COURTS VS. COURTS? OR A WAY TOGETHER? THE EVOLUTION OF CONSTITUTIONAL REVIEW IN THE EU AND WORLDWIDE*

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Abstract

The basic ideas of this presentation, around which we have organized the debate, are in the sense that a Court-vs.-Court positioning in the European Union (EU) is not acceptable. We have to find a path together in this European space and worldwide. The Courts in EU Member States, including the constitutional courts, are connected both horizontally and vertically, namely between each other and with the CJEU in a genuine network, operating under the same rule of law. Tensions in this area are too easily and too often pushed towards the debate of the concepts of sovereignty, national constitutional identity, losing the importance of the practical side of trying to solve them through collegiality and dialogue.

The article represents an invitation to debate the broad nature and complexity of the subject, bringing to light the need for dialogue between judges form national courts and the constitutional courts, including in other forms of cooperation, as a method used in the past years and which remains, in our opinion, the main strategy to avoid conflicts, both horizontally and vertically.

Keywords: *constitutional conflict, priority versus primacy, dialogue, collegiality, harmonization*

1.Introduction

Noting[1] the recent developments at European Union (EU) level exemplified by the decisions of the national constitutional courts and the Court of Justice (CJEU)

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[1] M. Safta, Relationships between the Court of Justice of the European Union and the constitutional courts. Jurisprudential developments, with special reference to the case law of the Constitutional Court of Romania, paper presented at the National Conference "The Rule of Law Mechanism – 2020 of the EU The relationship between EU law and the national law of the Member States, with special reference to Romania". PRIMACY VS. SOVEREIGNTY, 14-15 October 2021, held by the "Ovidius" University of Constanța, Faculty of Law and Administrative Sciences, in partnership with the Romanian Academy of Legal Sciences – ASJR, "Andrei Rădulescu" Institute of Legal Research of the Romanian Academy – ICJ and Universul Juridic Publishing House, in collaboration with UNBR, UNNPR, UNEJ, UJR, UNPIR.

revealing a persistence of conflicts over the issue of *priority versus primacy* of EU law as a central topic in the European constitutional space, we consider that a broader analysis of the overall and chronology of the events in the relationships between the CJEU and the courts of the EU Member States is required. In other studies on this topic, we presented benchmarks of the evolution of the relationships between the CJEU and the national constitutional courts, the recent developments in these relationships, and the constitutional diversity in the EU as premises for the difficulties encountered in the coherent communication between different types of courts at EU level. Our latest study in this regard, published on the website page of *JURIDICE,* raises the question of whether we have too much constitutional law in the EU[2], aiming at launching a debate on constitutional unity and diversity in the EU.

The recent turbulent turmoil poses a risk not only to the unity of the European construction, as a legal order characterized by an increasing degree of autonomy, but also, above all, to the fundamental rights and freedoms of citizens, recipients of the act of justice, regardless of the level of the courts that carry it out.

Therefore, the basic ideas of this presentation, around which we have organized the debate, are in the sense that a Court-vs.-Court positioning in the European Union (EU) is not acceptable; **we have to find a path together in this European space and worldwide**[3]. The Courts in EU Member States, including the constitutional courts, are connected both horizontally and vertically, namely between each other and with the CJEU in a genuine network, operating under the same rule of law. Metaphorically speaking, the CJEU and the constitutional courts are in the same boat, floating on the same turbulent ocean of history, guided by the same lighthouse – the common values of national constitutions and EU treaties, summarized in Article 2 of the Treaty of European Union which states that "*the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*".

Of course, a separate debate can be launched on the existence of a "safety net" for deviations of justice when it becomes, for example, politically captive (a mechanism that may be conceivable, *ultima ratio*, including a "court vs. court" approach, in order to protect the values of the rule of law and the fundamental rights). Justice in general and the constitutional justice in particular reveal inherent vulnerabilities, recognized and analyzed in the doctrine[4]. That is why the independence of the judiciary plays a

[2] M. Safta, *European constitutional justice. Too much constitutional law in the European Union?*, J Essentials, https://www.juridice.ro/essentials/5257/justitia-constitutionala-europeana-prea-mult-drept-constitutional-in-uniunea-europeana.

[3] See also Dimitrios Parashu, *Developing Billiard Skills: the CJEU Judgment in Euro Box Promotion, a Reaction to Recent Romanian Constitutional Case Law*, European Law Blog.

