

BRIEF CONSIDERATIONS ON THE RELATIONSHIP BETWEEN THE ROMANIAN CONSTITUTIONAL COURT, THE STRASBOURG COURT AND THE LUXEMBOURG COURT

Cristina TITIRIȘCĂ*

Abstract

In 2018, our country celebrates the 11 years that have passed since Romania's accession to the European Union, this year also being a preparatory year for the Romanian presidency of the Council of the European Union. Throughout its history, Romania has undergone profound transformations, one of which being the emergence of a new constitutional order after the Revolution of 1989, represented by the 1991 Constitution, revised in 2003, which established the principles of functioning of the state governed by the rule of law, as well as its operating mechanisms. The constitutional review was assigned to the Constitutional Court, as the guarantor of the Constitution's supremacy and the sole authority of constitutional jurisdiction. The jurisprudence of the Constitutional Court has been steadily evolving, but it is indissolubly linked to that of the Strasbourg Court and that of the Luxembourg Court. The Convention for the Protection of Human Rights and Fundamental Freedoms, on the one hand, and the Treaties establishing the European Union, as well as the European law, as interpreted by the Court of Justice of the European Union, are the benchmark elements of the constitutional review. In this context, it seems relevant to analyse the relationship between the Constitutional Court of Romania, the European Court of Human Rights and the Court of Justice of the European Union, from a theoretical perspective, but especially from a jurisprudential perspective.

Keywords: *Constitutional Court, European Court of Human Rights, Court of Justice of the European Union, jurisdiction, relationship.*

1. Introduction

The European Court of Human Rights and the Court of Justice of the European Union have been set up by two organizations with different goals and powers. The first of the two courts is the judicial authority of the Council of Europe, which operates as a corollary of a space of democracy and of the safeguarding of human rights. As to the Court of Justice of the European Union, essentially, its mission is to review the legality of acts of the institutions of the European Union, to ensure that Member States meet their duties resulting of the Treaties and to interpret EU law upon request of the national courts.

With regard to human rights, the powers of the two courts overlap. By way of example, we mention that, if in 2014, through the Judgment of July 16, 2014, in Case *Hämäläinen v. Finland*¹, the European Court of Human Rights reiterated that states are not required to recognize the marriage of same sex couples and that the definition of marriage and of the family, within the

meaning of the European Convention on Human Rights is the traditional one, and that how the Member States address this issue is an internal problem, the question arises how the Court of Justice of the European Union shall adjudicate on a matter which also refers to the application of human rights, respectively on the meaning of the notion "spouse".

Under these terms, this paper, without pretending to treat exhaustively the human rights issue in relation to the two courts, addresses in a systematic manner, the way in which the Constitutional Court of Romania integrates the Convention for the Protection of Human Rights and Fundamental Freedoms and, respectively, the Charter of Fundamental Rights of the European Union, into domestic law.

2. Legal framework

The legal basis of the relationship between the Romanian Constitutional Court, the Strasbourg Court and the Luxembourg Court is reflected in art. 20 and art. 148 of the Romanian Constitution, republished². If

* PhD, Parliamentary advisor at the Legislative Department of the Chamber of Deputies, currently advisor at the Office of the President of the Constitutional Court, member of SRDE (e-mail: cristina_titirisca_r@yahoo.com)

¹ Source: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%5B%222001-145768%22%5D%7D>

² According to art. 20 of the Fundamental Law, with the marginal title *International treaties on human rights*: „(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.”

According to art. 148 of the Fundamental Law, with the marginal title *Integration into the European Union*: „(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators. (2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence

the first article was found, in a similar form, in the text of the Constitution of 1991³, the second one was added during the revision of the Basic Law, in order to create the possibility of Romania's accession to the European Union.

As to the grounds for invoking the provisions of the Charter of Fundamental Rights of the European Union within the constitutionality control, we mention that, initially, the reporting was made to the provisions of art. 20 par. (1) of the Constitution, but, after 2009, the Constitutional Court held that it "is incorrect. The Charter, according to art. 6, par. 1 of the Consolidated Version of the Treaty on European Union, published in the Official Journal of the European Union, series C no. 84 of 30 March 2010, has the same legal value as the Treaty on European Union and the Treaty on the functioning of the European Union, which, within the meaning of art. 148 of the Constitution of Romania, are the constitutive treaties of the European Union. Therefore, within the Romanian constitutional system, the Charter of Fundamental Rights of the European Union is not covered by art. 20 of the Constitution, which refers to international treaties on human rights, so that the author of the exception should have invoked the norms of the Charter in conjunction with art. 148 of the Basic Law"⁴.

