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The Amendment of Member States' Constitutions in Relation to the EU Legal Order and Constitutional Identity, With a Special View on the Romanian Experience

ABSTRACT: *The European Union's constitutional order and identity are heavily reliant upon amending Member States' Constitutions. It is essential that these amendments be designed with careful consideration, as they have a direct impact on the functioning and stability of the European Union. This study proposes an analysis from the perspectives of both the compatibility of the European Union legal order with the Member States' Constitutions and the compatibility of the amendments of the Member States' Constitutions with the European Union order. Its primary aim is to examine whether European Union accession and the values that make up the core of the common legal order constitute an implicit limit to the amendment of national constitutions and how they interfere or integrate with national constitutionalism. By emphasising the interaction between the constitutional foundations of the Member States and the European Union itself, this study aims to create a reflective perspective on the hybrid character of the 'cornerstone' of Member States' Constitutions, which seems to have continuous and irreversible plasticity, influenced by the definition that common values acquire at various times. This plasticity is directly influenced by the way constitutional courts interpret these values, which has significant consequences for the evolution of the European Union as a structure of States.*

KEYWORDS: constitutional amendment, constitutional identity, EU legal order, constitutional review

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1. Introduction

The idea of European Union (EU) constitutionalism has gradually been established in the legal literature. However, the unique[1] nature of the EU's construction makes it difficult to fit it into the traditional paradigms of state structure. Therefore, there is a growing interest in studying the factors that shape the EU's autonomous legal system and the steps taken to achieve the goal mentioned in the Treaty on the European Union (TEU) of creating 'an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen'.[2] Understanding what these steps entail, what forces and instruments are involved, and what an 'ever closer union' actually means or can mean are important questions that encourage doctrinal analysis, which has also been challenged by an often surprising 'innovative' case law and is susceptible to controversies, of the Court of Justice of the European Union (ECJ) and of the constitutional courts of the Member States (MSs).

An expression of this uniqueness, the composite nature of the EU in terms of States with different histories, traditions, foundations, and constitutional developments ('diversity' as an inherent feature of the EU) entails special attention regarding the development of the 'genetic code'/'cornerstone' written in the MS constitutions and its articulation with the common values that establish the EU legal order. We consider the essence of constitutionalism, which is usually characterised as 'the cornerstone' of the Constitution. This comprises a set of intangible values that reflect the original constituent power to protect the established constitutional order. These values are explicitly mentioned in some constitutions as 'revision limits', or their implicit existence is inferred through interpretation in the case law of the constitutional courts. In the European context, the same courts attach to these limits the characteristic of *identity values* (concept seen in the light of art. 4 (2) of the TEU, according to which 'The Union shall respect the equality of Member States before the Treaties as well as their national identities (...)'. Alternatively, at the EU level, the values provided in art. 2 of the TEU were identified by ECJ as 'the very identity of the European Union as a common legal order'.[3] This implies that the European constitutional order is based on a set of intangible elements that must be protected using similar instruments. 'Articulation', which gives meaning to the very development of the EU as a structure of States, is mainly achieved through the judicial interpretation of the fundamental

1 Mak and Law, 2022, p. 246.
2 Art. 1 (2) of TEU.
3 ECJ, C-156/21, 16 February 2022, ACTION for annulment under art. 263 TFEU, Hungary, supported by: Republic of Poland, para. 127.

values included in the EU treaties ('the European constitutional charter'[4]) and MS constitutions.

In itself, the accession of the MSs to the EU is based on the presumption of the coherence of the system of fundamental values, namely on the idea that the acts of accession to the EU and the subsequent amendment of the founding treaties are in accordance with the explicit or implicit limits laid down in the MS constitutions. Additionally, any constitutional adaptations made by the States to achieve accession/normative compatibility must not have altered the essence of their own constitutions.[5] After joining the EU, the MSs agreed that, based on the principle of loyal cooperation, they shall take 'any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the treaties or resulting from the acts of the institutions of the Union', facilitate 'the achievement of the Union's tasks', and refrain 'from any measure which could jeopardize the attainment of the Union's objectives'. (art. 4 (3) of the TEU). As a consequence, after passing through the constitutional filter (explicit or implicit) of the 27 MSs, the legal order established by the EU Treaties appears to act as a 'filter' for them as well. Given the generality of the expression of the TEU ('*any measure*'), it can be stated that the very amendment of the MS constitutions is subject to a supranational filter.

This study aims to analyse the practical consequences of this obligation assumed by the MSs. Does it establish a new limit to the revision of MS constitutions? What would this limit consist of, and how does it interfere/integrate into national constitutionalism? Are we still talking about a 'cornerstone' of the MS constitutions or continuous and irreversible plasticity influenced by the definition that the common values acquire at various times? Does the ECJ have the exclusive right to define common values? Where is this evolution leading us, and what does 'constitutional identity' mean in this context?

To answer these questions, we first analyse the issue of constitutional revision limits within the existing constitutional framework of the MSs and then within the EU legal order. The evolving case law of the Romanian Constitutional Court (CCR) is used as a concrete example of the limits of revision within the EU context to show how the benchmarks of European constitutionalism are continuously modified. By emphasising the interplay between the analysed constitutional foundations (MSs and EU), this study intends to offer a reflection on the hybrid nature of the cornerstone of the MS constitutions and its impact on the development of the EU as a State structure.

4 See ECJ, Les Verts/Parlamentul, 294/83, EU:C:1986:166, point 23 and Opinion 2/13, para. 163.

5 See for example, the German Federal Constitutional Court, in Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009.

2. Amendments of EU Member States' constitutions and their limits

■ *2.1 General considerations*

The importance of the revision of constitutions and the issue of unconstitutional constitutional amendments are extremely topical in the field of comparative constitutional law. Prof. Richard Albert, in his book *Constitutional Amendments, Making, Breaking and Changing Constitutions*,[6] describes the constitutional amendment rules as '*the gatekeepers to a constitution*', showing that they 'open a window into the soul of a constitution, exposing its deepest vulnerabilities and revealing its greatest strengths'. Professor Yaniv Roznay, in his book *Unconstitutional Constitutional Amendment*[7], *noted the global trend is moving towards accepting the idea of limitations – explicit or implicit – on constitutional amendment power.* In addition to these reference authors, there is also a wealth of literature on the topic of constitutionalism, including a valuable initiative to provide an annual worldwide 'update' on this essential issue of constitutionalism in the *International Review of Constitutional Reform*, which brings together specialists throughout the world.[8]

Regarding the European region, the Venice Commission provides details in the *Report on Constitutional Amendment*.[9] The Report identifies '*special limitations to constitutional amendments*' in fundamental laws and distinguishes between two types of constitutions. The first type explicitly renders a limited number of provisions or principles unamendable under any circumstances, such as territorial integrity, fundamental rights, the fundamental form of government or federalism. The second type operates a distinction between different sets of constitutional provisions, making some harder to change than others through special procedures, equivalent to making the provisions unamendable (paras. 52-53). The study also highlights the role of constitutional courts in this framework (para. 57). The *Updated version of the compilation of Venice Commission opinions and reports concerning constitutional provisions for amending the Constitution*[10] offers relevant information on recent developments in this regard.

