ALINA-LIVIA NICU*

The Practice of the Constitutional Court of Romania Concerning Migration and Refugee Affairs

ABSTRACT: *This study analyses the jurisprudence of the Constitutional Court of Romania regarding the legal norms of legislation concerning the status and regime of refugees in Romania. The paper aims at (1) presenting the opinions expressed by the Constitutional Court of Romania in its jurisprudence regarding migration and asylum; (2) assessing whether the jurisprudence of the Constitutional Court of Romania on migration and asylum is drawn up about the limits of the competences of the European Union and member states; and (3) exploring whether the Constitutional Court of Romania linked the problems of migration or asylum to the problem of constitutional identity. The concept of constitutional identity and its presence within the activities of the Romanian Constitutional Court are briefly outlined. THE number of notifications to the Constitutional Court of Romania with the object of derogation from the unconstitutionality of certain provisions of the legislation concerning the status and regime of refugees in Romania was minimal from 22 December 1989 to 30 June 2023. Consequently, only a few laws exist in this area. There was only one referral to the Constitutional Court after Romania joined the European Union, which was completed in 2019 with the adoption of the admission decision.*

KEYWORDS: Constitutional Court of Romania, jurisprudence, emigrants, refugees, asylum, legislation

1. Introduction

The most important traits of Romanians are hospitality, generosity, and kindness in a hierarchy that includes dignity and courage. Romanians emphasise being friendly and generous with their peers in times of joy and trouble. The closest

* Full-time Professor, Phd, habil., University of Craiova, Faculty of Law, nicu1940ion@gmail.com, ORCID ID: 0009-0007-3965-5134 https://orcid.org/0009-0007-3965-5134

https://doi.org/10.47078/2024.1.281-309

tragic event that activated the potential energy of the Romanian people happened on 6 February 2023, when an earthquake of 7.8° on the Richter scale shook southern and central Turkey, respectively northern and western Syria. On that occasion, the Romanian people mobilised to help the people who suddenly lost everything and acquired, independent of their will, the status of victims. The press wrote, 'Mobilization of forces for the victims of Turkey and Syria. Romania is sending tons of aid to those affected by the earthquakes.'[1]

The evolution of social relations in Romania after 22 December 1989 brought new topics to the fore. Thus, the departure of some Romanians to work abroad, with or without the intention of settling in their respective countries, generated a reduction in the labour force and the need to bring in workers from other countries. Consequently, regulations regarding the status of foreigners in Romania have become a topic of interest for Romanian and foreign entrepreneurs as well as the national legislature. In addition, the tragic events that took place on the Romanian border starting on 24 February 2022 gave Romanians the opportunity to prove their hospitality and humanity to Ukrainian refugee citizens. On 25 February 2022, the media informed us[2] that 'Waves of Ukrainian refugees continue to enter Romania at various border crossing points.' At Siret Customs, the refugees were welcomed by volunteers with food, fruits, sweets, water, and warm doughnuts prepared by nuns from Putna Monastery. On 4 March 2023, under the title 'Refugee in Romania. How do the people and the authorities still help the Ukrainians after a year of war' the media specified,[3] 'More than 3 million refugees from Ukraine transited Romania to reach other European countries. In February 2023, over 109 thousand were settled in Romania. The refugees are helped both by civil society, volunteers and the authorities.' Supporting Ukrainian refugees continues to be a reality that proves that both citizens and the Romanian state know how to behave with friendship and respect towards any citizen of the world. The regulations regarding the status and regime of refugees in Romania have transformed from potential energy to kinetic energy, defining the portrait of social relations and demonstrating the wisdom of the popular author who synthesized the essence of friendship in the verb: 'A friend in need is a friend indeed.'

Since it concerned new aspects of social practice, the regulations had to be aligned with the new demands of objective reality. Consequently, it appears to be an objective necessity to present the evolution of the legal framework regarding migration and asylum in Romania between 22 December 1989 and June 2023. Although it may seem too broad, this presentation is necessary to understand why there are so few cases of referral to the Constitutional Court regarding exceptions

1 Niculae and Mîrza, 2023.
2 Angel, 2022.
3 Horșia, 2023.

to the legal rules of normative acts that regulate migration and the status of foreigners in Romania.

2. The evolution of the legal framework regarding migration and asylum in Romania from 22 December 1989 – June 2023

17 July 1991 constituted an important moment in the evolution of Romanian regulations regarding migration and asylum. It was published in the Official Monitor of Romania[4] Law No. 46/1991 for Romania's accession to the Convention on the Status of Refugees, as well as to the Protocol on the Status of Refugees. Romania's accession to international normative acts has generated a series of obligations for the country. The adoption of certain legislative acts aimed at harmonising relevant domestic law with international law has been the first step in fulfilling these obligations. The first normative act was adopted by the Government of Romania because of the first attempt to implement Law No. 46/1991 and was published in the Official Monitor of Romania, Part I, No. 39 on 11 February 1994. It is about Government Decision No. 28 of 27 January 1994 regarding the schooling of asylum seekers and refugees in Romania, whose role was to regulate the aspects regarding the schooling 'during pre-university studies' of the two categories of persons 'Until the adoption of the law on the status and regime of refugees in Romania.'[5]

1996 is the year in which the legislature fulfilled its obligation to adopt a law regarding the status and regime of refugees in Romania. This is about Law No. 15 of 2 April 1996 regarding the status and regime of refugees in Romania.[6] The Romanian government decided to facilitate the implementation of Law No. 15/23/1996. Decision No. 1.182 of 13 November 1996, for the application of Law No. 15/1996 regarding the status and regime of refugees in Romania.[7] Social practice required that the law be adopted the year before being amended by the Emergency Ordinance of the Romanian Government No. 47 of 2 September 1997 to remove the link between the level of salary, insurance, or social assistance rights and the gross minimum basic salary per country.[8] Thus, Article 15 Paragraph 1, which regulated the rights of refugees, was modified in the sense that the reimbursable aid, regulated in letter i) for the case that 'for objective reasons,' the refugee 'is deprived of the necessary means of subsistence,' was resized to the level of '172,500 lei per month, which is indexed with the indexation coefficients established for wages on the whole economy, after September 30, 1997,' previously this aid was

4 Official Monitor of Romania, Part I, No. 148.
5 Art. 1 of the G.D. No. 28/1994.
6 Published in the Official Monitor of Romania, Part I, No. 69 of April 5, 1996.
7 Published in the Official Monitor of Romania, Part I, No. 307 of November 26, 1996.
8 Published in the Official Monitor of Romania, Part I, No. 231 of September 4, 1997.

of only a 'minimum wage.' This regulation was intended to improve the quality of life of refugees in Romania.

Decision of the Government of Romania No. 1,182 of 13 November 1996 was amended by Decision No. 322 of 20 April 2000 regarding the amendment and completion of Government Decision No. 1.182/1996 for the application of Law No. 15/1996 on the status and regime of refugees in Romania,[9] three articles being introduced,[10] articles by which the right of the refugee status applicant who 'does not have any material means' to benefit 'within the limits of existing possibilities' of 'meals and accommodation in a reception, sorting and accommodation centre' was regulated, specifying that

> The reception, sorting and accommodation centres will also be able to accommodate people who have acquired refugee status, in special situations, such as incapacity to work, families with many minor children, the elderly, etc. The accommodation will be done by charging rent at the level established for living spaces and property of the state.

These new regulations were intended to improve the quality of life of refugees in Romania.

The year 2000 brought the repeal of Law No. 15/1996 regarding the status and regime of refugees in Romania by Government Ordinance No. 102 of 31 August 2000.[11] This Regulation was amended by five legislative acts due to the evolution of social relations. As a result of this important change, on 1 December 2004, the text of Government Ordinance No. 102/2000 on the status and regime of refugees in Romania was republished in the Official Monitor of Romania, Part I, No. 1136.

