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The impact of the clash between the CJEU Case Law concerning rule of law and the Constitutional Court| in Romania on the criminal legislation, investigation and fight against corruption

1. Introduction into the context of an increased interest in the criminal law in Romania

It is ordinarily assumed that the behaviour on the part of the supreme courts in Romania, Poland and Hungary, entrusted with the interpretation of constitutional provisions know the same origin. We believe and have gathered evidence to prove that the debate on the primacy of European Union (EU) law put forward in the case law of the Romanian Constitutional Court (RCC) presents only a superficial resemblance to the rule of law crisis in Poland and, an even weaker nexus with the rule of law crisis in Hungary. If this hypothesis is to be correct, the superficial resemblance with Poland can be found in the fact that the disputes involve disciplinary chambers, while the similarity with Hungary lies in the portrayal of rules and standards that design the constitutional identity. However, a closer look reveals a unique trajectory which makes the Romanian case stand out as it is linked with the independence of the judiciary in the context of the fight against corruption. There are several elements that contribute to this unique trajectory. In Romania there is the perception that judicial power is in the rise as a consequence of the investigations and fight against corruption. We believe that the positive results in combating corruption are strongly linked with the gained judicial independence. The conditions for juridical independence remain hard to pin down empirically, but the positive view of the Romanian citizen towards the judicial system is in nexus with the manner of interpretation of the phrase "judicial independence" is interpreted. Consider the link with the fact that it presents a comforting ring, implying that you can count on being judged

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impartially. Furthermore, it is perceived as enabling the proper functioning of a justice system that combats corruption. The Romanian justice system has garnered legitimacy and increased the public's belief in judicial impartiality including through judgements in high level corruption cases. The vibrant case-law of recent years on the fight against corruption and on politically sensitive issues represents just some types of explanations for the public support for judicial independence. In the mind of the citizen the courts are often considered strong institutions with the power to exercise control over the life of the community because a court is possessed with legal force, will to enforce it and the right to pass judgement. Among all of the institutions of Romania, none is more significant in the public view, at this time, than the courts of law as they are perceived as a factor of checks and balances from tyrannical abuses of power, countering the ambition to break the law, through their role in the fight against corruption, a revitalising force for Romanian goals of fundamental rights countering the existing inequities, limiting the perceived limitless discretion of existing unbridled prerogatives of the state. Over the course of the past years the Romanian court has been perceived as addressing the inherited destructive infirmities of the state that impact the rule of law, fundamental human rights and the rights of the Romanian EU citizen. Furthermore, although there have been some partial failures in the eyes of the public, we believe that the activity of the courts, under the umbrella of the EU legislation, is understood as fostering democratic consolidation and as a barrier to a transition from democracy to, not necessarily authoritarian rule, but the rule of a corrupt class. As a result, the efficiency of the justice system has become a common topic of interest and the factors influencing its success and failure are in direct nexus with the public interest. The Romanian judiciary has been thrusted into the position of a branch of the state that should be fearless, effective and independent. Citizens in Romania are concerned that other powers in the state do have the tools for overcoming the independence of the courts through budget control, the reliance of the courts on action by the legislative and executive power for institutional efficacy, the fact that the courts are devoid of the power to effect policy changes and the ability of the Romanian Constitutional Court (RCC) to, in fact, veto legislation. Popular critics bemoan the Romanian Constitutional Court as it is composed of unelected, but nominated by the political power, members, almost life-tenured judges, as they are appointed for a period of several years, apparently motivated by their own goals and with an imperial attitude towards the law. In fact, there are arguments to state that public opinion widely believes that the RCC is provided with too much leeway in imposing its views on society. Nonetheless, the Romanian Constitutional Court has an accustomed role of preventing any interference with the fundamental role of the Romanian Constitution. Nevertheless, by protecting the Constitution from encroachments in the manner in which it is accustomed, the RCC has been perceived as impeding the functioning of the Romanian courts, although,

