The regulatory role of judicial activism. The experience of the Constitutional Court of Romania – an ongoing evolution

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A B S T R A C T

The aim of this paper is to point out the experience of the Constitutional Court of Romania in terms of judicial activism and to support its factual necessity *vis-a-vis* the constitutional courts in order to enforce the principle of supremacy of the Constitution. The selected and analysed decisions focus on the relation of the Constitutional Court to the legislative and judiciary, on the way in which the Court regulates their activity through constitutional interpretation and on the necessity of extend and strengthen the normative content of the Constitution by incorporating certain international obligations that derives from international treaties – concluded especially in the field of human rights protection – without affecting the national constitutional identity. It is also emphasized that there is a thick borderline between judicial activism and infringement of other state authorities' competencies.

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At the beginning of a constitutional court's activity, there are inherent difficulties for its institutional legitimization; however, the confirmation of attainment thereof is a matter of time if the court has an active approach towards its role to guarantee the supremacy of the Constitution. Of course, for this purpose the court has to be endowed with powers that ensure the undiluted fulfilment of its role (therefore, an exterior condition unrelated to the court's behaviour), while the Court has to exercise its powers under a strict scrutiny, aspect that is linked to the inner behaviour of the Court and its members. In this context, in order to label a constitutional court as promoting judicial activism or judicial self-restraint, we have to define the two concepts that are quite new in

the Romanian legal philosophy. In a previous study we used and developed these concepts when analysing the relationship between the constitutional court and the judiciary[1], emphasizing that they designate the degree of involvement of the Constitutional Court in providing guidance and ensure that courts conduct their activity in line with the requirements of the Constitution whereas the monopoly of judicial interpretation of the Constitution belongs to the Constitutional Court. In terms of the Constitutional Court's approach, it is obvious that the two concepts are equally applicable to Parliament or Government. But, the intensity of this dialogue depends, crucially, on the one hand, on the position, role, powers, effects of decisions and institutional legitimacy of the Constitutional Court, criteria which we described as objective, and, on the other hand, on its composition, as well as on the political, economic and social realities at a given time, criteria which we described as subjective. It may seem that there should be no room for judicial activism, but only for a normal exercise of the constitutional review, a task that is inherent to any constitutional court's activity; this would be a genuine assertion only if there is an abstract way of tackling this issue. But reality is not governed by abstract notions and this is a reason why a normal exercise of a given competence should be regarded in certain circumstances as a judicial activism. When there is (a) a change of constitutional case law in a certain respect, (b) a constitutional struggle with other branches of powers in order to change their long established administrative/ judicial practice or (c) an evolving interpretation of the Constitution, we can assert that there is a high degree of constitutional implication in shaping the future political and legal evolution of the society; and that is judicial activism.

In order to analyse the Romanian experience, it should be borne in mind that, in our institutional landscape, the Constitutional Court is a relatively new authority[2], whereas it has been established under the 1991 Constitution[3]. Moreover, what is currently the most important and specific power of the constitutional court – the constitutional review of laws – used to be exercised

[1] Puskás V. Z., Benke K. - *Implications of the decisions of the Constitutional Court on the activity of the High Court of Cassation and Justice and of the Superior Council of Magistracy* in The Constitutional Court Bulletin no.2/2014, p.7-32.

[2] In drafting the Constitution, there were also opinions that the American review of constitutionality of laws should have been adopted, as it was considered excessive to set up a body which could control all three powers. Furthermore, there was also the view that the verification of the constitutionality of laws should be a competence solely of the Supreme Court of Justice, in Joint Sections, and the a priori review be carried out by a Committee of the two Chambers of Parliament; for details, see, I. Vida – *Bătălia pentru Curtea Constituţională* (The battle for the Constitutional Court – t.n.) in Despre Constituţie şi Constituţionalism – Liber Amicorum Ioan Muraru (About Constitution and Constitutionalism – Liber Amicorum Ioan Muraru – t.n.), Hamangiu Publishing House, Bucharest, 2006, p. 235-248, especially p. 244 and p. 246.

