



The effects of Constitutional Court Judgments in the context of EU integration: the case of Romania as an EU Member State

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Abstract

This contribution analyses the conflict between the Constitutional Court of Romania (the ‘CCR’) and the Court of Justice of the European Union (the ‘CJEU’) from the perspective of the affirmation of constitutional identity by the Constitutional Court of Romania as a national independent court, to the detriment of the principle of primacy of EU law enshrined in the settled case-law of the European Court of Justice. The following analysis focuses on two aspects of this conflict. The first involves consideration of the use of the concept of constitutional identity by the Constitutional Court of Romania as a tool to limit the principle of primacy of EU law, with the main argument being that the Constitutional Court is the supreme national institution the task of which is to ensure the supremacy of the Romanian Constitution on Romanian territory even insofar as concerns EU law and the case-law of the Court of Justice of the European Union. The second aspect focused upon in this analysis consists of the effects of the conflict between the two jurisdictions - the constitutional and the European Union – as seen in the constitutional decisions adopted by the Constitutional Court of Romania.

Keywords Constitutional identity · Rule of law · Primacy of EU law · Judicial independence

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1 Introduction

Between 2018 and 2022, Romania experienced an intense national debate on the independence of the judiciary,¹ on the effectiveness of - and possible abuses in - the fight against corruption,² and on the threat of disciplinary sanctions against undesirable judges and prosecutors, including, in the case of judges, if they dared to address preliminary questions to the Court of Justice of the European Union in accordance with Article 267 of the Treaty on the Functioning of the European Union.³

In this temporal context, the Romanian Parliament and the Government adopted several normative acts, and several decisions of the Romanian Constitutional Court played a role in these debates where justice was concerned.

The Romanian Constitutional Court decisions under discussion here related mainly, among others, to the principle of supremacy of EU law over the Romanian Constitution and other normative acts subordinate to the Constitution, as interpreted by the CCR. One of the arguments concerning rejecting the principle of primacy of EU law was the appeal made by the CCR, explicitly⁴ or implicitly, to the concept of constitutional identity.

Given the position expressed by the Constitutional Court on the concept of constitutional identity, this contribution will focus on the sources of national and constitutional identity in the context of Romania's integration into the EU and on the effects of Constitutional Court decisions affirming constitutional identity in the sense of the primacy of the Romanian Constitution and the interpretation given by the CCR to it in relation with European Union law.

The structure of this article, in the absence of an adequate sizing of the picture of the effects of the Romanian Constitutional Court's decisions from the perspective of the implicit and even explicit affirmation of constitutional identity by the CCR, the subject of this contribution, is as follows. A history and the factors that generated the three waves of referrals made by national courts between 2018 and 2023 as an immediate effect of the decisions adopted by the CCR about the major themes addressed

¹See, e.g., *Tănăsescu/Selejan-Guțan* [24]; *Morarul/Bercea* [15].

²See, e.g., *Bogdan* [2]. The author starts with the idea that classical political corruption is a reality in Romania, but that "all-out repressive anti-corruption is, paradoxically, no longer a viable solution to it" because

"the corruption of the rule of law, encapsulated by the idea that it does not matter how you put 'the corrupt' in jail, so long as you do it productively (end justifies means), is likely to generate various questionable practices, such as: targeted/selective prosecutions, systematic leaks from the case files to the friendly press, prosecution biases (e.g., strong-arming judges), and, indeed, problematic institutional collaborations in the name of 'robust' anticorruption."

³See the Case C-379/19 *KI & others*, and *Direcția Națională Anticorupție – Serviciul Teritorial Oradea*, ECLI:EU:C:2021:1034, para.80, last sentence. According to the referring court (the *Tribunalul Bihor*), the Judicial Inspection had initiated a disciplinary investigation against the referring judge "for failing to comply with the decision of the *Curtea Constituțională* (Constitutional Court) mentioned in the questions referred for a preliminary ruling."

⁴Romanian Constitutional Court, Decision No. 390 of 8.6.2021 published in the Official Gazette of Romania No. 612 of June 2021; see, e.g., Opinion of Advocate General Collins, Case C-430/21, *RS (Effect of the decisions of a constitutional court)*, ECLI:EU:C:2022:44 [2022], para. 1, 4.

by these decisions (Sect. 1). The analytical framework of national and constitutional identity (Sect. 2). The emergence and evolution of Romanian constitutional identity in the context of Romania's integration into the European Union (Sect. 3). It concludes with the immediate and mediated effects of decisions of the CCR, *i.e.*, those that implicitly or explicitly affirm constitutional identity about the principle of primacy of EU law and the case law of the European Court of Justice.

2 Background and the history of referrals

As some Romanian scholarship has pointed out, political factors made an essential contribution to the birth and development of these debates in the Romanian legal and public space, at a time when, with “the general elections of December 2016, democratic backsliding started to manifest in Romania (...)”.⁵

The European Union's concerns and warnings, through the instruments that the Union's institutions, such as the European Commission⁶ and the European Parliament,⁷ had at their disposal, also expressed the same warnings about the threat to the rule of law by the politicians in power in Bucharest at that time.

