

# THE INDEPENDENCE OF JUDGES AT THE CONFLUENCE BETWEEN THE PRIMACY OF THE NATIONAL CONSTITUTIONAL LAW AND THE PRIMACY OF THE EUROPEAN UNION LAW

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**Abstract:** *The Constitutional control in Romania implies the obligation of the courts to apply the decisions of the Constitutional Court and may involve the disciplinary sanctioning of judges for non-compliance with these decisions. Some judges considered that this mechanism may affect their independence, especially if the EU law may come into conflict with the decisions of the Constitutional Court. Our paper highlights that a proper understanding of the constitutional control underlines the essential role of the Constitutional Court for the protection of the democratic state and of the values of the European Union through its dialogue with the CJEU and with the national courts.*

**Key words:** *Constitution, EU law, primacy, independence, vulnerability*

## 1. Introduction

The European Union has always paid a special attention to ensuring an effective judicial protection of the litigants' rights. The independence of the courts is essential for achieving this goal. The independence and the impartiality of the court implies the existence of rules that allow the removal of any legitimate doubt, in the perception of litigants, regarding the independence of the court and its neutrality in relation to the interests at stake.

The independence imposes necessary guarantees to avoid any risk of using a system of political control of the judicial decisions. The independence of the courts must be guaranteed from the legislative and the executive powers.

Concerned with ensuring their independence, the Romanian courts successively addressed the European Union court for preliminary rulings regarding the compatibility with the EU law of several mandatory decisions of the constitutional court considered likely to threaten the judicial independence.

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The national courts expressed doubts about the constitutional control mechanism in Romania, considering that it can generate vulnerabilities in terms of the independence of the courts, either through the very nature and powers of the constitutional court, or through the binding effects of its decisions or by the possibility of sanctioning the judges who do not respect the decisions of the constitutional court.

## **2. Appointment and Powers of the Constitutional Court**

The Constitution of Romania configures the role of the Constitutional Court within the rule of law and it attributes a multitude of competences related to its function as guarantor of the supremacy of the Fundamental Law.

The Constitutional Court is a distinct and independent authority from the legislative, the executive and the judicial powers, it acts in an area of their confluence, and its acts are part of the regulatory instruments.

A series of decisions of the constitutional court found the unconstitutionality of procedural regulations in criminal cases in key areas such as the protection of the financial interests of the European Union or in corruption cases and allowed the retrial of the disputes.

The national courts expressed doubts that the decisions of the constitutional court implied an indirect intervention in their decision as the retrial of a case can activate the prescription of the criminal liability.

For the first time in its jurisprudence in Romanian cases, in the related cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, Eurobox and others, <https://curia.europa.eu>, the CJEU made an analysis of the constitutional control system as a whole.

The EU court analyzed the organization of the Romanian Constitutional Court in order to identify whether, by the nature of this authority and the effects of its generally binding decisions, the constitutional court can threaten the independence of the national judges.

This problem may seem atypical as the organization of justice in the member states, including the constitutional court is in the competence of the member states. However, in establishing the organization and the competence of the constitutional court, the member states are required to comply with the obligations from the Union law.

In the Eurobox case, the CJEU emphasized that the Union law does not impose on the member states a constitutional model that regulates the relations and the interaction between the state powers. The EU law does not oppose the establishment of a constitutional court whose decisions are binding on national courts, provided that the constitutional court complies with the requirements of independence from the legislative and the executive power.

Regarding the Romanian system, the CJEU emphasized that there is no element from the requests for a preliminary decision to suggest that the Constitutional Court, which has, among other things, the powers to decide on the constitutionality of laws and ordinances, as well as to resolve legal conflicts of a constitutional nature between the public authorities, would not meet the requirement of independence.

The EU Court also emphasized that the simple fact that the judges of the constitutional court are appointed by the legislative and executive powers is not likely to create a dependence of these judges on the respective powers, nor to give rise to doubts regarding their impartiality, as, once appointed, the persons concerned are not subjected to any pressure and do not receive instructions in the exercise of their functions.

We must emphasize that the Romanian constitutional model follows the French model in which the judges of the Constitutional Council are appointed by the president of the republic and the president of the parliament chambers. The Romanian constitutional model is part of the traditional picture of the majority of member states, where the constitutional judges are elected by political bodies.