[4] A study with specific examples in this regard belongs to the President of the Constitutional Law Division of the Venice Commission, being presented on the occasion of a Colloquium held by the Constitutional

central role in all debates concerning the rule of law. As we have shown, as long as EU States are part of a political and legal construction based on common values, including effective judicial protection, a defining component of the rule of law, **only independent and impartial courts can guarantee such effective judicial protection**[5]. The construction of Europe is based on mutual trust, but, as has been emphasized, it is not a blind trust.

Therefore, in a construction guided by the same principles, consisting of independent courts, the conflicting position is a fight without a winner, but only with losers, namely us, its recipients. Conflicts must be avoided and one of the prerequisites for the jurisdictional coherence is **the understanding and acceptance of the constitutional developments and the constitutional review in the EU and even globally.** EU accession and its strong integration have radically changed both dimensions. Obviously we are in a different paradigm of constitutionalism, as well as the constitutional review, correlated with the deeper and deeper integration of the State structure that we have built. In this paradigm, we are talking about both **the constitutional identity of the EU and the constitutional identity of the Member States, the autonomy of EU law** and **the sovereignty of the Member States**, the challenges being to reconcile all these elements that give the unique profile of the EU: **a unity in diversity, a composite democracy.**

Illustrating these ideas, we will further reveal the landmarks of the evolution of European constitutionalism and, inherently, the transformations of the constitutional review in the EU, to emphasize the vulnerabilities of the European construction reflected by the recent case law of the CJEU and some constitutional courts, including Romania, launching an invitation to debate on possible solutions.

2. The evolution of European constitutionalism

As we know, the European Union (EU) is an economic and political union whose core was formed by six States (France, Italy, Germany, Belgium, the Netherlands, and Luxembourg) by **the establishment in 1951 of the European Coal and Steel Community**. Over time, both a single market (the "internal" market) and a structure that operates in many areas, from climate, environment and health policies, to external relations,

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Court of Andorra, *Constitutional Courts: en endangered species? Schnutz Rudolf Durr*, in Rousseau, Dominique, ed., *Les Cours constitutionnelles, garantie de la qualité démocratique des sociétés?*, LGDJ, Lextenso, Issy-les-Moulineaux (2019), pages 111-136; see also Roznai, Yaniv, *Who will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy* (November 16, 2019). William & Mary Bill of Rights Journal, Vol. 29, 2020, Available at SSRN: https://ssrn.com/abstract=3488474 or http://dx.doi.org/10.2139/ssrn.3488474, as well as the references to these works in M. Safta, Constitutional updates, January 2021, https://www.juridice.ro/715033/actualitati-constitutionale-ianuarie-2021-jurisprudenta-relevanta-a-curtii-constitutionale-a-romaniei-evenimente-internationale-publicatii. html#_ftn12.

[5] See Judgment of 19 November 2019, in the Joined Cases C-585/18, C-624/18 and C-625/18ttps://curia.europa.eu/juris/document/document.jsf?text=&docid=220770&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=4919971.

security, justice and migration, have been developed. As noted, "**The European Union has evolved from a humble Coal and Steel Community to a solid Union that is involved in almost every area of the modern life**. However, the Union has not only extended its geographical and jurisdictional scope, but it has also considerably deepened **its supranational character**, both in terms of **normative and decision-making supranationalism**"[6].

As for **the legal nature of the European Union**, a structure positioned on a "middle ground" between national and international law, there are consistent debates, nuanced positions, both in doctrine, where we identify as major currents the American and European constitutional tradition, and in case law, where we identify the strong position of the CJEU from the dawn of the European construction and the one with accents of revolt, in various periods, of the national constitutional courts. However, even acquiring legal personality through the Treaty of Lisbon, the EU is not a European State / super State, but it is still a supranational organization, with federalist aspirations, as well as difficulties in integrating in some areas strictly related to national sovereignty (for example, the field of criminal law, which we have referred to on other occasions, characterizing it as being closer to the "core" of the national sovereignty). The legal literature has expressed the idea that "the European Union can hardly be defined by classical expressions or, rather, by their classical meaning. [...] It is not fair to assess the EU as a finite sum of bodies, procedures, powers and responsibilities. We understand the EU more as a project than as a final entity. The results of this project could be numerous and surprising. The important thing is to remember **the volunteerism of the participants and the responsibility for the results. European constitutionality is not a parasite on the backs of the Member States, just as European integration is not the abstract level above the States. Both are parts of the European reality and of the daily life of States and peoples**"[7]. We believe that this is the main premise from which we must start in order to strengthen a conflict avoidance strategy.

