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ROMANIAN COMMITMENT
TO INDEPENDENCE OF JUSTICE AND
ANTICORRUPTION REFORMS UNDER
CVM AND RULE OF LAW INCENTIVES.
SOME CONSIDERATIONS ON CASE-LAW
OF THE CONSTITUTIONAL COURT

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Abstract

During 2017-2019 Romania faced a controversial justice laws' 'reform', undermining the rule of law and independence of justice principles, challenging the commitments established under Commission Decision 2006/928/EC in the areas of judicial reform and the fight against corruption. In the context of democratic backsliding in Central and Eastern Europe, Romanian evolutions could be seen as following a regional pattern. The study proposes a critical analysis of the most important legislative evolutions in the area of justice and fight against corruption in the region, as reflected by the Cooperation and Verification Mechanism for Romania (CVM) and Rule of Law Reports, European Court of Justice and European Court of Human Rights judgements. The analysis focuses on some controversial decisions of the Constitutional Court, concerning justice laws 'reform' and the application of primacy of EU law principle. The study expresses a strong concern related to Romanian Constitutional Court's tendencies to walk along the authoritarian path of politically captured courts of Poland and Hungary. The conclusions reveal the requirement for new political instruments of EU supranational intervention to safeguard democratic EU core values.

Keywords: independence of justice, justice laws reform, rule of law, Constitutional Court case-law, primacy of EU law.

1. Introduction

Democratic backsliding of Central and Eastern Europe in recent years is attested by many scholarly articles (Cianetti, Dawson and Hanley 2018; Dimitrova, 2018; Gora and de Wilde, 2020; Scott, 2021). According to some authors (Cianetti, Dawson and Hanley, 2018) the term 'backsliding' is properly used in cases of former consolidated democracies, such as Hungary and Poland. In other parts of the region, it can be detected a merely democratic regression, since consolidation was never the case for low-quality post-communist democracies. Democratic decline of Hungary and Poland took the form of 'executive aggrandizement': illiberal parties winning the parliamentary majority have engaged in state capture, by challenging the rule of law and limiting pluralism (Cianetti, Dawson and Hanley, 2018; Bermeo, 2016; Dimitrova, 2018). Romania and Bulgaria, for example, were challenging for a long time the independence of justice and fight against corruption, threatening EU rule of law core values (Dimitrova, 2018); here, institutional and legislative accelerated reforms were conducted under the EU accession incentives and are now declining. The causes of democratic decline in post-communist states such as Bulgaria, Romania, Serbia and Slovakia are determined by slow and only partial democratic reforms, leading to state capture by political and business elites, benefiting from state resources and weakening new democratic institutions in order to maintain power (Dimitrova, 2018). Public trust in the political and administrative elites is strongly influenced by fostering public integrity values (Radu, 2020); consequently, mass protests of citizens defending democratic institutions, civil liberties and accusing corrupt practices were present in the entire region (2013–2021), attesting a certain popular attachment to democratic values.

Beyond the particular paths of democratic backsliding within Central and Eastern Europe, the result consists in threatening EU core values, accentuating the 'de-fragmentation' of EU law (Perju, 2018). Some general instruments grounding democratic decay could be identified in Central and Eastern European states (Dimitrova, 2018), putting into question the rule of law, independence of justice and anticorruption institutions. Internal safeguards such as constitutional courts, independent anticorruption prosecutorial offices, superior judicial councils and similar institutions were imperilled, along with mainstream media, civil society organisations and freedom of speech guarantees. Legislative 'reforms' of key-democratic institutions, enabling political interference in the judicial, were often used to undermine the independence of justice.

EU capacity to intervene in order to safeguard the rule of law and separation of powers, as EU law core values, was often questioned in recent years. National Constitutional Courts, as domestic safeguards of rule of law, were targets of abusive political majorities, attempting to limit the effects of courts' decisions and competencies (Romania, 2012, Hungary, 2012, Poland, 2015); eventually, several Constitutional Courts were politically captured. The Cooperation and Verification Mechanism for Romania (CVM), set up through Commission Decision 2006/928/EC at the moment of Romania's accession to the EU, and Art. 7(1) of the Treaty on European Union (TEU) procedure for Poland and Hungary were, in the first instance, possible solutions for EU interventions to safeguard