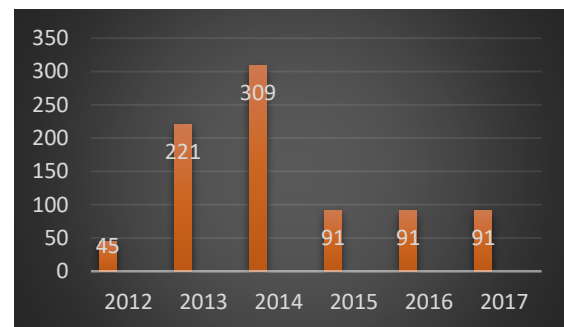
3. The Constitutional Court of Romania and the Strasbourg Court

The relationship between the Romanian Constitutional Court and the European Court of Human Rights has a long history, as Romania has ratified⁵ the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols ever since 1994. Thus, since the time of the ratification of the Convention, it is a part of national law, so that any reference to any of its texts is subject to the same rules applicable at relating to the provisions of the Constitution⁶. Following the ratification, Romania undertook to respect its provisions, as well as the interpretation of the Convention given by the European Court of Human Rights, within the limits of this; otherwise, Romania would be in the situation of a party to the Convention that fails to comply with its obligations undertaken under international public law

and domestic law, contrary to the provisions of art. 11 par. (1) and (2) and art. 20 par. (1) of the Constitution⁷.

The beginning of invoking the provisions of the Convention on Human Rights and Fundamental Freedoms within the constitutional review was carried out in a case filed in 1996 before the Constitutional Court, on the settlement on the exception of unconstitutionality of certain provisions of the Code of Criminal Procedure⁸. Since then, the number of cases of alleged non-compliance with the provisions of the Convention has increased significantly, as shown in the chart below, concerning the situation of the last years⁹:

Chart no. 1



Appropriately, the case-law of the Constitutional Court was significantly influenced by the judgments of the European Court of Human Rights. We can say that, nowadays, the judgments of the Constitutional Court where there isn't any reference made to the case-law of the European Court of Human Rights are becoming increasingly rare, especially if the provisions on the quality of the law, the principle of non-retroactivity of the law, the principle of equality of rights, free access to justice and the right to a fair trial or the right to defence are invoked as grounds for unconstitutionality¹⁰.

A clarification of interest from the perspective of Romania's status as an EU member state, refers to the fact that the accession of the European Union to the Convention on Human Rights and Fundamental Freedoms was launched at the same time with the entry into force, on June 1st, 2010, of the Protocol no. 14 to the Convention, that allows not only states but also international organisations, therefore, also the European Union, to become signatories to the

over the opposite provisions of the national laws, in compliance with the provisions of the accession act. (3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union. (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented. (5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.”;

³ According to art. 20 of the 1991 Constitution, with the marginal title *International human rights treaties*: „(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence.”;

⁴ Judgment of the Constitutional Court no. 206/2012, published in the Official Gazette of Romania, Part I, no. 254 of 17 April 2012;

⁵ Law no. 30/1994, published in the Official Gazette of Romania, Part I, no. 135 of 31 May 1994;

⁶ Judgment of the Constitutional Court no. 146/2000, published in the Official Gazette of Romania, Part I, no. 566 of 15 November 2000;

⁷ Judgment of the Constitutional Court no. 233/2011, published in the Official Gazette of Romania, Part I, no. 740 of 17 May 2011;

⁸ Judgment of the Constitutional Court no. 129/1996, published in the Official Gazette of Romania, Part I, no. 158 of 16 July 1997;

⁹ Source: www.ccr.ro;

¹⁰ For details, see, extensively, Toader and Safta, 2015, page 67 and subseq.;

Convention. It is, however, necessary for the accession to be ratified by all States party to the Convention, as well as the European Union. Negotiations between representatives of the Council of Europe and those of the European Union led to the completion of a draft agreement in April 2013.

The Court of Justice of the European Union, however, considered, in its Opinion no. 2/2013 of December 18th, 2014, that the respective project is not compatible with art. 6 par. (2) from the Treaty on European Union¹¹ and with Protocol no. 8 on art. 6 par. (2) of the Treaty on European Union, concerning the accession of the Union to the Convention for the Protection of Human Rights and Fundamental Freedoms¹², in that:

- it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;

- it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR;

- it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and

- it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body.

As a consequence, new negotiations will be required before a potential accession. At the same time,

following this decision of the Court of Justice of the European Union, European citizens will continue to be able to appeal to ECHR court for ruling on decisions of national courts and on national legislation, as well as to refer questions to the Luxembourg Court, but they will not be able to lodge a complaint concerning the institutions of the European Union or the functioning of the European Union legislation.