In 2006, the Government Ordinance No. 102 of 31 August 2000 was repealed because of the adoption of Law No. 122 of 4 May 2006 on asylum in Romania[12] by the Romanian Parliament. It thus returned to the state of normality, in the sense that

> the legal regime of foreigners who request international protection in Romania, the legal regime of foreigners who are beneficiaries of international protection in Romania, the procedure for granting, termination and cancellation of international protection in Romania, the procedure for establishing of the member state responsible for analysing the asylum application, as well as the conditions for granting, excluding and terminating temporary protection

9 Published in the Official Monitor of Romania, Part I, No. 179 of April 25, 2000.
10 Arts. 6(1), (2) and (3).
11 Published in the Official Monitor of Romania, Part I, No. 436 of September 3, 2000.
12 Published in the Official Monitor of Romania, Part I, No. 428 of May 18, 2006.

are regulated by legal rules adopted by the legislative body, not the executive body, which previously enacted through ordinances based on the legislative delegation according to the provisions of Article 115 from the Constitution of Romania.[13] Law No. 122 of 4 May 2006 is the normative act through which the provisions of the community regulations relating to asylum[14] were transposed into

13 Regarding the ability of the Government to legislate through acts with the legal force of law, Art. 115 of the Constitution of Romania Available at: https://www.ccr.ro/en/legal-basis/ (official translation), specifies:
'Art. 115 – Legislative delegation
(1) Parliament can pass a special law enabling the Government to issue ordinances in domains outside the scope of organic laws. (2) The enabling law shall expressly establish the domain and the date up to which ordinances may be issued. (3) If the enabling law so requests, ordinances shall be submitted to Parliament for approval, according to the legislative procedure, until the expiry of the enabling time limit. Failure to observe such limits entails discontinuation of the effects of the ordinance. (4) The Government can adopt urgency ordinances only in exceptional cases, the regulation of which cannot be postponed, and have the obligation to set forth the reasons for that urgency within their contents. (5) Urgency ordinances shall come into force only after their tabling for debate in an urgency procedure to the Chamber having the competence to be notified, and after it has been published in the Official Gazette of Romania. If not in session, the Chambers shall be convened within 5 days after tabling, or after forwarding. If within 30 days at the most after the tabling date, the Chamber thus referred has failed to decide on the ordinance, the latter shall be deemed approved and shall be sent to the other Chamber, which shall also decide in an urgent procedure. An urgent ordinance containing norms of the same kind as the organic law must be approved by a majority as stipulated under Art. 76(1) and (6) Urgency ordinances cannot be adopted in the field of constitutional laws, nor affect the status of fundamental institutions of the State, the rights, freedoms, and duties stipulated in the Constitution, the electoral rights, and cannot envisage any measures for the forcible transfer of assets into public property. (7) Ordinances referred to the Parliament are approved or rejected through a law which must also contain the ordinances that ceased to be effective according to paras. (3) and (8) Such law on approval or rejection shall regulate if such is the case, any necessary measures concerning the legal effects caused while the ordinance was in force.'

14 Following the legislative process on the website [Online]. Available at: https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=7044 (Accessed: 24 August 2023) it can be seen from the 'Explanation of reasons' document that through the drafting of the Law No. 122 of May 4, 2006 regarding asylum in Romania, the fulfillment of the commitment assumed by Romania regarding the alignment of Romanian legislation with the acquis communautaire in the field of asylum was pursued, being specified that the new normative act takes into account the need to transpose the following community acts into national legislation: Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0055 (official translation); Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003L0009 (official translation); Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [Online]. Available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32003L0086 (official translation); Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international

Romanian law and, simultaneously, the provisions of the legal norms of international law relating to the protection of refugees, also desiring to harmonise the legislation in the field in Romania with the provisions contained in the community acquis, taking into account the mechanisms established by the revised Dublin Regulation and the EURODAC system. As shown in the specialised literature,[15] citing the text of the law, 'We note, first of all, that the solution of the common applicable regulation was also chosen in Romania both asylum applications and refugee status, between which no distinction is made.' However, in the case of the legal standards set out in Law No. 122 of 4 May 2006, the evolution of social relations and problems to be solved in the field of social practice led to instability. Thus, from the moment of entry into force until now, the law has been modified by the government of Romania because it exercised the prerogatives resulting from the legislative delegation through five emergency ordinances and three simple ordinances. The Parliament itself considered it necessary to intervene with changes to the legal norms on asylum in Romania contained in Law No. 122 of 4 May 2006 and other regulations on migration and asylum through seven normative acts.[16]

protection and the content of the protection granted [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0083 (official translation). Also, in the 'Explanation of reasons' document, it is specified that the draft normative act is also carried out with the aim of creating the necessary legal framework i.e. establishing inter-institutional cooperation relations for the implementation of three community acts that 'do not require transposition:' Council Regulation (EC) No. 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000R2725 (official translation); Council Regulation (EC) No. 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No. 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002R0407 (official translation); Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003R0343 (official translation).

15 Vergatti, 2009, p. 178.

16 Law No. 347 of December 3, 2007 for the approval of Government Emergency Ordinance No. 55/2007 regarding the establishment of the Romanian Immigration Office through the reorganization of the Authority for Foreigners and the National Office for Refugees, as well as the modification and completion of some normative acts, published in the Official Monitor of Romania, Part I, No. 851 of December 12, 2007; Law No. 280 of December 24, 2010 for the amendment and completion of Law No. 122/2006 regarding asylum in Romania, published in the Official Monitor of Romania, Part I, No. 888 of December 30, 2010; Law No. 187 of October 24, 2012 for the implementation of Law No. 286/2009 regarding the Criminal Code, published in the Official Monitor of Romania, Part I, No. 757 of November 12, 2012; Law No. 18 of March 4, 2013 for the amendment of Law No. 122/2006 regarding asylum in Romania, published in the Official Monitor of Romania, Part I, No. 122 of March 5, 2013 ; Law No. 376 of December 19, 2013 for the modification and completion of some normative

All these regulatory measures of the Romanian Parliament and the Government prove, on the one hand, the permanent concern for a legal framework by practical needs, which allows the development of social relations in which people apply for refugee status and those who obtain this status feel comfortable, protected, supported, and safe; on the other hand, the permanent concern for the respective legal norms to be consistent with international law and European Union law in the field.

For the sake of scientific rigour, it is necessary to mention that in Romania, there has always been legislation on the regime of foreigners, alongside the legal framework on migration and asylum.[17]

3. National constitutional identity and the Constitutional Court of Romania

The concept of national constitutional identity is complex and important for social practice at both the European Union and national levels. This concept is particularly important for all persons who are residents of a member state of the European Union, given their rights and obligations arising from the quality of an EU citizen as well as those derived from Europe's citizenship, which complements national citizenship. Therefore, it is necessary to understand the content fully.

This need is not easy to satisfy because

> the national constitutional identity is a relatively new concept in the legal landscape of constitutional law, being at the centre of scientific

acts in the field of migration and asylum, published in the Official Monitor of Romania, Part I, No. 826 of December 23, 2013; Law No. 137 of October 15, 2014 regarding the approval of Government Ordinance No. 1/2014 for the amendment and completion of Law No. 122/2006 regarding asylum in Romania and Government Ordinance No. 44/2004 regarding the social integration of foreigners who have acquired a form of protection or a right of residence in Romania, as well as citizens of the member states of the European Union and the European Economic Area, published in the Official Monitor of Romania, Part I, No. 753 of October 16, 2014; Law No. 331 of December 16, 2015 for the amendment and completion of some normative acts in the field of foreigners, published in the Official Monitor of Romania, Part I, No. 944 of December 21, 2015.

17 Thus, after the events of December 1989, Law No. 25 of December 17, 1969, regarding the regime of foreigners in the Socialist Republic of Romania (published in the Bulletin Official No. 146 of December 17, 1969, and republish in the Bulletin Official No. 57 of May 18, 1972) by Law No. 123 of April 2, 2001, regarding the regime of foreigners in Romania (Published in the Official Monitor of Romania, Part I, No. 168 of April 3, 2001), repealed in turn by Emergency Ordinance No. 194 of December 12, 2002, regarding the regime of foreigners in Romania (published in the Official Monitor of Romania, Part I, No. 955 of December 27, 2002, republished, due to frequent changes, in the Official Monitor of Romania, Part I, No. 201 of March 8, 2004, and in the Official Monitor of Romania, Part I, No. 421 of June 5, 2008), which is in force, although it has undergone many changes.