historically, considering the number of decisions taken over the course of time such apparent encroachment has been relatively rare and remains so today. Recently, we have observed a difficulty on the proper manner to reconcile the constitutional veto over democratically crafted provisions, the supremacy of the EU law and the expectations of the Romanian citizen towards the functioning of the criminal justice system. Responses to this question have been few in comparison with numerous decisions of the CJEU and the RCC. Most notably, there have been several clashes. Each of these decisions, though, concerned the same question, what is the balance between the supremacy of EU law and the responsibility of the RCC, have in fact been more about determining the judicial independence of the Romanian courts in the context of the fight against corruption. In this article, we approach this debate from a different perspective and we offer an insight into the difficulty of this legal balance between the CJEU and the RCC. Although we recognise the importance of the debate, the supremacy of EU law, which seems to be an active discussion in several EU countries, we contend that another, perhaps more important, component lies at the heart of the Romanian discussion on this subject: the judicial independence of the Romanian Courts.

2. Sources of judicial independence for the criminal law: CJEU and RCC case-law

We perceive a complex set of interdependent elements that build the Romanian judicial independence aimed at providing the justice system with the means to protect itself without encroachments to other branches of power. In order to usefully discuss the topic, we attribute much of the difficulties to shortcomings that can be present in three fundamental areas: normative aspects in connection with the individual magistrate, institutional aspects in nexus with the justice system as a whole and institutional independence in nexus with the relationships established with other entities. The normative aspects in connection with the individual magistrate focus on the decision of one magistrate. Magistrates are humans, but their judgements matter greatly to people, as a consequence people will tend to view any sort of potential interference as a clear encroachment. Existing normative aspects are built in connection to the character of the judge who ought to be independent of venal considerations, impartial and morally autonomous while sharing the values that underlie the Romanian Constitution and the EU legislation. The magistrate ought to be in a state of individual insulation from pressure from the powerful and pressure from the many, interference from public officials, powerful economic or social interests, punishment and impeachment without due process, fear of interference or anticipation of unfair punishments, costly arbitrary reduction of salaries, infringing blandishments, threats of coercion, unmotivated cumbersome professional evolution, absence of lifetime tenure

and protected from politically controversial decisions. It involves also the warding off interference under the shape of demagogic attacks on individual magistrates that can take advantage of the fact that there exists a legal inability, provisioned by the law, of the magistrate to promptly respond to public attacks without violating the confidentiality of the procedure or the obligation to refrain from discussing cases. The institutional aspects in nexus with the justice system as a whole conspire to break down the insulation of the judiciary, not one individual at a time, but the functioning institution. Several of the entral points can be stated relatively simply, namely preventing a high level of coordination among members of the branches of power that would overcome the insulation of the judiciary, preventing the appearance or existence of a well-organised and cohesive group of members of the magistracy that would overcome the checks and balances that are present within the justice system, preventing a concerted partisan attack from wealthy and powerful groups and to offer real resistance before any decision to override certain kinds of judicial decisions, to undermine the finality of the court decision or to mobilize popular sentiment against the justice system. Ascertaining the relevance of these factors does not exempt other groups of variables such as the ability to decide how many magistrates will be in the system, to enact rules of court procedure, failing to fill vacancies that exist, to appropriate funds for the courts from eroding the capacity of the judiciary to protect individual liberties, to ensure the rule of law and to guarantee fundamental rights. Their cumulative effect can have a more nebulous effect than direct and evident measures. Also, their employment can accept a longer term horizon and can make the features of the independent judicial system seem contingent, not truly credible and durable. Institutional independence exists when the court stops relying on rules, jurisdiction, execution of judgements on others. We believe that we witness a tipping point to the traditional equilibrium as there are prospects, through the decisions of the CJEU, for courts to depend less on others, for example of the RCC. Note that this type of independence has increased with the existence of the EU legislation. There exists a current malaise on this aspect affecting the judiciary. In the absence of this type of independence we may see courts having a narrow jurisdiction or enacting laws that overturn the purpose of justice. There is a line, sometimes quite fine and hard to discern, that separates appropriate forms of legislation from objectionable legislative interference.