4. The Constitutional Court of Romania and the Luxemburg Court

The relationship between the Constitutional Court of Romania and the Court of Justice of the European Union must be seen on two levels: on the one hand, we refer to the priority of the application of the European norms, namely the provisions of the EU constituent treaties and other binding Community regulations by the contrary provisions of domestic laws¹³ and, on the other hand, we are considering the procedure for the preliminary questions referred to the Court of Justice of the European Union.

It should be noted, first of all, that in 2009, through the Treaty of Lisbon¹⁴, the Charter of Fundamental Rights of the European Union became legally binding, being given a legal value equal to that of the Treaties of the European Union, and the Union recognized the rights, freedoms and the principles laid down therein¹⁵. The text of the Charter was signed on December 7th, 2000, in Nice, as a reaffirmation of the conviction of the signatories that respect for human rights and fundamental values is the essential rule on which the cooperation of the European states is based upon, but, until 2009, it has functioned at a declarative level, even though, in its case-law, the Court of Justice of the European Union has used it as a source of interpretation¹⁶. In fact, the special significance of this document, but also the contents of its provisions have led, even since that time, for some specialists to see in

¹¹ See, to that extent, art. 6 par. (2) of the Treaty on European Union, the consolidated version of which was published in the Official Journal of the European Union series C no. 202 of the 7 June 2016, according to which: „(2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.”;

¹² Source: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=RO>;

¹³ See, to that extent, art. 148 par. (2) of the Constitution of Romania, republished;

¹⁴ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, ratified by Romania by Law no. 13/2008, published in the Official Gazette of Romania, Part I, no. 107 of 12 February 2008;

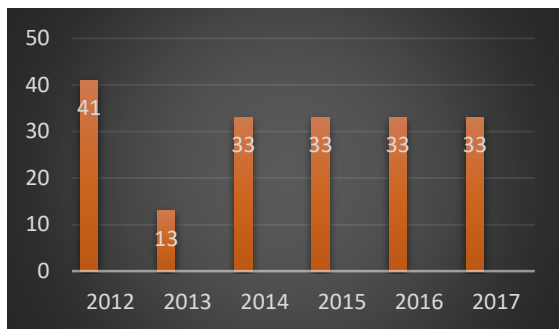
¹⁵ See, to that extent, art. 6 par. (1) of the Treaty on European Union, the consolidated version of which was published in the Official Journal of the European Union series C no. 202 of the 7 June 2016, according to which: „(1) The Union recognises the rights, freedoms and principles set out in the 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. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.”;

¹⁶ By way of example, for cases where provisions of the Charter of Fundamental Rights of the European Union were invoked, prior to 2009, see: Judgment of 23 October 2003, case RTL Télévision GmbH c. Niedersächsische Landesmedienanstalt für privatem Rundfunk, C-245/01 (Rec.2003, p. I-12489), par. 38; Judgment of 12 May 2005, Regione autonoma Friuli-Venezia Giulia and ERSA, case C-347/03 (Rec., p. I-3785) par. 118; Judgment of 27 June 2006, European Parliament/Council, case C-540/03 (Rec., p. I-5769) par. 38;

its adoption a step towards the drafting of the European Union Constitution¹⁷.

From a statistical point of view, the highlighting of the case-law of the Court of Justice of the European Union, in general, and of the failure to comply with the provisions of the Charter of Fundamental Rights of the European Union, in particular, in cases pending before the Constitutional Court has constantly evolved. The beginning¹⁸ was made in 2004, in resolving an exception of unconstitutionality concerning, *inter alia*, the provisions of Law no. 43/2003 on financing the activity of political parties and electoral campaigns¹⁹. Following the ratification of the Treaty of Lisbon, the number of such cases has increased, as shown in the chart below²⁰:

Chart no. 2



The beginning of the concrete application of the Charter of Fundamental Rights of the European Union within the Constitutional Court's reasoning was made in 2011, when the Court expressly provided that the provisions of the Charter "are applicable to constitutional review insofar as they assure, guarantee and develop the constitutional provisions in the field of fundamental rights, in other words, to the extent that their level of protection is at least at the level of the constitutional provisions on human rights"²¹.

A particular aspect of the relationship between the Constitutional Court and the Court of Justice of the European Union, as we have stated beforehand, concerns the reference for a preliminary ruling²², a procedure open to judges of the Member States of the European Union, which may address the Court with

questions on the interpretation or validity of European law in a pending case. Thus, the preliminary questions may concern two situations²³:

- the reference for interpretation of the European norm (as a primary and secondary law), when the national judge asks the Court of Justice to specify a point of interpretation of the European law in order to be able to apply it correctly; and
- the reference for the assessment of the validity of a European norm as a secondary law rule, where the national judge asks the Court of Justice to check the validity of an act of European law.