In this turbulent political context, the Constitutional Court of Romania had to rule several times on new legislative acts concerning essential changes to the justice laws, the application of the Criminal Code and the Code of Criminal Procedure, and some administrative acts issued by ordinary courts, such as those on the composition of the Romanian High Court of Cassation and Justice's trial panels for corruption offences.⁸

After 2019, confronted with these debates - materialised in national normative acts and jurisdictional decisions of the Constitutional Court of Romania - various courts in Romania referred preliminary questions to the European Court of Justice⁹ on the independence of judges, the rule of law and the fight against corruption. All of them related, in particular, to the compatibility with EU law of new national regulations and practices, including decisions of the Constitutional Court, especially in connection with the case law interpreting the European Court of Justice case law in these areas.

⁵Tănăsescu/Selejan-Guțan, *supra* note 2.

⁶See Commission reports under the Cooperation and Verification Mechanism established by Decision 2006/928/EC; for 2018 (COM(2018) 851 final) - pp. 2, 3, 14; for 2019 (COM(2019) 499 final -, at pp 5, 14, 15, 17; and for 2021 (COM(2021) 370 final -, pp. 7, 21.

⁷P8_TA(2018)0446, *The Rule of Law in Romania*, (European Parliament non-legislative resolution of 13.11.2018 on the rule of law in Romania (2018/2844(RSP))(available online at https://www.europarl.europa.eu/doceo/document/TA-8-2018-0446_EN.pdf) point 2.

⁸Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Eurobox Promotion and Others.*, ECLI:EU:C:2021:1034 (judgment of 21.12.2021) at paras. 54 and 55; *FX and Others (Effect of the decisions of a Constitutional Court III)* (order of 7.11.2022) at paras. 42, 43; *RS (Effect of decisions of a constitutional court)*, ECLI:EU:C:2022:99 (judgment of 22.2.2021) at para. 18; Moraru/Bercea, *supranote* 1, p. 91.

⁹See Opinion of Advocate General Bobek in Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, ECLI:EU:C:2021:170 at paras. 1 and 2.

3 National and constitutional identity – analytical framework

3.1 National and constitutional identity under article 4(2) TEU

The current form of the concept of ‘national identity’ was introduced by the Treaty of Lisbon into Article 4(2) TEU,¹⁰ “by limiting its scope to those manifestations of national identity that can be found in the Member States’ fundamental political and constitutional structures”.¹¹

However, Article 4(2) TEU reveals a semantic tension between the notions with which the TEU operates: national identity and its inherent “characteristics”, political and constitutional structures. The semantic tension discernible in the construction of the text of Art. 4(2) has translated into an obvious institutional tension between political institutions and constitutional courts of some Member States on the one hand and EU institutions and the European Court of Justice on the other,¹² when operationalising the concept of national and constitutional identity in the context of the integration of Member States in the European Union.

3.2 Constitutional identity

Concerning the identity clause, as introduced by Treaty of Lisbon in Article 4(2), a first category of authors identifies the operationalisation of this text only from the perspective of the constitutional structure of identity. This position holds that even if one should not remove the field of cultural identities and traditions from the notion of national identity, the concept of national identity does focus on the structures of the state (political and constitutional), thus emphasising constitutional identity.¹³ Other authors argue that the fundamental elements or values of the national community of a given Member State are derived from its constitutional order. The concept of national identity is the functional equivalent of constitutional identity and refers to the existence of different or distinct constitutional identities of Member States.¹⁴ They propose the concept of ‘multilevel constitutionalism’, a concept by which they explain the necessary interaction between the national constitutional system and EU law when applied to an individual case. According to this view, in assessing the elements of national/constitutional identity in a concrete case, the sources of identity are a combination of the two systems of law: EU law and the constitutions of the Member States. It is what the authors call “a shared space” in which the EU legal system is a complementary legal structure comprising EU law and national constitutions.¹⁵ However, constitutional national identity is understood only in terms of domestic constitutional law, and as regards the concept, it is not the physical characteristics or

¹⁰Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Official Journal of the European Union 2007/C 306/01.

¹¹*Cloots* [5], p. 84.

¹²See, e.g., *Claes/Reestman* [4], p. 933; *Král* [14], p. 8.

¹³*Besseling* [1].

¹⁴See, e.g., *Schnettger* [18], p. 21; *Van der Schyff* [26], p. 330.

¹⁵*Schnettger/Callies* [3], p. 354, 359.

ethnocultural form of life of the community's members that matters, but the organising principles.¹⁶ Therefore, constitutional identity is a specially constructed identity related to the constitution itself, and so it can only be expressed and found in the process of making, applying, and interpreting the constitution itself.¹⁷

The same apparent view is shared by an author who argues that modern constitutional identity differs from national identity as involving imagined communities, even if both have the same origins, namely the Enlightenment, and even though they may comprise the same exact membership: constitutional identity is constructed in part against national identity and in part consistently with it.¹⁸

3.2.1 National identity - syncretism between political and constitutional identity (and other elements)

The second category of authors started from the premise that constitutional identity is either intrinsically related to the broader notion of national identity or, at least, in a dialectical dynamic with national identity.

