitutional Court of Romania, with the specificity determined by the role of the constitutional court and the limits of its jurisdiction.

b) the Court of Justice of the European Union

As concerns the case-law of the Court of Justice of the European Union, we need to mention that Romania has joined the European Union in 2007, with a Constitutional Court established in 1992, a Constitution adopted in 1991 and revised in 2003, in order to ensure the constitutional basis for accession. Even if the Romanian Constitutional Court was able to learn from the experience of other constitutional courts and of other Member States of the European Union, building its own case-law with references to the EU law has been a complex process. Examining the case-law of the Constitutional Court of Romania on the relationship between national regulations and European regulations, respectively between the constitutional court and the CJEU, we find that it reflects a cautious attitude, avoiding possible conflicts of jurisdiction, driven in recent years towards the idea of dialogue through preliminary questions, dialogue that has not yet been opened.

The constitutional basis for the case-law development is Article 148 of the Constitution, cited above, and the particularly relevant decision of the Constitutional Court of Romania, reflecting the aforementioned development, is Decision no.688/2011. In the same line of reasoning¹³, referring to the cumulative conditions for using an European norm as a norm replacing the reference standard, the Court also held that *"it is up to the Constitutional Court to apply or not in its constitutional review the judgements of the Court of Justice of the*

¹² Decision no.233/2011, published in the " Official Gazette of Romania ", Part I, no.340 of 17 May 2011

¹³ See above, answer to Question no.1

European Union or to formulate itself preliminary questions to determine the content of the European norm. Such an attitude is related to cooperation between the domestic constitutional court and the European court and to the judicial dialogue between them, without concerning issues related to the establishment of hierarchies between these courts. "

More recently, on the power of interpretation of Union law for the purpose of uniform application in all Member States, the Constitutional Court of Romania stressed that *"it belongs to the Court of Justice of the European Union, which, as jurisdictional authority of the Union, pursuant to Article 19 (3) b) of the Treaty, gives preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions. The legal effects of the preliminary ruling of the Court of Justice of the European Union were outlined judicially. The Luxembourg Court held that such a ruling, bearing on the interpretation or validity of a European Union act is binding for the court or tribunal on whose initiative the reference for a preliminary ruling was made, and the interpretation, being linked to the interpreted European provisions, is vested with the authority also in relation to the other national courts, which cannot give an own interpretation to those provisions. However, the effect of preliminary rulings is a direct one in the sense that nationals of Member States may invoke directly the European standards before the national and the European courts and retroactively, meaning that the interpretation of a provision of European Union law in a preliminary reference explains and specifies the significance and scope thereof, of its entry into force. "*

Whereas the Charter of Fundamental Rights of the European Union has a distinct place in the case-law of the Constitutional Court of Romania, we note that its use as a reference tool in the constitutional review is made according to the interpretation and meaning given to its rules by the Court of Justice of the European Union. Thus, for example¹⁴, analysing the scope and conditions of Article 53 of the Constitution - *Restriction on the exercise of certain rights and freedoms*, the Constitutional Court of Romania has made an interpretation consistent with the Charter, using the case-law of the Court of Justice of the European Union. The Court noted in this regard that the formula used by Article 52 (1) of the Charter, which states that *"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they*

¹⁴ Decision no.53 of 25 January 2012, published in the "Official Gazette of Romania", Part I, no.234 of 6 April 2012

are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others" is inspired by the case-law of the Court of Justice of the European Union according to which "*restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights"* (Judgement of 13 April 2000, delivered in the Case C-292/97).

4. Is the jurisprudence of the constitutional court influenced in practice by the jurisprudence of European courts of justice?

Given the value of the jurisprudence of the European Courts of Justice, the practice of the Constitutional Court of Romania is greatly influenced by it. The Constitutional Court of Romania's change of practice was based on the judgements of the European Court of Human Rights and, more recently, on the judgement of the Court of Justice of the European Union.

We shall refer, as examples, to few such cases, structured on constitutional principles/provisions.

a) the case-law of the European Court of Human Rights

■ Quality of legislation. Principle of legal certainty

Interpreting and applying the constitutional provisions of Article 1 (3), stating that "*Romania is a state governed by the rule of law [...]*", and of Article 1 (5), stating that "*Observance of the Constitution, of its supremacy, and the laws shall be obligatory in Romania*", in accordance with the relevant case-law of the European Court of Human Rights, the Constitutional Court of Romania identified four criteria that need to be observed in the law-making activity, subsumed under the principle of legal certainty.

Thus, by Decision no.61/2007¹⁵, declaring the unconstitutionality of the provisions of Article II (1) and (3) of Law no.249/2006 amending and completing Law no.393/2004 on the status of local officials, the Court stated that *«the legal provisions under review, due to their improper wording, do not comply with the requirements of legislative technique for legal norms. As concerns these requirements, the European Court of Human Rights constantly*

¹⁵Published in the "Official Gazette of Romania", Part I, no.116 of 15 February 2007

stated that “a rule is “foreseeable” if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct” (case *Rotaru v. Romania*, 2000), and “[...] the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case and to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. In other words, the law must be, in the same time, accessible and foreseeable. (Case of the *Sunday Times v. the United Kingdom*, 1979).» The conclusion of the Constitutional Court was that ” the legal texts under review do not comply with the four criteria of clarity, precision, foreseeability and predictability as to enable an individual to regulate his conduct and therefore, avoid the consequences of the breach thereof.”

Numerous other decisions of the Constitutional Court of Romania, many of admission of objections / exceptions of unconstitutionality, are based on the case law of the European Court of Human Rights in the same matter, respectively Judgements delivered in cases such as: *Sunday Times v. the United Kingdom*, 1979 (see decision no.54/2000¹⁶, decision no.189/2006¹⁷, decision no.604/2008¹⁸, decision no.710/2009¹⁹, decision no.838/2009²⁰, decision no.1258/2009²¹, decision no.1609/2010²², decision no.670/2011²³, decision no.799/2011²⁴, decision no.26/2012²⁵, decision no.51/2012²⁶, decision no.681/2012²⁷, decision no.682/2012²⁸), *Rotaru v. Romania*, 2000 (see, besides the case-law mentioned above, which comprises, mostly, references to both cases, also decision no.189/2006²⁹, decision no.604/2008³⁰, decision no.783/2009³¹, decision no.1/2012³², decision no.494/2012³³), *Rekvényi v. Hungary*, 1999, (decision no.799/2011³⁴, decision no.51/2012³⁵, decision

¹⁶Published in the “Official Gazette of Romania”, Part I, no.310 of 5 July 2000

¹⁷Published in the ‘Official Gazette of Romania’, Part I, no.307 of 05 April 2006

¹⁸Published in the “Official Gazette of Romania”, Part I, no.469 of 25 June 2008

¹⁹Published in the “Official Gazette of Romania”, Part I, no.358 of 28 May 2009

²⁰Published in the “Official Gazette of Romania”, Part I, no.461 of 3 July 2009

²¹Published in the “Official Gazette of Romania”, Part I, no.798 of 28 November 2009

²²Published in the “Official Gazette of Romania”, Part I, no.70 of 27 January 2011

²³Published in the “Official Gazette of Romania”, Part I, no.421 of 16 June 2011

²⁴Published in the “Official Gazette of Romania”, Part I, no.440 of 23 June 2011

²⁵Published in the “Official Gazette of Romania”, Part I, no.116 of 15 February 2012

²⁶Published in the “Official Gazette of Romania”, Part I, no.90 of 3 February 2012

²⁷Published in the “Official Gazette of Romania”, Part I, no.477 of 12 July 2012

²⁸Published in the “Official Gazette of Romania”, Part I, no.473 of 11 July 2012

²⁹Published in the “Official Gazette of Romania”, Part I, no.307 of 5 April 2006

³⁰Published in the “Official Gazette of Romania”, Part I, no.469 of 25 June 2008

³¹Published in the “Official Gazette of Romania”, Part I, no.404 of 15 June 2009

³²Published in the “Official Gazette of Romania”, Part I, no.53 of 23 January 2012

³³Published in the “Official Gazette of Romania”, Part I, no.407 of 19 June 2012

³⁴Published in the “Official Gazette of Romania”, Part I, no.440 of 23 June 2011

³⁵Published in the “Official Gazette of Romania”, Part I, no.90 of 3 February 2012

no.682/2012³⁶), *Leempoel & S.A. ED. Cine Revue v. Belgium, 2006* and *Wingrove v. the United Kingdom, 1996* (both in decision no.1/2012³⁷).

It appears that the breach of the requirements of clarity, precision, foreseeability and predictability of legal rules was itself grounds of unconstitutionality [in violation of this Article 1 (3) and (5) of the Constitution], or it was associated to violation of specific fundamental rights.

The first situation occurs usually within the *a priori* constitutional review, also taking into account the abstract nature of this review. For instance, the decisions of admission of the objections of unconstitutionality delivered in 2012, mentioning that **within a third thereof** the case-law of the European Court is invoked in relation to the violation of Article 1 (5) of the Constitution of Romania (four out of the total of 11 decisions of admission of the objections of unconstitutionality delivered by the Constitutional Court in 2012).

Thus, by decision no.1/2012³⁸, the Constitutional Court held that *"in principle, any normative act must meet certain quality requirements, among which foreseeability, which means that it must be sufficiently precise and clear to be applied, so the formulation with sufficient precision of the normative act enables the interested persons - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Of course, it may be difficult to draw up laws of a total precision and a certain flexibility may even prove to be desirable, but a flexibility which does not affect the foreseeability of the law (see, in this respect, [...] the case-law of the European Court of Human Rights [...] for example, Judgement of 15 November 1996 in the Case of Cantoni v. France, paragraph 29, Judgement of 25 November 1996 in the Case of Wingrove v. the United Kingdom, paragraph 40, Judgement of 4 May 2000 in the Case of Rotaru v. Romania, paragraph 55, Judgement of 9 November 2006 in the Case of Leempoel & SA ED. Cine Revue v. Belgium, paragraph 59)."*

By Decision no.26/2012³⁹, the Court stated that *«existence of conflicting legislative solutions and cancellation of provisions of law by other provisions contained in the same law are in breach of the principle of legal certainty, due to the lack of clarity and foreseeability of the rule. [...] On the same principle, the Strasbourg Court held that "one of the pillars of the*

³⁶Published in the "Official Gazette of Romania", Part I, no.473 of 11 July 2012

³⁷Published in the "Official Gazette of Romania", Part I, no.53 of 23 January 2012

³⁸Idem

³⁹Published in the "Official Gazette of Romania", Part I, no.116 of 15 February 2012

rule of law is the principle of legal certainty". (Judgement of 6 June 2005 in the Case of Androne v. Romania; Judgement of 7 October 2009 in the Case of Stanca Popescu v. Romania). Likewise, the European Court of Human Rights stated that, "where States decide to enact legislation, it must be implemented with reasonable clarity and coherence in order to avoid, in so far as possible, legal uncertainty and ambiguity for the legal persons concerned (...)". (Judgement of 1 December 2005 in the Case of Păduraru v. Romania; Judgement of 6 December 2007 in the Case of Beian v. Romania).»

By Decision no.51/2012⁴⁰, the Constitutional Court recalled that the Strasbourg Court "stressed the importance of ensuring accessibility and foreseeability of the law, including in terms of its stability, establishing a set of benchmarks that the legislator must take into consideration to ensure these requirements (cases such as *Sunday Times v. the United Kingdom*, 1979, *Rekvényi v. Hungary*, 1999, *Rotaru v. Romania*, 2000, *Damman v. Switzerland*, 2005)."

By decision no.681/2012⁴¹ the Court referred again to the requirements of accessibility and foreseeability of the law, invoking Judgement of 24 May 2007, in the Case of *Dragotoniu and Militaru-Pidhorni v. Romania*, Judgement of 29 March 2000, in the Case of *Rotaru v. Romania*, Judgement of 23 September 1998, in the Case *Petra v. Romania*, Judgement of 23 November 2000, in the Case of *Former King of Greece and Others v. Greece*, Judgement of 8 July 2008, in the Case of *Fener Rum Patrikligi v. Turkey*, Judgement of 26 April 1979, in the Case of *Sunday Times v. the United Kingdom*.

As to the second situation evoked, respectively both violation of requirements of clarity, precision, foreseeability and predictability of legal rules and violation of specific fundamental rights, it is usually found in the *a posteriori* constitutional review, by means of the exceptions of unconstitutionality, a concrete review, an instrument that can be used by persons whose rights and legitimate freedoms at achieving these rights have been infringed upon.

As an example, we shall refer to this combination where the Court ascertained the infringement of the free access to justice. Thus pursuant to the consistent case-law of the Constitutional Court of Romania, "the principle of free access to justice [...] involves, *inter alia*, the adoption by the legislator of clear procedural rules, prescribing with precision the terms and the conditions in which individuals can exercise their procedural rights,

⁴⁰Published in the "Official Gazette of Romania", Part I, no.90 of 3 February 2012

⁴¹Published in the "Official Gazette of Romania", Part I, no.477 of 12 July 2012

including those for review appeals against the decisions of the courts.” The lack of such rules has led, for example, to declaring the unconstitutionality of Article 20 (1) of the Contentious Administrative Law no.554/2004 according to which: “(1) *The decision rendered by the court in the first instance can be challenged by means of appeal, within 15 days from pronouncement or from communication*”, on the grounds that “*the parties do not have a certain mark on the period of time in which they can challenge by appeal the decision rendered by the court of contentious administrative in the first instance, which renders their access to justice, by means of the avenue of appeal provided by the law, uncertain and random, therefore limited*” (decision no.189/2006⁴²). For the same reasons, by decision no.647/2006⁴³ the court ascertained the unconstitutionality of the provisions of Article 4 (3) of the Contentious Administrative Law no.554/2004, according to which: “*The solution of the court of contentious administrative is subject to appeal, which is to be declared within 48 hours as from pronouncement or as from communication and which is to be tried within 3 days from registration, by informing the parties of summons by publication.*” To the same effect, the Court ruled also by decision no.1.609/2010⁴⁴, ascertaining the unconstitutionality of Article 21 (2) second sentence of the Contentious Administrative Law no.554/2004.

■ Principle of non-retroactivity of the law

On this principle, we mention, by way of example, the case law in which, based on the practice of the European Court of Human Rights, the Constitutional Court held that the principle of retroactivity of the more favourable criminal law applies also in case of minor offences law. The Court rules as such although the constitutional provisions at that time did not provide for such a rule.

Thus, by decision no.318/2003⁴⁵, the Court stated that “*the constitutional provisions of Article 15 (2), stating that "The law shall only take effect for the future, except the more favourable law which lays down penal or administrative sanctions", must be interpreted in light of Article 20 (1) of the Constitution, in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms. [...] From the conventional perspective, the Constitutional Court notes that, in its case-law, the European Court of Human Rights held that nothing prevents states to fulfil their role as guardians of the public interest by establishing and maintaining a distinction between different types of crime. In*

⁴²Published in the " Official Gazette of Romania ", Part I, no.307 of 5 April 2006

⁴³Published in the „ Official Gazette of Romania”, Part I, no.921 of 14 November 2006

⁴⁴Published in the " Official Gazette of Romania ", Part I, no. 70 of 27 January 2011

⁴⁵ Published in the " Official Gazette of Romania ", Part I, no. 697 of 6 October 2003

principle, the Convention does not preclude the trend of "decriminalization" in the Member States of the Council of Europe. However, as noted in its judgement of 21 February 1994, in the Case of Öztürk v. Germany, these fall under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. [...], the provisions of this Article shall guarantee the right of every "accused person" to a fair trial, regardless of the classification of the offence in the domestic law.»

In light of this decision and, therefore, of the case-law of the European Court of Human Rights incorporated therein, Article 15 received a new wording upon the 2003 constitutional revision, and currently it enshrines the principle of the more favourable law which lays down penal or administrative sanctions.

■ **The principle of equal rights**

Interpreting the provisions of Article 16 (1) of the Constitution, according to which "*Citizens are equal before the law and public authorities, without any privilege or discrimination*" in conjunction with the provisions of Article 4 on criteria of non-discrimination, and, based on Article 20 of the Constitution, in conjunction with the provisions of Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms prohibiting discrimination, the Constitutional Court established that "*the principle of equality before the law implies an equal legal treatment for situations which, according to the aim sought, are no different; and the different treatment cannot only be the expression of the exclusive appreciation of the legislator, but it must be justified rationally and objectively*"⁴⁶ The Court also held that "*the principle of equality, on the one hand, means uniform regulation and non-discriminatory treatment for identical situations and, on the other hand, implies a right to differentiation.*"⁴⁷ In other words, "*the principle of equality shall not prevent specific rules, in case of a difference in situations. Formal equality would lead to the same rule, despite the difference in situations. That is why real inequality arising from this differentiation may justify different rules depending on the purpose of the law containing them. Therefore the principle of equality underscores a fundamental right, the right to differentiation, and to the extent that the equality is not natural, to impose it would be tantamount to creating discrimination.*"⁴⁸ Numerous decisions of admission of the exceptions of unconstitutionality invoke in this regard the Judgement delivered by the European Court of

⁴⁶For example, Decision no.513/2006, published in the " Official Gazette of Romania ", Part I, no. 598 of 11 July 2006

⁴⁷For example, Decision no.1092/2008, published in the " Official Gazette of Romania ", Part I, no.712 of 20 October 2008

⁴⁸Decision no.107/1995, published in the " Official Gazette of Romania ", Part I, no.85 of 26 April 1996

Human Rights in the Case of *Marckx v. Belgium*, 1979 (decision no.81/1998⁴⁹, decision no.148/2001⁵⁰, decision no.86/2003⁵¹, decision no.89/2003⁵², decision no.217/2003⁵³, decision no.342/2003⁵⁴, decision no.100/2004⁵⁵, decision no.969/2007⁵⁶, decision no.599/2009⁵⁷, decision no.1354/2010⁵⁸, decision no.573/2011⁵⁹, decision no.1470/2011⁶⁰, decision no.1483/2011⁶¹, decision no.1615/2011⁶²).

Referring to the rights that have constituted subject matter of examination by the Constitutional Court from the perspective of the principle of equal rights, and without leaving aside the rich-case, for example, on free access to justice⁶³, right to property⁶⁴ or social rights⁶⁵, we shall evoke as landmark decision one case where the Constitutional Court has specifically stated that it reconsiders its practice given the provisions of the Convention and the case-law of the European Court of Human Rights.

