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THE IMPACT OF THE RECENT CASE LAW OF CJEU REGARDING ARTICLE 2 TEU ON NATIONAL CONSTITUTIONAL VALUES IN ROMANIA¹

Dragoş Călin²

ABSTRACT: In recent years, the Constitutional Court of Romania has tried to create an internal wall for not giving effect to the application of the supremacy of European Union law, respectively the judgments of the Court of Justice of the European Union regarding the rule of law, as regards the Constitution itself, by developing an *ultra vires* control and an identity control in an original way. Although the pressure to change such an approach is omnipresent, however, the reasons of Decision no. 390/2021 have not been revised until today by the subsequent case law of the Constitutional Court of Romania, but on the contrary, in two press releases, the idea of revising the Constitution for accepting the effects of the relevant case law of the Court of Justice of the European Union in the matter was launched exclusively. However, a series of somehow sovereignist decisions, also including here the interpretation in its own, extensive manner, of an opinion of the Venice Commission, seems rather on the way to be abandoned, an example in this regard being the recent Decision no. 283/2023, by which the Constitutional Court of Romania restated the need to impose a threshold in the case of the offence of abuse of office.

KEYWORDS: Supremacy of European Union law; Constitutional identity; Court of Justice of the European Union.

1. D. Călin, *The Impact of the Recent Case Law of CJEU Regarding Article 2 TEU on National Constitutional Values in Romania*, in *Latin American Journal of European Studies*, v. 4, n. 1, 2024, p. 63 et seq.
2. Judge at Bucharest Court of Appeals, Romania, EU law Trainer, the National Institute of Magistracy, Bucharest and Associate Researcher of the Institute for Legal Research of the Romanian Academy. PhD in Law (University of Bucharest) - *The Dialogue between Constitutional Courts and the Court of Justice of the European Union*.

O IMPACTO DA RECENTE JURISPRUDÊNCIA DO TJUE RELATIVO AO ARTIGO 2º DO TUE SOBRE OS VALORES CONSTITUCIONAIS NA ROMÊNIA

RESUMO: Nos últimos anos, o Tribunal Constitucional da Romênia tentou criar um muro interno por não aplicar o primado do direito da União Europeia, respetivamente os acórdãos do Tribunal de Justiça da União Europeia relativos ao Estado de direito, no que diz respeito à própria Constituição, desenvolvendo um controle ultra vires e um controle de identidade de uma forma original. Embora a pressão para alterar essa abordagem seja onnipresente, os motivos da Decisão n.º 390/2021 não foram revistos até hoje pela jurisprudência subsequente do Tribunal Constitucional da Romênia, mas, pelo contrário, em dois comunicados da imprensa, foi lançada exclusivamente a ideia de rever a Constituição para aceitar os efeitos da jurisprudência pertinente do Tribunal de Justiça da União Europeia nesta matéria. No entanto, uma série de decisões de alguma forma soberanistas, incluindo também aqui a interpretação própria e extensiva de um parecer da Comissão de Veneza, parece estar em vias de ser abandonada, sendo um exemplo a este respeito a recente Decisão n. 283/2023, pela qual o Tribunal Constitucional da Romênia reafirmou a necessidade de impor um limiar no caso do crime de abuso de poder.

PALAVRAS-CHAVE: Supremacia do direito da União Europeia; Identidade constitucional; Tribunal de Justiça da União Europeia.

SUMMARY: Introduction. 1. Assertion of sovereignty or just a simple barricade, the result of a national political context? 2. The brief response of the court of justice of the European Union and the slalom of the Constitutional Court of Romania. Final considerations. References.

INTRODUCTION

In 2018-2019, the Constitutional Court of Romania, which until 2018 had constantly shown a pro-European tendency,³ backed the entry into force of a series of harmful amendments to the

3. For details, D. Călin, *The Constitutional Court of Romania and European Union Law*, vol.15, 2015, available at <https://sciendo.com/de/article/10.1515/iclr-2016-0028>.

laws of justice.⁴ In the decisions delivered, several opinions of the Venice Commission were not taken into consideration,⁵ nor were the reports of the European Commission, accepting provisions regarding material liability, but also limitations regarding the freedom of expression of judges and prosecutors. The cream of the crop was the establishment of a separate prosecution structure for the exclusive investigation of offences committed by judges and prosecutors, a unique body in the European Union and the Judicial Inspectorate has become a pyramid-type public authority at the disposal of a single person, the chief inspector.⁶

In this context, a wave of requests for a preliminary ruling have followed, as a result of the referral to the Court of Justice of the European Union, in several domestic disputes initiated by the Romanian Judges' Forum Association.⁷