the rule of law and separation of powers. In Hungary, the authoritarian strong political majority revised the Constitution (in 2012 and 2021 new amendments were drafted) and the Constitutional Court was politically captured in order to oppose EU intervention. In Poland, the Parliament revised the Act of Constitutional Tribunal in order to diminish its independence. Further on, 'authoritarian' Constitutional Courts developed an abusive understanding of the principle of constitutional identity (Kovács, 2017; Perju, 2018) related to Art. 4(2) TEU, in order to derogate from EU law and to defend the domestic 'autocratic legalism' based on 'ideological choice' (Scheppele, Kochenov and Grabowska-Moroz, 2020). Beginning with Costa v. ENEL, the European Court of Justice (ECJ) developed a long case-law defending the primacy of EU law (Kelemen and Pech, 2019; Perju, 2020). Recent ECJ case-law based on the interpretation of Art. 19 TEU, interlocked with pecuniary and ad interim blocking measures, succeeded to limit several legislative amendments undermining the independence of the judiciary (Kochenov and Bard, 2019; Scheppele, Kochenov and Grabowska-Moroz, 2020); the authors suggest that a broader approach of the ECI case-law based upon systemic infringement actions of the Commission in order to defend EU core values (based on Art. 2 TEU), attached to the possibility of suspension of some EU funds for systematic violations of EU law (Art. 260, 279 TFEU), is needed (Kochenov and Bard, 2019; Scheppele, Kochenov and Grabowska-Moroz, 2020).

Our analysis focuses on Romanian recent evolutions in the field of independence of justice and fight against corruption commitments, falling under Decision 2006/928/EC and CVM and Rule of Law reports. The study attempts to reflect the turning point in the case-law of the Constitutional Court, as an important domestic safeguard of EU core values, and its alignment to the practice of captured courts in the region, such as Hungary and Poland. The so-called 'Ro-Exit' Constitutional Court decision, issued on 18 May 2021, triggers major concerns related to Romania's commitment to EU values; possible restoration scenarios are explored.

2. Regional context of judicial reforms. Romania between CVM and Rule of Law

Recent Rule of Law Reports (2020, 2021) emphasize some regional patterns that Romania seemed to have followed: large 'judicial reforms', political interference in the field of independence of justice and anticorruption institutions, decisions of constitutional courts opposing the principle of EU law primacy and EU law core values.

In Hungary, concerns related to judicial 'reforms' triggered the initiation of Art. 7(1) TEU procedure; new legal amendments targeted the independence of authorities called to assure the balance within the judiciary (National Judicial Council). The Supreme Court (Kuria) declared unlawful a preliminary request addressed by a domestic court to the ECJ (European Court of Justice); new appointments to the Supreme Court overpassed the regular procedure; former Constitutional Court judges were appointed by the Parliament as Kuria judges (Rule of Law Report, Hungary, 2021). Independence of the Constitutional

Court was put into question by the provisions of the new Constitution from 2012 (Venice Committee Opinion, CDL-AD (2012)009). Judges were targets of public criticism and the freedom of expression of judges was limited (ECHR, *Baka v. Hungary*, 2016). The prosecution service activity also raised concerns related to political influences of the Prosecutor General; the disciplinary proceedings against prosecutors have been criticized in terms of transparency and accountability by GRECO Reports (2020). High-level corruption cases investigations also remained limited (Rule of Law Report, Hungary, 2021).

In Poland, the reforms of the judicial system (started in 2015) raised strong concerns related to the increasement of executive powers and political influences over the independence of justice; consequently, the Commission started the Art. 7(1) TEU procedure against Poland. The Constitutional Tribunal was subject to political capture, as the new Act of Constitutional Tribunal is undermining the independence of apex courts (Venice Committee Opinion, CDL-AD (2016)026). Also, ECHR decided on 7 May 2021 on the irregularities of the appointment of constitutional judges (Xero Flor v. Poland); the following controversial Constitutional Tribunal decisions were challenging the compatibility of EU law with the Polish Constitution, opposing the principle of primacy of EU law and ECJ decisions. The independence of the National Council for Judiciary was threatened by political appointments and the newly created Disciplinary Chamber initiated questionable procedures against judges; the Minister of Justice is holding the position of Prosecutor General, exercising supervision powers over the Central Anti-Corruption Bureau, in a context of a clear tendency of the executive subordinating the prosecutors. Infringement procedures were initiated and ad interim measures were disposed by the ECJ at the requests of the Commission (Rule of Law Report, Poland, 2021).