3. The clash between CJEU and the RCC

The fact remains that the references made by members of the Romanian judiciary justify a commitment to a high degree of independence, the incipit of the dialogue between the CJEU and the national courts of Romania in which the national courts would benefit from a privileged position to speak

authoritatively on questions of judicial independence, but also an opportunity for the CJEU to comprehensively assess the multi-prong accountability regime of Romanian magistrates in order to guarantee that what is being said is also legally accurate[2]. It is also true and one need not forget that at the time of drafting the request for a preliminary ruling, in 2018, the debated judgments of the CJEU on the controversially discussed disciplinary chamber and the issues dealt with under the catchphrase "the regime in Poland" were not yet delivered. This represents another reason to consider the differences between the situation in Romania and the context in Poland. Also, there is another argument for the novelty of the Romanian situation. Independence, that relies on numerous elements, among which we can name the law and symbolism, is assumed to be one of the cardinal necessities of the judiciary, and we believe it should always remain so, but less than absolute. This particular context required the CJEU to make a daring attempt and analyse the standards that are in direct connection with the notion of judicial independence. In the current legal use, these standards find their legal provisions primarily incorporated in Article 2 and article 19 (1) (2) of the TEU[3] and as a consequence, a host of issues surrounding these articles made their way onto the debate. The debate centered on their relation with Article 47 of the EU Charter[4] so as to optimize them rather than maximize them, the latter option being frowned upon. Such consultations are viewed by the EU legislator as not exceptional, but commonplace in the EU legal framework while this perspective seems distinctly less robust with some supreme courts in the EU. The first result of this analysis was illustrated in the development of a new vision in reference to the judicial independence standards. Six national courts in Romania have submitted requests for preliminary rulings, manifesting in this manner the displeasure with how the reforms in the justice system were carried out. These reforms were perceived as encumbering their judicial independence. It should also be emphasized that the courts originated from various regions of Romania and in the end they were joined in the same preliminary ruling. At this juncture, the focus of these requests for preliminary rulings were controversies related to laws that were part of a package of reforms in the field of justice and fight against corruption. The introduced legislative amendments were criticized as it seemed they were two sided, namely, on the one hand they weakened the authority of the national courts, while on the other it did not break from

2 Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, The Court of Justice of the European Union (CJEU), 18 May 2021, Data from the website: https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5763153.

3 Treaty on European Union (Consolidated Version), Treaty of Maastricht, European Union, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002.

4 Charter of Fundamental Rights of the European Union, European Union, 2010, Official Journal of the European Union C83. Vol. 53.

the perspective of a veritable past stranglehold on the independence of the judiciary. Under the scrutiny of the CJEU the reforms were implemented, such as the new procedure for the interim appointment of the management of the Judicial Inspection, the establishment of the new Section for the Investigation of the Judiciary Offences as part of the Prosecutor's Office resulting in stopping the investigation and the transfer of dozens of files of high-level corruption from the National Anticorruption Directorate, changes in the legislation governing the material liability of judges and the transformation in the manner in which appointments were made to the higher courts through the elimination of merit-based judicial qualification standards. These changes were viewed as not being within the framework of normal judicial independence and insufficiently broke with the past.

Current thinking on the importance and distinctiveness of Article 267 of TFEU[5] received a robust understanding and argumentation in the judgment of C-357/19 of 21 December 2021[6]. This case covered several aspects of the Romanian justice reform in the fight against corruption. It seems that the judgement considered that placing the focus on the risk of applying a disciplinary sanction to a judge for submitting a request for a preliminary ruling to the CJEU as more meaningful and valid than the binding nature of the decisions of the Romanian Constitutional Court. The binding nature of the RCC decisions was analysed in link with the impact it had upon the fight against corruption. From this perspective, it may seem that the vogue for the binding nature of the RCC has past its prime in the context of Romania. It is true that it may be that the fascination with the application of the binding decisions of the Romanian Constitutional Court may have been abated somewhat as the view from a broader perspective has focused upon the objective of fighting corruption at the highest level. The fight against corruption represented the main frame of reference in the context in which national legislation and national RCC case-law did not ensure the effective protection of the EU's financial interests.

It was already noted the unrealism of the assumption that EU law would impose a particular constitutional framework for its member states, but in the judgement[7] of Case C-430/21 it further stressed that this assumption is pallid when viewed from the focus placed on the parameters in nexus with the rule of law requirements. It invalidates the theory that the CJEU and the EU law

5 Consolidated version of the Treaty on the Functioning of the European Union, European Union, Official Journal C 326, 26/10/2012 P. 0001–0390.