We refer to decision no.349/2001⁶⁶, where, adjudicating on Article 53 and Article 54 of the Family Code, the Constitutional Court held the following: «*Whereas, following ratification by Romania of the Convention for the Protection of Human Rights and Fundamental Freedoms, in accordance with Articles 11 and 20 of the Constitution, the Convention has become part of domestic law, in the examination of the exception it is necessary to take into consideration its provisions and the judicial practice of the European Court of Human Rights in the application and interpretation of that Convention. Ruling on whether the interdiction imposed by national law for married women to challenge the*

⁴⁹Published in the "Official Gazette of Romania", Part I, no.220 of 16 June 1998

⁵⁰Published in the "Official Gazette of Romania", Part I, no.592 of 20 September 2001

⁵¹Published in the "Official Gazette of Romania", Part I, no.207 of 31 March 2003

⁵²Published in the "Official Gazette of Romania", Part I, no.200 of 27 March 2003

⁵³Published in the "Official Gazette of Romania", Part I, no.425 of 17 June 2003

⁵⁴Published in the "Official Gazette of Romania", Part I, no.755 of 28 October 2003

⁵⁵Published in the "Official Gazette of Romania", Part I, no.261 of 24 March 2004

⁵⁶Published in the "Official Gazette of Romania", Part I, no.816 of 29 November 2007

⁵⁷Published in the "Official Gazette of Romania", Part I, no.329 of 18 May 2009

⁵⁸Published in the "Official Gazette of Romania", Part I, no.761 of 16 November 2010

⁵⁹Published in the "Official Gazette of Romania", Part I, no.363 of 25 May 2011

⁶⁰Published in the "Official Gazette of Romania", Part I, no.853 of 2 December 2011

⁶¹Published in the "Official Gazette of Romania", Part I, no.853 of 2 December 2011

⁶²Published in the "Official Gazette of Romania", Part I, no.99 of 8 February 2012

⁶³For example, Decision of the Plenum of the Constitutional Court no.1/1994, Decision no.100/2004, published in the "Monitorul Oficial al României", Part I, no.261 of 24 March 2004, Decision no.610/2007, published in the "Monitorul Oficial al României", Part I, no.474 of 16 July 2007, Decision no.67/2003, published in the "Monitorul Oficial al României", Part I, no.178 of 21 March 2003

⁶⁴Decision no.177/1998, published in the "Official Gazette of Romania", Part I, no. 77 of 24 February 1999, Decision no.165/1999, published in the "Official Gazette of Romania", Part I, no.624 of 21 December 1999

⁶⁵Decision no.104/1995, published in the "Official Gazette of Romania", Part I, no.40 of 26 February 1996 or Decision no.1414/2009, published in the "Official Gazette of Romania", Part I, no.796 of 23 November 2009, Decision no.277/2006, published in the "Official Gazette of Romania", Part I, no.348 of 18 April 2006, Decision no.217/2003, published in the "Official Gazette of Romania", Part I, no.425 of 17 June 2003

⁶⁶Published in the "Official Gazette of Romania", Part I, no. 240 of 10 April 2002

presumption of paternity of her husband in relation to the child conceived during the marriage is contrary to the aforementioned Article 8 of the Convention, the European Court of Human Rights decided affirmatively in the case Kroon and Others v. the Netherlands. In this regard, by Judgement of 27 October 1994, it stated that "respect for family life requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone. Accordingly, even having regard to the margin of appreciation left to the State, the Netherlands has failed to secure to the applicants the respect for their family life. There has accordingly been a violation of Article 8". Given this interpretation and application of the Convention for the Protection of Human Rights and Fundamental Freedoms by the European Court of Human Rights, the Constitutional Court considers it necessary to reconsider its jurisprudence on the settlement of the exception of unconstitutionality of Article 54 (2) of the Family Code (Decision no. 78 of 13 September 1995, published in Official Gazette of Romania, Part I, no. 294 of 20 December 1995), and it is to ascertain that the text in question contravenes the provisions of Article 16 (1), Article 26, Article 44 (1) and Article 45 (1) of the Constitution, issues in relation to which it is to declare the exception of unconstitutionality of Article 54 (2) of the Family Code as well founded. »

■ Free access to justice and right to a fair trial

Among the many decisions by which the Constitutional Court ruled in relation to compliance / non-compliance, as the case may be, with free access to justice, we mention some of the issues raised and decisions rendered, which we consider as relevant for reconsideration of the case law precedents following issuance of certain judgements by the European Court of Human Rights.

Thus, in terms of "*reasonable time*" of proceedings, the case-law of the European Court of Human Rights determined principle conclusions of the Constitutional Court before the consecration of this requirement in the Basic Law. The Court held that the reasonable time concerns the celerity of proceedings, and not the need to establish for all remedies - including the extraordinary ones - time limits for the exercise thereof (decision 73/1996⁶⁷, decision 96/1996⁶⁸, decision 208/1997⁶⁹), as well as that "*the invoked requirement of reasonable time is not analysed conceptually, but individually, specifically taking into account a number of factors specific to each case -the procedure, the nature of the claims, the complexity of the*

⁶⁷Published in the „ Official Gazette of Romania ", Part I, no.255 of 22 October 1996

⁶⁸Published in the " Official Gazette of Romania ", Part I, no.251 of 17 October 1996

⁶⁹Published in the " Official Gazette of Romania ", Part I, no.302 of 5 October 1997

procedure" (Decision no. 13/1997⁷⁰) In this regard, pronouncing the solution finding unconstitutional the provisions of Articles 2-7 of the Law no.105/1997 on the resolution of objections, appeals and complaints against acts of control or of taxation compiled by bodies of the Ministry of Finance, the Constitutional Court of Romania reversed its jurisprudence on the constitutionality of these provisions, noting that among the grounds of unconstitutionality of this law it had never been invoked its contrariety to Article 6 par.1 first sentence of the Convention relating to the requirement of "*reasonable time*". It was considered that the requirement that the dispute be resolved "*within a reasonable time*" is interesting not only from the purely "temporal" aspect of the judicial administrative procedure established by Articles 2-7 of Law no.105/1997 but in the context of the provisions of Article 6 of the Convention, on the right to a "*fair trial*", the purpose of this phrase attracts also the connotation "*in a reasonable way*." Therefore, the administrative and judicial procedure laid down in Articles 2-7 of Law no. 105/1997 was estimated to be inconsistent with that purpose. (Decision no. 208/2000⁷¹) In deciding this, the Court acted "*in light of the constitutional provisions of Article 11 [...] and in the light of Article 20 (2) of the Constitution [...]*", referring to the case-law of the European Court of Human Rights, where, in relation to the application of Article 6 par. 1 of the Convention, it was established «*the requirement consisting of settlement of the case "in a reasonable time" includes dies a quo also the duration of such procedures preceding the referral to the court of law (for example, cases "Golder v. the United Kingdom", 1975 and "Vallee v. France", 1994), and that the "reasonable time" is calculated by the dies ad quem final resolution of the case (for example, cases "Ecklev. the Federal Republic of Germany", 1982 and "Bricmont v. Belgium", 1986)*». The Constitutional Court also held that «*In the meaning of the case-law of the European Court of Human Rights it shall not be considered as final settlement of the case the pronouncement of a judgement acknowledging the existence of the right (for example, the existence of the right to compensation under tort) without having determined also the actual amount of the money (e.g., amount of compensation), which would require separate proceedings (in this regard, see the cases "Guincho v. Portugal", 1984 and "Silva Pontes v. Portugal", 1994). Secondly, the same case law says that the procedures for the enforcement of the judgement is not covered by guarantee of "reasonable time" (Cases "X v. the United Kingdom", 1981 and "Alsterlund v. Sweden", 1988).*»

⁷⁰Published in the " Official Gazette of Romania ", Part I, no.37 of 6 March 1997

⁷¹Published in the " Official Gazette of Romania ", Part I, no.695 of 27 December 2000

We also wish to stress the situation where the issue of access to constitutional justice, from the perspective of the relevant judgements of the European Court of Human Rights, led to an essential reconsideration of the case law of the Constitutional Court, insofar it was related to its competence itself and the purpose was to facilitate access to constitutional justice. Thus, examining the provisions of Article 29 (1) of Law no.47/1992 on the organisation and operation of the Constitutional Court, according to which "*The Constitutional Court shall decide upon the exceptions raised before the courts of law or courts of commercial arbitration referring to the unconstitutionality of laws and ordinances which are in force, or any provision thereof, where such is related to adjudication of the case, regardless in which stage of trial proceedings or subject matter thereof*", it found that the expression "*in force*" within the cited provisions is constitutional "*to the extent it is interpreted as submitting to the constitutionality review the laws or ordinances or provisions therein, whose legal effects continue to produce even when they are no longer in force*"⁷². As grounds for that decision the Court referred also to the Judgement of 23 June 1993, delivered by the European Court of Human Rights in the *Case Ruiz-Mateos v. Spain*, concluding that "*Article 6 of the Convention shall apply to constitutional jurisdictions only when they carry out the constitutional review upon referrals from individuals, for the protection of their fundamental rights, either through direct applications, or through exception*". For the reasons set forth above, the Constitutional Court of Romania held that *«the expression "in force" - condition for the admissibility of the exception of unconstitutionality, therefore a procedural requirement preventing the examination on the merits of the referral of the author of the exception of unconstitutionality - falls under the scope of the protection of the right to a fair trial enshrined by Article 6 in the Convention for the Protection of Human Rights and Fundamental Freedoms, restricting access to constitutional justice.»*

■ Right to defence

By decision no.145/2000⁷³, based on the Convention and the case-law of the European Court of Human Rights, the Constitutional Court of Romania reconsidered its consistent practice on criminal procedural provisions prohibiting representation in court of the defendant in case of offences for which the penalty provided by law was imprisonment exceeding one year. The Constitutional Court held the following: *«given that the exception of*

⁷²Decision no.766/2011, published in the " Official Gazette of Romania ", Part I, no.549 of 3 August 2011

⁷³Published in the " Official Gazette of Romania ", Part I, no.695 of 16 December 2000

unconstitutionality of the provisions of Article 174 (1) a) of the Code of Criminal Procedure, concerns the constitutional right to defence, and it has its correspondent in the Convention for the Protection of Human Rights and Fundamental Freedoms, which in light of the constitutional provisions of Articles 11 and 20 is part of the domestic law, it is necessary to examine the exception of unconstitutionality also in light of the judicial practice of the European Court of Human Rights whilst applying the Convention. Thus, concerning the representation of the defendant in criminal proceedings, the European Court of Human Rights ruled in several judgements, including in the following cases: "Poitrimol v. France" (1993), "Lala v. the Netherlands" (1994) and "Pelladoah v. the Netherlands" (1994). In all these cases, the European Court of Human Rights ruled that the interdiction on the defendant's right to be represented by counsel to have his case tried in appeal is a violation of the provisions of Article 6 (1) and (3)s c) of the Convention for the Protection of Human Rights and Fundamental Freedoms [...]. The Court finds that the solution adopted by the European Court of Human Rights [...] is valid also in case of the provisions of Article 174 (1) a) of the Criminal Procedure Code, which do not allow representation of the defendant in the first instance or during retrial after the dissolution of the judgement upon appeal, in case of offences for which the penalty provided by law is imprisonment exceeding one year. » the Court accepted the exception of unconstitutionality and found that the provision "only if the penalty provided by law for the respective offence is fine or imprisonment not exceeding one year" referred to in Article 174 (1) a) of the Code of Criminal Procedure is unconstitutional.

■ **Right to property**

The period after 1991 was characterized by the adoption of many regulations with the purpose to repair the injustices committed during the Communist period, the issue of legislation on restitution of property abusively taken is well known, still raising problems in the Romanian legal system, as demonstrated by the very practice of the Court in Strasbourg. The Constitutional Court of Romania had to resolve many exceptions of unconstitutionality on these regulations, the issue relating to property giving raise to mutual references in the documents that the two Courts have issued on the matter.

From among the numerous decisions of the Constitutional Court, we mention those that "introduced" into domestic law the case-law of the European Court of Human Rights for to the extensive interpretation of the concepts "good" and "property", giving them a specific meaning related to international human rights. Thus, for example, by decision no.70/2001⁷⁴,

⁷⁴Published in the "Official Gazette of Romania", Part I, no.236 of 10 May 2001

the Court held that *«having regard to the provisions of Article 20 (1) of the Constitution, [...] the provisions of Article 41 (1) and (2) of the Constitution should be interpreted and applied in accordance with the provisions of Article 1 (1) of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms [...] In this interpretation the Court finds that the constitutional principle of equal protection of private property must be observed with respect to any property rights, any "possessions". In this respect, the European Court of Human Rights, through its case law, has broadly construed the notion of "possessions" and "property", giving them a specific sense for international law on human rights. Thus, the European Court stated that "the concept of «possessions» (in English, «possessions», in French, «biens») in the first part of Article 1 has an autonomous meaning and is independent from the formal classification in domestic law" (case of "Former King and Others v. Greece", 2000). This meaning "is not limited to ownership of physical goods. [...] certain other rights and interests constituting assets can also be regarded as «property rights», and thus as «possessions» for the purposes of this provision" (case of "Beyeler v. Italy", 2000). Likewise, in the case of "Gasus Dosier und Fördertechnik GmbH v. the Netherlands", 1996, to determine the scope of the provisions of Article 1, it was decided that "it is therefore immaterial whether Gasus's right [...] is to be considered as a right of ownership or as a security right in rem". The European Court of Human Rights also noted in the Case of "Van Marle and Others v. the Netherlands", 1986, that: "[...] clientèle [...] constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1 (P1-1). This provision was accordingly applicable in the present case." Also in the case of "Iatridis v. Greece", 1999 [...] since the applicant holds only a lease of his business premises, this interference neither amounts to an expropriation nor is an instance of controlling the use of property but comes under the first sentence of the first paragraph of Article 1". Furthermore, in the Case of "Pressos Compania Naviera S.A. and Others v. Belgium", 1995, it was decided that "claims for compensation come into existence as soon as the damage occurs. A claim of this nature «constituted an asset» and therefore amounted to «a possession» within the meaning of the first sentence of Article 1 (P1-1). [...] ». Based on the reasons set forth above, the Constitutional Court found that the provisions of Article 19 (3) final sentence of Law no.85/1992 concerning the refusal to grant interests, as well as to update the price refunded after ascertaining the nullity of the contract of sale of the dwelling, are contrary to the constitutional provisions which enshrine the right to property.*

It is worth mentioning also the decisions whereby the Constitutional Court established the conditions for limiting the exercise of the right to property or for allowing deprivation of property in accordance with the Constitution. Thus, substantiating again its solution on the case-law of the European Court of Human Rights, the Court held that *"the legislator is competent to establish the legal framework for the exercise of the attributes of the right to property in the sense conferred by the Constitution, so as not to come into collision with the general interest or other legitimate private interests of other legal subjects, thus establishing reasonable limitations on its use, as guaranteed individual right."* Deprivation of property must have a legitimate purpose and, for achievement thereof, the respective measure must keep a fair balance between the general interest of the community and the protection of individual fundamental rights.⁷⁵ The Court also held that the deprivation of property imposes an obligation on the State to indemnify the owner: *"in the absence of a remedy, Article 1 of Protocol No. 1 would provide only illusory and ineffective protection of the right to property"*. In this regard, it is worth mentioning, for example, decision no.870/2007⁷⁶, where the Court found that the challenged provisions *"settle a forced transfer of ownership, which do not observe the provisions concerning the expropriation enshrined by Article 44 (1) and (3) of the Constitution and by Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms In this respect, the European Court of Human Rights stated in its case-law that the ownership deprivation must be provided by the law, it must be in the public interest, it must observe the domestic legal norms and it must observe the relationship of proportionality between the means employed and the aim sought to be realised. As concerns the compensations for the owner of the ownership right for deprivation of his right, the European Court of Human Rights held that, in absence of a reparatory compensation, Article 1 of Protocol no.1 would only assure an illusory and ineffective protection of the ownership right, totally in disagreement with the provisions of the Convention (case "James and others v. the United Kingdom", 1986). The deprivation involves therefore the State's obligation to the payment of compensation to the owner, as without payment of an amount reasonably related to its value, the measure represents a disproportionate interference with the right of observance of their assets. The impossibility to obtain even a partial compensation, but adequate in case of deprivation represents a breach of the balance between the requirements on the protection of the ownership right and the*

⁷⁵Decision no.72/2004, published in the " Official Gazette of Romania ", Part I, no.249 of 22 March 2004

⁷⁶Published in the " Official Gazette of Romania ", Part I, no. 701 of 17 October 2007

exigencies of general type.» For these reasons, and finding that, in this case, the provisions of Articles 8 and 14 of the Government Emergency Ordinance no.110/2005, which established the maximum sale price of certain medical premises, in a differentiated way, based on categories of settlements, and for the afferent land a fix price of 1 euro/sqm (within the limit of 250 sqm), the Constitutional Court held that "the prices determined as such do not observe the market value of the asset. The visible disproportion between the two values qualifies the price as unreasonable, and thus the requirements imposed by the constitutional and international norms are not fulfilled."

b) The case-law of the Court of Justice of the European Union

We mention, as an example, the situation where, explaining the legislator's measure also in relation to the case-law of the Court of Justice of the European Union, the Constitutional Court invoked it as one of the reasons likely to support the change in its own practice. Thus, for example, by Decision no.1237 of 6 October 2010⁷⁷, having to decide on a regulation concerning pensions and, in this context, on the issue of equalization of retirement ages for men and women, the Constitutional Court of Romania noted that *"it is worth noting the reasons retained by the Court of Justice of the European Union in relation to certain arguments such as those concerning the role of women in the family [...] Based on the principle of ensuring equal pay between women and men for equal work, the Court in Luxembourg, in the Judgement of 13 November 2008, delivered in the case Commission of the European Communities v Italian Republic C-46/07, but also by the Judgement of 26 March 2009, delivered in the case Commission of the European Communities v Hellenic Republic C-559/07, held that social measures should contribute to ensuring working lives of women equal to men. Imposing different retirement ages is not likely to compensate for the disadvantages and hardships faced by women in their careers because of their social status. It was also recalled that the concern for child rearing should not to be reported only to women but also to men and that, from this perspective, the situation of the two sexes is comparable."* In light of these considerations, the Constitutional Court of Romania held that *"it is necessary to bring a change in its practice relating to the issue of equalization of retirement ages for men and women"*⁷⁸. Without being able to trenchantly decide on its opportunity, however, opposition to this solution would mean, at present, opposition to a social trend of international magnitude,

⁷⁷ Published in the „ Official Gazette of Romania”, Part I, no.785 of 24 November 2010

⁷⁸ Expressed in Decision no.90 of 10 February 2005, published in the ” Official Gazette of Romania”, Part I, no.245 of 24 March 2005

whose standards Romania is called to comply with.” Since one cannot deny the disparities between actual social conditions in Romania and these standards, the Constitutional Court held that *”the solution adopted by the legislator through the Law on the unified public pension system in the sense of a gradual increase in the retirement age of women over 15 years is the only way to ensure adequacy of this measure to the social reality and to render constitutional the legal norm.”*

5. Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?

a) The case-law of the European Court of Human Rights

Examining the data concerning the activity of the Constitutional Court of Romania, since its establishment⁷⁹, it appears that it has issued a number of 14690 decisions, rulings and advisory opinions, of which 430 are of admission (partially or fully unconstitutional, respectively under reserve of interpretation), divided into categories of powers, in the exercise of which the following were delivered:

- review of laws before promulgation: 87, representing 41,63 % out of the total of 209 decisions delivered;
- *ex officio* review on the initiatives for revision of the Constitution: 3, representing 50% out of the total of 6 decisions delivered;
- review of Standing Orders of Parliament:: 15, representing 42,86% out of the total of 35 decisions delivered;
- *a posteriori* review: 310, representing 2,19% out of the total of 14132 decisions delivered;
- settlement of legal disputes of a constitutional nature between public authorities: 9, representing 50% out of the total of 18 decisions delivered;
- compliance with the procedure for the election of the President of Romania: 3, representing 1,21% out of the total of 248 decisions delivered;
- fulfilment of other duties provides by the organic law of the Court: 3, representing 20,00% out of the total of 15 decisions delivered.⁸⁰

⁷⁹The reference period considered in compiling these statistics is up to 31 July 2013

⁸⁰Source: www.ccr.ro – *Regular statistics*

Therefore, 400 out of the total of 430 decisions of admission of the referrals addressed to the Constitutional Court were delivered following settlement of the objections of unconstitutionality, settlement of exceptions of unconstitutionality raised by the parties before the courts, by the courts *ex officio* or by the Advocate of the People, and following the constitutional review over the initiatives for revision of the Constitution.

We conducted an analysis of these cases because the challenges therein are usually directed at the violation of fundamental rights and freedoms, opportunity for reference to the case-law of the European Court of Human Rights which, in many situations, represented the standard leading to the solution of admission delivered by the Constitutional Court.

In terms of reliance upon the case-law of the European Court of Human Rights, we note the increased number of cases where the Constitutional Court refers to the judgements of the Strasbourg Court, the increased number of judgements invoked, as well as the increased scope of fundamental rights concerned. Another trend is that of "inclusion" of judgements of the European Court of Human Rights within the *a priori* constitutional review, given that the decisions delivered by the Constitutional Court in the settlement of the objections of unconstitutionality contain more consistent references to that case-law, especially on issues of legislative technique, with consequences in terms of compliance with the principle of legal certainty.