For Bulgaria, the Rule of Law Report (2021) notes remaining challenges regarding the independence of the judiciary, in spite of CVM removal in 2019. The Supreme Judicial Council's composition and functioning rules raise further concerns. High-position judges were appointed overpassing the regular open competition; the Constitutional Court declared the exceptional procedure of appointment as constitutional. The influence of the Prosecutor General within the Prosecutor's Office and the Supreme Judicial Council is also a source of concern, as well as the necessity to extend the judicial review over the prosecutorial decision not to open an investigation. The draft law concerning the accountability and legal liability of the General Prosecutor and his deputy was a source of concern as well but, eventually, the Constitutional Court declared the law as unconstitutional; the issue remained unsolved, as well as the promotion regime of magistrates (Rule of Law Report, Bulgaria, 2020, 2021).

Starting with the EU pre-accession stage, Romania has been focusing its efforts in the area of judicial independence reform and curbing systemic corruption. The January 2017 CVM Report attested important progress registered for the previous 10 years but pointed out the remaining steps to be followed referring to the sustainability of reforms and proper implementation of the legal framework. Unfortunate political developments during 2017–2019 led to losing the reform accomplishments, 're-opening issues considered previously to be fulfilled' (CVM Report, November 2017), proving lack of political commit-

ment to irreversibility of reforms and to the stability of anti-corruption legislation. Starting with 2017 some illiberal accents of political discourses in Parliament were claiming for the removal of the CVM. Anticorruption reforms and strategies were sliding back (CVM Reports on Romania, 2018, 2019) since the Parliament and Government permanently challenged the judicial legal framework. A large revision of justice laws, started in August 2017, undermining the independence of judges and prosecutors and the separation of powers principle. Venice Committee opinions (2018, 2019) expressed firm reservations about this reform 'which may have negative consequences for the fight against corruption' and for the independence and efficiency of the judiciary (\$161–164, CDL-AD (2018)017). During 2018-2019, challenges on justice and fight against corruption system continued. The chief prosecutor of the National Anticorruption Directorate (DNA) was dismissed at the request of the Ministry of Justice, based on a controversial decision of the Constitutional Court, despite a negative opinion issued by the Superior Council of Magistracy (SCM). A new special prosecution section for investigation of judges and prosecutors — Section for the Investigation of Criminal Offences in the Judiciary (SIJ) — was established, with a questioned operational capacity and effectiveness, risking to be 'an obstacle to the fight against corruption and organized crime' (Venice Committee, § 49 CDL-AD (2019)014-e); SIIJ was enabled to divert cases of high-profile corruption from DNA, acting as an 'instrument to intimidate and put pressure on magistrates' (§90 CDL-AD (2018)017). New amendments referring to the procedure of appointment of top prosecutors aimed to limit 'the independence of the leading prosecutors', since the proper balance between SCM, the Romanian President, and the Ministry of Justice was fractured by an increased position of the Ministry of Justice (Venice Commission, §54, CDL-PI(2018)007; GRECO, Ad-Hoc Report (2018)2). A general trend to politically subordinate prosecutors is obvious. New legal provisions were adopted on material liability of judges, the procedure being initiated at the proposal of the Ministry of Finances; limitations of freedom of expression of magistrates were brought into force. The guarantees of the independence of prosecutors were removed; also, new specific provisions regarding the early retirement of magistrates were to affect the entire capacity and effectiveness of courts and prosecutorial bodies (GRECO, Ad-Hoc Report (2018)2).

Moreover, the public integrity legal framework was several times challenged by the Parliament, attempting to diminish the National Integrity Agency (NIA) prerogatives and reducing its track record of cases.

Political pressures and criticism were targeting key anti-corruption institutions, on the background of growing 'tensions between prosecutors and some politicians, due to the fight against corruption' (Venice Committee, §54, CDL-AD (2018)017). At the same time the Superior Council of Magistracy (SCM) failed to fulfill its role in defending the independence of the judicial system (CVM Report, 2018). Large civil society protests during 2017 and 2018, followed by magistrates' silent protests and memorandums against the new justice laws, several appeals to the Constitutional Court by the High Court of Cassation and Justice, parliamentary opposition and the President raised deep concerns. The November 2018 CVM Report stressed that the benchmarks were re-opened. On

the same day, 13 November 2018 European Parliament Resolution on the Rule of law in Romania (Resolution 2018/2844(RSP), expressed important concerns referring to the legislative decisions of Romania, structurally undermining independence of justice and institutional capacity to fight corruption, weakening the rule of law.

