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Ion GÂLEA

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The Relation between Treaties and the Constitution of Romania: Recent Case-Law of the Romanian Constitutional Court

Ion GÂLEA[1]

Abstract: *In March 2020, the Constitutional Court of Romania issued the Decision no. 142/2020, which represents an important development in the interpretation of the constitutional norms related to the relation between international law and domestic law. As a matter of principle, the Constitutional Court ruled that it does not have jurisdiction to review the constitutionality of a treaty to which Romania is a party, once the treaty had entered into force. The constitutional review is limited, in this case, the „external" requirements of the law for the ratification of that treaty. According to article 11 paragraph 3 of the Constitution of Romania, constitutionality of treaties can be reviewed only before consent to that treaty is expressed and, if non-conformities are found between the treaty and the Constitution, ratification can take place only after the revision of the Constitution. Nevertheless, as an "exception", the Constitutional Court will maintain jurisdiction with respect to examining the conformity of treaties to which Romania is a party with "fundamental principles of international law" which have a correspondent in the Constitution – as it is the case, for example, of the principle of compliance with fundamental rights.*

Key-words: *international law and domestic law; treaties; Constitution; hierarchy of norms.*

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[1] Ion Gâlea is Senior Lecturer in Public International Law and International Organizations at the University of Bucharest, Faculty of Law. He held the position of director general for legal affaris (legal advisor) within the Ministry of Foreign Affairs of Romania between 2010 and 2016. Since 2016, he is the Ambassador of Romania to the Republic of Bulgaria. *The opinions expressed in this paper are solely the author's and do not engage the institutions he belongs to.*

1. Introduction

The relation between international law and domestic law has always been a debated topic. On one hand, from the perspective of international law – merely from the point of view of an international Court – domestic law is ”a fact”, not ”law”.[1] Such fact may prove compliance or non-compliance with an international obligation. At the same time, from the point of view of international law, a State cannot invoke its domestic legislation, not even the Constitution, in order to justify the non-compliance with an international obligation.[2] On the other hand, from the perspective of domestic law, the application of international law depends on the provisions of the respective Constitution and on the practice and case-law of national courts and of the Constitutional Court. As it has been affirmed by the Dutch scholar André Nollkaemper, international law is ”neutral” to how it should be implemented into the domestic sphere: the only obligation it involves is *pacta sunt servanda*; international law does not impose a specific solution to domestic courts related to the place it should have within the domestic legal hierarchy.[3]

Nevertheless, the largest implementation of international law in domestic law is a criterion the assessment of the rule of law. The Venice Commission included ”relationship between international law and domestic law” within the „legality” benchmark of its 2016 *Rule of Law Checklist.*[4] Even if the Venice Commission admits the „neutrality” of international law (”*the principle of the Rule of Law does not impose a choice between monism and dualism*”), it underlines that ”*at any rate, full domestic implementation of international law is crucial*”.[5]

In Romania, even if the place of treaties within the domestic legal system is regulated by the Constitution, the case-law of the Constitutional Court has played a very important role in consolidating the interpretation to be given to the relevant provisions of the Constitution, in order to ensure the fullest

[1] *German Interests in Polish Upper Silesia,* PCIJ, Ser. A, no. 7, 1926, p. 19.

[2] Article 27 of the 1969 Vienna Convention on the Law of Treaties between States – United Nations Treaty Series, vol. 1155, p. 331; with respect to impossibility to invoke the Constitution in order to justify the non-compliance with international obligations – *Treatment of Polish Nationals in Danzig,* PCIJ, Ser. B, no. 15, 1928, p. 24.

[3] André Nollkaemper, *National Courts and the International Rule of Law,* Oxford University Press, 2012, pp. 68-70.

[4] European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Documents and Publications Production Department (SPDP), Council of Europe, 2016, p. 19.

