CONSTITUTIONALIZING THE ACT OF JUSTICE IN THE EUROPEAN UNION[1]

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Abstract

This study addresses a component of the constitutionalization process at the Union level, namely the act of justice, considering its importance for the evolution of the constitutionalization process. The significance and importance of the constitutionalization of the act of justice are analyzed, as well as the premises and mechanisms of the constitutionalization of the act of justice in the European Union, with particular reference to the jurisprudence of the Romanian Constitutional Court. In this context, the control of constitutionality appears as a decisive modeling factor of the normative action of the legislator and even of the public policies. The constructive dialogue – if we refer to the two legal orders, national and supranational – is all the more necessary, being noticeable the key role played by national courts – and in particular constitutional courts – in defending the rule of law in the European Union, including through their collaboration with the CJEU in cases and through the instruments provided for in the Constitutions and the Treaties.

Keywords: *constitutionalization; justice; constitutional review; fundamental values*

1. Introduction

The process of constitutionalization characterizes the whole structure of modern international law. As has been found, however[2], there are different levels of evolution and different implications when considering distinct legal subsystems, as is the case at

[1] Theme presented at the Conference "The Future of the Judicial System of the European Union", Iasi - May 31, 2019.

[2] M. Arcari, S. Ninatti, *Narratives of Constitutionalization in the European Union Court of Justice and in the European Court of Human Rights Case Law*. ICL JOURNAL, 11(1), 11-41, 2017.

European level, especially in the context of European Union law[3], as well as for the Convention for the Protection of Human Rights and Fundamental Freedoms. Also within these subsystems the different components have different meanings and developments, being influenced by the level of development of the Member States, conceptions, traditions, elements of national identity. In assessing the process of constitutionalization, these different developments and factors that determine them must be considered, as well as the double dimension - the internal one, which deals with constitutional relations at the level of the Member States and, respectively, the external one, that of the relations determined by the specific legal order of the European Union.

The present study addresses a component of the constitutionalization process at the Union level, namely the act of justice, considering its importance for the evolution of the constitutionalization process in its entirety. Recent debates in which we have participated, bilaterally, at the German Federal Constitutional Court[4], regionally, at the International Conference hosted by the Romanian Constitutional Court[5], as well as internationally, at the Conference hosted by the Constitutional Court of the Russian Federation[6] within the International Legal Forum[7] a common topic of constitutional identity was approached, considered, taking the case into account, as appropriate in the European context and in relation to the universal values. As the hosts and the main participants were the constitutional courts, the discussions on this topic, being as generous as it was sensitive, were taken from the perspective of the role of justice in general and of constitutional justice in particular, connecting and aligning the national legal systems to the common core values, whether we are talking about the European or universal dimension, as well as ensuring the linking "bridges" between the legal orders, of reconciling and resolving possible contradictions.

Justice appears in this complex context as a vector of constitutionalization, both horizontally, internally and vertically, in relation to the supranational legal order, and the international one, respectively. We will assert a series of considerations on the significance and importance of the constitutionalization of the act of justice as well as

[3] Henceforth known as the UE.

[4] *https://www.ccr.ro/Anul-2019*.

[5] International Conference "The National Constitutional Identity in the context of European Law", Bucharest, April 12, 2019 (the representatives of the Constitutional Courts of Austria, Germany, Hungary, Croatia, the Czech Republic, Slovenia participated).

[6] International Conference "Constitutional Identity and universal values: the Art of Balance", St. Petersburg, 14 mai 2019 (representatives of constitutional courts/with constitutional review powers from Bosnia and Herzegovina, Israel, Hungary, Montenegro, Monaco, Cambodia, Spain, Jordan, Morocco, Thailand, Albania, Egypt, Armenia, Belarus, Bulgaria, Croatia, Nepal, Philippines, Finland, Guatemala, India, Indonesia, Afghanistan, Pakistan, Kazakhstan, Northern Macedonia, South Ossetia, Panama, Peru, Serbia, Turkey, Myanmar, Zambia, Zimbabwe, as well as representatives of international organizations, such as the UN, the Council of Europe, the European Court of Human Rights; The Venice Commission, the Tribunal of the Eurasian Economic Union participated).

[7] *https://www.ccr.ro/Anul-2019*.

on the premises and mechanisms of the constitutionalization of the act of justice in the European Union in an international context.

2. The significance and importance of constitutionalizing the act of justice

We use the term ***constitutionalization*** in this instance in a broad sense, conforming to a set of common values/principles agreed at national level and within the framework of the supranational legal order to which the states have adhered. This set of common values/principles are enshrined in the European Union Constitutions and Treaties, since "*the Union is added to the Member States, builds on their constitutions, adding a new instrument and new action options to what national constitutions can offer and which are made available to national authorities*"[8]. Article 2 of the Treaty on European Union establishes a set of common values in this respect, holding that "*the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*". As a result of regulating the EU's accession to the Convention for the Protection of Human Rights and Fundamental Freedoms[9], as well as the various ways of incorporating it into the legislation of the Member States, we report on the constitutionalization process to this Convention as well, when addressing the issue of fundamental rights and freedoms.

