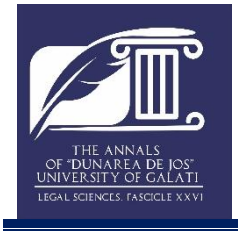

The Constitutional Review of International Treaties, a Purely Decorative Power of the Constitutional Court of Romania

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Abstract: The dialogue of the Courts in the European Union could be a veritable centripetal force of integration around the shared values that govern the European constitutional order. This dialogue must be supported by appropriate instruments, as the power regarding the constitutional review of international treaties is regulated by the Romanian Constitution and by other Constitutions of the Member States. However, in Romania, the legislative framework and the actors involved as possible referral subjects determine a purely decorative nature of the power to review international treaties before ratification. In this study, we will analyze the constitutional developments in the matter, outlining regulatory insights for the effectiveness of this power of the CCR and for the strengthening of the judicial dialogue in the EU.

Keywords: judicial dialogue; European integration; constitutional review of international treaties

1. Introduction

The recent debates in Romania concerning the relationship between national law and European Union (EU) law, as well as the opinions expressed regarding the legal instruments for the settlement of a possible conflict of rules in this framework, brought back to our attention the power (or rather the powers) of the Constitutional Court regarding the review of international treaties. Likewise, the topic is of interest in view of research within the project 'The future of coexistence in the EU, developed within the Central European Academy', where we have aimed at analyzing various centripetal forces of EU development, including the judicial dialogue.

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Thus, we noticed that, even if two decades had passed since the revision of the Romanian Constitution[1], in 2003[2], which was an opportunity to significantly enrich the range of powers of the Constitutional Court (CCR), including that of reviewing international treaties before their ratification by the Parliament, the practice has showed that it was not enough just to have a constitutional framework. This power remains, until now, the only one where CCR has not registered any referral. Under the influence of this observation, we chose the title of this study, in which we would try to clarify the constitutional, legal, and jurisprudential framework of the constitutional review of international treaties in Romania. Based on the research carried out and in view of the arguments that support the need for such review, we will emphasize certain regulatory insights, so that the targeted power/powers of the CCR will truly acquire a useful and effective nature.

2. The Constitutional and Legal Framework regarding the Constitutional Review of International Treaties in Romania

2.1. Historical Landmarks

The 1991 Constitution did not enshrine the power of the Constitutional Court regarding the *a priori* or *a posteriori* review of the international treaties. However, the CCR was referred, either in *a priori* review or *a posteriori* (through the exceptions of unconstitutionality), with criticisms having as subject-matter ratification laws of international treaties. This entitles us to a first conclusion, in the sense of the existence, still since the adoption of the Constitution, of certain indirect instruments for the constitutional review of treaties: the *a priori* and, namely, the *a posteriori* review of the laws ratifying the treaties and, as regards the *a posteriori* review, also of the Government's ordinances (in the sense that there is also a case settled by the CCR). However, until the time of the revision of the Constitution, no significant case-law was established; only one complex case, in which, surprisingly for that period, the question of a need for the revision of the Constitution was raised in the situation where a treaty to which Romania was to become a party includes provisions contrary to the Constitution.

[1] In its initial form, the Constitution was adopted at the meeting of the Constituent Assembly on 21 of November 1991 and entered into force following its approval by the national referendum on 8 of December 1991.

[2] Law No 429/2003 on the revision of the Constitution of Romania, approved by the national referendum of 18-19 October 2003 and entered into force on 29 of October 2003, the date of publication in the Official Gazette of Romania of the Constitutional Court Ruling No 3 of 22 of October 2003 for the confirmation of the result of the national referendum of 18-19 of October 2003 regarding the Law on the revision of the Constitution of Romania.

Thus, as far as the *a priori* review is concerned, by Decision no. 109/1996[1], the CCR rejected as inadmissible the referral of the parliamentary groups in the Senate and in the Chamber of Deputies of the Romanian National Unity Party regarding the constitutionality of the Law for the ratification of the Treaty of Understanding, Cooperation and Good Neighbourliness between Romania and the Republic of Hungary, signed in Timişoara on 16 of September 1996. The grounds were related to the legal framework of the referral, namely because an objection of unconstitutionality raised by parliamentarians could only be invoked by at least 50 Deputies or at least 25 Senators, and not by the parliamentary groups. Likewise, by Decision No 338/1997[2], the CCR found that the referral to the Supreme Court of Justice regarding the unconstitutionality of the Law for the ratification of the Treaty regarding the relations of good neighbourliness and cooperation between Romania and Ukraine was inadmissible, as the Constitutional Court was not legally referred to (the grounds for the illegal referrals being the lateness, on the one hand, and the fact that the decision to invoke the objection of unconstitutionality was not adopted with the required majority, on the other hand). Therefore, it is noted exclusively a formal analysis of the legal framework of the referral, not relevant against the background of the issue of the constitutional review of international treaties.