> and doctrinal debates, being also present in the jurisprudence of the supreme courts, of the constitutional courts and in the judicial dialogue of them from different states[18]

and, as a result of

> this sustained dialogue between the constitutional courts as well as between them and the Court of Justice of the European Union (CJEU), the content, meaning and significance of the notion of constitutional identity is in full formation and continues to be affirmed, demanding a recognition and both jurisprudential and doctrinal consecration.[19]

An example of dialogue having as its subject the content of the concept of constitutional identity is the organization in Romania, on 12 April 2019, of the International Conference 'The National Constitutional Identity in the Context of European Law,' organized by the Constitutional Court of Romania, a conference attended by judges from the Constitutional Court of Austria, the Constitutional Court of Hungary, the Constitutional Court of Germany, the Constitutional Court of the Czech Republic, the Constitutional Court of Croatia, the Constitutional Court of Slovenia and the Constitutional Court of Romania. The debate started from the reality that the constitutional identity acquired, due to the existence of the European Union, 'a double perspective: the national one, specific to each member state of the European Union and the European one, established in the European Union treaties.'[20] On this occasion, the practitioners pointed out synthetically and expressively the social importance of the constitutional courts:[21]

> Only constitutional justice makes the Constitution a legal norm in the proper sense of the term, that is, a regulation with binding legal force. On the other hand, if it were not for constitutional justice, a Constitution would be nothing more than a simple recommendation

a constitutional court being the one that ensures that democracy is functional and does not turn into a dictatorship of the majority, the role of watching materialising in that

> when a constitutional court exercises control over the constitutionality of laws, it acts not only as a supreme guardian of the Constitution

18 Varga, 2019, p. 20.
19 Varga, 2019, p. 20.
20 Dorneanu and Krupenschi, 2019, p. 3.
21 Bierlein, 2019, p. 13.

> but also as a guardian of democracy. Constitutional control is therefore not only a legal function but also a democratic one.[22]

There is also another level of concern towards the concept of constitutional identity, namely, the relationship between constitutional identity and the commitments freely assumed by constitutional states by concluding international treaties, such as the United Nations Charter, the European Convention on Human Rights, or the Treaty regarding the European Union and more definite treaties, such as conventions for the avoidance of double taxation.[23]

To be able to analyse the concept of national constitutional identity and the role of the Constitutional Court of Romania in the process of defining this concept, it is necessary to specify that in Romania, the Constitutional Court does not have the competence to refer itself to carry out a preventive control of constitutionality within the procedure of ratifying a European treaty.[24] Thus, neither the Treaty of Romania's accession to the EU (2005) nor the Treaty of Lisbon (2007) was subject to a constitutionality check by the CCR. Therefore, the latter was deprived of the legal framework that other European constitutional courts had, which was necessary to carry out a constitutionality check from the perspective of the national constitutional identity.[25]

Reading the text of Article 4.2, the European Union Treaty, the question arises, also formulated in specialised literature,[26] who has the prerogative to determine the content of the concept of national constitutional identity? The response highlighted two possible approaches:[27] if this concept is considered as 'an autonomous legal concept, belonging to the European legal order', its interpretation would be the competence of the Court of Justice of the European Union, and if the concept is 'a legal concept integrated into national constitutional orders,' then each national constitutional court will have the prerogative to rule. The "open and continuous dialogue" of national constitutional courts with the Court of Justice of the European Union to reach a mutually agreed interpretation of the content of the national Constitutional identity, appears to be the only solution likely to prevent social blockage.[28] This solution is also foreshadowed by the interpretation[29] that Article 4.2 of the European Union Treaty would represent a reduction in the level of insistence and rigidity with which, before it entered into force, the European Union affirmed and imposed the concept of European constitutional identity. Regarding the constitutional identity of Romania, it is defined with the help of the

22 Bierlein, 2019, p. 14.
23 Paulus, 2019, p. 29.
24 Tănăsescu, 2010, p. 153.
25 Guțan, 2015, p. 181.
26 Varga, 2019, p. 21.
27 Guțan, 2015, pp. 175–176.
28 Mayer, 2009, p. 423.
29 Besselink, 2010, p. 48.

identity clause,[30] the eternity clause[31] and the integration clause,[32] which includes in its content 'subsidiarily a compliance clause.'[33]

The concept of national constitutional identity is used in several decisions without being expressly defined but none of the decisions related to legal norms regulating migration or asylum. From the point of view of its jurisprudence, it was stated that[34]

> The Constitutional Court of Romania has not succeeded, so far,[35] to capitalize, to the extent of potential and possibilities, the concept of national constitutional identity, among other things, and to prove

30 *Stricto sensu,* the identity clause is defined by the provisions of Art. 1(3) from the Constitution: 'Romania is a state of law, democratic and social, in which human dignity, the rights and freedoms of citizens, the free development of the human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and ideals Revolution of December 1989, and they are guaranteed.' [Online]. Available at: https://www.ccr.ro/en/legal-basis/ (official translation). *Lato sensu*, the content of the identity clause can include all the articles of Title I of the Constitution, the title called 'General Principles' and which includes articles from 1 to 14, Art. 61, which regulates the bicameral parliament, the articles relating to the executive power, and Art. 115 regarding legislative delegation, Art. 114 regarding the institution of government liability and the rules governing the way justice is organized and operated.

31 The eternity clause is defined by the provisions of Art. 152 of the Constitution: 'Art. 152 – Limits of revision
(1) The provisions of this Constitution regarding the national, independent, unitary, and indivisible character of the Romanian state, the republican form of government, the integrity of the territory, the independence of the judiciary, political pluralism, and the official language cannot be subject to revision. (2) Likewise, no revision can be made if it results in the suppression of the fundamental rights and freedoms of citizens or their guarantees. (3) The Constitution cannot be revised during the state of siege or the state of emergency, nor in time of war.'

32 The integration clause is provided for by Art. 148 of the Constitution: 'Art. 148 – Integration into the European Union
(1) Romania's accession to the constitutive treaties of the European Union, to transfer some powers to the community institutions, as well as to jointly exercise with the other member states the powers provided for in these treaties, is done by a law adopted in the joint session of the Chamber of Deputies and Senate, with a two-thirds majority of the number of deputies and senators. (2) As a result of the accession, the provisions of the constitutive treaties of the European Union, as well as the other binding community regulations, have priority over the contrary provisions of the internal laws, in compliance with the provisions of the act of accession. (3) The provisions of paras. (1) and (2) shall apply, accordingly, also for the accession to the revision acts of the constitutive treaties of the European Union. (4) The Parliament, the President of Romania, the Government, and the judicial authority guarantee the fulfillment of the obligations resulting from the act of accession and the provisions of para. (2). (5) The Government submits to the two Chambers of the Parliament the drafts of binding acts before they are submitted to the approval of the institutions of the European Union.'

33 Varga, 2019, p. 24.

34 Ibid., p. 25.

35 The year 2019, when the claim was made.

> the unconditional acceptance of European law of the values, of the principles established by the European legal order.

A few decisions can be mentioned in which the problem of the relationship between European Community law and national law is present. Thus, in a decision[36] The Constitutional Court itself held that

> through the acts of transfer of some attributions to the structures of the European Union, they do not acquire, through its capacity, a «super-competence», a sovereignty of their own. EU member states have decided to jointly exercise certain powers that traditionally belong to the field of national sovereignty. In the current era of globalisation of humanity's problems, interstate developments, and inter-individual communication on a planetary scale, the concept of national sovereignty can no longer be conceived as absolute and indivisible without the risk of unacceptable isolation.

In another decision[37] The Court held that

> The essence of the Union is the assignment by the member states of some competences for the achievement of their common objectives, of course, without affecting, in the end, through this assignment of competences, the national constitutional identity – *Verfassungsidentitat*[38] (...). Therefore, the member states maintain powers to preserve their constitutional identity and the transfer of powers, as well as rethinking the establishment of new guidelines within the already transferred powers belonging to the constitutional margin of appreciation of the member states.

In Paragraph 81 of another decision,[39] the Court held, regarding

36 Decision No. 148 of April 16, 2003, published in the Official Monitor of Romania, Part I, No. 317 of May 12, 2003.

37 Point II.1, Decision No. 683 of June 27, 2012, on the legal conflict of a constitutional nature between the Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other, published in the Official Monitor of Romania, Part I, No. 479 of July 12, 2012.

38 The Court referred to the Decision of the German Constitutional Court of June 30, 2009, pronounced in Case 2 BvE 2/08, regarding the constitutionality of the Treaty of Lisbon.

39 Decision No. 104/2018 regarding the objection of unconstitutionality of the provisions of the Law amending Law No. 161/2003 regarding some measures to ensure transparency in the exercise of public dignities, public functions, and in the business environment, prevention and sanctioning of corruption published in the Official Monitor of Romania, Part I, No. 446 of May 29, 2018.