As a criticism of restricting the sphere of the concept of national identity only to constitutional identity that would be considered by Article 4(2) TEU in its current form, one author points out that national identity 'should be seen as an instantiation of the basic moral principles that require a multinational political community to show respect for the identity of its national groups'.¹⁹ As such, restricting the concept of national identity to constitutional identity is an expression of the 'state sovereignty narrative', as an effort by constitutional courts in some EU member states to defend the national constitutional and, at the same time, the very *raison d'être* of constitutional courts.²⁰

Likewise, constitutional identity is considered in a dialectical relationship with "the values of culture", "so that 'constitutional law derives from culture and in turn regulates culture'.²¹ However, the political culture of a country crystallises around its constitution, and 'this common political culture is rooted in an interpretation of constitutional principles from the perspective of the nation's historical experience'; thusly, the system of rights must be seen within the historical context of a legal community from the perspective of the 'constitutional patriotism'.²²

The theory of 'competing narratives' offers a fascinating syncretic perspective. This author argues that 'defining constitutional identity is a dynamic ongoing process having in the background 'the fight' between the various historically driven narratives', and that these multiple and competing narratives depend on the historical, social, economic and (geo)political contexts. Therefore, as a narrative, "the concept of constitutional identity does not express, equate or go beyond national identity".²³

¹⁶ *Kovács* [13], p. 175.

¹⁷ *Polzin* [16], p. 1603, 1604.

¹⁸ *Rosenfeld* [17], p. 758.

¹⁹ *Cloots* [5], p. 93.

²⁰ *Ibid* p. 92.

²¹ *Jacobson* [12], p. 13, 351.

²² *Habermas* [11].

²³ *Gütan* [10], p. 138, 148.

Last but not least, the same author also points out that “a series of external competitors, *e.g.*, international or regional organisations (European Union) or international courts (European Court of Justice), are creating narratives about one’s national constitutional identity against the backdrop of international economic, political and juridical integration”.²⁴

One essential source in defining the concept of national identity is the case law of the constitutional courts of EU member states and that of the Court of Justice of the European Union. The ‘nature of constitutional identity’ has at least two perspectives in the practice of some EU constitutional courts: first, constitutional identity located within the constitution, *e.g.*, the “eternity clause”, and universally valid but identifiable principles in the body of the constitution, such as human dignity, democracy, the rule of law, etc.; and, secondly, a broader perspective deriving from pre-, supra-, or extra-constitutional factors relating to an idiosyncratic history, culture or ethnicity.²⁵

It would be a mistake to leave it to constitutional or supreme courts alone to determine the content of the notion of constitutional identity - because even if they are sensitive to other ‘identitarian narratives’ about the national constitutional identity, national constitutional courts are inevitably constructing their hegemonic narrative.²⁶

Often, ‘constitutional identity’ is seen as a battleground for disputes between the European Court of Justice and constitutional courts: when it guides or blocks reforms in the European Union, constitutional identity is used as a shield; when constitutional identity is used as a source of legal conflict with EU structures on the part of constitutional courts, it is used as a sword.²⁷

Given the definition of national identity²⁸ and the tension between the two concepts – national identity and constitutional identity – I would define constitutional identity as a relationship between the fundamental elements or values existing in the political and constitutional order of a European Union Member State and an inherent part of its national identity as understood and applied at the level of a European Union Member State by its political and constitutional structures.

4 Romanian constitutional identity

4.1 Introduction

There were three waves of preliminary references in the relevant period between 2019 and 2023. Moreover, referrals are likely to continue, with the same argumentative context as for these three waves.

²⁴*Ibid* p. 143.

²⁵*Spieker* [21], p. 368, 369.

²⁶See, *e.g.*, *Guțan*, *supranote* 24, p. 146; *Cloots* [5], p. 91.

²⁷*Faraguna* [7], p. 1621.

²⁸See *Smith* [20]. The author defines the nation (and national identity) as “a named human population sharing an historic territory, common myths and historical memories, a mass, public culture, a common economy and common legal rights and duties for all members”, p. 14.

The first wave of preliminary references²⁹ concerned various amendments to national regulations relating to the organisation of justice and the status of judges.

The second wave of references for preliminary rulings³⁰ had as a common theme the question of whether some decisions of the Constitutional Court of Romania are likely to infringe the principle of the independence of judges (a component of the rule of law) as well as the protection of the financial interests. The third wave of referrals,³¹ made by some national courts in 2022 and 2023, concerned the limitation of the period of criminal liability provided for in national legislation - legislation which had been invalidated by the Constitutional Court of Romania as incompatible with constitutional rules.

The link between these multiple cases before the European Court of Justice is their shared subject matter. Essentially, this link, as the argumentative background implicitly or explicitly, indicated by the referring courts, concerns the issue of whether decisions handed down by a constitutional court (or a supreme court) have a binding effect on national courts so that the latter does not have the power to examine the conformity with EU law of a provision of national law which has been declared constitutional by a decision of that constitutional court (or that supreme court).

In brief, two broad categories of questions outline the common theme of these referrals.

4.1.1 The guarantee of judicial independence

The first set of questions concerns the independence of the judiciary and the guarantees that a European Union Member State must provide concerning it.³² Here, the referring courts were concerned about interference by a body which does not belong to the judiciary, namely the Constitutional Court of Romania, which appears to be a political structure about its appointments, structure, and functioning.

The response of the European Court of Justice to the question of whether the Constitutional Court belongs to the judiciary or not and to the doubts indicated by the referring courts in that regard because, as a body outside the judiciary, it was a political body, was a negative one presented in a logical argumentative scale.

