

Judicial Autonomy Amid the Clash Between National Constitutional Supremacy and European Union Legal Primacy

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Abstract

The present paper addresses the intricate dynamics of the independence of the judiciary between two dominant legal systems namely national constitutional law and the European Union (EU) law. It examines the method in which the concept of judicial autonomy occurs when the courts find themselves straddled between the supremacy of local constitutional structures and the force of law of the EU laws. The compiled literature evaluates the central case law of both national constitutional courts and that of the Court of Justice of the European Union (CJEU). This paper reviews competition and collaboration in the hierarchical legal framework. It also evaluates the consequences of the rule of law, certainty in the law and democratic governance in the EU member state. The results posit that there is a need to trade off between the judicial independence of justice and the vertical nature of European legal authority.

Keywords: *Judicial independence, constitutional supremacy, EU law primacy, legal hierarchy, national courts, CJEU, legal pluralism, rule of law, democratic governance, constitutional identity.*

1.Introduction

Independence of the judiciary is another of the fundamental principles of the modern democratic countries, which guarantees the existence of the rule of law free of political or even external influence. During the last few decades, when supranational organizations such as the European Union (EU) have also established strong legislations, national judicial systems are operating at a crossroads at best and at the crosszone between the supremacy of national systems of the law in their countries of origin and supremacy of the European Union law. This meeting of legal primacies has brought about some big questions such as how one can best advance the autonomy of judges as well as maintain a level of coherence through such a multilevel legal order.

Judicial independence in the European Union is not only a dream, but also a condition of successful implementation of fundamental rights and enforcement of EU laws in a uniform manner. Treaty on European Union (TeU) and the jurisprudence of the Court of Justice of the European Union (CJEU) stressed the obligation of the member states to have their governments be in compliance with the requirements of the impartiality, independence and legality(1). This requirement, however, needs to agree with the inner constitutional practices of the member states that tends to give precedence to the decisions of their constitutional courts. Such coexistence can lead to divided loyalties, and have intricate legal complexities, as well as lead national courts to stringently adjudicate in the face of competing claims of national constitutional norms and the EU law which is binding.

Romania can be viewed as a significant example of such a legal interplay. Its justice system has turned more and more to the CJEU to seek clarification as to whether compulsory measures taken by its own Constitutional Court are consistent with EU law. Romanian Constitutional Court is the institution endowed by the Constitution, the independent institution, which is charged with the responsibility of defending the supremacy of the Romanian Constitution. However, its binding rulings particularly in politically sensitive regions like in the area of anti-corruption practices or protection of European financial interests has at other times seemed to bully the lower courts and judges. The prospect of disciplinary action against any judge who does not follow such decisions, introduces yet another strain, which endangers the appearance, and substance, of judicial autonomy.

In addition, the control mechanisms in Romania as set out in the constitution and the procedure of appointment and control of constitutional judges is based on a political model that is also characteristic of most of the EU member states whose models include France, Germany and Spain among others. The Romanian Constitutional Court is enrolled with judges whose appointment by office of politics, like the President of the Republic and chamber of the Parliament. Though this model of appointment is not necessarily an issue, it creates the necessity of adding some more precautions in order to preserve the appearance and reality of judicial impartiality. Romanian constitutional judges receive a non-renewable, fixed term upon appointment and their independence is supposed

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to be constitutional hedged against attack. Nevertheless, the power of their decisions over inferior courts, and the disciplinary processes linked to them, has given rise to ambiguity in the law when they seem to hold the opposite of what EU law holds⁽²⁾.