[3] See, also, Law no.47/1992 on the organization and functioning of the Constitutional Court, published in the Official Gazette of Romania, Part I, no.101 of 22 May 1992, successively republished in the Official Gazette of Romania, Part I, no.187 of 7 August 1997, the Official Gazette of Romania, Part I, no.643 of 16 July 2004, and the Official Gazette of Romania, Part I, no.807 of 3 December 2010.

by courts of law both during the period up to the beginning of the Communist regime [1911-1945], and in the aftermath of the 1989 Revolution, when the plenary of the Supreme Court of Justice, by four judgements delivered on 14 January 1991, therefore prior to the adoption of the Constitution, held that it alone was empowered to rule on the constitutionality of laws upon referral by the General Prosecutor of Romania[4]. After the 1991 Constitution, the plenary of the court lost the power – established by case-law – to verify the constitutionality of laws, and such has been transferred to the Constitutional Court.

In what follows, we will present a concise image: (1) on the manner in which the Constitutional Court of Romania preserved and consolidated its powers vis-à-vis the attempts of the Parliament and Government to limit them; (2) on the manner in which the Constitutional Court strengthened its position in relation to the judiciary; and (3) on the Court's approach as to the interpretation of the Constitution taking into account the requirements of the international treaties ratified by Romania and the mandatory acts of the European Union. Therefore, there are there types of situations that need to be analysed in terms of the judicial activism promoted by the Court, as follows:

1. Judicial activism of the Constitutional Court leads to an *ex post* reaction of the legislative authority to limit its powers;

2. Judicial activism of the Constitutional Court broadens the sphere of constitutional review as to include legal norms in the interpretation given by means of decisions delivered for the uniform interpretation and application of the laws or by means of a consolidated case law;

3. Judicial activism of the Constitutional Court constitutionalizes, in certain circumstances, the obligations arising from the international treaties on human rights or from the EU law, all these becoming either standard of reference or standard on interpretation interposed to the Constitution.

1. Judicial activism and the reaction of the legislative authority

We will take into account the broad sense of the term "legislative authority" as to designate in what follows both Parliament and the Government when the latter acts as a delegate legislator. It has to be pointed out that in the Romanian constitutional system the Government has the

[4] The Court held that the means made available to the judiciary for the control of the executive and the legislative are the administrative litigations procedure and the constitutional litigations procedure; in the case of the constitutional litigations procedure, the jurisdiction belongs to Plenum of the Court upon referral by the prosecutor-general; in this case, the Plenum of Court had been referred to by a court of law in October 1990 with reference to the unconstitutionality of the Grand National Assembly Decree no.92/1950 for the nationalisation of some buildings, published in Official Bulletin no.36 of 20 April 1950, which has also led to the dismissal of the application as inadmissible for the reason that the Plenum had not been properly notified; see, for details, M. Criste – *Controlul constituţionalităţii legilor în România – aspecte istorice şi instituţionale* (The constitutional review of laws in Romania – historical and institutional aspects – t.n.), Lumina Lex Publishing House, Bucharest, 1992, p. 70-76

competence to adopt legislative acts that – after their enactment – are subject to a parliamentary procedure that may lead to their approval or rejection [Article 115 of the Constitution].

The powers of the Constitutional Court are enshrined in the Constitution [Article 146 a-k)], but a provision of the Constitution [Article 146 l)] stipulates that other powers may be provided in the Court's organic law. On this constitutional basis, the Parliament adopted Law no.177/2010[5] according to which the Constitutional Court adjudicates on the constitutionality of the resolutions by the Plenary of the Chamber of Deputies, resolutions by the Plenary of the Senate and resolutions by the Plenary of the joint Chambers of Parliament[6]. After the enactment of the aforementioned law, 40 senators contested its constitutionality before the Constitutional Court in an *a priori* constitutional review, but the challenge was dismissed by the Court[7]. The activism promoted by the Constitutional Court when exercising this power prompted the governing political parties' representatives to fiercely challenge its normative existence[8]. As a result, initially the Parliament and then the Government tried to abolish it by adopting a law[9]/ an emergency ordinance[10] to that purpose and having failed in this endeavour, the Parliament tried to limit the Court's discretion in exercising this power[11].