Thus, the main areas of the democratic state of law are found both in the constitutions of the Member States and in the EU treaties. Each Member State promotes and shares these common values adopted by the Act of Accession, which justifies the premise of mutual trust. In academic literature, over time, constitutionalization has traditionally been correlated with the process of European integration that has led to a remarkable transformation of the EU, evolving from a set of legal agreements that bind sovereign states to a vertical system, to an integrated legal regime that confers legal rights and obligations on legal entities, public and private entities in the sphere of application of European law. Constitutionalization has profoundly shaped the EU legal system as well as national legal systems[10], including and overcoming the phenomenon of European legal integration.

[8] I. Pernice, *European constitutionalism and the national constitutions of the Member States. Implications for "Brexit"*, in the Romanian Journal of European Law No. 3 of September 31, 2017.

[9] Henceforth known as the convention.

[10] Berthold Rittberger and Frank Schimmelfennig, Explaining the constitutionalization of the European Union, Journal of European Public Policy 13:8 December 2006: 1148-1167.

As far as the term of ***justice*** is concerned, it signifies in this context in particular the constitutional courts, the latter by their very nature and their specific nature, being responsible for the constitutionalization of the law, as well as for the acts, the deeds which they are called upon to assess in terms of the interpretation norms and and of constitutional principles. We are considering both national and international courts and, as regards the latter, in particular the Court of Justice of the European Union[11] and the European Court of Human Rights[12], with quasi-constitutional functions at regional, respectively EU and Council of Europe levels. Of course, in the process of constitutionalization, the courts of the judiciary system also participate within the limits of their jurisdiction through the activity of solving cases concerning the civil, administrative, commercial, criminal, labor etc. applying sanctions, restoring the violated rights and legitimate interests. In Romania, for example, the mechanism of the exception of unconstitutionality is built so that the courts are partners of the Constitutional Court, and the first filter for the issues of unconstitutionality raised by the parties in the case.

We understand through the ***constitutionalization of the act of justice*** both the conformity of justice, in its many meanings, with the set of common principles and values, and the attribution of the same interpretations/meanings of these values and the application of the same reference standards. All courts, irrespective of their nature and level, speak the language of law, but it is necessary that this language be spoken in the same way, by common values, to understand the same thing at national, supranational and international level, and to apply the same standards. The logic of this process appears to be elementary given the structure and legal relations within the European Union, but it is not easy to achieve in practice, precisely because of the existence of a "given" of each legal subsystem, determined by history, traditions, their own social developments, elements of identity, and how all these elements are perceived and interpreted. As doctrine and jurisprudence reveal, over time, some national courts have noted that they were a more difficult interlocutor for the Court of Luxembourg. (…) being considered to be guarantors of national constitutional values, the ultimate authorities that must ensure that the hard core of national politics is not affected by Community rules, but only by the part of the conversation that should lead to the creation of common European constitutional values, and, at the same time, o the remodeling of the national ones[13]. Over time, these asperities have diminished, both sides are open to dialogue, numerous preliminary references have been formulated by constitutional courts. However, there are still issues that national and supranational courts need to agree on, in their approach/interpretation of constitutional principles and values, in relation to national traditions and elements of national identity. A more

[11] Henceforth known as the CJEU.

[12] Henceforth known as the ECHR.

[13] T. Chiuariu, *The principle of the primacy of Community law in the case-law of the German Federal Constitutional Court*, The Journal of Legal Studies, year I, No. 1-2-/2006, p. 40.

obvious example is the area of substantive criminal law, more strongly attached than others to the nucleus of national sovereignty, meaning the jurisprudence of the CJEU and the Constitutional Court of Italy in the relatively recent so-called *Taricco* saga[14].

Why is the constitutionalization of the act of justice important/necessary? Because justice and the values they defend are for the man and the citizen. Under the principle of equality and non-discrimination, we must benefit within the EU from the same democratic standards, of the rule of law, dignity and fundamental rights and freedoms. Because the concepts that characterize the supreme values enshrined in the Constitutions and Treaties are very general, a process of interpretation is inevitable, and this process must be convergent. In other words, we need to speak the same language in the matter of the protection of European universal values of standards of protection of fundamental rights and freedoms, and the constitutional and quasi-constitutional courts are those which, through the specificity of their activity, have the competence

[14] Determined by the ruling of the CJEU on two judgments in response to the preliminary rulings of the Italian courts. It is to be remembered that, by judgment of 5 December 2017 in Case C-105/14, at the request of the Tribunale di Cuneo (Italy), the CJEU has ruled that national legislation on criminal liability, such as that provided for in the last paragraph of Article 160 of the Italian Criminal Code, as amended by Law No. 251 of 5 December 2005, in conjunction with Article 161 of this Code, which at the time of the facts in the main proceedings provided that the act of interruption in criminal proceedings concerning serious fraud in the field of value added tax had the effect of prolonging the limitation period by only one quarter of its original duration may prejudice the obligations imposed on Member States by Article 325 (1) and (2) TFEU in the hypothesis in which this national regulation would prevent the application of effective and dissuasive sanctions in a significant number of cases of serious fraud affecting the financial interests of the European Union, or would provide for longer limitation periods for cases of fraud affecting the financial interests of the Member State concerned than for cases of fraud affecting the financial interests of the European Union, which is a matter for the national court to verify. It is for the national court to ensure the full effect of Article 325 (1) and (2) TFEU not applying, if necessary, the provisions of national law which would have the effect of preventing the Member State concerned from complying with the obligations imposed on it by Article 325 (1) and (2) TFEU. Please note that under Article 325 (1) and (2) TFEU: *„1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies. 2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests*".