First, it was up to the Member State to think about how systematically to set up the judicial system, including the constitutional courts and their powers, but with an important addition: when exercising that competence, its obligations deriving from European Union law.³³

Secondly, many constitutions in the European Union stipulated that the referrals that constitutional courts have to deal with come from political structures, such as

²⁹Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația 'Forumul Judecătorilor din România* ECLI:EU:C:2021:393 (judgment of 18.5.2021) as well as the follow-up at national level to this ruling.

³⁰See n. 9 *supra*.

³¹Case C-107/23 *PPU (Lin)* ECLI:EU:C:2023:606 (Judgment of 24.7.2023); Case C-131/23 *Unitatea Administrativ Teritorială Județul Brașov*, ECLI:EU:C:2024:42 (Order of 9.1.2024).

³²*Tănăsescu/Selejan-Guțan*, [24], p. 4.

³³*Eurobox Promotions and Others*, para. 216, 229, 232; *RS (Effect of the Decisions of a Constitutional Court)*, para. 38, 43; *FX and Others (Effect of the Decisions of a Constitutional Court III)*, para. 107, 118.

those within the executive and the legislative, namely to resolve conflicts of a constitutional nature, without, however, such a court being perceived as a political structure.³⁴

Thirdly, as far as the Constitutional Court was concerned, the manner of appointment, composition, and competence of the Constitutional Court of Romania, displayed by the Romanian constitutional design, did not lead to the idea of a lack of independence as a court established by law, the latter having the guarantees of independence required by European Union law. The European Court of Justice pointed out that

“the mere fact that the legislature and the executive appoint the judges concerned, as is the case with the judges of the CCR, does not give rise to a relationship of subordination of those judges to the legislature or the executive or doubts as to their impartiality, if, once appointed, they are free from influence or pressure when carrying out their role.”³⁵

The European Court of Justice stated that EU law, namely Article 2, the second subparagraph of Article 19(1) and Decision 2006/928, must be interpreted “as not precluding national legislation or national practice under which decisions of the constitutional court are binding on ordinary courts, provided that national law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive, as required by those provisions.”³⁶

4.1.2 The primacy of EU law

Once this dilemma about the guarantees of independence of a constitutional court had been resolved, there remained the substantive question of the principle of the priority of European Union law over the binding nature of constitutional court decisions, namely, which of the two had priority of application if such rules were relevant to specific cases to be decided by national courts and the two categories of rules were in conflict.

In essence, the referring courts wished to know whether European Union law was to be interpreted as precluding a national rule or practice according to which the national courts of ordinary law were not competent to examine the compatibility of EU law with national law or practice if the constitutional court of the Member State concerned had found that the national law or practice was compatible with constitutional rules.³⁷

³⁴ *Eurobox Promotions and Others*, para. 236.

³⁵ *Eurobox Promotions and Others*, para. 233; *FX and Others (Effect of the Decisions of a Constitutional Court III)*, para. 120. However, the CJEU points out that the referring courts do not provide sufficient information on the appointment of judges to the CCR, leading to the idea that these appointment decisions are such as to give rise to reasonable doubts (*Eurobox Promotions and Others*, para. 234). In other words, it must be proven, according to the CJEU, that the substantive conditions and procedural rules governing the adoption of these appointments cast doubt on the independence of the judges and, thus, of the CCR, which shows that the CJEU does not entirely reject the referring courts’ assertions in this regard.

³⁶ *Eurobox Promotions and Others*, para. 242; *RS (Effect of the Decisions of a Constitutional Court)*, para. 44; *FX and Others (Effect of the Decisions of a Constitutional Court III)*, para. 119.

³⁷ *Eurobox Promotions and Others*, para. 244; *RS (Effect of the Decisions of a Constitutional Court)*, para. 33; *FX and Others (Effect of the Decisions of a Constitutional Court III)*, para. 127.

In providing reasons for its answer to this question, the European Court of Justice recalled its settled case law on the EEC Treaty, according to which the Community Treaties had established a new legal order. The first consequence was that the new legal order was integrated into the Member States' legal systems. The second is that Member States had limited their sovereignty in the areas defined by the Treaties.

The essential feature of the EU legal order and the importance of complying with that legal order, with the two consequences mentioned above, had been preserved by the common will of the Member States with the amendment of the EEC Treaty (in particular, by the Treaty of Lisbon). This included as regards the confirmation of previous case law on the principle of the primacy of EU law, a principle which required all Member State bodies to give full effect to the various provisions of EU law, and the law of the Member States - including constitutional provisions - could not undermine the effect accorded to those various provisions in the territory of those States.³⁸

The preliminary conclusion of the European Court of Justice was expressed as clearly as was possible: that the provisions of Article 4(2) TEU relating to national identity, through its political and constitutional components, had neither the object nor the effect of authorising a constitutional court of a Member State not to apply a rule of European Union law..³⁹

Moreover, the answer regarding the principle of the primacy of EU law, key to the questions referred by the referring courts, was that, in exercising the powers of a European court under the second paragraph of Article 267 TFEU, the national court must, where it considered it appropriate to do so, disregard the rulings of a national constitutional court, having regard to the interpretation given by the European Court of Justice that they were not in conformity with European Union law, refusing, where appropriate, to apply the national rule, including that with constitutional status, which required it to comply with the decisions of that constitutional Court, even if the national Court was obliged, under a national procedural rule, to comply with a decision of a national constitutional court.⁴⁰

4.2 Emergence of constitutional identity

The context of Romania's integration into the European Union was that it was accompanied by two essential moments which preceded the integration process. These moments have left their mark on the evolution of the integration process itself and the concept of constitutional identity as a tool for assessing integration.