[5] *Ibid.*, p. 20, para. 48.

possible implementation of international law. This study has the purpose to present the latest developments in the case-law of the Constitutional Court, related to the relation between international treaties and the Constitution itself. This is a ”specific” section of the broader picture of applying international law in domestic law. Shortly, the Constitutional Court decided that it will not examine on the merits the constitutionality of a treaty *after* it has entered into force, subject to certain exceptions: the main question is ”how wide these exceptions are?”. Indeed, this topic has the merit to ”supplement” the interpretation of the constitutional norms related to the relation between treaties and laws.

Therefore, the study proposes to present, first, the general picture of the provisions of the Constitution with respect to the relation between international law and domestic law, second, relevant developments related to the inadmissibility of future possible complaints related to the conformity between treaties and the Constitution and, third, a possible ”open window” left by the Constitutional Court, which might allow to shape its future jurisprudence.

2. General Picture of the Provisions of the Romanian Constitution with respect to the Relation between International Law and Domestic Law

It is our opinion that it might be wise to refrain from labelling the provisions of the Romanian Constitution related to the relation between treaties and domestic law as ”monist” or ”dualist”. It might appear more useful to identify the ”constitutional techniques”, such as *automatic incorporation, supremacy clauses* or *clauses regarding consistent interpretation.*[1] From this perspective, the following clauses could be identified in the Constitution:

a) a clause for *the automatic incorporation* of treaties ”ratified by the Parliament, in accordance with the law” (article 11, paragraph 2).[2] It is true, the scope of this clause is limited to treaties which are ”ratified by the Parliament” and the scope of the automatic incorporation may be enlarged either by way of interpretation, or through the effect of legislative

[1] André Nollkaemper, *op. cit.*, p. 73-77, 139; Antonio Cassese, *Modern Constitutions and International Law,* RCADI, vol. 192 (1985), p. 331; Ion Gâlea, *Dreptul tratatelor,* CH Beck, 2015, p. 335-338; Anthony Aust, *Handbook of International Law,* Oxford University Press, 2nd Ed., 2010, p. 12.

[2] Article 11 (2) provides: ”The treaties ratified by Parliament in accordance with the law are part of the domestic law”.

provisions.[1] The Constitution also contains a clause which may be interpreted as giving effect to customary international law in the domestic legal order (article 10).[2]

b) *supremacy clauses* which cover: i) treaties concerning fundamental human rights – in case of which an express clause is included in the Constitution (article 20 paragraph 2);[3] ii) all treaties ”to which the Romanian State is a party” – article 11 paragraph 1.[4] In case of article 11 paragraph 1, its effect as a ”supremacy clause” was not evident at the moment of the adoption of the Constitution (especially with respect to treaties covering other matters than human rights). Nevertheless, the Constitutional Court held, gradually but firmly, that a law that is contrary to the provisions of a treaty in force will be considered unconstitutional, because it infringes article 11 paragraph 1.[5]

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[1] In this sense, article 31 paragraph (2) of Law no. 590/2003 on treaties, provides that ”the application of and the compliance with provisions of treaties in force represent an obligation for all the Romanian State authorities, including the juridical authority, as well as for Romanian physical and moral persons or who find themselves on the territory of Romania”.

[2] Article 10 provides: ”Romania maintains and develops peaceful relations with all states and, in this framework, relations of good neighborliness based on the principles and generally accepted norms of international law”; National courts applied directly norms of customary international law, for example in the case of State immunities – for example, Decision of the Supreme Court of Justice no. 1292/2002, file 1781/2002, related to a working contract between a physical person and the Embassy of Canada.

[3] Article 20 paragraph (2) provides: „In case of an inconsistency between domestic law and the international obligations resulting from the covenants and treaties on fundamental human rights to which Romania is a party, the international obligations shall take precedence, unless the Constitution or the domestic laws contain more favorable provisions.”

[4] Article 11 paragraph (1) provides: ”The Romanian State commits to fulfill to the letter and in good faith the obligations resulting from the treaties to which it is a party”.