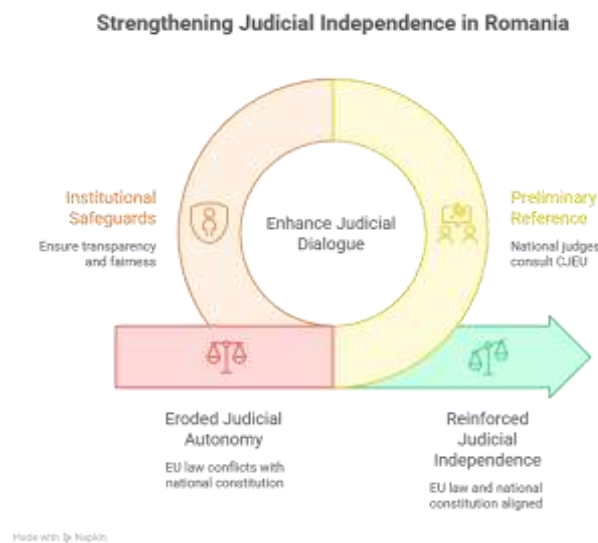


FIGURE 1 Strengthening Judicial Independence in Romania

The latest development on this point is that the CJEU discussed this very issue in a series of consolidated cases, known as the Eurobox (C-357/19, C-379/19, C-547/19, C-811/19, and C-840/19), through the lens of whether the structure of the Romanian Constitutional Court and the binding nature of its ruling threatened the independence of run-of-the-mill judges. The EU court also added that the national constitutional courts may provide binding decisions but their authorities could not restrict the right of the judge either to demand preliminary ruling of the CJEU or to apply the EU law in the cases when it contradicted to the national one. The CJEU has declared that any system which exposes judges to the threat of disciplinary penalty in the event of compliance with EU law and its legal obligation would be against the principle of the law of the Union and its basic ideas.

Although the CJEU has repeatedly stated that the independence of the national courts should not be jeopardized by the action of constitutional courts, the Romanian legal system still preserves those elements that imply that the judges who do not comply with the given decision of a constitutional court may be subjected to disciplinary sanctions⁽³⁾. As established in practice, no judge in Romania has yet been punished because he has applied EU law even contrary to national decisions, although such disciplinary measures are provided. That said, the availability of such punishments does have a chilling effect on judges. The threat of possible prosecution inclusive of the fear of possible prosecution can inhibit judges to claim their independence especially in politically charged cases even when the prosecution is not legal.

But there is nothing like absoluteness of judicial independence. The CJEU has not ignored how even extreme and blatant breaches of the judicial duty of responsibility, e.g. willful dereliction of duty or flagitious misapplication of the law, can be subject to disciplinary action. One should, therefore, find the balance between the need to prevent the undue influence of judges and the necessity to be responsible in case of significant failure in the professional context. The contemporary problem is the need to make sure that the disciplinary systems cannot become the instruments of political interference or sources of diminishing the judicial neutrality.

One of the main factors of achieving this balance is the constant judicial debate between national courts, constitutional courts and CJEU. An example of such a bridge is the preliminary reference process in Article 267 of the Treaty on the Functioning of the European Union (TFEU), which enables national judges to bring the CJEU cases directly, to clarify EU law. This is so that there is uniformity in the interpretation of the EU law in different member countries, and also to secure that national judges do not find themselves struggling alone when it comes to resolving such conflicts. Romanian Constitutional Court, in spite of its functions of the post-factum constitutional review in particular, has shown an increasing propensity to partake in this dialogue. Its a priori review powers, however, whose exercise does not involve the occurrence of a live dispute, are not subject to the preliminary reference procedure, thus significantly reducing the chances of alignment in such circumstances at the legal level.

To conclude, the situation created by the overlapping of the constitutional supremacy at national level and the dominance of EU law are very challenging, but qualified challenges to the independence of courts. This dual-legal system is characterized by the optimism and the complexity of the Romanian legal system(4). Even though the conflict of legal rules can be overcome with the use of institutional safeguards and judicial dialogue, the contradiction between the force of constitutional decisions and the primacy of the EU law is a tricky issue. Dealing with such convergence of interests necessitates transparency of laws, fairness of processes and strong supporter of the adage that judicial independence is not formally an idea, but an indispensable element of the rule of law both nationally and at the supra-national arena.

2. Authority, Structure, and Legitimacy in Romania's High Jurisdiction

The concept of equilibrium among different branches of government and the protection of the supremacy of the fundamental law has become the core of constraint and institutional arrangement of constitutional courts within the legal institutions settings of contemporary constitutional democracies. The case of Romania Constitutional Court presents an example of a sectional statutory institution that lies somewhere between the boundary of legal power and a political design, and poses indispensable questions about its effects on the broader justice system and its congruence with the EU law. The court composition, its powers and operational philosophy show that not only does the Court lie at the center stage of interpretation of constitutional provisions but also shows the impact on judicial independence as well as legal coherence at the supranational level(5).