This supranational legal order, constituted by the Member States in agreement and within the limits set forth by their own constitutions, which is constantly evolving, is currently founded on the Treaty on European Union[8] (hereinafter TEU) and the Treaty on the Functioning of the European Union[9] (hereinafter TFEU), which largely take over the provisions of the forthcoming Constitution for Europe[10], an ambitious

[6] R. Schutze, cited work, page 44.

[7] O. *Hamuak,* The substance of the "State character" of the European Union after the Treaty of Lisbon and the decisions of the constitutional courts in the matter, in Romanian Journal of European Law no. 5/2020 (Revista Română de Drept European).

[8] https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_1&format=PDF.

[9] https://eur-lex.europa.eu/legal-content/ro/TXT/?uri=CELEX:12012E/TXT.

[10] http://ier.gov.ro/wp-content/uploads/publicatii/DCT_Tratat_instituire_Constitutie.pdf.

project, but one that did not end with the adoption of a single constitutional law. **However, the above-mentioned treaties function as a body of fundamental rules and, in this light, we should remember that not all States in the world have constitutions as a single act, as is the case, for example, with the United Kingdom**.

Over time, normative, institutional and jurisprudential development has led to the achievement of **a specific EU constitutional order. Such framing was made progressively by the CJEU**, starting with historical judgments in cases such as *NV Algemene Transport en Expeditie Onderneming van Gend&Loos v. Nederlandse Administratiederbelastingen, Case C-26/62, Flaminio Costa v E.N.E.L., Case C-6/64, Amministrazione of State Finance v. Simmenthal SA, Case C-106/77*[11]. The solutions given in the settlement of the preliminary references contributed essentially to the "creation" of the EU's constitutional architecture, **which has acquired its own constitutional identity**[12]. **The mechanism of preliminary reference,** established by Article 267 TEU, has been suggestively characterized as a kind of **central nervous system**, contributing to the organization of the legal, economic and political integration[13].

However, **in this context, the assertion of the primacy of EU law by the CJEU has created and still creates tensions in the relationships with the constitutional courts of the Member States**. These tensions are enhanced at various times, including the intervention of other "ingredients" than the preservation of formally declared national sovereignty and / or constitutional identity. Given this very complexity, it is important to analyze as objectively, coldly, impartially as possible the reasons for such tensions and to proceed to eliminate their real causes.

As for **the autonomy of the EU legal order**, it is at the heart of the idea[14] that the founding treaties of the EU are not "ordinary international treaties", and therefore EU law is not an "ordinary international law". Such approach follows from the case law of the CJEU, which, over time, has abandoned the characterization of the EU legal order as international law[15]. This approach is very visible in **Opinion 2/13, where the CJEU makes a very clear distinction between the systems of protection of fundamental rights in the EU system (internal review) versus the Council of Europe (external review)**: "166. EU law is characterized by that fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States (see, to that effect, judgments in Costa, EU:C:1964:66, p. 594, and judgment Internationale Handelsgesellschaft, EU:C:1970:114, paragraph 3; Opinions 1/91, EU:C:1991:490,

[11] https://curia.europa.eu/jcms/jcms/P_49505/liste-des-57-arrets-de-1954-a-2000-dans-les-langues-des-adhesions-2007.

[12] K. Lenaerts, *National constitutions and European Union law – interactions at the intersection of constitutional pluralism with accession to common values*, in Romanian Journal of Community Law no. 2/2019 (Revista Română de Drept Comunitar).

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

[14] Thoroughly, K. Lenaerts, J.A. Gutierrez-Fons, S. Adam, *Exploring the legal autonomy of the European Union*, in Romanian Journal of European Law no. 3/2021 (Revista Română de Drept European).

[15] CJUE, Comisia/Consiliu, C-28/12, Wightman and Others, C-621/18.

paragraph 21, and 1/09, EU:C:2011:123, paragraph 65; and judgment in Melloni, C-399/11, EU:C:2013:107, paragraph 59), and **by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves** (judgment in van Gend & Loos, EU:C:1963:1, p. 12, and Opinion 1/09, EU:C:2011:123, paragraph 65). Subsequent case law of the CJEU continues and reinforces these ideas.