The more complex case we mentioned to concerns also the *a priori* review of constitutionality, having as its subject-matter a Law on the empowerment of the Government to issue ordinances. It was argued that the ratification of the European Charter of Regional or Minority Languages, provided in the impugned text to be carried out by ordinance, "is not part of the category of regulations whose legislative delegation can be carried out according to the procedure in the Romanian Constitution", the ratification of this Convention belonging exclusively to the Parliament. Likewise, it was argued (and this is the subject that deserves attention in view of this study) that the Charter ignored the intangible values enshrined in the Romanian Constitution, "namely the unitary, national, independent nature of the Romanian State, the independence of justice, administrative autonomy and the principles of non-discrimination of the majority of the Romanian citizens in relation to the minority citizens, because it established a regime for minorities above the constitutional framework", which it confined only to "the preservation, development and expression of their ethnic, cultural, linguistic and religious identity". Furthermore, it was argued that certain provisions of the Charter required the revision of the Romanian Constitution, because "they provide, in addition to the official language of the Romanian State, and the regional or minority languages, the recognition of elements specific to the federal States, such as the organization of the population within the Romanian State based on ethnic criteria, ignoring the ratio

[1] Official Gazette no. 250 of 16 of October 1996.
[2] Official Gazette no. 163 of 21 of July 1997.

between majority/minority; the use of mother tongues in administration and justice without the obligation to use the official language as well". Finally, another ground invoked by the authors of the objection of unconstitutionality referred to the dispute between the European Charter of Regional or Minority Languages and the provisions of the Romanian-Hungarian Treaty of Understanding, Cooperation and Good Neighbourhood, "in which the two parties expressly specify their agreement on the fact that Recommendation 1201 of the Council of Europe does not compel the parties to grant persons belonging to minorities the right to a special status of territorial autonomy based on ethnic criteria".

Analyzing these criticisms, the Court found the constitutionality of the impugned norms (Decision no. 113/1999[1]), noting that, according to the Constitution, the laws in force and the parliamentary practice, international treaties signed on behalf of Romania were subject of Parliament, for ratification by law, which was therefore in compliance with the concept of legislative delegation, which did not exclude ratification laws. Likewise, the Court noted that the provisions of Article 72 (3), as well as the other texts of the Constitution that provide for the mandatory adoption of organic laws, did not include in this category the ratification laws, establishing that, in principle, ratification could form the subject-matter of legislative delegation through a special enabling law, adopted by Parliament[2].

As regards the statement that the provisions of the European Charter directly target values enshrined in the texts of the Constitution, the CCR held that certain express provisions of the European Charter of Regional or Minority Languages, which are essential for clarifying the implications of the Charter's ratification on national legislation, were not considered in this ground. Thus, as concerns the criticism of the authors of the referral that the ratification of the Charter would affect the concept of "national, independent, unitary and indivisible State", enshrined by Article 1 of the Constitution, the Court noted that in the preamble of the Convention (paragraph 7) it was specified that "the protection and promotion of regional or minority languages in the different countries and regions of Europe represents an important contribution to the building of a Europe based on the principles of democracy and cultural diversity, within the framework of national sovereignty and territorial integrity". At the same time, the Charter expressly provides for in Article 5, entitled "Existing Obligations", that "Nothing in this Charter may be interpreted as implying any right to engage in an activity or to perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under

[1] Official Gazette no. 362 of 29 July 1999

[2] Decision no. 105 of 13 July 1998, published in the Official Gazette of Romania, Part I, no. 263 of 15 of July 1998, see also Decisions No 43 of 8 of July 1993 and No 718 of 29 of December 1997, published in the Official Gazette of Romania, Part I, no. 175 of 23 of July 1993 and namely No 396 of 31 of December 1997.

international law, including the principle of sovereignty and territorial integrity of States". In conjunction with the statement according to which the ratification of the Charter would require the revision of the Constitution regarding the official language (Article 13), the Court noted the provisions of paragraph 6 of the preamble of the convention, text according to which "the protection and encouragement of regional or minority languages must not be done at the expense of official languages and the need to acquire them". Likewise, Article 8 (1) expressly enshrines, in matters of education, the possibility of taking measures in areas where regional or minority languages are used, "without prejudice to the teaching of the official language(a) of the State". As for the argument invoked in the objection of unconstitutionality in the sense that the ratification of the Charter would defeat the principles of equality and non-discrimination in relation to other Romanian citizens, enshrined in Article 6 (2) of the Constitution, the Court observed that in Article 7 of the Charter, in paragraph 2, second sentence, it was specified that "The adoption of special measures in favor of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population or which take due account of their specific conditions is not considered to be an act of discrimination against the users of more widely-used languages". This provision must also be related to the broad possibility, offered by several provisions of the Charter, for each State-party to opt for the most suitable measures from a diverse and gradual range of measures.