[5] Decision of the Constitutional Court no. 2/2014, concerning the objection of unconstitutionality of provisions of articles I point 5 and II point 3 of the Law for the modification of certain normative acts and of the sole article of the Law for the modification of article 2531 of the Criminal Code, published in the Official Monitor no. 71 of 29 January 2014; Decision of the Constitutional Court no. 195/2015, concerning the exception of unconstitutionality of provisions of article 29 para. 1 letter d) second phrase of the Law on the land registry and real estate publicity no. 7/1996, published in the Official Monitor no. 396/5 June 2015; Decision of the Constitutional Court no. 536/2016 concerning the objection of unconstitutionality of provisions of Law for the modification of Law no. 393/2004 concerning the Statute of locally elected officials, published in the Official Journal no. 730/21 September 2016; Ion Gâlea, *Valențe recente ale interpretării articolului 11 din Constituție*, in Ștefan Deaconu, Elena Simina Tănăsescu (ed.), *In Honorem Ioan Muraru*, Hamangiu, Bucharest, 2019, pp. 174-194.

c) a clause concerning *the consistent interpretation* between the constitutional provisions and international law – which is limited to provisions and treaties related to fundamental human rights.[1]

d) a clause which relates to the relation between the treaties and the constitution, provided by article 11 paragraph 3: ”*If a treaty to which Romania is to become a party comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.*”

The latter provision of article 11 paragraph 3 represents the ”source” of the question analyzed within this study. This paragraph has been included in the Constitution in 2003 and may be regarded as being inspired from article 54 of the Constitution of France.[2] The essential element is that it represents an “*ex ante”* filter: its scope is limited to treaties “to which Romania is to become a party”, not to treaties in force. It ensures that, prior to expression of consent to be bound; Romania cannot become a party to a treaty which is contrary to the constitution. Article 11 paragraph 3 is accompanied by the competence of the Constitutional Court to examine “*the constitutionality of treaties or other international agreements upon request by one of the presidents of the two Chambers, or at least 50 deputies or 25 senators*”.[3]

However, article 11 paragraph 3 leaves open the question related to: “what happens if” a treaty “escapes” this *ex-ante* filter? “what happens if” a provision of a treaty is found to be unconstitutional *after* the treaty had entered into force?

As a preliminary remark, before presenting the relevant Constitutional Court decision, it has to be pointed out that the Romanian Constitutional Court has the competence to conduct “*ex ante*” control of constitutionality of laws (meaning that the control is to be conducted “before their promulgation, upon request of the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the People's Attorney, at least 50 deputies or 25 senators”)[4], as well as “*ex post*” control related to the constitutionality of laws and ordinances, if an “objection” or “exception” is raised before a court or a commercial

[1] Article 20 paragraph 1 provides: “Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration on Human Rights and with other treaties and pacts to which Romania is a party”.
[2] Patrick Daillier, Mathias Forteau, Alain Pellet, *Droit international public,* 9-eme Ed., LGDJ, 2017, pp. 237-321.
[3] Article 146 letter b) of the Constitution of Romania.
[4] Article 146 letter a) of the Constitution of Romania.

arbitration tribunal (by the parties to a case or by the court itself).[1] In the latter case, a Decision of the Constitutional Court which may find a provision to be unconstitutional has the effect to suspend *de jure* the contested provisions and, if the Parliament does not bring the respective provisions in line with the Constitution within 45 days after the publication of the decision, those provisions shall cease their validity.[2]

Because of the fact that, in Romania, treaties are ratified, as a rule, by law, the question that appears is "what happens if" the constitutionality of a treaty provision is contested before a national court – thus triggering the *ex post* control of the Constitutional Court.