The Government continued in 2019 to amend justice laws by government emergency ordinances (GEO no. 7/2019 and no. 12/2019). The Venice Committee (CDL-AD (2019)014-e), referring to the new conditions for the appointment and dismissal of top prosecutors, criticizes the 'arbitrarily' adopted criteria for removing prosecutors in office. Two GRECO Reports on Romania were issued in 2019, assessing that 'no tangible results' have been made to restore the controversial justice 'reform', noticing that the recommendation regarding the abandoning of SIIJ, 'has been completely disregarded' (\$59, Greco-AdHocRep (2019)1). The lack of objective criteria in appointment and dismissing procedures for top-prosecutors is detrimental to the checks and balances system (\$82, Interim Compliance Report, GrecoRC4(2019)11).

On November 2019, the newly invested Government declared its commitment to CVM obligations. Parliamentary elections, on December 2020, brought a different parliamentary majority, expected to put an end to the legislative fragmentation of the anti-corruption framework, to restore justice laws and to re-establish trust in the justice system, in order to realign Romania towards its European path. But CVM Report on Romania (2021, pp. 4-5) stresses that justice laws, as amended during 2017-2019, are still effective. SIIJ continues to present a major concern, being perceived as an instrument of political pressure on judges and prosecutors. Beginning with September 2020, Romanian Governments expressed publicly the commitment to restore justice laws; still, no major results were achieved. On February 2021, a particular draft law, referring to the abolition of SIIJ was sent to Parliament, in spite of a negative opinion of SCM. Additional amendments were brought in Parliament, introducing the SCM's prior approval for investigations of judges and prosecutors for corruption offences; Venice Committee recommended the removal of SCM's 'filter', as going 'far beyond the functional immunity' of judges (July 5, 2021, CDL-AD (2021)019), p. 14), but the legislative procedure is still pending. Draft laws regarding the full set of provisions amending the justice laws were sent to SCM for advisory opinion on March 2021; public debates and consultations were organized with judicial institutions and civil society. CVM Report (2021) and Rule of Law Report (2021) are stressing that the draft laws on justice must reflect the holdings of the ECJ judgment from 18 May 2021, opinions issued by GRECO and Venice Committee, along with recommendations of CVM reports. Although the Government's commitment to restore justice laws was expressed since 2019, the dedication of the political will to transpose CVM recommendations remains limited. Rule of Law Report (Chapter Romania, 2021, p. 23) expresses concerns related to Decision no. 390 from 8 June 2021 of the Constitutional Court; the Constitutional Court disregarded the principle of EU law primacy and decided that domestic courts have no legal competence to verify the conformity of national provisions, declared as constitutional, to EU law.

3. Controversial case-law of the Constitutional Court on justice laws' 'reform'. Another politically captured Court?

The political developments during 2017-2019 have common roots in the 2012 Romanian constitutional crisis, motivated by the 'fear' of the growing independence of the judiciary and its effectiveness in curbing high-level corruption (Perju, 2015, p. 274). GRECO Reports also observed 'the risks of set-backs' in anticorruption legislation and efforts as a 'recurring issue in respect of Romania over nearly a decade' (§17, Ad-Hoc Report (2018)2). The so-called 'Black Tuesday' (2013), the parliamentary legislative proposal to pardon a series of corruption offences for high-ranked politicians, pursued a similar intention as the legislative proposal to review the Romanian Constitution (2014), attempting to subordinate the prosecutors to the executive branch. Venice Committee's Opinion (§185-191CDL-AD (2014)010) emphasized at that time the risk of 'threatening of already fragile independence of prosecutor's office', asking Romania to secure the principle of independence of prosecutors, claiming for 'clear, strong and efficient guarantees'. All these developments align Romania to the same tendency of democratic backsliding in Central and Eastern European countries.

Capturing the Constitutional Court is another line in the same pattern. Unlike the 2012 constitutional crisis, during the 2017–2019 justice laws' 'reform', the Constitutional Court mostly failed to be an internal safeguard of the rule of law and often acted 'as the third Chamber of Parliament' (the decisional one) (Boc, 2018, p. 112) or simply reflected the ruling majority's interests. Due to the Constitutional Court's controversial decisions on the new justice laws, pleading for 'constitutional identity' in order to oppose EU law obligations and to disregard the principle of primacy of EU law, the Romanian Constitutional Court aligns on the path of politically captured apex courts, as Hungary and Poland (also, Slovakia and Czech Republic; see Kovacs, 2017, p. 1711).