6 In Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, The Court of Justice of the European Union (CJEU), 21 December 2021, Data from the website: https://curia.europa.eu/juris/document/document.jsf?text=&docid=251504&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2984972.

7 Case C-430/21,The Court of Justice of the European Union (CJEU), 22 February 2022, Data from the website: https://curia.europa.eu/juris/document/document.jsf;jsessionid=91F30CBA76969A2691E49B0BEB1663FB?text=&docid=254384&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1894037.

impose a specific type of constitutional model and faithfully reproduces the complexity of the independence of the national courts. In fact it is an explanation, not a description of the link between the rule of law requirements and the independence of the national courts in Romania. An important test of the independence of the national courts is their ability to assess the conformity of relevant national law with EU law. Judged against the Romanian constitutional court's decision of denial of the right of ordinary Romanian courts to assess this conformity, the independence of the judiciary is a significant unsuccess. Thus, it would be realistic to state that this denial would go against the nature of the UE law and the CJEU case-law. The CJEU studied the relation between this denial and the preliminary ruling mechanism. Here, too, the test was unsuccessful, as the CJEU confirms that such a denial would hinder the effectiveness of the cooperation between it and the Romanian national courts. In the view of the CJEU this denial would represent a deviation from the principle of primacy of EU law and it would cancel out the effectiveness of the cooperation between the CJEU and the Romanian national courts. It further explains the deficiencies that have been ignored when a binding national supreme court would discourage national courts from using the mechanism of the preliminary ruling. The judgement underlines the heavy reliance on national courts to examine the conformity with EU law of a national law while having sufficient guarantees for independence.

4. Possible explanations for the clash between CJEU and the RCC

We believe that there are two assumptions that concern the clash between the CJEU and the RCC. The first is that the courts will have an even more important role to play. The second is that both, the CJEU and the RCC, make every effort at their disposal to assure the independence of the judiciary. Nevertheless, the concept of judicial independence is differently perceived because it is far more complex than it first appears. We believe that the clash between the CJEU and the RCCgives the impression of a greater independence of the judiciary.

We believe that the discussions about the relationship between the CJEU and the RCC has produced more questions than answers, we convened to discuss what seems to be some of the roots of the debate. First of all, the CJEU perspective on judicial independence is distinctive from the perspective of the RCC in the extent of its reliance on legal development that is continuouslybeing carved out and crafted, while the RCC is so deeply established that it takes its steadiness for granted, as though nature itself provided and continuously guarantees it. Secondly, it seems to be a clash between activism and restraint as the changes brought by the CJEU result almost entirely through departure from the past without establishing ready-made solutions for the member state's judicial organisation, while the RCC seems to consider that

this is a lenient attitude that creates an unfortunate splintering on the notion of judicial hierarchy with harmful effects to the certainty of law. We were used to concurring and dissenting opinion in Romania, as we have far more judicial lawmaking in Romania and constitutional criticism was always plentiful, but this simple setting, with complex problems and institutional constraints, has to adapt to tides of change that impact on the existing assumed parameters. It is about a move to a more flexible legal model in which each national court and national supreme court takes a more active role in the legal dialogue, being less reliant on assumed parameters. This model allows for greater scrutiny and examination to proposed curbing from the national supreme court. There is more to the interaction among national courts, supreme national courts, the CJEU and the public than it was contemplated by the traditional model. The choices that are being made would have to consider the supplemental forces and relationships.