> the invocation of the provisions of Article 148 (4) of the Constitution, by reference to Decision 2006/928/EC of the European Commission of 13 December 2006 it shall establish, by joining the European Union, a mechanism for cooperation and verification of Romania's progress in meeting specific reference objectives on reforms to the judiciary and combating corruption

Romania accepted that, in the fields in which the exclusive competence belongs to the European Union, regardless of the concluded international treaties, the implementation of the resulted obligations, should be subject to the rules of the European Union, so that 'Romania cannot adopt a normative act contrary to the obligations to which it has committed itself as a member state,'[40] with a single constitutional limit, expressed in what the Court qualified as 'national constitutional identity.'[41] Another decision[42] discussed the issue of national constitutional identity. Thus, the authors of the referral requested the Court, before solving the request with which it was vested, to formulate four preliminary questions to address the Court of Justice of the EU, questions which, in summary, expressed the desire to specify whether the Mechanism of Cooperation and Verification (MCV) established by Decision 2006/928/EC of the European Commission is an act adopted by an EU institution within the meaning of Article 267 TFEU, which can be subject to the interpretation of the CJEU and if the requirements of this mechanism are mandatory for the Romanian state. In Paragraph 75 of the final sentence, the Court held that

> such an act, even mandatory for 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 gap in the national Law.

In Paragraph 77 of the same decision, it is stated regarding the reports of the MCV that 'Considering the lack of constitutional relevance of Decision 2006/928/EC, a European binding act on the Romanian state, the constitutional relevance of the reports can be retained even less issued within the M.C.V.', they refer more

40 According to what was retained by the Court in para. 75 of Decision No. 887 of December 15, 2015, published in the Official Monitor of Romania, Part I, No. 191 of March 15, 2016.

41 The Court itself cited Decision No. 683 of 27 June 2012, published in the Official Monitor of Romania, Part I, No. 479 of 12 July 2012, and Decision No. 64 of 24 February 2015, published in the Official Monitor of Romania, Part I, No. 286 of April 28, 2015.

42 Decision No. 137/2019 regarding the objection of unconstitutionality of the provisions of the Law for the approval of the Government Emergency Ordinance No. 90/2018 regarding some measures for the operationalization of the Section for the investigation of crimes in the judiciary, published in the Official Monitor of Romania, Part I, No. 295 of April 17, 2019.

to 'opportunity aspects of legislation.'[43] In Paragraph 456 of another decision,[44] the Court ruled that

> the Constitution is the expression of the will of the people, which means that it cannot lose its binding force just by the existence of an inconsistency between its provisions and the European ones. Also, joining the European Union cannot affect the supremacy of the Constitution over the entire legal order.[45]

Through a decision from 2015,[46] the Court referred to its jurisprudence in which it defined the concept of 'national constitutional identity.'[47] On this occasion, the Court stated:

> Therefore, by joining the legal order of the European Union, Romania accepted that, in the fields where the exclusive competence belongs to the European Union, regardless of the international treaties it has concluded, the implementation of the resulted obligations to be subject to the rules of the European Union. Otherwise, it would lead to an undesirable situation in which, through the international obligations assumed bilaterally or multilaterally, the member state would seriously affect the competence of the union and, practically, substitute it in the mentioned fields. For this reason, in the field of competition, any State aid falls under the purview of the European Commission, and the procedures for contesting it belong to the union's jurisdiction. Therefore, the application of Article 11(1) and Article 148(2) and (4) of the Constitution, Romania applies in good faith the obligations resulting from the act of accession, not interfering with the exclusive competence of the European Union, and, as established in its jurisprudence, under the compliance clause included in the text of Article 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations to which it committed itself as a member state. Of course, all the previously

43 Varga, 2019, p. 27.

44 Decision No. 80 of February 16, 2014, on the legislative proposal regarding the revision of the Romanian Constitution, published in the Official Monitor of Romania, Part I, No. 246 of April 7, 2014.

45 The Court referred to the Decision of May 11, 2005, K 18/04, issued by the Constitutional Court of the Republic of Poland.

46 Decision No. 887 of December 15, 2015, published in the Official Monitor No. 191 of March 15, 2016.

47 Decision No. 683 of June 27, 2012, published in the Official Monitor of Romania, Part I, No. 479 of July 12, 2012, and Decision No. 64 of February 24, 2015, published in the Official Monitor of Romania, Part I, No. 286 of April 28, 2015.

shown to have a constitutional limit, expressed in what the Court qualified as «national constitutional identity».

These are landmark decisions; however, none of them dealt with migration and asylum regulations. On the one hand, the current situation is since Romanian legislation on the matter is modern and harmonised with community and international norms; on the other hand, because there is no possibility of self-referral in the case of the Constitutional Court of Romania. No litigants have brought issues before the Court that would generate discussions regarding national constitutional identity or the sharing of competencies between the European Union and its member states of the European Union.

4. The jurisprudence of the Constitutional Court of Romania on migration and asylum

Given the concern of the Romanian legislator—the Parliament—and the Government, as an entity empowered to legislate in situations expressly specified by Article 115 of the Constitution, to create a legal framework regarding migration and asylum corresponding to the requirements of the addressees and beneficiaries of the respective legal norms, in a small number of cases, the Constitutional Court of Romania is empowered to solve exceptions of unconstitutionality regarding legal norms from the legislation on the status and regime of refugees in Romania in terms of asylum.

Thus, four admission decisions have been issued by the Constitutional Court of Romania since its establishment and until the date of writing this paper.[48] The first three decisions contain findings related to the faulty drafting of certain legal norms that regulate aspects of migration and asylum. Through their

48 Decision No. 106 of April 11, 2001, regarding the exception of unconstitutionality of the provisions of Art. 27(1), (2) and (3) and of Art. 28 of Law No. 25/1969 on the regime of foreigners in Romania, republished, published in the Official Monitor No. 416 of 26 July 2001 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/29845; Decision No. 176 of May 29, 2001 regarding the exceptions of the unconstitutionality of provisions of Art. 13(1) letter a), Art. 17(1) and (2) and Arts. 18–22 of Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, published in the Official Monitor No. 374 of 11 July 2001 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/29474; Decision No. 604 of 20 May 2008 regarding the exception of unconstitutionality of provisions of Art. 121 of Law No. 122/2006 on asylum in Romania, published in the Official Monitor No. 469 of 25 June 2008 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/94752; Decision No. 214 of April 9, 2019, regarding the objection of unconstitutionality of the provisions of the Law for the amendment and completion of the Emergency Government Ordinance No. 75/2018 for the amendment and completion of some normative acts in the field of environmental protection and the regime of foreigners, as well as the Ordinance of the Government emergency No. 75/2018 in its entirety, published in the Official Monitor No. 435 of 03 June 2019 [Online].

wording, the respective texts violated the right to free movement and the principle of proportionality in restricting the exercise of certain rights or freedoms, the right to defence, which is guaranteed in Romania, or free access to justice. The fourth decision was pronounced because of the creation of a file starting from the approach of a group of 27 Romanian senators who formulated criticisms of extrinsic and intrinsic unconstitutionality. Regarding extrinsic unconstitutionality, they showed that it was regulated by the government through an emergency ordinance, although none of the legislative solutions contained in the criticised normative act were based on the existence of an exceptional situation whose regulation could not be postponed, which the court found to be true. In Decision No. 604 of 20 May 2008, regarding the exception of unconstitutionality of the provisions of Article 121 of Law No. 122/2006 on asylum in Romania, the Court referred to the legislation of the European Union in the field[49] and to the jurisprudence of the ECHR.[50]

In the Court's jurisprudence, seven decisions rejected the exceptions of unconstitutionality regarding legal norms related to migration and asylum.[51]

Available at: https://www.ccr.ro/en/admission-decisions/?anul_postului=2019&_page=7 (official translation).

49 Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (official translation).

50 ECtHR, *Rotaru v. Romania* (Application No. 28341/95), Decision, 4 May 2000, ECLI:CE:ECHR :2000:0504JUD002834195; ECtHR, *Times Newspapers LTD. and others against United Kingdom* (Application No. 64367/14), Decision, 13 November 2018.