The CCR concluded that the ratification of the European Charter of Regional or Minority Languages did not imply the revision of the Constitution. However, the CCR held that "this, of course, implies the obligation of the Government to ensure, through the possibilities it leaves to the States-parties, the choice, among the alternative measures provided, of those that are in compliance with the Constitution and to make the necessary reservations within the framework allowed by the Charter, ensuring, at the same time, compliance with the limits of the powers provided by Article 114 (1) of the Constitution". The Court raised awareness on the fact that "the ratification ordinance would be subject to parliamentary scrutiny which must be submitted, according to Article 2 of the Law regarding the empowerment of the Government to issue ordinances, to the Chamber of Deputies and the Senate for approval, according to the legislative procedure, until the resumption of Parliament's work. Furthermore, it may also be subject to the concrete, posterior, constitutional review, through the exception provided for in Article 144 c) of the Constitution, as well as, indirectly, to the abstract, *a priori* review carried out over the law approving the ordinance, in the event of an objection of unconstitutionality, according to Article 144 a) of the Constitution".

The latter recitals of the CCR seem particularly relevant to us, which rule both on the *a priori* and *a posteriori* review over the laws that ratify international treaties (in this case, in fact, a law approving a government ordinance of ratification). However,

it is not clear what is the extent and what are the limits of such review, although, as can be seen, the CCR invested in and practically reviewed an international treaty (by way of reviewing the law empowering the Government to ratify that international treaty).

As for the *a posteriori* review, we hold Decision No 47/1996[1], by which the CCR rejected as manifestly unfounded the exception of unconstitutionality of the provisions of Law No 30/1994 regarding the ratification of the Convention for the protection of human rights and fundamental freedoms and the additional protocols to this convention. Apart from the aspects of extrinsic unconstitutionality, the CCR also responded to substantive challenges, which aimed at the inclusion in the law of the provisions of Article 3, according to which the individual appeal before the European Commission of Human Rights and the European Court of Human Rights concerned only the cases in which the violation of the rights guaranteed by the convention occurred after the entry into force of the convention and its protocols mentioned in the provisions of this article. CCR considered that these challenges were not well-founded, "*as the application of international jurisdiction for the cases prior to accession infringes the principle of non-retroactivity of the law, provided for by Article 15 (2) of the Constitution. (...) In principle, the liability of the State for compliance with the obligations stemming from an international convention cannot be engaged for facts prior to the convention. Otherwise, it would mean that the State is liable for complying with an obligation, prior to its establishment*". Likewise, the CCR held that "*Article 3 of Law No 30/1994 cannot be considered as violating the constitutional obligation of good faith provided for in Article 11, in the application of international conventions or the provisions of Article 20 of the Constitution, regarding the priority over national laws of international treaties regarding fundamental human rights. (…) Furthermore, Article 21 of the Constitution, regarding free access to justice, is applicable only to national jurisdictions, according to the territorialism principle of constitutional law, so that, for this reason, it cannot be applicable to international courts*."

The few decisions pronounced in the first 10 years of functioning of the CCR are not likely to clarify or establish a clear conception regarding the constitutional review of international treaties. This experience, together with the comparative law/experience of other Courts and especially the amendments made when the revision of the Constitution regarding Romania's "connection" to the European and international normative system, determined the rethinking, on the occasion of the same revision, of the powers of the CCR in terms of the introduction of the constitutional review of international treaties apart from the review of laws before promulgation.

[1] Official Gazette no. 293 of 19 of November 1996.

Thus, in 2003, it was enshrined a power of an *a priori* review of international treaties before ratification by Parliament [currently Article 146 b) of the Constitution]. Ruling, by Decision No 148/2003[1], on these amendments, the CCR examined the proposal to extend its competence in the context and in relation to the expected accession of Romania to the EU, as well as the consequences produced by such accession. According to the Court, the first consequence is the integration of the acquis communautaire into national law and the establishment of the relationship between the community normative acts and national law. In this context, positioning itself regarding the relations between national law and Union law, the CCR held that "*the Member States of the European Union understood to place the acquis communautaire - the constitutive treaties of the European Union and the regulations derived from them - on an intermediate position between the Constitution and the other laws, when it comes to binding European normative acts*." This conception was interpreted as being a particular enforcement of the provisions of the current Article 11 (2) of the Constitution, according to which "*Treaties ratified by Parliament, according to the law, are part of national law*." The introduction into the national legal system of only those norms that infringe the Constitution appears, in this light, within the logic of the CCR, as having been carried out "*for the purpose of integrating this European concept into the Romanian Constitution*", with the consequence of supplementing the provisions of Article 11 with a new paragraph, according to which "*If a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution*." Following the same logic, the Court considered that in order to ensure this constitutional provision an operational nature, it was proposed to introduce another provision, contained in Article 144 a[1]), according to which the Constitutional Court "*shall adjudicate on the constitutionality of treaties or other international agreements, upon notification by one of the presidents of the two Chambers, a number of at least 50 deputies or at least 25 senators*". As for the new power, the CCR held that "*international treaties are, in general, an appropriate field for the reviewing procedure of the Constitutional Court. Likewise, it is reasonable that the procedure of the constitutionality of the treaties be clarified before their entry into force, through the specific procedures of an a priori review*."