If, according to a study conducted in 2005⁸¹, between 1994 and 2003 the Constitutional Court invoked the texts of the Convention and the case-law of the European Court of Human Rights as grounds for about 380 decisions (out of the total of almost 3000 issued in that time interval), at present, the Court invokes them in such a number in just one year (in relation to the 9 years- reference period of the study). We consider the situation of 2012, when the Constitutional Court delivered a total of 1098 acts.

It is true that the number of cases decided by the Constitutional Court has experienced significant growth over time. At the same time, since the moment (7 October 2010) when it

⁸¹It is a project initiated and conducted by the Constitutional Court of Romania with the support of the Royal Ministry of Foreign Affairs of Norway. This project consisted of the publication of a collection of decisions of the Constitutional Court issued in the period 1994-2003, whose motivation was based on the Convention for the Protection of Human Rights and Fundamental Freedoms and on the case-law of the European Court of Human Rights, the building of a website and the writing of a CD containing the database included in the collection of decisions mentioned above, the organisation of four regional seminars (Bucharest, Timisoara, Cluj-Napoca, Iași) attended by 176 judges from courts of 14 counties of Romania, academics, other legal professionals, as well as organisation of a survey among Romanian judges participating in these seminars, based on a Questionnaire on the relationship between judgements and the case-law of the European Court of Human Rights; see www.ccr.ro *Case-law of the Constitutional Court and the European Convention of Human Rights*

was established that the raising of an exception of unconstitutionality does no longer result in suspension of proceedings, until settlement of the exception, the number of cases experienced a significant decline. As it can be noted from examining the statistical data presented, the increase in the number of cases has not been determined, as one might think, by the introduction of new powers of the Constitutional Court during and after the constitutional revision in 2003. With or without the new powers, the substantial activity of the Constitutional Court of Romania consists of settlement of exceptions of unconstitutionality, which reveals the role of this Court in the protection of fundamental rights and freedoms, leading to its strengthening both in terms of volume and substance. And one of the factors behind this development is the reception by the Court, through the mechanism imposed by Article 20 of the Constitution, of the international reference standards, leading, in some cases, to the enrichment of constitutional safeguards of fundamental rights and freedoms, determined by their interpretation and application "in line" with the international regulations.

Some of the most significant examples are those that resulted in a change of practice, which we have already mentioned. For illustrative purposes, we present below a list of the ECHR cases most frequently invoked in the case-law of the Constitutional Court of Romania (specifying the relevant area of law), mentioning that this is not an exhaustive list either in terms of cases of the European Court of Human Rights invoked in the case-law of the Constitutional Court of Romania or in terms of decisions of the Constitutional Court where the mentioned cases were invoked. The selection concerns mainly the Constitutional Court's decisions of admission of the exceptions / objections of unconstitutionality.

Judgement Abdulaziz Cabales and Balkandali v. The United Kingdom 1985- Decision no.1354/2010, Official Gazette of Romania no.761 of 15 November 2010 (compensation for political convictions - equality, non-discrimination); **Decision no.1615/2011**, Official Gazette of Romania no.99 of 8 February 2012 (allowances and other entitlements of teaching staff in the education system - the State's margin of appreciation in deciding whether and to what extent does the differences between various similar situations justify a different legal treatment);

Judgement Akdejeva v. Latvia, 2007- Decision no.874/2010, Official Gazette of Romania no.433 of 28 June 2010 (reducing spending, reducing the amount of pensions, financial interest, ownership) **Decision no.1360/2010**, Official Gazette of Romania No.761 of

November 15, 2010 (compensation for political convictions, property, measures of redress, State's obligations);

Judgement Almeida Garrett, Mascarenhas Falcão and Others v. Portugal, 2000- Decision no.691/2007, Official Gazette of Romania no.668 of 1 October 2007 (setting up the National Company „Loteria Română”, situation of assets owned by the Self-Managed Company "Loteria Națională", conditions for expropriation, the concept of "public utility")

Judgement Amman v Switzerland, 2005- Decision no.682/2012, Official Gazette of Romania no.473 of 11 July 2012 (parliamentary elections - the accessibility and the foreseeability of the law);

Judgement Ana Maria Frimu v. Romania 2012 - Decision no.297/2012, Official Gazette of Romania no.309 of 9 May 2012 (integration of service pensions into the general pensions system);

Judgement Androne v. Romania, 2005 - Decision no.26/2012, Official Gazette of Romania no.116 of 15 February 2012 contradictory legislative solutions, the principle of legal certainty);

Judgement Anghel v. Romania, 2007- Decision no.494/2012, Official Gazette of Romania no.407 of 19 June 2012, **Decision no.500/2012**, Official Gazette of Romania no.492 of 18 July 2012 (legal regime of contraventions, remedy, removal of the judicial review of judgements of the trial court, access to justice);

Judgement Ashingdane v. United Kingdom,1985 - Decision no.417/2004, Official Gazette of Romania no.1044 of 11 November 2004 (State's material liability for judicial errors, free access to justice), **Decision no.1202/2010**, Official Gazette of Romania no.743 of 8 November 2010 (stamp duty for initiating court proceedings, free access to justice);

Judgement Aydın v. Turkey, 1997 - Decision no.62/2007, Official Gazette of Romania no.104 of 12 February 2007 (criminalization of libel and slander, freedom of expression), **Decision no.783/2009**, Official Gazette of Romania no.404 of 15 June 2009 (eliminating the possibility to challenge a judgement by means of appeal on the grounds that it is contrary to law or that the law has been misapplied, the right to an effective remedy);

Judgement Balliu v. Albania, 2005 - Decision no.1519/2011, Official Gazette of Romania no.67 of 27 January 2012; (interdiction to practice the lawyer's profession in courts and prosecutor's offices attached to them, including the National Anticorruption Directorate, the Directorate for Investigating Organized Crime and Terrorism, the High Court of Cassation

and Justice or the Prosecutor's Office attached to the High Court of Cassation and Justice, where the lawyer's spouse or relative or affinity to the third degree acts as judge or prosecutor, regardless of the department, directorate, division or office in which he/she works, the right to defence);

Judgement Banfield v. the United. Kingdom, 2005 - Decision no.873/2010, Official Gazette of Romania no.433 of 28 June 2010 (measures on pensions, special pensions for magistrates, right to property);

Judgement Bleic v. Croatia, 2004 - Decision no.1354/2010, Official Gazette of Romania no.761 of 15 November 2010 (compensation for political convictions, equality, non-discrimination);

Judgement Beian v. Romania, 2007 - Decision no.980/2012, Official Gazette of Romania no.57 of 25 January 2012 (administration of assets that belong to the national cinema heritage, property, legislative coherence, legal certainty); **Decision no.19/2013**, Official Gazette of Romania no.84 of 7 February 2013 (idem)

Judgement Bergauer and others v. The Czech Republic, 2004 - Decision no.1360/2010, Official Gazette of Romania no.761 of 15 November 2010, (mentioned above, see also **Judgement Akdejeva v. Latvia, 2007**), **Decision no.1358/2010**, Official Gazette of Romania no.761 of 15 November 2010 (compensation for political convictions, State's obligations)

Judgement Beyeler v. Italy, 2000 - Decision no.1360/2010, Official Gazette of Romania no.761 of 15 November 2010, (mentioned above, see also **Judgement Akdejeva v. Latvia, 2007**), **Decision no.872/2010**, Official Gazette of Romania no.433 of 28 June 2010, **Decision no.874/2010**, Official Gazette of Romania no.433 of 28 June 2010, (mentioned above, see also **Judgement Akdejeva v. Latvia, 2007**), **Decision no.1358/2010**, Official Gazette of Romania no.761 of 15 November 2010 (mentioned above, see also **Judgement Bergauer and others v. The Czech Republic, 2004**), **Decision no.1470/2011**, Official Gazette of Romania no.853 of 2 December 2011 (certainty of legal relations, retroactivity of the more favourable criminal law);

Judgement Bladet Tromso and Stensaas v. Norway, 1999 - Decision no.134/2000, Official Gazette of Romania no.393 of 23 August 2000 (criminalization of calumny, freedom of expression);

Judgement Bocancea and Others v. Moldova, 2004 - Decision no.1615/2011, Official Gazette of Romania no.99 of 8 February 2012 mentioned above, see also **Judgement Abdulaziz Cabales and Balkandali v. The United Kingdom 1985**);

Judgement Brincat v. Italy, 1992 - Decision no.293/2002, Official Gazette of Romania no.876 of 4 December 2002 (the status of the prosecutor, the hierarchical subordination principle);

Judgement Brumărescu v. Romania, 1999 - Decision no.1470/2011, Official Gazette of Romania no.853 of 2 December 2011 (mentioned above, see also **Judgement Beyeler v. Italy, 2000**) ;

Judgement Bucheň v. The Czech Republic, 2002 - Decision no.82/2009, Official Gazette of Romania no.33 of 16 January 2009 (amendment of legislation on pensions, right to property, the concept of "possession"), **Decision no.874/2010**, Official Gazette of Romania no.433 of 28 June 2010 (mentioned above, see also **Judgement Akdejeva v. Latvia, 2007**), **Decision no.414/2010**, Official Gazette of Romania no.291 of 4 May 2010

Judgement Burdov v Russia, 2002 - Decision no.458/2009, Official Gazette of Romania no.256 of 17 April 2009 (forced execution, removal of judicial review, unconstitutionality)

Judgement Conka v. Belgium, 2002 - Decision no.62/2007, Official Gazette of Romania no.104 of 12 February 2007 (mentioned above, see also **Judgement Aydin v. Turkey, 1997**), **Decision no.783/2009**, Official Gazette of Romania no.404 of 15 June 2009 (mentioned above, see also **Judgement Aydin v. Turkey, 1997**)

Judgement Constantinescu v. Romania, 2000 - Decision no.129/2002, Official Gazette of Romania no.399 of 11 June 2002 (criminalization of insult, freedom of expression);

Judgement Dalban v. Romania, 2000 - Decision no.129/2002, Official Gazette of Romania no.399 of 11 June 2002, (mentioned above, see also **Judgement Constantinescu v. Romania, 2000**);

Judgement Damman v. Switzerland, 2005 - Decision no.799/2011, Official Gazette of Romania no.440 of 23 June 2011 (revision of the Constitution, legal certainty);

Judgement Dombo Beheer BV v. the Netherlands, 1993 - Decision no.969/2007, Official Gazette of Romania no.816 of 29 November 2007 (principle of equality of arms, divorce);

Judgement Dragotoniu and Militaru-Pidhorni v. Romania, 2007 - Decision no.1258/2009, Official Gazette of Romania no.798 of 23 November 2009 (retention of data generated or processed by providers of publicly available electronic communications services or of public communications networks, the transposition of a Directive, accessibility, foreseeability, protection of private life);

Judgement Dumitru Popescu v. Romania, 2007 - Decision no.1258/2009, Official Gazette of Romania no.798 of 23 November 2009 (mentioned above, see also ***Judgement Dragotoniu and Militaru-Pidhorni v. Romania, 2007***);

Judgement Engel and Others v. The Netherlands, 1976 - Decision no.1615/2011, Official Gazette of Romania no.99 of 8 February 2012, (mentioned above, see also ***Judgement Abdulaziz Cabales and Balkandali v. The United Kingdom 1985***);

Judgement Eckle v. Germany, 1982 - Decision no.208/2000, Official Gazette of Romania no.695 of 27 December 2000 (solving appeals, challenges and complaints with regards to the amounts set forth in the audit or taxation orders of the bodies of the Ministry of Finance, administrative procedures, fair trial, reasonable time);

Judgement Ernewein and Others v. Germany, 2009 - Decision no.1360/2010, Official Gazette of Romania no.761 of 15 November 2010, (mentioned above, see also ***Judgement Akdejeva v. Latvia, 2007***), ***Decision no.1358/2010***, Official Gazette of Romania No.761 of November 15, 2010 (mentioned above, see also ***Judgement Bergauer and others v. The Czech Republic, 2004***);

Judgement Former King of Greece and Others v Greece, 2000 - Decision no.70/2001, Official Gazette of Romania no.236 of 10 May 2001, (sale of dwellings and of premises built for other purposes using funds of the State and funds of State economic or budgetary entities, right to property), ***Decision no.1358/2010***, Official Gazette of Romania no.761 of 15 November 2010 (mentioned above, see also ***Judgement Bergauer and others v. The Czech Republic, 2004***), ***Decision no.681/2012***, Official Gazette of Romania no.477 of 12 July 2012 (regulation in the area of national education, accessibility, foreseeability);

Judgement Fener Rum Patrikligi v. Turkey - Decision no.1470/2011, Official Gazette of Romania No.853 of December 2 (mentioned above, see also ***Judgement Beyeler v. Italy, 2000***) 2011 ***Decision no.681/2012***, Official Gazette of Romania no.477 of 12 July 2012 (mentioned above, see also ***Judgement Former King of Greece and Others v. Greece, 2000***);

Judgement Gasus Dosier und Fördertechnik GmbH v. The Netherlands", 1996 Decision no.70/2001, Official Gazette of Romania no.236 of 10 May 2001 (mentioned above, see also **Judgement Former King of Greece and Others v. Greece, 2000**)

Judgement Gaygusuz v. Austriei - Decision no.1615/2011, Official Gazette of Romania no.99 of 8 February 2012 (mentioned above, see also *Judgement Abdulaziz Cabales and Balkandali v. The United Kingdom 1985*)

Judgement Georgel and Georgeta Stoicescu v. Romania, 2011- Decision no.1/2012, Official Gazette of Romania no.53 of 23 January 2012 (management of stray dogs issue, the accessibility and the precision of the law)

Judgement Golder v. United Kingdom, 1975 - Decision no.670/2011, Official Gazette of Romania no.421 of 16 June 2011 (challenging in courts the decisions of the general assembly of owners' associations, the foreseeability of the law);

Judgement Handyside v. United Kingdom 1976- Decision no.54/2000, Official Gazette of Romania no.310 of 5 July 2000 (reorganisation of the legal entity; individual and unjustified removal, through a normative act having force of law, from the benefit of selection for the purpose of taking over the absorbed entity's employees by the absorbing entity, restriction of a right, unconstitutionality)

Judgement Hirst v. The United Kingdom, 2005 - Decision no.51/2012, Official Gazette of Romania No.90 of February 3, 2012 (organisation and conduct of elections, electoral process, legal certainty);

Judgement Huber v Switzerland, 1990 - Decision no.293/2002, Official Gazette of Romania no.876 of 4 December 2002 (mentioned above, see also **Judgement Brincat v. Italy, 1992**);

Judgement Iatridis v. Greece, 1999 - Decision no.70/2001, Official Gazette of Romania no.236 of 10 May 2001 (mentioned above, see also **Judgement Former King of Greece and Others v. Greece, 2000**);

Judgement Immobiliare Saffi v. Italy, 1999 - Decision no.458/2009, Official Gazette of Romania no.256 of 17 April 2009 (mentioned above, see also **Judgement Burdov v. Russia, 2002**);

Judgement Ioan Pop v. Romania, 2004, Decision no.500/2012, Official Gazette of Romania no.492 of 18 July 2012 (mentioned above, see also **Judgement Anghel v. Romania, 2007**);

Judgement Iosub Caras v. Romania, 2006- Decision no.969/2007, Official Gazette of Romania no.816 of 29 November 2007 (divorce, the State's obligation to provide the legal framework under which spouses have equal rights and obligations);

Judgement James and Others v. United Kingdom, 1986 - Decision no.871/2007, Official Gazette of Romania no.701 of 17 October 2007 (legal framework for selling dwellings that are in the private property of the State or of the administrative-territorial units, used as medical offices, as well as for selling premises where activities related to medical care take place, right to property) ; **Decision no.691/2007**, Official Gazette of Romania no.668 of 1 October 2007 (expropriation, compensation as remedy) ;

Judgement Janis Adamsons v. Latvia, - Decision no.820/2010, Official Gazette of Romania no.420 of 23 June 2010 (illustration law, requirements);

Judgement Jatner v. Slovakia - Decision no.1360/2010, Official Gazette of Romania no.761 of 15 November 2010, ((mentioned above, see also **Judgement Akdejeva v. Latvia, 2007**);

Judgement Klass and Others v. Germany, 1978 - Decision no.57/2002, Official Gazette of Romania no.182 of 18 March 2002 (use of audio and video recordings as evidence in the criminal trial, protection of private life), **Decision no.1258/2009**, Official Gazette of Romania no.798 of 23 November 2009 (mentioned above, see also *Judgement Dragotoni and Militaru-Pidhorni v. Romania, 2007*);

Judgement Klaus and Iouri Kiladze v. Georgia, 2010 - Decision no.1360/2010, Official Gazette of Romania no.761 of 15 November 2010 (mentioned above, see also **Judgement Akdejeva v. Latvia, 2007**), **Decision no.1358/2010**, Official Gazette of Romania no.761 of 15 November 2010 (mentioned above, see also *Judgement Bergauer and others v. The Czech Republic, 2004*);

Judgement Kjartan Asmundsson v. Iceland, 2004 - Decision no.297/2012, Official Gazette of Romania no.309 of 9 May 2012; pensions of counsellors of accounts; service pensions, distinctions, the rights arising from the social security system, right to property);

Judgement Kopecky v. Slovakia, 2004 - Decision no.1360/2010, Official Gazette of Romania no.761 of 15 November 2010 (mentioned above, see also **Judgement Akdejeva v Latvia, 2007**), **Decision no.1358/2010**, Official Gazette of Romania No.761 of November 15, 2010 (mentioned above, see also *Judgement Bergauer and others v. The Czech Republic, 2004*);

Judgement Kokkinakis v. Greece, 1993 - Decision no.54/2000, Official Gazette of Romania no.310 of 5 July 2000 (restructuring of the Romanian Bank of Foreign Trade - Bancorex - S.A., right to work, restriction);

Judgement Kostovski v. The Netherlands, 1989 - Decision no.672/2012, Official Gazette of Romania no.559 of 8 August 2012 (access to one's own files and disclosure of the Securitate, right to a fair trial, adequate procedural safeguards to prevent arbitrariness and to reinforce, thus, litigants' confidence in the act of justice);

Judgement Lala v. The Netherlands, 1994 - Decision no.145/2000, Official Gazette of Romania no.665 of 16 December 2000 (interdiction on the defendant's right to be represented by his/her lawyer during appeals, right to a fair trial);

Judgement Larkos v. Cyprus, 1999 - Decision no.1615/2011, Official Gazette of Romania no.99 of 8 February 2012 (mentioned above, see also **Judgement Abdulaziz Cabales and Balkandali v. The United Kingdom 1985**);

Judgement Lawless v. Ireland, 1961- Decision no.874/2010, Official Gazette of Romania no.433 of 28 June 2010 (mentioned above, see also **Judgement Akdejeva v. Latvia, 2007**);

Judgement Le Compte, Van Leuven and De Meyere v. Belgium, 1981 - Decision no.168/1999, Official Gazette of Romania no.85 of 24 February 2000 (freedom of association, forms of association, tenants' associations);

Judgement Leempoel & S.A. ED. Cine Revue v. Belgium, 2006 - Decision no.1/2012, Official Gazette of Romania no.53 of 23 January 2012 (mentioned above, see also **Judgement Georgel and Georgeta Stoicescu v. Romania, 2011**);

Judgement Lungoci v. Romania, 2006- Decision no.500/2012, Official Gazette of Romania no.492 of 18 July 2012 (mentioned above, see also **Judgement Anghel v. Romania, 2007**);

Judgement Lutz v. Germany, 1987 - Decision no.161/1998, Official Gazette of Romania no.3 of 11 January 1999 (the concept of "criminal charge" includes also the minor offences' field, i.e. the same procedural safeguards apply to those accused of having committed minor offences and to those accused of having committed crime);