3. The Decision of the Constitutional Court no. 142/2020 – the General Rule concerning the *ex post* Control of Treaties

Before 2020, it was generally thought that parties and courts can bring forward "objections" or "exceptions" of unconstitutionality concerning provisions of treaties in force – thus triggering the *ex post* control of the Constitutional Court: for example, in 2012, the Constitutional Court examined on the substance the conformity of certain provisions of the Extradition Treaty between Romania and the United States of America, signed on 10 September 2007.[3]

The case that triggered the Decision no. 142/2020 was related to the following facts: before a national court, a physical person argued that articles 20-22 of the Agreement between Romania and the Republic of Moldova in the field of social security, signed in Bucharest, on 27 April 2011 are contrary to the Constitution, mainly to the articles concerning the non-discrimination and the right to property.[4] The Court identified the

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[1] Article 146 letter d) of the Constitution of Romania.
[2] Article 147 of the Constitution of Romania.
[3] Decision of the Constitutional Court no. 1014/2012 related to the exception of unconstitutionality of provisions of Law 111/2008 for the ratification of the Extradition Treaty between Romania and the United States of America, signed in Bucharest, on 10 September 2007, with reference to articles 1 and 22 of the treaty, as well as to the terms "treaty for the extradition of criminals" from its preamble, published in the Official Monitor no. 882/20 December 2012 (hereinafter "Decision 1014/2012"); The Court relied on article 146 d) of the Constitution and found that the contested provisions do not infringe the Constitution (para. 5).
[4] Decision of the Constitutional Cort no. 142/2020 concerning the rejection of the exception of unconstitutionality of provisions of articles 20-22 of the Agreement between Romania and the Republic of Moldova in the field of social security, signed in Bucharest, on 27 Aprilie 2010, ratified by Law no. 130/2011; the Decision is published in the Official Monitor no. 468/03 June 2020 – hereinafter "Decision 142/2020".

”object” of its constitutionality control: on one hand, the authors of the ”objection”/”exception” and the domestic court pointed out the ”sole article” of the Law no. 130/2011, by which the said Agreement was ratified; nevertheless, the Court found that the *real object* of the request concerned the provisions of the Agreement itself.[1] It is important to point out the fact that the Court underlined the difference between the Law by which the Parliament ratified the Agreement, on one side, and the agreement itself, on the other side, as the object of the request were only articles 20-22 of the Agreement.[2]

Starting from this basis, the Court established an important principle related to the control of constitutionality of treaties: as a general approach, the Constitutional Court does not have jurisdiction to examine *ex post* the conformity of international treaties with the Constitution, but has only jurisdiction over verifying the ”external” constitutional requirements of the Law by which the Parliament ratified the respective treaty (for example, if the quorum or majority requirements were met). The relevant paragraph of the Decision reads as follows:

> *”Examining the objection of unconstitutionality, the Court holds that the treaty is a legal act, whatever its particular designation or form, which embodies in written an agreement at State, government or department level, having the purpose of creating, modifying or extinguishing rights and obligations of legal or other nature, governed by public international law and embodied in a single instrument or in two or more related instruments [article 1 letter a) of Law on treaties no. 590/2003]. It results that the conclusion of an agreement, a species of treaty, reflects the concurring will of subjects of international law, not of a single subject. The individual will of each State Party does not maintain its individuality, the treaty being the expression of their common will. As a consequence, a single Party, through its Constitutional Court, cannot hold as unconstitutional a part of the text of the Agreement, with the possible consequence of obliging the other Contracting Party to comply with the generally mandatory character of the decision of the Constitutional Court of such party. The Constitutional Court has the competence to verify only the constitutionality of acts of primary regulation issued by the Romanian State, respectively the sovereign will of the State materialized by the acts of primary regulation adopted, but not the common will of the States parties to the treaty.*

[1] Decision 142/2020, para. 14.
[2] *Ibid.*, para. 15.