Indeed, as early as 2011, the Constitutional Court stated that "it remains at the Constitutional Court's discretion to apply, within the constitutionality review, the rulings of the Court of Justice of the European Union or to address itself preliminary questions for the purpose of determining the content of the European norm. Such an attitude is related to the cooperation between the national constitutional court and the European one, as well as to the judicial dialogue between them, without calling into question issues relating to the establishment of hierarchies between these courts"²⁴.

Although the procedure is widely used by the common courts, the Constitutional Court appealed to it relatively recently²⁵, in a case brought before the Constitutional Court in early 2016, thus joining the constitutional courts in states such as Austria, Belgium, France, Italy, Lithuania or Spain²⁶, who have used this procedure.

The case concerns the settlement on the exception to the unconstitutionality of the provisions of art. 277 par. (2) and (4) of the Civil Code, an exception raised by Relu Adrian Coman, Robert Clabourn Hamilton and ACCEPT Association, in a file of the 5th District Court in Bucharest – The Civil Section. The European legislative act applicable to the case is Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the

¹⁷ See, Duculescu Victor (2001), pp. 316-320;

¹⁸ Source: www.ccr.ro;

¹⁹ Judgment of the Constitutional Court no. 517/2004, published in the Official Gazette of Romania, Part I, no. 49 of 14 January 2005;

²⁰ Source: www.ccr.ro;

²¹ Judgment of the Constitutional Court no. 765/2011, published in the Official Gazette of Romania, Part I, no. 476 of 6 July 2011;

²² The basis of this procedure is found in the provisions of art. 267 of the Treaty on the Functioning of the European Union, the consolidated version of which was published in the Official Journal of the European Union series C no. 202 of the 7 June 2016, according to which: „The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.” Source: <http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012E/TXT&from=RO>;

²³ Source: <http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=LEGISSUM%3A114552>;

²⁴ Judgment of the Constitutional Court no. 668/2011, published in the Official Gazette of Romania, Part I, no. 487 of 8 July 20;

²⁵ Constitutional Court file no. 78D/2016. Source: www.ccr.ro;

²⁶ See, extensively, Toader and Safta, *op. cit.*, page 104 and subseq.;

Union and their family members to move and reside freely within the territory of the Member States²⁷.

In essence, the case is a civil one and concerns the existence of a discriminatory treatment of a couple on the basis of sexual orientation, justified on the provisions of art. 277 par. (2) of the Civil Code²⁸, which prohibit, in Romania, the recognition of marriages between persons of the same sex, with the consequent refusal for these people, of the rights deriving from Directive 2004/38/EC on free movement of persons, consisting in granting residence rights for the reunification of the family.

Thus, the Constitutional Court has referred the following questions to the European Court of Justice:

1. The term "spouse" in art. 2(2)(a) of Directive 2004/38/EC, in conjunction with art. 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union includes the same-sex spouse from a non-EU country, of a European citizen with whom the citizen has legally married, under the law of a Member State, other than the host State?
2. If the answer to the first question is in the affirmative, then art. 3(1) and 7(1) of Directive 2004/38/EC, in conjunction with art. 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union require for the host Member State to grant the right to reside on its territory for a period longer than three months to a same-sex spouse of an EU citizen?
3. If the answer to the first question is in the negative, the same-sex spouse from a non-EU Member State, of an European citizen, with whom the citizen has legally married under the law of a Member State other than the host State, may be qualified as "any other family member, [...]" within

the meaning of art. 3 par. (2) letter (a) of Directive 2004/38/EC or as a "partner with whom the Union citizen has a durable relationship, duly attested" within the meaning of art. 3 par. (2) letter (b) of Directive 2004/38/EC, with the host State's correlated obligation to facilitate his or her entry and stay, even if the host State does not recognize same-sex marriages nor does it provide for any other alternative form of legal recognition, such as registered partnerships?

4. If the answer to the third question is in the affirmative, then art. 3(2) and 7(2) of Directive 2004/38/EC, in conjunction with art. 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union require the host Member State to grant the right to reside in its territory for more than three months to a spouse of the same sex of a European citizen?

There is yet to have a ruling, at the date of this paper²⁹.

5. Conclusions

Currently, in Romania, just as in other member states of the European Union, the protection of the rights and fundamental freedoms is performed in a system in which they are recognized and protected by the Constitution, by the European Convention of Human Rights and by the Charter of Fundamental Rights of the European Union. The one who implements the national and international instruments, through a "judicial dialogue", is the judge, called upon to apply the legal provisions to specific case-law.

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²⁷ Published in the Official Journal of the European Union series L no. 158 of 30 April 2004. Source: <http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:02004L0038-20110616&from=RO>;

²⁸ Law no. 287/2009 on the Civil Code, republished in the Official Gazette of Romania, Part I, no. 505 of 15 July 2011, as subsequently amended;

²⁹ March 2018.