Courts of constitutional jurisdiction frequently discuss constitutional principles. For instance, during the XVIth Congress of the Conference of European Constitutional Courts, which was held by the Constitutional Court of Georgia in 2017, the topic was the 'Role of Constitutional Courts in upholding and applying Constitutional Principles'.[11] Responding to the Congress questionnaire which

6 Albert, 2019.
7 Roznai, 2017; see also Roznai, 2013.
8 See Barroso and Albert, 2021, 2022, 2023.
9 CDL-AD(2010)001-e, Report on Constitutional Amendment adopted by the Venice Commission at its 81st Plenary Session, Venice, 11–12 December 2009.
10 Venice Commission, 2023a.
11 Venice Commission, 2023b.

raised, *inter alia*, the issue of the existence of a hierarchy of these principles, some Courts[12] referred to the 'special status' or 'special protection' afforded to constitutional principles that are considered to be 'a cornerstone of the entire constitution or to principles considered to be unamendable'.[13] They also talked about the need to involve themselves in processes leading towards the application or determination of implicit constitutional principles[14] and the challenges of defining these principles in the context of EU accession. Thus, Congress acknowledged the attempts made to synchronise the legal systems during the accession process, which included the necessary revision of the constitutions for this purpose. Likewise, the national reports outlined the fact that

> 'although the general consensus therefore holds that national legal orders are open to the primacy of EU law, when it comes to taking precedence over fundamental constitutional principles, some states shall maintain the primacy of their national constitutions. For many countries, fundamental principles are seen as part of the 'reserved powers' of their national constitutions'.[15]

Not only the Courts and the Venice Commission but also various doctrinal studies have addressed the issue of revising MS constitutions in the EU context. A reference book in this regard, *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law,*[16] includes a thorough presentation of the amendments made to the constitutions in the context of the EU accession, the transfer of powers, the meaning of the concept of sovereignty in this framework, and the viewpoint of the constitutional courts of the MS.

This study aims to further explore an aspect of EU constitutionalism that has received less attention, which is the 'limits imposed on limitations' in terms of the relationship and overlap between the 'core identity' of MSs and the EU. To achieve this, it will refer to a bibliography that provides a valuable research base for the constitutional framework existing in each MS, selecting a few significant examples in terms of the volume of unamendable provisions and their interpretation in relation to the EU legal order.

12 For example, Romania.
13 See the General Report of the Congress Lali PAPIASHVILI -Vice - President of the Constitutional Court of Georgia, in the volume of the Conference, published by the Constitutional Court of Georgia, p. 31.
14 Ibid., p. 27.
15 Ibid., pp. 32–33.
16 Albi and Bardutzky, 2019, pp. 1005 et seq.

■ *2.2. Explicit and/or implicit limits of the amendment of constitutions and their use in relation to the EU legal order*

When ordering the chosen examples, specific consideration was given to the extent to which the limits of the amendment were established in MSs' constitutions or determined by constitutional courts and their relationships with the EU legal system.

Thus, the *Constitution of the Portuguese Republic*[17] is perhaps the most meaningful example of an MS in terms of the volume of explicit unamendable provisions. Art. 288 establishes in this regard the following 'matters in which revision shall be restricted':

> [n]ational independence and the unity of the state; the republican form of government; the separation between church and state; citizens' rights, freedoms and guarantees; the rights of workers, workers' committees and trade unions; the coexistence of the public, private and cooperative and social sectors in relation to the ownership of the means of production; the requirement for economic plans, which shall exist within the framework of a mixed economy; the elected appointment of the officeholders of the bodies that exercise sovereign power, of the bodies of the autonomous regions and of local government bodies by universal, direct, secret and periodic suffrage; and the proportional representation system; plural expression and political organization, including political parties, and the right to democratic opposition; the separation and interdependence of the bodies that exercise sovereign power; the subjection of legal rules to a review of their positive constitutionality and of their unconstitutionality by omission; the independence of the courts; the autonomy of local authorities; the political and administrative autonomy of the Azores and Madeira archipelagos.

These values were qualified by the doctrine as representing the 'essential core of the Constitution',[18] in that 'they provide the Portuguese constitutional system with its identity and structure'.[19] The Portuguese Constitutional Court is empowered to assess the possible violation of these limits that 'concern the Portuguese constitutional identity itself'.[20]

17 Canotilho, 2003.

18 Ibid., p. 1184.

19 The national report of the Constitutional Court in Portugal on the occasion of the XVIIth Congress of the European Constitutional Courts, Maria Clara Sottomayor and António Manuel Abrantes (2018), in the Volume of the Congress edited by the Constitutional Court of Georgia, vol. 2, p. 608.

20 Ibid., p. 620.

Regarding the constitutional changes required to adapt to EU membership status, it should be noted the revision of 2004 which introduced [by adding a new paragraph (4) to art. 8 of the Constitution] the principle of the primacy of European law into the national legal system, under the following terms:

> The provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.[21]

In relation to these provisions, both doctrine and case law agree that the legal authority of EU law in the Portuguese legal order must be established according to the parameters laid out by the EU legal order, but this recognition must comply with the fundamental principles of a democratic rule of law. Concerning the scope of this safeguard, the doctrine expressed the idea that it is not limited to these principles but also includes the essential core of the Constitution enshrined in art. 288, which specifies the 'material limits on revision'.[22] Considering the mentioned limits, 'EU provisions cannot lead to »internal revolutions« to the point of subverting those constitutional principles that are materially unalterable, which condense the identity of the Portuguese constitutional order and which not even the constitutional legislator can revise'.[23] Or, in another viewpoint,

> this recognition does not imply a constitutional surrender. The Constitution remains the basic law that defines and protects the core values of the political community and the basic rights and liberties of individuals. This implies that the Constitutional Court is not bound to recognise the supremacy of a supranational legal order in the unlikely event of a breach of those values, rights and liberties.[24]

Thus, art. 8 (4) of the Constitution appears both as a 'bridge' and a 'limit' in the process of European integration.

Likewise, *the Constitution of Romania* contains a significant number of unamendable provisions in a separate title that establishes the rules applicable to the procedure for the revision of the Constitution. The limits of revision are

21 Ibid., p. 618.

22 Canotilho, 2003, p. 827, apud The national report of the Constitutional Court in Portugal on the occasion of the XVIIth Congress of the European Constitutional Courts, written by Maria Clara Sottomayor, Justice of the Constitutional Court of Portugal, and António Manuel Abrantes, legal adviser at the Constitutional Court of Portugal, in the Congressional Volume edited by the Constitutional Court of Georgia, 2018.

23 Ibid.

24 Pereira Coutinho and Piçarra, 2019, pp. 1005 et seq.

expressly enshrined in art. 152 of the Constitution, and have been classified in legal literature[25] as material limits (para. 1), consisting of values considered by the constituent power to be intangible ('the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language' shall not be subject to revision), the teleological limits (para. 2), in the sense of 'result of the procedure which is not desirable'[26] (no revision shall be made if it results 'in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof') and limits regarding exceptional situations ('The Constitution shall not be revised during a state of siege or emergency, or in wartime'). Within the procedure for the revision of the Constitution, the Constitutional Court (CCR) conducts a constitutional review of the initiatives to revise the Constitution[27] and of the laws for the revision of the Constitution adopted by the Parliament.[28] Additionally, the CCR is responsible for overseeing the procedures for holding a referendum and confirming its results.[29] The purpose of the CCR's review is to ensure that the revision process is conducted in accordance with established procedures (known as extrinsic constitutionality) and that any proposed revisions to the Constitution fall within the limits set forth in the Constitution itself (known as intrinsic constitutionality).