As this solution came in collision with the principle of the lawfulness of offenses and punishments, regulated by the Constitution of Italy, the Constitutional Court was notified, which referred to the Court of Justice of the European Union, by reference for a preliminary ruling, raising the issue of a possible breach of the principle of the lawfulness of offenses and penalties which may result from the obligation laid down by the *Taricco* judgment to not apply the concerned provisions of the Criminal Code. That, having regard, first, to the material nature of the limitation rules laid down in the Italian legal order which implies that these rules are reasonably foreseeable for the justices at the time when the sanctioned offenses are committed, without being able to be modified, *in peius*, retroactively, and, secondly, the requirement that any national rules on incrimination regime must be based on a sufficiently precise legal basis in order to be able to delimit and direct the assessment of the national court. The doctrine commented that the Italian Constitutional Court has decided to give CJEU a chance to clarify or better substantiate its point of view in *Taricco* and to interpret Article 325 of the TFEU in a way that goes beyond the conflict with the supreme constitutional principle of legality, to avoid a constitutional collision between the two legal order. (Comments are included in Federico Fabbrini and Oreste Pollicino - LAW 2017/06 Department of Law - Constitutional identity in Italy: European integration as the fulfilment of the Constitution).

and authority to interpret fundamental norms, having to identify solutions where the law is too general, unclear or incomplete.

In addition, common values, with their multiple meanings, are not static but are in a continuous dynamic, and constitutional justice, justice in general, appears to have the necessary flexibility to adapt to this dynamics, to a greater extent than the legislator, for example, in order to achieve a correlation in internal/supranational/international relations. Legal systems must be virtually made compatible in achieving the same values and achieving the same standards, ensuring a delicate balance between these values and the elements inherent in national constitutional identity, as recognized by the Treaties. The dialogues – horizontal within the same system, even if concerning different jurisdictions – common law courts and constitutional courts, as well as vertical, of these courts with the CJEU, reveals contradictions and ways to solve them.

And how the strength and use of the judicial precedent exists to various extents in any system of law (be it only by enshrining the generally binding nature of the decisions of the constitutional, respectively quasi-constitutional courts), the work of interpreting the fundamental norms constitutes a genuine "engine" of the law-making activity, ruling the work of the national and European legislator. When verifying that a constitutional norm is in accordance with the Constitution, constitutional courts necessarily carry out the official interpretation of the Constitution in that it explains and develops constitutional principles and norms which determine it to remain a "living law". The meaning of these concepts or principles, established by the Constitutional Court, "is socially accepted and determines the state of constitutionality of society", as well as the elimination of possible divergences of interpretation among the other recipients of constitutional norms, thus realizing the constitutional substantiation of the law-making and law enforcement activity, guiding the evolution of the entire legal system. In this way, the Court and, in general, the constitutional jurisdiction courts "broaden" the scope of constitutional law as well[15].

All of these considerations are also applicable, *mutatis mutandis,* to the CJEU with reference to Treaties. Practically, the CJEU has been and is central to integration and constitutionalization at EU level. The literature highlights how, in crucial moments, the Court's jurisprudence has shaped market integration, the balance of power between EU governing bodies, the "constitutional" boundaries between international, supranational and national authorities[16].

[15] S.M. Teodoroiu, D. Morar, M.Safta, S.Costinescu, *National Report in the Volume of the 17th Congress of the Conference of European Constitutional Courts*, Batumi, Georgia, with the topic "Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles" – *http://constcourt.ge/congress2015-2017/downloads/landesberichte/romania_MS.pdf*, published by the Constitutional Court of Georgia, 2 volumes, 2018, ISBN 978-9941-8-0076-4; *http://constcourt.ge/congress2015-2017/downloads/landesberichte/romania_S_EN.pdf.*

[16] A.S. Sweet, Yale Law School Faculty Scholarship 1-1-2010, *The European Court of Justice and the Judicialization of EU Governance*, *https://pdfs.semanticscholar.org/1862/b09b7bb711ba2957896009c0b7d52fb50821.pdf.*

3. Premises and mechanisms of the process of constitutionalization of the act of justice

3.1. The norms contained in the Fundamental Laws

Concerning subsystems of a complex system, we identify **the norms contained in the fundamental laws of the member states** as the main premises/mechanisms of constitutionalization. Thus, where the legislator fails to adopt legislative solutions conforming to constitutional norms, the law is "corrected", in terms of constitutionalization, by constitutional control, thus by the constitutional jurisdiction courts, in fulfilling the attributions conferred upon them by the constitutional norms of reference. As we can see, the courts can be partners in this process by being able to notify the constitutional courts, by being the first constitutional filter, and then to apply the decisions made in the resolution of concrete disputes.

It is also the norms contained in the fundamental laws that are the support for the vertical constitution process as well, providing the constitutional and ordinary courts with the legal basis for the application of the Treaties and other binding EU acts, respectively the provisions contained in the treaties on human rights. By taking a short comparative examination of the way in which the constitutions of the Member States consecrate the relationship between domestic law and European Union law, we find various approaches, from devoting distinct chapters, to treating European norms within the framework of general norms applicable to all international regulations.