> *Thus, in principle, with respect to a law for ratification/accession, the control of constitutionality through the ex post objection ("exception") of unconstitutionality may regard only the external constitutionality requirements, especially because the effects of the decision of the Constitutional Court are limited to acts of primary regulation issued by the Romanian State, not acts of international law. The decisions of the Court are generally obligatory in the domestic legal order of the State, but they cannot extend their effects with respect to other subjects of international law…"*[1]

The following elements could be underlined:

i) the Constitutional Court incorporated in its decision the definition of the treaty provided by the Law on treaties no. 590/2003 (which is partly inspired by the definition provided by the 1969 Vienna Convention on the Law of Treaties between States) ;[2] although it is not the first time when the Court quotes this definition,[3] it is an important sign that the Constitutional Court is willing to "assume" such definition, even if it is provided "only" by law (not by the Constitution).

ii) the Constitutional Court offered details about how it regards the legal nature of a treaty – it is an act of international law, stemming from the sovereign will of *two or more* subjects of international law; for this reason, the Constitutional Court cannot assume jurisdiction over the provisions of the treaty. The Constitutional Court reiterated that "*an act of international law does not become a law or an ordinance in order to be subject to the jurisdiction of the Court in an indirect manner, but maintains its individual character"*.[4]

iii) at the same time, the Constitutional Court provided details related to the nature of the law for the ratification of a treaty: even if the ratification is done by law, the ratification "*does not represent an act of law-making on behalf of the parliament, but a modality of expressing consent that the Romanian State shall be bound by that treaty, with the consequence of complying with the provisions of that treaty within the internal law*".[5]

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[1] Decision 142/2020, para. 17.

[2] On the definition of the treaty, see: Anthony Aust, *Modern Treaty Law and Practice,* 2nd Ed., Cambdridge University Press, 2007, p. 16-24.

[3] Decision of the Constitutional Court no. 195/2015, concerning the exception of unconstitutionality of provisions of article 29 para. 1 letter d) second phrase of the Law on the land registry and real estate publicity no. 7/1996, published in the Official Monitor no. 396/5 June 2015, para. 22.

[4] Decision 142/2020, para. 19.

[5] *Ibid.*, para. 20.

iv) nevertheless, the Constitutional Court maintains jurisdiction over the ”external constitutional requirements”; we would suppose that these requirements are represented by the formal constitutional requirements for the adoption of a law for the ratification of a treaty (quorum, majority).

4. The Window Left Open – Compliance with ”Fundamental Principles of International Law”

Besides the ”external constitutional requirements” of the law for the ratification of a treaty, the Constitutional Court left a window open: even if it does not have jurisdiction over the verification of the conformity of treaties concluded by Romania with the Constitution, the Court held that it will, nevertheless, accept jurisdiction in two cases: a) ”*with respect to the violation of fundamental principles of international law that find, in all cases, a corresponding constitutional correspondence”* and b) ”*violation of principles that represented the basis for expressing consent to conclude the treaty/engaging in relations based on public international law (for example, the condition of reciprocity in the case of extradition of a Romanian citizen)”.*[1]

At the first glance, the „exceptions” are difficult to understand. The Court explains, indeed, that the first situation – *verification of compliance with fundamental principles of international law* – ensures consistency with previous case-law. As it has been mentioned before, in its Decision no. 1014/2012, the Constitutional Court has examined on the substance the conformity of articles 1 and 22 of the Extradition Treaty between Romania and the United States of America. These contested provisions were alleged, by the party that invoked the objection (”exception”) of unconstitutionality, to have violated the presumption of innocence, provided by article 23 of the Romanian Constitution.[2] In its Decision 142/2020, the Court referred to the previous case of 2012 and explained that ”*in that Decision [1014/2012] the Court had analyzed the compliance with a fundamental principle of international law reflected in article 23 paragraph 11 of the Constitution, related to the presumption of innocence, principle that also represented the basis for expressing the consent of the Romanian State for the conclusion of the treaty“.*[3]

In our view, the ”window left open”, represented by the two cases in which the Constitutional Court retained jurisdiction over the compliance of

[1] Both situations are expressed in Decision 142/2020, para. 21.
[2] Decision 1014/2012, paras. 2, 4, 5.
[3] Decision 142/2020, para. 21.

international treaties with the Constitution, may raise, in the future, certain difficulties.