For EU accession, Romania amended its Constitution[30] in 2003. The CCR found that the new provisions related to Euro-Atlantic integration comply with the limits of the revision. With reference to the issue of transferring some of Romania's powers to community institutions, the CCR held that:

> The act of accession has a double consequence, namely, on the one hand, the transfer of some powers to the community institutions, and on the other hand, the joint exercise, with the other Member States, of the powers provided for in these treaties. As for the first consequence, the Court notes that, by the mere membership of a State to an international treaty, it diminishes its powers within the limits established by international regulation. (...) Through the acts of transferring certain powers to the structures of the European Union, these powers do not acquire, through bestowal, a 'supra-competence', a sovereignty of their own. In reality, the Member States of the European Union have decided to jointly carry out certain

25 For this clarification, see Dănișor, 2018.
26 Ibid.
27 Art. 146 a) second sentence of the Constitution.
28 Power introduced in 2004, being regulated by art. 23 of Law No. 47/1992 on the organization and operation of the CCR, republished (Official Gazette No. 807/3 December 2010).
29 Art. 146 i) of the Constitution.
30 Adopted in 1991.

> powers that, traditionally, belong to the field of national sovereignty. (...) Since Romania's goal to join the Euro-Atlantic structures is legitimized by the country's interest, sovereignty cannot be opposed to the goal of joining.[31]

Noting that sovereignty is not laid down among the limits of revision but falls under independence, which constitutes such a limit, the CCR concluded that it was not affected because the act of accession did not violate Romania's independence. In the same context, the CCR gave its own meaning to the normative coherence in the context of EU accession, noting that 'the acquis Communautaire – the founding treaties of the European Union and the regulations derived from them' are 'on an intermediate position between the Constitution and the other laws, when referring to binding European normative acts'.[32] According to this interpretation,[33] the new provisions regarding the priority of the binding normative acts (contained in the current wording of art. 148 (2)) were considered as not infringing the constitutional provisions regarding the limits of revision and other provisions of the Fundamental Law, but rather as 'a particular application of the provisions of the current article 11 (2) of the Constitution, according to which »Treaties ratified by Parliament, according to the law, are part of national law«'. More recently, the CCR qualified the limits of revision laid down in art. 152[34] as belonging to the national constitutional identity, a guarantee of a 'core identity of the Romanian Constitution', which 'should not be relativized in the process of European integration'. By virtue of this constitutional identity, 'the Constitutional Court is empowered to ensure the supremacy of the Fundamental Law within Romania'.[35]

If the examples of Portugal and Romania stand out as relevant in terms of the volume of unamendable provisions expressly laid down in the Constitutions for notoriety, perhaps the most relevant is the *German example*, due to the case law of the Federal Constitutional Court, which also influenced, to a great extent, the case law of other Courts,[36] including Romania. Art. 79(3) of the German Constitution governs 'unamendable provisions' by stipulating that: 'Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in articles 1 and

31 Decision No. 148/2003, Official Gazette no. 317 of 12 May 2003

32 Ibid.

33 This has been criticized in the legal literature, where it is shown that the prevalence of EU law over the entire legal system established by Art. 148 of the Constitution is 'conditioned by its own requirements' (of the Court) – see Tanasescu, 2023, p. 543.

34 Remains unchanged and constantly mentioned by the CCR in its case law (see, most recently, Decision No. 390/2021, Official Gazette No. 612 of 22 June 2021).

35 Decision No. 390/2021, Official Gazette No. 612 of 22 June 2021, para. 81.

36 See, for example, Constitutional Court of the Czech Republic, mentioned above.

20 shall be inadmissible'.[37] These provisions limited the possibility of transferring sovereign rights to international entities and were expressly regulated in 1992 through art. 23 sec. 1 sentence 3 GG for the process of European integration (the integration clause).[38] The Federal Constitutional Court of Germany (FCCG) developed the doctrine of the so-called 'eternity clauses' (*Ewigkeitsklauseln*)/'eternity guarantee', meaning substantial limits to constitutional amendments, by protecting the key principles of the German Basic Law (constitutional identity) against any constitutional revision.[39] In the Lisbon Case,[40] the Court affirmed its authority to review whether the inviolable core content of the constitutional identity of the Basic Law is respected.[41] According to the Court, the Basic Law is open to European integration,[42] but there are limits to this openness. The MS remains sovereign, and transfers of power to the EU must remain limited and, in principle, revocable.[43] Consequently, the CCFG acts as a guardian, particularly in the context of the European integration process, when it comes to violations of constitutional identity as laid down in art. 79 sec. 3 GG.[44]

Similarly, *the Constitution of France* provides in art. 89 (4) and (5) that no amendment procedure shall be commenced or continued where the integrity of national territory is placed in jeopardy, as well as the fact that the republican form of government shall not be the object of any amendment. Similarly, the French Constitutional Council[45] uses the concept of constitutional identity, which might be used against European law if necessary.[46] It concerns not only historical case law but also more recent decisions, such as the decision of 15 October 2021 (2021-940 QPC Société Air France)[47] in which the French Constitutional Council states that 'the transposition of a directive or the adaptation of national law to a regulation

37 German Constitution (1949) [Online]. Available at: http://www.bundesverfassungsgericht.de/en (Accessed: 22 December 2023).

38 See Britz and König, 2018, p. 162; Art. 23 sec. 1 GG reads as follows: With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of art. 79.

39 *German Constitution (1949)* [Online]. Available at: http://www.bundesverfassungsgericht.de/en (Accessed: 22 December 2023).

40 Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009.

41 Schönberger, 2009.

42 Ibid., paras. 219, 225.

43 Ibid., paras. 231, 233.

44 Britz and König, 2018, p. 144, with reference to BVerfGE 123, 267 (340, 344, 431) – Lisbon.

45 Even if, according to Prof. Eleonora Bottini, it has consistently refused to control constitutional amendments; Barroso and Albert, 2021, pp. 112–116.