By Decision no.727 of 9 July 2012[12], the Constitutional Court stated that the legislative amendment, which abolishes the power of the Constitutional Court to rule on the constitutionality of the resolutions by the Plenary of the Chamber of Deputies, the resolutions by the Plenary of the Senate and the resolutions by the Plenary of the two Joint Chambers of Parliament, without any distinction, does nothing but to diminish the authority of the Constitutional Court – a fundamental institution of the State, and to infringe, thus, the principle of the rule of law, leading to unforeseeable difficulties in achieving an appropriate State policy aimed to consolidate and build a democratic State in which the Constitution, its supremacy and the laws are mandatory. In these circumstances, the Court noted that the democratic and social State based on the rule of law should

[5] Law no.177/2010 amending and supplementing Law no.47/1992 on the Organisation and Operation of the Constitutional Court, the Civil Procedure Code and the Criminal Procedure Code of Romania, published in the Official Gazette of Romania, Part I, no.672 of 4 October 2010.
[6] In the Romanian legal system, such resolutions may concern the vote of confidence/ no confidence adopted by the Parliament, the appointment/ removal of certain high ranking public officials etc.
[7] Decision no.1106 of 22 September 2010, published in the Official Gazette of Romania, Part I, no.672 of 4 October 2010.
[8] For an extensive study on this topic, see Puskás V. Z. – *Rolul Curţii Constituţionale în consolidarea statului de drept (The Role of the Constitutional Court in Enhancing the Rule of Law)* in the volume Repere actuale din jurisprudenţa Curţii Constituţionale a României şi perspective de justiţie europeană (Current Benchmarks in the Constitutional Court of Romania Case-Law and Perspectives of European Justice), Sitech Publishing House, Craiova, 2012.
[9] The law was adopted on the 25th of June 2012 and immediately challenged before the Constitutional Court.
[10] Emergency Ordinance no.38/2012 amending Law no.47/1992 on the Organisation and Operation of the Constitutional Court, legislative act published in the Official Gazette of Romania, Part I, no.445 of 4 July 2012.
[11] Law for the approval of Emergency Ordinance no.38/2012, law adopted on the 18th of July 2012.
[12] Published in the Official Gazette of Romania, Part I, no.477 of 12 July 2012.

not remain a fundamental principle, with purely theoretical nuances, without any practical results, but it must become a reality, properly perceived, both by public authorities and by citizens.

The Court also pointed out that exclusion from constitutional review of all the resolutions of the Parliament is not based on the rule of law but, possibly, on grounds of necessity, which, by nature, involves subjectivity, interpretation and arbitrary. However, constitutional justice is based on the rule of law, not on necessity. The Court emphasized that the exercise of this power cannot mean an "excessive" burden for the Constitutional Court, as stated in the explanatory memorandum to the law subject to review, a claim without legal significance, whereas it is inextricably integrated, once legitimately given, into a legal mechanism likely to contribute to the separation and balance of powers in a democratic and social State governed by the rule of law. To assess and decide on the activity of the Constitutional Court, especially in terms of quantitative standards, is to incorrectly perceive it and furthermore, to ignore the substance of its fundamental role.

The Court concluded that the purpose of the rule of reference comprised in Article 146 l) of the Constitution, as results from its wording - „it also fulfils other prerogatives as provided by the Court's organic law", was to allow the legislator to extend the powers of the Constitutional Court. Therefore, to interpret the mentioned fundamental rule in that the legislator would be able to limit, abolish or reduce these powers, at the expense of other fundamental provisions, amounts to emptying it of its contents, respectively to divert it from the purpose to improve constitutional democracy, pursued by the framers themselves during the revision, which is absolutely unacceptable. Therefore, the powers of the Constitutional Court provided under Article 146 l) of the Basic Law cannot be changed if such results in abolishing, under any conditions and in breach of certain fundamental rules, any of these powers. In this regard, even if the power to review the constitutionality of the resolutions issued by Parliament was granted to the Constitutional Court by means of its organic law, it acquired a constitutional nature under the provisions of Article 146 l) of the Constitution.

As a consequence, the Court held that the legislative solution which exempts from constitutional review Parliament Resolutions that infringe upon constitutional principles and values was unconstitutional[13].