These two moments have been recorded in political acts and legally binding acts of the European Union and of a Member State, Romania, the latter having constitutional status. This fact underlines the importance of defining the concept of constitutional identity in the context of the conflict between the Constitutional Court of Romania and the European Court of Justice. It is key to the current form of Article 4(2) TEU.

³⁸ *Eurobox Promotions and Others*, para. 245, 248, 250, 251; *RS (Effect of the Decisions of a Constitutional Court)*, para. 47, 49, 50, 51; *FX and Others (Effect of the Decisions of a Constitutional Court III)*, para. 128, 129, 130.

³⁹ *RS (Effect of the Decisions of a Constitutional Court)*, para. 70.

⁴⁰ *Ibid.*, paras. 75, 76 and 77.

4.2.1 Revision of the Romanian Constitution

The first moment was the revision of the Romanian Constitution in 2003. In its Decision No. 148/2003 on the draft revision submitted by the Parliament,⁴¹ the Constitutional Court of Romania commented on this, in particular on the constitutional provisions relating to the process of Romania's integration into the European Union, which was thus supposed to create the necessary constitutional framework for Romania's accession to the Union.

The Constitutional Court concluded that the introduction of the new provisions on integration into the European Union and the consequences of this process did not constitute a violation of the constitutional provisions relating to the limits of revision, *i.e.*, they did not affect the so-called "eternity clause" (which establishes the limits to revision) in the Romanian Constitution (at that time Article 148 thereof).⁴²

To reach this conclusion, the Constitutional Court starts from the premise that in order to join the European Union, the Romanian State had to cede national sovereignty in favour of the Union, an aspect mentioned by the Constitutional Court as consisting of the "transfer of certain competencies to the Community institutions", but this did not mean that the European Union obtains, through endowment, an "over-competence."⁴³

The consequences of the limitation of sovereignty were the incorporation of the 'acquis communautaire' into national law, on the one hand, and establishing the relationship between Community law and national law, on the other. However, the Constitutional Court placed the 'acquis communautaire' in an intermediate position between the Constitution and other laws regarding binding European legislation.⁴⁴

With this deficient reasoning, the Constitutional Court of Romania drew the boundaries of constitutional identity through this normative placement, which would be of crucial importance later in the conflict between the Constitutional Court and the European Court of Justice on the issue of constitutional identity versus the principle of primacy of EU law.

4.2.2 Decision no. 2006/928 – the Cooperation and Verification Mechanism (CVM)

The second essential moment of integration is represented by the instrument of Romania's accession to the European Union, namely the Accession Treaty, and – occurring close to the moment of Romania's entry into the EU – the conditionality mechanism adopted by the Commission Decision 2006/928.⁴⁵

⁴¹Romanian Constitutional Court, Decision No. 148 of 16.4.2003, published in the Official Gazette of Romania, No. 317 of 12.5.2003 (available online at http://proyectos.cchs.csic.es/europeconstitution/sites/proyectos.cchs.csic.es/europeconstitution/files/Decision_on_the_issue_of_constitutionality_of_the_legislative_proposal_for_the_revision_of_the_Constitution_of_Romania.pdf.)

⁴²*Ibid.*, p. 12; see, *e.g.*, Șuteu [22], Silvia at p. 21 according to whom "the aim of eternity clauses that insulate state fundamentals is to ensure the state's survival in a recognisable form"; Jacobsohn [12], p. 6.

⁴³*Decision No. 148/2003*, p. 11.

⁴⁴*Ibid.*; see criticism of this inference of the Constitutional Court at Viță [27]- "this formulation exposes a still fragile understanding of the primacy principle", p. 1637, and at footnote 71 in which the author explains why this formulation may be contested.

⁴⁵*FX and Others (Effect of the decisions of a Constitutional Court III)*, para. 8 – 12.

The Commission repealed Decision No 2006/928, (with its four reference objectives⁴⁶) in 2023.⁴⁷

However, in the context of the conflict mentioned above, what is essential was the binding nature of the Decision under Article 288(4) TFEU for Romania and all national institutions, including national courts, as well as the binding or non-binding nature of the reports and recommendations the Commission incorporated in the reports drawn up between June 2007 and June 2021. This, moreover, was one of the points challenged by the Constitutional Court of Romania in its decisions of 2018 and 2021 (Decisions 104/2018 and 390/2021) precisely on the ground that neither Decision 2006/928 nor the reports and recommendations adopted by the Commission under the Cooperation and Verification Mechanism could be binding on national courts.⁴⁸

4.3 Evolution of the constitutional identity concept and the conflict with

4.3.1 Romania: a newcomer in constitutional identity EU landscape

Romania is new using constitutional identity, including from the perspective of academic debate and of the Romanian Constitutional Court jurisprudence.⁴⁹ One of the first academic references to the concept of national identity explained the notion of constitutional identity, which the author saw as more precisely identifiable in the concept of the identity of the Romanian Constitution.⁵⁰ In other words, she reduced the meaning of the notion of identity to the sphere of constitutional provisions, a tendency seen with most authors on European and constitutional law.