46 Bordere and Sydoryk, 2022, pp. 89–92.

47 Decision No. 2021-940 QPC of 15 October 2021, Air France.

must not go against a rule or principle that is inherent in France's constitutional identity', as well as the fact that

> the Constitutional Council is only competent to control the compliance of the disputed provisions with rights and freedoms that are guaranteed by the Constitution in that they call into question a rule or principle that, not having found an equivalent protection in European Union law, is inherent to France's constitutional identity.[48]

The Constitution of Italy sets forth in art. 139 that the form of republic shall not be a matter for constitutional amendment. As for the relationships with EU law, a specific feature of the approach of the Italian Constitutional Court is the counter-limits doctrine, devised in the Frontini and Granital historical judgments and 'conceived of as a way to carry out an exceptional control of respect of the conditions for the constitutionality of the Italian accession to the EU'.[49]

According to the National Report presented to Congress hosted by Georgia in 2017 (mentioned above), the Constitutional Court of *Bulgaria* established by interpretation the limits within which the Legislature shall be free to amend the Constitution. Thus, by its Decision No. 3 on Constitutional Case No. 22/2002 and Decision No. 8 on Constitutional Case No. 7/2005, the Constitutional Court gave a binding interpretation of art. 153 and 158, Item 3 of the Constitution of the Republic of Bulgaria, with respect to questions pertaining to the form of state structure and the form of government. By its Decision No. 3 on Constitutional Case No. 3/2004, the Constitutional Court gave an interpretation of art. 153 of the Constitution read in combination with art. 158, Item 3 of the Constitution and vis-à-vis Bulgaria's membership in the EU.[50]

In terms of the contribution of the Constitutional Courts to the architecture of the limits of constitutional amendment, the example of *Croatia*, where the doctrine states that the Constitutional Court itself 'discovered' the broader power to strike down unconstitutional amendments, is relevant.[51] Thus, in 2013, drawing from its power to oversee the legality and constitutionality of referendums generally, the Court noted that it would intervene in all those cases where it detects such 'formal or substantive unconstitutionality of the referendum questions or such a serious procedural fault that threaten to violate the structural features of Croatian constitutional state, that is Croatia's constitutional identity'.[52] As noted,

48 Ibid., para. 13.
49 For a detailed presentation, especially on the development of this doctrine, see Martinico, Guastaferro, and Pollicino, 2019, p. 493.
50 The Constitutional Court of the Republic of Bulgaria, the volume of the Congress edited by the Constitutional Court of Georgia, 2018, volume I, P. 282.
51 Milos and Zlatic, 2022, pp. 63–64.
52 Ibid., see SuS-1/2013 of 14 November 2013, Official Gazette 138/2013-2966.

while apparently restricted to constitutional amendments through referendums, the Court's latter case law would confirm that this power extends to all constitutional amendments'.[53] Likewise, in 2015 the Court held[54] that when we speak about amending the Constitution, it is the Constitutional Court's obligation, on the basis of general control powers, not to allow any referendum

> when it determines such a formal and/or substantive unionist stationarity of the referendum question, or such a grave procedural error that threatens to undermine the structural characteristics of the Croatian constitutional state, i.e. its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution). In such cases, the Constitutional Court, in its assessment, takes into account the Constitution in its entirety.[55]

Regarding this case, it was also noticed that 'the Constitutional Court has added to the constitutional identity of the Republic of Croatia the highest values of its constitutional order by stating that they are those laid down in art. 1 and 3 of the Constitution'.[56] Regarding the relationship between the national order and that of the EU, in the same decision in 2015, the Constitutional Court explicitly held that the Constitution is, by its legal force, above EU law.[57]

Also relevant are the examples of other MSs, such as the *Czech Republic,* where the Constitution has an explicit eternity clause that prohibits 'any changes in the essential requirements for a democratic state governed by the rule of law'.[58] According to this doctrine, although there is no explicit provision concerning the role of the Constitutional Court in enforcing this eternity clause, the Court claims authority to annul constitutional laws based on the general provisions of art. 83 of the Constitution.[59] As regards EU accession, the Czech Constitutional Court 'has interpreted sovereignty and its transfer in a flexible way',[60] finding, *inter alia*, that the EU had advanced by far the furthest in the concept of shared, 'pooled' sovereignty, and at that time already formed an entity sui generis, which is difficult to classify under the categories of classical political science. A key manifestation of a state's sovereignty is its ability to continue to manage its sovereignty (or part of

53 Milos and Zlatic, 2022, pp. 63–64.
54 Decision of the CCRC No. U-VIIR-1159/2015 of 8 April 2015 (Official Gazette No. 43/15).
55 The Constitutional Court of the Republic of Croatia, the volume of the congress edited by the Constitutional Court of Georgia, 2018, volume I, P. 293.
56 Venice Commission, 2017.
57 Ibid., p. 311, p. 23.
58 Art. 9 section 2 of the Czech Constitution.
59 'The Constitutional Court is the judicial body responsible for the protection of constitutionality'; for explanations see Benak, 2022, pp. 74–75.
60 Kühn, 2019, p. 801.

it) or to cede certain powers temporarily or permanently. In the second judgment on the Lisbon Treaty,[61] the Court emphasised that in terms of the constitutional order of the Czech Republic – and within it, especially in view of the essential core of the Constitution – what is important is not only the actual text and content of the Treaty of Lisbon but also its future concrete application. The CCC, too, will function as an *ultima ratio* and may review whether any act by Union bodies has exceeded the powers that the Czech Republic transferred to the EU pursuant to art. 10a of the Constitution. However, the CCC assumes that such a situation can occur only in quite exceptional cases; these could include, in particular, abandoning the identity of values and exceeding the scope of conferred competences.[62]

Lithuania offers an interesting example of defining the '*cornerstone of the Constitution*', in the sense of establishing a more difficult amendment procedure for values/principles related to the political and constitutional regime, implicitly accepting, however, that these fundamental principles can also be amended.[63] Thus, art. 148 of the Constitution of *Lithuania* sets forth in art. 1 that 'The State of Lithuania shall be an independent democratic republic' and that the Constitution may only be amended by referendum if not less than ¾ (three-fourths) of the citizens of Lithuania with the electoral right vote in favour thereof. The Constitutional Court of Lithuania ruled[64] that art. 1 of the Constitution consolidates the fundamental constitutional values – the independence of the state, democracy, and the republic – which are inseparably interrelated and form the foundation of the State of Lithuania as the common good of the entire society consolidated in the Constitution; they must not be negated under any circumstances. In addition, the principle of recognition of the innate nature of human rights and freedoms should be regarded as a fundamental constitutional value that is inseparably related to constitutional values – independence, democracy, and the republic – so the innate nature of human rights and freedoms may not be negated either. Given the constitutional imperative to ensure that no amendments to the Constitution violate the harmony of the provisions of the Constitution or the harmony of the values consolidated by them, the Constitution does not permit any such amendment that would deny the abovementioned constitutional values, with the exception of cases in which art. 1 of the Constitution would be altered (by a referendum

61 Judgment of 3 November 2009, file No. Pl. ÚS 29/09, Lisbon Treaty II, paras. 147–148, *apud* Kühn, 2019.

62 Lisbon Treaty II, supra n. 14, para. 150, summarising Lisbon Treaty I, apud Kühn, 2019, p. 802.

63 Likewise, see art. 162 of the Constitution of the Republic of *Estonia*, 'Chapter I (General Provisions) and Chapter XV (Revision of the Constitution) of the Constitution shall only be amended by referendum'.