According to the doctrine (Deaconu, Muraru, Tănăsescu and Barbu, 2015), for example, in Germany, half of the members of the Federal Constitutional Court are appointed by the Bundestag, and the other half by the Bundesrat.

In Austria, the constitutional judges are elected by the federal government, respectively they are appointed by the parliament.

In Belgium, the king chooses each constitutional judge on the proposal of the House of Representatives and of the Senate.

In Spain, the constitutional judges are appointed by the king and are proposed by the parliament, the government and the Council of the Judiciary.

In Italy, the constitutional judges are appointed by the President of the Republic, the parliament and the courts. In Poland, all members of the Constitutional Court are elected by deputies.

In Portugal, the Assembly of the Republic appoints ten of the thirteen constitutional judges.

In support of their independence, the Romanian Constitution also stipulates that the judges of the Constitutional Court are appointed for a 9-year term, which cannot be extended or renewed, and specifies that the judges are independent in the exercise of their mandate and irremovable during its term.

Regarding the conditions for the appointment of Constitutional Court judges, the Constitution requires that they have superior legal training, high professional competence and at least 18 years of experience in legal activity or in higher legal education. The Constitution provides for the principle of incompatibility of the position of judge of the Constitutional Court with any other public or private position, with the exception of teaching in the field of higher legal education.

The CJEU underlined that although authorities of the executive and legislative power can refer the Constitutional Court, this fact is natural in relation to the nature and function of a court established to rule on constitutional disputes and cannot, in itself, constitute an element which would allow his independence in relation to these powers to be called into question.

In conclusion, according to the EU Court, the nature and the competences of the Romanian constitutional court cannot constitute a vulnerability regarding the independence of the national judges.

### **3. The Possibility of Sanctioning National Judges for Non-Compliance with the Decisions of the Constitutional Court**

The national courts also raised the issue of disciplinary liability of judges for non-compliance the decisions of the Constitutional Court.

According to the Romanian Constitution, the decisions of the Constitutional Court are binding and the judges cannot leave this jurisprudence unapplied - otherwise the judges are exposed to the risk of a procedure of disciplinary sanctions.

The independence requires that the rules governing the disciplinary regime have the necessary guarantees to avoid any risk of using such a regime as a system of political control over the content of the judicial decisions. According to the CJEU, any national judge who would consider that the jurisprudence of the national constitutional court is contrary to Union law and would leave this jurisprudence unapplied, according to the principle of the supremacy of the EU law, could not be engaged in disciplinary liability.

We emphasize, however, that, following Romania's accession to the European Union, there is a large disciplinary history of magistrates and that, so far, no judge has been disciplinary sentenced for asking questions to the Court of Justice of the European Union or for applying the principle of the supremacy of EU law and removing from application, national laws or mandatory decisions of national courts, including those of the Constitutional Court.

In case C-430/21, RS, <https://curia.europa.eu>, CJEU underlined, however, that even the mere prospect of initiating a disciplinary investigation is in itself likely to exert pressure on judges. We consider that this conclusion requires some additional explanations.

As a result of the political will in the legislative act, the Romanian legislator provided, indeed, a liability for violating the decisions of the Constitutional Court. In practice, however, not every violation can lead to a disciplinary liability. Thus, the authorities with competences in the disciplinary liability of magistrates have always sought to balance the rigid provisions in this matter. The Judicial Inspection, an independent authority with competences in the field of the disciplinary liability of the magistrates, emphasized every time in its administrative acts that it cannot intervene in the courts' decisions in general.

We believe that the Judicial Inspection can analyze whether a court decision is motivated, speaking of the purely formal aspect of motivation, that is to check whether the judge's decision is based on legal reasoning and whether it is coherent and related to the case. However, the Judicial Inspection cannot analyze the legality of this reasoning. In other words, the Judicial Inspection only analyzes whether the judge adopted a purely abusive decision, with an excess of power, which has a reasoning that is completely foreign to the issue of the litigation or has no reasoning at all. In this case, it could even be a matter of bad faith or an error of judgment, obvious to any individual, even without any legal studies. However, these are completely exceptional situations.