51 Decision No. 209/2001 regarding the exceptions of unconstitutionality of the provisions of Art. 13(1) letter a), of Art. 17(1) and (2), of Arts. 18–20 and of Art. 22 of the Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, approved with modifications through Law No. 323/2001, published in the Official Monitor, Part I No. 674 of October 25, 2001 [Online]. Available at: https://lege5.ro/Gratuit/gmydomzv/decizia-nr-209-2001-referitoare-la-exceptiile-de-neconstitutionalitate-a-prevederilor-art-13-alin-1-lit-a-ale-art-17-alin-1-si-2-ale-art-18-20-si-ale-art-22-din-ordonanta-guvernului-nr-102-2000-privin?d=2023-06-19; Decision No. 330/2002 regarding the rejection of the exception of unconstitutionality of the provisions of Art. 20(5) and of Art. 21(6) of Government Ordinance No. 102/2000 regarding the status and regime refugees in the Romania, approved and modified through Law No. 323/2001, published in the Official Monitor, Part I No. 893 of December 10, 2002 [Online]. Available at: https://lege5.ro/Gratuit/heztaojx/decizia-nr-330-2002-referitoare-la-respingerea-exceptiei-de-neconstitutionalitate-a-dispozitiilor-art-20-alin-5-si-ale-art-21-alin-6-din-ordonanta-guvernului-nr-102-2000-privind-statutul-si-regimul-re?d=2023-06-19; Decision No. 503 of 4 October 2005 regarding the exceptions of unconstitutionality of the provisions of Art. 16(7) of the Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, published in the Official Monitor, Part I No. 986 of 7 November 2005 [Online]. Available at: https://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=67617; Decision no 407 of 16 May 2006 regarding the exceptions of unconstitutionality of the provisions of Art. 17(1) of the Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, published in the Official Monitor, Part I No. 493 of 7 June 2006 [Online]. Available at: https://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=73245; Decision No. 288 of 3 July 2003 regarding the exceptions of unconstitutionality of the provisions of Arts. 17, 18, 19 and 20 of the Government Ordinance No. 102/2000 regarding the status and regime of

The Constitutional Court issued its first admission decision in 2001.[52] This is the result of the deliberation of the Constitutional Court because of the promotion of an exception to unconstitutionality by the applicant in a case pending before the Administrative Litigation Section of the Supreme Court of Justice of Romania. The author considered that the provisions of Article 27 Paragraphs 1, 2 and 3 and Article 28 of Law No. 25/1969[53] — Administrative litigation section, i.e.: 'are contrary to the provisions of Article 23 of the Constitution regarding individual freedom, as well as Article 4 of the Universal Declaration of Human Rights.' The procedure for solving the exception of unconstitutionality includes the stage in which the 'Conclusion by which the Court was notified is communicated' to the president of the Senate, the president of the Chamber of Deputies, the Government, and the People's Advocate (only if the author of the exception of unconstitutionality is not the People's Advocate), specifying the date until which these authorities must send their point of view regarding the exception to the court. During this stage, the government argued that it was necessary to admit the exception because the criticised legal texts violated the right to free movement and the proportionality principle of restricting the exercise of certain rights or freedoms. Through this

refugees in Romania, approved and modified through Law No. 323/2001, with subsequent amendments, published in the Official Monitor, Part I No. 560 of 5 August 2003 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/45429; Decision No. 231 of 25 May 2004 regarding the exceptions of unconstitutionality of the provisions of Art. 15(3), (5), (7) and (8) of the Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, approved with modifications by Law No. 323/2001, as amended by Government Ordinance No. 43/2004, published in the Official Monitor, Part I No. 561 of 24 June 2004 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/52943; Decision No. 406/2006 regarding the rejection of the exceptions of unconstitutionality of the provisions of Art. 5 point 2 of the Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, published in the Official Monitor, Part I No. 511 of 13 June 2006 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocument/72576.

52 Decision No. 106 of April 11, 2001.

53 The judicial court that occupies the highest position in the hierarchy of courts in Romania has been called 'Supreme Court of Justice' until October 2003. Its name was then changed to 'High Court of Cassation and Justice.' To understand the disposition of the decision, it is useful to specify that the texts whose constitutionality was verified by the Court had the following wording:
Art. 27 of the Law No. 25/1969: 'The blamed foreigner or accused in a criminal case can only leave the country after being removed from prosecution, termination of criminal prosecution, termination of criminal proceedings or acquittal, and in case of conviction, only after the execution of the sentence.
If the conviction was pronounced with a suspension of imposition or execution of sentence, the foreigner can leave the country after the decision has become final.
The foreigner who does not have his residence in Romania and is accused or indicted in a criminal case may leave the country even without fulfilling the conditions provided in para. 1 if he applied for immigration bail provided by law.'
Art. 28 of the Law No. 25/1969: 'In the cases provided for in Art. 27, the competent authorities or interested parties will notify the Ministry of Internal Affairs about the obligations of the foreigner, also providing the supporting documents.'

decision, the Court ordered that the exception be admitted, with the respective legal texts being unconstitutional to the extent that the restriction of the right to free movement was not ordered by the magistrate.[54]

With this decision, the Court had to solve a preliminary problem. It is about the fact that the legal texts considered by the authors of the exception to be unconstitutional were part of a law that entered into force in 1969, long before the entry into force of the current Romanian Constitution at the time of the settlement of the case. The Court called it 'pre-constitutional' in the text of the decision. To solve this problem, the Court applied the provisions of Article 150(1) of the Constitution, which stated that the provisions of such a law '[...] remain in force, insofar as they do not contravene this Constitution.' The Court also held in the considerations of the decision that

> to the same extent, the criticised legal texts also violate the provisions of Article 25(1) of the Constitution, according to which «The right to free movement, in the country and abroad, is guaranteed. The law establishes the conditions for the exercise of this right», as well as those of Article 2 point 2 of Protocol No. 4 additional to the Convention for the Protection of Human Rights and Fundamental Freedoms, provisions according to which «Any person is free to leave any country, including on his own».

It is also useful to specify that the authors of the unconstitutionality exception invoked the fact that Article 27 Paragraphs 1, 2 and 3 and Article 28 of Law No. 25/1969 violated the provisions of Article 23 of the Constitution regarding individual freedom. The authors of the exception of unconstitutionality stated that the provisions of Article 27 Paragraphs 1, 2 and 3 and Article 28 of the Law No. 25/1969 also violated the provisions of Article 4 of the Universal Declaration of Human Rights, which stated that 'No one shall be held in slavery or servitude; slavery and the slave trade are prohibited in all their forms.'

A second decision was made in 2001.[55] This was a solution to the partial admission of the request with which the court was vested. The Constitutional Court of Romania ordered the connection of two files, File No. 65C/2001 and File No. 64C/2001. Of the several legal grounds considered by the authors of the exceptions to contradict constitutional legal norms, the Court found unconstitutionality only

54 'Admits the exception of unconstitutionality of the provisions of Art. 27(1), (2) and (3), as well as of Art. 28 of the Law No. 25/1969 on the regime of foreigners in Romania, republished (...). It is found that these legal provisions are unconstitutional to the extent that the restriction of the exercise of the right to free movement, is provided for in Art. 25(1) of the Constitution, of the foreigner accused, indicted, or convicted in a criminal case is not ordered by a magistrate and the provisions of Arts. 23 and 49 of the Constitution are not respected.'

55 Decision No. 176 of May 29, 2001.

in two provisions. Thus, they contradicted the provisions of Article 24(1) of the Romanian Constitution, which states that 'the right to defence is guaranteed,' the provisions of Article 20(5) of Government Ordinance No. 102/2000, which specifies that "The final decision is legally enforceable" and the provisions of Article 21(6) sentence one of the same ordinance, which provides: 'In the case provided for in paragraph (5) letter, a) the decision is reasoned, final and enforceable by the law [...].' The unconstitutionality, in the Court's opinion, resulted from the fact that these two texts 'do not ensure an effective protection of the rights of refugee status applicants,' violating the right to defence regulated by Article 24(1) of the Romanian Constitution: The violation results from the fact that, in the two texts of Government Ordinance No. 102/2000, the definitive and executory nature of the decision of the first instance is established, with the consequence that the decision can be applied immediately. So, a possible applicant, dissatisfied with the fact that the first court rejected his request, who would have promoted an appeal because the appeal was not suspensive of execution, could no longer benefit in real terms from the 'right to defend himself before the court of appeal.'

To make this decision, the Constitutional Court considered international legislation.[56] Regarding the rights of refugees, the 1951 Convention states that they enjoy the treatment generally granted to foreigners (Article 7(1) of the Convention). These rights are also regulated by Romanian law (Articles 23–25 of the ordinance), in close compliance with international regulations, namely those contained in Articles 12–31 of the Convention.

The third decision was made in 2008.[57] This decision is the result of the approach of a foreign citizen who invoked the exception in a civil litigation whose object was 'the complaint against the decision of the Romanian Immigration Office by which his application for access to the asylum procedure was rejected and by which the transfer of the applicant to Bulgaria was ordered.' The Court found that the provisions of Article 121 Paragraphs 1 and 3 of Law No. 122/2006 on asylum in Romania are unconstitutional, violating the provisions of Article 21 of the Constitution and that the provisions of Article 121(2) from the same law are unconstitutional 'to the extent that they do not provide for the possibility that the complaint can be submitted directly to the court nor the possibility of submitting the complaint also through a representative,' thus violating the provisions of Article 21 of the Constitution. It should be noted that in this case, the Government of Romania and the People's Advocate also expressed points of view in favour of admitting the exception. The government considered that the provisions of

56 The provisions of the 1951 Convention, supplemented by the 1967 Additional Protocol, acts adopted under the auspices of the UN, to which Romania acceded in 1991.