64 The Constitutional Court of the Republic of Lithuania, Case No. 22/2013, Ruling of 24 January 2014, [Online]. Available at: https://lrkt.lt/data/public/uploads/2015/04/2014-01-24_kt2-n1_ruling.pdf (Accessed: 22 December 2023).

with a three-fourths majority).[65] With regard to EU accession, the Constitution of Lithuania has undergone several amendments,[66] the most important of which is the Law Supplementing the Constitution with the Constitutional Act on Membership of the Republic of Lithuania in the European Union and Supplementing art. 150 of the Constitution on 13 July 2004[67] (CA), which establishes explicit constitutional provisions concerning both the transfer of part of the competences of state institutions to the supranational level (Art. 1 of the CA) and the incorporation of EU law into national law with (limited) recognition of its specific features (art. 2 of the CA). These provisions are critical in the context of ongoing discussions and disputes concerning the relationship between SM and EU order, especially the way of transposing EU law into the national legal system and its consequences, as the doctrine[68] reveals, 'after the adoption of art. 2 of the CA, the basis for the application of EU law rests, foremost, within the Constitution itself', which means that the Constitution instead of EU law by its very nature forms the basis for the application of EU law in Lithuania. As for the Constitutional Court of Lithuania, in the ruling of 24 January 2014,[69] it stated that membership in the EU is a reflection of the geopolitical choice of Lithuania, which, at the same time, is a value choice: the Preamble of the CA clearly reveals that Lithuania's accession to the EU is based on an assumption of the structural compatibility of the fundamental values established in the Constitution with those on which the EU is founded. The CC stressed that the principle of the rule of law is applicable to the procedure for amending the Constitution, and the pacta sunt servanda principle is a part of the constitutional principle of the rule of law. The Constitution establishes the constitutional imperative to observe and fulfil international obligations correctly; consequently, the Constitution does not allow amendments that go against obligations undertaken under international or EU law.

The constitutional landscape of the EU also reveals examples of constitutions which provide limits to amendments, but these limits are not discussed in relation to the EU legal order. Thus, *Greece* has a rigid Constitution where art. 110 includes an eternity clause, the form of government as a Parliamentary Republic, and certain particular provisions like separation of powers.[70] According to this

65 Martinico, Guastaferro, and Pollicino, 2019, p. 493 et seq.
66 Jarukaitis and Švedas, 2019, p. 1005.
67 Ibid., p. 1002.
68 Ibid., p. 1005.
69 The Constitutional Court of the Republic of Lithuania, Case No. 22/2013, Ruling of 24 January 2014, [Online]. Available at: https://lrkt.lt/data/public/uploads/2015/04/2014-01-24_kt2-n1_ruling.pdf (Accessed: 22 December 2023).
70 'The provisions of the Constitution shall be subject to revision with the exception of those which determine the form of government as a Parliamentary Republic and those of articles 2 paragraph 1, 4 paragraphs 1, 4 and 7, 5 paragraphs 1 and 3, 13 paragraph 1, and 26'. See Greek Constitution (2008) [Online]. Available at: https://www.constituteproject.org/constitution/Greece_2008 (Accessed: 22 December 2023).

doctrine, the constitutional review of constitutional amendments is principally bestowed on the Revisionary Parliament, with courts having no power to intervene. The only exemption derives from art. 87 (2) of the Constitution, which empowers judges not to apply provisions enacted in violation of the Constitution. It was noted that 'although never applied in practice, a judge should abstain from applying and revised constitutional provisions that amend unamendable constitutional rules. At the supranational level, any constitutional provision can be reviewed for compliance with EU law under the principle of supremacy from the ECJ.[71] In such cases, the constitutional provision is not repealed but should be set aside when conflicts with EU law arise'.[72] *Cyprus* unconditionally recognises the primacy of EU Law at the constitutional level.[73]

Conversely, constitutional developments in *Poland* and *Hungary* reveal a counter position in a specific register of the identity component, in which sense, the doctrine overflows with studies and opinions.

The selected examples support the general assessment of the Venice Commission in the Report cited above,[74] according to which 'The overview of provisions for constitutional amendment illustrates the rich European constitutional heritage, which in itself is a legacy to democracy and the rule of law' (para. 59). This diversity is a reflection of the roots of European constitutionalism (para. 63), influenced 'by the domestic political context and compromises'. The Commission emphasises in this regard that also, in the case of European countries that are politically, historically, and culturally close (like Denmark, Norway and Sweden), they 'may have different constitutional cultures and very different amendment rules' (para. 65). An interesting remark concerns the debates in the countries of Central and Eastern Europe during the processes of constitution writing in the 1990s after the fall of communism, related to 'the correct threshold for future amendments'. According to the Venice Commission,

> the dominant view was that the new democracies should adopt rigid constitutions, with strict rules on amendment, in order to protect the new democratic order and constrain executive power. Others, however, argued strongly that the particular aspects of this major transition to democracy required a more flexible form of constitutionalism, with relatively easy access to amendment, in order to adjust to the fundamental changes taking place' (para. 66).

This resulted in different amendment rules (para. 67).

71 C-213/07 *Michaniki AE v. Ethniko Symvoulio radiotileorasis and Ypourgos Epikrateias*.
72 Tzemos, Margaritis, and Palioura, 2022, pp. 97–100.
73 For an overview see Paraskeva and Meleagrou, 2023, p. 103.
74 CDL-AD(2010)001-e, Report on Constitutional Amendment adopted by the Venice Commission at its 81st Plenary Session, Venice, 11–12 December 2009.

However, the review of the constitutional amendments clearly illustrates the evolution of the vision of the Constitution itself as the supreme law of the land. As noted in the legal literature, constitutions have political value and express national identity and policy goals,[75] and the constitutional nucleus appears to be more resistant to the influence of EU law. While constitutional courts allow EU law to have primacy over national law (including constitutional law) in general, they do not allow it to have primacy over the constitution's core, which they define as matters of constitutional identity, maintaining the authority to 'safeguard the inviolable constitutional identity' of their respective states.[76] How this core interacts with what the ECJ, in its capacity as the constitutional court of the EU legal order, defines as the core identity of the EU order remains debatable.

3. Core values of the EU: Limits of the revision of the EU Treaties and the role of the ECJ

Over time, through the joint action of the MSs embodied in amendments to the Founding Treaties and with the substantial contribution of the ECJ, which acted as an 'engine' of integration, the EU acquired the features of an autonomous constitutional order. Thus, according to the ECJ, in Opinion no. 2/13,

> [T]he EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation (paras. 157–158).

The founding treaties, as subsequently amended and supplemented, are 'the basic constitutional charter of the Union',[77] having in the centre the common values laid down in art. 2, according to which

> 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.

75 De Visser, 2022, pp. 216–236.
76 Halmai, 2018.
77 Judgment Les Verts/Parlamentul, 294/83, EU:C:1986:166, point 23 and Opinion 2/13 para. 163.

The values are shared with all MSs, a premiss that 'implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected' (para. 168). According to the ECJ, 'at the heart of this legal structure' are

> the fundamental rights recognized by the Charter – which, under Article 6(1) TEU, has the same legal value as the Treaties –, respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU (para. 169).