Such courts are frequently given a high mandate to serve as custodians of constitutional authority with powers to curb and even neutralise the individuals and authorities who violate these. Romania is not an exemption. According to the Romanian Constitution, the Constitutional Court is an autonomous body that stands outside the legislative, the executive and the judicial powers. Its decisions have wider binding force so it can declare void the laws that are in conflict with stipulations in the Constitution and it can identify and decide upon the constitutionally based conflicts amongst the authorities in the public. It can be used as such as it assumes an influential role playing the role of an arbiter in fundamental legal conflicts even in cases involving delicate issues like judicial reforms, criminal justice processes and even in its definition of what the national identity should be in the light of European integration.

The structural independence of the Romanian model is one of the hallmarks of the system, which is supported by the legal stipulations to prevent the political retribution against its justices. The constitutional judges are appointed on a non-renewable 9 year term and nobody may dismiss them in their term leaving them hypothetically outside of external influences. To qualify to hold the position, an applicant must be highly qualified legally with high standards of professional experience, usually at least 18 years experience; he/she must uphold the attributes of public integrity, such as by not being allowed to hold another office besides an academia post. These are constitutional protections aimed at developing neutrality, stability and loyalty to the constitutional mandate of the court.

However, even the appointment procedure itself shows a rather complicated interrelation of the politics. The constitutional judges in Romania are appointed by political institutions, the President of the Republic and the two chambers of Parliament. The processes reflect those in other European Union nations, where the electoral process is divided between the Bundestag and Bundesrat in Germany, the Parliament, judiciary and the President in Italy, but in addition it paves the way to the possibility of political manipulation. The court is theoretically independent after it chooses its judges but the idea that the court should be politically composed in the first instance casts a valid doubt regarding perceived or actual bias.

Nevertheless, concerns have been raised over this regardless, the business record of the Court has implied that its institutional decency is maintained at large. The Court has come out with ruling of great constitutional and legal importance even in the aspects that overlap awkwardly with European law. As an example, it has decided on the unconstitutionality of some norms of procedure in criminal law, frequently those ones that relate to corruption and to safeguarding EU financial interests (6). These rulings can cause retrials or procedure re starts and, although these are legally sound, they can indirectly influence the integrity of lower court judges as they might be left with no choice but to change original decisions or redo cases as a result of constitutional decisions.

This is the interaction process between the Constitutional Court and the general judiciary that has provoked the reaction of the European legal order. Court of Justice of the European Union (CJEU), specifically in its judgments Eurobox (cases C-357/19, C-379/19, C-547/19, C-811/19, and C-840/19) has looked at whether the constitutional

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arrangement of the system in Romania is a threat to judicial independence at the lower levels. The analysis provided by the CJEU concerned the fact that the rulings made by the Romanian Constitutional Court undermine the principle of judicial independence through coercing judges towards following rulings that might be against the EU legal requirements. Notably, the CJEU has opined that there is no conflict between the binding character of the decisions taken by the national constitutional court and the EU law as far as the independence of such a court with respect to the executive and legislature prevails.

More importantly, the CJEU felt that the potential risk to the impartiality and independence of constitutional judges because of the way that they are appointed by organs of the political branch of government is not self-evident. What matters is how independent they are allowed to be after appointment. EU court believes that after being invested in the office, constitutional judges should not feel pressurized or directed by any authority. The Romanian model thus would meet the EU standards provided that this post-appointment independence would be carefully followed and that the process of the judicial system would not be broken up with political interests(7).

Such acknowledgement however does not altogether remove the possibility of provocation. Constitutional courts that give binding decisions to all other courts have the ability as it happens voluntarily or involuntarily to narrow the discretionary space that is exercisable by the judges who preside over the trial or the appeal level of courts. The risk is especially acute where such lower courts must be required to UNDO decisions, or modify proceedings, in order to conform to new interpretations of the constitution, even in cases that are already established. In combination with the threat of disciplinary action, which will be the topic of later sections, such a dynamic can create a kind of indirect control that can compromise the norm of independence in the running of the judiciary.