Thus, for example, Chapter I of the Austrian Constitution is entitled *General Provisions. The European Union* and regulates these relations expressly and in detail. The Czech Constitution expressly states in Article 3 the rule according to which the Charter of Fundamental Rights and Freedoms is part of the constitutional order of the Czech Republic and, in Article 10, the priority of applying the international treaties to which the Czech Republic is party to in case of contradiction with internal rules. Cyprus enshrines the supremacy of European Union law over the entire Cypriot normative system, and in Greece Article 28 of the Constitution contains an interpretative clause, giving priority to generally recognized international law as well as international conventions in detriment to the contrary provisions of the law. The Constitution of Germany establishes its participation in the development of the EU, states the common values of the Union as well as the condition to guarantee a level of protection of fundamental rights comparable in essence to that provided by the German Basic Law. There are also Constitutions where there are not specific chapters/articles devoted to EU relations but various provisions inserted in chapters referring to the EU (Italy, Latvia) or Constitutions that do not contain specific regulations for relations with EU law but general rules on the incorporation of provisions of international treaties/conventions or of the relationships concerning national authorities in the context of EU institutions (eg.: Estonia, Finland). Other fundamental laws include more nuanced provisions such as the

Hungarian Constitution, which in Art E establishes that, "*in order to enhance the liberty, prosperity and security of European nations, Hungary shall contribute to the creation of European unity. With a view to participating in the European Union as a member state, Hungary may exercise some of its competences arising from the Fundamental Law jointly with other member states through the institutions of the European Union under an international agreement, to the extent required for the exercise of the rights and the fulfillment of the obligations arising from the Founding Treaties. The law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out in Paragraph (2)*"[17].

As regards the Constitution of Romania, for the process of verbally constitutionalizing the act of justice, articles 148 and 20 of the Constitution are of particular importance, articles which provide the support for adapting to the dynamics of the interpretation of the fundamental values/principles common to the national legal order and to the supranational and international ones, with the most obvious impact on the protection of fundamental rights and freedoms. On the basis of these express constitutional grounds, the ECHR and CJEU jurisprudence is found in the recitals of the Constitutional Court of Romania[18], the interpretation of constitutional texts and even case-law revisions being based on this jurisprudence[19], which, implicitly, means the alignment with the standards promoted by the ECHR and the CJEU.

Thus, Article 148 of the Constitution provides for the priority of binding EU rules in relation to internal legislation, where there are contradictions between them. Establishing this priority rests with the courts, which apply the law in concrete disputes. As for the Constitutional Court, those rules can be interposed in constitutional review. In this respect, the Constitutional Court held that „the use of a rule of European law in the context of constitutional control as a norm interposed to the reference, implies, on the basis of Article 148 (2) and (4) of the Constitution of Romania, a cumulative conditionality: on the one hand, that rule must be sufficiently clear, precise and unambiguous in itself or its meaning has been clearly, precisely and unequivocally established by the Court of Justice of the European Union, and, on the other hand, the rule must be circumscribed to a certain level of constitutional relevance, so that its normative content supports the possible violation by the national law of the Constitution – the only direct reference rule in constitutional review"[20].

[17] For developments, see Ş. Deaconu (coord.), *Constitutional Codex. Constitutions of the Member States of the European Union*, vol. I and II, the Official Gazette of Romania, 2015.

[18] Henceforth known as the CCR.

[19] See, broadly, T. Toader, M. Safta, *Changes in the Constitutional Case-Law*, in the volume of the International Conference on the topic "Education and Creativity for a Knowledge-Based Society"- Law - 8th ed., 2014, indexed SSRN, CD ISBN 978-3-9503145, ISSN 2248-0064.

[20] For example, Decision No. 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, No. 286 of 28 April 2015, or Decision No. 668 of 18 May 2011, published in the Official Gazette of Romania, Part I, No. 487 of 8 July 2011, Decision No. 137 of March 13, 2019, published in the Official Gazette No. 295 of 17 April 2019.

Thus, for example, the CCR considered it to be a norm interposed with the reference, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (2), in conjunction with the Charter of Fundamental Rights of the European Union and the recent jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights, on the right to family life (and not on marriage) and to clarify its meaning, the CJEU addressed several preliminary questions[21]. Based on the reply CJUE, the CCR accepted the exception of unconstitutionality and found that the provisions of Article 277 (2) and (4) of the Civil Code are constitutional insofar as they allow the right of residence on the territory of the Romanian State, under the conditions laid down by European law, to spouses – citizens of Member States of the European Union and/or citizens of third countries – of same-sex marriages concluded or contracted in a Member State of the European Union[22].