57 Decision No. 604 of 20 May 2008.

Paragraphs 1 and 2 of Article 121 of Law No. 122/2006[58] violated the provisions of Article 21 of the Constitution, an Article entitled 'Free access to justice.'[59] The People's Advocate testified to the court that he supported the unconstitutionality of the provisions of Paragraphs 2 and 3 of Law No. 122/2006 on asylum in Romania because they were contrary to the provisions of Article 21 of the Constitution, which established the principle of free access to justice.

In justifying the decision, the Court also referred to Regulation of the Council of the European Union No. 343/2003,[60] published in the Official Journal of the European Communities L 199, 31 July 2007, p. 0023-0029, and to the jurisprudence of the European Court of Human Rights,[61] which clarifies the defining aspects of the concept of 'foreseeable rule'.

58 To understand the device of the decision, it is necessary and useful to state the legal text considered unconstitutional by the author of the exception. Thus, Art. 121 of Law No. 122/2006 provided: 'Art. 121 - Appeal
(1) Against the decision provided for in Art. 120(3) 'a complaint can be made within two days from the date of receipt of the proof of communication or the document by which it is established that the applicant is not at the last declared residence. The introduction of the complaint within the said term does not suspend the execution of the transfer provision in the responsible Member State. (2) The complaint is submitted in person to the National Office for Refugees and will be accompanied by a copy of the decision rejecting access to the asylum procedure in Romania. (3) The complaint is submitted immediately to the court in whose territorial jurisdiction is located the competent structure of the National Office for Refugees that issued the decision (...).'

59 Art. according to which '(1) Any person may the address of justice for the defense of his rights, freedoms, and legitimate interests. (2) No law can limit the exercise of this right. (3) The parties have the right to a fair trial and to the resolution of cases within a reasonable time. (4) Special administrative jurisdictions are optional and free of charge.'

60 Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003R0343. The Court held that: 'It is true that Regulation of the Council of the European Union No. 343/2003, published in the Official Journal of the European Communities L 199, 31 July 2007, p. 0023-0029, establishing the criteria and mechanisms for determining the responsible member states for the examination of applications submitted in one of the member states by a citizen of a third country, provides, in Art. 19(2), that the implementation of the transfer is not suspended in the event of the introduction of an appeal, in this case, the complaint. But this is not an imperative rule but allows either the domestic legislation or the national courts to assess, on a case-by-case basis, the need to suspend the execution of the transfer order to another state.'

61 ECtHR, *Rotaru v. Romania* (Application No. 28341/95), Decision, 4 May 2000, ECLI:CE:ECHR :2000:0504JUD002834195; ECtHR, *Times Newspapers LTD. and others against United Kingdom* (Application No. 64367/14), Decision, 13 November 2018. Regarding the jurisprudence mentioned previously, in order to deliberate, the Court noted that: 'Regarding this aspect, the European Court of Human Rights ruled, in its jurisprudence, that a rule is "foreseeable" only when it is drafted with sufficient precision, in such a way as to allow any person – who, if necessary, can turn to specialist advice – to correct his conduct' (Rotaru case against Romania, 2000), and in the Sunday Times case against the United Kingdom, 1979, he decided that '[...] the citizen must have sufficient information on the legal norms applicable in a given case and be able to foresee, to a reasonable extent, the consequences that may

The fourth decision was made in 2019.[62] By this decision, the Court admitted the exception and found that

> the Law for the approval of the Government's Emergency Ordinance No. 75/2018 for the amendment and completion of some normative acts in the field of environmental protection and the regime of foreigners, as well as the Emergency Ordinance of the Government No. 75/2018, are unconstitutional, in their entirety.

The decision was based on the creation of a file using the approach of 27 Romanian senators. They criticised extrinsic and intrinsic unconstitutionality. Regarding the extrinsic unconstitutionality, they showed that it was regulated by the Government through an emergency ordinance, although 'none of the legislative solutions contained in GEO No. 75/2018 are based on the existence of an exceptional situation whose regulation cannot be postponed,' which means that the conditions of Article 115(4) of the Constitution was not met, which stipulates that 'the Government may adopt emergency ordinances only in extraordinary situations whose regulation cannot be postponed, having the obligation to justify the urgency within their content.'

Emergency Government Ordinance No. 75/2018 brought changes to the legislation on the regime of foreigners by amending Government Ordinance No. 25/2014 regarding the employment and detachment of foreigners in Romania and for the modification and completion of some normative acts regarding the regime of foreigners in Romania, approved by Law No. 14/2016, with subsequent amendments and additions. To evaluate the criticisms of extrinsic unconstitutionality, the Court had to verify the fulfilment of the conditions of Article 115(4) of the Constitution, both for the field of environmental protection and the field of the regime of foreigners. In doing so, the Court relied on a judgment. To evaluate the criticisms of extrinsic unconstitutionality, the Court had to verify the fulfilment of the conditions of Article 115(4) of the Constitution, both for the field of environmental protection and the field of the regime of foreigners. In doing so, the Court relied on its judgments. On the other hand, it relates to decision No. 109 of 9 February 2010, by which the Constitutional Court stated that an emergency measure may be adopted.

The Court found that it had carried out an assessment concerning doubts about the unconstitutionality of legal norms relating to the rule of foreigners, which were raised by both parties. The Government justified the need to amend the provisions of Government Ordinance No. 25/2014 regarding the employment

arise from a determined act. In short, the law must be, at the same time, accessible and predictable.'

62 Decision of the Constitutional Court of Romania No. 214 of April 9, 2019.

and posting of foreigners on the territory of Romania and for the amendment and completion of some normative acts regarding the regime of foreigners in Romania, in the sense of establishing a term of 6 months as a period in which the employer has not been sanctioned, noting that,

> considering that we are in the middle of the summer season, a season in which the main activities in the field of tourism and construction, important areas of the Romanian economy, are in full swing, it is necessary that this legislative approach be adopted as an emergency in support of economic operators active in these fields

but without identifying an extraordinary situation whose regulation could not be postponed. In the reasoning 40 of the Decision,[63] the Court even noted that 'the Government has not even made the effort to identify elements of the necessity of legislation, let alone demonstrate the existence of an extraordinary situation whose regulation cannot be postponed,' which led to the conclusion that the criticisms of extrinsic unconstitutionality are well-founded. In the same reasoning 40, the Constitutional Court also referred to the Government's non-compliance with the provisions of Article 6(1) of Law No. 24/2000 regarding the rules of legislative technique for the elaboration of normative acts, which, at the time of the resolution of the case, provided that the formulations contained in the normative act must be thoroughly grounded, considering the social interest, the legislative policy of the Romanian state, and the requirements of correlation with the set of internal regulations and the harmonisation of national legislation with community legislation and international treaties to which Romania is a party, as well as with the jurisprudence of the European Court of Human Rights.

5. Conclusions

This study aimed at (a) clarifying and summarising the Constitutional Court of Romania's views on migration and asylum in its jurisprudence, (b) providing an assessment of whether such jurisprudence is drawn about the limits of the competencies of the European Union and its member states, and (c) assessing if the solutions of the Constitutional Court of Romania connect the issues of migration and asylum with state identity.

Ad a) The Constitutional Court of Romania was entrusted, in the period from the beginning of its activity until the date of writing this paper, through a small number of referrals, to rule on the constitutionality of some legal norms that regulated the fields of migration and asylum. This deliberative activity resulted in

63 Decision No. 214 of April 9, 2019.

four decisions, except for unconstitutionality. Two decisions were made in 2001, that is, during the period when the public authorities in Romania took steps for Romania's accession to the European Union, but there was no fixed date for this event (it is known that the date of Romania's accession to the European Union was 1st of January 2007 the date proposed at the Thessaloniki Summit in 2003 and confirmed in Brussels on 18 June 2004). The third and fourth decisions were made in 2008 and 2019, respectively. These clarifications are of particular interest for achieving the objective of 'specifying whether the jurisprudence of the Constitutional Court of Romania regarding migration and asylum is drawn up about the limits of the powers of the European Union and of the member states.'