The introduction of constitutional courts to the wider European legal structure brings another level of complexity. This is the case though the EU does not lay down a common model of the constitution among the member states rather requiring that all judicial institutions either in practice or constitutional, abide by minimum standards of the rule of law including judicial independence, transparency, and the availability of effective legal redress. In this regard, the Constitutional Court of Romania should strive on performing transparent jurisprudence and dialogue with the European institutions in order to legitimize its status both in the internal and the supranational legal orders. Additionally, despite the constitutional courts, such as those in Romania, not usually participating in any fact-finding endeavor, or in the application of statutes to particular cases; the fact that the constitutional courts have authority to make extremely broadly binding interpretations suggests that legal authority, through them, is exercised in a potent though unusual way. Their rulings determine not only how to interpret a statute but also the very structure of democratic government. This demands a strict criterion of logic, transparent process of jurisprudence and clear adherence to rules that are above the political divide.

To sum up, the Romanian Constitutional Court takes a pivotal position in the legal and constitutional system of the country. Although formulated to take independent action to protect Constitution supremacy, its politically tainted method of appointment as well as the supremacy in matters of the law, where it over-rides other judicial courts, necessitates close observation to avoid infringing judiciary independence. The juggling of national sovereignty and constitutional legitimacy as head to head against European legal obligations is still unsafe. Finally, the success of the case next to achieve a harmonization between the constitutional adjudication of Romania and the EU expectations will depend on the effectiveness with which its institutions are succeeding in maintaining the independence and impartiality of its judges, not only within the Constitutional Court, but also within the judicial system in general.

3.Navigating Accountability and Autonomy in Romania's Legal System

The interaction of judicial independence and judicial accountability is one of the most closely debated issues of contemporary legal theory and, specifically in regard to state practice, when judicial activities include multi-level legal practices, as was the case in the European Union. The case of Romania shows the problems in finding the right tone between the validity of the decisions of the constitutional courts and the necessity to prevent possible undue pressure or punishment of ordinary judges. The conflict that lays at the heart of this dilemma is an inherent legal quandary, as follows, under what circumstances can a judge be sanctioned or penalized because he/she denies a constitutional ruling when the ruling is perceived to violate EU law?

The real world equivalent of this is that in the Romanian Constitution it is explicitly stated that the decisions of the Constitutional Court are binding to all public authorities, including the courts (8). These decisions should be applied by the judges in their judgments or interventions, and not applying the same could, under some

circumstances, make the judges face disciplinary action. On the one hand this might be viewed as an important apparatus to create legal certainty and uniformity of institutions, on the other hand, however, it has been a source of unease among the judiciary. Most judges understand the possibility of the disciplinary action not only as a punitive measure but also as a low-key pressure that can intimidate the exercise of judicial discretion and undermine their independence.



FIGURE 2 Judicial Independence vs. Accountability in Romania

Since Romania became a member of the European Union, this internal constitutional requirement has come in conflict with the European law, in the form of the principle of primacy of EU law. European jurisprudence, particularly in terms of how the CJEU defined the issue, stipulates that national judges have a right (and duty) to set aside national legal rules, including rulings of individual constitutional courts, when they are in conflict with EU law. Theoretically, it puts individual judges in an awkward situation: applying EU law would result in their non-application of locally binding constitutional jurisprudence, which would have the potential disciplinary consequence.

Even though there are no instances when judges in Romania have received formal disciplinary measures after adhering to European Union law in situations of conflict, such a possibility is enshrined in law. Such potential has an element of structural coercion in that it will make the judges less inclined to use their powers under Article 267 of the Treaty on the Functioning of the European Union (TFEU) to seek preliminary rulings before the CJEU. It is likely to also discourage them to avoid deactivating of national law provisions that conflict with the EU principles even when such deactivation is demanded by supranational law. The chilling effect of such clause is more troublesome during politically high profile cases- like those on corruption, judicial reform or functioning of independent institutions(9).