By adopting the revision law of the Constitution, the aforementioned provisions were incorporated into the Fundamental Law, and the procedural aspects were developed in Law No 47/1992 on the organization and functioning of the Constitutional Court[2], which was amended in this regard after the revision (Articles 24-26 of the law). Further, we will analyze the constitutional and legal framework thus created.

[1] Official Gazette no. 317 of 12 of May 2003.
[2] Republished in the Official Gazette no. 807 of 3 of December 2010.

2.2. Analysis of the Normative Framework in Force

According to the Constitution in its current wording, the constitutionality of treaties can be reviewed by the Constitutional Court, before ratification, under Article 146 b) of the Constitution, according to which the CCR "*shall adjudicate on the constitutionality of treaties or other international agreements, upon notification by one of the presidents of the two Chambers, a number of at the least 50 deputies or at least 25 senators*".

Likewise, if the constitutionality of the international treaty or agreement has not been found according to Article 147 b), it may be subject to an exception of unconstitutionality, a conclusion resulting from the *per a contrario* interpretation of the provisions of Article 147 (3) first sentence of the Constitution, according to which "*if the constitutionality of a treaty or international agreement has been found according to Article 147 b), such a document cannot be the subject of an objection of unconstitutionality*". The provisions of Article 40 of Law No 590/2003 on treaties, which, referring to the *a priori* review of international treaties/agreements, establishes in paragraph (4) that "*The provisions of this Article do not affect the procedures for reviewing the constitutionality of laws and Government ordinances, provided by the law on the organization and functioning of the Constitutional Court. In the event that, in carrying out its powers of constitutional review, the Constitutional Court decides that the provisions of a treaty in force for Romania are unconstitutional, the Ministry of Foreign Affairs, together with the ministry or institution whose competences lie in the main area regulated by the treaty, will take steps, within 30 days, to initiate the necessary procedures in order to renegotiate the treaty or terminate its validity for the Romania or, as the case may be, in order to revise the Constitution.*" The reference to treaties and ratification laws for treaties as a subject-matter of the *a posteriori* review can be observed under this aspect.

Also, the ratification laws can be subject to the *a priori* constitutional review, like any other law adopted by the Parliament, but it is not clear whether such review would also extend to the ratified treaty.

As for the subject-matter of the constitutional review, both constitutional texts refer to "*treaties or other international agreements*", in which sense the provisions of Article 1 a) of Law No 590/2003 on treaties[1] are incident, according to which "*For the purposes of this law, by: a) treaty is understood the legal act, regardless of its name or form, which records in writing an agreement at the State level, at the governmental level or at the departmental level, with the aim of creating, amending or to ceasing legal or other rights and obligations, governed by public international law and recorded in a single instrument or in two or more related instruments*". Article 1 b) of Law No 590/2003 establishes that "*b) the conclusion of treaties means the sequence of stages that must be followed, the set of*

[1] Official Gazette no. 23 of 12 of January 2004.

activities that must be carried out, as well as the set of procedures and rules that must be followed so that the treaty enters into force for Romania".

However, we note that both Article 11 (3) of the Constitution, as well as article 24 of Law No 47/1992 refers to treaties/agreements subject to ratification by Parliament, hence the conclusion that only international treaties or agreements subject to ratification by Parliament can be subject to such review, and not those signed at governmental level that do not fall under the provisions of Article 19 (1) of Law No 590/2003[1], nor the treaties signed at departmental level, subject to approval by Government decision. The conclusion in the sense of this approach to the subject-matter of constitutional review is also endorsed by Article 40 (1) of Law No 590/2003, laying down that "*After the agreement or adoption of the treaties provided for in Article 19 (1), at any stage of their conclusion, any of the presidents of the two Chambers of the Romanian Parliament or a number of at least 50 deputies or at least 25 senators may request the Constitutional Court's opinion regarding the compliance of the treaty provisions with the Constitution of Romania*." A distinction under this aspect is also enshrined in Article 91 (1) of the Romanian Constitution, which refers to the powers of the President of Romania in foreign policy, according to which "*The President shall, in the name of Romania, conclude international treaties negotiated by the Government, and then submit them to the Parliament for ratification, within a reasonable time limit. The other treaties and international agreements shall be concluded, approved, or ratified according to the procedure set up by law*."