Judgement Maaouia v. France, 2000 - Decision no.342/2003, Official Gazette of Romania no.755 of 28 October 2003 (aliens' regime);

Judgement Malama v. Greece", 2001 - Decision no.691/2007, Official Gazette of Romania no.668 of 1 October 2007 (mentioned above, see also **Judgement Almeida Garrett, Mascarenhas Falcão and Others v. Portugal**);

Judgement Maggio and Others v. Italy Decision no.297/2012, Official Gazette of Romania no.309 of 9 May 2012 (mentioned above, see also *Judgement Kjartan Asmundsson v. Iceland, 2004*);

Judgement Maszni v. Romania, 2006- Decision no.610/2007, Official Gazette of Romania no.474 of 16 July 2007 (military courts, equality, non-discrimination);

Judgement Muller v. Austria - Decision no.873/2010, Official Gazette of Romania no.433 of 28 June 2010 (mentioned above, see also *Judgement Banfield v. the United Kingdom, 2005*);

Judgement Munoz Diaz v. Spain, 2009- Decision no.297/2012, Official Gazette of Romania no.309 of 9 May 2012 (mentioned above, see also *Judgement Ana Maria Frimu v. Romania 2012*);

Judgement Marckx v. Belgium, 1979 - A large number of decisions, in various areas of law, see the answer to question 4;

Judgement Mellacher and Others v. Austria, 1989 - Decision no.26/2012, Official Gazette of Romania no.116 of 15 February 2012 (mentioned above, see also *Judgement Androne v. Romania, 2005*), Decision no.874/2010, Official Gazette of Romania no.433 of 28 June 2010 (mentioned above, see also *Judgement Akdejeva v. Latvia, 2007*)

Judgement Micu v. Romania, 2011- Decision no.1519/2011, Official Gazette of Romania no.67 of 27 January 2012 (mentioned above, see also *Judgement Balliu v. Albania, 2005*);

Judgement Moskal v. Poland, 2009 - Decision no.873/2010, Official Gazette of Romania no.433 of 28 June 2010 (mentioned above, see also *Judgement Banfield v. the United Kingdom, 2005*);

Judgement Nejdet Şahin and Perihan Şahin v. Turkey, 2007- Decision no.980/2012, Official Gazette of Romania no.57 of 25 January 2012, (mentioned above, see also *Judgement Beian v. Romania, 2007*); Decision no.615/2012, Official Gazette of Romania no.454 of 6 July 2012 (certainty of legal relations, remedies);

*Judgement Öztürk v. Germany, 1984 -*Decision no.161/1998, Official Gazette of Romania no.3 of 11 January 1999 (mentioned above, see also *Judgement Lutz v. Germany, 1987*);

Judgement Partidul Comuniștilor (Nepeceriști) and Ungureanu v. Romania- Decision no.820/2010, Official Gazette of Romania no.420 of 23 June 2010 (illustration law, requirements);

Judgement Păduraru v. Romania, 2005 - Decision no.26/2012, Official Gazette of Romania no.116 of 15 February 2012 (mentioned above, see also *Judgement Androne v. Romania, 2005*); *Decision no.980/2012*, Official Gazette of Romania no.57 of 25 January 2012 (mentioned above, see also *Judgement Beian v. Romania, 2007*);

Judgement Petkov and Others v. Bulgaria, 2009 - Decision no.682/2012, Official Gazette of Romania no.473 of 11 July 2012 (mentioned above, see also *Judgement Amman v. Switzerland, 2005*);

Judgement Petra v. Romania - Decision no.26/2012, Official Gazette of Romania no.116 of 15 February 2012 (mentioned above, see also *Judgement Androne v. Romania, 2005*);

Judgement Padalevicius v. Lithuania, 2009, Pincova and Pinc v. The Czech Republic, 2002- Decision no.1358/2010, Official Gazette of Romania no.761 of 15 November 2010 (mentioned above, see also *Judgement Bergauer and others v.The Czech Republic, 2004*);

Judgement Platform «Ärzte für das Leben» v. Austria, 1985- Decision no.199/1999, Official Gazette of Romania no.76 of 21 February 2000 (conducting public meetings, prior authorization, constitutionality);

Judgement Poitrimol v. France, 1993- Decision no.145/2000, Official Gazette of Romania no.665 of 16 December 2000 (mentioned above, see also *Judgement Lala v. The Netherlands, 1994*);

Judgement Pressos Compania Naviera S.A. and Others v. Belgium, 1995 - Decision no.70/2001, Official Gazette of Romania no.236 of 10 May 2001 (mentioned above, see also *Judgement Former King of Greece and Others v. Greece, 2000*);

Judgement Raicu v. Romania, 2006 - Decision no.923/2009, Official Gazette of Romania no.520 of 29 July 2009 (restitution of property that belonged to communities of national minorities in Romania);

Judgement Rasmussen v. Denmark, 1984 - Decision no.1354/2010, Official Gazette of Romania no.761 of 15 November 2010 (mentioned above, see also *Judgement Blečić v. Croatia, 2004*); *Decision no.573/2011*, Official Gazette of Romania no.363 of 25 May 2011 (reducing the penalty limits, conditions, non-discrimination, foreseeability of the law),

Decision no.1615/2011, Official Gazette of Romania no.99 of 8 February 2012 (mentioned above, see also *Judgement Abdulaziz Cabales and Balkandali v. The United Kingdom 1985*);

Judgement Rassemblement jurassien v Switzerland, 1979 - Decision no.199/1999, Official Gazette of Romania no.76 of 21 February 2000 (organizing and conducting public meetings);

Judgement Rekvényi v Hungary, 1999 - A large number of decisions, in various areas of law, see the answer to question 4;

Judgement Rotaru v. Romania, 2000 - idem

Judgement SC Ruxandra Trading v. Romania, 2007, Ruianu v Romania, 2003, Judgement Sabin Popescu v. Romania, 2004 - Decision no.458/2009, Official Gazette of Romania no.256 of 17 April 2009 (mentioned above, see also *Judgement Burdov v. Russia, 2002*);

Judgement Schuler-Zgraggen v. Switzerland, 1993 - Decision no.90/2005, Official Gazette of Romania no.245 of 24 March 2005 (status of military staff, men, women, non-discrimination);

Judgement Scoppola v. Italy, 2009; Decision no.1470/2011, Official Gazette of Romania no.853 of 2 December 2011 (mentioned above, see also *Judgement Beyeler v. Italy, 2000*);

Judgement Schiesser v. Switzerland, 1979 - Decision no.293/2002, Official Gazette of Romania no.876 of 4 December 2002 (mentioned above, see also *Judgement Brincat v. Italy, 1992*);

Judgement Sissanis v Romania 2007 - Decision no.903/2010, Official Gazette of Romania no.584 of 17 August 2010 (arrangements for holding dangerous and aggressive dogs, clarity and precision of the law), *Decision no.494/2012*, Official Gazette of Romania no.407 of 19 June 2012 (traffic offences, road transport, law drafting, precision);

Judgement Slavov and Others v. Bulgaria, 2008 - Decision no.1358/2010, Official Gazette of Romania no.761 of 15 November 2010 (mentioned above, see also *Judgement Bergauer and others v. The Czech Republic, 2004*);

Judgement Slivenko v. Latvia, 2009- Decision no.1360/2010, Official Gazette of Romania no.761 of 15 November 2010 (mentioned above, see also *Judgement Akdejeva v. Latvia, 2007*); *Decision no.1358/2010*, Official Gazette of Romania no.761 of 15 November

2010 (mentioned above, see also *Judgement Bergauer and others v. The Czech Republic, 2004*);

Judgement Stanca Popescu v. Romania 2009- Decision no.26/2012, Official Gazette of Romania no.116 of 15 February 2012 (mentioned above, see also *Judgement Androne v. Romania, 2005*), *Decision no.1470/2011*, Official Gazette of Romania no.853 of 2 December 2011 (mentioned above, see also *Judgement Beyeler v. Italy, 2000*)

Judgement Sunday Times v. the United Kingdom, 1979 - A large number of decisions, in various areas of law, see the answer to question 4

Judgement Valkov and Others v. Bulgaria - Decision no.297/2012, Official Gazette of Romania no.309 of 9 May 2012 (mentioned above, see also *Judgement Ana Maria Frimu v. Romania 2012*);

Judgement Van der Musselle v. Belgium, 1983- Decision no.1360/2010, Official Gazette of Romania no.761 of 15 November 2010 (mentioned above, see also *Judgement Akdejeva v. Latvia, 2007*), *Decision no.1358/2010*, Official Gazette of Romania no.761 of 15 November 2010 (mentioned above, see also *Judgement Bergauer and others v.The Czech Republic, 2004*);

Judgement Vitan v. Romania, 2008 - Decision no.1519/2011, Official Gazette of Romania no.67 of 27 January 2012 (mentioned above, see also *Judgement Balliu v. Albania, 2005*)

Judgement Zdanoka v. Latvia, 2006 - Decision no.820/2010, Official Gazette of Romania no.420 of 23 June 2010 (mentioned above, see also *Judgement Janis Adamsons v. Latvia*);

Judgement Zvolsky and Zvolska v. the Czech Republic, 2002 - Decision no.691/2007, Official Gazette of Romania no.668 of 1 October 2007 (mentioned above, see also *Judgement Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*);

Judgement Wasa Liv Ömsesidigt, Försäkringsbolaget Valands Pensionsstiftelse and a group of approximately 15 000 individuals v. Sweden - Decision no.224/2012, Official Gazette of Romania no.256 of 18 April 2012 (obligation to contribute to the health insurance fund with a share of income from pensions, right to property);

Judgement Yumak and Sadak v. Turkey - Decision no.51/2012, Official Gazette of Romania no.90 of 3 February 2012 (mentioned above, see also *Judgement Hirst v. the United Kingdom, 2005*).

b) The case-law of the Court of Justice of the European Union

In many of the decisions handed down after 2007 (year of accession of Romania to the European Union), the Constitutional Court found that the primary or delegated legislator had achieved harmonization of domestic laws with the European provisions in various matters: asylum (Law no.122/2006 on asylum in Romania, published in the Official Gazette of Romania, no. 428 of 18 May 2006)⁸², aliens' regime⁸³, preventing and combating cross-border crime (Law no. 76/2008 on the organisation and operation of the National System of Judicial Genetic Data, published in the Official Gazette of Romania, no.289 of 14 April 2008)⁸⁴, trademarks (Law no. 84/1998 on trademarks and geographical indications, published in the Official Gazette of Romania, Part I, no. 161 of 23 April 1998)⁸⁵, mutual recognition of judgement in civil and commercial matter⁸⁶, mediation⁸⁷, consumer protection⁸⁸ and others.

In some cases, the reasoning parts of the decisions contain a development of the argumentation as to underline the obligation and importance of the harmonization process, seen as justifying the adoption of certain laws. Thus, for example, the Court held that *"in accordance with the provisions of Article 148 (4) of the Constitution, the authorities of the Romanian State assumed the obligation to guarantee that any obligations arising from the the founding Treaties of the European Union, the binding regulations under community law and the accession instrument are put into effect. In this regard, the Government is constitutionally empowered to guarantee, through the means it has at its disposal, the fulfilment of obligations of Romania to the European Union. Thus, the use of emergency ordinances for bringing into accord the national legislation with the Community legislation, where the initiation of the infringement procedure before the Court of Justice had become imminent, is fully*

⁸² Decision no. 1033 of 9 October 2008, published in the " Official Gazette of Romania ", Part I, no. 757 of 10 November 2008, Decision no. 631 of 12 May 2011, published in the " Official Gazette of Romania", Part I, no. 536 of 29 July 2011

⁸³ Decision no.432 of 15 April 2010, published in the "Official Gazette of Romania ", Part I, no.361 of 2 June 2010

⁸⁴ Decision no.666 of 17 April 2011, published in the " Official Gazette of Romania", Part I, no.502 of 14 July 2011

⁸⁵ Decision no.688 of 31 May 2011, published in the " Official Gazette of Romania", Part I, no.537 of 29 July 2011

⁸⁶ Decision no.1.289 of 4 October 2011, published in the " Official Gazette of Romania ", Part I, no.830 of 23 November 2011

⁸⁷ Decision no.447 of 7 April 2011, published in the " Official Gazette of Romania ", Part I, no.485 of 8 July 2011

⁸⁸ Decision no.1591 of 13 December 2011, published in the " Official Gazette of Romania", Part I, no.80 of 1 February 2012

constitutional."⁸⁹ Even if such an infringement procedure was not imminent, specific conditions requiring rapid legislative intervention - such as avoiding the negative consequences that would be produced on competition at EU level, respectively ensuring the immediate protection of consumers - have been also retained as justifying the adoption of emergency ordinances⁹⁰.

In the post-accession period, the Constitutional Court has more frequently invoked the case-law of the Court of Justice of the European Union, an approach adopted also by other Constitutional Courts also prior accession⁹¹, for the purpose to guide the legislator's action, to explain or to substantiate its measures. We refer to what the doctrine called "*interpretative tools*" within the reach of the Constitutional Courts used to determine the consistent interpretation of national legislation with EU law.⁹² For example, adjudicating on a piece of legislation regarding the organisation and operation of gambling⁹³, the Court held that "*it is necessary to take into account also the case law of the Court of Justice of the European Union in the field of freedom to provide services under Article 49 EC. Thus, by the Judgement of 3 June 2010, in the Case C-258/08, Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v. Stichting de Nationale Sporttotalisator, the Court of Justice of the European Union reiterated its practice in that, in the regulation of gambling, Member States have a very wide margin of action. [...] The Member States are free to set the objectives of their policy on betting and gambling according to their own scale of values and, where appropriate, to define in detail the level of protection sought. The restrictive measures that they impose must, however, satisfy the conditions laid down in the case-law of the Court, in particular as regards their proportionality (see, to that effect, the Judgement of 6 March 2007, in the joint cases C-338/04, C-359/04 and C-360/04, Massimiliano Placanica and Others).*"

We present below, for illustrative purposes, a number of cases of the Court of Justice of the European Union invoked in the case-law of the Constitutional Court of Romania.

⁸⁹ Decision no.802 of 19 May 2009, published in the "Official Gazette of Romania", Part I, no.428 of 23 June 2009; Decision no.1070 of 8 September 2009, published in the "Monitorul Oficial al României", Part I, no.703 of 20 October 2009

⁹⁰ Decision no.450 of 3 May 2012, published in the "Official Gazette of Romania", Part I, no.507 of 24 July 2012, in the same regard – Decision no.1540 of 6 December 2011, published in the "Monitorul Oficial al României", Part I, no.151 of 7 March 2012, Decision no.802 of 19 May 2009, published in the "Monitorul Oficial al României", Part I, no.428 of 23 June 2009

⁹¹ D. Piqani, *Constitutional Courts in Central and Eastern Europe and their Attitude towards European Integration*, EJLS, Vol I, Nr.2, <http://www.ejls.eu/2/28UK.pdf>

⁹² Ibidem, p.8

⁹³ Decision no.1344/2011, published in the "Official Gazette of Romania", Part I, no.32 of 16 January 2012

C-26/62 Van Gend & Loos v Netherlands Inland Revenue Administration (5 February 1963), C-28/62 Da Costa and Others v Netherlands Inland Revenue Administration (27 martie 1963), C- 29/68 Milch-, Fett- und Eierkontor GmbH v Hauptzollamt Saarbrücken (24 June 1969) , C-24/86 Vincent Blaizot v Université de Liège and Others (2 February 1988), C-263/10 Iulian Nisipeanu v Direcției Generale a Finanțelor Publice Gorj and Others (7 July 2011), C- 313/05 Maciej Brzeziński v Dyrektor Izby Celnej w Warszawie (18 January 2007) - Decision no.1039/2012, Official Gazette of Romania no. 61 of 29 January 2013 - (ascertaining the unconstitutionality of certain legal provisions to the extent they are construed in the sense that the final and irrevocable rulings issued by the courts of appeal cannot be subject to review, in breach of the principle of priority of EU law, when such do not evoke the merits of the case; State's obligations arising from its membership to the European Union);

C-61/65 G. Vaassen-Göbbels v. direction du Beambtenfonds voor het Mijnbedrijf (30 iunie 1996), C-17/00 François De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort (29 November 2001)- Decision no.1166/2009, Official Gazette of Romania no.706 of 21 October 2009 (the concept of "court" with jurisdiction to rule on preliminary appeals, setting in this regard some specific requirements for the delimitation of this concept from other concepts used in defining various bodies in the national law of the Member States);

C-61/79 Amministrazione delle finanze dello Stato v Denavit italiana SRL (27 martie 1980); C-24/86 Vincent Blaizot v Université de Liège and Others (2 February 1988); C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA împotriva Jean-Marc Bosman and Others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman (15 December 1995), C- 402/09 Ioan Tatu v Statul român prin Ministerul Finanțelor și Economiei and Others (7 April 2011) - Decision no.668/2011, Official Gazette of Romania no.487 of 8 July 2011; Decision no.669/2011, Official Gazette of Romania No 524 of 26 July 2011; Decision no.738/2011, Official Gazette of Romania no 524 of 26 July 2011; Decision no.903/2011, Official Gazette of Romania no. 673 of 21 September 2011; Decision no.921/2011, Official Gazette of Romania no. 673 of 21 September 2011; Decision no.1088/2011, Official Gazette of Romania no. 668 of 21 September 2011 -(pollution tax, the preliminary question referred by the court, the conditions to formulate a preliminary question by the Constitutional Court);

C-309/99 Wouters and Others (19 February 2002)- Decision no.393/2012, Official Gazette of Romania no.370 of 31 May 2012 (*lawyer's fee - the lawyer, by practising his profession, fulfils an economic activity, activity consisting in offering goods or services in a free market [...] However, according to the constitutional text of Article 45, any economic activity is conducted "in accord with the law". Accordingly, the Court found that the legislator considered that the amount of the fee must be proportionate to the service provided, thus allowing limitations thereto if there isn't a balance between the lawyer's performance and the fee requested.*)

C-11/00 Commission of the European Communities v BCE, (10 July 2003), C-15/00 Commission of the European Communities v European Investment Bank (10 July 2003)- Decision no.859/2011, Official Gazette of Romania no 639 of 7 September 2011, **Decision no.869/2011**, Official Gazette of Romania no 639 of 7 September 2011 [*preventing, discovering and sanctioning corruption; special legal object of the contested regulation "refers to those social relations of patrimonial nature directly related to the financial interests of the European Union, as they are defined in the case-law of the Court of Justice of the European Union. (...) Therefore, with regard to the constitutional basis relied on in this case concerning economic freedom, the Court finds that it is to be understood in the meaning that it is not absolute, but conditioned and limited by the compliance with the law and with the financing contracts which the parties agree. Therefore, from this perspective, the Romanian legislator must enact in national legislation a regulation that meets the minimum requirements established for the purposes of the Council Act of 26 July 1995 concerning the adoption of the Convention on the protection of the financial interests of the European Community (also known as the "PIF" Convention) published in the Official Journal of the European Communities C 316 of 27 November 1995, with the three additional protocols adopted under Article 325 of the Treaty on the functioning of the European Union (former Article 280 of the TEC), whereas the European Union and the Member States shall counter fraud affecting the financial interests through measures that concern the application of national criminal law.*];

C-224/01 Gerhard Köbler v Austria (30 September 2003), C-173/03 Traghetti del Mediterraneo SpA v Italy (13 June 2006), C-379/10 Commission v Italy (24 November 2011)- Decision no 2/2012, Official Gazette of Romania no. 131 of 23 February 2012 (magistrates' liability);

C-340/02 Commission of the European Communities v France , (14 October 2004), **C-126/03 Commission of the European Communities v Federal Republic of Germany** (18 November 2004)- **Decision no.1636/2009**, Official Gazette of Romania no.45 of 20 January 2010; (transformation of the National Trade Register Office from public institution with legal personality into a structure attached to a non-governmental association - Chamber of Commerce and Industry of Romania - unconstitutionality; "*this fundamental change cannot operate unless in compliance with the constitutional principles and the relevant European norms, as well as with the case-law of the Court of Justice, which condemned for lack of transparency a number of procedures for the award of public works or services by some Member States*");

C-338/04 Procese penale v Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) și Angelo Sorricchio (C-360/04) (6 March 2007); **C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa** (8 September 2009); **C-258/08 Ladbrokes Betting & Gaming Ltd și Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator** (3 June 2010) - **Decision no.1344/2011**, Official Gazette of Romania no 32 of 16 January 2012, **Decision no.973/2012**, Official Gazette of Romania no. 57 of 25 January 2013 (organisation and operation of gambling);

C-402/05 Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities. (3 September 2008), **C-379/08 ERG and Others** (9 March 2010) - **Decision no.1256/2011**, Official Gazette of Romania no. 777 of 3 November 2011 (right to property, national energy strategy), **Decision no.17/2012**, Official Gazette of Romania no. 152 of 7 March 2012 (idem)

C-46/07 Commission of the European Communities v Italy (13 November 2008), **C-559/07 Commission of the European Communities v Greece** (26 March 2009) - **Decision no.1237/2010**, Official Gazette of Romania no.785 of 24 November 2010 (principle of gender equality< the right to pension).