This dissonance has been dealt with directly by the CJEU. The court stressed in the case of C-430/21 (RS) that the threat of disciplinary proceedings, even prior to the actual conviction introduces a pressure jeopardizing in the psychological sense the independence of the prevailing judges. The Court held that national legal systems are required to have adequate guarantees of non-influencing judges, in particular where they are performing a legitimate role with regard to the interpretation and application of EU law. Accordingly, the RS judgment upholds once again that the principle of EU law primacy should never be enforced at the expense of personal or professional risks of the judge.

Both of them, the Court understood that a judicial independence is not tantamount to absolute immunity. Judges are free like the rest of the people in great public position, to be accountable in case of grave breaches of professional ethics, which includes the exercising of actions in bad faith, gross negligence to law or the blatant abuse of powers. Nevertheless, disciplinary actions should be focused and exclusively extraordinary. They must not be deployed to punish good-faith readings even when such readings stray in terms of constitutional or political expectations. Such a disciplinary system of conducting disciplinary procedures should have adequate procedural protections and substance to differentiate between accountability and coercion.

In the case of Romania, a specialized body (the Judicial Inspection) charged with monitoring the behavior of magistrates is involved in carrying out allegations of malpractice against magistrates. The Inspection has the capacity to consider the decisions that are made by the judges in order to ascertain that there is enough legal research as well as uniformity in accordance to legal rules. Nevertheless, the substantive legality or good sense of

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judicial reasoning may not be evaluated. It is limited to detecting plain-sight arbitrary or abusive decisions especially those decisions that are bereft of any reasoning conjoined to the facts of the case or any legal standards. To the extent it is narrowly limited, this can be helpful in guarding against excess, but where there are ambiguities in the relevant disciplinary provisions, such indeterminacies can create both institutional and legal confusion⁽¹⁰⁾. The legal community in Romania has differed over the usefulness of having disciplinary provisions that are directly related to a failure to abide by rulings of the constitutional court. Critics say that these steps are unnecessary because the binding character of constitutional rulings is already embedded into the Constitution. What is more important, they believe that these provisions pose a danger of distorting judicial priorities by making the process of becoming formally correct rather than legally correct. To counter this, there have been suggestions by certain policymakers to repeal the disciplinary offense of failure to apply the constitutional court rulings. Such a reform would not impact on the binding effect of such decisions but it would alleviate perceptions that there exists judicial intimidation and strengthen the perception that the judiciary exercises a measure of independence. At the same time, the elimination of disciplinary provisions should be done in a proportional manner. The elimination of these crimes cannot be used to indicate the acquisition of impunity towards the judges or even judicial activism out of the restraint of constitutional precepts. Instead it can be viewed as a procedural improvement that shifts the model of accountability more on a principled and less politicized level. Judges would be accountable on an issue of wilful wrongdoing or indeed gross judicial ineptitude, but not on issue of good faith efforts at addressing EU legal requirements contrary to that of Conservative home rule based on home jurisprudence.

The developing case law of the CJEU provides an approach towards the harmonization of the needs of constitutional allegiance and European legal unification. It concludes that national judges are central figures in the application of the EU law and that their immunity against the unnecessary interference in the disciplinary field is not merely a national issue but also a constitutional prerequisite of the EU itself. The Romanian experience reminds us that it is not enough to pay lip service to the importance of judicial independence; that the necessary lesson is that a legal design that rhymes domestic disciplinary cultures with international virtues is needed.

To sum up, the issue of judicial accountability versus independence in Romania transposes a larger problem in Europe: how to guarantee that the judges may operate as impartial interpreters of the law without fear of personal retribution when there are conflicts between national and European duties. It is increasingly recognized that some form of concerted action, or at least some form of concerted thought, is required to explain and coordinate the relationships between various legal systems. At the same time, the issue of judicial discipline raises acutely a sense of urgency in appreciating the need to develop a primeval and consistent approach. The need to introduce reforms that facilitate transparency, moderation, and due process in disciplinary cases is not only fundamental to the security of the individual judges, but also the rule of law in the currently unified Europe.