4. See B. Selejan-Guţan, *The Taming of the Court – When Politics Overcome Law in the Romanian Constitutional Court*, VerfBlog, <https://verfassungsblog.de/the-taming-of-the-court-when-politics-overcome-law-in-the-romanian-constitutional-court/>.
5. For details, D. Călin, *The Constitutional Court of Romania and the Rule of Law Standards' in 900 Days Of Uninterrupted Siege Upon The Romanian Magistracy: A Survival Guide*, in Beck Bucharest, 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3803508.
6. See I. Heinlein, *Korruptionsbekämpfung in Rumänien am Ende? Was die Regierung Rumäniens unternimmt, um die Strafjustiz zu schwächen und von diesem Vorhaben abzulenken*, in *Betrifft JUSTIZ*, n. 136, von Dezember 2018, p. 189 et seq. D. Călin, A. Codreanu, *The Situation Regarding the Romanian Judicial System at the end of 2018*, in *Richterzeitung*, n. 2, 2019, available at <https://richterzeitung.weblaw.ch/rzissues/2019/2.html>.
7. For details, D. Călin, *The Court of Justice of the European Union, ultima ratio for saving the independence of the judges in Romania – a commentary of the CJEU preliminary ruling in C83/19, C127/19, C195/19, C291/19 and C355/19 and C397/19, AFJR and others*, available at <https://blogs.eui.eu/constitutionalism-politics-working-group/the-court-of-justice-of-the-european-union-ultima-ratio-for-saving-the-independence-of-the-judges-in-romania-a-commentary-of-the-cjeu-preliminary-ruling-in-c%2E2%80%91183-19-c%2E2%80%91127-19/>; M. Moraru, R. Bercea, *The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19*,

The CJEU has already delivered several judgments concerning these requests. Thus, in the first set (the joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-55/19 and C-397/19, *Asociația "Forumul Judecătorilor din România" and others*), by the judgment of 18 May 2021,⁸ it was found that the independence of the judiciary was seriously compromised, the new special prosecution section being contrary to the rule of law, and the chief inspector of the Judicial Inspectorate, who was appointed directly by the Executive, even if only temporarily,⁹ being against any rules of the rule of law.

The latter opened blitzkrieg type disciplinary proceedings against the former president of the High Court of Cassation and Justice, the former chief prosecutor of the National Anticorruption Directorate and the judges and prosecutors who publicly protested

*C-195/19, C-291/19, C-355/19 and C-397/19, Asociația 'Forumul Judecătorilor din România, and their follow-up at the national level, in European Constitutional Law Review, vol.18, n.1, available at <https://www.cambridge.org/core/journals/european-constitutional-law-review/article/first-episode-in-the-romanian-rule-of-law-saga-joined-cases-c8319-c12719-c19519-c29119-c35519-and-c39719-asociația-forumul-judecătorilor-din-romania-and-their-followup-at-the-national-level/CE19FB514B2F7DED659132BF545D6305>; D. Călin, Case C-817/21, *Judicial Inspectorate. Compatibility of the organization of an authority competent to carry out the disciplinary investigation of judges, which is under the total control of a single person, with the rules of the rule of law*, in *UNIO EU Journal*, 2022, available at <https://officialblogofunio.com/2022/01/18/case-c-817-21-inspectia-judiciara-compatibilitate-of-the-organization-of-an-authority-competent-to-carry-out-the-disciplinary-investigation-of-judges-which-is-under-the-total-control-of-a-single-pers/>.*

8. See L. Pech, V. Perju, S. Platon, *How to address rule of law backsliding in Romania. The case for an infringement action based on Article 325 TFEU*, *VerfBlog*, 2019, available at <https://verfassungsblog.de/how-to-adress-rule-of-lawbacksliding-in-romania>; E. Tănăsescu, B. Selejan-Guțan, *A Tale of Primacy: The ECJ Ruling on Judicial Independence in Romania*, *VerfBlog*, 2021, available at <https://verfassungsblog.de/a-tale-of-primacy/>.
9. D. Călin, *The priority of the EU law in Romania: between reality and Fata Morgana*, in *UNIO EU Journal*, 2021, available at <https://officialblogofunio.com/2021/09/20/the-priority-of-the-eu-law-in-romania-between-reality-and-fata-morgana/>.

against the amendments contrary to the rule of law brought to the status of judges in Romania, as well as, in 2021, disciplinary proceedings against the judges who proposed and those who referred to the CJEU.¹⁰

The judgment delivered recently, on 11 May 2023 in case C-817/21, *Inspekția Judiciară*¹¹, provided the opportunity for the CJEU to reconfirm the reasoning from the judgment of 18 May 2021, *Asociația "Forumul Judecătorilor din România" and others*, C83/19, C127/19, C195/19, C291/19, C355/19 and C397/19,¹² respectively the necessary guarantees to prevent any risk of using the disciplinary regime as a system of political control of the content of judicial decisions, so that the rules governing the appointment procedure for management positions within a body that has the power to carry out investigations and exercise disciplinary action, as well as the rules governing the organization and operation of that body must be designed in such a way that they cannot give rise, in the perception of individuals, to any reasonable doubts regarding the use of the prerogatives and functions of the mentioned body as an instrument of pressure on, and political control over this activity (see par.49-51 of the judgment).