For reasons of space allocated to this study, without elaborating the reference case law, we will emphasize **the conclusions resulting from this case law, stated in a large study dedicated to the issue of legal autonomy of EU law**, signed, along with other authors, by the President of the CJEU, Koen Lenaerts[16]:

- **The incorporation of external rules into EU law is conditional on those rules complying with the fundamental values and structures on which the EU is based** (the CJEU having the power to carry out this review, just like a national constitutional court);
- **The transnational dimension of autonomy, in the sense that EU law is also autonomous towards the domestic law of the Member States, as a supranational law but also integrated into the legal order of the Member States, as an expression of the same degree of commitment of the Member States towards the values on which the EU is founded, established by Article 2 TEU, reflected in the principles of equality and mutual trust.** As stated in the cited study, "the principle of mutual trust gives impetus to the idea of legal interdependence between the EU and its Member States and between Member States as such";
- **The principle of direct effect –** in the sense that "the very raison d'être of EU law is inherently related to the creation of individual rights that can be exercised directly before national courts";
- **Absence of regulatory gaps –** a characteristic of a coherent and thorough legal system whereas the task of complying with the interpretation of the existing rules falls into the responsibility of the CJEU;
- **Normative conflicts and diversity of values – which are settled similarly to internal ones, starting from the supralegislative position of the treaties and strengthening the idea that "the rules of national law, even those of constitutional rank, which are in conflict with EU law must be left unenforced";**
- **The Treaties and the Charter are a living instrument meaning "a broad approach to constitutional law" and they should be interpreted as a "fundamental constitutional charter"**[17].

Each of the conclusions can be analyzed from the perspective of the Member States, in view of the case law of the constitutional courts. Perhaps the one that immediately

[16] K. Lenaerts, J.A. Gutierrez-Fons, S. Adam, *Exploring the legal autonomy of the European Union*, in Romanian Journal of European Law no. 3/2021 (Revista Română de Drept European).

[17] CJUE, LesVerts/ParlamentulC 294/83.

brings forth reactions at national level refers to conflicts of rules and the possibility of removing the rules of constitutional national law, which are in conflict with EU law. **This is one of the vulnerabilities we were talking about, in the sense of a potential source of conflict. Consequently, it is necessary to analyze, evaluate and identify ways of settlement.**

In essence, the conclusion laid down in the case law of the CJEU is a logical one, because the Union, as an autonomous, coherent and complete legal structure, cannot survive in the context of an internal constitutional conflict, namely between national constitutions and the "fundamental constitutional charter". Theoretically, **such conflicts should not even exist, as long as accession is presumed to have meant an assessment of the constitutional compatibility of each Member State**. Likewise, we are united around the same body of fundamental values. If, however, constitutional conflicts arise (in the broad sense of this term), they must be removed as they crack down on EU unity. Quoting again the President of CJEU, we should imagine that we are in a club, and certain members are disregarding the core values of the club. In such a situation, we would not like to be associated with those other members: "The same is true within the EU. When a State is a member of the EU, it needs to be seen as having the same core values as the other Member States. It is not a matter of a power grab or of singling out any particular Member States for criticism. It is simply a matter of making the system work"[18]. **But the question is who and how can proceed with the "removal"? Can it be the task of any European court of law, regardless of place, rank, jurisdiction?**

As regards the courts within the traditional justice system, involved in settling individual cases, it is difficult to accept, even under the rule of EU law, that the courts of law should remove the constitution from its enforcement, giving priority to contrary EU rules. Not to mention that such implication would be the issue of conflicts of jurisdiction with the constitutional courts where they exist and act as guarantors for the primacy of the constitution[19]. Furthermore, it is the constitutional courts that uphold the unconditional primacy of the Constitution. **Vertical constitutional conflicts thus have the potential to lead to horizontal conflicts between courts of law and constitutional courts, with a destructive effect on the protection of fundamental rights and freedoms.**

Thus, we believe that such extreme situations (conflicts of constitutional norms) would require a more clearly defined, codified and regulated mechanism, in terms of the powers of public authorities.