Regarding the seven rejected decisions, it is necessary to state that they are the result of an appeal concerning the unconstitutionality of certain legal grounds on which the Court of Justice has already ruled or which are no longer in force. Regarding the seven rejected decisions, it is necessary to state that they are the result of an appeal concerning the unconstitutionality of certain legal grounds on which the Court of Justice has already ruled or which are no longer in force. It is necessary to point out that aspects other than those already referred to the Court by other foreign nationals and analysed in admission decisions have not been criticised as unconstitutional.

Thus, a decision pronounced in 2001[64] contained a rejection solution argued as follows:

1. Regarding the unconstitutionality of the provisions of Article 20(5) and Article 21(6) Government Ordinance No. 102/2000. The Court had already ruled[65], establishing that the legal norms were unconstitutional, so new referrals regarding the unconstitutionality of the same legal grounds were inadmissible.
2. On the date of the pronoun of the decision para. 5 for Article 20 and para. 6 of Article 21 of the Government Ordinance No. 102/2000, in the form criticised by the authors of the exceptions of unconstitutionality, was no longer in force because, as a result of the pronouncement of another decision[66] of the Constitutional Court to fulfil the constitutional obligation to harmonise the legal norm declared unconstitutional with the constitutional norm, the Parliament had adopted Law No. 323 of 27 June 2001 for the approval of Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania[67]. In this case, the court applied the provisions of Article 23(1) Law No. 47/1992 regarding the organisation and functioning of the Constitutional Court, republished, specified that the Constitutional

64 Decision No. 209/2001.
65 By Decision No. 176 of May 29, 2001.
66 Decision No. 176 of May 29, 2001.
67 Published in the Official Monitor of Romania, Part I, No. 342 of June 27, 2001.

Court could only rule on the legal norms contained in a law or an ordinance in force.

3. Regarding the exceptions of unconstitutionality in the provisions of Article 13(1) letter a) of Article 17 Paragraphs 1 and 2, of Articles 18, 19, 20(1)-(4), and Article 22 of Government Ordinance No. 102/2000, approved with amendments by Law No. 323/2001, the Court found that they have been analysed before and responded to, making it unnecessary to reanalyse the exceptions.[68]

The decision rendered in 2002[69] includes a solution regarding the exception of the unconstitutionality of the provisions of Article 20(5) and Article 21(6) from Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, approved and amended by Law No. 323/2001. The Court based the rejection solution on the following arguments: the court also analysed the constitutionality of the two legal texts, finding their constitutionality because

> the amendments made to Article 20(5) and Article 21(6) Government Ordinance No. 102/2000 through points 1 and 3 of the single Art. of Law No. 323/2001 have nothing to do with the right to defend and do not limit the exercise of this right.

The fact that the court's decision was final and irrevocable does not mean that the author of the exception was deprived of the right to defend himself. According to the constitutional provisions of Article 128, appeals can be exercised by the interested party and the Public Ministry only under the conditions of the law, with the legislator being able to establish special rules of procedure in consideration of special situations (such as the situation of refugees in Romania).

The exemption was refused for two reasons in the 2003 decision.[70] First, the Court found that 'some of the cited reasons do not represent matters of constitutionality subject to the control of the Constitutional Court, but of the interpretation of the law,' the court being the one called to apply the provisions of Article 20(2) of the Constitution, which establishes that if there are inconsistencies between the pacts and treaties regarding fundamental human rights, to which Romania is a party, and the internal laws, the international regulations have priority. The Court invoked the provisions of Article 2(3) from Law No. 47/1992 regarding the organisation and functioning of the Constitutional Court, republished.[71] Secondly,

68 Because 'no new elements have intervened to justify the change of the solution of rejection of the exceptions of unconstitutionality.'

69 Decision No. 330/2002.

70 Decision No. 288/2003.

71 Which states: '[...] in its interpretation and application of the law, the Constitutional Court shall decide only on grounds or contrary to the Constitution.'

the Court specified that in its jurisprudence,[72] it 'also ruled on the compliance of the accelerated procedure regulated in Articles 17–20 of Government Ordinance No. 102/2000' with the provisions of Article 49 of the Constitution, stating that 'the criticised legal texts do not contain special restrictions on the exercise of certain rights for foreigners who follow the procedure of granting a form of protection from the Romanian state.'

Regarding the decision made in 2004,[73] the exception was rejected by the Court because it was the attribution reserved for the legislator to establish the competence of the courts and the court procedure, respectively, the exercise of appeals, considering, mainly, the nature of the cases.[74] The Court also invoked its previous jurisprudence regarding the provisions of Article 15(3), (5), (7) and (8) from Government Ordinance No. 102/2000.

By the decision of 2005,[75] the exception was rejected because the court found that the criticised legal text had been modified by Article I point 12 to Government Ordinance No. 43/2004.

According to the decision of 2006,[76] the exception was rejected because the procedure for granting a form of humanitarian protection, that is, refugee

72 Decision No. 209 of June 28, 2001, published in the Official Monitor, Part I, No. 674 of October 25, 2001.

73 Decision No. 231/2004.

74 '... the criticized texts of Ordinance No. 102/2000 regarding the status and regime of refugees in Romania regulates a special procedure, namely that of solving the complaint that the foreign applicant for refugee status makes against the decision to reject the request, given by the National Refugee Office. This complaint resolution procedure is established for a special category of people and regarding a certain category of requests involving an obvious urgency. Based on a rational criterion, such a regulation is justified, different from that of the administrative litigation procedure, as well as from other procedures provided by law. On the other hand, considering the provisions of Art. 126(2) and of Art. 129 of the Constitution, republished, the Court considers that the legislator is the one who establishes the competence of the courts and the court procedure, respectively the exercise of appeals, considering, mainly, the nature of the cases. The setting of shorter deadlines for the resolution of cases, as well as a certain regulation of appeals, justified by the specifics of the respective processes, within a special procedure, established constitutionally, by law, or by Government ordinance, which has the same legal force as and the law, is not likely to constitute discrimination either, as it applies to all persons in the respective category (respectively foreigners applying for refugee status).' '...the Court has in mind its constant jurisprudence, in full agreement with that of the European Court of Human Rights, in the sense that the principle of equal rights and non-discrimination does not mean the introduction of uniformity in terms of the legal treatment applicable to legal subjects. On the contrary, according to this jurisprudence, the difference in legal treatment for different situations is admissible, when it is rationally and objectively justified. Moreover, the Constitution provides, in Art. 18, regarding foreigners and stateless persons, that they enjoy the general protection of persons and assets, guaranteed by the Constitution and other laws, and the right of asylum is granted and withdrawn under the conditions of the law, in compliance with international treaties and conventions to which Romania is a party.'

75 Decision No. 503/2005.

76 Decision No. 407/2006.

status, meets the requirements of the right of access to the court, the right to defence, or the right to an effective appeal, as they are regulated in Romanian and international legislation.

Another decision issued in 2006[77] regarding the rejection of the exceptions of unconstitutionality of the provisions of Article 5 point 2 of Government Ordinance No. 102/2000 regarding the status and regime of refugees in Romania, published in the Official Monitor, Part I No. 511 of 13 June 2006 was rejected because the reported aspects had already been analysed by the Court.

Regarding the admission decisions, as already shown, they concerned the following aspects:

1. The regulation by legislation related to emigration and asylum of certain procedures in such a way as to consider the fact that 'restriction of the exercise of the right to free movement, provided for in Article 25(1) of the Constitution, foreigners accused, indicted, or convicted in a criminal case' can only exist if the respective measure is ordered by a magistrate and if the provisions of Article 23 and Article 49 of the Romanian Constitution are respected.
2. Respect the right to defend refugee status applicants, a right guaranteed to any person by the Romanian Constitution. 3. The procedure for promoting the complaint against the decision of the Romanian Immigration Office, by which the request for access to the asylum procedure of an applicant was rejected and by which the transfer of the applicant to another state was ordered, the Constitutional Court found that the regulations regarding asylum in Romania were unconstitutional

   in the extent to which they do not provide for the possibility that the complaint can be submitted directly to the court, nor the possibility of submitting the complaint through a representative, thus violating the provisions of Article 21 of the Constitution which established the principle of free access to justice.

The extrinsic unconstitutionality of an emergency ordinance, a normative act adopted by the Government through the mechanism of legislative delegation, the unconstitutionality being generated by the fact that 'none of the legislative solutions' was based on the 'existence of an exceptional situation whose regulation cannot be postponed,' which had the meaning that the conditions of Article 115(4) of the Constitution were not met, which provides that 'the Government can adopt emergency ordinances only in extraordinary situations whose regulation cannot be postponed, having the obligation to justify the emergency in their content.'