In this context it is to be mentioned the decision of the European Court of Human Rights (ECHR) in case Kovesi vs. Romania (application no. 3594/19, 5 May 2020), attempting to re-establish the broken equilibrium within the powers, in the equation of safeguarding the independence of the judiciary, particularly the independence of prosecutors from political influences of the Ministry of Justice. The balance was broken by Constitutional Court Decision no. 358/2018: at the request of the Ministry of Justice, the decision imposed the removal of Chief-Prosecutor of DNA by the Romanian President (DNA chief-prosecutor was removed for expressing public criticism regarding the new justice laws, as undermining the independence of prosecutors). The controversial decision of the Constitutional Court ascertained a clear and total subordination of the prosecutors to the Ministry of Justice. On grounds of an abusive interpretation of Art. 132(1) of the Constitution, the Court stressed that 'the authority of the Ministry of Justice is not an administrative one, but on the contrary, he has the *plenum* of competencies in the exercise of his authority over prosecutors' (§90, Decision 358/2018). Further on, the Decision 358/2018 strengthened the position of the Ministry of Justice in the procedure of removal and appointment of top-prosecutors, holding that SCM has only an advisory opinion

and the powers of the Romanian President are limited to the examination of the legality of the procedure. Consequently, the decisional equilibrium of powers between SCM, the Romanian President and the Ministry of Justice has been broken. Additionally, the Constitutional Court decided that a judicial review of the removal decree by administrative courts should be considered inadmissible; this way, the decision of the Constitutional Court has overpassed the ordinary legislative provisions (Law no. 317/2004). Eventually, ECHR established in case Kovesi vs. Romania (2020) that there was a violation of Art. 6 §1 of the Convention and a violation of Art. 10 of the Convention, noting that the freedom of expression of magistrates is a cornerstone of democracy and of the rule of law principle, especially when bringing into public debate the controversial justice laws reform infringing the independence of the judiciary. A similar ECHR decision, Baka v. Hungary (2016, application no. 20261/12) found a violation of Art. 10 of the Convention in the context of the President of Supreme Court's premature termination of mandate, for expressing critical opinions on the major judicial reform in Hungary. But the most important remedial impact of decision Kovesi vs. Romania (2020) was to emphasize the importance of the independence of prosecutors, as a 'key element for the maintenance of judicial independence', holding that 'the premature removal of the applicant from her position as chief prosecutor of the DNA (and the reasons justifying it) defeated the very purpose of maintaining the independence of the judiciary' (§ 208, application no. 3594/19 from 5 May 2020). The lamentable reaction of the Constitutional Court came immediately, declaring publicly (Constitutional Court, Press release, 6 May 2020) that ECHR decisions have no impact on Constitutional Court case-law and ignoring deliberately the provisions of the Constitution¹ and Romanian commitments as a member of the Council of Europe. A similar position was adopted by the Polish Constitutional Tribunal (16 June 2021) declaring the ECHR decision's (Xero Flor w Polsce sp. z o.o. v. *Poland*, application no. 4907/18) findings of irregular appointments of Constitutional Tribunal judges, as 'non-existent' (Rule of Law Report, Poland, 2021, p. 5). Further on, Polish Constitutional Tribunal Decision from 24 November 2021 holds that ECHR has no jurisdiction to assess the legality of the new system of appointment of domestic judges, since ECHR decided (in Broda and Bojara v. Poland, applications no. 26691/18, 27367/18) that Poland undermined the independence of justice principle (Council of Europe, press release, 24 November 2021).

The European Court of Justice (ECJ) issued on 18 May 2021 a referential decision (Asociația Forumul Judecătorilor din România and others v Inspecția Judiciară and others) regarding the rule of law and independence of justice in Romania. The decision was issued on the basis of six requests for a preliminary ruling, under Art. 267 TFEU, made by

¹ Art. 20 (2) of the Romanian Constitution stipulates: 'Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.'

national courts in the context of litigations related to the extended 'justice laws reform'. Synthetically, the requests for preliminary ruling were focusing on the consistency of EU law with the amendments brought to justice laws, concerning: the establishment of SIIJ; the new regulations on personal liability of magistrates; the organization of the Judicial Inspectorate; the binding effects of Commission Decision 2006/928/EC, establishing specific benchmarks in the areas of judicial reform and the fight against corruption, and the binding effects of CVM reports, strongly criticizing the new provisions of justice laws 'reform' during 2017–2019. National courts invoked several Constitutional Court decisions, in particular Decision no. 104 from 2018, holding that Commission Decision 2006/928/ EC cannot constitute grounds for constitutional review, since it was adopted previous to Romania's EU accession and, in this respect, has no-binding effects within the scope of the Accession Treaty (§81–§84, Decision no. 104 from 2018; also, Decision no. 137 from 2019); on the contrary, Constitutional Court Decision no. 2 from 2012 ascertained that Romania, as Member State, has the obligation to put into practice the mechanism and the recommendations based on Commission Decision 2006/928/EC, according to Art. 148 (4) of the Romanian Constitution.