The historical part of the judgment relates to the concrete assessment of the factual and national legal context that must

10. Forumul Judecătorilor, *The Good Lobby Profs reacted rapidly in favor of the judge subject to disciplinary investigation*, available at <http://www.forumul-judecatorilor.ro/index.php/archives/4409>.

11. Court of Justice of the European Union, judgment of 11 May 2023, *Inspekția Judiciară*, C-817/21.

12. Court of Justice of the European Union, judgment of 18 May 2021 *Asociația "Forumul Judecătorilor din România" and others*, C-83/19, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19).

be taken into account, the CJEU noting the consolidation of the chief inspector's powers in the more global context of the reforms regarding the organization of the Romanian judicial system, having as object or effect the reduction of guarantees of independence and impartiality of Romanian judges, but especially the concrete practice followed by the chief inspector in exercising his/her prerogatives, with explicit reference to the examples mentioned by the European Commission, which can show that the prerogatives of the Judicial Inspectorate "have been used, on several occasions, for the purpose of political control of the judicial activity, some of these examples appearing, in fact, in the Commission's reports to the European Parliament and to the Council of 22 October 2019 and of 8 June 2021 regarding the progress made by Romania within the cooperation and verification mechanism,¹³ of which the Romanian authorities must take due account, under the principle of loyal cooperation provided for in Article 4(3) TEU, in order to achieve the objectives pursued by Decision 2006/92.¹⁴

The examples of the European Commission include the disciplinary procedures with the proposal of preventive suspension from office until the completion of the disciplinary investigation against judges from the associations of magistrates who rejected the backward changes from the 2017-2019 period and submit-

13. Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM/2019/499 final, available <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0499&qid=1678957765939>, p. 07 *et seq.* Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM/2019/499 final, *cit.*, p.18.

14. CJUE, *Inspectia Judiciară*, *cit.*, para. 71.

ted requests for preliminary ruling to the Court of Justice of the European Union (disciplinary investigation into alleged disclosed group conversations in a private group created on a social network – judges Dragoş Călin, Anca Codreanu, Alina Gioroceanu, Cristi Danileţ, Laurenţiu Grecu, rejected definitively by the High Court of Cassation and Justice two years after its start), the suspension for 6 months of a judge for publicly criticizing the Judicial Inspectorate and the functioning of the Special Section for the Investigation of Judicial Crimes (judge Crina Muntean), respectively disciplinary investigations initiated in relation to public statements criticizing the reforms (judge Cristi Danileţ, the prosecutor Bogdan Pîrlog), including against the heads of judicial institutions who opposed the forced judicial reform (the Chief Prosecutor of the National Anticorruption Directorate – Laura Codruţa Kovesi, the President of the High Court of Cassation and Justice, judge Cristina Tarcea, respectively the General Prosecutor of the Prosecutor’s Office attached to the High Court of Cassation and Justice – Augustin Lazăr, all of which were rejected whether by the disciplinary sections of the Superior Council of Magistracy, or by the High Court of Cassation and Justice).

The CJEU clearly admits that “these elements of the factual and legal national context brought to the attention of the Court ‘tend to confirm, rather than to refute’ a possible finding that the regulation in question in the main litigation is not designed in such a way that it cannot give rise to any legitimate doubt, in the perception of individuals, regarding the use of the prerogatives and functions

of the Judicial Inspectorate as an instrument of pressure on, and of political control over the judicial activity".¹⁵

Therefore, the Court of Justice of the European Union confirms the political control of the judicial activity in Romania, carried out through the Judicial Inspectorate, with direct reference to the judges and prosecutors who were subject to pressure and harassment during the reference period.¹⁶

Ironically, although the Judicial Inspectorate invoked, as it appears from the conclusions of Advocate General Collins, a final decision of 7 December 2021, by which the Craiova Court of Appeal ruled that the interim extension of the appointment of the chief inspector could not generate doubts regarding the exercise of political pressure on judges and prosecutors, the Court of Justice of the European Union did not take into account the domestic interpretation, a sign that the Union interpretation, imposed by the judgment of 18 May 2021, *Asociația "Forumul Judecătorilor din România" and others*, C83/19, C127/19, C195/19, C291/19, C355/19 and C397/19,¹⁷ was not followed. In support of this internal solution, invoking the need to unify the judicial practice, at the request of

15. CJUE, *Inspekția Judiciară*, cit., para. 72.

16. It is clear that this is not the path to follow, as the CJEU judgment of 11 May 2023 recalled the well-known Christian adage according to which "evil has a tragic end, and the truth always comes out" (apud C. David, "Bătrânul" – „Copilul” Înaintemergătorului, in *Evangelismos Publishing House*, Bucharest, 2003, p. 62 et seq).