As far as we know, the legislator currently aims to repeal the disciplinary offense for non-compliance with the decisions of the Constitutional Court. The repeal of the disciplinary offense we are referring to would rather mean that the legislator would give

up an unnecessary disciplinary regulation. We say that the regulation was not useful because from the very beginning it was able to create confusion between the litigants who would have addressed to the Judicial Inspection, some invoking the jurisprudence of the Constitutional Court, and others the jurisprudence of the CJEU, each depending on their own procedural interests. Obviously, the Judicial Inspection could not have analyzed which of the opinions is correct since it is not a superior court and does not check the legality of the court decisions.

On the other hand, the binding nature of the decisions of the Constitutional Court does not result from the disciplinary regime of judges, but from the Constitution itself, so that even if the legislator were to repeal the disciplinary offense, it would not mean that the constitutional decisions will lose this effect.

The repeal of the disciplinary offense regarding non-compliance with the decisions of the constitutional court would not mean an absolute impunity, as the independence of the courts does not mean the exclusion of any disciplinary liability. In case C-430/21, RS, CJEU underlined that the independence is not intended to exonerate possible serious and totally inexcusable behavior of judges, which would consist, for example, in the deliberate and bad faith violation or in a particularly serious and gross negligence.

Even if the legislator chooses to repeal the disciplinary offense, the binding nature, *erga omnes*, of the decisions of the Constitutional Court results directly from the Constitution. This binding nature should not be seen as a vulnerability for the independence of judges, especially as the Romanian judges have an effective dialogue with the CJEU when they have doubts about the compliance of the decisions of the Constitutional Court with the EU law.

#### **4. The Dialogue between the Constitutional Court and the Court of Justice of the European Union**

The Constitutional Court can carry out the constitutional review of laws before their entry into force (*a priori* constitutional review) or after they have entered into force (*a posteriori* constitutional review). The exception of unconstitutionality is the means that triggers the *a posteriori* control. In most cases, the referral to the Constitutional Court with the exception of unconstitutionality is issued by the courts when resolving disputes in which the applicable law is criticized for non-compliance with the fundamental law. Unlike the judicial courts, in the cases regarding exceptions of unconstitutionality, the Constitutional Court does not establish the factual situation of the case and does not apply the law to a case.

The *a priori* control does not involve a pending litigation, as it concerns the control of a normative act that is not yet in force. Within this control, the Court exercises an abstract control of constitutionality.

We believe that within the framework of the *a priori* control of constitutionality, it is not possible to refer the Court of Justice of the European Union with a request for a preliminary decision, as it follows from Article 267 TFEU that the preliminary procedure requires that a dispute is effectively pending before the national courts, which are called to pronounce within it a decision likely to take into account the preliminary ruling. The

justification for the preliminary reference is not an advisory opinion on general or hypothetical issues, but the need for the effective resolution of a dispute.

In the *a posteriori* control, if the Constitutional Court has doubts about the interpretation of EU law, it must open a dialogue with the CJEU to prevent the risk of an erroneous interpretation of the EU law. A possible omission of the constitutional court to notify the CJEU for a preliminary ruling may also affect the quality of the act of justice before the judicial court.

The practice of the Romanian Constitutional Court showed its openness to a dialogue with the CJEU regarding the interpretation of Union law when the constitutional court is referred an *a posteriori* review of unconstitutionality. In the case, less likely in practice, where the constitutional court itself does not decide to refer to the EU court, and the judiciary court still has doubts about the compliance with the Union law of the decision of the constitutional court, the judiciary court can refer the CJEU with a request for a preliminary ruling. Therefore, an effective dialogue between the judicial courts and the Constitutional Court with the EU court is a factor that removes any possible vulnerability of the national judge in applying the principle of supremacy of the EU law.

## 5. Conclusions

We believe that a good knowledge and understanding of the mechanism of the constitutional review and of the democratic constitutional tradition correctly places the national judge to ensure a fair balance between the binding nature of the decisions pronounced in the constitutional review and the principle of the supremacy of the EU law, in order to achieve an efficient protection of the of litigants' rights. In this framework, the national judge should not see the constitutionality control system as a vulnerability to his independence, but as a as a natural mechanism in a democratic society through which the Constitutional Court achieves a true balance between the three state powers, encouraging and ensuring a dialogue with the CJEU, and, thus, protecting the values of the European Union.

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