[18] Interview, Koen Lenaerts „Judges should be fully insulated from any sort of pressure", https://verfassungsblog.de/judges-should-be-fully-insulated-from-any-sort-of-pressure/.

[19] For a viewpoint, see A-J Nițǎ, *The relationship between the decisions of the C.C.R. and the judgments of the C.J.U.E. Compliance with the decisions of the C.C.R. – essential component of the rule of law, in the Volume of the Conference "THE MECHANISM OF THE RULE OF LAW – 2020 of the EU. The relationship between EU law and the national law of the Member States, with special reference to Romania. PRIMACY VS. SOVEREIGNTY (pages 125-144).*

Inspired by a system of law where there is no single-act constitution in the classical sense (the British model) and therefore quasi-mechanisms of constitutional review operate, one possible solution would be for the courts of law to have the possibility of a declaration of incompatibility, the task of settling the conflict of norms falling to the legislator. Moreover, the legislature has the power to initiate, if necessary, the revision of the Constitution, thus ensuring the coherence of the EU legal system, without jeopardizing the legal certainty. Given that there is a conflict of constitutional norms in question, it would be conceivable for the constitutional court (s) to issue an interpretation act of compliance between the Constitution and the EU rule in question, again with the legislature's obligation to intervene if such a consistent interpretation is not possible. Such settlement would be more in the sphere of the relationships between the constitutional courts, namely the national constitutional courts and the CJEU, and not of the traditional courts of law that have jurisdiction to settle individual cases, to enforce the law in concrete situations, and the CJEU. We should point out again that we are referring to the typical situation, to principles, and not to exceptional situations that would call into question institutional slippages and adapted correction mechanisms.

The preservation of the autonomy of EU law and the national sovereignty is the first architects of the Member States. Hence, the settlement of constitutional conflicts must be considered primarily at the national level. The legislature and the other authorities shall find the best way (in relation to the national constitutional framework) to remove national rules or interpretations contrary to the binding ones commonly created and accepted by all Member States, **so as not to create legal uncertainty, tensions and no disproportionate burden on the shoulders of the national judge, caught in the dilemma of choosing the constitution and the European charter / constitutional order.** Having these solutions, we can then move to the table of European dialogue, to the improvement of the supranational instrument of dialogue, as the EU is not an abstract structure that works in a vacuum, but the voice of 27 states.

3. Transformations of constitutional review in the EU

We said that EU accession and developments in this context have led to significant changes in terms of constitutional review.

Given the complex nature and peculiarities of constitutional justice in Europe and in the world, it is generally accepted that it is difficult to strictly identify models or patterns[20]. However, by following the historical developments and taking into account specific common features, they can be broadly identified as "models" of constitutional

[20] For a presentation on the constitutional review models, see A. MAVČIČ, Comparative Constitutional Analysis, www.concourts.net; D. Maus, *Application of the Case Law of Foreign Courts and Dialogue between Constitutional Courts*, in Constitutional Law Review no. 2/2010, page 3, www.constcourt.ge.

review, with the largest extension at present, **the American** one (the constitutional review exercised within the jurisdiction falling into the courts of law, being in its traditional form a diffuse review) and **the European or Kelsenian model** (the review exercised by a single, special and specialized body of constitutional jurisdiction)[21].

Along with these forms of constitutional review, "attenuated" forms also subsist, in the sense that the courts of law may give, for example, a statement of incompatibility of normative acts with a body of laws considered fundamental, leaving the last word to Parliament (see Great Britain) which we have already mentioned[22]. Likewise, there are notable features of traditional models because this judicial review of legal norms is constantly evolving, irrespective of the legal system.

In the EU, in most States there are separate constitutional courts, belonging, with various variations (notably the German model) to the Kelsenian model of constitutional justice: Austria-Constitutional Court (Articles 137-148 of the Constitution), Belgium – Constitutional Court (Article 142 of the Constitution), Bulgaria – Constitutional Court (Articles 147-152 of the Constitution), Czech Republic – Constitutional Court (Articles 83-89 of the Constitution), Croatia – Constitutional Court (Articles 126-132 of the Constitution), France – Constitutional Council (Articles 56-63 of the Constitution), Germany – Constitutional Court (Articles 93-94 of the Constitution), Italy – Constitutional Court (Articles 135-137 of the Constitution), Lithuania – Constitutional Court (Articles 102-108 of the Constitution), Luxembourg – Constitutional Court (Article 95 of the Constitution), Poland – Constitutional Court (Articles 188-197 of the Constitution), Portugal – Constitutional Court (Articles 221-224 of the Constitution), Slovakia – Constitutional Court (Articles 124-140 of the Constitution), Slovenia – Constitutional Court (Articles 160-167 of the Constitution), Spain – Constitutional Court (Articles 150-165 of the Constitution), Hungary – Constitutional Court (Article 24 of the Constitution), Romania – Court Constitutional Court (Articles 142-147 of the Constitution).

