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SUPREMACY OF EU LAW AND JUDICIAL INDEPENDENCE IN ROMANIA

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The challenge to the primacy of European Union (EU) law made in the recent case law of the Romanian Constitutional Court (RCC) at face value bears a resemblance to the rule of law crisis in Poland and, to a lesser extent, Hungary. What evokes the similarity with Poland is that at the heart of the disputes are the disciplinary chambers that sanction the work of the judges. The similarity with Hungary, although less pronounced lies in the portrayal of the constitutional identity and populism as a source of inspiration for the politicians and the courts that seek to challenge the primacy of EU law.

However, a closer look reveals a unique trajectory which makes the Romanian case stand out. First, the roots of the crisis lie in the judicial anti-corruption campaign which gave the Romanian judiciary a profound role in curbing the power of the corrupt political leaderships. Between 2013 and 2016, the judiciary processed thousands of cases of political corruption mostly prosecuted by the national anti-corruption directorate (DNA). From 2016, the backlash against the judiciary began as an attempt to dismantle the collaboration between the DNA and the intelligence agency and their joint work on political corruption, to limit the laws regulating corruption criminal offences and to establish a special

investigatory body for the offences committed by judges. No less important was the role of the RCC which sided with the government in almost all instances of decisions that concerned the constitutional review of the anti-corruption campaign.

Interestingly, as Selejan observed, the string of decisions that the RCC reached in this sense was not a constitutional review of a decision in a criminal case *per se* but rather solutions of constitutional conflicts between branches of government in which the representatives of the ruling Social Democratic Party (PSD) petitioned the RCC to limit the power of the judiciary and adopt interpretation of the laws that would make the prosecution of corruption more difficult. As a result of these decisions, the national security agency, the SRI, was removed from the anti-corruption investigations which marked the end for many investigations. The constitutional review of the decision of the Romanian President not to remove the Head of the DNA Laura Codruța Kövesi was declared to be a constitutional conflict between the powers of the president and that of the government. Both of these constitutional conflicts found themselves before the European judicial bodies; European Court of Human Rights (ECtHR) found that Kövesi was denied access to justice while the removal of the SRI from the anti-corruption investigations was under the opinion of AG Bobek in C-357/19 and C-547/19 found to be outside of the scope of competence of EU law and a decision reached with the goal of protection of fundamental rights.

However, when the government came for the judicial independence via formation of the Section for Investigation of Offences within the Judiciary (SIOJ) it faced strong opposition from the judicial associations. They did not only organize mass protests but also requested a preliminary opinion of the CJEU in a series of cases where they challenged the establishment of the SIOJ. In its judgment of May 18, 2021 (known as the Romanian judges judgment), the CJEU found that the special tribunal for judges violates the CVM and the institutional safeguards of judicial independence. The opinion of the Venice Commission about the special tribunal was no different.

The CJEU also ruled on the nature of the Co-operation and Verification Mechanism (CVM), a unique monitoring mechanism set-up in the aftermath of the country's accession to the EU. The legitimacy of this mechanism built into the accession process was beyond doubt in the immediate aftermath of the enlargement. But, following the mass prosecutions and the rule of law crisis elsewhere within the EU, its very existence began to appear discriminatory towards the Romanians, in particular as the mechanism was supposed to last for only three years. The CJEU's decision to strengthen it cannot be justified by the desire to prevent further rule of law backsliding. Because the supremacy of EU law in matters of deciding whether a special offence body is in line with the obligation of the member state towards the Union as per Portuguese Judges case. By protecting the CVM and its benchmarks as a normative source of power and not merely a report on the state of rule of law as was their initial design, the CJEU has, as Kochenov has also noticed, protected something that is essentially redundant.

Second stand out feature of the quest for supremacy over EU law that the RCC is engaged in is the attempt to define the Romanian constitutional identity as a variant of the constitutional populism and, as such, something that is beyond reach of the CJEU. While much less pronounced than in Hungary or Poland, examples of such an approach were already visible in the RCC's desire to frame the issues of legal conflicts of constitutional nature to strengthen its own interpretative power but also a separate doctrine of active constitutional review. Still, if we look at the matter from the standpoint of Art 4.2 of the TEU, the RCC remains focused not so much on the national identity as on essential state functions, in this case, organization of the judiciary as an essential state competence. Also, unlike the situation in Poland or Hungary, it is helpful that the Romanian political class, does not challenge the supremacy of the EU law as such. However, aside from the Union Save Romania, an anti-corruption party that left the government after being unable to mobilize its coalition partners to suspend the SIOJ, the large part of the political scene is united around the idea that it is important to have an oversight over judges in

the form of the judicial inspectorate so that the mass prosecutions initiated by the DNA never repeat itself again.

This doesn't mean that the rule of law crisis is less serious of an affair for the judiciary in the country. A judge who was willing to apply the CJEU judgment and quash a disciplinary proceeding found himself under disciplinary proceedings. Indirectly, the RCC played a role in such an outcome as its judgment 390/2021 of June 8, 2021 - essentially rejecting the possibility that the judges may challenge those norms that the RCC found to be constitutional. Following the judgment C-357/19 of December 21st, 2021 in which the CJEU once again reaffirmed the importance of Art. 267 of TFEU, the RCC issued a press release in which it openly stated that for such a stance to be accepted, a change to the Constitution should be made. While this being only a press release it does have a chilling effect – it is an implicit call to the judges not to refer cases to the CJEU.

The most recent response from the EU to the judicial disciplinary body saga is the Judgment in C-430/21 which concerns a referral of a court unable to decide in a disciplinary proceeding against two judges and a prosecutor for an alleged misuse. The judgment follows the opinion of AG Collins answering the question "can a national judge be prevented from and put at risk of exposure to disciplinary proceedings and penalties as a consequence of examining the conformity with EU law of a provision of national law that has been held to be constitutional by the constitutional court of that Member State?" predictably, in a negative way.

Unlike AG Collins, who took the view that the RCC's assertion of national constitutional identity in 390/2021 was too broad and without regards to the shared values of Article 2 of the TEU in order to qualify as a valid exception to the EU law's primacy, the CJEU choose a somewhat more diplomatically worded statement of the same problem. The CJEU criticized the RCC for failing to request a preliminary ruling from the CJEU (para. 71), arguing that the stance of the RCC is against Article 19 of the TEU as it precludes the national judges from challenging the norm that the RCC found to be constitutional (para 68.-69) and that, in any event, calling upon the CJEU to determine that an obligation of EU law does not

undermine the national constitutional identity of a Member State. With regards to the disciplinary liability of the judges, which under Romanian law exists in every case a judge acts contrary to the decision of the RCC, the Court found that "Article 2 and the second subparagraph of Article 19(1) TEU must be interpreted as precluding national rules or a national practice under which any failure to comply with the decisions of the national constitutional court by a national judge can trigger his or her disciplinary liability." Effectively, the judgment has left Romania without a possibility to apply its legislation concerning SIOJ and exercise the checks on legality of the work of the judges and prosecutors before a court of law.

In a sense, it could be argued that the judiciary is paying the price of its earlier successes in curbing the power of the political class remaining well-organized in defending the judicial independence from the governmental onslaught. Their mobilization serves not only to request CJEU engagement but also to prevent the capture of the judiciary making it resilient towards external constraints. Comparable to the resistance we have seen in Poland, the shared loyalty of the Romanian judges to both their national order and the CJEU is a strategic behaviour aimed at preserving their reputation and independence. As such, it is a natural outgrowth of the model of judicial dialogue between the national and European courts that is now being uprooted after being successfully entrenched across European jurisdictions.