On the other hand, understanding the evolution in how the Romanian Constitutional Court has interpreted the concept of national identity is also essential in understanding both concepts – *i.e.*, national identity and constitutional identity. As most Romanian authors show, the Constitutional Court was not initially particularly interested in developing, systematising, and analysing the concept.⁵¹

The first attempt by the Romanian Constitutional Court to use the concept of constitutional identity - *nota bene*, more than seven years after Romania acceded to the European Union - was in Decision No. 683/2012,⁵² a decision given in a legal conflict of a constitutional nature between the President of Romania and the Prime Minister and concerning Romania's right to be represented at regular meetings of the European Council. However, as one author correctly pointed out, it did not appear in any

⁴⁶See, *e.g.*, Dumbravă [], p. 441 – 444.

⁴⁷Commission Decision (EU) 2023/1786 of 15.9.2023 repealing Decision 2006/928/EC establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, OJ L 229/94/18.9.2023.

⁴⁸See *supranote* 8, para. 78 of the Decision No. 390/2021.

⁴⁹Guțan [9].

⁵⁰Tanasescu [23].

⁵¹See, *e.g.*, Guțan [8], p. 10; Teodoriu/Enache/Safta [25], p. 41, 42.

⁵²Romanian Constitutional Court, Decison no. 683 of 27.6.2012, published in the Official Gazette of Romania No. 479 of 12.7.2012.

way from the content of this decision which constitutional identity element needed to be defended regarding the possible infringement of this identity by the European Union institution.⁵³

4.3.2 'New era' in the Romanian Constitutional Court's interpretation of the primacy EU law principle versus constitutional identity

The Romanian Constitutional Court's interest in the concept of constitutional identity underwent a dramatic change from 2018, as upheavals on the Romanian political scene relating to the rule of law, the fight against corruption, justice reform, *i.e.*, the essential themes addressed by the Mechanism of Cooperation and Verification in Decision No. 2006/928, were intrinsically linked to the Constitutional Court's decisions on the conflict with the Commission and the European Court of Justice.

For example, with Decision No. 104/2018, the Court concluded that the Mechanism of Cooperation and Verification Decision was not part of the domestic normative order, had no constitutional relevance, and, as such, could not constitute a reference norm in the constitutionality review. As an argumentative premise, the Constitutional Court underlined that only it could exercise the constitutionality control of a norm interposed in the text of the Romanian Constitution.⁵⁴

On 18 May 2021, the European Court of Justice delivered the judgment known as '*Forumul Judecătorilor din România*'⁵⁵ by which it ruled that Commission Decision 2006/928/EC establishing the Mechanism of Cooperation and Verification, as well as the reports drawn up by the Commission in the framework of the Mechanism of Cooperation and Verification, constituted binding acts adopted by an institution of the European Union. It also held that Romania was obliged to comply with the conditions laid down in the Mechanism of Cooperation and Verification Decision 2006/928 and the reports and recommendations drawn up under the mechanism of cooperation and verification.⁵⁶

The conflicting tension was felt to be at its highest by the Romanian Constitutional Court following this ruling of the European Court of Justice, which in practical terms undermined its constitutional authority at the national level.

The Constitutional Court's response was not long in coming in this conflict with the European Court of Justice. In obvious irritation, it adopted Decision No 390/2021. The Romanian Constitutional Court argued that, although the Romanian Constitution provided that the Romanian Constitutional Court must respect the primacy of EU law (Article 148), the primacy or precedence (of European Court of Justice jurisprudence) should not be understood as excluding or denying the national constitutional identity under the eternity clause (Article 152 Romanian Constitution) which could not be relativised in the process of Romania's integration into the EU.

The Romanian Constitutional Court emphasised that the Romanian Constitution maintained a hierarchically superior position in Romanian law. Consequently, the

⁵³Guțan [8], p. 11.

⁵⁴Romanian Constitutional Court, Decison no. 104 of 6.3.2018, published in the Official Gazette of Romania No. 446 of 29.5.2018, at paras. 80, 82 and 88.

⁵⁵Asociația '*Forumul Judecătorilor din România*, *supranote* 30.

⁵⁶Decision No. 390/2021, n. 5 *supra*, para. 27; Dumbravă [6].

Romanian Constitution (Article 148) did not give EU law precedence over the Constitution. Hence, a national court had no jurisdiction to examine the conformity of a provision of national law, considered constitutional in the light of Article 148, with a provision of EU law.⁵⁷

On the other hand, national courts were not bound by Decision 2006/928, as the courts did not have the authority to cooperate with the EU political institutions, namely the European Commission, in the framework of the Mechanism of Cooperation and Verification. In the same vein, the Romanian Constitutional Court held that the Mechanism of Cooperation and Verification report, drawn up on the basis of Decision 2006/928, did not constitute rules of EU law, which the court should apply with priority, overruling the national rule, contrary to the findings of the European Court of Justice in the judgment *Asociația ‘Forumul Judecătorilor din România’*.⁵⁸

Finally, the Constitutional Court stated no more and no less than that the European Court of Justice has exceeded the powers conferred by Article 267 TFEU as the European Court of Justice had applied EU law rules to a particular case. However, this power had not been conferred on it by EU law, but rather only the power to rule on the interpretation of the Treaties and acts of the EU institutions.⁵⁹