4. Conclusion

The interaction of European Union law and the national constitutional control poses one of the most ideal intellectually and the practical legal dilemmas that are currently faced in European jurisprudence. The core of this paradox is the judicial independence a principle that is central to the nature of judicial power to the extent that its erosion would undermine the national democracies and the intelligence of the EU legal framework indeed. The experience of the Romanian law and especially the way it has been implemented through the architecture and operation of the Constitutional Court and the regular courts provides an interesting case study of how to negotiate this precarious legal balance.

The concept of judicial independence can not be considered outside the legal climate in which the judges are to work. This is the case in Romania, and it is conditioned by the two compelling demands of loyalty to the national Constitution and the observance of EU law. The Constitutional Court is the protector of the Romanian constitution and its interpretative powers are very wide. It makes decisions on matters concerning whether the law is constitutional and settles disputes between the state institutions. Such decisions are regarded as binding and they have erga omnes legal implications. They are, however, sometimes diffusive in that they can produce tensions of interpretation, when they seem to contradict EU norms--particularly in the respect of anti-corruption, judicial reform, and procedural guarantees fields of which the Union has become more assertive in regulating.

Romania judges are so put in uncomfortable juridical and professional position regarding the conflicting obligations. On the one hand, they have the constitutional duty of abiding by the decisions of Constitutional Court

that are binding. On one hand, the doctrine of the primacy of the EU law, established in the case-law of the CJEU, requires them to not apply any national directive or constitutional reading that is at variance with EU law. It is not an abstract, though must applied conflict, but an existent legal conflict as far as judges have to live out this legal dilemma, an existent conflict implying that decisions made by judges can be significantly distorted by the fact that disciplinary actions may threaten those judges who may tend to defer to EU law in disputed cases.

In the CJEU case-law, specifically the Eurobox and RS cases, there has been a legal mandate given to national judges to gain independence in cases when there is a need to avoid legal supremacy of EU. These rulings confirm that judges should be immune to any form of disciplinary inquiry or professional punishment when they act according to the EU law. The constitutional structure of the EU requires not only that the member states do not interfere with judicial independence merely in terms of form, but also that they defend judicial independence in practice. Seen in this context the implication of there even being a risk of disciplinary liability on the part of judges that fail to follow the national constitutional jurisprudence in order to ensure that the EU law is enforced, is that the cooperation which is assumed in the legal architecture of the Union is based on the existence of trust, which is undermined by such disciplinary liability.

But the way out in terms of reconciling these two conflicting allegiances does not consist in nullifying either one of the systems in favor of the other. Instead, it requires the formalization of the dialogue between national constitutional courts, ordinary judiciaries, and the CJEU at the institutional level (both informal and formal). Judicial conversation does not pretend at hierarchy; it is a process tool through which mutual regard and interpretative intelligibility can be achieved. There is an increased willingness on the part of the Constitutional Court in Romania to interact with EU law, especially in the framework of a posteriori constitutional review. Although it was still a tentative interaction, it indicates, albeit gradually, that the constitutional court understanding of the European legal community must change.

Also, the reform of the legislations that help to understand the limits of judicial discipline are indispensable. The fact that disciplinary offense related to non-adherence to decisions of the Constitutional Court might be repealed would not in any way impair the legislative basis of the ruling of Constitutional Court, which are directly related to the Constitution, but would contribute toward the alleviation of welfare and uncertainty relating to independence of the bench. The professional insecurity should never be a barrier against the judges so that they can choose to interpret the law in good faith. Mechanism of accountability should be upheld; however, accountability mechanism should be created to differentiate between the real instances of wrongfulness and legal discretion exercised within the limits of supranational rules.

Summing up, the sovereignty of the judge between constitutional supremacy of countries and the rights of the EU legal supremacy is not a zero-sum game. It is an institutional, doctrinal and procedural balancing act that needs maturity, doctrinal certainty and innovation. Romania, similarly to most of other member states of EU, is dealing with this landscape in the real-time, with mere real implications with regard to the soundness of the country legal system, along with its bonds with the Union. The work that lies ahead is to make sure that constitutional courts do not turn into obstacles to integration; that it is not the innocent judge who is punished by the everyday preference of the European law values.

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Conflicts of interest

The authors have no conflicts of interest to declare

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