In another recent case, however[23], The CCR considered that European Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation cannot constitute a rule interfering with the constitutional review as it does not provide for specific obligations (except for the establishment of an integrity agency) or effective safeguards which, together or separately, contribute to the rule of law, but instead it draws up a series of guidelines, with a character of maximum generality and of predominantly political value (according to point 8 of the preamble of the decision, "*this Decision does not preclude the adoption of safeguard measures at any time on the basis of Articles 36 to 38 of the Act of Accession, if the conditions for such measures are fulfilled"*). However, such an act, even binding on the state to which it is addressed, *cannot have constitutional relevance*, since it neither develops a constitutional norm, being circumscribed to the existing ones, nor does it fill a gaps in the National Fundamental Law. In this light, the Court has already ruled by its Decision No. 104 of March 6, 2018, paragraph 89, in which, while noting that Decision 2006/928/EC has no implications for the case, implicitly denied its constitutional relevance: *„even if it were accepted that Decision 2006/928/EC could be an indicator for the assessment of the*

[21] M. Teodoroiu, M. Safta, *A number of considerations concerning the references for preliminary rulings by the Constitutional Courts of the Member States to the Court of Justice of the European Union*, Annual session of scientific communications on "10 years from Romania's accession to the European Union Impact on the evolution of Romanian law", 31 March 2017, Romanian Academy, in the volume *http://www.icj.ro/Volum-ICJ-2017.pdf*, ISBN CD: 978-606-39-0043-3, pp. 381-391, see judgment of 5 June 2018, delivered in Case C-673/16, CJEU (The Grand Chamber).

[22] Decision No. 534 of 18 July 2018, published in the Official Gazette of Romania, Part I, No. 842 of 3 October 2018.

[23] Decision No. 137 of 13 March 2019, published in the Official Gazette of Romania, Part I, No. 295 of 17 April 2019.

constitutionality of the rule, it would not be relevant in the case, since its content merely recommends the establishment of an integrity agency with the administrative capacity of conducting an investigation into potential incompatibilities and conflicts of interest, as well as the capacity to make binding decisions that may lead to the imposition of sanctions". In other words, the only concrete element of the norm is the obligation to set up an integrity agency, all the other aspects, in the general way of the proposed objectives, cannot cause express legal obligations to the state, which retains its own margin of appreciation. The Court has also held that, given the lack of constitutional relevance of Decision 2006/928/EC, a binding European act for the Romanian State, much less so can the constitutional relevance of the reports issued within the framework of the CVM be held. In this case, the act issued does not meet the condition provided by Article 148 (2) of the Constitution, according to which only *„the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act"*. Thus, although they are acts adopted on the basis of a decision, the reports contain provisions of an advisory nature, following an assessment, after the conclusions have been presented, mentioning that, *„in order to remedy the situation, the following measures are recommended: […]".* However, by means of a recommendation, the institutions make known their views and suggest directions of action without imposing any legal obligation on them to the addressees of the advisory opinion. In conclusion, even if these acts (Decision 2006/928/EC and the CVM reports) In conclusion, even if these acts comply with the conditions of clarity, precision and unequivocality; the meaning of which is established by the CJEU, these acts do not constitute rules that are circumscribed to the level of constitutional relevance necessary for carrying out the constitutional review by making reference to them. As the cumulative conditionality established in the constant jurisprudence of the constitutional court was not met, **the Court held that they cannot justify a possible violation by the national constitutional law as the only direct reference withing the framework of constitutional review.**

In itself, as regards the European Commission's Decision No. 928/2006, the Court has stated that it is a binding act for the Romanian State (Decision No. 137/2019, para. 77[24]), maintaining the recitals of Decision 2/2012, in which it also referred to the obligation of this mechanism with regard to the establishment of guarantees of independence and accountability of justice, and even under the conditions in which the explanatory statement of the criticized law invokes the Cooperation and Verification Mechanism established by the aforementioned European Commission Decision"[25].

[24] "77. Given the lack of constitutional relevance of the Decision 2006/928/EC, **a binding European act for the Romanian state**, the less so can the constitutional relevance of the CVM reports be taken into account".

[25] Decision No. 2 of January 11, 2012, the Official Gazette of Romania No. 131 of 23 February 2012.

Moreover, in the case in which these considerations were made, the authors of the request sought recognition of the binding nature of the recommendations contained in the CVM report of 13 November 2018, namely the immediate suspension of the implementation of the laws of justice and subsequent emergency ordinances, and the revision of the laws of justice, establishing the Criminal Justice Investigation Division. In other words, the aim of their action is to suspend the activity of this Public Prosecutor's Office structure and, subsequently, to modify the law, to abolish it. However, the respective case concerned the constitutional control over a normative act subsequent to the law establishing the contested Public Prosecutor's Office structure, so that the decision to be taken by the Constitutional Court had and has a limited effect on the provisions of this normative act and not on the existence of the Section for the Investigation of Criminal Offenses in justice, which remains established and operational on the basis of Law No. 304/2004, as amended by Law No. 207/2018. Therefore, beyond the fact that, by means of constitutional review, the constitutional court has no power to order any of the measures sought by the plaintiffs, neither was the procedural framework in which the request was made compliant it is thus that all the arguments put forward by the authors of the request for referrals to the CJEU concerned the establishment of the Section for the Investigation of Criminal Offenses of justice, thus not related to the subject-matter of the case in which the application was made, which concerned only the constitutional review of certain legal provisions concerning the operationalization of this structure of the Public Prosecutor. In other words, even if the Constitutional Court admitted the application and sent the preliminary questions to the CJEU, the answers received would have had no effect on the resolution of the substantive case inferred from the constitutional court's ruling. In conclusion, the Court held that the legal provisions establishing the Section for the Investigation of Criminal Offenses of justice were subject to control, by Decision No. 33 of 23 January 30, 2018, para. 134-159, establishing their constitutionality. For all of the arguments put forward, the Court rejected the request for preliminary questions to CJEU as inadmissible.