[13] In Decision no.799 of 17 June 2011, published in the Official Gazette of Romania, Part I, no.440 of 23 June 2011, and Decision no.80 of 14 February 2014, published in the Official Gazette of Romania, Part I, no.246 of 7 April 2014, delivered on two legislative proposals concerning the revision of the Constitution of Romania [art.146 a) 2nd thesis of the Constitution], the Court stated that article 146 l) of the Constitution can be repealed by way of constitutional amendment only if the power of the Constitutional Court to review the constitutionality of the resolutions by the Plenary of the Chamber of Deputies, resolutions by the Plenary of the Senate and resolutions by the Plenary of the

It has to be mentioned that the Court struck down the legislative solution – so, not only the law that was under *a priori* constitutional review and that was not in force at that moment, but also the emergency ordinance adopted by the Government whilst the case was pending before the Court, emergency ordinance which contained the same solution abolishing the aforementioned power of the constitutional court. As an effect of the Court's decision, the said emergency ordinance should have been rejected by the Parliament. But, instead of rejecting the emergency ordinance, the Parliament approved it with amendments and it only limited the Court's competence in respect of the aforementioned power[14]. However, in an *a priori* constitutional review the Court declared unconstitutional the enacted approval law, because it limited in an unconstitutional manner the plenary jurisdiction of the Court in exercising the constitutional review of the parliamentary resolutions[15].

After this constitutional struggle, the Constitutional Court's power conferred by Law no.177/2010 has still a normative existence, and there have been no other legislative attempts to abolish/ restrict it. We may assert the constitutional review of parliamentary resolutions has now become a standard democratic exercise. As a matter of fact, since September 2012, the Court has delivered 19 decisions on the constitutionality of parliamentary resolutions. In conclusion, it is obvious that the dynamic interpretation of the Constitution was the paramount ground that preserved unaltered the Constitutional Court's competence.

Another decision that worth to be mentioned in this context is Decision no.766 of 15 June 2011[16]. Through that decision, the Court extended its jurisdiction, considering itself competent to exercise the constitutional review of normative acts that are no longer in force, but which continue to produce effects in concrete judicial cases. It has to be emphasized that the respective decision represented a turning point in the Court's practice as until 2011 the Court itself had established that was not competent to verify the constitutionality of the normative acts that were no longer in force. This self-restraint approach was left behind and since 2011 the Court deemed itself competent to verify the constitutionality of all normative acts regardless whether they are in force or not.

joint Chambers of Parliament is enshrined in the Constitution. Otherwise a simple repeal of Article 146 l) of the Constitution violates the provisions of Article 152 of the Constitution - *The limits on matters of revision*.

[14] According to the adopted law, the Court would not be any more competent to verify the constitutionality of the decisions that concerned the internal autonomy of the Parliament and the individual decisions adopted *intuitu personae* by the Parliament.

[15] Decision no.738 of 19 September 2012, published in the Official Gazette of Romania, Part I, no.690 of 8 October 2012.

[16] Published in the Official Gazette of Romania, Part I, no.549 of 3 August 2011.

2. Judicial activism in relation to the judiciary

The legislature has regulated, in both civil and criminal matters, two legal concepts that can give expression to Article 126 (3) of the Constitution, under which "The High Court of Cassation and Justice shall provide a unitary interpretation and implementation of the law by the other courts of law, according to its competence". These concepts regard the decisions delivered in an appeal in the interest of the law and the preliminary rulings on questions of law.

In its case law, the Constitutional Court stated that "the mandatory nature of the solutions given on matters of law, by settling an appeal in the interest of the law, means that the judge must comply with the uniform legal interpretation given by the supreme court"[17]. Therefore, the Constitutional Court, by Decision no.854 of 23 June 2011[18], deemed itself competent to verify the constitutionality of Article 394 of the Criminal Procedure Code of 1968, as interpreted by Decision no. LX/2007 pronounced by the Joint Sections of the High Court of Cassation and Justice following the settling of an appeal in the interest of the law lodged by the General Prosecutor of Romania[19]. Furthermore, in order to be able to rule on the constitutionality of the rule thus interpreted, it has already become an exercise in the case-law of the Constitutional Court to verify whether or not the High Court of Cassation and Justice, by the interpretation given, falls within the limits of Article 126 (3) of the Constitution[20], in the sense that the Constitutional Court first establishes whether or not the interpretation of the High Court of Cassation and Justice constitutes an interference in the competence of the legislative power and, subsequently, the Court determines whether or not the text thus interpreted is constitutional in substance, respectively whether or not it complies with the provisions of the Constitution[21].