4.4 Effect of decisions of the Romanian Constitutional Court

4.4.1 Between agony and appeasement (?)

The simmering conflict between the Romanian Constitutional Court and the European Court of Justice over applying the principle of the primacy of EU law and constitutional identity escalated immediately after the publication of Decision No. 390/2021 by the Constitutional Court. Following the letter addressed by European Commissioner Didier Reynders, on behalf of the Commission, asking for clarification by the Government on the “serious concerns raised by the CCR Decision No. 390/2021, as it affects the core of the EU legal order”,⁶⁰ the issued extended press release published by the Constitutional Court, which extensively repeated the arguments indicated in Decision No. 390/2021, the Court ended with an appeal to the Commission, with an argument turned on its head this time, to respect the principle of loyal cooperation, which consists precisely in efficient cooperation between the competent institutions at European level and those at the national level, to avoid, the Romanian Constitutional Court stressed in the press release, specific dysfunctions the system. As one author noted, “this particular move was an improper use of an administrative instrument to take a faux-jurisprudential stand.”⁶¹

⁵⁷*Ibid.*, para. 76.

⁵⁸*Ibid.*, paras. 78 and 79.

⁵⁹*Ibid.*, para. 71.

⁶⁰See Mihai Roman, “European Commission asks Romania to clarify CCR decision denying EU law” G4Media.ro, 20.12.2021, available online at <https://www.g4media.ro/surse-comisia-europeana-cere-clarificari-romaniei-privind-decizia-ccr-care-neaga-dreptul-ue-e-primul-pas-spre-declansarea-procedurii-de-infringement.html>.

⁶¹*Iancu* [2], p. 1.

Immediately after this exchange of “letters”, the European Court of Justice reiterated the arguments of the original judgment (in Case C-83/19 and others) in the second wave of preliminary rulings⁶² However, emphasising direct criticism of the Romanian Constitutional Court, this time linked to the constitutional identity defence which had been invoked by the Constitutional Court:

“By contrast, this provision (Article 4(2)) has neither the object nor the effect of authorising a constitutional court of a Member State (...) not to apply a rule of EU law on the ground that rule is prejudicial to the national identity of the Member State concerned, as defined by the national constitutional court.”

The Constitutional Court, through its President, issued a new statement⁶³ reiterating that it was impossible to change the case law affirmed by Decision No 390/2021. In addition, it pointed out that the European Court of Justice’s claim in the judgment of 21 December 2021 that the effects of the principle of primacy of EU law applied to all bodies of a Member State, without the need for national provisions, including those of a constitutional nature, required a revision of the Constitution in force.⁶⁴

However, after this hectic period, punctuated by letters and statements, things calmed down somewhat — or at least the blunt public conflict between the Romanian Constitutional Court and the European Court of Justice did. Of course, one cannot speak of Euro-friendly case law having been adopted by the Constitutional Court after 2022, but the explanation of some authors that in 2018, the composition of the Constitutional Court was utterly different from that in 2011–2012 may be valid as regards the period after 2022, given that one-third of the composition of the Constitutional Court has changed.⁶⁵

At this point of the discussion, it should be recalled that the has yet to that the independence of judges at the Romanian Constitutional Court is affected have been appointed to the Constitutional Court.⁶⁶ The pointed out that the referring court should have provided more elements concerning the appointment procedure at the Romanian Constitutional Court.

4.4.2 The immediate effect of the conflict – the lack of the legal certainty

The immediate effect of the above-described conflict was undoubtedly represented by the many referrals from the ordinary national courts to the European Court of Justice. These were based on a dilemma of the lack of legal certainty that the ordinary courts have felt acutely, not only as regards the interpretation of the legislation and the case law of the Romanian Constitutional Court about the principle of the primacy of EU

⁶²See n. 9 *supra*.

⁶³See statement by the Romanian Constitutional Court, published on its official site on 23.12.2021, available online at <https://www.ccr.ro/en/press-release-23-december-2021/>.

⁶⁴On the contrary, see the Romanian Constitutional Court’s own case law, which recognises that the Constitutional Court may reconsider its own case law: see, *e.g.*, Decision no. 369 of 30.5.2017, published in the Official Gazette of Romania No. 582 of 20.7.2017, para. 21.

⁶⁵Moraru & Bercea, [15], p. 92.

⁶⁶See n. 22 *supra*.

law, but also as regards legal certainty for the consumers of justice, who nevertheless expect the courts to provide a uniform judicial practice.

The dilemma is highly topical. On the one hand, in the plethora of cases with a similar subject matter to that referred to the European Court of Justice in the three waves mentioned above, the ordinary courts were obliged to respect the decisions of the Constitutional Court of Romania, which were binding on them under Article 147(4) of the Romanian Constitution. Otherwise, judges are liable to disciplinary investigations and sanctions.