Likewise, the importance of these values emerges in the documents of the European Commission, describing them as

> the bedrock of our societies and common identity (...). The rule of law is a well-established principle, well-defined in its core meaning. This core meaning, in spite of the different national identities and legal systems and traditions that the Union is bound to respect, is the same in all Member States.[78]

In various studies, art. 2's significance in the construction of the EU has led, in various studies,[79] to the idea that the values it sets forth can be seen as limits for revising the Treaties, noting at the same time the lack of an express qualification in this regard in the Treaties or in the case law of the ECJ.[80] However, with time, the ECJ has gradually defined the meaning of art. 2 of the TEU towards the acknowledgement of what it called the '*identity*' of the EU, leading to interesting insights for debates on European constitutionalism. Thus, in *Case C-156/21,* having as subject matter an action for annulment formulated under art. 263 TFEU, introduced on 11 March 2021, Hungary supported by the Republic of Poland, v. the European Parliament and the Council of the European Union, the ECJ stated that

> The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties' (para. 127); 'In that regard, it must be borne in mind that Article 2 TEU is not merely a statement of policy

78 European Commission, 2019.
79 See, e.g. de Witte, 1994; or, more recently, Passchier and Stremler, 2016, p. 357.
80 Fasone, 2020, pp. 707–732.

> guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States (para. 232).

The judgment defines both the material content and 'procedural dimension' of EU constitutional identity. As Professors Pietro Faraguna and Timea Drinóczi emphasise,

> even though art. 48 TEU, which provides for the ordinary and simplified revision procedure of the Treaties, does not include any textual hints to determine a European "eternity clause", substantive constraints to the Treaty amending power may derive from theories of implicit unamendability.[81]

The cited judgment establishes a counter-limit for the affirmation of the 'distinct national identities' of the MS, to the effect that this cannot be contrary to the values enshrined in art. 2 of the TEU.

This perspective on the fundamental core of the European legal system that must be protected could lead to an explicit definition of the ECJ's role in verifying the compliance of future treaty amendments with the limits enshrined by art. 2 of the TEU.[82] Therefore, the filtering role of the constitutional courts in the MSs (verifying the compliance of the treaties with the national constitutions) is complemented by that of the ECJ in upholding common EU values, with interesting overlaps of powers as far as common values are concerned. It is, therefore, crucial to articulate the cornerstone of the EU order and those of the MS constitutions and to have the same understanding of the common components. Consequently, beyond the doctrinal debates focused on the revision of the Treaties itself and the role that the ECJ could undertake of verifying the revision acts in relation to the limits that establish the identity core of the EU as a common legal order, we consider that art. 2 (and its interpretation given by the ECJ) can also be seen as a limit on the revision of the MS constitutions, supplementing or integrating with the limits existing in these constitutions, either explicit or implicit.

The harnessing of this limit could be achieved according to the mechanism described by Prof. von Bogdandy through the formula of a 'Reverse Solange doctrine' functioning 'in exactly the opposite way as the original model'. According to Prof. von Bogdandy:

81 Faraguna and Drinóczi, 2022.
82 See Passchier and Stremler, 2016.

> with regard to EU fundamental rights, the Reverse Solange doctrine operates as follows: beyond the scope of Article 51(1) CFR, any member state remains autonomous in its fundamental rights protection as long as (Solange) the presumption holds that it respects the essence of fundamental rights enshrined in Article 2 TEU. All courts in the EU are competent to police this presumption. If the presumption is rebutted, the EU mechanisms for protecting the Union's common values apply. [83]

This reasoning can be transgressed in the constitution revision mechanism, leading to the idea that the autonomy of the states in reconfiguring their own constitutions is limited by the identity of the EU (given by art. 2 TEU). Prof. von Bogdandy also noted that 'the values enshrined in Article 2 are vague and open', which can lead to debates regarding their interpretation by the ECJ and their integration with national constitutional courts. However, the ECJ continued to define these values over time, and the EU developed mechanisms to ensure their enforcement and effectiveness, such as the Rule of Law Mechanism.[84] This mechanism supports the idea of *de facto* federalisation, which has been explored in previous studies.[85] A comprehensive study published in 2020 by Kim Lane Scheppele, Dimitry Vladimirovich Kucherov, and Barbara Geabowska-Moroz highlights the EU's power to enforce its values.[86]

To gain a complete understanding of the EU's profound constitutional structure, it is important to consider not only the visible developments at the supranational level but also the events occurring at the national level. Though less noticeable, some occurrences, such as the interpretation and application of the EU's constitutional framework by the national constitutional courts (more or less coherent), contribute to achieving an interesting harmonisation effect, including in terms of the 'cornerstone' of European constitutionalism. Developments in constitutional review in Romania serve as an interesting example in this regard.

4. Limits of amending the Romanian Constitution in the CCR case law: A hybrid 'cornerstone' of the Constitution

■ *4.1. Stages in interpreting the limits of the Constitution's revision*

With a rigid constitution, a comprehensive set of intangible values, and a Constitutional Court engaged in protecting them, including by promoting, sometimes

83 von Bogdandy and Spieker, 2019.
84 European Commission, no date.
85 Schutze, 2009.
86 Scheppele, Kucherov, and Geabowska-Moroz, 2020.

more vocally, the concept of constitutional identity,[87] Romania represents a case of analysis relevant to the topic of this study. The examination of case law shows how the CCR introduced EU law in interpreting the limits of the revision of its own Constitution, somehow attaching them to the 'core identity'.

Thus, in Romania, in the 30 years since the adoption of the Constitution, 10 initiatives to amend the Constitution have been promoted, as follows: 5 by MPs [1996, 2003, 2014, 2019 (2 initiatives)], 4 by citizens (2000, 2007, 2016, 2019), and 1 by the President of Romania on the proposal of the Government (2011). The decisions of the CCR on these initiatives illustrate an evolution towards a broader interpretation of the express limits of the revision of the Constitution established in art. 152. This evolution became noticeable in the decisions made following the 2003 revision of the Constitution.

Thus, in the *first stage* (decisions pronounced in 2011 and 2014), the interpretation of the limits of the revision took into account not only the express provisions of art. 152, but also the general principles outlined in art. 1 of the Constitution (democracy, legality, rule of law, etc.) and international treaties on human rights to which Romania is a party, as provided by art. 20 of the Constitution (referred to as the 'block of constitutionality'[88]). CCR established in this regard that

> in carrying out this power, the Constitutional Court is to rule upon the fulfilment of the constitutional requirements of form and substance regarding the revision of the Constitution, laid down in title VII – Articles 150-152 of the Fundamental Law – "Revision of the Constitution" (...) At the same time, the Court is to rule upon the observance of the provisions of international treaties in the field of human rights Romania is a party to, and, in carrying out its role as guarantor of the primacy of the Constitution, to analyse the proposed amendments in terms of the principles that ground and define the Romanian State, set forth in Article 1 of the Constitution.[89]

It appears that the identity core has become a 'block of constitutionality', incorporating both the general principles that underpin the organisation of the Romanian State and the international treaties on human rights to which Romania is a party.

87 Varga, 2022.

88 The idea of 'block of constitutionality'/'constitutional block' originates from French doctrine and the jurisprudence of the Constitutional Council of France. It refers to the possibility of including in the constitutional text other rules related to fundamental rights and freedoms that are not explicitly part of the Constitution itself. This means that all norms with constitutional significance, whether found in the text of the Constitution or in other legal acts, together form the 'constitutional block'. See Denizeau-Lahaye, 2022.