By Decision no.854 of 23 June 2011, the Court held that "the fact that by a decision handed down in an appeal in the interest of the law a certain interpretation is given to a legal text is not

[17] See, in this regard, Decision no.8 of 18 January 2011, published in the Official Gazette of Romania, Part I, no.186 of 17 March 2011.
[18] Published in the Official Gazette of Romania, Part I, no.672 of 21 September 2011.
[19] By Decision no.854 of 23 June 2011, the Court, stating that it has no jurisdiction to give a ruling on the decision of the High Court of Cassation and Justice as an act, but that it may rule on the primary regulatory act as interpreted by it, gave the signs of returning to its case-law established by Decision no.409 of 4 November 2003, published in the Official Gazette of Romania, Part I, no.848 of 27 November 2003. It thus continued what it had started with Decision no.8 of 18 January 2011, published in the Official Gazette of Romania, Part I, no.186 of 17 March 2011, by which it considered the constitutionality of Article 35 of Law no.33/1994 in the mandatory interpretation imposed by Decision no.53/2007 of the Joint Sections of the High Court of Cassation and Justice. It is worth noting that it did not retain this mentioning in the title and in the operative part of the decision, but it stated it in the recitals of the decision.
[20] See Decision no.349 of 17 June 2014, published in the Official Gazette of Romania Part I, no.582 of 4 August 2014.
[21] By Decision no.898 of 30 June 2011, published in the Official Gazette of Romania, Part I, no.706 of 6 October 2011, the Court held that the Decision of the High Court of Cassation and Justice no.3 of 4 April 2011 concerning the salaries of teaching staff, „is far from constituting an interference in the competences of the legislative power, as it constitutes a correct implementation of the Constitutional Court's decisions handed down in matters related to the salaries of teaching staff".

likely to be converted into a bar to the proceedings forcing the Court, despite its role as guarantor of the supremacy of the Constitution, to stop examining the text in question in the interpretation given by the supreme court. The Constitution is the framework and the extent to which the legislature and the other authorities can act; therefore, all interpretations in relation to the legal rule should take account of this constitutional requirement contained in Article 1 (5) of the Basic Law, which provides that, in Romania, the observance of the Constitution and its supremacy is mandatory". Therefore, the Constitutional Court "verifies the constitutionality of the applicable legal texts in the interpretation enshrined by the appeals in the interest of the law. To accept the contrary view is contrary to the very reason for existence of the Constitutional Court, which would thus deny its constitutional role by accepting that a legal text can apply within limits that could collide with the Basic Law".

Accordingly, the High Court of Cassation and Justice has the jurisdiction to interpret and apply a legal provision within the limits set by the Constitution, and this competence cannot be exercised in breach of the constitutional framework and, as described above, by infringing the competence of the legislature or even the case-law of the Constitutional Court.

In this context, it is worth mentioning the Decision of the High Court of Cassation and Justice no.8 of 18 October 2010[22], delivered in an appeal in the interest of the law, by which it was held that after the repeal of the provisions of Articles 205 to 207 of the Criminal Code, by Article I (56) of Law no.278/2006 amending and supplementing the Criminal Code and other laws, "insult and slander have not been re-incriminated", although the Constitutional Court had previously assessed, by Decision no.62 of 18 January 2007[23], that the repealing provisions found to be unconstitutional "cease their legal effects under the conditions laid down in Article 147 (1) of the Constitution and the legal provisions subject to repeal shall continue to produce their effects". It was evident that the High Court of Cassation and Justice had exceeded its constitutional competence of uniform interpretation of the law, annulling the Constitutional Court Decision no.62 of 18 January 2007. Subsequently, the Constitutional Court, by Decision no.206 of 29 April 2013[24], held that 'the solution given on the matters of law examined' by the Decision of the High Court of Cassation and Justice – Joint Sections no.8 of 18 October 2010, published in Official Gazette of Romania, Part I, no.416 of 14 June 2011 is unconstitutional, being contrary to the provisions of Article 1 (3), (4) and (5), Article 126 (3), Article 142 (1) and Article 147 (1) and (4)

[22] Published in the Official Gazette of Romania, Part I, no.416 of 16 June 2011.
[23] Published in the Official Gazette of Romania, Part I, no.104 of 12 February 2007.
[24] Published in the Official Gazette of Romania, Part I, no.350 of 13 June 2013.

of the Constitution and to the Constitutional Court Decision no.62 of 18 January 2007, published in Official Gazette of Romania, Part I, no.104 of 12 February 2007.