C-489/07 Pia Messner v Stefan Krüger (3 September 2009) **Decision no.1591/2011**, Official Gazette of Romania no. 80 of 1 February 2012 (consumer protection);

C-459/02 Willy Gerekens and Association agricole pour la promotion de la commercialisation laitière Procola v État du grand-duché de Luxembourg (15 July 2004); **C-550/09 Criminal proceedings against E and F.** (29 June 2010) - **Decision no.570/2012**, Official Gazette of Romania no. 404 of 18 June 2012 ("*inclusion within the*

scope of the impugned emergency ordinance of some buildings that previously fell under the Law no.112/1995 creates a climate of instability, which ultimately is likely to lead to disregard of the principle of legitimate expectations of citizens in relation to the evolution of the legal regulations”), **Decision no.615/2012**, Official Gazette of Romania no. 454 of 6 July 2012 (establishment of a new period for bringing proceedings for annulment of legal acts of alienation of immovable property, the principle of the legitimate expectations of citizens)

C-136/10 Daniel Ionel Obreja v Ministerul Economiei și Finanțelor and Direcția Generală a Finanțelor Publice a județului Mureș (19 June 2010)- Decision no.1119/2010, Official Gazette of Romania no.745 of 8 November 2010 (pollution tax, the jurisdiction of the Constitutional Court versus the jurisdiction of the courts of law as to the application of EU law)

C-310/10 Ministerul Justiției și Libertăților Cetățenești v Ștefan Agafiței and Others (7 July 2011) - Decision no.115/2012, Official Gazette of Romania no 230 of 5 April 2012, **Decision no.199/2012**, Official Gazette of Romania no 317 of 11 May 2012, **Decision no.545/2012**, Official Gazette of Romania no. 440 of 2 July 2012, **Decision no.768/2012**, Official Gazette of Romania no. 795 of 27 November 2012 (the wages of staff paid from public funds - this is the responsibility of the Member State, and not the EU's, which means that it does not fall under EU regulations.)

6. Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?

There have been sometimes such divergences.

Thus, one of them regarded the status of the prosecutor in connection with its power to order pre-trial detention. To this effect, by Decision no.28 of 15 February 2000⁹⁴, the Constitutional Court of Romania held that "*the prosecutor falls within the concept of «other officer authorised by law to exercise judicial power», referred to in Article 5 § 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms*", as well as that "*there is no inconsistency between, on the one hand, the provisions of Article 5 § 3 of the Convention and, on the other hand, domestic laws (Code of Criminal Procedure and Law no. 92/1992 on judicial organisation, republished), as to apply the provisions Article 20 (2) of the Constitution, stating that: «Where any inconsistencies exist between the covenants and*

⁹⁴ published in the " Official Gazette of Romania ", Part I, no.301 of 3 July 2000

treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence»".

Giving a different interpretation to Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights held, by the judgement of 3 June 2003 in the Case of *Pantea v. Romania*, that "the prosecutor who ordered the applicant to be placed in pre-trial detention was not an "officer" for the purposes of the third paragraph of Article 5 of the Convention" (paragraphs 238 to 239): "*The Court points out that it has already noted in Vasilescu v. Romania (judgement of 22 May 1998, Reports 1998-III, pp. 1075-76, §§ 40-41), in the context of Article 6 § 1 of the Convention, that since prosecutors in Romania act as members of the Prosecutor-General's Department, subordinate firstly to the Prosecutor-General and then to the Minister of Justice, they do not satisfy the requirement of independence from the executive. The Court finds no reason to depart from this conclusion, albeit under Article 5 § 3 of the Convention in the instant case, given that independence from the executive is also one of the guarantees inherent in the concept of "officer" for the purposes of this provision (see Schiesser, cited above, pp. 13-14, § 31). Having regard to the foregoing, the Court concludes that the prosecutor who ordered the applicant to be placed in pre-trial detention was not an "officer" for the purposes of the third paragraph of Article 5. Accordingly, it must now be determined whether judicial review of the applicant's detention nonetheless took place "promptly" ("aussitôt") within the meaning of the same Convention provision.*"

Through Decision no. 367 of 30 September 2003⁹⁵, the Constitutional Court of Romania held, maintaining its case-law, that „*the prosecutor falls within the concept of «other officer authorized by law to exercise judicial power», referred to in Article 5 § 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms*”.

The revision of the Constitution of Romania, in 2003, brought the amendment of the constitutional provisions referring to individual freedom, there being established, at constitutional level, that “*the pre-trial detention is ordered by the judge [...]*” [Article 23 (4) of the Constitution].

Another situation of jurisprudential divergences concerns the audio or video recordings authorized by the prosecutor for conducting criminal investigations. Through Decision no. 21 of 3 February 2000⁹⁶, the Constitutional Court of Romania established that

⁹⁵ Published in the “Official Gazette of Romania”, Part I, no. 787 of 7 November 2003

⁹⁶ Published in the “ Official Gazette of Romania”, Part I, no. 159 of 17 April 2000

the provisions of Article 91¹⁻⁵ of the Criminal Procedure Code are constitutional. The Court noted in this respect that *“Articles 91¹ - 91⁵ of the Criminal Procedure Code provide for sufficient guarantees, by the regulation in details the justification of the issuance of the authorization, the conditions and the way of the ways in which the recordings could be made, the consignment and certification of the recorded conversations’ authenticity, of their integral play, and the eventual non-observance by the criminal prosecution body of these regulations is not, as shown above, an issue of the legal texts’ constitutionality, but an issue of their implementation, which exceeds the jurisdiction of the Constitutional Court, as, according to Article 2 (3) second sentence of Law no. 47/1992, republished, «the Constitutional Court cannot decide on the way of interpretation and implementation of the law, but only on its meaning contrary to the Constitution».* Thus, the examination and settlement of these aspects are within the exclusive competence of the court invested with the settlement of the criminal trial. In the light of the provisions of Articles 11 and 20 of the Constitution, the Court also finds that the impugned legal provisions do not violate the provisions of the international applicable acts.”

Through Decision of 26 April 2006, pronounced in the case *Dumitru Popescu 2*, the European Court of Human Rights established that such a conclusion *„is certainly in contradiction with the Court’s judgments enounced in the above paragraphs 84 and 85, but, as regrettable as this situation may be, we must however recall that, in general, it is not the duty of the Court to analyse the fact or law errors allegedly committed by an internal court (see, among others, Garcia Ruiz v. Spain [MC], no. 30.544/96, § 28, ECHR 1999-I; above mentioned Perez, § 82; Coeme and others v. Belgium, no. 32.492/96, 32.547/96, 32.548/96, 33.209/96 and 33.210/96, § 115, ECHR 2000-VII).* This aspect is also valid in the event it is about an error of application or interpretation of the Court’s case-law by the national constitutional judge” (par. 101).” Through the same decision, the European Court of Human Rights (par. 84) held: *„It follows that these legislative amendments, that we must remark, are much subsequent to the facts denounced by the applicant. Moreover, we must find out that, in spite of the amendments brought to CPC by laws no. 281/2003 and 356/2006, the surveillance measures in the case of some potential threats to national security seem to be able to be ordered now by the prosecutor’s office too, according to the procedure provided for in Article 13 of Law no. 51/1991, provisions which has been not abrogated yet. This is confirmed by the recent decision of the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 25 of 16 January 2007, by which the constitutional judge, seized by a national*

court that sustained the unconstitutionality of Article 13, motivated by the fact that this one allowed circumvention of the guarantees laid down by the CPC in the field of interception of communications, has invoked the special character of Law no. 51/1991, in order to justify its implementation in the case of some facts subsequent to the entry into force of the new procedure laid down by the CPC (above paragraph 42)”.

7. Do other national courts consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?

From the answer to (1) we note that the provisions of Article 20 and Article 148 of the Constitution confer to national courts the power to apply with priority provisions from international treaties („*the pacts and treaties on fundamental human rights, to which Romania is a party*”, respectively „*the founding treaties of the European Union, and the other binding Community regulations*”) if the internal laws contain contrary provisions [with the exception provided for in Article 20 (2) final thesis of the Constitution, for ensuring a high protection of the fundamental rights and freedoms].

However, unlike court decisions, producing effects *inter partes litigantes*, the decisions of the Constitutional Court are binding *erga omnes*, according to Article 147 (4) of the Constitution. By judicial decision, the Constitutional Court of Romania established that the compliance with the general binding effect of its decisions does not mean only giving efficiency to their operative part, but also, equally, to the recitals⁹⁷, respectively the interpretation given by the Constitutional Court to the texts of the Constitution, therefore inclusively by reference to the rules of international law and the case-law of European courts, based on the provisions of Articles 20 and 148 of the Constitution.

The influence exercised by the Constitutional Court, from the analyzed perspective, upon national courts has been especially remarked with regard to the case-law of the

⁹⁷ For example: Decision no.196/2013, published in the “Official Gazette of Romania”, Part I, no.231 of 22 April 2013, Decision no.163/2013, published in the “Official Gazette of Romania”, Part I, nr.190 of 4 April 2013, Decision no.102/2013, published in the “Official Gazette of Romania”, Part I, no.208 of 12 April 2013, Decision no.1039/2012, published in the “Official Gazette of Romania”, Part I, no.61 of 29 January 2013, Decision no.536/2011, published in the “Official Gazette of Romania”, Part I, no.482 of 7 July 2011, Decision no.414/2010, published in the “Official Gazette of Romania”, Part I, no.291 of 4 May 2010, Decision no.415/2010, published in the “Official Gazette of Romania”, Part I, no.294 of 5 May 2010

European Court of Human Rights. It was shown that⁹⁸, “*in the decisions of the Constitutional Court for the first time the European Convention on human rights and the ECHR practice were perceived. It is an undeniable reality, that all legal courts should take into account, especially that they are also concerned with the application of the European Convention and the ECHR case-law.*” The Romanian constitutional judge assumed his role and authority to ensure the acceptance of the Convention and European court’s practice, with effects in the regulation of the issue of fundamental rights and freedoms, as well as in the application of these regulations by national courts. In the practice of the contentious constitutional court there can be identified decisions which, in the interpretation of the constitutional texts on human rights, give priority to the provisions of the Convention, when they are more favourable, as well as decisions which are based, in the determination of the content of the constitutional concepts, on the provisions of the Convention and the interpretation given to them by the European Court of Human Rights. And if – as it was pointed out – “*the constitutional court states that the European Court’s interpretation of the Convention rules, as results from its case-law, is also imposed [...] towards this one, a fortiori the case-law of the European court is imposed to the other Romanian public authorities, inclusively to legal courts, from those adjudicating on the substance until the level of the High Court of Justice and Cassation [...]*”.⁹⁹

8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?

The European Court of Human Rights referred, on several occasions, to the pronounced decisions, to decisions of the Constitutional Court of Romania, by taking into account relevant considerations for the referred cases.

Thus, for instance, Decision of 28 October 1999 pronounced in the case *Brumărescu v. Romania*, invokes Decision no.73/1995 on the constitutionality of some provisions of the Law on the settlement of the legal condition of some buildings designed for dwelling purposes,

⁹⁸ N. Popa, *The impact of the jurisprudence of the European Court of Human Rights and Constitutional Court of Romania in the practice of legal courts*, paper presented at the national Conference on the *Jurisprudence of the Constitutional Court of Romania and the European Convention on Human Rights*, Sinaia, 5-16 June 2005, Conference volume, pp.38-44

⁹⁹ C. Bârsan, *European Convention on Human Rights. Comment on articles*, Vol. I rights and freedoms, All Beck Publishing House, Bucharest, 2005, p. 104

passed into State property¹⁰⁰ (par. 39), respectively the considerations that based the admission of the objection of unconstitutionality of that part of Article 1 (1) of the law, which refers to the buildings passed into State property or of other legal persons, without title. There are also quoted the considerations by which the Court refers to the Parliament's power to appreciate, on the occasion of the law review, regarding the possibility to adopt some measures for the completion of its provisions concerning the right of the persons whose dwellings have been taken by the State, without title, and of their heirs – dwellings for which the State did not acquire the property right – to choose the law enforcement benefit, assuming that they will wish abandon the uncertain, slow and costly action for recovery of possession.

Decision of 3 June 2003, pronounced in the case *Pantea v. Romania* invokes Decision no.45 of 10 March 1998 on the objection of unconstitutionality of the provisions of Article 504 (1) of the Criminal Procedure Code, whose considerations are quoted, in excerpt (par. 147). By this decision, holding that the principle of the State's responsibility for the persons who suffered because of a judicial error committed in the criminal trials must be applied to all the victims of such errors, as well as the fact that the legislator did not agree to the provisions of Article 504 of the Criminal Procedure Code with those of Article 48 (3) of the Constitution, and taking into account that Article 504 of the Criminal Procedure Code established only two possible cases of holding the State responsible for the judicial errors committed in the criminal trials, the Constitutional Court decided that this restriction is unconstitutional regarding the provisions of Article 48 (3) of the Constitution, which do not allow such an abridgement. By Law no.281/2003¹⁰¹ the provisions of the Criminal Procedure Code on taking the preventive measure have been amended. Article 504 of the Criminal Procedure Code has been amended, leaving open the possibility of the persons illegally deprived of liberty to address the court for obtaining the repair of the damage that was caused to them by this measure.¹⁰²

The same decision of the Constitutional Court is mentioned (*par. 18*) in Decision of **24 April 2008, pronounced in the case *Vișan v. Romania***¹⁰³, by which the effects of the Constitutional Court's decision are raised, in relation to the date on which the applicant formulated the action for compensation (6 March 1998), as well as the role of the objection of

¹⁰⁰ Published in the "Official Gazette of Romania", Part I, no.177 of 8 August 1995

¹⁰¹ Published in the "Official Gazette of Romania", Part I, no.468 of 01 July 2003

¹⁰² *ECHR Decisions in the cases v. Romania, 1994-1999, Analysis, consequences, potentially responsible authorities*, University Publishing House, vol. IV, p.1353

¹⁰³ Published in the "Official Gazette of Romania", Part I, no. **876 of 24 December 2008**

unconstitutionality in the protection of human rights and freedoms. As indicated above¹⁰⁴, one of the possibly responsible authorities in this case belongs to the legislative power, “due to the lack of concern for the unconstitutional regulation and for the delays in the regulation of the right to compensation in case of judicial error”. As stated above, the intervention of the Romanian legislator for the purposes of Decision no.45/1998 of the Constitutional Court took place only in 2003. The decision of 10 June 2008, pronounced in the case *Tase v. Romania*, also refers to Decision no.45/1998 of the Constitutional Court of Romania, actually disclosing the same problems under the aspects of the legislative authority’s responsibility, meaning that “the Romanian law did not provide for a procedure available to the applicant for the attainment of the right to compensation for illegal arrest, asked by Article 5 (5) of the Convention”.¹⁰⁵

Decision of 22 June 2004, pronounced in the case *Pini and Bertani and Manera and Atripaldi v. Romania*, se mentions (par. 104), the decision of the Constitutional Court of Romania no. 308/2002¹⁰⁶ on the objection of unconstitutionality of the provisions of Article 7 (1) (a) and (2) of the Government Emergency Ordinance no. 25/1997 on the legal status of adoption, approved with amendments by Law no. 87/1998, by which, admitting the objection of unconstitutionality raised in the case, the Court found that the impugned critics are unconstitutional as far as they do not provide for taking the consent of any person or of any authority which would be empowered to exercise parental rights, according to Article 5 § 1 (a) of the European Convention on the Adoption of Children, concluded at Strasbourg on a 24 PRIL 1967, to which Romania adhered by Law no.15/1993. Then, Law no. 272/2004 on the protection and promotion of the rights of the child¹⁰⁷ and Law no. 273/2004 regarding the adoption of procedure¹⁰⁸, there being introduced new rules for the protection of minors and collaterals in the adoption procedures¹⁰⁹.

Decision of 27 September 2007, pronounced in the case *Cobzaru v. Romania* invokes a reference case of Constitutional Court of Romania – Decision no. 486/1997¹¹⁰ which established that Article 278 of the Criminal Procedure Code is constitutional only if it does

¹⁰⁴ *ECHR Decisions in the cases v. Romania, 1994-1999, Analysis, consequences, potentially responsible authorities*, University Publishing House, vol. IV, p.1490

¹⁰⁵ *Idem*, p.1508

¹⁰⁶ Published in the “Official Gazette of Romania”, Part I, no.78 of 6 February 2003

¹⁰⁷ Published in the “Official Gazette of Romania”, Part I, no..557 of 23 June 2004

¹⁰⁸ Republished in the “Official Gazette of Romania”, Part I, no. 259 of 19 April 2012

¹⁰⁹ *ECHR Decisions in the cases v. Romania, 1994-1999, Analysis, consequences, potentially responsible authorities*, University Publishing House, vol. I, p.158

¹¹⁰ Published in the “Official Gazette of Romania”, Part I, no. 105 of 6 March 1998

not hinder the person unsatisfied by the settlement of the complaint against the measures or acts performed by the prosecutor or performed based on the provisions given this one and which do not reach in front of courts to refer a matter to court according to Article 21 of the Constitution, which is to directly apply. It is a reference case regarding the insurance and guarantee of the free access to justice and which determined, otherwise, the amendment of the criminal legislation for the attainment of this right.

Decision of 24 November 2009 pronounced in the case *Ieremeiov v. Romani* mentions (par. 19) decision no.62/2007 on the objection unconstitutionality of the provisions under Article I paragraph 56 of the Law no. 278/2006 for the amendment and supplementation of the Criminal Code, as well as for the amendment and supplementations of other laws, by which the Constitutional Court found as unconstitutional the repeal of the provisions of the Criminal Code on insult and defamation.

Decision of 24 march 2009, pronounced in the case *Tudor Tudor v. Romania* also invokes Decision no. 1.055/2008 on the objection of unconstitutionality of the provisions under Article 2 paragraph (1) subparagraph i), Article 45 paragraph (2) and Article 47 of Law nr. 10/2001 regulating the legal status of certain immovable property taken by duress between 6 March 1945 and 22 December 1989¹¹¹, by which the Constitutional Court held that “*Article 47 of Law no.10/2001 is unconstitutional, being contrary to the principle of guaranteeing and protecting property as enshrined in Article 44 of the Constitution, being breached the right to property of the bona fides purchaser under the Law no. 112/1995. Thus, natural and legal persons whose ownership over a property under Law no. 10/2001 has been recognized and enforced by irrevocable court order cannot be asked to return the same, as long as such measure is not seriously justified, based on the case of public utility, in the meaning of Article 44 (3) of the Constitution.*”

Thus, Decision of 12 October 2010 pronounced in the case *Maria Atanasiu and others v. Romania*¹¹² refers (par. 68-70), to a series of decisions of the Constitutional Court regarding Law no. 112/1995, Law no. 1/2000, Law no. 10/2001 and Law no. 247/2005, with the express mention of Decision no. 830/2008¹¹³, which admitted the objection of unconstitutionality of the provisions of Article I item 60 of Title I of Law no. 247/2005 on reform in property and justice, as well as some additional measures, being found that, by repealing the phrase

¹¹¹Published in the “Official Gazette of Romania”, Part I, no. 737 of 30 October 2008

¹¹²Published in the “Official Gazette of Romania”, Part I, no. 778 of 22 November 2010

¹¹³Published in the “Official Gazette of Romania”, Part I, no.559 of 24 July 2008

“immovable property taken with valid title” from the content of Article 29 (1) of Law no. 10/2001, the provisions of Article 15 (2) and of Article 16 (1) of the Constitution are violated.