First, there is no certainty about what the Constitutional Court understood by "fundamental principles of international law". In international law, this notion may lead to the principles[1] of the United Nations Charter, the seven principles provided by the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations of 1970,*[2] or the ten principles provided by the *Helsinki Final Act of the Conference for Security and Cooperation in Europe of 1975.*[3] Nevertheless, the Constitutional Court referred to the presumption of innocence as a fundamental principle of international law (which may be derived from the principle of respect for human rights and fundamental freedoms – enshrined also in the Helskinki Final Act).

Second, certain difficulties may stem from the fact that the Constitutional Court seems to create a „hierarchy" between: the treaty that will be subject to review, on one side, and the „fundamental principles of international law", on the other side. In our view, a treaty could be reviewed with respect to its conformity to such principles *only* if these principles would constitute *jus congens.*[4] Nevertheless, the Constitutional Court did not refer to this notion, as did, for example, the General Court of the European Union in the "*Kadi I"* case (when it assumed the examination of the conformity of Resolutions of the Security Council with *jus cogens*).[5]

Third, the Constitutional Court mentioned that the fundamental principles of international law "*find, in all cases, a corresponding constitutional correspondence".*[6] We are not convinced that all principles enshrined, for

[1] On the nature of principles of international law - *Militarv and Puramilitary Activities in und against Nicaragua (Nicaragua v. United States of America), Merits, Judgment,* ICJ Reports 1986, p. 14, paras. 42-57.

[2] Resolution of the United Nations General Assembly no. 2626 (XXV) of 24 October 1970.

[3] Text available at https://www.osce.org/files/f/documents/5/c/39501.pdf (consulted 1 June 2020).

[4] With regard to *jus cogens* norms, see Alfred Verdross, "*Jus Dispositivum* and *Jus Cogens* in International Law", in *American Journal of International Law*, vol. 60 (1966), p. 55; Robert Kolb, *Théorie du jus cogens international. Essai de relecture du concept*, PUF, Paris, 2001, p. 65-77, Giorgio Gaja, "*Jus Cogens* beyond the Vienna Convention", RCADI, vol. 172, (1981-III), p. 282; articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties between States.

[5] Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Union, 2005,* ECR II-3649, para. 226.

[6] Decision 142/2020, para. 21.

example, by the UN Charter, find a correspondent in the Constitution of Romania.

Fourth, certain unclear elements persist with respect to what should be understood by ”*principles that represented the basis for expressing consent to conclude the treaty/engaging in relations based on public international law”*. Indeed, in the case of treaties of extradition, the Constitution of Romania provides for the cumulative conditions that the Romanian citizens should be extradited only on the basis of a treaty and on conditions of reciprocity (meaning that the Constitution imposes that a treaty providing for the extradition of Romanian citizens must contain the condition of reciprocity).[1] Nevertheless, besides this clear case, it is difficult to identify the principles the Court had referred to.

As a short conclusion to this sub-section, the Constitutional Court was bound to find a way of reconciling the new approach of its 2020 Decision (the principle that it does not have jurisdiction to control *ex post* the international treaties concluded by Romania, as acts of international law) with the previous case-law, when it has verified on the substance the „constitutionality” of certain treaties. On one side, the Court limited its review of treaties to fundamental principles of international law, and thus it avoided to ”subordinate” the provisions of the treaties to provisions of domestic law (even constitutional law). On the other side, the Court did not use the notion of *jus cogens* and included certain notions that may be subject to interpretation (such as ”*principles that represented the basis for expressing consent to conclude the treaty/engaging in relations based on public international law”*).