17. M. Moraru, R. Bercea, *The First Episode in the Romanian Rule of Law Saga: Joined 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, and their follow-up at the national level*, in *European Constitutional Law Review*, cit.

the same Judicial Inspectorate, the High Court of Cassation and Justice had issued Decision no. 15 of 14 March 2022.¹⁸

The High Court of Cassation and Justice, as the Constitutional Court of Romania has done several times with regard to legislative amendments likely to affect the independence of the judiciary and the rule of law in recent years, avoided referring to the CJEU.

This is the context in which the decisions of the Constitutional Court of Romania contrasted visibly with the requirements imposed by the Court of Justice of the European Union for the minimal functioning of the rule of law.

By the judgment delivered on 11 May 2023 in case C-817/21, *Inspekția Judiciară*, the CJEU reconfirmed the reasoning from the first set of cases regarding the rule of law in Romania (judgment of 18 May 2021, *Asociația "Forumul Judecătorilor din România" and others*, C83/19, C127/19, C195/19, C291/19, C355/19 and C397/19, EU:C:2021:393), respectively the necessary guarantees to prevent any risk of using the disciplinary regime as a system of political control of the content of judicial decisions, so that the rules governing the appointment procedure for management positions within a body competent to carry out investigations and exercise disciplinary action, as well as the rules governing the organization and operation of that body must be designed in such a way that they

18. The High Court of Cassation and Justice established as mandatory for all national courts that "The provisions of Article II of the Government Emergency Ordinance no. 77/2018 for supplementing Article 67 of Law no. 317/2004 regarding the Superior Council of Magistracy are not liable to confer on the Government a direct power of appointment in these positions and to give rise to legitimate doubts regarding the use of the prerogatives and functions of the Judicial Inspectorate as an instrument of pressure on the activity of judges and prosecutors or of political control over this activity".

cannot give rise, in the perception of individuals, to any reasonable doubts regarding the use of the prerogatives and functions of the mentioned body as an instrument of pressure on, and political control over this activity.¹⁹

Even if it admits the concentration of broad powers in the hands of the chief inspector, which allow them to regulate the organization and functioning of the body in question, as well as to make individual decisions regarding the inspectors' careers and the cases they investigate, it is capable of ensuring an effective control over all the actions of the said body, however, the CJEU does not find *ab initio* the incompatibility with the second paragraph of Article 19(1) TEU.

This incompatibility may exist, but it is double conditional upon: 1) the possibility that inspectors, including the deputy, are the only ones competent to carry out a disciplinary investigation against the chief inspector on whose decision their careers depend, respectively 2) the regulation should not be designed in such a way that it cannot give rise to any legitimate doubt, in the perception of individuals, regarding the use of the prerogatives and functions of the said body as an instrument of pressure on, and political control over the activity of these judges and prosecutors.

In the national legislation applicable to the case, but also in the legislation amended in 2022, a disciplinary action aimed at sanctioning abuses committed by the chief inspector can only be initiated by an inspector whose career depends, to a large extent, on the decisions of the chief inspector and who should necessarily act

19. CJUE, *Inspekția Judiciară*, cit., para.49 et seq.

within the organization established by the latter. Moreover, Law n. 305/2022 and the Regulation on the norms for the performance of inspection work seem to contradict the principle of the operational independence of judicial inspectors, one of the main duties of the chief inspector is to approve, verify, confirm, endorse resolutions, reports and any other documents drawn up by judicial inspectors.²⁰ The latter can reject the solution of discontinuing the referral and can order the supplementation of checks. The result of the new checks and the inspector's solution are then again subject to the same chief inspector's approval and confirmation.

The decisions concerning the chief inspector could be reviewed, under the rule of the legislation applicable to the case in which the request for a preliminary ruling was submitted, by the deputy chief inspector, who was appointed by the chief inspector and whose term of office ended at the same time as that of the chief inspector. The new legislation changed this paradigm, with the deputy chief inspector being appointed directly by the Superior Council of Magistracy.

1. ASSERTION OF SOVEREIGNTY OR JUST A SIMPLE BARRICADE, THE RESULT OF A NATIONAL POLITICAL CONTEXT?

From a historical point of view, the first breach in the interpretation of international instruments with a sovereigntist tone was created by Decision no. 392/2017.²¹ The Constitutional Court of

20. See art.74 para. 1 letter I of Law n. 305/2022.

21. Decision no. 392/2017 regarding the exception of unconstitutionality of the provisions of art. 248 of the Criminal Code from 1969, art. 297 para. (1) of the

Romania found that “the legislator has the obligation to regulate the value threshold of the (financial) damage and the intensity of the damage to the right or legitimate interest resulting from committing the act in the criminal rules regarding the offense of abuse of office, its passivity being likely to cause the emergence of situations of incoherence and instability, contrary to the principle of the security of legal relations in its component regarding the clarity and predictability of the law.” The Report on the relationship between political and criminal ministerial responsibility²² was used as a justification argument in a completely erroneous way.²³ Even the spokesperson of the Venice Commission²⁴ denied such a hy-

Criminal Code and of art. 13² of Law no. 78/2000 for the prevention, detection and sanctioning of acts of corruption.