ECJ decision from 18 May 2021 brings important findings related to justice laws 'reform' in Romania, during 2017-2019. The European Court stresses that Commission Decision 2006/928/EC of 13 December 2006 constitutes an act adopted by an EU institution and its legal nature, content and effects are falling within the scope of the Treaty, pertaining to EU law and having direct effect (§178, §249). Consequently, Commission Decision 2006/928/EC and the CVM reports' recommendations are binding on Romania, the Member State being 'required to take the appropriate measures for the purposes of meeting those benchmarks' (§253). The whole judicial system and the fight against corruption in Romania is falling within the scope of Commission Decision 2006/928/ EC and must be consistent with rule of law values (Art. 2 TEU), (§177). Even if the domain of formal organization of justice pertains to national legislation, the domestic law could not conflict with the basic principles falling under EU law (§111). Accordingly, the ECJ concludes that Art. 2, the second subparagraph of Art. 19(1) TEU and Commission Decision 2006/928 'must be interpreted as precluding national legislation' regarding the new justice laws (establishment of SIIJ, new regulations on personal liability of magistrates and the organization of Judicial Inspectorate), since the rule of law and the guarantees of independence and impartiality of justice, required under EU law, are imperiled. ECJ emphasizes the 'Member States are thus required to ensure that (...) any regression of their laws on the organization of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary' (§162). It is the duty of the national referring court to verify the consistency of specific domestic legal provisions to EU law, to assure the full effectiveness of the EU law, by 'refusing of its own motion to apply any conflicting provision of national legislation' (\$247). Most importantly, the ECJ decision, referring to the principle of primacy of EU law, holds that 'rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law' (\$245), in the light of the second paragraph of Art. 19(1) TEU. Independent of the nature of legislative or constitutional origin, the national referring courts are required to disapply of their own motions the provisions infringing the second paragraph of Art. 19(1) of TEU and Decision 2006/928/EC (§251). Undoubtedly, the ECJ decision opposes previous Constitutional Court case-law (e. g. Decision no. 104 from 2018; Decision no 137 from 2019), 'ingeniously' and premeditated grounded on the so-controversial interpretation of the principle of 'constitutional identity'.

But only with the defiant 'Roexit' decision (Perju, 2021), namely Decision 390 from 8 June 2021, the Romanian Constitutional Court accomplishes its alignment to the 'elitist' politically captured courts, alongside with Hungary and Poland (also, Slovakia and Czech Republic; see Kovacs, 2017). In spite of clear holdings of ECJ decision from 18 May 2021, the Romanian Constitutional Court ascertained, on 8 June 2021, the constitutionality of the Emergency Ordinance for the establishment of SIIJ, fiercely criticizing the ECJ decision and performing an intentional misinterpretation of the 'constitutional identity' argumentation.

Decision no. 390 from 8 June 2021 (§43 and followings) stresses that even if, according to the ECJ judgement, the Commission Decision 2006/928/EC is an act of EU law, with direct application and, therefore, mandatory for Romania, it has 'no constitutional relevance' for the constitutional control (§39), since the organization of justice pertains to the decisional competence of the Member States (§50). But, ECJ decided the whole judicial system in Romania and the fight against corruption is falling within the scope of Commission Decision 2006/928/EC and must be consistent with rule of law values (Art. 2 TEU); according to Art. 4 of TEU, the exercise of exclusive competencies of Member States must be applied in accordance with EU basic values, enshrined in Art. 2 of TEU, such as rule of law and independence of justice (judges Stanciu and Tănăsescu, Separate Opinion, Decision no. 390 from 8 June 2021). Also, the Constitutional Court admits that there is no contradiction between any constitutional provisions (guaranteeing rule of law and independence of justice) and Commission Decision 2006/928/CE; therefore, the 'constitutional identity' justification for infringing the principle of EU law primacy is lacking any substance.