89 Decision No. 799/2011, Official Gazette No. 440 of 23 June 2011.

The effectiveness of this hybrid/composite core is evident in 'reshaping' the constitutional framework for the protection of fundamental rights. For example, through a decision[90] issued in 2014 on the initiative to amend the Constitution, the CCR recommends that Romanian fundamental law use a legal language identical to that of the European Convention on Human Rights. Thus, noting that the proposal on the revision of the Constitution contained the amendment of art. 21 (3) of the Constitution in the sense of replacing the notion of 'reasonable term' with that of 'optimal and predictable term' and that the text of art. 6 (1) of the Convention uses the term 'reasonable term', 'by unanimity, the Court recommended the removal of the proposed amendment to article 21 (3) of the Constitution' (para. 62). Similarly, the CCR recommended the removal of the proposed amendment to art. 49 of the Constitution – *Protection of children and young people* – with reference to the concepts and definitions contained in the Declaration of the Rights of the Child, adopted by the General Assembly of the United Nations Organisation on 20 November 1959 and in The Convention on the Rights of the Child, adopted by the General Assembly of the United Nations Organisation on 20 November 1989 ratified by Law No. 18/1990, republished in the Official Gazette of Romania, Part I, no. 314 of 13 June 2001.

In the *next stage* (decisions pronounced in 2019), the CCR shows an interesting nuance regarding the application of EU law in controlling initiatives to revise the Constitution. It is important to note that the Romanian Constitution capitalises on EU law based on a specific text, art. 148 of the Constitution. The inclusion of the EU Charter of Fundamental Rights is subject to these special rules, which prioritise the application of EU law in case of conflict with internal laws. This differs from the general framework of international human rights treaties to which Romania is a party, established by art. 20 of the Constitution and already implemented by the CCR in previous jurisprudence regarding the review of constitutional amendments. This nuanced approach seems to be based on the principle of human dignity outlined in art. 1 of the Constitution.

Thus, in Decisions No. 464 and 465/2019,[91] the CCR examined the initiative to amend the Constitution, intended to forbid the President of Romania from granting pardons for crimes of corruption. On this occasion, the CCR specified more clearly the way in which it proceeds to analyse the limits of the review, showing that the Court's analysis must be carried out in two steps when evaluating the suppression of fundamental rights and freedoms or their guarantees in the sense of art. 152 paragraph (2) of the Constitution, namely, the analysis of the revision initiative in relation to the general principles which guide the entire catalogue of fundamental rights and freedoms, principles that constitute their guiding guarantees, and the analysis of the review initiative in relation to an applicable fundamental right or

90 In Decision No. 80/2014, Official Gazette No. 246 of 7 April 2014.
91 Published in Official Gazette No. 646 of 5 August 2019.

freedom. Starting from the premise that 'the fundamental rights and freedoms of citizens and their guarantees cannot be considered a diffuse set of elements without any connection between them, but make up a coherent and unitary system of values, based on human dignity' and 'any violation of the named fundamental rights and freedoms represents a violation of human dignity', the CCR explained the value of human dignity in relation to the practice of the European Court of Human Rights and the European Court of Justice. According to CCR,

> taking into account, on the one hand, Article 1 (3) of the Constitution, which qualifies human dignity as the supreme value of the Romanian State, and, on the other hand, the case law of the European Court of Human Rights in conjunction with Article 20 (1) of the Constitution, placed right in title II of the Constitution – Fundamental rights, freedoms and duties, it follows that human dignity is the very source, basis and essence of fundamental rights and freedoms, therefore Article 152 (2) of the Constitution by referring to human dignity shall be analysed from two complementary perspectives: a guiding principle regarding fundamental rights and freedoms and a distinct fundamental right, and its bivalent meaning is valued as a limit to the revision of the Constitution in the sense of Article 152 (2) of the Constitution. Even if the aforementioned case law of the Court of Justice of the European Union is not valued within the framework Article 20, but of Article 148 of the Constitution [see Decision No 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015, paragraph 30], but also taking account of Article 52 (3) of the Charter of Fundamental Rights of the European Union, according to which, to the extent that this charter contains rights that correspond to rights guaranteed by European Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope are the same as those enshrined in the said convention, without preventing Union law from conferring wider protection [see also mutatis mutandis Decision No 216 of 9 April 2019, published in the Official Gazette of Romania, Part I, no. 548 of 3 July 2019, paragraph 24], one can only reinforce the idea that human dignity is the essence of fundamental rights and freedoms and that it represents in itself a limit to the revision of the Constitution.[92]

Therefore, it appears that there may be an interference of art. 2 of the TUE and art. 152 of the Romanian Constitution concerning fundamental rights by reference to the value of dignity as a source of human rights and the case law of the

92 Ibid., para. 52.

European Court of Justice (even *obiter dictum*). In the interpretation of these rights, the Charter and ECJ case law were attached (even *obiter dictum*) to the core of the Romanian Constitution; along with the international treaties on human rights, Romania is a party to the ECtHR case law in the interpretation of the Convention. We can see this evolution as a second stage of building the 'block of constitutionality' around art. 152, meaning human rights both in the acceptance of EU law (art. 148 of the Constitution) and other international treaties to which Romania is a party (art. 20 of the Constitution).

Thus, the CCR's interpretation causes the nucleus of the Constitution to appear in continuous remodelling influenced by the interplay of the ECHR and ECJ. In the same way as the reference to human dignity, which is a general principle enshrined in art. 1 of the Romanian Constitution, the gate is opened to the valorisation of other principles, such as the rule of law. However, the rule of law has a unique status between the identity values of the EU and its own imposition mechanism,[93] making its definition impossible in ways other than in EU terms.

■ *4.2. Challenges: The standards of protection of human rights*

Since 'the door' to shaping or reshaping the core of the Constitution is open to the regulation of fundamental rights at the European level, a challenge concerns the variation of standards in this matter. Moreover, the CCR's interpretation of the position of human rights within the limits of amendments to the Constitution is itself variable. Thus, in certain decisions, the CCR *strictly* applies the constitutional text according to which 'no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof', while in other decisions, the Court argued for *balancing* or *increased* protection of fundamental rights.

The most suggestive example where *a strict interpretation* can be identified is a decision by which the Court found the constitutionality of the initiative to revise art. 48 of the Constitution (in the sense of changing the phrase 'between spouses' referring to marriage to the phrase 'between a man and a woman'). Thus, using a grammatical interpretation of the wording of art. 152 of the Constitution, the CCR held that' according to the Explanatory Romanian Dictionary, the term 'to supress' means 'to make it disappear, to remove, to discard, to cancel'. By examining the wording of Article 48 (1) of the Constitution, proposed by the initiators of the revision, the Court found that it is not such as to cause the disappearance or removal, the elimination or cancellation of the institution of marriage. (para. 42) According to the CCR,

> the proposed amendment to Article 48 (1) of the Constitution refers only to the right to marriage and family relationships resulting from

93 European Commission, no date.

> marriage. Other fundamental rights, referred to in the amicus curiae briefs filed, are not called into question by the revision initiative and therefore cannot be subject to the review of its constitutionality. (para. 44)[94]