22. Adopted at the 94th Plenary Session of the Venice Commission on 11 March 2013.
23. Although, in another context, the Constitutional Court of Romania refused to take into account the opinions of the Venice Commission. For example, by Decision no. 358/2018, it was argued that the opinion sent by the Venice Commission cannot be used in the constitutional review, and the recommendations formulated by the international forum could have been useful to the legislator in the parliamentary procedure for drafting or amending the legislative framework, the Constitutional Court being empowered to check the compliance of the legislative act adopted by the Parliament with the Fundamental Law, and under no circumstances to check the appropriateness of a legislative solution or another, aspects that fall within the margin of appreciation of the legislator, in the framework of its policy in the matter of the laws of justice.
24. “The report on the relationship between political and criminal ministerial responsibility refers, according to its title, only to the situation of ministers; (...) The Venice Commission considers that national criminal provisions on “abuse of office”, “excess of authority” and similar expressions should be interpreted narrowly and applied with a high threshold, so that they may only be invoked in cases where the offence is of a grave nature, such as for example serious offences against the national democratic processes, infringement of fundamental rights, violation of the impartiality of the public administration and so on. (par. 102). Therefore, it is the nature of the act that is decisive, and the threshold it refers to is in no way a financial one. Moreover, this threshold applies, of course, only to the general rules of the criminal law regarding abuse of office or excess of authority, and not to other offences such as corruption, money laundering or breach of trust”. For details, L. Avram, *the*

pothesis, that “high threshold” referring to a high level of it in terms of the impact on social values (property or non-property), and not to a minimum financial amount below which the abstract social danger of the offence is reflected, as decided by the Constitutional Court of Romania. Also, Article 19 of the United Nations Convention against corruption²⁵ does not condition the existence of the act provided for in Article 19 by a certain value of the damage caused or by any intensity of the damage.

By Decision no. 104/2018,²⁶ the Constitutional Court of Romania made another surprising analysis, by practically attributing to itself the status of a body of the European Union, this time an analysis of the legal consequences of Decision 2006/928/EC of the European Commission of 13 December 2006, 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 and its consequences, ignoring its effects, because it is an “act adopted before Romania’s accession to the European Union, it was not clarified by the Court of Justice of the European Union in terms of its content, nature and temporal extent and whether they are limited to those provided in the Accession Treaty, implicitly by Law no. 157/2005, which is part of the internal

Venice Commission: Under any circumstance, it is not a question of a financial threshold for abuse of office, in “Adevărul” newspaper, 2017, available at http://adevarul.ro/news/politica/comisia-venetia-In-niciun-caz-nu-e-vorba-pragfinanciar-abuzul-serviciu-1_59c7b6035ab6550cb87c4d6d/index.html.

25. United Nations, *Convention against corruption*, 1 October, 2003.

26. Decision no. 104/2018 regarding the objection of unconstitutionality of the provisions of the Law amending Law no.161/2003 on certain measures to ensure transparency in the exercise of public office, public functions and in the business environment, and the prevention and punishment of corruption.

regulatory order”, therefore Decision 2006/928/EC cannot constitute a reference norm in the constitutional review in light of Article 148 of the Constitution.²⁷

The reasoning of the Constitutional Court of Romania goes further and holds that “the Constitution is the expression of the will of the people, which means that it cannot lose its binding force just due to the existence of an inconsistency between its provisions and the European ones. Also, accession to the European Union cannot affect the supremacy of the Constitution over the entire legal order”.²⁸ Including the establishment of integrity standards, the subject of the Court’s referral in the given case, is a matter of opportunity that falls within the margin of appreciation of the legislator, within the constitutional limits regarding constitutional identity, in conjunction with national sovereignty and the constitutional obligations arising from Article 11 and Article 148 of the Constitution of Romania.

27. Traditionally, the Constitutional Court of Romania recognized the CVM as a mandatory instrument, by Decision No. 1519/2011 of 15 November 2011, as well as Decision No. 2/2012 of 11 January 2012. Starting from 2018 (Decision No. 33/2018 of 15 February 2018 and Decision No. 104/2018 of 29 May 2018) the interpretation has been different, diametrically opposite.

28. As an element of analogy, the Decision of 11 May 2005, K 18/04, delivered by the Constitutional Tribunal of the Republic of Poland, is cited. By Decision no. 148 of 16 April 2003, the Constitutional Court of Romania made a distinction between the Constitution and the other laws. The same distinction is made at the level of the Fundamental Law by the final sentence of Article 20 (2), which provides for the priority application of international regulations, unless the Constitution or national laws contain more favorable provisions, and Article 11 (3) states that, if a treaty to which Romania is to become a party includes provisions contrary to the Constitution, its ratification can only take place after the revision of the Constitution.