This latter decision shows that, indirectly, through the texts in the Code of Civil Procedure or the Code of Criminal Procedure, where appropriate, one can even challenge, in terms of their constitutionality, the decisions delivered by the High Court of Cassation and Justice in settling appeals in the interest of the law[25]. Moreover, we note that, by Decision no.799 of 17 June 2011[26], the Court suggested the introduction of a new power, respectively, the power to rule on the constitutionality of the decisions handed down by the High Court of Cassation and Justice in the settlement of appeals in the interest of the law. The Court held that "the solutions rendered in the appeal in the interest of the law, binding on the courts, adopted in order to ensure the uniform interpretation and application of the law, should comply with the constitutional requirements, reason why the constitutional review thereof is necessary".

The Court has also held that the normative content of a legal act as established in the interpretation given through a preliminary ruling on questions of law can be subject to constitutional review just as the interpretation given through an appeal in the interest of the law[27].

According to the Court's recent case law, the constitutional review may regard the normative content of a legal act as established by the systematic case law of the courts and confirmed/ accepted by the decisions of the courts of last instance[28].

3. Judicial activism in assessing the normative content of the Constitution

3.1. By Decision no.64 of 24 February 2015[29], the Court noted that Article 41 (2) of the Constitution, enshrining the right of employees to social protection measures, lists the components of this right, respectively the employees' safety and health, the working conditions for women and young persons, the setting up of a minimum gross salary per economy, weekly rest periods, rest

[25] For further information, see, Puskás V. Z., Benke K. - *Implications of the decisions of the Constitutional Court on the activity of the High Court of Cassation and Justice and of the Superior Council of Magistracy* in The Constitutional Court Bulletin no.2/2014, p.24.
[26] Published in the Official Gazette of Romania, Part I, no.440 of 23 June 2011.
[27] See Decision no.265 of 6 May 2014, published in the Official Gazette of Romania, Part I, no.372 of 20 May 2014, Decision no.717 of 29 October 2015, published in the Official Gazette of Romania, Part I, no.216 of 23 March 2016, or Decision no.152 of 17 March 2016, published in the Official Gazette of Romania, Part I, no.419 of 3 June 2016.
[28] Decision no.956 of 13 November 2012, published in the Official Gazette of Romania, Part I, no.838 of 12 December 2012, Decision no.448 of 29 October 2013, published in the Official Gazette of Romania, Part I, no.5 of 7 January 2014, or Decision no.841 of 10 December 2015, published in the Official Gazette of Romania, Part I, no.110 of 12 February 2016.
[29] Published in the Official Gazette of Romania, Part I, no.286 of 28 April 2015.

leave with pay, work performed under difficult and special conditions, training courses, as well as "other specific conditions determined by law". The Court found that the intention of the legislature, by reference to "other specific conditions determined by law" in view of establishing the regulatory scope of the right, was to allow it to be shaped and structured in a dynamic way, in order to adapt it to the new economic or social realities occurred in the evolution of society.

The Court, in order to configure the fundamental right to social protection of labour, in addition to its components specifically listed by the constitutional text, held under Articles 11 and 20 of the Constitution that the citizens' rights and freedoms shall be interpreted in conformity with the international treaties to which Romania is a party, and the legislature implicitly imposed as level of constitutional protection of fundamental rights and freedoms at least the one provided by the international documents. In this context, the regulation of a measure of social protection of labour in an international treaty, in conjunction with its social importance and magnitude, results in conferring a right or freedom provided by the Constitution of an interpretation consistent with the international treaty, in other words an interpretation that develops in an evolving manner the constitutional concept. Therefore, the Court, having regard to the provisions of Part I points 21 and 29 of the revised European Social Charter, held that the right to social protection of labour comprises as components the information and consultation of employees, being thus integrated to the normative content of the fundamental right mentioned above.