As for **the subjects of the referral**, within the review of the treaty before the ratification by the Parliament, only the presidents of the two Chambers of the Parliament, at least 50 deputies or at least 25 senators, can refer to the CCR. It should be noted the exclusive parliamentary origin of the referral to the Constitutional Court, which supports the conclusion that the moment when it can be formulated is that of the investiture of one of the two Chambers of the Parliament with the draft

[1] "*(1) The following categories of treaties shall be submitted to the Parliament for ratification by law:*
a) treaties at the State level, whatever their regulatory field;
b) treaties at the governmental level that refer to political cooperation or that involve commitments of a political nature;
c) treaties at the governmental level that refer to military cooperation;
d) treaties at the governmental level that refer to the State territory, including the legal regime of the State border, as well as to the areas over which Romania exercises sovereign rights and jurisdiction;
e) treaties at the governmental level that refer to the status of persons, fundamental human rights and freedoms;
f) treaties at the governmental level that refer to participation as a member in international intergovernmental organizations;
g) treaties at the governmental level that refer to the assumption of a financial commitment that would impose additional burdens on the State budget;
h) treaties at the governmental level whose provisions make it necessary, for application, the adoption of new normative provisions having the legal force of law or of new laws or the amendment of the laws in force and those which expressly provide for the requirement of their ratification."

law for the ratification of the treaty. As for the *a posteriori* review, it follows the rules regarding the settlement of the exception of unconstitutionality laid down in Article 29 (1) and (2) of Law No 47/1992, which means, in essence, the access of any person to constitutional justice to challenge the laws ratifying international treaties.

With reference **to the effects of the decisions** issued by the CCR within this framework, we consider it important to distinguish between the general effects of all the decisions of the Constitutional Court (*erga omnes* binding nature also for the future), regardless of the specific competence in the exercise of which they were pronounced, and the specific effects, which personalize the decisions issued within the review of international treaties/agreements.

As for the specific effects, these are laid down by the provisions of Article 147 (3) of the Constitution, Article 26 (3) of Law No 47/1992 on the organization and functioning of the Constitutional Court and Article 40 (3) and (4) of Law No 590/2003 on treaties, in which sense we further distinguish. Thus, in the *a priori* review: the treaty or international agreement found unconstitutional shall not be ratified [Article 147 (3) of the Constitution and Article 26 (3) of Law No 47/1992]; "*if the treaty comprises provisions contrary to the Constitution of Romania and it is not possible to renegotiate the treaty, and in the case of multilateral treaties, nor to formulate reservations, the draft normative act of ratification, approval, accession or acceptance shall be promoted only after the revision of the Constitution*" [Article 40 (3) of Law No 590/2003]; if an international treaty or agreement was considered constitutional according to Article 146 b) of the Constitution, republished, this could not be the subject of an exception of unconstitutionality [Article 147 (3) of the Constitution and Article 26 (3) of Law No 47/1992]. Within the *a posteriori* review: "*In the event that, in carrying out its powers of constitutional review, the Constitutional Court decides that the provisions of a treaty in force for Romania are unconstitutional, the Ministry of Foreign Affairs, together with the ministry or institution whose competences lie in the main area regulated by the treaty, will take steps, within 30 days, to initiate the necessary procedures in order to renegotiate the treaty or terminate its validity for the Romania or, as the case may be, in order to revise the Constitution*" [Article 40 (4) of Law No 590/2003].

3. Why a "Purely Decorative" Power?

A first reason for this statement concerns the obvious facts: even if two decades have passed since the establishment of this power of the CCR, the Court has not been referred to with the constitutional review of any treaty before ratification.

As for the *a posteriori* review, there is no significant case-law either in terms of volume or effects. Thus, the CCR ruled on an international treaty by Decision No