By Decision no. 390/2021²⁹, in order to counteract the effects of the CJEU judgment of 18 May 2021 issued in the joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-55/19 and C-397/19, *Asociația Forumul Judecătorilor din România and others*, the Constitutional Court of Romania refused to apply the priority of European Union law with regard to the Constitution itself, developing “in a confusing and original way an *ultra vires* control and an identity control, the Constitutional Court of Romania has built a true brick wall between national courts and the CJEU, requiring national ordinary judges not to examine the conformity of a national provision, already found to be constitutional by a decision of the Constitutional Court, in relation to the legal provisions of the European Union”.³⁰

The Constitutional Court of Romania reasoned the decision by the disregard of the national constitutional identity, seen as “a guarantee of a basic identity core of the Romanian Constitution and which should not be relativized in the process of European integration and found that “the CJEU, by declaring the binding nature of the Decision 2006/928/EC,³¹ limited its effects from a double perspective: on the one hand, it established that the obligations

29. Decision no. 390/2021 regarding the exception of unconstitutionality of the provisions of Articles 88¹ - 88⁹ of Law No 304/2004 on judicial organization, and of the Government Emergency Ordinance No 90/2018 on measures to operationalise the Section for the investigation of offences in the Judiciary. See B. Selejan-Guțan, *A Tale of Primacy Part. II*, VerfBlog, available at <https://verfassungsblog.de/a-tale-of-primacy-part-ii/>.

30. See D. Călin, *Constitutional courts cannot build brick walls between the CJEU and national judges concerning the rule of law values in Article 2 TEU: RS*, in *Common Market Law Review*, n.60, ed.3, 2023.

31. Decision 2006/928/EC establishing the Cooperation and Verification Mechanism (CVM) for Romania.

resulting from the decision fall to the Romanian authorities competent to cooperate institutionally with the European Commission,³² therefore fall to the political institutions, the Parliament and the Government of Romania, and, on the other hand, that the obligations are exercised based on the principle of sincere cooperation, provided for by Article 4 of the TEU. From both perspectives, the obligations cannot fall on the courts, State bodies that have no power to cooperate with a political institution of the European Union." Therefore, "the application of point 7 of the operative part of the decision, according to which a court is authorized to disapply out of its own motion a national provision that falls within the scope of Decision 2006/928 and which it considers, in the light of a Court decision, to be contrary to this decision or the second paragraph of Article 19 (1) TEU, has no basis in the Romanian Constitution".

Actually, the Constitutional Court of Romania denied the obligations assumed by Romania under the Treaty of Accession to the European Union, establishing that the way in which the judicial system is organized represents a part of the Romanian constitutional identity, but the option is not justified in any way,³³ having only the role of removing the consequences of the judgment of 18 May 2021.³⁴

32. Decision 2006/928/EC, *cit.*, para. 177.

33. M. Guțan, *Este Curtea Constituțională a României un portdrapel al identității constituționale naționale?* In *Revista Romana de Drept European*, Bucharest, n. 1, 2022, available at <https://www.proquest.com/scholarly-journals/este-curtea-constituțională-româniei-un/docview/2671713432/se-2>.

34. J. Ziller, *La primauté du droit de l'Union européenne*, 2022, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732474/IPOL_STU\(2022\)732474_FR.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732474/IPOL_STU(2022)732474_FR.pdf).

This series of somehow sovereigntist decisions, also including here the interpretation in its own, extensive manner of an opinion of the Venice Commission, cannot have a reasonable explanation. Although the Constitutional Court of Romania indicated in its reasoning the Decision of 30 June 2009³⁵ delivered by the Federal Constitutional Court of the Federal Republic of Germany, it cannot be a serious parallel, given that the refusal to apply the European Union law in Romania does not ensure a superior protection of a fundamental right, but rather the preservation of some legislative amendments (from the period 2018-2019) that affected the independence of the judiciary. The case law of the Constitutional Court of Romania seems to be similar to that of the courts in Poland and Hungary.

Basically, an entire national political context grafted on the internal war against the successes of the National Anti-Corruption Directorate (whose results were praised by the European Commission frequently because hundreds of politicians, judges or prosecutors were convicted for corruption offences) has led to contradictory solutions that are difficult to explain. The authority of the Court of Justice of the European Union was denied, the *de facto* compliance and application of the judgments was refused. Anyway, the protection of national identity cannot justify

35. Decision of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, available at https://www.cvce.eu/en/obj/decision_by_the_german_constitutional_court_on_the_treaty_of_lisbon_30_june_2009-en-8facbcac-b236-47c8-9db3-e2199d825cfb.html.

the non-compliance with the essential and fundamental values contained in Article 2 TEU, including the rule of law.³⁶