With significant differences and peculiarities, in some States there is a constitutional review carried out by the courts of law, usually the Supreme Court: Cyprus – Supreme Court (noting that after 1964, the powers of the High Court and the Supreme Constitutional Court were reunited in the Supreme Court[23]), Denmark – common law courts at all levels[24], Greece – each court is considered competent to rule upon the compliance of the legal norms with the Constitution, but only the Special Supreme

[21] Thoroughly, M. Safta, *Constitutional Law*...., vol. 1, cited work, pages 103-110.

[22] Y. Roznay, *Introduction: Constitutional Courts in a 100-years perspective*, in ICL Journal, 2020, vol.14, issue 4.

[23] See E.Araliou-Koula, L. Mixedes, legal advisers to the Supreme Court of Cyprus – in the paper Legal Advisers of the Supreme Court of Cyprus – volume The role of assistant-magistrates in the jurisdiction of the Constitutional Courts, Universul Juridic Publishing House, Bucharest, 2016, page 53.

[24] S.G. Barbu, commentary on the Constitution of the Kingdom of Denmark, in the Constitutional Codex, the Constitutions of the European Union Member States, Official Gazette Publishing House, vol. I, page 443.

Court (Article 100 of the Constitution) can exclude such norms from the legal order[25], Estonia – Supreme Court (Article 150 of the Constitution), Finland – any court of law (Article 106 of the Constitution), Ireland – Supreme Court and High Court[26], Malta – Constitutional Court – Supreme Court of Law under Article 95 of the Constitution, Sweden – Supreme Court and Supreme Administrative Court[27].

There is no constitutional review in the Kingdom of the Netherlands (Article 20 of the Constitution).

Beyond these classifications and the separate treatment of the constitutional review according to the constitutional regulations of each State, we must note that, by accession to the EU, even in the classical Kelsenian systems a review carried out by the courts of law within the traditional justice system overlapped, which is very similar to the American one and aims at ensuring the primacy of EU law, by preventing the contrary rules of domestic law from being enforced.

What the courts do when they remove domestic law contrary to EU law from being enforced (and we are referring here exclusively to unconstitutional rules) is practically a constitutional review, but in relation to a supranational reference system, that conglomeration of rules which constitutes the European constitutional charter[28]. This sui generis form of constitutional review carried out by the courts of law coexists with that carried out by the constitutional courts on the norms of primary rank in domestic law, in relation to the national Constitution. This radical paradigm shift in terms of the review exercised by the courts of law on rules in the EU gives rise to a dynamic of court relationships not only in the field of dialogue but also in that of competition. However, the idea of that path about which we were talking about at the beginning of this study is not to stimulate the competition, but the dialogue. Neither the CJEU nor any other supranational or international court of law is an "arbiter" of internal conflicts, but a partner of national courts of law. National judges, regardless of the court of law, are both judges of national law and EU law.

In other words, given the specificity of the EU legal order, the two overlapping forms of judicial review of the rules need to be harmonized. Harmonization can be achieved in relation to a body of common principles. Can't we refer to a certain constitution – which constitution – because we have 27 constitutions – which one should we comply with? Consequently, we are referring to what we all find in the constitutions and it is set forth in the body of fundamental principles of the EU, because it is clear that there is no European Constitution that does not recognize the

[25] E.S. Tănăsescu, commentary on the Constitution of the Hellenic Republic, Constitutional Codex (...) Ibidem, page 474.

[26] E.S. Tănăsescu, commentary on the Constitution of Ireland, Ibidem, page 758.

[27] S.G. Barbu, commentary on the Constitution of the Kingdom of Sweden, Ibidem, vol. II, page 660.