As for the other norm to link the national and international jurisprudence, namely art. 20, the Constitutional Court held that the integration „of the pacts and treaties on fundamental human rights, to which Romania is a party" in the so-called „*the body of constitutional rules and principles*", determines that they constitute, by means of Article 20 of the Constitution, reference rules for constitutional review. The CCR has taken this into account in several rulings that „*the ratification by Romania of the Convention for the Protection of Human Rights and Fundamental Freedoms by Law No. 30 of 18 May 1994 made the Convention to be part of national law in which the reporting to any of its texts is subject to the same regime as that applicable to reporting to the provisions of the Basic Law*"[26]. Of course, things must be viewed in a more nuanced way, since the

[26] Decision No. 146/2000, published in the Official Gazette of Romania, part I, No. 566 of November 15, 2000.

constitutional review is not directly related to the provisions of the Convention, but in relation to Article 20 of the Constitution and the distinctions made there. Applying Article 20 of the Constitution, the Constitutional Court of Romania established not only the binding nature of the Convention for the Protection of Human Rights and Fundamental Freedoms, but also the interpretation given to its texts by the European Court of Human Rights. The Court has held in this sense that *"as long as Romania has not been a member of the Council of Europe and has not adhered to the European Convention on Human Rights, the interpretation of Art. 8 of the Convention, by the ruling of the European Court of Human Rights in Strasbourg, had no relevance to Romanian legislation and jurisprudence, after Romania's accession to the Council of Europe and accession to the European Convention on Human Rights, there has been a fundamental change in the situation. The Constitution of Romania, which in Art. 20 (1) states that its provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania is a party, however, the European Convention on Human Rights, starting with with May 31, 1994, became such a treaty. Moreover, Article 20 (2) of the Constitution enshrines the principle of priority of the rule of international law: "If there are inconsistencies between the pacts and treaties regarding human rights, to which Romania is a party, and the internal laws, priority are the international regulations"*[27].

In other states, the Convention is superior to the law but inferior to the Constitution (eg.: France[28], Cyprus, Spain, Portugal) or have the status of ordinary law (eg.: Italy, San Marino)[29]. In Germany, the European Convention on Human Rights has the status of a federal law, and is therefore inferior to the fundamental law in the legal hierarchy[30]. Therefore, direct action cannot be taken for a violation of the Convention as a result of a constitutional complaint. However, the safeguards provided by the Convention are of constitutional importance because they influence the interpretation of fundamental rights and the principles of the rule of law in the Fundamental Law. According to the long-standing jurisprudence of the German Federal Court, both the Convention and the jurisprudence of the European Court of Human Rights, which gives it a concrete meaning, must be regarded as interpretative instruments to define the content and scope of fundamental rights and the principles of the rule of law in the

[27] Decision No. 81/1994, published in the Official Gazette of Romania, part I, No. 14 of 25 January 1995.

[28] N. Lenoir, *The response of the French Constitutional Court to the Growing Importance of International Law* apaud D. Spielmann, *Jurisprudence of the European Court of Human Rights and the constitutional system of Europe,* în *The Oxford handbook of comparative constitutional law,* Oxford University Press, 2012, p. 1238.

[29] Broadly see: C. Bîrsan, *The European Convention on Human Rights. Comment on articles. Vol I – Rights and Freedoms*, All Beck Publishing House, Bucharest, 2005, p. 100; O. Predescu, *The influence of the European Convention for the Protection of Human Rights and Fundamental Freedoms on the Internal Law of the Member States of the Council of Europe*, in the Annals of Constantin Brâncuşi University of Târgu Jiu, Legal Sciences Series No. 2/2010, *http://www.utgjiu.ro/revista/jur/pdf/2010-02/3.*

[30] *http://www.vfgh.gv.at/cms/vfgh-kongress/en/xvi-kongress-2014/landesberichte.html.*

Constitution. On the one hand, this serves to provide the broadest possible scope for the safeguards provided for by the Convention and, on the other hand, helps to avoid the Federal Republic of Germany's violation of the Convention.

3.2. Rules and mechanisms enshrined in international treaties or other binding European acts

The Treaties of the European Union as well as the treaties on human rights also support the foundations by regulating a body of common values, we have already stated such provisions. There are also express references to acts corresponding to other forms of legal integration, such as those relating to human rights or the rule of law. These are, for example, the provisions of Article 6 (2) TEU according to which the Union adheres to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Similarly, there are recommendations issued within the CVM, which make reference to the acts of the Venice Commission, structure within the Council of Europe. In this way, a correlation/integration/constitutionalization is achieved by combining many reference systems.