2. THE BRIEF RESPONSE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE SLALOM OF THE CONSTITUTIONAL COURT OF ROMANIA

By the judgment of 18 May 2021 in the joined 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" and others*, the CJEU carried out an abstract check of the constitutionality at the level of the European Union regarding the national legislative solutions in Romania, by referring to the principle of independence of judges, as it derives mainly from the right to a fair trial established by the second paragraph of Article 47 of the charter, with reference to the second paragraph of Article 19 (1) of the TEU (their content coincides at least as regards the elements of independence and impartiality of the judiciary). Also, it was decided that the second paragraph of Article 19 (1) TEU and the reference criteria stated in Decision 2006/928³⁷ have direct effect, the CJEU ruling that a national court has the obligation to guarantee, within its powers, their full effect, disapplying, if necessary, the contrary provisions of national law.³⁸

36. L. Pech, *The Rule of Law as a Well-Established and Well-Defined Principle of EU Law* *Hague Journal on the Rule of Law*, in *Hague J Rule Law*, n. 14, 2022, available at <https://doi.org/10.1007/s40803-022-00176-8>.

37. Decision 2006/928/EC, *cit.*

38. CJUE, *Inspekția Judiciară*, *cit.*, para. 242 *et seq.*

The interpretation was confirmed by the judgment delivered on 21 December 2021, in *Euro Box Promotion and others*.³⁹

By Press Release,⁴⁰ the Constitutional Court of Romania refused to accept the judgment of the Court of Justice of the European Union delivered on 21 of December 2021. The Constitutional Court of Romania has held that “the conclusions of the CJEU ruling that the effects of the principle of the primacy of EU law apply to all organs of a Member State, without national provisions, including those of a constitutional nature, being capable of hindering this, and according to which national courts are obliged to disapply, of their own motion, any national legislation or practice contrary to a provision of EU law, requires revision of the Constitution in force. From a practical point of view, this judgment can only produce effects after the revision of the Constitution in force, which, however, cannot be done by operation of law, but only on the initiative of certain subjects of law, in compliance with the procedure and under the conditions laid down in the Romanian Constitution itself”.

These conclusions of the Constitutional Court of Romania have the effect of a warning for ordinary judges that in case they will apply EU law (including CJEU judgments), they will risk colliding with the Constitutional Court and be subject to disciplinary actions.

This was followed by a new request for a preliminary ruling sent by the brave Romanian judges from the ordinary courts, with all the risks, and the CJEU solution of 22 February 2022 in case

39. Court of Justice of the European Union. Judgment of 21 December 2021, *Euro Box Promotion and others*, C-357/19, joined cases, C379/19, C547/19, C811/19 and C840/19.

40. The Constitutional Court of Romania. *Press Release*, 23 December 2021, available at <https://www.ccr.ro/en/press-release-23-december-2021/>.

RS,⁴¹ which reconfirmed that constitutional courts cannot build fortresses between the CJEU and national judges regarding the common values related to the rule of law provided for in Article 2 of the TEU.⁴²

The CJEU reiterated that, by virtue of the principle of the primacy of EU law, a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. The Court showed that it has exclusive jurisdiction to give the definitive interpretation of EU law, therefore it is for the Court, in the exercise of that jurisdiction, to clarify the scope of the principle of the primacy of EU law in the light of the relevant provisions of that law, with the result that such scope cannot turn on the interpretation of provisions of national law or on the interpretation of provisions of EU law by a national court which is at odds with that of the Court. Also, under Article 4(2) TEU, the Court specified that it can be called upon to determine that an obligation of EU law does not undermine the national identity of a Member State. By contrast, that provision has neither the object nor the effect of authorising a constitutional court of a Member State, in disregard of the obligations under, in particular, Article 4(2) and (3) and the second subparagraph of Article 19(1) TEU, which are binding upon it, to disapply a rule of EU law, on the ground that such rule undermines the national identity of the Member State concerned as defined by the national constitutional court.

41. Court of Justice of the European Union. Judgment of 22 February 2022, RS, C430/21.

42. For an exhaustive analysis, see D. Călin, *Constitutional courts cannot build brick walls between the CJEU and national judges concerning the rule of law values in Article 2 TEU: RS, cit.*

It was also found that the constitutional court of a Member State cannot, on the basis of its own interpretation of provisions of EU law, including Article 267 TFEU, validly hold that the Court has delivered a judgment exceeding its jurisdiction and, therefore, refuse to give effect to a preliminary ruling from the Court. If a constitutional court of a Member State considers that a provision of secondary EU law, as interpreted by the Court, infringes the obligation to respect the national identity of that Member State, that constitutional court must stay the proceedings and make a reference to the Court for a preliminary ruling under Article 267 TFEU, in order to assess the validity of that provision in the light of Article 4(2) TEU, the Court alone having jurisdiction to declare an EU act invalid.