The Constitutional Court applies on its own merits the test of compatibility of domestic provisions to EU law (although this competence pertains only to the referring courts), in order to inhibit any 'attempt' of national referring courts to disapply of their own motions the provisions of new justice laws, if considered as infringing second paragraph of Art. 19(1), Art. 2 of TEU and Commission Decision 2006/928/EC. The Constitutional Court could have only proceeded to a constitutional control, in line with its own case-law (Decision no. 1.249 from 7 October 2010; Decision no. 137 from 25 February 2010; Decision no. 1.596 from 26 November 2009; Decision no. 668 from 18 May 2011). Inconsistent with its own case-law, the Constitutional Court subrogates to legal competencies of domestic referring courts. Decision no. 390 from 8 June 2021(§85) stresses that the domestic courts could not 'choose' to disregard the application of national legal provisions declared as constitutional, even if considered incompatible to EU law, Decision 2006/928/EC and CVM reports, according to Art. 148 of the Romanian Constitution. The considerations

are grounded on the principle of constitutional pluralism (see also, Decision no. 80 from 16 February 2014, §453–458; Decision no 668 from 18 May 2011). The argumentation disregards the provisions of Art. 148 from the Romanian Constitution, granting *expressis verbis* the principle of primacy and direct effectiveness of EU law (see, Separate Opinion on Decision no. 390 from 8 June 2021, judges Stanciu and Tănăsescu). Also, according to Law no. 47/1992, regulating the organization and functioning of the Constitutional Court (Art. 29), a legal provision declared as constitutional, could be the object of a subsequent constitutional control, based on different legal grounds (its constitutionality is not immutable). A similar holding, infringing the principle of primacy of EU law, can also be found in Judgement K 3/21 of 7 October 2021 of Polish Constitutional Tribunal (Thiele, 2021).

Subsequently, in the application of the ECJ judgement, Pitești Court of Appeal, one of the referring courts, concluded on 7 June 2021 that SIIJ's establishment is not justified 'by objective and verifiable requirements relating to the sound administration of justice and that it is therefore not competent to investigate a case brought before it' (Rule of Law Report, Romania, 2021, p. 7). The Judicial Inspection started a disciplinary procedure against the judge of Pitesti Court of Appeal, grounded on the Decision of 7 June 2021 (Rule of Law Report, Romania, p. 7). This incident is very similar with a judgment of Hungarian Kúria (Supreme Court), of 10 September 2019, declaring unlawful a preliminary reference to ECJ (Case C-564/19-IS), considering it 'irrelevant' for the case; subsequently, the referring judge was subject of a disciplinary procedure (Rule of Law Report, Hungary, 2020, p. 4). ECJ decision from 23 November 2021 in Case C-564/19-IS, stated that 'the principle of the primacy of EU law requires the lower court to disregard the decision of the supreme court' considering the referral as 'unlawful', since ECJ is exclusively competent to appreciate the admissibility of a request for a preliminary ruling. Also, ECJ holds that the principle of primacy of EU law precludes disciplinary procedures against the referring judge, as being a procedure undermining the independence of justice (ECJ, press release, 23 November 2021). A similar infringement procedure was started by the Commission against Poland, on 31 March 2021, since a new law on the judiciary, adopted in 2019, prevents domestic courts from direct application of the principle of primacy of EU law and from referring questions to ECJ for preliminary rulings, under the threat of disciplinary procedures against judges (Rule of Law Report, Poland, 2021).

But the major danger of the Constitutional Court Decision no. 390 from 8 June 2021 is the argumentation overpassing the principle of supremacy of EU law, based on the misused concept of 'constitutional identity', inflicted in the context of the controversial principle of 'bidimensional supremacy in EU constitutionalism', interpreted as the supremacy of EU law depending on 'cooperation or acceptance of national constitutional guardians' (Perju, 2020, p. 1007). The doctrine of constitutional pluralism tried to imagine a compromise in order to harmonize the boundaries between ECJ competencies and national apex courts, in the attempt to solve the so-called 'Kompetenz – Kompetenz' conflict between ECJ and national courts (Beck, 2011; Kelemen and Pech, 2019), without creating hierarchies, but solving differences by honest, trustful 'dialogue and mutual accommodation' between courts (Scholtes, 2021). Referring to Art. 4.2 of TEU, the concept of 'con-