1014/2012[1], when it rejected, as unfounded, the exception of unconstitutionality of the provisions of Law No 111/2008 for the ratification of the Extradition Treaty between Romania and the United States of America, signed in Bucharest on 10 of September 2007. The Court held that «the use of the term 'criminal' in the preamble of the treaty does not mean defeating the presumption of innocence enshrined in Article 23 (11) of the Constitution, but serves to confine the subject-matter of the treaty, expressing the concern of the two signatory States to counter the criminal phenomenon, which has seen a particular intensification at the international level, especially a certain offensive of the organized crime. Extradition constitutes an act of interstate judicial assistance in criminal matters that seeks the transfer of a person prosecuted or criminally convicted from the domain of judicial sovereignty of one State to the domain of another State. Therefore, the provisions of Article 1 of the treaty in conjunction with the phrase "treaty for the extradition of criminals" in its preamble do not violate the provisions of Article 11 (3) of the Fundamental Law, but represents the enforcement at the legislative level of the provisions of Article 19 (2) of the Constitution, according to which "[...] Romanian citizens can be extradited based on the international agreements Romania is a party to, according to the law and on a mutual basis". » Likewise, the CCR noted that, regarding the provisions of Article 22 of the Extradition Treaty between Romania and the United States of America, these do not violate the principle of non-retroactivity of the law provided for by Article 15 (2) of the Constitution, since, according to Article 23 (3) and (4) of the treaty, it applies to extradition procedures in which extradition applications were submitted to the courts of the requested State after the date of its entry into force. However, the rules of procedure are of immediate application, the moment of the crime being irrelevant. "The court concluded that, for the reasons shown, "*the impugned provisions of the law do not infringe the provisions of Article 11 (2), Article 19 and Article 78 of the Constitution*." In another decision[2], the CCR rejected, as inadmissible, the exception of unconstitutionality of the provisions of Decree No 186/1961 regarding the accession of the Romanian People's Republic to the Convention for the recognition and enforcement of foreign arbitral sentences, adopted in New York on 10 of June 1958, noting that the author of the exception relied his criticism on the hypothesis that the court would consider that the application of the Convention for the recognition and enforcement of foreign arbitral sentences excludes the burden of proving the fact that the foreign arbitral sentence is final according to the national law in which the sentence had been issued, obligation provided by Article 167 (1) c) and of Article 171 of Law No 105/1992 on the regulation of private international law relationships.

[1] Official Gazette no. 882 of 22 of December 2012.
[2] Decision No 1491/2011, *Official Gazette no. 68 of 27 of January 2012.*

Therefore, there is no relevant practice on this matter. The only conclusion could look at the subject-matter of the review as it was understood by the Court at the time of settling the case cited above, namely that it referred to the content of the treaty itself, and not only to the ratification law, which raised some questions in terms of the limits of the power of the CCR.

However, taking into account to the recurring discussions regarding the relationship between national and EU law, it would have been of interest and importance, for example, to verify at least the Treaty of Lisbon, subject to the ratification procedure by the Romanian Parliament, through Law No 13/2008 for the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 of December 2007[1] (hereinafter the Law for the ratification of the Treaty of Lisbon). However, examining the procedural stages of the adoption of this law, as it results from the ratification law file, published on the public page of the Chamber of Deputies[2] and the transcript of the debates and adoption of the draft law on the ratification of the Treaty of Lisbon[3], we find that there was no moment in discussion the referral to the CCR or any issue of a constitutional nature. The Treaty of Lisbon was implemented in an emergency parliamentary procedure, no constitutionality issues were raised, and no limits related to national or constitutional identity were opposed. The Constitutional Court was not referred to rule upon the constitutionality of the Treaty.

We emphasize these aspects not because we consider that, in itself, the Treaty of Lisbon would have raised constitutionality issues, but to underline that such an analysis would perhaps have been able to clarify aspects that remained latent, regarding the relationships between national law and EU law, which broke out in a conflicting manner through an atypical decision of the CCR[4], followed by reactions of the CJEU[5]. It is relevant the example of other Courts, which examined the constitutionality of the Treaty of Lisbon, such as the Federal Constitutional Court of Germany, a benchmark court for the European constitutional review and beyond. Ruling upon the compliance of the Treaty of Lisbon with the German Constitution, this court focused its decision "on the relationship between the democratic system required by the Constitution at the federal level and the level reached by carrying out autonomously the power at the European level". The Court held that "the problem of the structure of the European Union is at the center of the constitutional analysis: the Union has a power of political action - not least through the Treaty of

[1] Published in the Official Gazette, Part I, no.107 of 12 of February 2008.
[2] *http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=9041&cam=2.*
[3] *http://www.cdep.ro/pls/steno/steno.stenograma?ids=6430&idm=3&idl=1.*
[4] Decision No 390/2021.
[5] C-430/21 – RS, https://curia.europa.eu/juris/liste.jsf?num=C-430/21.

Lisbon - which has grown continuously and appreciably, so that, if an analogy is made with the States, it can be said that the European Union is similar to a federal state in certain political areas. Only the decision and appointment procedures mostly correspond to the model of an international organization, in the case of the analogy with international law; The European Union continues to have a structure that, in essence, complies with the principle of sovereign equality between States. If within the limits of a European federal State it is not possible for a unitary European people, as the subject of legitimization, to be able to politically effectively formulate a majority will, according to the principle of equality, it means that the peoples of the European Union within the Member States will be the determining carriers of public power, including the authority of the Union. For the accession to a European federal State, in Germany it would be necessary to rewrite the Constitution, to expressly give up to the sovereign statehood guaranteed by the fundamental law. In the present case, there is no such act"[1].