77 Decision No. 406/2006.

Ad b) The jurisprudence of the Constitutional Court of Romania regarding migration and asylum, even before joining the European Union, was drafted considering the norms of international law. We have highlighted that Decision No. 604 of 20 May 2008, regarding the exception of unconstitutionality of the provisions of Article 121 of Law No. 122/2006 on asylum in Romania, the Court referred to the legislation of the European Union in the field — Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national—and to the jurisprudence of the ECHR—Case of *Rotaru v. Romania*, Judgment of the European Court of Human Rights of 4 May 2000 in the case of *Rotaru v. Romania* and *TIMES NEWSPAPERS LTD. and others against United Kingdom*. In Decision No. 106 of April 11, 2001, the Court referred to the provisions of the Article 2 point 2 of Protocol No. 4 additional to the Convention for the Protection of Human Rights and Fundamental Freedoms. In Decision No. 176 of May 29, 2001 to make this decision, the Constitutional Court considered the provisions of the 1951 Convention, supplemented by the 1967 Additional Protocol, acts adopted under the auspices of the UN, to which Romania acceded in 1991.

Ad c) The issue of constitutional identity has concerned Romanian researchers, judges from the Constitutional Court of Romania, and the plenary session of the Constitutional Court. Tănăsescu expressed that[78] 'The notion of constitutional identity is susceptible to several meanings, sometimes being simply contested.' The author emphasises the differences between the acceptance of the concept in Europe and the United States of America. Mr. Valer Dorneanu, President of the Constitutional Court of Romania, analysing the importance of the concept of constitutional identity, stated that[79] 'national constitutions and the legal order of the EU complement each other and, therefore, are perfect—although not in an unconditional way—capable of coexistence and harmonious development.'

With regard to the jurisprudence of the Constitutional Court of Romania regarding migration or asylum issues, it can be easily ascertained from the presentation of jurisprudence, presented in detail in heading 4 of this paper, that the exceptions of unconstitutionality were not characterised by a high degree of complexity, and there was no need to analyse the competence of the relevant national structures in opposition to the competence of the European Union institutions. Therefore, it was not necessary for the Court to link the issues of migration or asylum with the issue of constitutional identity in arguing the solutions. Regarding the role of the Constitutional Court of Romania in terms of migration, asylum, and refugee issues, it was exercised by the Court's mission according to the Romanian Constitution. In practice, one cannot talk about the presence in

78 Tănăsescu, 2017, p. 1.
79 Dorneanu, 2019, p. 8.

the Court's jurisprudence of a position of the Constitutional Court in the matter of migration and asylum, about the limits of the competencies of the EU and the member states, or about a connection of issues related to migration or asylum with the issue of constitutional identity. On the one hand, the current situation is since the Romanian legislation on the matter is modern and harmonised with community and international norms, and on the other hand, because there is no possibility of self-referral in the case of the Constitutional Court of Romania. No litigant has been formulated before the court issues that would generate discussions regarding the national constitutional identity or the sharing of competencies between the European Union and its member states of the European Union.

De lege ferenda, it is necessary to define the concept of constitutional identity both at the national and community levels to abandon this difficult working mechanism, which is the dialogue between the Court of Justice of the European Union and the national constitutional courts. Perhaps even the text of Article 4(2) of the TUE could be the framework for such a clarification.

Bibliography

- Angel, O. (2022) 'Imagini tulburătoare la Vama Siret. Sute de refugiaţi ucraineni, aşteptaţi cu gogoşi calde şi camioane pline cu alimente. Peste 4000 de oferte de cazare gratuită', *RomaniaTV.net*, 25 February 2022. [Online]. Available at: https://www.romaniatv.net/imagini-tulburatoare-la-vama-siret-sute-de-refugiati-ucraineni-asteptati-cu-gogosi-calde-si-camioane-pline-cu-alimente-peste-4000-de-oferte-de-cazare-gratuita_6273918.html (Accessed: 27 June 2023).
- Besselink, L. F. M. (2010) 'National and constitutional identity before and after Lisbon', *Utrecht Law Review*, 6(3), pp. 36–49; https://doi.org/10.18352/ulr.139.
- Bierlein, B. (2019) 'Rolul Curților Constituționale în stabilirea conținutului identității constituționale' in Dorneanu, V., Krupenschi, C–M. (eds.) *Conferința Internațională 'Identitatea constituțională națională în contextul dreptului European', București, 12 aprilie 2019*. Bucharest: Hamangiu, pp. 11–14.
- Dorneanu, V. (2019) 'Cuvânt de deschidere al domnului Valer Dorneanu Preşedintele Curţii Constituţionale a României cu ocazia Conferinţei Internaţionale '"Identitatea constituțională națională în contextul dreptului european"' in Dorneanu, V., Krupenschi, C–M. (eds.) *Conferința Internațională 'Identitatea constituțională națională în contextul dreptului European', București, 12 aprilie 2019*. Bucharest: Hamangiu, pp. 7–10.
- Dorneanu, V., Krupenschi, C–M. (2019) 'Cuvânt înainte' in Dorneanu, V., Krupenschi, C–M. (eds.) *Conferința Internațională 'Identitatea constituțională națională în contextul dreptului European', București, 12 aprilie 2019*. Bucharest: Hamangiu, p. 3.
- Guțan, M. (2015) 'Identitatea constituțională românească între pozitivism juridic și abordare interdisciplinară' in Bercea, R. (ed.) *Comparația în științele umaniste. Mizele interdisciplinarității*. Bucharest: Universul juridic, pp. 170–208.
- Horșia, S. (2023) 'Refugiat în România. Cum îi mai ajută oamenii și autoritățile pe ucraineni după un an de război', *Europa Liberă România*, 4 March 2023 [Online]. Available at: https://romania.europalibera.org/a/refugiati-ucraina-romania/32294614.html (Accessed: 28 June 2023).
- Niculae, A., Mîrza, Y. (2023) Video – Mobilizare de forțe pentru sinistrații din turcia și siria. România trimite tone de ajutoare pentru cei afectați de cutremure, *ȘTIRILE PRO.TV*, 9 February 2023 [Online]. Available at: https://stirileprotv.ro/video/mobilizare-de-forte-pentru-sinistratii-din-turcia-si-siria-romania-trimite-tone-de-ajutoare-pentru-cei-afectati-de-cutremure/62323256/ (Accessed: 26 June 2023).
- Mayer, F. C. (2009) 'Multilevel Constitutional Jurisdiction' in von Bogdandy, A., Bast, J. (eds.) *Principles of European Constitutional Law*. 2nd revised edn. Oxford: Hart–CH Beck–Nomos, pp. 399–439 [Online]. Available at: https://www.uni-bielefeld.de/fakultaeten/rechtswissenschaft/ls/mayer/publikationen/25_Mayer_BOGDANDY_BAST_EN_SDR.pdf (Accessed: 24 August 2023).
- Paulus, A. (2019) 'Relația dintre identitatea constituţională națională și principiul supremației dreptului tratatelor. Perspectiva constituționalistă germane' in Dorneanu, V., Krupenschi, C-M. (eds.) *Conferința Internațională 'Identitatea constituțională națională în contextul dreptului European', București, 12 aprilie 2019*. Bucharest: Hamangiu, pp. 29–36.

- Tănăsescu, E–S. (2017) 'Despre identitatea constituțională și rolul integrator al constituției', *Curierul judiciar. Revista română de actualitate juridică*, 28 May 2017 [Online]. Available at: https://www.curieruljudiciar.ro/2017/05/28/despre-identitatea-constitutionala-si-rolul-integrator-al-constitutiei/ (Accessed: 29 June 2023).
- Tănăsescu, E–S. (2010) 'Tendances dans la jurisprudence de la Cour constitutionnelle après l'adhésion de la Roumanie à l'UE' in Vrabie, G. (ed.) *Le rôle et la place des cours constitutionnelles dans le système des autorités publiques*. Iasi: Editura Institutul European, pp. 151–168.
- Varga, A. (2019) 'Determinarea conținutului identității constituționale – consacrare normativă și jurisprudențială' in Dorneanu, V., Krupenschi, C–M. (eds.) *Conferința Internațională 'Identitatea constituțională națională în contextul dreptului European', Bucureşti, 12 aprilie 2019*. Bucharest: Hamangiu, pp. 20–28.
- Vergatti, C. N. (2009) *Statutul juridic al refugiaților*. Bucharest: Institutul Român pentru Drepturile Omului.