5. Consequences of the New Approach Embodied in the Decision no. 142/2020

Despite certain difficulties raised by the „exceptions” related to the application of fundamental principles of international law, the Decision no. 142/2020 represents an important development: *as a matter of principle*, constitutionality of a treaty shall be reviewed only *ex ante*, before the treaty enters into force. This procedure does not offer automatic prevalence of the Constitution over treaties, but simply „avoids conflict”: the Constitution provides expressly that if a treaty contains provisions contrary to the Constitution, ”*its ratification shall only take place after the revision of the Constitution*”.[2] After a treaty enters into force – again, *as a matter of*

[1] Article 19 of the Constitution of Romania.
[2] Article 11 para. 3 of the Constitution of Romania.

principle – it cannot be contested for the reason that its provisions may be contrary to the constitution, even if the *ex ante* review had not been accomplished with respect to the respective treaty.

This conclusion is to be completed by the fact that the case-law of the Constitutional Court accepted already that in case of conflict between a treaty and a law of the parliament, the provisions of a law which are contrary to the treaty will be considered unconstitutional (as being contrary to article 11 paragraph (1) of the Constitution, which stipulates the principle *pacta sunt servanda*). The Court held, in 2015, that certain contested legal provisions ”*breach the obligations assumed by Romania through treaties to which it is a party, thus breaching article 11 paragraph (1) of the Constitution, which stipulates that the Romanian State shall comply in good faith with its obligations from treaties to which it is a party”.*[1]

Thus, if on one side, treaties have precedence over laws, by virtue of article 11 paragraph (1) of the Constitution and, on the other side, treaties may not be subject, as a matter of principle, to a review of their conformity with the constitution after they had entered into force – by virtue of the interpretation provided by the Constitutional Court in its Decision no. 142/2020 – it might sound daring to say, but, *in practice, it might appear that the treaties and the Constitution have similar legal force within the Romanian legal system* – in the sense that both sources of law are superior to laws enacted by the Parliament and there seems not to be a hierarchy between them (as it has been mentioned, treaties cannot be held to be „unconstitutional”).[2] This statement is not modified by the ”exceptions” or ”window left open” retained by the Constitutional Court in its Decision no. 142/2020: the Court maintained jurisdiction to review the treaties concluded by Romania only in relation to ”*fundamental principles of international law”* which find their correspondent in constitutional norms. Practically, it appears that, according to the Constitutional Court, it is not the Constitution that has superiority over treaties, but other norms of international law that are also found in the Constitution (the Court mentioned ”*fundamental principles”,* but, from the

[1] Decision of the Constitutional Court no. 195/2015, para. 25.

[2] Nevertheless, it would not be reasonable, at this point, to argue that treaties have superior legal force over the Constitution, as long as the principle of *supremacy* of the Constitution is expressly mentioned in its article 1 paragraph 5 – see also Decision of the Constitutional Court no. 70/2002 on the objection/exception of unconstitutionality of provisions of article 34 paragraph (1) of Law no. 68/1992 for the election of the Chamber of Deputies and of the Senate, published in the Official Monitor no. 234/8 April 2002.

point of view of international law, we appreciate that *jus cogens*[1] would have been the appropriate category).

Without prejudice to the short conclusion mentioned above, the Constitution still applies to the conditions for expressing consent, as well as to those conditions which are expressly imposed with respect to certain categories of treaties: as it is the case of the example given by the Constitutional Court itself concerning the condition of reciprocity for treaties by which Romania consents to the extradition of its own nationals.