stitutional identity', in a sense of protection of 'the core limits of national constitution' (Scholtes, 2021) was developed mostly by the German Federal Constitutional Tribunal (Solange, 1974, 1986, 1993, 2000; Weiss, 2018) (see Perju, 2020; Scholtes, 2021; Kelemen and Pech, 2019). Beginning with Costa v. ENEL (1964), followed by more recent cases (Foto-Frost, 1987; Fazenda Pública, 2000; Adeneler and Others, 2006), the ECJ tried to prevent the 'de-fragmentation of EU law' (Perju, 2018), emphasizing that domestic law cannot override EU legal order, the common values on which the EU was founded, such as rule of law, legal certainty and non-discrimination between Member States (ECJ, Press release, 2020). But the clarification of EU constitutionalism principles is needed, possibly by rejecting bidimensional supremacy (Perju, 2020).

The negative effects of the utopia of European constitutional pluralism doctrine and the abusive interpretation of the constitutional identity concept by Constitutional Courts in authoritarian states started to be obvious beginning from 2010 in Hungary and 2011 in Slovakia, 2012 in the Czech Republic (see Kovacs, 2017, pp. 1710–1711), 2015 in Poland (Kelemen and Pech, 2019, p. 10; Martinico and Pollicino, 2020, pp. 243-248) and culminating with Polish Constitutional Tribunal Judgement K 3/21 of 7 October 2021. In 2016, the interpretation given to 'constitutional identity' by a decision of the Hungarian Constitutional Court (Decision 22/2016. (XII. 5.) AB on the Interpretation of Art. E) (2) of the Fundamental Law) completely disregarded the EU principle of loyal cooperation, in accordance with Art. 4.3 TEU (Martinico and Pollicino, 2020, p. 247), considering 'constitutional identity' as 'an achievement of the historical constitution' (Halmai, 2018, p. 34) and therefore becoming a constitutional value. The Polish Government (White Paper on Reform of the Polish Judiciary, 2018) justifies the judiciary 'reform' laws' non-compliance to EU rule of law on the basis of the misused concepts of constitutional pluralism and constitutional identity (Kelemen and Pech, 2019; Scholtes, 2021). In line, the Romanian Constitutional Court judgements, referring to justice laws' 'reform', followed the same politically captured path, misusing the 'constitutional identity' argumentation in order to disregard common values on which the EU was founded, and at the same time, defying national constitutional principles of rule of law and independence of justice ('Romania will apply in good-faith the obligations resulted from the accession act, in the domains pertaining to EU legislative exclusive competence, but without infringing a constitutional limit residing in the concept of 'constitutional identity'; Decision no. 104 from 2018, §81; also, Decision no. 137 from 13 March 2019; Decision no. 390 from 8 June 2021). Eventually, the European Commission started the infringement procedure against Romania.

4. Conclusions

In terms of democratic backsliding, some general trends could be identified in the Central and Eastern European region. Large legislative 'reforms' of the judiciary undermined the independence of judges and targeted the subordination of prosecutors to the executive branch, aiming to limit the efficiency of anti-corruption key-institutions. Political capture of apex courts was drafted by ruling majorities in order to oppose the primacy of EU law

and ECJ decisions. Consequently, captured Constitutional Courts pleaded for an abusive understanding of the constitutional pluralism principle and 'constitutional identity' in order to justify their controversial decisions. EU political instruments of supranational intervention are limited and rather difficult to impose. An immediate solution could be a strong standing ECJ case-law to defend the primacy of EU law principle. A long-term solution could be imagined at the level of new political mechanisms of EU intervention to safeguard democratic core values. There is a need for a clear definition of the concept of 'national identity' (Art. 4(2) of TEU), in order to prevent apex courts' misinterpretation of the 'constitutional identity' principle to derogate from EU law obligations and democratic principles. Civil society adherence to EU democratic values must not be neglected, since sustainable democratic reforms could be accomplished only by large popular support.

For Romania, a solution to overpass the controversial Constitutional Court's case-law could be a proper intervention of the Parliament to restore the justice laws (including the dismantle of SIIJ), in accordance with ECJ judgements and recommendations of CVM, GRECO, Venice Committee and Rule of Law reports; but the governmental instability and political turmoil during 2021 are not an optimistic indicator. The infringement procedures started against Romania could be seen as a more reliable remedy, for the moment. The reform of appointment of the constitutional judges should take into consideration the need of independence from political influences, high standards of integrity and professionalism. Also, the debate related to the revision of the Constitution, in the recent political context, could be at risk.

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