Moreover, the Treaties regulate genuine engines of integration/constitutionalization, such as the mechanism of preliminary referral, as laid down in Article 267 TEU. It has been appreciated, in the context of the constitutionalisation process at the level of the European Union, that Article 267 has become a kind of central nervous system, contributing to the organization of legal, economic and political integration[31]. However, this nervous system must be supported for proper and effective functioning, the benchmarks in this respect being set by the CJEU itself. It is the admissibility of the preliminary questions referred developed in the case-law of the CJEU - when formulating those questions, the national courts must verify whether the legal situation at issue in the main proceedings falls within the scope of European Union law (see, for example, the Decision of 27 March 2014, C-265/13 Emiliano Torralbo Marcos v Korota SA and Fondo de Garantía Salarial par 43[32] or the Decision of 26 February 2013, C-617/10, klagaren/Hans Åkerberg Fransson, para. 22[33]), questions must not be general and hypothetical, but with practical applicability (see, for example, the Decision of 15 September 2011, C-197/10 Unió de Pagesos de Catalunya v Administración del Estado,

[31] *Idem*.

[32] "It follows from all of the foregoing considerations that the legal situation at issue in the main proceedings does not fall within the scope of European Union law. Consequently, the Court is not competent to answer the questions addressed by the Juzgado de lo Social n° 2 de Terrassa".

[33] "Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C-466/11 Currà and Others [2012] ECR, paragraph 26)".

para. 18[34]), they must be related to the reality and subject-matter of the action before the court [see, for example, the Decision of 7 June 2012, C-27/11, Anton Vinkov v Nachalnik Administrativno-nakazatelna deynost, para. 44[35], the Decision of 2 March 2017, C-97/16 José María Pérez Retamero v TNT Express Worldwide Spain S.L., Last Mile Courier S.L., formerly Transportes Sapirod S.L., Fondo de Garantía Salarial (Fogasa), para. 22[36]]. In other words, the dialogue of national courts with the CJEU must be constructive, practical, and not a mere theoretical exercise.

3.3. Initiatives in the sphere of information and collaboration

We recall here initiatives such as the creation of judicial networks – the initiative that the CJEU and the supreme and constitutional courts in the Member States had at the Magistrates' Forum organized by the CJEU in March 2017 in Luxembourg, establishing the Judicial Network of the European Union, an online platform designed to promote and facilitate the circulation of information between all these courts. The new instrument is likely to enhance mutual understanding between legal systems and its own approaches to addressing legal issues - including issues of a constitutional nature – and thus increase consistency and convergence in the future development of the EU legal order[37]. This is meant to be a partner network for the other European networks, a collaborative site, the voluntary service being provided by the CJUE and the participating courts, a site for the quality and celerity of justice. The network is operational, and at the time of writing this article, judgments of the supreme or constitutional courts in Denmark, Germany, France, Italy, Hungary, the Netherlands, Romania and Sweden were posted.

Since the process of European constitutionalization must also be seen in an international dimension and context, especially in the field of human rights, in view of

[34] "The Court's function in preliminary rulings is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see, inter alia, Case C-112/00 Schmidberger [2003] ECR I-5659, paragraph 32; Case C-478/07 Budějovický Budvar [2009] ECR I-7721, paragraph 64; and Case C-384/08 Attanasio Group [2010] ECR I-2055, paragraph 28)".

[35] "As the Court of Justice has consistently held, it has no jurisdiction to answer a question referred for a preliminary ruling where the interpretation of rules of EU law which is sought by the national court has no relation to the actual facts of the main action or to its purpose, and those rules are incapable of applying in the main proceedings (see, in particular, Case C-567/07 Woningstichting Sint Servatius [2009] ECR I-9021, paragraph 43, and Case C-245/09 Omalet [2010] ECR I-13771, paragraph 11)".

[36] "Nevertheless, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted to it (see, *inter alia*, judgments of 11 July 2006, Chacón Navas, C-13/05, EU:C:2006:456, paragraph 33, and of 7 July 2011, Agafiţei and Others, C-310/10, EU:C:2011:467, paragraph 27)".

[37] K. Lenaerts, *The role of national constitutions in European Union law. From shared values to mutual trust and constructive dialogue*, in the Romanian Revision of European Law No. 2 of 30 June 2018.

the connection with the Convention, we also welcome the initiatives at international level that pursue the same objectives. Thus a relatively recent major event in this plan, namely the signing of a Joint Statement by the Chairs of the African Court for Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights on 18 July 2018, in San José, Costa Rica, on the occasion of the 40th anniversary of the entry into force of the American Convention on Human Rights and the creation of the Inter-American Court for Human Rights. Representatives of the three Courts agreed, through this joint statement, to establish a permanent institutional dialogue forum between the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights, with a view to strengthening the protection of human rights and access to international justice for persons under the jurisdiction of the three courts in order to contribute to the efforts of states to strengthen their democratic institutions and human rights protection mechanisms and to overcome, through cooperation, common challenges and threats to the effectiveness of human rights. The Permanent Forum will meet in private and public sessions at the premises of each Court on a rotating basis whenever the participating courts deem it necessary. The private work meetings will be sessions in which the three courts will engage in the dialogue on: the main institutional, normative and jurisprudential developments of each Court; the impact, difficulties and challenges of the work undertaken by each Court and the mechanisms for enhancing cooperation between courts, among others. Public sessions will be events aimed at disseminating and sharing the case-law dialogue between the three courts. The forum can conclude its session with the subscription of a joint declaration on the principal advances and consensus reached in each meeting, as well as the concrete measures to be adopted to strengthen the dialogue and shared work[38].