One last comment could be mentioned with respect to the ”window open” allowed by the Romanian Constitutional Court for the legal review of treaties to which Romania is a party. The Court seems to be in line with a ”larger tendency” of domestic courts assume jurisdiction over the scrutiny of a conflict between an international obligation and another international law norm – the latter coinciding with a constitutional law norm. This ”tendency” allows, for example, to refuse the execution of an international obligation owed to a third State, for the reason that a *human right* is violated – as it was the case, for example, of the Orlèans Court of Appeals in 2003, when it refused the immunity of the African Development Bank for the reason of breaching the right to a fair trial (stipulated, *inter alia,* by article 6 of the European Convention on Human Rights).[2] Practically, it was generally the same approach that the European Court of Justice adopted in its decision in *Kadi I,* where it rejected the approach of the General Court and scrutinized the actions of the Union which implemented obligations of Member States resulting from UN Security Council Resolutions, in relation to human rights which applied to the as general principles of EU law (having their source in the ECHR and the constitutional traditions of Member States).[3]

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[1] International Law Commission, ”Peremptory norms of general international law (jus cogens)”, Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading, doc. A/CN.4/L.936, 29 May 2019, Draft Conclusion 10, p. 3.

[2] France, Court of Appeals of Orlèans, X c. Banque Africaine de Development, 7 October 2003; the Decision of the Court of Appeals was confirmed by the Cour de Cassation - Cour de Cassation, Chambre sociale, du 25 janvier 2005, 04-41.012; also quoted by André Nollkaemper, *op. cit.*, p. 291.

[3] Cases C-402/05P, C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and the Commission,* [2005] ECR I-6351.

6. Short Conclusion

The Decision of the Constitutional Court no. 142/2020 represents an important development with respect to the approach concerning the relation between international law and domestic law, especially concerning the relations between the Constitution and treaties concluded by Romania. The main element of the Decision is represented by the fact that the Constitutional Court decided that, as a matter of principle, it will not have jurisdiction over the review of the conformity with the Constitution of a treaty, on substantial matters, once it has entered into force. This allows a ”daring” conclusion: *in practice, it might appear that the treaties and the Constitution have similar legal force within the Romanian legal system* – in the sense that both sources of law are superior to laws enacted by the Parliament and there seems not to be a hierarchy between them. Indeed, the constitutionality of a treaty is to be reviewed, according to article 11 paragraph (3) of the Constitution of Romania, before consent of Romania is expressed: in case that incompatibilities are identified, the ratification can be performed ”*only after the revision of the Constitution*”.

Nevertheless, the Constitutional Court maintained jurisdiction over the „external” elements of constitutionality of the law by which the Parliament ratifies a treaty. Moreover, as an „exception”, it assumed jurisdiction also over the review of the treaties themselves, in the following cases: a) ”*with respect to the violation of fundamental principles of international law that find, in all cases, a corresponding constitutional correspondence”* and b) ”*violation of principles that represented the basis for expressing consent to conclude the treaty/engaging in relations based on public international law (for example, the condition of reciprocity in the case of extradition of a Romanian citizen)”.* As a general opinion, these ”exceptions” do not establish necessarily the fact that the treaties to which Romania is a party are ”subordinate” to the Constitution (except for the case when the Constitution expressly provides for a condition for the conclusion of a treaty – as it is the condition of reciprocity for extradition of nationals) – because the review to be conducted by the Constitutional Court would be ”between two norms of international law”: the treaty and a ”fundamental principle of international law” (the latter having also a correspondent in the Constitution). In our view, it would have been more appropriate if the Constitutional Court had referred to *jus cogens*, instead of ”fundamental principles of international law”.

This ”exception”, which allows review of treaties in relation to such „fundamental principles” will allow, in the future, the Constitutional Court to put in balance on one side, obligations owed to third parties resulting

from treaties binding on Romania and, on the other side, *human rights* (which might be framed as a ”fundamental principle of international law” and have constitutional correspondent). It is to be noted that this tendency is not ”single”, as it has been followed also by other domestic courts.

Despite the challenges that will be raised by the future interpretation of these ”exceptions”, the Decision no. 142/2020 is a very commendable step forward, towards the fullest possible application of treaties in the Romanian legal system.

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