[28] For the various "competition" relationships among the various European courts, see Leonard F.M Besselink, The proliferation of constitutional law and constitutional adjudication, or how american judicial review came to Europe after all, în Utrecht Law Review, Vol.9, issue 2, March 2003.

values contained in Article 2 TEU. The question is what do we all mean by those values?

Therefore, concepts that are not yet sufficiently defined (thus capable of creating conflicts), such as national constitutional identity, come to light[29], a kind of "shield" more or less outlined, more or less coherently used at various times in the case law of constitutional courts. As Professor J H Weiler emphasized in a comprehensive study of judicial review in the modern world, identity can be worn out or abused as part of political or constitutional argument; this return to identity in the case law of constitutional courts can be a more or less sincere, reactive or constitutive display of political and social sensitivit[30]. The argument of constitutional identity as a coherent and well-founded discourse can be a producer of constructive vertical dialogue, taken as such by the case law of the CJEU, as demonstrated through various moments in the history of the EU.

In this light, the strategy of avoiding conflicts involves assigning the same meaning to the common values of the EU and the Member States and establishing a coherent and mutually accepted doctrine of constitutional identity. The recent rule of law mechanism, imposed on all Member States, can be a tool to lead to this goal, depending, of course, on how it is implemented.

Returning to the classification of constitutional review models, we must not forget the vulnerabilities of both review systems – the risk of legal uncertainty of the American model and the spectrum of political influences that threaten the Kelsenian constitutional courts. Of course, even traditional justice is not exempt from political influences. This is a common vulnerability. We could look at the full side of the glass, hoping that a coexistence of the two forms of review, by reference to different reference systems, would temper these vulnerabilities. However, our legal system is not Anglo-Saxon, the unification of practice at the level of the HCCJ being carried out under strictly determined conditions (RIL or HP). Moreover, the HCCJ cannot replace the Constitutional Court with regard to the binding interpretation of the Constitution. **Consequently, until a legislative clarification, the dialogue between the courts of law remains the main strategy to avoid conflicts, both horizontally and vertically. We take into account an effective dialogue, a real assumption by judges of the objective of avoiding / eliminating conflicts.**

[29] See also A.Niță, *National constitutional identity – concept derived from Article 4.2 T.U.E., controversial in the context of the Rule of Law Mechanism 2020 of the U.E.",* paper presented at the National Conference "The Rule of Law Mechanism – 2020 of the EU The relationship between EU law and the national law of the Member States, with special reference to Romania". PRIMACY VS. SOVEREIGNTY, 14-15 October 2021, held by the "Ovidius" University of Constanța, Faculty of Law and Administrative Sciences, in partnership with the Romanian Academy of Legal Sciences – ASJR, "Andrei Rădulescu" Institute of Legal Research of the Romanian Academy – ICJ and Universul Juridic Publishing House, in collaboration with UNBR, UNNPR, UNEJ, UJR, UNPIR.

[30] D. Lustig, J.H:H weiler, Judicial Review in the contemporary world, Retrospective and prospective, ICON (2018), vol.16, no 2, pages 315-372.

As an example, we would like to mention the first and only preliminary reference of the CCR to the CJEU in the Coman Case. A complex and sensitive case, due to the fact that the same-sex marriages, unrecognized in Romania, were under discussion. If we look at the separate opinion/opinions expressed then, we find that there may be a seemingly simpler, technical, formal way – that of rejecting as inadmissible both the reference for a preliminary ruling and the exception of unconstitutionality in view of the fact that the problems of interpretation of law and of EU law arose. However, the CCR acted extraordinarily nicely and assumedly in opening this dialogue with the CJEU, because it obviously raised an issue of EU law with constitutional relevance – the free movement within the EU of same-sex couples, legally married in a Member State. In line with the majority opinion that substantiated the decision, we believe that this issue of EU law with constitutional relevance could not be ignored, simply sent back to the court of law that referred to the CCR.

We have always considered and stated whenever we have had the opportunity that the constitutional judge (and here we are also taking into account the European one) must ponder very well the cases settled in terms of the effects taken through the decision he/she pronounces. Do they solve the problem? Do they bring peace, in a broad sense? Or, on the contrary, do they cause storms? Or maybe they give rise to confusion, in the sense that a separate debate should perhaps be given to the quality of the reasoning of the decisions of the constitutional courts.