If the earlier jurisprudence of the European Court of Human Rights – from which only some examples are provided – the mention of the Romanian contentious constitutional court’s practice appears more like an establishment of the legal framework of the case referred to court, in the more recent jurisprudence there being found a foundation of the European Court considerations on considerations contained in decisions of the Constitutional Court of Romania.

Thus, for example, through Decision of 7 February 2012, pronounced in the case *Ana Maria Frimu v. Romania and other 4 applications*¹¹⁴, the European Court of Human Rights considered that the reduction of the applicants’ pensions, although substantial, constituted a modality to integrate these pensions in the general pension system stipulated by Law no.19/2000 in order to obtain the budgetary balance and to correct the disparities between the different systems, expressly mentioning at § 44 from the considerations that “*like the Constitutional Court, the Court estimates that these reasons could not be considered unreasonable or disproportionate.*” The reference made is to Decision no. 871/2010¹¹⁵, by which the Constitutional Court of Romania found the constitutionality of the measure for the transformation of the service pensions (called special) into contributory pensions. The removed financial supplement was not a contributory-based one, but it was granted from the State budget for the consideration of the status of the respective socio-professional categories (servicemen, policemen, specialized support staff).

Also, through Decision of 20 March 2012 pronounced in the case *Ionel Panfile v. Romania*¹¹⁶, the European court held, *expressis verbis*, at § 21, the following: “*Within the evaluation of the public interests of the contested measures, the Court [European Court of Human Rights] takes into account the reasoning of the Constitutional Court*¹¹⁷, which confirmed that the Romanian legislator has imposed new rules regarding the salaries in the public sector aiming to rationalize public spending, as imposed the exceptional context of the global economic and financial crisis (see supra, paragraph 11). Taking also into account that this problem falls under the competence of national authorities, which have direct democratic legitimacy and are situated better than an international court to evaluate the needs and local

¹¹⁴ Published in the “Official Gazette of Romania”, Part I, no. 870 of 20 December 2012

¹¹⁵ Published in the “Official Gazette of Romania”, Part I, no. 433 of 28 June 2010

¹¹⁶ Published in the “Official Gazette of Romania”, Part I, no. 315 of 11 May 2012

¹¹⁷ It is about Decision no. 1414/2009, published in the “Official Gazette of Romania”, Part I, no. 796 of 23 November 2009

conditions, the Court did find no reason to wander from the finding of the Constitutional Court, according to which the contested measures pursued a legitimate purpose of public interest (see, *mutatis mutandis*, *Valkov and others v. Bulgaria*, no. 2.033/04, 19.125/04, 19.475/04, 19.490/04, 19.495/04, 19.497/04, 24.729/04, 171/05 and 2.041/05, 92, 25 October 2011).”

Thus, in Decision of 4 September 2012, pronounced in the case *Nastaca Dolca and others v. Romania*, the European Court of Human Rights has remarked that the removal of Article 5 (1) (a) I thesis of Law no. 221/2009, the legal basis of the applicants’ request, took place following a constitutional review¹¹⁸ which is usual in a democratic State and does not represent the result of an extraordinary *ad-hoc* mechanism (*mutatis mutandis*, *Slavov and others v. Bulgaria*, Decision of 2 December 2008, paragraph 99); “the invalidation of the that provision by the Constitutional Court pursued an objective of common interest, related to the proper administration of justice, as results from the motivation of the Constitutional Court, which criticized the vague wording of the legal provisions in the case and underlined the need to avoid the coexistence of several normative acts on compensation for the damages suffered by the politically persecuted persons during the Communist period.”¹¹⁹ The Court also considered that the development of the national courts’ jurisprudence to apply the decision of the Constitutional Court on the unconstitutionality of the provisions which has been the legal base of the applicants’ action is not contrary to a proper administration of justice (*mutatis mutandis*, *Atanasovski v. Former Yugoslav Republic of Macedonia*, 14 January 2010, par. 38).¹²⁰ It was also reiterated that the interpretation of national legislation is the obligation of national authorities, especially of the courts, and if the applicants perceive as an injustice the fact that the courts responded to the mentioned decisions of the Constitutional Court, such an injustice is inherent to any change in the legal solution that would appear, following the exercise of a normal control mechanism in a democratic State. The Court also recalled, to that

¹¹⁸ It is about Decision no. 1358 of 21 October 2010 and Decision no. 1360 of 21 October 2010, published in the “Official Gazette of Romania”, Part I, no. 761 of 15 November 2010, by which the Constitutional Court of Romania has admitted the objection of unconstitutionality of the provisions of Article 5 (1) (a) I thesis of Law no. 221/2009 regarding political convictions and the assimilated administrative measures, pronounced between 6 March 1945 and 22 December 1989, finding, essentially, that the impugned rule creates situations of incoherence and instability, that in the field of granting compensation for the non pecuniary damages there are parallel regulations and that the legal text, as it is written, is too vague, violating the rules referring to the accuracy and clarity of legal standard, “leading to its incoherent implementation, the courts granting compensation of up to 600.000 Euro, which represents an excessive and unreasonable implementation”. Î

¹¹⁹ <http://www.codexnews.com>

¹²⁰ <http://www.hotaricedo.ro/>

effect, that the requirements of the legal security and protection of the legitimate expectation of individuals do not consecrate a legitimate right to a constant jurisprudence (*Unédic v. France*, paragraph 71). The application in this case of the solution given in the decision of the Constitutional Court of 21 October 2010 did not question the rights finally acquired by the applicant (*Unédic v. France*, paragraph 75 *in fine*). Moreover, the new legal situation resulted from the decision of the Constitutional Court of 21 October 2010 was perfectly known by the applicants and completely predictable, when the courts adjudicated on their action for damages.

It must be also underlined the convergent jurisprudence of both courts regarding the legislative measure for the reduction of the budgetary employees' salaries. Thus, the Constitutional Court of Romania held within the meaning of the constitutionality of the reduction by 25% of these salaries¹²¹. Seized on the same problem, the Court of Strasbourg, through Decision of 6 December 2011 pronounced in the cases *Felicia Mihăieş v. Romania* (application no. 44232/11) and *Adrian Gavril Senteş v. Romania* (application no. 44605/11), found that the Romanian State did not violate the provisions of Article 1 of the Protocol no. 1 to the Convention, in terms of reducing by 25% the salaries, following the implementation of Law no. 118/2010 on certain measures necessary for the restoration of budgetary balance. The European Court of Human Rights recalled that the provisions of the Convention do not confer a right to receive a salary of a certain amount (see Decision of 19 April 2007 pronounced in the case *Vilho Eskelinen and others v. Finland*, and *mutatis mutandis*, Decision of 12 October 2004 pronounced in the case *Kjartan Ásmundsson v. Island*). Further on, the Court held that it is not sufficient for an applicant to invoke the existence of a „real dispute” or a „credible complaint”. A claim can be considered as „patrimonial value”, within the meaning of Article 1 of the First additional Protocol to the Convention, only when it has a sufficient basis in the internal law, for example when it is confirmed by a well-established jurisprudence of courts (Decision of 28 September 2004, pronounced in the case *Kopecky v. Slovakia*). It is the State's obligation to establish what benefits must be paid to its employees from the State budget. The State can order the introduction, suspension or termination of the payment of such benefits through adequate legislative amendments (Decision of 8 November 2005, pronounced in the case *Ketchko v. Ukraine*). However, when a legal provision is in

¹²¹Decision no. 874/2010, published in the Official Gazette of Romania”, Part I, no. 433 of 28 June 2010: “The Court finds that the measure for the reduction of the salary/allowance/pay by 25% is a restriction of the exercise of the constitutional right to work affecting the right to salary, with the observance of the provisions of Article 53 of the Constitution”

force and provides for the payment of certain benefits, and the stipulated conditions are observed, the authorities cannot deliberately their payment as long as the legal provisions are in force. Similarly, an applicant can invoke interference into the right to respect for his property, regarding the salaries, when a court decision has recognized the right to a well enough determined claim against the State to be payable (Decision of 15 June 2010, pronounced in the case *Mureșanu v. Romania*). Or, this is not the situation in this case, as revealed by the considerations that the Court exposed further on.¹²²

Conclusions

The general idea that emerges from the case-law of the Constitutional Court of Romania is that of promotion of mutual respect, based on the understanding of the phenomenon of multiple constitutional systems existing in the European Union, which must coexist within and relate to the autonomous legal order that it entails.

In this complex context, the dialogue of the constitutional judge with the European judge serves to the development of common standards for the protection of fundamental rights or to the enrichment of the existing ones, with effects in the law making and enforcement at national level.

Upon citing earlier decisions of the Constitutional Court, we pointed out that reception of judgments of the European Court of Human Rights by those decisions has led even to the enrichment of the Basic Law, i.e. the 2003 revision took into account the conclusions therein.

As for the specific relationships determined by Romania's accession to the European Union, we believe that the national constitutional case-law has established certain concepts concerning: the relations between national law and the European Union law; the competence of the Constitutional Court; the competence of courts and that of the Court of Justice of the European Union within this relationship, inclusively as concerns the possibility to refer to the Court of Justice of the European Union with a preliminary question, the framework of the constitutional review of the rules for the transposition into national law of a regulation adopted at the level of the European Union and of the reference standards for the exercise of this review. Within these coordinates, the constitutional court is one of the main factors of the Europeanization process in the national legal system, in compliance with the national constitutional identity, conclusion confirmed by the numerous cases adjudicated by the Court

¹²²See summary www.jurisprudencedo.ro

on the obligations of national authorities from the perspective of Article 148 of the Constitution and on the fulfilment of these obligations.

The relevant aspects prove the effort for identification of a common language and common standards, particularly in the field of the protection of human rights. It is true that the plurality of sources in the matter – the national constitutions, the Charter of Fundamental Rights and Freedoms, the Convention for the Protection of Human Rights and Fundamental Freedoms, compulsory themselves - determines a risk of collision between the courts called to apply the rules contained therein. The standards for the protection of these rights tend, however, towards uniformity, also through the contribution of courts called upon to interpret those rules and that invoke each other's case-law. In addition, acceptance of the Charter or of the Convention as systems or reference for the exercise of constitutional review - with the distinctions and peculiarities determined by the legal systems from which they originate - enhances the dialogue between courts, by means of preliminary references, as a way of solving such divergent approaches and of “constitutionalisation” at European level of the matter of fundamental rights and freedoms

II. INTERACTIONS BETWEEN CONSTITUTIONAL COURTS

PUSKÁS Valentin-Zoltán, Judge at the Constitutional Court of Romania

BENKE Károly, Assistant-Magistrate in Chief

1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?

Anne-Marie Slaughter¹²³ identifies five different categories of judicial interaction that result in the exchange of ideas and cooperation in cases involving national or international law, namely:

1. the relations between national courts and the Court of Justice of the European Union;
2. interaction between national courts and the European Court of Human Rights;
3. judicial cooperation in dealing with transnational disputes – “*judicial comity*”;
4. constitutional interactions – “*constitutional cross-fertilization*”;
5. direct meetings between judges.

The interaction between national and international courts involves “vertical” relations, while the interaction between the courts across national and regional borders involve “horizontal” relations. In the latter case, in principle, we are dealing with a judicial dialogue formalized through court decisions or formal meetings of judges as part of the external agenda of the court in which they operate¹²⁴.

This question aims at the exchange of ideas between constitutional courts at judicial level and its mutual influence upon their mode of action; therefore, it is about the fourth category of juridical interaction between the above-mentioned ones, category involving a horizontal relation between national constitutional courts.

Certainly, this exchange of ideas has its limits, citation of foreign precedents being determined by factors such as national constitutional identity, a State’s constitutional traditions, the legal system, i.e. Romano-Germanic or *common-law* system, or the different meaning given to some legal concepts based on which the national law operates.

¹²³ A-M. Slaughter – *Judicial globalization in Virginia Journal of International Law* vol.40/2000, p.1104.

¹²⁴ There is, of course, also the informal judicial dialogue, i.e. those meetings between judges that are not part of the external agenda, see, A-M. Slaughter – *cited paper*, p.1121 et.seq.

That is why, citation of foreign constitutional precedents in the jurisprudence of the Constitutional Court of Romania has often occurred upon examination of issues relating to fundamental rights and freedoms¹²⁵ because, although they can have a coverage varying from State to State, they best allow, in a given historical context, that "*constitutional cross-fertilization*" mentioned by Anne-Marie Slaughter. However, in addition, it appears that the jurisprudence of foreign constitutional courts was also cited when the Constitutional Court examined some issues concerning State institutions or issues concerning the transfer of powers from the nation states to the European Union.

Thus, 22 decisions delivered by the Constitutional Court of Romania contain specific reference to the jurisprudence of other constitutional courts, mostly to the decisions of the Federal Constitutional Court of Germany and of the Constitution Court of Hungary, i.e. 9 decisions. But, to have a clearer overview, two criteria must be taken into account, namely the total number of decision, respectively the number of the distinct, non-repetitive decisions of foreign constitutional courts invoked in the jurisprudence of the Constitutional Court. To this end, see the table below:

No.	Constitutional Court	No. of decisions of the Constitutional Court of Romania citing foreign precedents ¹²⁶	Total number of cited foreign decisions	Number of cited unique decisions
1.	Federal Constitutional Court of Germany	8	9	8
2.	Constitutional Court of Hungary	5	9	5
3.	Constitutional Court of the Czech Republic	3	4	4
4.	Constitutional Council of France	4	4	3
5.	Constitutional Court of Latvia	3	3	2
6.	Supreme Court of the United States of America	2	3	2
7.	Constitutional Court of Lithuania	2	2	2
8.	Constitutional Court of Austria	1	1	1

¹²⁵ T. Toader and M. Safta – *Forms of Judicial Dialogue between the Constitutional Courts in Dreptul no.6/2013*

¹²⁶ Although, at a simple calculation, the table contains 30 decisions where the foreign precedents were cited, in fact there are 22 decisions, the difference resulting from the fact that decisions of several foreign constitutional courts were cited in one and the same decision of the Constitutional Court of Romania.

9.	Constitutional Court of Bulgaria	1	1	1
10.	Constitutional Court of Poland	1	1	1
TOTAL			37	29

In terms of dynamics of citation of foreign precedents, the foreign constitutional courts' decisions have been increasingly cited since 2003, as shown in the table below:

No.	Year	No. of decisions of the Constitutional Court of Romania citing foreign precedents	No. of cited foreign decisions
1.	1995	1	2
2.	1996	1	1
3.	1999	2	2
4.	2001	1	1
5.	2007	2	4
6.	2010	5	13
7.	2011	2	4
8.	2012	5	6
9.	2013 ¹²⁷	3	4
TOTAL		22	37

In the following, we shall present chronologically and exhaustively the decisions of the Constitutional Court relied on references to the case-law of other constitutional courts according to the issues examined therein.

1.1. Principle of equality between men and women as to the retirement age

Through Decision no.107 of 1 November 1995¹²⁸, the Court ascertained the constitutionality of a legal provision establishing different retirement ages for men and women. To this end, reference was made to the jurisprudence of the constitutional courts of Austria and Germany, as follows: *“even in situations such as the one in Austria, where the constitutional jurisdiction stated that the principle of gender equality requires the same retirement age, the legislative authority, taking into account the existing socio-professional relations, did not accepted the respective point of view. In Germany, as it results from the decision of the Constitutional Court in Karlsruhe, taking into account the same socio-*

¹²⁷ Until 31 August 2013.

¹²⁸ Published in the Official Gazette of Romania, Part I, no.85 of 26 April 1995.

professional relations as resulted from a broad social inquiry, it decided that different retirement ages are justified at present time (Decision no.12.568/1990 of the Constitutional Court of Austria and Decision no.1 of 28 January 1987 of the Federal Constitutional Court of Germany)”.

1.2. Freedom of expression

Through Decision no.25 of 6 March 1996¹²⁹, the Court found that the provisions of Article 238 of the Criminal Code concerning the offence of insult to authority *”are partially repealed, in accordance with Article 150 (1) of the Constitution, remaining valid only to the extent that the facts refer to a person carrying out an important State activity”*. Subsequently, an appeal was brought against this decision, which was rejected by Decision no.140 of 19 November 1996¹³⁰. The appellants, in support of their claim, *“have also invoked Decision no.36/1994 of the Constitutional Court of the Republic of Hungary, decision by which the provisions of Article 232 of Law no. IV/1978 on Criminal Code were declared unconstitutional. Section 232 of the Hungarian Criminal Code was directed at the offence of defamation of authorities and official persons. But the decision of the Constitutional Court of the Republic of Hungary cannot have the significance of an argument for the solution that is to be pronounced in this case, and the reasons in support of that decision cannot make the object of the examination by the Constitutional Court of Romania. However, it is worth noting that also the Decision of the Constitutional Court of the Republic of Hungary refers to << an expression of a value judgement >>, stating that the punishment of such an expression is not a necessary and proportionate restriction, but that communication of false statements exceeding the legal framework of the freedom of expression may be restricted by means of criminal law tools”*.

1.3. The rights of persons belonging to national minorities

Through Decision no.113 of 20 July 1999¹³¹, the Court held that *“citation by the authors of the referral of a recent decision by which the Constitutional Council of France established that in the content of the European Charter of Regional or Minority Languages there are clauses contrary to the Constitution of France has no relevance in the case,*

¹²⁹ Published in the ”Official Gazette of Romania”, Part I, no.324 of 4 December 1996.

¹³⁰ Published in the ”Official Gazette of Romania”, Part I, no.324 of 4 December 1996.

¹³¹ Published in the ”Official Gazette of Romania”, Part I, no.362 of 29 July 1999.

[Decision 99-412 D.C. of 15 June 1999 – sn] given the completely different regulation – at constitutional level -, existing in our country regarding the national minorities”.

1.4. Access to public offices

In Decision no.203 of 29 November 1999¹³², adjudicating on the objection of unconstitutionality of the provisions of Article 2 (f) of Law on the access to the personal file and the disclosure of the *Securitate* as a political police, the Court made a generic reference to the Decision of the Constitutional Court of Bulgaria no.10 of 22 September 1997¹³³, to reach the conclusion that the legislation of this State does not regulate “the data supply, as information of public interest, referring to the persons who had the capacity of agent or collaborator of the former secret services or political polices”.

1.5. Presumption of innocence – the persons’ right not to incriminate themselves

Through Decision no.124 of 26 April 2001¹³⁴, the Constitutional Court referred to the case *Miranda v. Arizona*, by which “*the Federal Supreme Court [of the United States of America – a/n] established, inter alia, that the persons have the right to defence during preliminary examination of the case. The government cannot use statements stemming from interrogation unless it demonstrates the use of procedural safeguards, among which the right to have the assistance of counsel for defence. If a person does not receive the assistance of a lawyer, the State authorities must prove that the respective person has been informed before any question that he/she is entitled to be assisted by a lawyer, so that the person has given up his/her right to defence in full knowledge of the facts. If the suspect asks to consult the defence counsel before giving any statement, he cannot be asked any question. The simple fact that the suspect has answered to some questions or that he voluntarily has given some statements does not lead to the conclusion that he gave up his right not to answer to the subsequent questions. He can decide at any time to consult with a lawyer and only then to continue to answer*”¹³⁵.