Thirdly, there is tension as it seems that national courts become the interlocutors with the CJEU,while the RCC could see this as a hindrance to the doctrine of constitutional sovereignty. The CJEU is concerned with the courts being able to integrate EU law at the domestic level and considers that the true nature of the relationship between courts should focus on the enforcement of EU law and the CJEU rulings. This objective is seen as compatible with the current realities of the member states as it is being done without sweeping aside the constitutional supremacy, but without implying constitutional autocracy. The enforcement of EU law and the CJEU rulings is done, sometimes, independent of opposing strong domestic will representing political, economic or social interest. In the national tradition, the constitutional supremacy comes with a supreme and undiminished power. The fact that national courts are able to become interlocutors with the CJEU conjures an instant discussion in which the distinction between law creation and dispute resolution in Romania becomes an indirect issue of focus. Traditionally, the courts are in nexus with dispute resolution, while the RCC presents a role in law creation. This perspective conjures the image of the RCC as being the natural and only interlocutor with the CJEU, but the EU legislation has never been of this nature. The main point to get hold of here is that there is an increasing prominence of national courts in recent CJEU case-law, in contrast to the rather ahistorical tendency of national supreme courts to represent the only interlocutor for the CJEU, as this manner of doing things appears for them to be the only meaningful and intelligible construct. Some traditional conception might regard the increasing prominence of national courts in the dialogue with the CJEU as an inextricably enmeshed example of erosion of the legal hierarchy. The approach of the supreme court is that of an unitary actor and is inclined to analyse while being rooted in this particular context.

Fourthly, we would like to bring into question the fact that the debate around the supremacy of law has brought sharply into focus the difference between a rule and a standard.

The RCC boasts of its insularity, but the courts are essential elements of the judicial system and their independence is just as important.

5. Conclusions

Celebrated examples in which it seemed that the RCC defied the CJEU, or the CJEU overruled the RCC are not in fact the complete truth, as the truth is far more complex that the one-sided presentation of victorious moments. A number of factors, some rooted in the Romanian Constitution, others rooted in the EU law and CJEU case-law move the Romanian judiciary away from the sway of one or the other possible influences. Some of the more dramatic moments have become opportunities for reform or at least the debate on reforms. Some of the new protections of the independence of the justice system have been reinforced by the evolution of the clash between the CJEU and the RCC. A case in point concerns the presence of the national courts in the dialogue with the CJEU, their active role in requesting the CJEU engagement and the ability of the Romanian judiciary of becoming more resilient towards constraints. The effort of the Romanian judiciary seems motivated by its loyalty to preserving its reputation, independence and role in guaranteeing the protection of fundamental rights.

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The impact of the clash between the CJEU Case Law concerning rule of law and the Constitutional Court in Romania on the criminal legislation, investigation and fight against corruption

Abstract

This scientific research shall explore the recent jurisprudence of the Court of Justice of the EU on the rule of law regarding Poland, Hungary and Romania. We shall strive to identify the nexus between the ground-breaking judgments and the prospects for criminal legislation and criminal investigation by analysing the arguments of the parties and the reasoning of the courts. We believe that judgements in the cases of Poland, Hungary and Romania represent the Court of Justice's incrementalist response to a perceived process of rule of law backsliding which was perceived as a threat to EU values at the community level and as a threat to the ability of the justice system to prevent corruption at the national level. Backsliding is believed to first emerged in Hungary before spreading to Poland, but serious cases were already existing in Romania.

Keywords: CJEU, case law, criminal legislation, criminal investigation

Wpływ kolizji orzecznictwa TSUE i Trybunału Konstytucyjnego w Rumunii w sprawach dotyczących praworządności na ustawodawstwo karne, postępowanie karne i walkę z korupcją

Streszczenie

W opracowaniu przeanalizowano najnowsze orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej w zakresie praworządności odnoszące się do Polski, Węgier i Rumunii. Poprzez analizę argumentów stron i stanowisk sądów spróbowano ustalić związek pomiędzy przełomowymi wyrokami a zmianami w ustawodawstwie karnym i postępowaniu karnym. Zdaniem autorów wyroki w sprawach Polski, Węgier i Rumunii stanowią inkrementalną odpowiedź Trybunału Sprawiedliwości na dostrzeżony proces odchodzenia od rządów prawa, który postrzegany jest jako zagrożenie zarówno dla wartości UE na poziomie wspólnotowym, jak i dla funkcjonowania wymiaru sprawiedliwości w zapobieganiu korupcji na poziomie krajowym. Uważa się, że zjawisko odchodzenia od rządów prawa pojawiło się najpierw na Węgrzech, a następnie rozszerzyło się na Polskę, jednak poważne przypadki występowały również w Rumunii.

Słowa kluczowe: TSUE, orzecznictwo, ustawodawstwo karne, postępowanie karne