4. Proposals to Amend the Constitutional Framework of Reference

Taking account of the very restrictive framework of the referral, as enshrined in Article 146 b) of the Constitution, it is very possible that this power will continue to remain a decorative one, in which sense the concerns of amending the constitutional framework of reference are relevant.

In this regard, we note the initiative for the revision of the Constitution in 2014, when it was proposed to amend the provisions of Article 146 b) of the Constitution regarding the referral to the Constitutional Court for carrying out the constitutional review of treaties or other international agreements. This would have been carried out "ex officio or upon notification by one of the presidents of the two Chambers, a number of at least 25 senators or at least 50 deputies", being borrowed, though unfortunately, the expression used within the constitutional review of the initiatives for the revision of the Constitution/revision law of the Constitution adopted by the Parliament.

The CCR ruled that the proposed amendment did not call into question the limits of the revision, noting that "the proposed text is however deficient, a clarification being necessary in the sense of the circumstances of the "ex officio" referral in relation to the referral "by one of the presidents of the two Chambers, a number of at least 25 senators or at least 50 deputies". The use of the conjunction "or" in the drafting of

[1] Judgment of 30 of June 2009 – 2 be 2/08, 2 be 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, in the Selection of Decisions of the Federal Constitutional Court of Germany, available here *https://www.kas.de/c/document_library/get_file?uuid=a9bd5fee-847e-3a3f-e251-4b909eaec632&groupId=268877*, pp. 609-616.

the text leads to the interpretation that it is about alternative methods of referral, which requires the establishment of the concrete way in which the notification of the Constitutional Court will be carried out ex officio, considering the fact that, compared to the other two powers in which the review of the Court shall be carried out ex officio, in this situation there are alternative ways of referral». Therefore, the Court held that "it is necessary to reformulate the proposed text, depending on the purpose envisaged by the initiators of the proposal for the revision of the Constitution, and with the enforcement of the necessary correlations. Thus, if the objective in mind is that of establishing the constitutional review as a mandatory step in the procedure for ratifying treaties or other international agreements, the corresponding legislative solution is to regulate a systematic and ex officio constitutional review. In this situation, it would no longer be necessary to establish an alternative way of referral, namely by qualified subjects, but only the regulation at the infraconstitutional level of the mechanism by which treaties and international agreements are sent to the Constitutional Court to rule upon them. Such a regulation would not be likely to exclude the possibility of the authorities empowered with the procedure of negotiation/conclusion/ratification of treaties and international agreements to formulate criticisms of unconstitutionality, they will be asked for their viewpoints accordingly, an aspect whose regulation it is also at the level of the organic law."

Likewise, the CCR held that «The adoption of this legislative solution requires the compliance of the provisions of Article 146 b) with those of Article 147 (3) of the Constitution, namely the elimination of the hypothesis in which the international treaty or agreement was not subject to an a priori constitutional review. Following the logic of the constitutional norms, the elimination of this hypothesis would have the effect of excluding international treaties or agreements from the a posteriori review, they no longer being able to form the subject-matter of exceptions of unconstitutionality under the conditions of Article 146 d) of the Constitution. Of course, in itself, this legislative solution is also debatable, as long as certain aspects of unconstitutionality can only be noticed in the practice of applying the respective provisions, namely after the ratification of the international treaty." Starting from the idea that "Insofar as the aim taken into account is only that of widening the possibility of referral to the Constitutional Court, one of the solutions would be the one proposed by the initiators, but with the circumstances noted above", the CCR also offered an alternative, namely "expanding the scope of the subjects that can refer to the Constitutional Court, by including public authorities that have specific powers within the procedure of negotiation/conclusion/ratification of treaties.", as well as, possibly, the People's Advocate in consideration of his constitutional role. Finally, the CCR held that "in order to bring into line Article 146 b) and Article 11 (3) of the Constitution, it is necessary for the constitutional text to provide for the

stage (within the process of negotiation/conclusion/ratification of treaties) in which the Constitutional Court can be referred. Such clarification would lead to greater clarity of the constitutional norm, which at this moment any mention of this aspect is made"[1].

As far as we are concerned, we consider the solution of the *ex officio* referral to be objectionable, if there is indeed the possibility of expanding the scope of the subjects that can notify the Court in order to carry out this power. Moreover, we consider that the legislator also made a terminological confusion, being rather, in the intention of law-making, about a systematic review and not "ex officio", in the meaning of this phrase within the review of the initiatives/laws for the revision of the Constitutions.