¹³² Published in the Official Gazette of Romania, Part I, no.603 of 9 December 1999.

¹³³ The Constitutional Court of Bulgaria established that certain provisions of the Law on the access to documents of the former State *Securitate* referring to the persons who must be verified in terms of cooperation with the *Securitate* are unconstitutional.

¹³⁴ Published in the “Official Gazette of Romania”, Part I, no.466 of 15 August 2001.

¹³⁵ The Constitutional Court also held that „in view of pronouncing a decision in the case *Miranda* against *Arizona*, the Supreme Court of the Unites States of America also took into account some aspects emerged from the police handbooks, referring to the investigation procedure. Thus, these methods, aiming at psychological pressures on the investigated person, recommended the interrogation only of this one and the removal of any support from the outside. The policemen were also trained to apply the practice of interrogation without pauses,

In Decision no.334 of 3 April 2007¹³⁶, the Court also referred, regarding persons' right not to incriminate themselves, to the decision of the Supreme Court of the United States of America, in the case *Miranda v. Arizona* of 1966, holding that “*before the interrogation the accused must be informed that he has the right to silence, that any of his statements can be used against him and that he is entitled to be assisted by a lawyer, and if he has insufficient financial resources an ex officio lawyer will be appointed in order to represent him. These are the procedural safeguards effective to secure the privilege against self-incrimination*”. The Court also invoked the case *Dickerson v. The United States* of 2000 of the same court, by which the Supreme Court „*upheld this principle – the right to silence – as being one of constitutional nature, even if it is not expressly provided for in the Constitution*”.

1.6. Individual freedom –European arrest warrant

In Decision no.1127 of 27 November 2007¹³⁷, referring to the European arrest warrant, the Constitutional Court of Romania mentioned the decision of the Constitutional Court of Poland of 27 April 2005, “*by which it was held that Article 607 (1) of the Criminal Procedure Code allowing the surrender of a Polish citizen to another EU Member State according to an European arrest warrant violates Article 55(1) of the Basic Law of Poland, forbidding the extradition of its citizens without any derogating rule. (...) Then, the Constitution of Poland was revised for the purpose of allowing the extradition of its own citizens whenever there is an international obligation in this regard, so that as of November 2006, precisely in order to meet the obligations resulted from the status of EU Members State, the Polish citizens can be surrendered based on an European arrest warrant*”.

At the same time, the Court also referred to the situation of Germany, indicating that “*the initial law for the transposition of the framework-decision on the European arrest warrant was declared unconstitutional not because it does not allow the censoring by the German judicial authority of the validity of the precautionary measure or of the decision pronounced in the requesting State, but because it took into account the need to respect fundamental rights, inclusively the right to benefit from a legal remedy, situation which, as indicated, is not regulated in the Romanian law.*”

the stratagems consisting in giving intentionally erroneous legal advice and other similar methods that took advantage of the isolation and insecurity of the questioned suspect”.

¹³⁶ Published in the ”Official Gazette of Romania”, Part I, no.308 of 9 May 2007.

¹³⁷ Published in the ”Official Gazette of Romania”, Part I, no.2 of 3 January 2008.

1.7. The right to pension

Through Decisions no.872 of 25 June 2010¹³⁸ and no.874 of 25 June 2010¹³⁹, the Constitutional Court found unconstitutional the reduction by 15% of the contributory pensions and, in support of this solution, it also mentioned certain decisions pronounced by other constitutional courts, namely:

- Decision no.455/B/1995, Decision no.277/B/1997 and Decision no.39/1999 (XI 1.21.), delivered by the Constitutional Court of Hungary¹⁴⁰;

- Decision no.2009-43-01 of 21 December 2009, delivered by the Constitutional Court of Latvia.

1.8. The magistrates' right to pension

Through Decision no.873 of 25 June 2010¹⁴¹, the Court held the reasons referring to the need to ensure financial security of judges, as guarantee of their independence, contained in the Decision of the Constitutional Court of Latvia of 18 January 2010¹⁴², in the Decision of the Constitutional Court of Lithuania of 12 July 2001¹⁴³ and in the Decision of the Constitutional Court of the Czech Republic of 14 July 2005¹⁴⁴.

¹³⁸ Published in the "Official Gazette of Romania", Part I, no.433 of 28 June 2010.

¹³⁹ Published in the "Official Gazette of Romania", Part I, no.433 of 28 June 2010.

¹⁴⁰ In both decisions, it was held that: „The Constitutional Court of Hungary, by Decision no.455/B/1995, established that the pension calculated by the rules of the social security system cannot be affected, and by Decision no.277/B/1997 it held that the unilateral amendment of the amount of pensions is unconstitutional, with direct reference to the impossibility of the legislator to reduce the large pensions in order to increase small pensions. At the same time, by Decision no.39/1999 (XII.21), the same constitutional court held that the (contributory) pension is a right won and bought in a large extent so that the amendment of its nominal amount is unconstitutional”.

¹⁴¹ Published in the "Official Gazette of Romania", Part I, no.433 of 28 June 2010.

¹⁴² By this decision certain provisions of the Law on judicial power have been declared unconstitutional and inapplicable, finding that they are contrary to the principle of the independence of the Judiciary, enshrined in Article 83 of the Constitution of Latvia. The Parliament – taking into account the financial situation of Latvia and the country's external commitments – decided to recalculate the salaries of judges, which would have resulted in a decrease in the amount of their remuneration. In that sense, the Constitutional Court found that the notion of independence of the Judiciary includes appropriate remuneration, comparable to the prestige of the profession and to the aim of their responsibility. Taking into account the status of the judge, the aim of the judges' remuneration is to ensure the independence, as well as to partially compensate the restrictions imposed by law. At the same time, the requirement to ensure appropriate remuneration for judges is not only in connection with the principle of the independence of the Judiciary, but with the skill and competence requirements established and with the prohibitions imposed on them.

¹⁴³ It was held that in democratic States it is accepted that the judge responsible for the settlement of disputes in society, inclusively those between natural or legal persons and the State, must not only have a high professional qualification and a perfect reputation, but must be independent from the material point of view and must have a sense of safety about the future. The State has the obligation to determine the remuneration of judges so as to

1.9. Property right – compensation for non-material damages for the benefit of the politically convicted persons during the communist period

In Decisions no.1358 and no.1360 of 21 October 2010¹⁴⁵, by which it was found the unconstitutionality of the compensatory measures for the benefit of the persons who have suffered political convictions during the period 6 March 1945 - 22 December 1989 or which has been subject to administrative policy-oriented measures, the Constitutional Court of Romania referred to the Decision of the Constitutional Court of Hungary no.1 of 8 February 1995, indicating that by this decision „*it was established that the compensation measure provided for in Act no. XXXII of 1992, regulating the compensation for non-material damages for the benefit of the politically convicted persons during the communist period, is not taken based on the existence of a legal obligation taking rise from the past, but the State equitably granted this compensation, so that no person can have a substantial right to compensations for non-material damages*”.¹⁴⁶

1.10. Object of constitutional review

Through Decision no.766 of 15 June 2011¹⁴⁷, the Court established that are subject to constitution review the laws or ordinances or the provisions of laws or of ordinances whose legal effects continue to produce even when they are no longer in force. The Court held on this occasion that in the case of the concrete review exercised via the exception of unconstitutionality, “*the case-law of the European constitutional courts concerning legal rules that are no longer in force, but are applicable in the case, includes the review of the merits of those rules. Thus, in the case of Germany, Italy, Hungary, Czech Republic, Poland or France, based on certain regulatory provisions or jurisprudential guidelines, the constitutional courts considered that it is more important to examine the merits of the impugned provisions, in view of eliminating the provisions that do not comply with the constitutional requirements, than to establish a purely formal procedural criterion that would stop the proceedings*”. The Court cited the grounds of the Decision of the Constitutional Court

compensate for their status, positions and responsibilities, and maintaining the remuneration for judges is one of the guarantees of the independence of the Judiciary.

¹⁴⁴ It was held that in democratic States the financial security is clearly recognized as one of the essential elements ensuring the independence of the Judiciary.

¹⁴⁵ Published in the "Official Gazette of Romania", Part I, no.761 of 15 November 2010.

¹⁴⁶ The same mention is also found in Decision no.1360 of 21 October 2010, published in the "Official Gazette of Romania", Part I, no.761 of 15 November 2010.

¹⁴⁷ Published in the "Official Gazette of Romania", Part I, nr. 549 of 3 August 2011.

of the Czech Republic of 10 January 2000 which established that the exception of unconstitutionality of a text that was no longer in force would not be rejected as inadmissible, but examined on the merits, “*because ordinary courts have the obligation to implement the law, and not to consider a law as unconstitutional and, consequently, not to apply it. When considering that the law that shall be applied is unconstitutional, the ordinary court must refer to the constitutional court, otherwise, by applying this law, it violates the provisions of the Constitution*”. The Court also mentioned Decision no.2010 - 16 of 23 July 2010 of the French Constitutional Council, by which it was shown that the exception of unconstitutionality could also concern a legal provision no longer in force, as long as the subsequent amendment or repeal of the impugned provisions does not make the violation of these rights and freedoms guaranteed by the Constitution disappear. Another example is given by the Constitutional Court of Lithuania, which, through its Decision of 27 March 2009, stated that, if the legal provision challenged as unconstitutional was amended in its substance, the constitutional court must examine the respective provision, regardless of whether it is still in force or not.

1.11. Role of the Parliament

Through Decisions no.209 of 7 March 2012¹⁴⁸ and no.307 of 28 March 2012¹⁴⁹, the Court, examining the role of the Parliament and, thus, of the parliamentary commissions, held that “*Parliament cannot be represented or replaced by any of its internal bodies and which are established by itself, for the simple reason that it cannot delegate to anyone – and the less to a group of parliamentarians – the national sovereignty with which the electorate empowered it following the parliamentary elections*”. The Court noted that “*the same is also the conclusion recently reached by the Federal Constitutional Court of Germany, through Decision 2BvE 8/11 of 28 February 2012, unanimously pronounced in the second Chamber*”.

Through Decision no.1533 of 28 November 2011¹⁵⁰, adjudicating on the constitutionality of the Law for the approval of the Government Emergency Ordinance no.71/2009 regarding the payment of certain amounts provided in enforceable titles having as their object the granting of salary rights to the personnel in the budgetary sector, the Court held, *inter alia*, that “*Parliament must have control over the fundamental decisions in the field of budgetary policy and that it enjoys a margin of appreciation in this area, as it has to*

¹⁴⁸ Published in the Official Gazette of Romania, Part I, no.188 of 22 March 2012.

¹⁴⁹ Published in the Official Gazette of Romania, Part I no.293 of 4 May 2012.

¹⁵⁰ Published in the Official Gazette of Romania, Part I, no.905 of 20 December 2011.

ensure the sustainability of the budget and the State economic performance. The Constitutional Court must comply with this margin of appreciation, its review being limited to the obvious violations of constitutional texts (see also the Decision of the German Federal Constitutional Court 2 BvR 987/10 of 7 September 2011 on the settlement of the complaints of unconstitutionality formulated against the package of measures concerning the financial aid granted to Greece and the Euro rescue fund). ”¹⁵¹

1.12. National constitutional identity

Through Decision no.683 of 27 June 2012¹⁵², the Court adjudicated on an application for a declaration of a legal dispute of constitutional nature between Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other hand, regarding the participation of Romania at the European Council meetings. Examining the request, the Court started from the premise that “transfer to the Union of certain powers of the Member States is deemed essential in order to achieve the common objectives, without, of course, prejudicing, through this transfer of powers, the national constitutional identity - *Verfassungsidentität*”, expressly referring thus to the Decision of the German Constitutional Court of 30 June 2009, pronounced in Case 2 BvE 2/08, regarding the constitutionality of the Lisbon Treaty.

1.13. Property right – limits, proportionality test

In Decision no.266 of 21 May 2013¹⁵³, the Constitutional Court relied on the model of proportionality test as described in the case-law of the German Federal Constitution Court, the German Court being considered, in this case, a ”reference” court. To this end, the Decision of 11 June 1958 - BVerfG 7, 377 *Apotheken*, was also invoked.

In the mentioned case the Court adjudicated on the constitutionality of the obligation of the cable operators to rebroadcast certain TV stations; in order to assess the constitutionality of this measure, the Court had in view the following logical reasoning:

- the determination of the scope of the protected fundamental right (*Schutzbereich*);

¹⁵¹ See also Decision no.897 of 25 October 2012, published in the Official Gazette of Romania, Part I, no.35 of 16 January 2013.

¹⁵² Published in the ”Official Gazette of Romania”, Part I, no.479 of 12 July 2012.

¹⁵³ Published in the ”Official Gazette of Romania”, Part I, no.443 of 19 July 2013.

- the determination of the existence of an impairment/restriction of the protected fundamental right through the intervention of the State or of a third person (*Eingriff*);

- the existence of a justification of the impairment/restriction of the protection fundamental right (*Rechtfertigung*). In order to examine this requirement, the Court took into account two conditions, a special one, for the explanation of the measure to be based on a provision expressly provided for in the Constitution (*Qualifizierter Gesetzesvorbehalt*), and a general one, respectively the principle of proportionality, according to which any measure for the restriction of a right must be appropriate (*geeignet*), necessary (*erforderlich*) and proportional (*angemessen*) in relation to the legitimate aim in question.

1.14. Right to a fair trial – recognition of guilt

Through Decisions no.988 of 22 November 2012¹⁵⁴ and no.198 of 9 April 2013¹⁵⁵, the Court, regarding the possibility of the judge to reject the request for the recognition of guilt and for the adjudication of the case according to the simplified procedure, held that *“it constitutes a guarantee of the right to a fair trial, enshrined in Article 21 (3) of the Constitution and in Article 6 of the Convention for the protection of human rights and fundamental freedoms, as well as a guarantee of the application of the presumption of innocence, especially in the cases in which pressure is put on the defendant to plead guilty”*. To this end Decision no.2004-492 DC of 2 March 2004 of the French Constitutional Council was also invoked, *„by which it held that – within the procedure called <<reconnaissance préalable de culpabilité>>- the judge of the case cannot be bound to the recognition of the guilt by the defendant, but this one <<has the responsibility to ensure that the respective person has freely and honestly recognized that he is the author of the facts and to verify their reality>>. Through the same decision, the French Constitutional Council held that, if it issues an ordinance for the approval of the agreement establishing the guilt, <<the judge must verify not only the reality of the person’s consent, but, equally, its honesty>>”*.

1.15. Principle of the non-retroactivity of law

Through Decision no.26 of 18 January 2012¹⁵⁶, the Constitutional Court found the unconstitutionality of a legal provision regarding the placement of advertising facilities on the grounds that it violates the constitutional principle of the non-retroactivity of law. In

¹⁵⁴ Published in the "Official Gazette of Romania", Part I, no.43 of 19 January 2013.

¹⁵⁵ Published in the "Official Gazette of Romania", Part I, no.239 of 25 April 2013.

¹⁵⁶ Published in the "Official Gazette of Romania", Part I, no.116 of 15 February 2012.

clarifying the principle of the non-retroactivity of law and of the functional connection to the principle of legal certainty, the Court referred to the Decisions of the Constitutional Court of the Czech Republic of 12 March 2002 and 9 March 2004.

Through these decisions, the Constitutional Court of the Czech Republic held that " the basic principles defining the category of a state based on the rule of law include the principle of protecting citizens' confidence in the law and the related principle of a ban on the retroactivity of legal norms". Also, "the principles of a State based on the rule of law require, in each possible case of retroactivity that it be expressly stated in the Constitution or in a statute, with the aim of ruling out the possibility of retroactive interpretation of a statute, and also require that consequences tied to retroactivity be resolved in a statute so that acquired rights are properly protected", the Constitutional Court of the Czech Republic stated hereinafter that "the characteristics of a State governed by the rule of law inseparably include the principle of legal certainty and protection of the citizen's confidence in the law, and that this process includes the ban on the retroactivity of legal norms or their retroactive interpretation".

1.16. Human dignity and the general right of personality

Through Decision no.96 of 28 February 2013¹⁵⁷, the Constitutional Court found the constitutionality of a legal provision regarding the name of the spouses after the dissolution of marriage. To reach the conclusion that the name of the natural person is an essential component of the general right of personality, which is finally based on the concept of "human dignity", the Court, invoking the case-law of the Federal Constitutional Court of Germany, namely decisions 2BvR 113/81 of 12 January 1982 and 1BvL 9/85 and 43/86 of 8 March 1988, stated that "*the right to a name represents a distinctive feature for the identification of the natural person, has a social function and expresses both the individuality and identity of the person*".

*

Therewith, it should be recalled that some separate opinions have invoked the foreign constitutional precedent, usually the French one. To this effect, we have in view the separate

¹⁵⁷ Published in the "Official Gazette of Romania", Part I, no.165 of 27 March 2013.

opinions to the Decisions of the Constitution Court no.1415 of 4 November 2009¹⁵⁸ or no.1470 of 8 November 2011¹⁵⁹, referring to the decisions of the French Constitutional Council no.89-269 of 22 January 1990 concerning the procedure of holding the Government responsible to the Parliament and no.2004-492 DC of 2 March 2004 aiming at the procedure of the guilt recognition in criminal matter.

A separate opinion to Decision no.784 of 26 September 2012¹⁶⁰ also refers to a Polish constitutional precedent, respectively Decision of the Constitutional Court of Poland of 20 May 2009 regarding the settlement of a conflict of jurisdiction between the President of the Republic and the Prime Minister concerning the representation of the Republic of Poland at the European Council's proceedings.

2. If so, does the Constitutional Court tend to refer primarily to jurisprudence from the same language area?

The answer is negative.

3. In which fields of law (civil law, criminal law, public law) does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?

The complex nature of the criticism of unconstitutionality makes quite difficult the very clear selection of the branches of law in which the foreign constitutional precedent is invoked, so that any classification is relative, as it has to take into account the interpenetration of the areas of law in the constitutional analysis.

Therefore, with the necessary limitations, the below classification tries to offer a fair enough quantitative image of the branches of law in which decisions of foreign constitutional courts are invoked, as follows:

Civil law:

¹⁵⁸ Published in the "Official Gazette of Romania", Part I, no.796 of 23 November 2009.

¹⁵⁹ Published in the "Official Gazette of Romania", Part I, no.853 of 2 December 2011.

¹⁶⁰ Published in the "Official Gazette of Romania", Part I, no.701 of 12 October 2012.

No.	Constitutional court	No. of decisions of the Constitutional Court of Romania citing foreign precedents	Total number of cited foreign decisions	Number of cited unique decisions
1.	Federal Constitutional Court of Germany	2	3	3
2.	Constitutional Court of Hungary	2	2	1
3.	Constitutional Court of the Czech Republic	1	2	2
TOTAL		5	7	6

Criminal law:

No.	Constitutional Court	No. of decisions of the Constitutional Court of Romania citing foreign precedents	Total number of cited foreign decisions	Number of cited unique decisions
1.	Supreme Court of the United States of America	2	3	2
2.	French Constitutional Council	2	2	1
3.	Federal Constitutional Court of Germany	1	1	1
4.	Constitutional Court of Hungary	1	1	1
5.	Constitutional Court of Poland	1	1	1
TOTAL		7	8	6

Public law:

No.	Constitutional Court	No. of decisions of the Constitutional Court of Romania citing foreign precedents	Total number of cited foreign decisions	Number of cited unique decisions
1.	Federal Constitutional Court of Germany	5	5	4
2.	Constitutional Court of Latvia	3	3	2
3.	Constitutional Court of	2	6	3

	Hungary			
4.	Constitutional Court of Czech Republic	2	2	2
5.	French Constitutional Council	2	2	2
6.	Constitutional Court of Lithuania	2	2	2
7.	Constitutional Court of Austria	1	1	1
8.	Constitutional Court of Bulgaria	1	1	1
TOTAL		18	22	17

Therefore, in the field of civil law 4 references to the foreign precedent have been made, namely to the non-retroactivity of law, property right or personality rights, and in the criminal and public laws 8, respectively 25 references have been made. In these latter cases, the quoted decisions mainly aimed at the criminal procedure, the criminalisation of certain acts, respectively State social insurance rights, access to the records of the former political police or the free access to justice.

4. Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?

The Constitutional Court of Romania has a close collaboration with the Venice Commission and within it with the other constitutional courts of the Council of Europe's Member States, respectively the other affiliated States. This collaboration is mainly reflected in the transmission, for the publication in the Bulletin of the Venice Commission, of the relevant case-law of the Constitutional Court of Romania, as well as in the transmission of answers to the questions of other constitutional courts formulated on specific constitutional themes. It is thus facilitated the information of all the constitutional courts involved in this mechanism about various constitutional issues and their settlement¹⁶¹.

It is also noted that the decisions of unconstitutionality are translated into French and English on the official web site of the Constitutional Court of Romania and that, whenever there is a request for the delivery of a decision, it is translated and sent expeditiously. In this regard, there have been requests from the constitutional courts of Germany, Hungary,

¹⁶¹ T. Toader, M. Safta – *cited paper*, p. 180

Slovakia, Czech Republic or Republic of Moldova. But, not always the communicated decision is expressly mentioned in the body of the decision of the foreign constitutional court.

However, by way of example we mention that the Decision of the Constitutional Court of Romania no.1258 of 8 October 2009¹⁶² was expressly recalled by the Constitutional Court of the Czech Republic in the Decision of 22 March 2011 (Pl. US 24/10), by which certain provisions of the Act on electronic communications no.127/2005 have been found unconstitutional. The Constitutional Court of the Czech Republic mentioned those considerations of Decision no.1258 of 8 October 2009 which referred to the absence of the clear definition of the scope of the law, to its vague expression, as well as to the fact that the law did not establish in details the powers and obligations of the public authorities in the field and did not effectively guarantee the citizens' rights against the interception and storage of illegal data.

5. Are there any forms of cooperation going beyond the mutual acknowledgement of court decisions?

5.1. The question concerns the exchange of ideas and the dissemination of constitutional courts' case-law either by meetings organized in a formal or informal framework between the constitutional judges or by the drawing up in collaboration of certain jurisprudential studies.

5.2. We shall refer below to the formal framework in which the meetings of the judges are held, assuming the direct intercession of constitutional courts through the specialized department for this purpose.

Thus, according to Article 4 (1) (g) of the Regulation on the organisation and functioning of the Constitutional Court¹⁶³, its Plenum approves the external relations plan and the participation at various actions bilaterally or multilaterally organized, as well as the representation of the Constitutional Court within certain international bodies.

The draft of this plan is drawn up by the Assistant-Magistrate-in-chief– director of the Office of the President of the Constitutional Court, together with the Secretary General. After its approval by the Plenum of the Constitutional Court, the Assistant-Magistrate-in-chief– director of the Office of the President of the Constitutional Court seeks the execution of the external relations plan, while the Secretary General collaborates to its execution.

¹⁶² Published in the "Official Gazette of Romania", Part I, no.798 of 23 November 2009.

¹⁶³ Approved by the Decision no.6 of 7 March 2012 of the Plenum of the Constitutional Court, published in the "Official Gazette of Romania", Part I, no.198 of 27 March 2012.

The structure of the Constitutional Court also includes the External Relations, Press Relation and Protocol Compartment, which, according to Article 14 (1) of the Regulation, operates under the coordination of the Assistant-Magistrate-in-chief– director of the Office of the President of the Constitutional Court, and ensures the technical support necessary for the cooperation with the foreign constitutional courts.

5.3. The external relations plan has as main objective to facilitate the exchange of ideas and case-law between constitutional judges by organizing bilateral meetings or by participating or organizing conferences and/or seminars.

5.3.1. The bilateral meetings are held through visits of the delegation of the Constitutional Court of Romania or through receiving some visits of foreign delegations.

By way of example, we mention that the external relations plan for 2013 contains 15 bilateral meetings (7 visits to carry out and 8 to receive).

5.3.2. Participation or organization of conferences and/or seminars

In addressing this point, we have in view (1) the participation in conferences/ seminars organized by the international bodies; (2) participation in conferences/ seminars organized by the constitutional courts in collaboration or not with the international bodies; (3) organization of conferences/seminars and (4) organization of some common constitutional „days” of the constitutional courts.

5.3.2.1. Participation in conferences/seminars organized by the international bodies in collaboration or not with universities or international foundations having as main object of activity the constitutional justice.

In recent years, the Constitutional Court of Romania has become more active in terms of openness and participation in the conferences organized by the international bodies. Consequently, it appears that the external relations plan of the Constitutional Court of Romania for 2013 provides for the participation in 7 conferences/seminars organized by the European Commission for Democracy through Law (Venice Commission), Association des Cours Constitutionnelles ayant en Partage l'Usage du Français - ACCPUF, University of Regensburg, Faculty of Law of the University of Michigan, German Foundation for International Legal Cooperation - IRZ, European Public Law Organization, Furth Family Foundation and International Foundation for Electoral Systems.

Particularly important are also the conferences/seminars organized at regional level, since, given the historical, political, economic and social common context of the States in the region, they can provide particularly valuable jurisprudential solutions for constitutional

courts. It is mentioned to this end the International Conference of Constitutional Judges of Nagykanizsa, Hungary, held in March 2012, attended by representatives of the constitutional courts of Croatia, Romania, Slovakia and Hungary.

The participation of the Assistant-Magistrates in summer schools in the field of constitutional¹⁶⁴ or European¹⁶⁵ law is also useful for the mutual exchange of case-law in the European constitutional area.

5.3.2.2. Participation in conferences/seminars organized by the constitutional courts in collaboration or not with the international bodies.

It is another way of realizing that judicial interaction, respectively meetings and exchange of ideas/case-law between constitutional judges. In this respect, the external relations plan of the Constitutional Court of Romania for 2013 provides for the participation in 7 conferences/seminars.

5.3.2.3. Organization of conferences/seminars.

In 2013 the Constitutional Court of Romania is also active on this side, having in view that it organized 3 events. Among these, we mention:

a) the conference on *“The impact of the European Convention on Human Rights and of the case-law upon the democratic developments and upon the changes in Eastern Europe”*, organized by the European Court of Human Rights in cooperation with the Constitutional Court of Romania at Strasbourg on 18 February 2013.

b) the international event organized in cooperation with the German Foundation IRZ, on *„Constitutional jurisdiction 20 years after the fall of the Communist Curtain”*, Bucharest, 2-3 October 2013.

It is also worth noting that, together with the Foundation Konrad Adenauer, the volume *“Selected decisions of the Federal Constitutional Court of Germany”* was launched, event attended by Romanian and German constitutional judges.

5.3.2.4. Organization of some common constitutional “days” of constitutional courts.

This type of event is organised in order to enhance and strengthen the collaboration between constitutional courts, in terms of both institutional and jurisprudential aspects.

¹⁶⁴ By way of example, we mention the summer school *„Comparative Constitutional Adjudication CoCoA”*, organized by the University of Trento, Italy.

¹⁶⁵ We have in view the participation in courses like: *Advanced European Union Legal Practice*, organized by Central European University of Budapest in collaboration with TOTAL LAW™ within The Jean Monnet Centre for International and Regional Economic Law & Justice - NYU School of Law, at Budapest; that of the Academy in European Law in Florence or of the Academy for Human Rights Implementation in Lucerne, Switzerland.

In this regard, it is worth mentioning that the Constitutional Court of Romania has actively participated in the scientific sessions organised during the editions of the “French-Romanian Constitutional Days”. Also, in collaboration with the German Foundation IRZ, the Constitutional Court organised an edition of the „Romanian-German Constitutional Days” (3-4 June 2004).

5.4. There have been also drafted joint studies between representatives of the constitutional courts or personalities in the field of the Constitutional or European law. In this respect, we consider the collections of studies published by the Constitutional Court of Romania due to the organization of conferences or seminars¹⁶⁶, and the publication of articles in the journal *The Constitutional Court Bulletin*¹⁶⁷.

5.5 Last but not least we mention that there is an active exchange of decisions between the Constitutional Court of Romania and the foreign constitutional courts.

¹⁶⁶ We refer to the collection dedicated to the *Romanian-French constitutional days*, VIth edition, on the *Effects of the Constitutional Court's decisions*, Bucharest, 2000, or the collection *Constitutional justice: functions and relationship with the other public authorities*, Universul juridic Publishing House, Bucharest, 2012. The collection of studies presented at the 20th anniversary of the Constitutional Court of Romania is also being edited.

¹⁶⁷ For example, we refer to the publication of two studies – *The right to information (and freedom of expression) according to the case-law of the European Court of Human Rights* and *Freedom and security according to the case-law of the European Court of Human Rights* – o M. J.-P. Costa, Vice President of the European Court of Human Rights, in the Constitutional Court Bulletin no.6/2003, as well as to the publication of the paper *Human dignity in the case-law of the constitutional courts of Germany, Hungary and Romania* in the *Constitutional Court Bulletin* no.2/2012, written in collaboration with Mrs Zakariás Kinga, counsellor at the Constitutional Court of Hungary and Mr Benke Károly, Assistant-Magistrate-in-chief at the Constitutional Court of Romania.

III. INTERACTIONS BETWEEN EUROPEAN COURTS IN THE JURISPRUDENCE OF CONSTITUTIONAL COURTS

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1. Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the constitutional court ?

The Constitutional Court of Romania hasn't yet analysed the law of the European Union or the case law of the E.C.J. quoted in the case law of the European Court of Human Rights. The European Law could, to some extent, have an influence on the case law of the Constitutional Court if the judicial solutions of the two Courts would have the same orientation. It will be also very interesting to notice the practice of the other constitutional courts on this issue.

2. How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union ?

The operation of clarification of the legal relations between the two supranational courts - the European Court of Human Rights and the Court of Justice of the European Union in the context of the necessary achievement of a coherent and consolidated system of protection of fundamental rights is within the competence of the organs of the Council of Europe and the European Union, taking into account the fact that, according to Lisbon Treaty, the European Union is compelled to accede to the European Convention on Human Rights.

So far, no aspect relating to the relations between the two courts has been emphasized in the jurisprudence of the Constitutional Court.

However, in the context of interstate evolutions and of primary concern for the protection of human rights and globalization of this concept, the Constitutional Court, the European Court of Human Rights and the Court of Justice of the European Union are in a permanent and useful relationship of a judicial interaction involving constant and mutual cooperation with regard to the legal issues that the courts deal with. It is, mainly, about the realization of working reunions of judges and references made to the case law of other courts existing within the framework of issued judgments. The imperative of the legitimacy of a decision / judgment of a court clearly requires a solution based on a persuasive reasoning, which needs, at its turn, to be respected. Therefore, the jurisprudence of the Constitutional Court, by the specific features of the legal system in which it is created, can support the efforts of the judges of other courts to solve cases in a convincing manner, providing opportunities in order to be able to face new situations, as an expression of the national legal and constitutional identity. Thus, concepts such as the protection of rights, developed by constitutional law, are transferred, under the personal conviction of the judges, in the supranational legal order, thus realizing a constitutionalization process, without questioning the issue of a hierarchy between courts.

Taking into account that the European Court of Human Rights is the most ancient partner of dialogue of the national judges in this issue of the protection of human rights, it might occur that the position of the Court of Strasbourg prevails on the vision of the Court of Luxembourg. Put in other words, it is possible to see the justices of national constitutional courts following the case law of the European Court of Human Rights. As a direct result, the European Court of Justice could be compelled to follow the judicial reasoning of the European Court of Human Rights.

On the other hand, the force of judicial arguments of a constitutional court could have an influence on the relations between the two European Courts if they (the arguments) would support the jurisprudential vision of one of the two Courts (e.g. when it is about the autonomous interpretation of some juridical notions).

3. Do differences between the jurisprudence of the European Court of Human Rights, on the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the constitutional court ?

The accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms is a step forward, towards the improvement of the protection of human rights in the European area, contributing to a coherent development the jurisprudence of the European Court of human Rights and of the Court of Justice of the European Union.

Clarity and consistency of the jurisprudence of the two courts are very important for all citizens, as holders of rights, and for courts called upon to insure, within their competence, the respect for human rights.

So far, in its case law, the Constitutional Court has not addressed the problem of conflicting decisions between the European Court of Human Rights and the Court of Justice of the European Union and the possible priority given to one or another of the two courts, in case of judicial inconsistency.

In the Romanian constitutional system, the constitutional provisions related to the rights and freedoms shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, the covenants and other treaties Romania is a party. If there are inconsistencies between the covenants and treaties on fundamental human rights to which Romania is a party and national laws, international regulations have priority, unless the Constitution or national laws contain more favorable provisions (see Article 20 of the Constitution of Romania). In applying this provision, given the impact that the jurisprudence of the European Court of Human Rights on the case law of the jurisdiction of constitutional litigation, the Constitutional Court examined the compliance of certain legal provisions under the rules contained in the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of human Rights. For instance: Decision No. 81 of 15 July 1994¹⁶⁸, Decision No. 129 of 24 October 1996¹⁶⁹, Decision No. 21 of 21 February 2000¹⁷⁰, Decision No. 208 of 25 October 2000¹⁷¹, Decision No. 183 of 8 May 2005¹⁷², Decision No. 197 of 13 May 2003¹⁷³. As an expression of judicial dialogue between

¹⁶⁸ Published in the "Official Gazette of Romania", Part I, no. 14 of 25 January 1995

¹⁶⁹ Published in the "Official Gazette of Romania", Part I, no. 158 of 16 July 1997

¹⁷⁰ Published in the "Official Gazette of Romania", Part I, no. 159 of 17 April 2000

¹⁷¹ Published in the "Official Gazette of Romania", Part I, no. 695 of 27 December 2000

¹⁷² Published in the "Official Gazette of Romania", Part I, no. 425 of 17 June 2003

¹⁷³ Published in the "Official Gazette of Romania", Part I, no. 545 of 29 July 2003

the two courts we can mention the cases when the European Court of Human Rights has held in its decisions the considerations of the Constitutional Court. For example: Decision of 20 March 2012, pronounced in the case *Ionel Panfile against Romania* which contains such references, in paragraphs no.21 and 28, of the Decision of the Constitutional Court No. 1414 of 4 November 2009¹⁷⁴ on the restriction of the addition of pensions having a certain amount and the wage in the State sector, the Decision of 6 December 2011, pronounced in the case *Mihăieş and Senteş against Romania*, by which, in the same direction chosen by the Constitutional Court in Decision No. 872 and No. 874 of 25 June 2010¹⁷⁵, the European Court held that the temporary wage reduction does not imply a disproportionate and excessive charge on recipients, in relation the property right.

At the same time, following Romania's accession to the European Union in 2007, the provisions of the founding Treaties establishing the European Union and the other mandatory community regulations take precedence over any provisions of national laws contrary thereto, in compliance with the provisions of the Act of Accession. The Parliament, the President of Romania, the Government and the judiciary shall ensure compliance with the obligations resulting from the Act of Accession and from the provisions of par. (2) [see Article 148 (2)-(4) of the Constitution of Romania].

Thus, through Decision no. 668 of 18 May 2011, published in the Official Gazette of Romania, Part I, no. 487 of 8 July 2011, the Constitutional Court held that, during the constitutional review, it retained the right to apply the rulings of the Court of Justice of the European Union or to formulate, by itself, preliminary questions in order to establish the content of the European rule.

Furthermore, according to the dissenting opinion to Decision no. 668 of 18 May 2011, "the fact of acknowledging, for the first time, in the Constitutional Court's case-law, its possibility to apply, during the constitutional review conducted, the rulings of the Court of Justice of the European Union and to formulate preliminary questions in order to establish the content of the European rule, which depends on the cooperation between the national

174 Published in the "Official Gazette of Romania", Part I, no. 796 of 23 2009

175 Published in the "Official Gazette of Romania", Part I, no. 433 of 28 June 2010

constitutional court and the European court and on the judiciary dialogue between the two, equals to an obvious case-law progress”.

Expression of the inter-institutional dialogue, as basis for its arguments, the Constitutional Court also held, in the rationale of certain of its decisions, the interpretations that the Court of Justice of the European Union gave to certain provisions of European mandatory legal documents.¹⁷⁶

Moreover, for a clear highlighting of the way in which the case-law of the European Court of Human Rights, on the one hand, and of the Court of Justice of the European Union, on the other, have influenced the case-law of the Constitutional Court, we are considering as relevant Decision of the Constitutional Court no. 296 of 9 June 2005, published in the Official Gazette of Romania, Part I, no. 724 of 10 August 2005. On this occasions, having to rule upon the exception of unconstitutionality of the provisions of Article 19 (1) a) of Law no. 108/1999 for the establishment and organisation of Labour Inspection, published in the Official Gazette of Romania, Part I, no. 740 of 10 October 2002, the Court examined whether or not the right of labour inspectors to a free and permanent access without prior notification to the headquarters of the legal entity and to any other work premises is a violation of the constitutional provisions of Article 27 on the inviolability of the home.

The Constitutional Court dismissed the exception of unconstitutionality raised, holding that the obligations resulting from the provisions of Article 27 of the Constitution on the inviolability of the home cannot be opposed to the activity of the Labour Inspection, considering the particular nature of the activity of the Labour Inspection, the specificities of the duties that this authority has to accomplish, pursuant to law, the object of the review and the place where it is conducted.

This analysis considered the significance of the notion of “*domicile*”, as it results from the evolution of the case-law of the Court of Justice of the European Union in this matter (Judgment of 21 September 1989, issued in Case *Hoechst v. Commission of the European Communities*, Judgment of 22 October 2002, issued in Case *Roquette Freres S.A. v. Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities*) and of the European Court of Human Rights

¹⁷⁶ Decision no. 266 of 21 May 2013, published in the “Official Gazette of Romania”, Part I, no. 443 of 19 July 2013.

(Judgment of 16 December 1992, issued in Case *Niemietz v. Germany*, Judgment of 16 April 2002, issued in Case *Société Colas Est et al. v. France*).

Thus, it results from the judgement of the Court of Justice of the European Communities issued in Case *Hoechst v. Commission of the European Communities* that the headquarters and the professional or commercial premises of legal entities do not benefit from the same protection as the home of an individual and that only audit procedures can be censored by the European jurisdiction.

The European Court of Human Rights, through the judgment issued in Case *Société Colas Est et al. v. France*, ruled that, in certain circumstances, the rights enshrined in Article 8 of the Convention for the protection of Human Rights and Fundamental Freedoms can be understood as including the right to respect the registered office of a company, as well as their professional premises.

Following this judgement, by invoking judgments issued in this matter by the European Court of Human Rights, the Court of Justice of the European Union has reviewed its case-law line and held that the professional and commercial headquarters and premises of a legal entity benefit from a certain degree of protection.

Consequently, it seems that, in this case, the problem of an eventual discrepancy between the case-law of the Court of Justice of the European Union and that of the European Court of Human Rights also depends on the cooperation between the national constitutional court and the two courts, as well as on the permanent judiciary dialogue between them, aiming at basing and legitimising its own decisions, without calling into question aspects concerning the establishment of hierarchies between courts.

Despite the aforementioned allegations, we must hope that there will be no differences of opinion between the two courts. It is important to be noticed that art.6 par.2 of the T.E.U. provides for that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The specific protocol contains also additional details which are very helpful. Thus, the Union will have the obligation to respect the Convention and therefore will be placed under the external control of the European Court of Human Rights.

In any case, the national constitutional courts are obliged to ensure the most favourable regime for the citizens under their jurisdiction, and the national constitutional provisions are very important in this process.