A similar strict approach, but also with reference to the ECtHR case law in the matter, can be found in the decision on the constitutionality of the initiative for the revision of art. 37 of the Constitution – *Right to be elected* – which proposed a new requirement for the exercise of this right, namely that the person in question had not been convicted by a final decision for crimes committed with intent, for which rehabilitation did not take place. After an extensive analysis, the CCR held the following:

> both the incidental constitutional principles, as they were developed in the case law of the Constitutional Court, as well as the international treaties in the field of human rights and the case law of the European Court of Human Rights place the regulation of the requirements for exercising the right to be elected in the responsibility of the legislator, being preferable as their regulation to be carried out at the constitutional level, by establishing clear and precise criteria/requirements. Limitations shall be allowed as long as they are not arbitrary and do not interfere with the substance of the right, a more restrictive regulation of the right to be elected compared to the right to vote being admissible, in compliance with the analysed proportionality requirements.[95]

The Court found that the proposal to revise the Constitution

> 'is in compliance with the constitutional requirements, not being likely to result in a suppression or restriction of the right to be elected in such a way as to interfere with its substance. (...) Thus, the proposal to revise the Constitution is constitutional and in relation to the provisions of Article 152 (2) of the Constitution' (paras. 46-47).

The emphasis in this decision refers to the possibility of accepting certain restrictions on rights by way of revision as long as they do not interfere with the substance of the rights.

An assessment in the sense of a *balancing* of competing interests and, in this light, the acceptance of the possibility of restricting certain rights through the

94 Decision No. 580/2016, Official Gazette No. 857 of 27 October 2016.
95 Decision No. 222/2019, Official Gazette No. 425 of 30 May 2019.

revision of the Constitution appears in a decision by which the CCR found (including with reference to the Convention) the constitutionality of the provision which increased the period of detention as a custodial measure, arguing as follows:

> the new wording of the constitutional text, regulating the maximum period of detention, through a clear norm, not being subject to interpretation, and the term provided for in this sense being likely to allow minimal interference with regard to the freedom of the person, complies with the mentioned requirements and cannot be interpreted as having the effect of suppressing the guarantees of a fundamental right, in terms of Article 152 (2) of the Constitution. The proposed amendment responds to the State's obligation to ensure a fair balance between the interest of defending the citizen's fundamental rights and the interest of defending the legal order, taking account of the issues raised in practice by the current length of the detention period, as far as the activity of the criminal prosecution bodies is concerned, with direct consequences on the way in which the achievement of the general interests of the society and the defence of the legal order are ensured.[96]

In a different argumentative manner, in other decisions, the CCR seemed to interpret the word 'suppression' in a different way, expressly stating that the revisions of the Constitution can only be in the sense of *raising the standards of protection of fundamental rights* (*upward protection of fundamental rights*). According to this vision,

> the Constitution is the one that enshrines fundamental rights/freedoms, giving them a normative wording, and therefore cannot impair/suppress them, in which sense Article 152 (2) of the Constitution is unequivocal. It follows that the constitutional protection of the citizen is upward, therefore the constitutional revisions must also grant an increasingly greater protection to the protection of fundamental rights and freedoms [in the sense of Article 152 (2) of the Constitution], the protection of the fundamental right and freedoms can only have an upward orientation.[97]

Through the formula 'impair/suppress', which puts terms with different meanings on the same level ('impair' means to harm, to jeopardise, and 'suppress' means to eliminate), the Court seems to raise the constitutional standard that expressly

96 Decision No. 799/2011, cited.
97 Decision No. 465/2019, cited, para. 29.

refers only to suppression (implicitly accepting an impairment). It is true that the CCR completes the ruling with the statement that 'the Constitution shall protect the general interest by achieving a fair balance between it and the fundamental rights/freedoms', which suggests a balancing of the fundamental rights in view of the general interest, and thus implicitly the restriction of certain rights in favour of others.

Considering the development of the 'cornerstone' of the Constitution in conjunction with international treaties on human rights and EU law, it is unclear how these rights will be interpreted in the future, given the problematic standards resulting from the interplay of the European Convention of Human Rights and EU Law (ECtHR and ECJ).[98]

5. Conclusions: Interferences and overlaps of constitutional nucleus/identities and the future of the EU

This study does not exhaustively cover the subject but raises some questions for debate on the future of the EU, namely that of the evolution of national constitutions in terms of the EU's identity.

Given the developments at the supranational level, especially the shaping of the EU's own constitutional identity, equally with reference to the EU's specific constitutional framework, the theory of constitutional revision in terms of amendment/dismemberment described by Richard Albert[99] can also be applied to the EU itself. 'A constitutional dismemberment', meaning 'a fundamental transformation of one or more of the constitution score commitments', which 'intends deliberately to disassemble one or more of constitution elemental parts', meaning the core values of the EU, should not be acceptable. In this light, any revision of the MS constitutions (so as not to have the effect of 'dismemberment' in terms of common order) must take into account EU membership and respect not only its own body of rules/principles (explicit or implicit) with special status in the set of constitutional provisions (the '*cornerstone*' of the Constitutions), but also the values laid down in art. 2 of the TEU, namely the identity of the EU as a structure of States.

The overlap of the values qualified as 'cornerstone' or 'identity' creates a continuous plasticity of identities that are constantly reconfigured and developing together. The 'key' to this development seems to be related to the interpretation of those values, as well as the delimitation of those that remain (if they

98 See Claes, 2015, p. 209: 'the Charter has the efect of harmonizing fundamental rights in the scope of EU law, and MS are not allowed under art. 53 to deviate from the common standard'.

99 Albert, 2019, p. 84.

remain) exclusively national. As mentioned,[100] considering the idea of substantive constraints on the MSs' power of Treaty revision may be especially important, moreover, at a time when constitutional democratic norms and values are under considerable pressure in certain European countries.[101] Issues can arise when various European courts disagree on the meaning of such values.

Whether conflicts arise between the EU and MSs depends on how well they cooperate with each other. It is worth remembering that both the regional and national constitutions ultimately serve the same citizens.[102] A model of constitutional 'embedding' of EU values, and thus a key to harmony, can be the approach of the CCR, which also analysed the limits of revision of the Constitution with reference to EU law/Charta. Thus, the fundamental values of the EU (human dignity, as developed in the case law of the ECJ) seem to have become an implicit limit of the revision to the Romanian Constitution, embedded into the 'block of constitutionality' of the identity core. The analysis can be further extended by referring to other countries to see if they have similar approaches to analysing the limits of constitutional amendments. Regarding Romania, it would be interesting to clarify the role of fundamental rights protection standards as limits for revising the Constitution. The issue of interpreting fundamental values in the EU, particularly fundamental rights, must be addressed. We wonder if it would be admissible to make a preliminary referral as part of the process of revising the Constitution (in constitutional review) in order to clarify the interpretation of the limits of amending the Constitution when such clarification concerns the standard of protection of human rights and the consequences of the relationship between national and supranational legal orders.

100 Passchier and Stremler, 2016, p. 357. According to von Bogdandy and Spieker, 2019, these values also represent clear constitutional limits to Member States' actions.

101 Cf. Halmai, 2014; von Bogdandy and Sonnevend, 2015; Koncewicz, 2015.

102 van der Schyff, 2021a; van der Schyff, 2021b.

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