For a desirable expansion of the subjects that can refer the Court, we note the procedural stages and authorities mentioned in a more recent decision of the CCR[2]: "the treaties to which Romania wishes to become a party to are negotiated by the Government, then concluded by the President and, in the last stage, ratified by the Parliament. Therefore, it is a question of distinct, clearly delimited moments, complying with the different powers, being in turn clearly delimited, of the authorities that represent the legislative and executive power, as well as, within the executive power, of the President of Romania and the Government". The CCR held that "regarding the authority that carries out the legislative power, the constitutional norms are clear, the power of the Parliament being exclusively subject to the ratification stage. (…) Therefore, it is an act of will be expressed through a legal act so that the State shall be fully legally bound by the provisions of a treaty. As for the executive power and the existing relationships between the authorities that represent it, it has been noted in the specialized literature that the constitutional text does not use the terminology of signing treaties, but of concluding treaties, a power that belongs exclusively to the President of Romania. To conclude a treaty, negotiation is needed, and negotiation involves both a technical dimension, which entails the establishment of powers within the Government, and a political one, which also entails the power of the President of Romania. Hence, the decrees of the President issued in carrying out the power in question are countersigned by the Prime Minister. (…) In relation to the reference constitutional norms, as they are developed in the cited legal norms, it follows that, if regarding the expression of consent with reference to treaties we can speak of a shared power of both the legislature and the executive, depending on the category of treaties, regarding the negotiation and signing of treaties, the power is exclusive. This belongs to the sphere of the executive power, which, through the competent authorities, carries out the

[1] Decision No 80/2014, Official Gazette no. 246 of 7 April 2014.
[2] Decision No 680/2020, Official Gazette no. 957 of 19 of October 2020.

constitutional powers to represent the Romanian State, namely, to carry out the foreign policy of the State. » Likewise, the CCR noted, in the end (paragraph 44) that "the regulation by the framer of certain clearly delimited powers of the legislative and executive powers in the field of foreign policy and the conclusion of international treaties also entails the dialogue between them in the implementation of policies and strategies in the field. In application of Article 1 (4) of the Constitution, which regulates both the separation and the balance of the State powers, the legislative and executive authorities are called to collaborate, with constitutional loyalty. This requires, in terms of foreign policy, the identification and realization of those solutions that respond to the economic, social, and cultural needs of the Romanian State." In this way, there are subjects of referral from both the legislative and executive authority, necessary to be involved in carrying out the power of the *a priori* review of international treaties by the CCR. Even more so, we say, given this shared power and the common obligation of all the authorities involved, it is imperative that they all could notify the CCR for the constitutional review of international treaties.

5. Conclusions

Currently, the "keys" connecting the national and international legal order are Articles 11, 20 and 148 of the Constitution, among which Article 11 represents the general framework, which regulates the ratification of international treaties, and Art. 20 and 148 comprise special rules, applicable to international treaties in the field of human rights (Article 20) and EU acts (Article 148). In the internal legal order, international treaties contrary to the Constitution are, theoretically, prevented from entering, as far as, according to paragraph Article 11 (3), "if a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution" and, according to Article 147 (3) final sentence of the Constitution, "the treaty or international agreement found to be unconstitutional shall not be ratified". However, the brief considerations contained in this study emphasize the fact that, although there are constitutional instruments to ensure the application of these veritable "keys" of review, their regulation is restrictive and deficient, causing the constitutional review of international treaties in Romania to be practically non-existent.

As an important factor that determines this situation is the legislator's option regarding the subjects that can refer to the CCR, we believe that a constitutional review is necessary in this regard. Likewise, the constitutional texts should be clear and expressly state the forms of constitutional review of international treaties/agreements, the extent of this review within each of the powers of the CCR

being incident, as well as the scope of the international treaties that can be subject to the constitutional review, to avoid divergent interpretations. This conclusion is all the more necessary since the Constitution of Romania grants a special status to certain categories of treaties, namely those regarding human rights, as well as the founding treaties of the European Union. Thus, the provisions of Article 20 of the Constitution of Romania establish the supra-legislative position of international human rights treaties Romania is a party to, their constitutional interpretive value, as well as their priority, unless the Constitution and national laws comprise more favorable provisions. The provisions of Article 148 of the Constitution of Romania enshrine in paragraph (2) the priority of the provisions of the founding treaties of the European Union, as well as of the other binding community regulations, in relation to the provisions contrary to national laws - in this context, we take account the provisions of the Charter of Fundamental Rights of the European Union. These treaties/agreements may also be subject to constitutional review, but taking into consideration the constitutional particularities.

Especially regarding the relationships between the national legal order and that of the European Union, the regulation of effective instruments for reviewing treaties at the internal level would ensure the support of "communication" between the CCR and the CJEU in order to achieve harmonization and eliminate the asperities that can result in disputes. In this way, the dialogue of the Courts as a centripetal force of European integration would be strengthened.

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