3.4. Good faith and loyalty to shared values

Of course, all these mechanisms must be used in good faith and loyalty to constitutional, national and union values.

We have already referred to the conditions for admissibility of the preliminary references so that they serve the purpose for which they were established. Similarly, concepts such as constitutional identity must be used in a balanced way. Referring to a wider context than the union and given the specific problems that the order of the Convention is currently facing, during one of the recent international conferences I have made reference to, the Vice-President of the Venice Commission showed that there

[38] *http://www.corteidh.or.cr/40aniversario/Declaracion/Declaration%20of%20San%20José%20ENG%20FINAL.pdf.*

must be a balance between what we identify as a national constitutional identity and universal values. This balancing of the two legal categories, that of national and international/European interests is legitimate if it meets a number of criteria. This is primarily the good faith of the bodies/authorities creating this balance (*bona fides*), and of the judges to be independent; then there should be a genuine weighing, that is, to evaluate all interests and not to give *ab initio* priority to one or the other; thirdly, the exam must be based on respect for common values. This approach must also be seen in the specific context in which it has been achieved, respectively, of the talks on the phenomenon of populism, where the concept of constitutional identity can become a less balanced one[39].

We believe that compliance with these criteria is also fundamental with regard to the constitutionalization of the act of justice in the European Union. Even when different divergence elements/interpretations of the same concepts arise, they must be overcome, settled through constructive dialogue, both at a national level where sometimes we are talking about purely internal situations, as well as vertically, in the relationships between the legal orders. ÎIn any case, as regards the EU-specific legal order, the constitutional courts have an open attitude towards the EU and the CJEU, as confirmed by the discussions held at the aforementioned meetings and conferences, as well as in the mentioned jurisprudence. Because we have used the example of *Taricco* to illustrate such a possible divergence and how it has been solved, it seems interesting to us that, by asking for clarification to the CJEU, the Italian court has focused, with regard to the hard constitutional core of the principle of legality, more on the concept of constitutional tradition than on that of constitutional identity. As has been shown[40], "it is not only a formal, linguistic, difference, but a substantial one. The constitutional tradition is by definition pluralistic in nature, whereas the reference to the constitutional identity, by design, is not. (....) the CC reasoning shifts from the national constitutional tradition to the European one, seeking to prod the ECJ to reconsider its previous judgment in light of values which are part of the European constitutional heritage". The doctrine observes in this sense that "the Italian constitutional vocabulary is inspired by the language of common constitutional tradition – not by that of individual constitutional identity. In the case of Italy, a founder of the EU, the process of European integration represents the most perfect fulfillment of the Constitution"[41].

[39] V. Bilkova, *Session I: National constitutional identity - a retrieved concept.* - Presentation by Ms Brigitte Bierlein, President of the Austrian Constitutional Court, rapporteur in *Session II - Judiciary and Modern Populism: Challenges and Perspectives*, International Conference "Constitutional Identity and Universal Values: the Art of Balance", May 14, 2019, Saint Petersburg.

[40] F. Fabbrini, O. Pollicino - *LAW 2017/06 Department of Law -Constitutional identity in Italy: European integration as the fulfilment of the Constitution*, *http://cadmus.eui.eu/bitstream/handle/1814/45605/LAW_2017_06.pdf?sequence=1&isAllowed=y*.

[41] *Ibidem*.

4. Conclusions

In the context of European integration, and in a different plan, in the direction of globalization, we tend and move towards universal values, and from this perspective we can support a constitutionalization that characterizes modern international law, as we showed in the beginning of the material. This common connection to universal values is conditional on cooperation, continuous dynamic, of the channeling of internal trends to global values.

Undoubtedly, speaking about the constitutionalization of the act of justice in the European Union, we speak not only of convergence, but of divergence in law and its interpretation. It is important to accept that the fundamental laws and the legal order of the European Union complement one another and can coexist and develop in a harmonious way*"*[42]*.* Constitutionalizing the act of justice in the EU practically means a Union of Justice, qualified as "one of the pillars of the functional constitutionalism of the EU"[43]. In this context, constitutional review appears to be a powerful influencing factor for the legislative action of the legislator and even of public policies, and the constructive dialogue – if we refer to the two legal, national and supranational legal orders – is all the more necessary, "the essential role played by the national courts - and especially the constitutional courts - in defending the rule of law in the European Union" being obvious[44], including through their collaboration with the CJEU in the cases and through the instruments provided for in the Constitutions and the Treaties, respectively. **Courts and, above all, constitutional courts share co-responsibility for the European area of law, which is why what has essentially been called the "judicial ethos" has appeared**[45]**, that is, the high jurisdiction and the commitment to apply the Basic Law that must characterize the constitutional judges**.

[42] K. Lenaerts, *The role of national constitutions in European Union law. From shared values to mutual trust and constructive dialogue*, in the Romanian Review of European Law No. 2 of 30 June 2018.

[43] *Ibidem*.

[44] *Ibidem*.

[45] The International Conference "The National Constitutional Identity in the context of European Law", Bucharest, 12 April 2019 - Session I: National constitutional identity - a retrieved concept. - Presentation by Brigitte Bierlein, President of the Austrian Constitutional Court.