As a consequence, the Court assessed that Article 41 (2) of the Constitution, in addition to the essential components of the right to social protection of labour specifically mentioned in the Constitution, implicitly allows the possibility of constitutionalisation by way of the Constitutional Court's case-law of the measures of social protection of labour covered by international treaties, and of the measures provided by law as a result of international obligations assumed by the Romanian State or of the need to regulate measures with a particular social and economic impact. It follows that the information and consultation of employees are components of the right to measures of social protection of labour with constitutional valences, joining, by way of interpretation, those specifically mentioned in Article 41 (2) second sentence of the Constitution.

The same way of interpretation of the Constitution can be found in Decision no.2 of 4 January 2011[30]. That decision concerns, mainly, aspects regarding the education of persons belonging to national minorities, such as the organisation of education units where all school subjects are studied in the minority language or where the Romanian language and literature is studied according to curricula and textbooks developed specifically for the respective minority.

[30] Published in the Official Gazette of Romania, Part I, no.136 of 23 February 2011.

The Court considered, in its analysis, the combined application and interpretation, on the grounds of Articles 11 and 20 of the Constitution, of the provisions under Article 6 and Article 32 paragraph (3) of the Constitution[31] with the relevant international instruments, making extensive references to the preamble to the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by Resolution No.47/135 of 18 December 1992 of the United Nations General Assembly, the Framework Convention for the Protection of National Minorities, ratified by Law no.33/1995[32], the explanatory report of the Framework Convention, as well as to the European Charter for Regional or Minority Languages, ratified by Law no.282/2007[33], the latter two instruments having been developed under the auspices of the Council of Europe[34]. All the aforementioned international instruments refer to the special situation of persons belonging to national minorities, which requires a special conduct from the State in their respect and thus, the Court concluded that infraconstitutional normative acts must respect and develop both the constitutional requirements and those contained in international instruments to which the Romanian State is a party. In this regard, the Court found that the National Education Law - regarding the organisation of education units where all school subjects are studied in the minority language or where the Romanian language and literature is studied according to curricula and textbooks developed specifically for the respective minority - implements and develops these requirements in a manner as to enable and ensure the continuous development of the cultural identity of persons belonging to national minorities.

3.2. As regards EU law, the Court observed by Decision no.64 of 24 February 2015 that the Court of Justice of the European Union, by the Judgment of 3 March 2011, in the Case C-235/2010 *David Claes and others v Landsbanki Luxembourg SA*, having regard to Article 27 of the Charter of Fundamental Rights of the European Union and Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, held

[31] Article 6 provides: *„(1) The State recognizes and guarantees for persons belonging to national minorities the right to the preservation, development and expression of their ethnic, cultural, linguistic and religious identity.*

(2) Measures of protection taken by the Romanian State with a view to the preservation, development and expression of identity of persons belonging to national minorities must be consistent with the principles of equality and non-discrimination as to the other Romanian citizens".

Article 32 (3) provides: *„The right of persons belonging to national minorities to learn their mother tongue, and their right to be taught in this language are guaranteed; the manner in which these rights may be exercised shall be determined by law".*

[32] Published in the Official Gazette of Romania, Part I, no.82 of 4 May 1995.

[33] Published in the Official Gazette of Romania, Part I, no.752 of 6 November 2007.

[34] All these international acts emphasize that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, is an integral part of the development of society as a whole and within a democratic framework.

that the obligations of information and consultation covered by the directive must be observed irrespective that the judicial reorganization or liquidation procedure was open to the undertaking.

Concerning the application of the European Union binding acts within the constitutional review, the Court held that the use of a rule of European law within the constitutional review as rule interposed to that of reference involves, pursuant to Article 148 (2) and (4) of the Constitution of Romania, o cumulative conditionality: on the one hand, this rule must be sufficiently clear, precise and unambiguous by itself or its meaning should have been established in a clear, precise and unambiguous manner by the Court of Justice of the European Union and, on the other hand, the rule must apply to a certain level of constitutional relevance, so that its normative content supports the possible breach by national law of the Constitution – the sole direct reference rule within the constitutional review[35]. The normative inconsistency between national and European Union law, where the latter has constitutional relevance, cannot be resolved only through recourse to the constitutional principle of priority of application of the European Union acts, but by ascertaining the violation of Article 148 (2) of the Constitution, a text that implicitly contains a clause of compliance of national laws with the European Union acts, and the breach of which must be sanctioned as such by the Constitutional Court. Of course, for the European Union acts that have no constitutional relevance, the power to remedy the normative inconsistency belongs to the legislature or to the courts, as appropriate.