Therefore, as Professor Valeriu Stoica emphasized in a recent speech on this subject, the dialogue between the CCR and the CJEU (and of the constitutional courts in general with the CJEU) is a necessary one, with positive effects in terms of the national legal order and the EU as a whole. Likewise, there is a need for a dialogue between national courts and the constitutional courts, including in other forms of cooperation, for meetings and direct discussions. Such an approach was tried many years ago and perhaps this dialogue should be brought again into discussion.

4. Conclusions and perspectives

The broad nature and complexity of the subject determines that the few ideas we have expressed are just an invitation to debate.

Member States have committed themselves to a new constitutional reality at the time of accession, through their own Constitutions, which enshrine in unison – regardless of the diversity in terms of transposition of EU law into domestic law – the principle of *pacta sunt servanda*. Each Member State means the European Union, and in this paradigm we should consider the institutional relationships, clothed in loyalty, imposed by the EU constitutions and Treaties.

One of the judges of the German Federal Constitutional Court argued in an interview[31] that after the entry into force of the Treaty of Lisbon, we are very close to the European federation. He also argues that (in the context of a continuous transfer of powers from the Member States to the Union) there is only one small step left to achieve this transformation of the supranational organization into a form of government. However, this "last" step is within easy reach of the Member States, as potential creators of the State[33,] not being able to be imposed by a court of law, whatever that would be – the CJEU or national court of law or constitutional court.

The EU is made up of sovereign states, and the autonomy of EU law does not preclude the sovereignty of Member States, noting the distinctions made in this regard in the coherent doctrine of legal relationships at EU level made by the German Federal Constitutional Court. This Court has recognized in that case law that autonomy does not involve a "significant structural shift to the detriment of the powers of the Member States"[32]. It remains an open and sensitive discussion who controls these deviations / movements from the joint project on both sides, to what extent and with what effects. In other words, as has been shown, "the EU remains in a position to create permanent tensions. **It is important to transfer the tensions from the formal constitutional conflict to the competition of the various materials with the purpose of achieving the objectives of the joint project"**[33].

In this light, perhaps tensions are too easily and too often pushed towards the debate of the concepts of sovereignty, national constitutional identity. Is this really about in question when "swords come out of their scabbards"? We think that every tension or conflict has peculiarities that cannot be ignored, because, it is not so, the devil is in the details.

And, in the same sense, we would like to emphasize a value, which may not seem to find its impact when we talk about the relationships between different institutions but which we believe it should be also given an inter-institutional importance and not just an intra-institutional one: collegiality. Perhaps not coincidentally, the topic of the recent Conference of Presidents of Courts within the Associations of Francophone Constitutional Courts was Collegiality. As the President of the Association emphasized in his opening remarks[34], working in the spirit of collegiality means resolving differences in order to reach a clear and convincing result on which a group

[31] Udo di Fabio, Interview between Daniel Kaiser and Udo di Fabio intitulat "Po Lisabonujsme uz na hranicifederace" ["After Lisbon we are on the border of the federation "]. Published in the Czech daily publication Lidovenoviny of 12 December 2009. Interview [online]. Accessible at http://www.euroskop.cz/8801/14887/clanek/po-lisabonu-jsme-uz-na-hranici-federace, apud Ondrej HAMULAK, cited work.

[32] BverfG, Honeywell, Ordinance of 6 July 2010, 2 BvR 2661/06, paragraph 71.

[33] O. *Hamuak,* The substance of the "State character" of the European Union after the Treaty of Lisbon and the decisions of the constitutional courts in the matter, in Romanian Journal of European Law no. 5/2020 (Revista Română de Drept European).

[34] Richard Wagner, in Bulletin no. 14, December 2021, pages 7-9.

of judges can agree. Such task is easier to be described than to be accomplished because collegiality is not a theory but it refers to a living and concrete judicial universe, shaped by essential human traits, springing from the unique experience and personalities of members of a court of law. In this respect, the selection pool of constitutional judges is also important, which can be more or less fertile for cultivating a spirit of collegiality.

To sum up, at the end of this presentation, we come to a topic of reflection and concern, namely the profile of judges in general and constitutional judges in particular, irrespective of their level: independence, competence, balance, those judges who, as the US Supreme Court judge said, Antonin Scalia, shall apply the Constitution, the law, in the most direct way possible and, we add, to engage themselves in dialogue in the same spirit with their confreres, regardless of the court of law, the national, international, supranational plan, in order to avoid conflicts.