On the other hand, the European Court of Justice expressly emphasised that a preliminary ruling by the Court of Justice is binding on the national court, as regards the interpretation of the EU law provisions concerned, for the purposes of the decision to be given in the main proceedings, and, that the decisions of the Romanian Constitutional Court or the Romanian High Court of Cassation and Justice were not to be applied when the national court considered, in the light of a European Court of Justice judgment, that such case-law was contrary to the principle of the primacy of EU law.⁶⁷

It is hard to understand why, however, if the Romanian Constitutional Court and the Romanian High Court of Cassation and Justice consider that a provision of secondary European Union law or of constitutional status as interpreted by the European Court of Justice is contrary to EU law or Court of Justice case law, they do not refer to the Court for a preliminary ruling under 267 TFEU.⁶⁸

The adverse consequence is precisely what the Romanian Constitutional Court argued in Decision 390/2021: the lack of legal certainty.⁶⁹ However, the lack of recourse to a mechanism which is made available by the EU Treaties, even on the basis of the principle of loyal cooperation laid down in Article 4(3) TEU, has led to⁷⁰ This effect constitutes a significant dysfunction of the Romanian judicial system.

4.4.3 The new European Union Rule of Law Mechanism

The conflict between the Romanian Constitutional Court and the European Court of Justice in the debate on constitutional identity versus the principle of primacy of EU law is of particular importance in the context of the fact that the Mechanism of Cooperation and Verification established by Decision No. 2006/928 is no longer in force, having been repealed by Decision 2023/1786.⁷¹

⁶⁷See *FX (Effect of the decisions of a Constitutional Court III)*(Order of 7.11.2022) paras. 135, 140 (the final sentence).

⁶⁸See, e.g., *RS (Effect of decisions of a Constitutional Court)*, para. 71.

⁶⁹See Decision No. 390/2021, n. 5 *supra*, para. 79.

⁷⁰See, e.g., Moraru & Bercea [15], p. 104 (footnote 136); Report from the Commission to the EU Parliament and the Council, COM (2021) 370 final, Brussels, June 2021, n. 7 *supra*, p. 21 (footnotes 105, 106).

⁷¹Commission Decision (EU) 2023/1786 of 15.9.2023, L 229/94, 18.9.2023 - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023D1786>.

This is because the Commission established a new rule of law mechanism in 2019⁷² and publishes annual reports on the state of the rule of law at the EU and Member State levels.⁷³

As a first consequence, it should be noted that the new mechanism has broadly the same characteristics as those put in Decision No 2006/928 (overlapping benchmarks – to name just two of them, independent of courts and fighting against corruption – as well as annual reports and recommendations to all Member States).

As a second consequence, precisely because the similarity between this unitary rule of law mechanism applied to all Member States, on the one hand, and the Mechanism of Cooperation and Verification established by the repealed Decision No. 2006/928, on the other, is an obvious one, the new mechanism can be used as a mechanism in itself to adjust the policies or practices of a Member State that endanger the rule of law, not only through cooperation on the part of the EU institutions with the Member State in question but also through a referral to the European Court of Justice either by way of infringement proceedings under Article 258 TFEU, or by a reference by the ordinary courts under Article 267 TFEU.

In other words, in addition to the existing direct mechanisms available to the Commission, the Parliament, the Council, and the Member States to correct and sanction backsliding from the rule of law, there is also this indirect mechanism which the European Court of Justice can be called upon to decide. Moreover, through the multiple referrals sent by national courts in 2019 – 2023, Romania can be a case study for such a possible indirect mechanism to correct the backsliding of the rule of law.

A more careful analysis of these consequences would be helpful in a future study, as the evolutions in this new mechanism and future challenges regarding threats to the rule of law in some Member States will undoubtedly not be long in coming.

5 Conclusion

The turmoil through which the Romanian judiciary has been and is going through, which includes and involves the highest Romanian jurisdictions – the Romanian Constitutional Court and Romanian High Court of Cassation and Justice – thanks to the effects of their decisions, covers in practice the tensions on the Romanian political scene, especially the consequences of the anti-corruption fight, which has left its mark on the political class: with top politicians and senior civil servants having been investigated and put on trial for corruption offences (some of them even affecting the EU's financial interests), and some of them even convicted for such acts.

While in the case of other Member States, there has been talk of abuse of constitutional identity as a tool of illiberal politics or authoritarian constitutionalism (namely, in Hungary and Poland),⁷⁴ in Romania, the use of this concept, with its variants of

⁷²See European Commission, *Further strengthening the rule of law in the Union: state of play and possible next steps* (COM(2019) 163), and European Commission, *Strengthening the rule of law within the Union: a blueprint for action* (COM(2019) 343).

⁷³These are available online at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en.

⁷⁴Scholtes [19], p. 1.

“sovereignism” or “national interest” has been more a matter of the efforts of part of the political class, in power (whether legislative or executive) in the period of 2017 to 2020, with reverberations also in the years after, to escape investigations of its most prominent members for committing corruption offences, related to EU financial interests or simply ordinary corruption offences, indicated as such in the Mechanism of Cooperation and Verification established by Decision 2006/298.

So it can be said that the conflict between the Romanian Constitutional Court/Romanian High Court of Cassation and Justice and the European Court of Justice, on the one hand, and between national ordinary courts and the Romanian Constitutional Court and (partially) Court of Cassation and Justice, on the other involved particular stakes not only as regards the establishment of the priority of norms with constitutional status or as regards the application of the principle of primacy of European Union law but also an existential stake for some politicians and some political parties that counted in their ranks politicians proven by national ordinary courts to be guilty of severe corruption offences.

Declarations

Competing Interests The author declares no competing interests.

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