3.3. Through a dynamic interpretation of the Constitution, the Court, taking into account Article 20 (1) of the Constitution, according to which *"The constitutional provisions relative to the citizens' rights and freedoms shall be interpreted and applied in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party"*, has constitutionalized the provisions of international treaties. The aforementioned case-law highlights that the level of protection of the fundamental rights and freedoms guaranteed by the Constitution must be at least equal to that of the international instruments to which Romania is a party, whereas, pursuant to the text of Article 20 (1) of the Constitution, the international treaties shape the content of the Constitution. Therefore, under this text, the Court, in analysing and structuring a constitutional right or freedom, is obliged to take into account and observe the provisions of the treaties to which Romania is a party, and, therefore, it can constitutionalize specific aspects arising from the provisions of such instruments[36].

[35] See also Decision no.688 of 18 May 2011, published in the Official Gazette of Romania, Part I, no.487 of 8 July 2011.

[36] For further developments, see M-M. Pivniceru, Benke K. - *Constitutionalisation of the obligations under international treaties and European Union binding acts – Constitutional Court of Romania* in Vienna Journal on International Constitutional Law, vol.9, no.3/2015, p.455-456.

We notice that, by Decision no.766 of 15 June 2011 and Decision no.64 of 24 February 2015, reference is made to the concept of living law, establishing that the fundamental rights do not have an abstract existence or a fixed, immutable content, since the constitutional concepts are themselves subject to an evolving interpretative vision. Therefore, the Court highlighted that a fundamental right or freedom has an evolving meaning, without being abstract and removed from legal reality. However, this evolving meaning may not diminish the legal protection granted to it, but, on the contrary, it requires an ascending legal protection, being thus maintained a fair balance between fundamental rights that become concurrent at a given time.

The European Union binding acts cannot be considered reference rules in the constitutional review; however, they contain very important guiding principles that may be taken into account upon conducting such review. The existence of a normative contradiction between European law and national law does not automatically indicate a problem of constitutionality; such a problem only arises if the European rule concerns an issue with obvious constitutional relevance, as in the present case (Decision no.64 of 24 February 2015), where the labelling of the issue raised by the European Union act as of legal or constitutional relevance depended on how the invoked constitutional right was shaped. Furthermore, we note that the Constitutional Court has underlined the implicit existence of a constitutional clause of compliance of the infra-constitutional legislation with the European Union law, of course, to the extent that the raised problems do not concern the national constitutional identity.

The concept of national constitutional identity has been constantly emphasized by the Court in its decisions and it is perceived as a possible barrier to the implementation at national level of the obligations deriving from EU law. The content of this concept cannot be strictly and exhaustively established; however, it can be shaped according to the constitutional values that define the State and its existence; in that respect, it is worth mentioning the Christian values which structure and guide the system of rights and liberties that are set forth in the Constitution[37], the special protection of national minorities and/ or the *jus cogens* principles. Therefore, the national constitutional identity regards a people's profound roots.

To conclude, the judicial activism of the Romanian Constitutional Court has consolidated its institutional position in relation to the other State authorities and has allowed, through the interpretation of the Constitution, the receipt of the obligations arising from the international treaties on human rights or from the EU law – in this latter case, the Constitutional Court decisions

[37] See Puskás V. Z. – *Christian values in the Romanian Constitution* in The Constitutional Court Bulletin, no.2/2011, p.7-10.

can be perceived as an invisible Constitution, which explains and increases the normative content of the Constitution. Of course, there are also limits to judicial activism, whereas constitutional courts are not entitled to take over the competencies and responsibilities of other State branches; therefore, constitutional adjudication cannot have an *ultra vires* approach to the constitutional courts competencies enshrined in the Constitution and law.