Until today, the Constitutional Court of Romania has abstained from opposing the solution of the Court of Justice in the case *RS*,⁴³ but indicated, on 9 November 2021,⁴⁴ that it will not change its Decision no. 390/2021.⁴⁵

FINAL CONSIDERATIONS

Historical errors are beginning to be recognized, for now timidly, by the Constitutional Court of Romania. The recent Decision no. 283 of 17 May 2023 is edifying, as it accepted that certain regulatory inconsistencies can be substituted by the interpretative action of the courts, and the problem that arises is that of the limit/framework in which this action is adequate and appropriate to the given regu-

43. CJEU, Judgment C430/21, *cit.*

44. Romanian Constitutional Court. Comunicat de presă, 9 noiembrie 2021, available at <https://www.ccr.ro/comunicat-de-presa-9-noiembrie-2021/>.

45. Decision no. 390/2021, *cit.*

latory situation and even if the legislator did not regulate a certain value threshold of the damage or a certain intensity of the damage to the legitimate interests of natural/legal persons for admitting the offences of abuse of office or negligence in office, the action of the courts – consistent with the case law of the Constitutional Court – is likely to maintain and consolidate the presumption of constitutionality of the text, which must harmoniously combine the aspects of objective and subjective specificity of the offence. In other words, the Report on the relationship between political and criminal ministerial responsibility, adopted at the 94th Plenary Session of the Venice Commission on 11 March 2013, was no longer taken truncated to provide reasons for unconstitutional solutions.

Poland, Hungary and Romania are the European Union Member States with the most unenforced CJEU judgments.⁴⁶

In the case of Romania, as regards the lack of compliance and the denial of the authority of the CJEU, such a trend cannot go unnoticed, even in the presence of flattering individual statements by some judges of the Constitutional Court, including the new president,⁴⁷ which reaffirm the supremacy of European Union law.

46. See J. Jaraczewski, N. Tsereteli, I. Iliescu, A. Ciccarone, G. Stafford, Y. Mammadova, *Justice Delayed and Justice Denied: Non-Implementation of European Courts Judgments and the Rule of Law European Implementation Network (EIN)*, in *Democracy Reporting International (DRI)*, 2023, available at <https://democracy-reporting.org/en/office/EU/publications/new-report-exposes-alarming-trend-of-non-implementation-of-european-court-rulings>.

47. S. Matei, *Marian Enache, President of the Constitutional Court of Romania: "I will try with my colleagues from the CCR to have an even greater openness towards the application of EU law, through the Romanian Constitution"*, 2022, available at <https://www.mediafax.ro/politic/marian-enache-presed-intele-ccr-voi-incerca-cu-colegii-din-ccr-sa-avem-o-deschidere-si-mai-mare-spre-aplicarea-dreptului-ue-prin-intermediul-constitutiei-romaniei-21133901>.

For example, Decision no. 390/2021⁴⁸ is still in force and binding *erga omnes*.

In 2022, Romania changed the legislation on the status of judges, under the pressure of the European Commission and stating that it was an attempt to apply the judgments of the CJEU, among others, expressly repealing the disciplinary offense that concerned the non-compliance with the decisions of the Constitutional Court or the decisions issued by the High Court of Cassation and Justice in the settlement of appeals in the interest of the law. However, Article 271 letter s) from the new regulation (Law no. 303/2022 regarding the status of judges and prosecutors) provides that exercising the position in bad faith or with gross negligence is a disciplinary offense. The Constitutional Court of Romania, by Decision no. 520/2022, interpreting this legislative text, assessed that non-compliance with the decisions of the Constitutional Court can trigger the disciplinary liability of the judge or the prosecutor to the extent that it is proven that they exercised their position in bad faith or with gross negligence.⁴⁹

This reasoning is consistent with the interpretation of the Judicial Inspectorate, which filed an appeal against the decision of the Disciplinary Section for Judges of the Superior Council of the Magistracy, by which, in April 2022, the disciplinary action against Judge Costin Andrei Stancu, from the Pitești Court of Appeal, the

48. Decision no. 390/2021, *cit*.

49. For details, D. Călin, *Once again on the rule of law in Romania. The risk that thousands of defendants would not face criminal liability: a new wave of requests preliminary rulings at the CJEU*, 2023, available on the web page <https://officialblogofunio.com/2023/05/09/once-again-on-the-rule-of-law-in-romania-the-risk-that-thousands-of-defendants-would-not-face-criminal-liability-a-new-wave-of-requests-preliminary-rulings-at-the-cjeu/>.

only Romanian judge who had applied the Judgment of the Grand Chamber of 18 May 2021, joined cases C83/19, C127/19, C195/19, C291/19, C355/19 and C397/19, *Asociația Forumul Judecătorilor din România and others*, precisely because, through this *modus operandi*, the decision of the Constitutional Court would have been disregarded in bad faith. The High Court of Cassation and Justice rejected the appeal finally, on 24 April 2023.

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